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# Health Care Navigator PBMs: What ERISA Fiduciaries Need to Know

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# Agenda

- The ERISA Framework
- Basic Pharmacy Benefit Management (PBM) Functions
- PBM Services and Pricing Models
- PBM Industry – Vertical Integration
- PBM Contracting – What can Fiduciaries Do?

# ERISA Fiduciaries

- Two types of fiduciaries under ERISA:
  - **Named** fiduciaries
    - Designated in plan document
  - **Functional** fiduciaries
    - Exercises any **discretionary authority or control** concerning the **management** of the plan
    - Has any **discretionary responsibility** in the administration of the plan
- Each may have personal liability for fiduciary “breaches”

# Selecting/Monitoring PBM is a Fiduciary Act

- An act by the named fiduciary (*i.e.*, plan administrator)
- Or, an act by a functional fiduciary
  - Exercising discretionary authority over management of the plan
  - Discretionary responsibility in administration of the plan



# Fiduciary Rules Implicated

- Prudent expert rule
- Duty to monitor
- Prohibited transaction rules (and exemptions)



# PBM-Related Fiduciary Duties

- ***Prudent expert rule*** ... fiduciaries must discharge their duties:
  - With the care, skill, prudence, and diligence *under the circumstances then prevailing* that a prudent person acting in a like capacity *and familiar with such matters* would use in the conduct of an enterprise of a like character and with like aims.

# PBM-Related Fiduciary Duties

- *Duty to monitor* ...

“At reasonable intervals the performance of ... other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan.”

29 C.F.R. § 2509.75-8

# PBM-Related Fiduciary Duties

- **Prohibited transaction rules**
  - Payments to “parties-in-interest” from plan assets are generally prohibited transactions (under ERISA § 406(a)).
  - “Parties-in-interest” include service providers (*i.e.*, PBMs).
  - ERISA § 408(b)(2) provides an exception.

# Prohibited Transactions

- **Section 408(b)(2) exemption**
  - Statutory exemption from P/T rules for payments to service providers, so long as:
    - Services are “necessary” for establishment or operation of plan.
    - The contract/arrangement is “reasonable.”
    - No more than **“reasonable compensation”** is paid to service provider.
  - Excessive fees are unreasonable; unreasonable fees create non-exempt prohibited transactions.

# Prohibited Transaction Claims Expected to Proliferate

- The U.S. Supreme Court clarified ERISA's prohibited transaction rules this term (*Cunningham v. Cornell Univ.*).
- Plaintiffs need only allege the existence of the transaction (not the *absence* of the exemption) to state a claim.
- Plan fiduciaries must prove the exemption (i.e., that fees were reasonable) as an affirmative defense.

# What is a “Reasonable” PBM Fee?

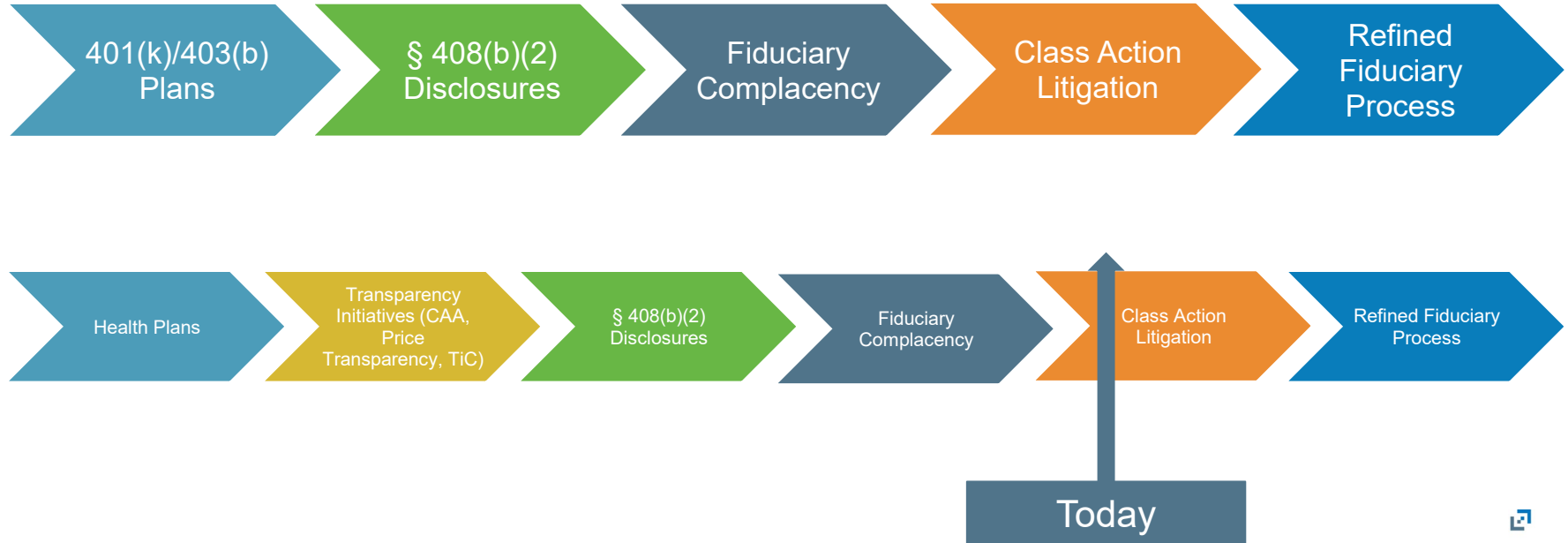
- Requires an understanding of the fee structure and services provided.



