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## Feds Tell Justices Not To Wade Into Anthem Drug Price Case

By **Abby Wargo**

Law360 (May 25, 2022, 6:40 PM EDT) -- The federal government urged the U.S. Supreme Court not to hear policyholders' challenge to the dismissal of their proposed class action accusing Anthem Inc. and Express Scripts Inc. of violating federal benefits law by overcharging for prescriptions, saying the case isn't worth the justices' time.

U.S. Solicitor General Elizabeth Prelogar **filed an amicus brief** Tuesday arguing that the suit was a bad candidate for review by the nation's highest court. She asked the court to deny a June petition for certiorari from policyholders who lost their case at the Second Circuit.

"The decision of the court of appeals does not conflict with any decision of this court or any other court of appeals. And because the decision below is nonprecedential, the Second Circuit will be free to evaluate the issues here afresh in a future case. Moreover, this case would be a poor vehicle for the court's review," Prelogar said in the brief, which responded to the justices' call in December for the solicitor's input.

Prelogar said court records don't include key contract provisions that would be necessary for a more in-depth analysis of Anthem's relationship with and obligations to the policyholders' plans with respect to drug pricing.

Without the full terms of the contracts in question, the high court wouldn't be able to perform any "meaningful analysis" deciding whether Anthem was a fiduciary liable under the Employee Retirement Income Security Act.

Further, the high court would need to decide whether the **Second Circuit** had jurisdiction over the case in the first place before it could get to the main issues, Prelogar said, because the district court had dismissed the complaint but kept the door open for the plaintiffs to amend it. If the Supreme Court decided it did not have jurisdiction, it would not be able to address the case for review anyway, she said.

The policyholders petitioned the Supreme Court to hear the case in June 2021, hoping to see the Second Circuit decision backing the suit's dismissal overturned. The Second Circuit had sided with a trial court's conclusion in 2018 that setting drug prices is a business decision that doesn't warrant further inspection under ERISA and that Anthem and Express Scripts weren't acting as ERISA-governed fiduciaries when they set the drug prices.

The 10-year contract at issue between Anthem and Express Scripts negotiated and signed in 2009 also resulted in Anthem selling several pharmacy benefit manager companies to Express Scripts for about \$4.7 billion. Express Scripts had offered to provide prescription drugs at a lower cost if it got a better deal on the PBMs it acquired, but, ultimately, Express paid a higher price and charged higher drug costs, the plaintiffs said.

Anthem tried to stop Express Scripts from overcharging, but the pharmacy benefit manager refused to renegotiate, according to Anthem. As a result, the policyholders were left to foot the bill, they said, and they filed their suit in 2016 accusing the companies of breaching their responsibility to keep drug costs low.

The dispute led Anthem to sever its relationship with Express Scripts, and it filed its own lawsuit in

March 2016 against the PBM in New York federal court seeking \$15 billion in damages.

Counsel for the parties and spokespeople for Express Scripts and Anthem did not immediately respond to requests for comment Wednesday.

The proposed class is represented by Peter K. Stris, Radha Pathak, Douglas Geyser and John Stokes of Stris & Maher LLP, Jeffrey Lewis, Derek W. Loeser, Gretchen S. Obrist and David J. Ko of Keller Rohrback LLP and Joe R. Whatley Jr. of Whatley Kallas LLP.

Express Scripts is represented by Derek L. Shaffer, Jonathan G. Cooper, Andrew S. Corkhill, Michael J. Lyle and Jacob J. Waldman of Quinn Emanuel Urquhart & Sullivan LLP.

Anthem is represented by Glenn M. Kurtz of White & Case LLP.

The case is John Doe 1 et al., Petitioners v. Express Scripts Inc. et al., case number 21-471, in the Supreme Court of the United States.

--Additional reporting by Kellie Mejdrich. Editing by Haylee Pearl.

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