

CVS Defeat Shows Quiet Ways Drug Middlemen Try to Influence Care

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A recent court defeat for CVS Health Corp. is shining a light on how health-care corporations wield their financial might over doctors and pharmacies in ways that can put profits over patient care.

With more than a dozen similar cases still pending in private arbitration, the pharmacy giant has millions of dollars on the line.

The most recent conflict got so heated that members of Congress cited it as an example of CVS's overreach during a July hearing where pharmacy benefit managers faced bipartisan scorn over the power they exert over patient care.

"CVS Caremark clearly stood in the way of properly treating cancer patients," Representative Nick Langworthy, a New York Republican, said at the Congressional hearing. In response, CVS's head of pharmacy services defended its practices, saying it complied with the government's rules.

The case involved CVS's Caremark prescription drug division withholding some payments to a regional cancer treatment chain beginning in 2016, without any clear explanation. When the center investigated, it learned Caremark was penalizing doctors for stopping cancer medication regimens early, even if those decisions had been made for medical

reasons. As a result, the company charged the practice \$17 million in fees that were subtracted from subsequent Medicare reimbursements.

The group, New York Cancer & Blood Specialists, disputed the fees in arbitration and was awarded the \$17 million — a finding that a judge upheld in mid-July. The court found that CVS Caremark drug plans improperly took fees for years when Medicare patients didn't adhere to cancer drugs, even when keeping patients on the highly toxic medications would have endangered their health.

CVS entities were aware that the company's policies ignored potentially harmful consequences for patients on Medicare, the decision said, citing "Caremark's bad faith or reckless indifference" in how it handled paying for cancer drugs.

David Whitrap, a spokesman for CVS, said the case was "wrongly decided" and called the ruling against the pharmacy giant "an outlier." The company has had other victories against pharmacies upheld in court, he said in an email.

CVS is fighting other practices for millions more. Frier Levitt, the law firm that represented New York Cancer & Blood Specialists, filed 19 similar arbitration cases against the company in 2023. While those would typically be private, their existence was revealed after CVS filed a federal court case in Arizona seeking to change where the disputes are being heard. A decision on that is pending.

Pharmacy benefit managers including units of CVS, UnitedHealth Group Inc. and Cigna Groupare under scrutiny for how they price medicines, pay pharmacies and influence what drugs patients may take. Some lawmakers blame them for dictating how doctors practice medicine.

'Black Box'

New York Cancer & Blood Specialists has about 100 oncologists with locations across New York City, Long Island and the Hudson Valley. The group sees about 1.5 million patients a year.

Jeff Vacirca, the chain's chief executive officer, said the rationale for CVS's fees was mysterious from the start.

"We had no understanding of why they were recouping this money out of nowhere," Vacirca said in an interview, adding the fees meant the practice would lose money on about half the drugs it dispensed.

CVS Caremark reimbursed the practice more than \$190 million for medications dispensed over the period in dispute, after subtracting the \$17 million in fees, according to Jonathan Levitt, a founding partner of Frier Levitt who represented New York Cancer & Blood

Specialists in the case. The amount of the fees went up over time from about 4% of the reimbursement to more than 10%, Levitt said.

CVS said the fees were levied under a program meant to “recognize pharmacies for their performance,” according to the court decision. But there was no reward: All providers had to pay something, even if they had a perfect score on the program. How the scores were calculated “is complex and has changed over time,” the judge found.

One element measured how patients adhered to the drugs they were prescribed. That may make sense for low-risk maintenance medications like cholesterol drugs. But cancer treatments are highly toxic, and doctors often pause or stop treatment to protect patients from the side effects.

“It’s very different from walking in and getting a blood pressure medicine,” Vacirca said.

Under CVS’s program, halting therapy led to penalties. “Caremark would deem the clinical decision to hold or discontinue the drugs to protect the patient’s safety and quality of life/care as non-compliant,” the arbitration panel found, and the company would collect fees as a result.

The company never spelled out how the program worked to doctors and pharmacies dispensing the drugs, according to the arbitration decision. CVS executives in testimony referred to the formulas as a “secret sauce” and a “black box,” according to the decision.

107,400% Increase

New York Cancer & Blood Specialists disputed the program in 2019 and spent years in arbitration, where both sides argued the case out of public view. The arbitration panel ruled in favor of the oncology group in 2023 and ordered CVS to repay all the fees that had been imposed through the program since 2016.

The matter might have stayed hidden from view, but CVS challenged the arbitration award in federal court. A judge declined the company’s request to seal the case and ruled in favor of the oncology group. The judge also affirmed the arbitration award, plus \$5 million in attorneys’ fees, costs and interest.

Up until this year, Medicare allowed PBMs to operate programs meant to reward pharmacies based on their performance. Independent pharmacies have long complained about how these programs work, arguing that PBMs arbitrarily take back payments.

The fees associated with these programs are called DIR fees, for direct and indirect remuneration. The value of these types of fees exploded in recent years to more than \$9.5 billion in 2020. That’s up from less than \$9 million in 2010, according to Medicare data, an increase of 107,400%.

A recent Federal Trade Commission study suggested PBMs know the fees can be arbitrary. “Internal PBM documents reviewed to date show PBM staff discussing how certain assessment metrics make little sense in application, such as applying non-specialty metrics to specialty pharmacies,” the FTC wrote.

That’s consistent with the arbitrators’ findings that CVS Caremark evaluated cancer drug adherence with rules designed for more routine treatments. “Caremark understood that there was nothing NYCBS could do to improve its adherence score,” the panel found, but the company never told the practice that.

A recent report from the House Oversight and Accountability Committee said that the fees “are being manipulated by PBMs to increase profits and introduce vast uncertainty for pharmacies.”

While these fees can lower what the PBM ultimately pays for a medication, patients didn’t get that benefit, according to Medicare. Effective this year, Medicare made prescription drug plans count any fees collected from pharmacies in the negotiated price that patients would pay.

Vacirca said it shows how big companies put their bottom lines above patient care.

“It’s not just that they want to practice medicine,” Vacirca said. “It’s also that they want to retain as much of the money as possible