

# Benefits Report December 2025

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## Johnson & Johnson Beats Back (Again) Class Action Alleging Breaches of Fiduciary Duty Regarding Prescription Drug Program



Clarissa A. Kang

Plan fiduciaries notched another victory in a much-watched, bellwether case alleging breaches of fiduciary duty for failures to manage the drug costs of employer-sponsored health plans. In a November 26, 2025, order in the Johnson & Johnson (“J&J” or “Defendants”) prescription drug class action *Lewandowski v. Johnson and Johnson*, the U.S. District Court for the District of New Jersey dismissed the latest iteration of a complaint filed by participants in the J&J plans, but granted leave to file a third amended complaint within 30 days of the order (by December 26, 2025). The order, like the January 2025 order dismissing the earlier version of the complaint, held that the plaintiffs lacked constitutional standing for their ERISA breach of fiduciary duty claims because they had not shown that they suffered an injury in fact, that any injury was caused by the alleged breaches, and that any injury would likely be redressed by judicial relief. After the order, the plaintiff-participants chose not to amend their complaint; however, they may appeal.

For prior Trucker Huss articles on earlier versions of the *Lewandowski* complaint and the court’s dismissal of the first amended complaint, see:

- [The Cost of Drugs: Johnson & Johnson Lawsuit Could Signal the Opening of a New Area of ERISA Class Action Litigation Against Health Plan Fiduciaries](https://www.truckerhuss.com/2024/03/the-cost-of-drugs-johnson-johnson-lawsuit-could-signal-the-opening-of-a-new-area-of-erisa-class-action-litigation-against-health-plan-fiduciaries) (<https://www.truckerhuss.com/2024/03/the-cost-of-drugs-johnson-johnson-lawsuit-could-signal-the-opening-of-a-new-area-of-erisa-class-action-litigation-against-health-plan-fiduciaries>)
- [Lewandowski v. Johnson & Johnson—Unable in First Try to Pursue Fiduciary Breach Claims for High Costs of Drugs](https://www.truckerhuss.com/2025/01/lewandowski-v-johnson-johnson-unable-in-first-try-to-pursue-fiduciary-breach-claims-for-high-costs-of-drugs) (<https://www.truckerhuss.com/2025/01/lewandowski-v-johnson-johnson-unable-in-first-try-to-pursue-fiduciary-breach-claims-for-high-costs-of-drugs>)

- [ERISA and Prescription Drug Costs: The Latest on Fiduciary Breach Class-Action Lawsuits](https://www.truckerhuss.com/newsletter/erisa-and-prescription-drug-costs-the-latest-on-fiduciary-breach-class-action-lawsuits/) (<https://www.truckerhuss.com/newsletter/erisa-and-prescription-drug-costs-the-latest-on-fiduciary-breach-class-action-lawsuits/>).

Plaintiffs Ann Lewandowski and Robert Gregory (the “Plaintiffs”) sought to bring a class action on behalf of participants and beneficiaries of two J&J group health plans and on behalf of the plans themselves – a plan for active employees and another for retirees (collectively, the “Plans”). Asserting two claims for breaches of fiduciary duty under sections 502(a)(2) and 502(a)(3) of ERISA the Plaintiffs alleged that the Plans’ fiduciaries failed to prudently manage the Plans’ prescription drug benefits and carefully monitor the Plans’ pharmacy benefit manager (PBM) and prescription drug costs to ensure that the Plans and their participants and beneficiaries paid only reasonable amounts for prescription drugs. The Plaintiffs accused the Defendants of agreeing to direct participants to a mail-order pharmacy that charges higher prices than retail pharmacy for the same drug, failing to incentivize use of generic drugs over higher-priced branded drugs, failing to engage in a prudent and reasoned decision-making process before agreeing to a PBM contract that caused participants to pay higher prices for drugs, and failing to negotiate lower drug prices. They alleged that the breaches of fiduciary duty harmed the Plans by requiring excessive payments for prescription drugs and harmed the participants and beneficiaries by increasing premiums and out-of-pocket costs. Lewandowski also asserted a claim for alleged failure to provide requested plan governing documents, which the Defendants did not challenge in their motion to dismiss.

After an earlier motion to dismiss the first amended complaint, Plaintiffs attempted to shore up their allegations regarding an injury-in-fact by adding, in the second amended complaint, allegations regarding how employee contributions towards premiums increase when plans overpay for prescription drugs, citing reports and articles. Plaintiff Lewandowski alleged she paid more in both employee premium contributions (when an active employee) and COBRA premiums (after termination of employment) than she would have absent the Defendants’ fiduciary breaches. Plaintiff Gregory alleged that after retirement, his premium contributions towards retiree coverage are “even greater” than the amount he paid as an employee. (Gregory, a retiree, was also added as a named plaintiff in the second amended complaint.) The second amended complaint also added new allegations about out-of-pocket costs. Lewandowski alleged that even though she “nominally” reached her out-of-pocket maximum, Defendants’ conduct caused her to pay more out of pocket for prescription drugs than she otherwise would have paid. Gregory asserted that he paid more out of pocket for a generic drug in October 2024.

