



U&C Litigation Summary: Pharmacy

United States of America, et al. ex rel. James Garbe v. Kmart Corporation

The *Garbe* case was pivotal in establishing the standards that future courts used for the legality of different interpretations of usual and customary prices. As a later qui tam litigation over U&C prices noted, “[p]rior to *Garbe* [decided May 2016] federal regulations did not make clear whether the U&C price for a particular drug includes lower prices offered through pharmacy discount programs.”¹

Case Details

- Summary: Relator alleged that Kmart artificially inflated its U&C prices by failing to factor in discounts given to customers in its generic retail maintenance program (“RMP”), leading to higher prices submitted to various PBMs.
- File Date: July 16, 2008.²
- At-Issue Time Period: 2005 – ongoing at time of litigation (ended 2016)³

Program Details

Kmart’s RMP program began in 2004 and expanded chain-wide by 2006.⁴ The program was offered to *any* cash-paying Kmart customer who enrolled, and gave significant discounts on 90-day prescriptions of generic drugs.⁵ In June 2008, Kmart expanded the number of generics on its RMP program (now renamed “Generics Plus”) and began offering discounted 30- and 60-day prescriptions for certain generics.⁶ In July 2009, Kmart introduced a new program, the “Prescription Savings Club,” which required both enrollment and an annual fee of \$10. The program offered similar discounts on generics as the Generics Plus program (though the formulary may be different).⁷ By 2011, Kmart had discontinued all programs other than the “Prescription Savings Club.”

¹ Appeal from the United States District Court for the Central District of Illinois. *United States of America ex rel. Thomas Proctor v. Safeway, Inc.* (7th Cir. No. 3:11-cv-3406) (20-3425) (April 5, 2022) at 3.

² Memorandum and Order. *United States of America ex rel. James Garbe v. Kmart Corporation* (S.D. Ill. 12-CV-881-NJR-PMF) (Nov. 7, 2014) at 40.

³ *Id.* at 2.

⁴ *Id.* at 5.

⁵ Second Amended Complaint. *United States of America, et al. ex rel. James Garbe v. Kmart Corporation* (S.D. Ill. No. 3:12-cv-00881-MJR-PMF) (Doc. 98) (Nov. 17, 2012) ¶ 3.

⁶ Memorandum and Order. *United States of America ex rel. James Garbe v. Kmart Corporation* (S.D. Ill. 12-CV-881-NJR-PMF) (Nov. 7, 2014) at 6.

⁷ *Id.*

U&C determination

Kmart claimed that due to the enrollment process (and the later \$10 annual fee under the Prescription Savings Plan program), the customers in its rewards programs were not the “general public” and thus the industry standard of the U&C price as “the cash price offered to the general public” didn’t apply.⁸ The court found that “the members of Kmart’s generic discount programs are part of the ‘general public’ (as opposed to a private group or club) because of the open eligibility of the programs, i.e. anyone is eligible to join the program.”⁹ Moreover they found the “eligibility process” as insufficient differentiation due to its negligible requirements.¹⁰

United States of America ex rel. Azam Rahimi v. Rite Aid Corporation

Case Details

- Summary: Relator alleged that “Rite Aid routinely overbilled [] government programs because the amounts it charged did not ‘take into account either the lower Rx Savings Program prices or any lower prices that Rite Aid makes available to other payers.’”¹¹
- File Date: May 2, 2011¹²
- At-Issue Time Period: 2007 – ongoing at time of litigation¹³
- Additional Cases Against Rite Aid:¹⁴
 - *Blue Cross and Blue Shield of North Carolina v. Rite Aid Corp., et al.* (D. Minn. No. 0:20-cv-01731-ECT-KMM).
 - *County of Monmouth v. Rite Aid Corp.* (E.D. Pa No. 2:20-cv-02024).
 - *Stafford v. Rite Aid Corp.* (S.D. Cal. No. 3:17-cv-01340).
 - *Envolve Pharmacy Solutions, Inc. v. Rite Aid Hdqtrs. Corp., et al.* (Del. No. N19C-12-214-PRW-CCLD).

