



---

Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com  
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

---

## 9th Circ. Breathes New Life Into CVS Drug Pricing Suit

By **Adam Lidgett**

Law360 (June 13, 2019, 7:26 PM EDT) -- The Ninth Circuit has revived a class action brought on behalf of millions of consumers accusing CVS Pharmacy Inc. of overcharging them for generic medications, finding that a lower court judge incorrectly weighed evidence and wrongly narrowed the classes.

A three-judge panel said Wednesday that U.S. District Judge Yvonne Gonzalez Rogers erred in granting CVS summary judgment in a suit claiming it overcharged insured customers by inflating the prices of drugs to third-party insurance providers and pharmacy benefit managers. The consumers had argued they paid more than the so-called usual and customary price some uninsured consumers had to pay.

Judge Rogers wrongly gave equal weight to both the consumers' and CVS' evidence when really she was required to "draw all reasonable inferences from the evidence in plaintiffs' favor," the panel found.

Additionally, the judge shouldn't have narrowed classes of consumers in California, Florida, Illinois and Massachusetts. The lower court narrowed the class definition to include only consumers who had the same pharmacy benefit manager adjudicate their claims as their respective class representative did, according to court documents.

The panel, however, found that the named plaintiffs and the class members who weren't certified were all allegedly harmed in the same way.

"Plaintiffs alleged that insured CVS customers were charged higher copayments as a result of CVS's failure to report its actual [usual and customary] prices in accordance with its agreements with the PBMs," the panel said. "The district court did not identify any meaningful differences in the PBM agreements that would result in the interests of the class representatives being misaligned with those of the absent class members."

The customers accused CVS of running a scheme to charge insured consumers more for generics than the usual and customary price that people paying in cash pony up.

The company did this by way of a now-discontinued program called Health Savings Pass, which was a discount program for people without insurance, the plaintiffs have said. The program allowed its uninsured customers to pay steeply discounted prices for drugs, all while insured people were paying much more for the same drugs.

CVS argued at the appellate court that it never deceived the PBMs, which calculate copayments, and that "the undisputed evidence is that CVS did not misrepresent the U&C price." It additionally argued that the lower court was right to narrow the definition of the classes, noting that class members had different PBMs with differing contracts with CVS.

Robert B. Gilmore, an attorney for the classes, told Law360 on Thursday he was pleased with the appellate court's decision.

"We look forward to continue fighting for the millions of patients CVS overcharged for their prescription drugs until CVS makes those patients whole," Gilmore said.

Representatives for CVS did not immediately respond to requests for comment on Thursday.

Circuit Judges Consuelo Callahan and N. Randy Smith sat on the panel. U.S. District Judge for the Central District of California Fernando M. Olguin sat on the panel by designation.

The classes are represented by Bonny E. Sweeney, Richard S. Lewis, Sathya S. Gosselin and Michaela Spero of Hausfeld LLP, Robert B. Gilmore and Edward H. Meyers of Stein Mitchell Beato & Missner LLP, and Elizabeth C. Pritzker, Jonathan K. Levine and Bethany L. Caracuzzo of Pritzker Levine LLP.

CVS is represented by Enu Mainigi, F. Lane Heard III and Grant A. Geyerman of Williams & Connolly LLP, and Edward W. Swanson and August Gugelmann of Swanson & McNamara LLP.

The case is Christopher Corcoran et al. v. CVS Health Corporation et al., case number 17-16996, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Jack Karp.

---

All Content © 2003-2020, Portfolio Media, Inc.