Defendants moved to dismiss the breach of fiduciary duty claims in the second amended complaint, again challenging the Plaintiffs’ standing and the adequacy of the breach of fiduciary duty allegations. Defendants argued that Plaintiffs had no concrete harm or injury in fact to have standing to bring the breach of fiduciary duty claims. As to alleged harm of increased premiums, Defendants argued that setting premiums was not a fiduciary function and therefore no fiduciary duty breach exists. Defendants also argued that increased premiums and out-of-pocket costs were speculative.

The court held that Plaintiffs’ new allegations were insufficient to establish injury in fact, causation, and redressability necessary for standing. The court found persuasive the dismissal of a similar case brought by health plan participants alleging breaches of fiduciary duty related to an employer’s prescription drug program – *Navarro v. Wells Fargo & Co.* from U.S. District Court for the District of Minnesota ([see our prior article describing the Wells Fargo dismissal \(https://www.truckerhuss.com/newsletter/erisa-and-prescription-drug-costs-the-latest-on-fiduciary-breach-class-action-lawsuits/\)](https://www.truckerhuss.com/newsletter/erisa-and-prescription-drug-costs-the-latest-on-fiduciary-breach-class-action-lawsuits/)). The *Wells Fargo* court dismissed the complaint

for lack of standing, holding that the alleged harm in the form of higher premiums and out-of-pocket costs for participants was speculative and therefore not redressable by judicial review. The same plaintiffs' firm represents the participant-plaintiffs in both *J&J* and *Wells Fargo*.

Interestingly, the *J&J* court cited to the *Wells Fargo* court's characterization of the Wells Fargo health plan as a "defined-benefits plan," which the *J&J* court viewed as also applicable to the J&J Plans. (This term is most often used to describe a type of retirement plan.) The court noted that it describes a plan that is funded by employer and/or employee contributions into a general pool, undifferentiated into individual accounts. The benefits do not fluctuate with the value of the plan assets, plan investments, or the amount of the contributions. The court noted that the structure of a defined benefit plan reflects risk borne by the employer, as the employer is obligated to make up any shortfall in the asset pool to be able to pay benefits, and reduction of the general asset pool does not affect participants' entitlement to benefits or cause them any injury. Placing the health plans into a "defined benefits" bucket, the *Wells Fargo* and *J&J* courts could rely, in part, on the U.S. Supreme Court's 2020 ruling in *Thole v. U.S. Bank N.A.*, an often-cited case holding that participant-plaintiffs in a lawsuit alleging mismanagement of plan investments in a defined benefit retirement plan lacked standing as their benefits were unaffected by the alleged mismanagement.

The *J&J* court, adopting the reasoning in *Wells Fargo*, held that the connection between the amount of participants' contributions and out-of-pocket costs, on one hand, and the fees the Plans paid the PBM, on the other, was "tenuous at best." The causal effect of the excessive fees paid to the PBM on the Plaintiffs' contribution rates and out-of-pocket costs was "too speculative." The court noted that the Plans vested the Defendants with "sole discretion" to set participant contribution rates ("[t]he Sponsor shall establish each year the amount of Participant contributions"), and that participant contribution rates might be affected by factors that are independent of prescription drug benefits (such as market trends, administrative expenses, non-drug medical costs, factors impacting employees, etc.). The court read language in the Plans about the source of funding as authorizing the Defendants to require participants to fund all plan expenses, not just expenses related to their own individual benefits, arguably extrapolating a little further than the plain language. ("Benefit under this Plan shall be funded through contributions made by the Company and by the enrolled Participants.") The court also noted that under the Plans, the Plaintiffs are responsible for the full out-of-pocket costs for prescription drugs until they have met their annual deductible (and reached the out-of-pocket maximum), after which the Plans paid most of the costs for the Plaintiffs' prescription drugs for the remainder of the year. It called Plaintiffs' allegations about overpaying for certain prescriptions at the pharmacy "selective" when compared against plan benefits of over \$200,000 paid to Lewandowski and over \$121,000 paid to Gregory in the same year when they were complaining about overcharges of \$210 and \$10, respectively. The court deemed the allegations speculative and insufficient to establish the necessary causal connection for any injury because there are "too many variables" regarding how participant contribution rates are set.