Program Details

The Rite Aid Rx Savings Card (“RSC”) Program started in 2008 and allowed any cash customer who enrolled to receive discounts on generic and branded drugs. These discounted prices weren’t reported as U&C.¹⁵

Cash sales under the RSC Program (and other similar programs) far exceeded Rite Aid’s sales at non-discounted prices paid by non-insured, cash-paying customers. However, Rite Aid instead

⁸ *Id.* at 24

⁹ *Id.* at 25.

¹⁰ *Id.* This decision was affirmed by the 7th circuit in 2016.

¹¹ Appeal from the United States District Court for the Eastern District of Michigan at Detroit. *United States of America ex rel. Azam Rahimi v. Rite Aid Corporation* (6th Cir. No. 20-1063) (June 29, 2021) at 2.

¹² *Id.* at 4.

¹³ Opinion and Order Denying Without Prejudice Defendant’s Motion to Dismiss and Permitting Relator to File Amended Complaint. *United States of America, et al. ex rel. Azam Rahimi v. Rite Aid Corporation* (E.D. Mich. No. 2:11-cv-11940) (Apr. 11, 2018) at 13.

¹⁴ Appeal from the United States District Court for the Northern District of California, Opening Brief. *Carl Washington, et al v. CVS Pharmacy, Inc.* (N.D. CA. No. 15-cv-03504-YGR-JSC) (No. 21-16162) (Jan. 26, 2022) at 51 n. 5.

¹⁵ See Opinion and Order. *Blue Cross and Blue Shield of North Carolina, et al. v. Rite Aid Corp. et al.* (D. Minn. No. 20-cv-1731-ECT-KMM) (Feb. 9, 2021) at 6.

reported the retail U&C prices that were paid by few actual cash customers, which were regularly “five, ten, or even twenty times higher than what Rite Aid actually charged cash customers without insurance,” as alleged in a similar case against Rite Aid.¹⁶

U&C determination

This qui tam suit was dismissed under the public disclosure bar (partially because the *Garbe* case had been unsealed just before Relator’s initial filing), a decision which was upheld upon appeal.¹⁷ The ultimate issue of the legality of U&C was therefore not decided in this case.

Other cases against Rite Aid from third parties are still ongoing.¹⁸

The State of Texas ex rel. Tracy Schutte, et al. v. HEB Grocery Company, L.P., et al.

Case Details

- Summary: Grocery chain H.E.B. reached a \$12 million settlement agreement with the State of Texas over allegations involving U&C. The original suit alleged that H.E.B. overcharged Medicaid by inflating the usual and customary prices it submitted by disregarding the discounted prices offered to rewards program customers.¹⁹
 - This case was one of the first U&C litigation cases to settle.²⁰
- File Date: 2011²¹
- At-Issue Time Period: October 1, 2006 - February 24, 2014 (settlement date).²²

Program Details

RxRewards was H.E.B.’s discount drug program that was introduced in 2006. It had two program components; one offered hundreds of commonly prescribed prescription drugs for \$5

¹⁶ See *id.* at 7.

¹⁷ Appeal from the United States District Court for the Eastern District of Michigan at Detroit. *United States of America ex rel. Azam Rahimi v. Rite Aid Corporation* (6th Cir. No. 20-1063) (June 29, 2021) at 2, 5.

¹⁸ See, e.g., Opinion and Order. *Blue Cross and Blue Shield of North Carolina, et al. v. Rite Aid Corp. et al.* (D. Minn. No. 20-cv-1731-ECT-KMM) (Feb. 9, 2021).

¹⁹ See Settlement Agreement and Release. *The State of Texas ex rel. Tracy Schutte, et al. v. HEB Grocery Company, L.P., et al.* (No. D-1-GV-11-001796) (Feb. 24, 2014).

²⁰ “Texas-Based Grocery Store H-E-B Settles Medicaid Fraud Case for \$12 Million.” *Berger Montague*. <<https://bergermontague.com/texas-based-grocery-store-settles-medicaid-fraud-case-for-12-million>> (accessed July 13, 2022).

