

# Clawbacks: Recent Litigation Targeting Insurers and Pharmacy Benefit Managers

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While the term “co-pay” might suggest a sharing of costs between patients and their health plans, a recent study by the University of Southern California Schaeffer Center found that almost a quarter of patients are paying *more* than the full price for their prescription drugs under their insurance plans due to “clawbacks.” A prescription drug clawback occurs when patients purchasing drugs from pharmacies make co-payments required under their insurance plans that exceed the price of the prescriptions and then the insurers and/or pharmacy benefit managers (“PBMs”) clawback from the pharmacies the excess amounts paid.

There have been frequent media reports on the practice of prescription drug clawbacks and federal lawsuits have been filed against insurance companies and PBMs, such as UnitedHealth, Cigna, Humana, and Optum Rx. The theories of liability being asserted include breach of fiduciary duty under the Employee Retirement Income Security Act (“ERISA”), violations of the Racketeer Influenced and Corrupt Organizations Act, as well as under various state laws. These actions are all in their early stages, with none having been decided on the merits.

With respect to the ERISA claims, plan participants and beneficiaries have argued that the insurers and PBMs are liable as ERISA plan fiduciaries. In two recent cases, the courts have concluded that the fiduciary duty analysis turns on whether the defendants exercised any discretionary authority or control in creating and implementing the alleged clawbacks and acted in accordance with the terms of the plans. See *Negron v. Cigna Health & Life Ins.*, No. 16-cv-1904, 2018 WL 1258837 (D. Conn. Mar. 12, 2018); *In re UnitedHealth Grp. PBM Litig.*, No. 16-cv-3352, 2017 WL 6512222 (D. Minn. Dec. 19, 2017).

In *In re UnitedHealth*, the court dismissed plaintiffs' ERISA fiduciary argument because the plaintiffs failed to allege facts sufficient to demonstrate that the defendants exercised any discretion and thus UnitedHealth and its PBM, Optum Rx, were not acting as ERISA plan fiduciaries. In so ruling, the court determined that the defendants' performance of "instantaneous calculations" in accordance with the terms of the plan was insufficient to show that their conduct was "anything more than ministerial claims processing." More recently, in *Negron*, plaintiffs' claim survived a motion to dismiss. The court found plaintiffs alleged facts sufficient to assert a plausible claim of fiduciary status based on the argument that Cigna's conduct was in violation of plan terms and thus necessarily required the exercise of discretion.

In light of the *Negron* decision, and armed with a new academic study establishing the overpayment of a large portion of prescription drug claims, we may see an increase in actions involving health insurers and PBMs targeting clawbacks. As the existing cases continue to be litigated and decisions on the merits are rendered, the impact of this trend will become more apparent. In the interim, plan fiduciaries should consider: (i) reaching out to their health insurer and/or PBM to determine whether or not participants are being advised when the co-pay under the plan exceeds the cost of the prescription; and (ii) advising plan participants who fill prescription drugs to ask the pharmacy whether the cash price for that prescription is less than the co-pay required under the plan.

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