# The Plaintiffs' Bar is Paying Attention

- The playbook is already written and available
  - Two decades of 401(k)/403(b) plan litigation
  - A lower bar for ERISA prohibited transaction claims after U.S. Supreme Court's *Cornell Univ.* decision this spring
- Cases are making their way through the system
  - *Lewandowski v. Johnson and Johnson* (D.N.J. Jan. 24, 2025) amended complaint filed in March.
  - *Stern v. JPMorgan Chase* (S.D.N.Y. Mar. 13, 2025) (motion to dismiss pending)
  - *Navarro v. Wells Fargo* (D. Minn. July 30, 2024) (motion to dismiss filed June 12, 2025)

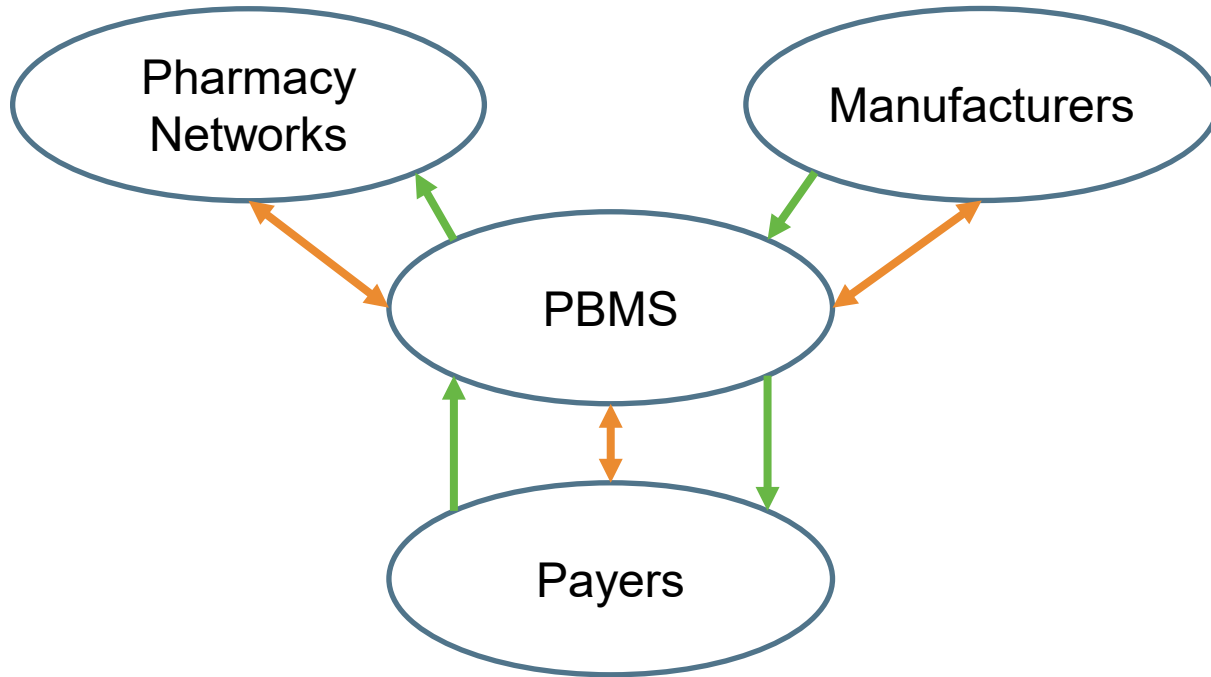
# Retirement Plan Litigation Analog



# What Should Fiduciaries Know About PBMs?

- What **services** does the PBM provide?
- How (and how much) is the PBM **paid** (directly and indirectly)?
- What does the PBM do with prescription drug **rebates**?
- How do you **benchmark and monitor** your PBM?
- What red flags should you look for in PBM **agreements**?

# Basic Pharmacy Benefit Management (PBM) Functions



# Claims Adjudication

- Mechanics of communicating between the pharmacy and the PBM or payer at the point of sale
- Pricing options:
  - Per claim
  - Bundled into global admin services fee per claim
  - Percentage of claim amount or flat \$ per claim



# Pharmacy Network

- Based on PBM's contracts with pharmacies, determines where members fill prescriptions.
- Options: open/broad, limited/narrow, tiered, custom, grace fills
- Pricing
  - Dispensing fee per claim
    - Guaranteed (with spread opportunity) or pass-through pricing
  - Ingredient cost
    - Guaranteed (with spread opportunity) or pass-through pricing
    - "Lesser of logic"
    - Typically three-year pricing that improves over time

# Manufacturer Rebates

- Based on the PBM's agreements with manufacturers, typically for brand drugs only
- Payment options
  - Pass-through, guarantee, “best of both”
  - Typically three-year guarantees that improve over time

