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ERISA Plan Participants Cannot Proceed As A Class In Challenging EpiPen Prices

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Four ERISA plan participants, who participated in four different ERISA plans, commenced an ERISA class action against four of the nation's largest pharmacy benefit managers (PBMs), alleging that the PBMs breached their fiduciary duties by failing to ensure that the plaintiffs and other plan participants received the benefit of discounts that the PBMs had negotiated with Mylan Pharmaceuticals, a company that markets and sells EpiPens. As a result of the alleged breaches, the plan participants argued that they were forced to pay excessive prices for EpiPens through their respective plans.

In a blow to the plaintiffs' case, a federal judge in Minnesota recently denied their motion for class certification of four nationwide classes—one class for each PBM. In so ruling, the court concluded that class certification was not appropriate because plaintiffs could not satisfy Rule 23's commonality requirement. The court determined that it would need to examine the terms of each plan to determine (i) whether each PBM was a fiduciary, (ii) if a PBM was a fiduciary, whether the PBM breached its fiduciary duty, and (iii) how to measure any losses. The court explained that many plans required the PBMs to pass along 100% of any discount to the plan and it was therefore each plan's decision to pass on such discounts to the plan participants. The court also explained that each PBM's contract with Mylan Pharmaceuticals differed markedly, both in terms of the services provided and whether a PBM passed through a percentage or the entire amount of the Mylan discounts, which would in turn determine the amount of profits that would be subject to forfeiture.

The case is *In re: EpiPen ERISA Litig.*, No. 17-1884 (PAM/HB) (D. Minn. Aug. 5, 2020).

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