As to redressability, the final required element of standing, the court noted that if the Plaintiffs were to prevail in the case and were granted all of the requested relief, the Defendants still are permitted to increase Plan participants' contribution amounts, because the Defendants have the sole discretion under the terms of the Plans to set participant contribution rates. The court concluded that no standing exists.

It is interesting that the *J&J* court relied so heavily on the reasoning and holdings of the *Wells Fargo* court – which is another district court in a different circuit. However, that is not surprising because the basic allegations of the operative complaints were similar, as the same law firm represents both sets of plaintiffs. A

somewhat similar case, brought against JP Morgan and brought by the same plaintiffs' law firm, is awaiting a ruling on a pending motion to dismiss which also asserts lack of standing arguments – *Stern v. JP Morgan Chase & Co.*

On December 18, 2025, the J&J Plaintiffs filed a notice stating that they would not be filing an amended complaint, that they were voluntarily dismissing Lewandowski's third claim related to failure to provide required documents, and that the court should enter judgment. Plaintiffs specifically reserved the right to appeal from the judgment and the order on the motion to dismiss. We might see an appeal in the near future.

So far, this new wave of prescription drug putative class actions – based on the rulings in *J&J* and *Wells Fargo* – has not overcome the threshold requirement of standing. While it remains to be seen whether these kinds of cases will surmount the standing hurdle, they are a reminder to plan sponsors and fiduciaries to examine their prescription drug programs and arrangements with their PBMs to curb potential overcharges, avoid abdicating control to PBMs, and maintain oversight over PBMs.

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## Proxy Voting Back in the Spotlight – Practical Steps for Now



Robert R. Gower

On December 11, 2025, President Trump signed Executive Order 14366, *Protecting American Investors from Foreign Owned and Politically-Motivated Proxy Advisors* (the [Executive Order](https://www.whitehouse.gov/presidential-actions/2025/12/protecting-american-investors-from-foreign-owned-and-politically-motivated-proxy-advisors/) (<https://www.whitehouse.gov/presidential-actions/2025/12/protecting-american-investors-from-foreign-owned-and-politically-motivated-proxy-advisors/>)). As described by the White House, the Executive Order is intended to “end the outsized influence of proxy advisors that prioritize radical political agendas over investor returns.” On the same date, a [Fact Sheet](https://www.whitehouse.gov/fact-sheets/2025/12/fact-sheet-president-donald-j-trump-protects-american-investors-from-foreign-owned-and-politically-motivated-proxy-advisors/) (<https://www.whitehouse.gov/fact-sheets/2025/12/fact-sheet-president-donald-j-trump-protects-american-investors-from-foreign-owned-and-politically-motivated-proxy-advisors/>), was issued to help frame the intent of the Executive Order, strongly emphasizing an objective of “protecting American investors and retirement savings.”

The relationship between ERISA retirement plans and proxy voting is longstanding. With mutual funds serving as the dominant investment vehicle for ERISA retirement plans, trillions of dollars of proxy voting power is held by such plans, and unless the proxies are passed through to participants, they are generally voted by the plan fiduciaries or fiduciary investment managers. Voting such proxies is considered to be a fiduciary function, and in carrying out their fiduciary responsibilities, fiduciaries commonly seek the advice of third-party proxy advisors.

The Executive Order argues that two large foreign-owned proxy advisors have significant influence and power in shaping the policies and priorities of some of the United States' largest companies through control of more than 90% of the proxy voting advisory market. The Executive Order takes the position that this level of proxy voting influence and power directly impacts American's retirement assets, and that the proxy advisors regularly

use their power and influence to advance “radically-motivated agendas” (with specific references to diversity, equity and inclusion (“DEI”) and environmental, social and governance (“ESG”) agendas), at the cost of American retirement savings.

While the financial implications of DEI and ESG practices and policies have been the subject of longstanding political debate, the current administration has frequently taken the position that such influences are costly and subvert financial return.[1] With this position in mind, the Executive Order directs the Securities and Exchange Commission (SEC) to take numerous steps to curb the influence of such influences in the proxy voting process, as follows:

- review and potentially rescind any regulations relating to proxy advisers to the extent they promote diversity, equity and inclusion or environmental, social and governance factors;
- enforce anti-fraud provisions against proxy advisers’ voting recommendations believed to contain material misstatements;
- consider requiring proxy advisers to register as investment advisers (and be subject to such rules and regulations);
- consider requirements to increase transparency related to conflicts of interest, particularly with respect to diversity, equity and inclusion or environmental, social and governance motives;
- analyze whether these firms undertake efforts to coordinate group voting among institutional investors; and
- assess whether investment advisers are engaging in a breach of fiduciary duty to the extent they rely on proxy advisers who promote non-pecuniary motives.