# Formulary Design and Maintenance

- Formulary design and maintenance
  - Clinical assessment
  - Value assessment
  - Disruption analysis
- Pricing
  - Typically priced in global admin fee (percentage of claims or flat \$ per claim)
  - Additional fees for customization

# Utilization Management

- Utilization management
  - Utilization review
  - Prior authorization
  - Step therapy
  - Appeals
  - Override processing
- Pricing
  - Typically priced in global admin fee (percentage of claims or flat \$ per claim)
  - Additional fees for customization

# Other Services

- Clinical programs (typically flat \$ PMPM fee)
- Medication therapy management (typically flat \$ per review fee)
- Intensive appeals (typically flat \$ by level of appeal, per appeal)
- White labeling and other customization
- Data analysis and reporting
- Etc.



# PBM Industry – Vertical Integration

Vertical Business Relationships Within the U.S. Drug Channel, 2025							
	BlueCross BlueShield	THE CIGNA GROUP	CENTENE Corporation	CVS Health.	Humana.	UNITEDHEALTH GROUP	
Insurer	BlueCross BlueShield	cigna healthcare	Medicaid wellcare ambetter	aetna	Anthem Wellpoint	Humana.	United Healthcare
PBM	Prime Therapeutics <sup>1</sup>	Express Scripts By EVERNORTH	CENTENE PHARMACY SERVICES <sup>3</sup>	CVS caremark	carelon <sup>6</sup> Rx	Humana Pharmacy Solutions.	Optum Rx <sup>®</sup>
GPO	synergie <sup>2</sup>	Ascent Health Services	—	zinc HEALTH SERVICES	synergie <sup>2</sup>	—	EMISAR
Manufacturer	—	Quallent Pharmaceuticals	—	cordavis	—	—	nuvaila
Wholesale distribution	—	CuraScript SD By EVERNORTH	—	—	—	—	Optum Frontier Therapies
Specialty/mail pharmacy	Prime Therapeutics Pharmacy <sup>3</sup>	Accredo By EVERNORTH Freedom Fertility By EVERNORTH	AcariaHealth <sup>4</sup> Specialty Pharmacy	CVS specialty	carelon Rx BioPlus <sup>5</sup> A Carelon Company	CenterWell Specialty Pharmacy	Optum Specialty Pharmacy
Retail/LTC pharmacy	—	—	—	CVS pharmacy Omnicare <sup>5</sup> a CVS health company	—	—	genOa healthcare PHARMSCRIPT
Provider	—	EVERNORTH Care Group MDLIVE VillageMD <sup>4</sup>	Community Medical Group Magellan HEALTH.	CVS minute clinic signifyhealth. Oak St. Health	carelon Health carelon Behavioral Health	CenterWell Senior Primary Care CenterWell Home Health CONVIVA Senior Primary Care	Optum

PBM = pharmacy benefit manager; GPO = group purchasing organization; LTC = long-term care

1. Prime Therapeutics sources formulary rebates from—and has a minority ownership interest in—Ascent Health Solutions, which is part of Cigna's Evernorth segment.
2. Synergie is a buying group focused on medical benefit drugs. Its ownership includes the Blue Cross Blue Shield (BCBS) Association, Prime Therapeutics, Elevance Health, and other independent BCBS health plans.
3. Prime Therapeutics Pharmacy was previously known as Magellan Rx Pharmacy. Prime's clients have the option to use Express Scripts for mail/specialty pharmacy services.
4. In 2022, Cigna invested \$2.7 billion for an estimated 14% ownership stake in VillageMD. In 2024, it wrote down the full value of this investment. Walgreens Boots Alliance owns a majority of VillageMD.
5. Centene began outsourcing its PBM operations to Express Scripts in 2024. In 2023, Centene rebranded its Envolve Pharmacy Solutions pharmacy benefit subsidiary as Centene Pharmacy Services.
6. CVS Caremark provides certain PBM services to CarelonRx business. CarelonRx also sources formulary rebates from—and has a minority interest in—Zinc Health Services, which is a subsidiary of CVS Health.

Source: *The 2025 Economic Report on U.S. Pharmacies and Pharmacy Benefit Managers*, Exhibit 261. Exhibit does not illustrate every subsidiary business operated by each company.

# PBM Contracting – What Can Fiduciaries Do?

- Know that most PBMs are not fiduciaries.
- Understand and model the pricing of each component of the contract.
- Pay attention to the definition of “rebates” and timing of rebate payments.
- Note what is excluded from guarantees.
- Pay attention to the definition of “marketplace changes” or other factors that void guarantees.
- Require advance notice of changes.
- Watch for fee escalations, particularly for percentage-based fees.

# PBM Contracting – What Can Fiduciaries Do?

- Include service level guarantees (and actually measure them).
- Negotiate for market checks (and actually conduct market checks).
- Negotiate for audit rights (and actually audit).
- Consider if commercial use of plan data, or de-identified plan data, will be permitted.
- Try to use the plan's business associate agreement.
- Pay attention to indemnification and limitations of liability, particularly for breaches of the business associate agreement.

# Thank You!



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