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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

CVS Persuades Justices To Review HIV Bias Case

By **Alexis Shanes**

Law360 (July 2, 2021, 2:17 PM EDT) -- The U.S. Supreme Court said Friday it will review the revival of an Affordable Care Act case alleging CVS Pharmacy's mail-delivery drug program discriminates against HIV and AIDS patients.

The justices granted CVS Pharmacy Inc.'s March petition for certiorari but said they would limit their involvement to one question the petition raised: whether the Rehabilitation Act — along with the ACA by extension — offers a disparate impact cause of action for disability bias plaintiffs.

Excluded from the review is the petition's other question, which asks whether such disparate impact claims, if valid, can cover the terms and conditions of health insurance plans.

The petition takes aim at a December ruling by the Ninth Circuit **that revived** five anonymous plaintiffs' proposed class action under the ACA but affirmed the dismissal of their Americans with Disabilities Act claims.

The lawsuit claims that CVS' mail-order drug program discriminates against HIV and AIDS patients because they don't get the same level of care, including pharmaceutical counseling, that other patients receive through the program.

The patient plaintiffs also cited privacy and delivery issues with CVS, problems they said were not as common when they got their prescriptions from community pharmacies.

In its petition, CVS cited an "untenable" circuit conflict about the viability of such disparate impact claims, which it said could encourage "rampant forum shopping" among plaintiffs and prove unnecessarily restrictive to companies. It noted the plaintiffs' law firms previously brought similar Rehabilitation Act claims against Blue Cross Blue Shield that failed at the Sixth Circuit.

"CVS condemns discrimination on the basis of disability," the company said in the petition. "But this widely acknowledged and irreconcilable circuit split hamstring companies that operate nationwide and cannot adopt multiple business strategies in circuits with conflicting legal rules."

In a June 1 brief urging the justices to pass up the petition, the plaintiffs argued the 2019 Sixth Circuit ruling hadn't definitively rejected the idea that "denial of meaningful access is actionable" under the ACA's anti-discrimination provision.

"The limitations and exclusions imposed by petitioners under their specialty medication program put respondents' lives at risk," the plaintiffs said in the brief. "CVS provides two separate and unequal prescription drug benefits: one for those with disabilities, and one for everyone else."

Since it launched the petition, CVS has garnered support from four amici, including the U.S. Chamber of Commerce and America's Health Insurance Plans, a trade group that represents health insurance companies.

The case before the Ninth Circuit, but not the high court, also names Amtrak, Lowe's Cos. and Warner Media. The plaintiffs claimed their health plans with those employers forced them to get in-network specialty drugs through CVS Health Corp., which limits access to mail delivery.

In December 2018, a California federal judge originally **ruled in favor** of CVS and the employers, siding with the health care company's contention that all specialty drugs — not just HIV and AIDS

medications — are subject to the same mail-only option, meaning the program isn't discriminatory.

An attorney for the proposed class didn't immediately respond to a request for comment Friday.

Counsel and a spokesperson for CVS didn't respond to requests for comment.

CVS is represented by Lisa Blatt, Enu Mainigi, Craig Singer, Sarah Harris, Sarah O'Connor and Katherine Meeks of Williams & Connolly LLP.

The plaintiffs are represented by Gerald Flanagan, Daniel Sternberg and Benjamin Powell of Consumer Watchdog, and Alan Mansfield and Henry Quillen of Whatley Kallas LLP.

The case is CVS Pharmacy Inc. et al. v. John Doe One et al., case number 20-1374, before the U.S. Supreme Court.

--Additional reporting by Melissa Angell and Dani Kass. Editing by Aaron Pelc.

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