To complement the charge to the SEC, the Executive Order also directs the Federal Trade Commission (FTC) to determine whether the power and influence of proxy advisers that engage in promotion of non-pecuniary amounts to engaging in unfair or deceptive practices, including potential violations of federal antitrust laws.

Finally, the Executive Order directs the Secretary of Labor to revise all regulations and guidance regarding the fiduciary status of individuals who manage or *advise* on proxy voting. Specifically, the Executive Order requires the Secretary of Labor to “consider whether these proposed revisions should include amendments to specify that any individual who has a relationship of trust and confidence with the client, including any proxy advisor, and who provides advice for a fee or other compensation . . . with respect to the exercise of the rights appurtenant to shares held by ERISA plans, is an investment advice fiduciary under ERISA.”

Ultimately, the objective of the Executive Order is to dissuade proxy advisers from making recommendations based on DEI and ESG initiatives. The utilization of the ERISA fiduciary statutory scheme as a tool for dissuasion has direct and significant impacts on service providers to retirement plans. From a practical perspective, service providers and fiduciaries to ERISA plans should consider the following:

**Proxy Advisers.** Despite their attenuation, the Executive Order launches a process for the DOL to determine whether proxy advisers should be considered fiduciaries under ERISA for the advice they render with respect to proxies associated with ERISA plan investments. If the DOL concludes proxy advisers should be held to a fiduciary standard, the implications will be significant in that the regulatory landscape involving ERISA’s duties of prudence and loyalty will apply to every proxy voting recommendation involving ERISA plan assets made by proxy advisers. This would be a significant shift, likely to increase costs for such advice based on additional scrutiny and risk. It would likely result in proxy voting recommendations that are more readily defensible as

pecuniary in nature, shifting many current practices. However, under the current statutory framework defining an ERISA fiduciary, it may prove difficult for the DOL to actually conclude that proxy advisers are fiduciaries given that proxy advisers are not actually exercising discretionary control over plan assets.

**Investment Managers.** Regardless of whether proxy advisers are ultimately considered fiduciaries, investment managers are fiduciaries and therefore should be cognizant of the current Administration's increased scrutiny of how proxy voting policies, particularly those involving DEI and ESG, may influence investment returns. First, managers who vote their own proxies should exercise caution with respect to any actual or perceived DEI or ESG influence in their voting practices. In addition, until further guidance is published by federal regulatory agencies, in order to demonstrate adherence to ERISA's fiduciary duties of loyalty and prudence, investment managers should pay increased attention to the proxy voting policies of their advisers to ensure such policies are pecuniary in nature, and to the extent they involve any DEI, ESG, or similar motives, obtain clear documentation as to how such policies are pecuniary and do not subvert financial return.

**Plan Sponsors.** The Executive Order refocuses the attention of plan fiduciaries on the underlying proxy voting process for plan investment holdings that was previously highlighted by *Spence v. American Airlines*. In that case, plaintiffs successfully argued that plan fiduciaries violated their fiduciary duty of loyalty by allowing a 401(k) plan investment manager to apply ESG motives in its proxy voting policies. (see our prior article [Court Finds American Airlines Liable for Breach of Fiduciary Duty of Loyalty to its 401\(k\) Plans Because it Allowed BlackRock to Pursue ESG Objectives in its Proxy Voting](https://www.truckerhuss.com/2025/04/ebsa-adds-self-correction-component-to-voluntary-fiduciary-correction-program-update-2/) (<https://www.truckerhuss.com/2025/04/ebsa-adds-self-correction-component-to-voluntary-fiduciary-correction-program-update-2/>)). Though the decision was considered novel, the Executive Order bolsters a focus on whether plan fiduciaries have an obligation to monitor the proxy voting recommendations, policies, and decisions made with respect to plan asset investment holdings. Given the increased attention, at a minimum, plan fiduciaries should work to confirm that their investment managers agree to vote all proxies in accordance with ERISA. Such confirmations should be obtained in writing and retained in Plan records.

If you have questions regarding the impact of the Executive Order, please contact us.

[1] The Trump Administration has issued numerous executive orders intended to curb federal funding for ESG and DEI initiatives (see for example Executive Orders 14151, 14281, 14190 and 14156), and in May 2025 announced it would abandon a regulation that took a more neutral approach to considering ESG factors in selecting investment funds for ERISA retirement plans.

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#### PUBLICATION INFO:

The Trucker Huss Benefits Report is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of the Benefits Report are posted on the Trucker Huss website ([www.truckerhuss.com](http://www.truckerhuss.com) (<https://www.truckerhuss.com>))

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