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CVS must face generic drug overcharging class action - 9th Circuit

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(Reuters) - A federal appeals court on Wednesday revived a class action lawsuit accusing pharmacy chain CVS Health Corp of systematically overcharging people who bought generic drugs using insurance rather than cash.

The 9th U.S. Circuit Court of Appeals in San Francisco ruled that a lower-court judge erred in dismissing the case after improperly weighing evidence in the case that should have been presented to a jury to consider.

In their 2015 lawsuit, the plaintiffs alleged that, after CVS launched a discount program for people buying generic drugs without insurance, it inflated the "usual and customary" drug prices it reported to pharmacy benefit managers.

The plaintiffs' lawyers contended that as a result, CVS charged 6.6 million customers in six states who used their insurance benefits for their prescriptions higher co-payments than they should have had to pay, costing them \$123.7 million.

U.S. District Judge Yvonne Gonzalez Rogers in Oakland, California, in 2017 granted summary judgment to CVS, saying testimony from PBMs who administered prescription benefits for health plans showed CVS did not misrepresent drug prices to them.

But a three-judge panel of the 9th Circuit said the plaintiffs did not need to produce evidence showing that the PBMs actually believed CVS misrepresented the price, only that CVS failed to report them properly in accordance with its contracts with PBMs.

The court also said Rogers incorrectly narrowed a proposed class that would cover consumers in six states to just four, California, Florida, Illinois and Massachusetts based on differences among the PBMs operating in those states.

And the panel rejected her conclusion that the testimony of the plaintiffs' economics expert lacked a foundation and needed to be excluded, saying he had an "adequate basis for his disclosed testimony."

The panel included U.S. Circuit Judges Consuelo Callahan and N. Randy Smith and U.S. District Judge of Fernando Olguin, who was sitting by designation.

"We look forward to continue fighting for the millions of patients CVS overcharged for their prescription drugs, until CVS makes those patients whole," said Robert Gilmore, a lawyer for the plaintiffs at Stein Mitchell Beato & Missner.

CVS, represented by Grant Geyerman of Williams & Connolly, in a statement said it "will continue to vigorously defend against these baseless allegations."

The lawsuit centered on a discount program called Health Savings Pass that CVS introduced in 2008 for people buying generic drugs without insurance.

The program made about 400 generic drugs available for less than \$12 for a 90-day supply to members who paid an annual fee. Drugs in the program include the beta blocker carvedilol, diabetes drug metformin and anticoagulant warfarin.

The lawsuit alleged that CVS launched the program to compete with rivals Wal-Mart and Target, which began selling generic drugs for similarly low prices in 2006.

But according to the lawsuit, at the same time, CVS inflated the "usual and customary" drug prices it reported to insurers, which relied on those prices to determine what they would reimburse.

The plaintiffs said the usual and customary price should have been the discounted price, since that was the price for most cash-paying customers, who as a result of CVS' actions paid less than people covered by third-party plans.

The case is Corcoran et al v. CVS Pharmacy Inc, 9th U.S. Circuit Court of Appeals, No. 17-16996.

For plaintiffs: Robert Gilmore of Stein Mitchell Beato & Missner

For CVS: Grant Geyerman of Williams & Connolly

--- **Index References** ---

Company: CVS HEALTH CORP; TARGET CORP; WALMART INC

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