²¹ “Texas Grocery Chain Pays \$12 Million in Settlement of Medicaid Fraud Case.” *The National Law Review* (Mar. 21, 2014). <<https://www.natlawreview.com/article/texas-grocery-chain-pays-12-million-settlement-medicaid-fraud-case>> (accessed July 13, 2022).

²² Settlement Agreement and Release. *The State of Texas ex rel. Tracy Schutte, et al. v. HEB Grocery Company, L.P., et al.* (No. D-1-GV-11-001796) (Feb. 24, 2014) ¶ 27.

per 30-day supply, and the other offered a discount on “nearly every remaining drug HEB sold.”²³ It was open to all customers free of charge.²⁴

U&C determination

H.E.B. offered a discount drug rewards program to customers, but it did not offer these discounts to Medicaid customers and did not factor in these discounts when reporting the U&C prices to Medicaid. The case was settled and did not go to trial, so the ultimate legality of the U&C definition used by H.E.B. was not decided in court.²⁵

United States ex rel. Tracy Schutte, et al., v. SuperValu, Inc., et al.

Case Details

- Summary: Plaintiffs allege that “SuperValu knowingly filed false reports of its pharmacies’ ‘usual and customary’ (‘U&C’) drug prices when it sought reimbursements under Medicare and Medicaid. SuperValu listed its retail cash prices as its U&C drug prices rather than the lower, price-matched amounts that it charged qualifying customers under its discount program.”²⁶
- File Date: August 8, 2011²⁷
- At-Issue Time Period: 2006-2016²⁸

Program Details

SuperValu offered a “price match program” which allowed *any* customers (including those with insurance) to request SuperValu match a lower price offered by a local competitor. After this price match was requested, it was automatically applied to future refills of the prescription. These price matches were not reported as the U&C price when billing 3rd party payors. Between 2006 and 2016, “sales under SuperValu’s price-matching policy accounted for 26.6% of SuperValu’s cash drug sales and 1.69% of its total prescription drug sales—roughly 6.3 million sales.”²⁹

²³ *Id.* at 2-3.

²⁴ “Texas Grocery Chain Pays \$12 Million in Settlement of Medicaid Fraud Case.” *The National Law Review* (Mar. 21, 2014). <<https://www.natlawreview.com/article/texas-grocery-chain-pays-12-million-settlement-medicaid-fraud-case>> (accessed July 13, 2022).

²⁵ See Settlement Agreement and Release. *The State of Texas ex rel. Tracy Schutte, et al. v. HEB Grocery Company, L.P., et al.* (No. D-1-GV-11-001796) (Feb. 24, 2014).

²⁶ Appeal from the United States District Court for the Central District of Illinois. *United States of America ex rel. Tracy Schutte, et al. v. SuperValu, Inc., et al.* (7th Cir. No. 11-cv-3290) (20-2241) (August 12, 2021) at 2.

²⁷ Opinion. *United States of America, et al. ex rel. Tracy Schutte, et al. v. SuperValu, Inc., et al.* (C.D. Ill. No. 11-cv-3290) (Apr. 23, 2018) at 5.

²⁸ Appeal from the United States District Court for the Central District of Illinois. *United States of America ex rel. Tracy Schutte, et al. v. SuperValu, Inc., et al.* (7th Cir. No. 11-cv-3290) (20-2241) (August 12, 2021) at 5.

²⁹ *Id.*

U&C determination

The U&C price in this case was alleged to be inflated because it failed to account for the lower price applied to almost a third of its cash sales under the price matching policy. The court held that, under the standard established in *Garbe*, “SuperValu’s discounted prices fell within the definition of U&C price and [] SuperValu should have reported them.”³⁰ However, the circuit court agreed with the district court that SuperValu had “an objectively reasonable understanding of the regulatory definition of U&C price” and that prior to the 2016 *Garbe* decision, “no authoritative guidance placed it on notice of its error.”³¹ This fact led the circuit court to affirm the district court’s decision to grant summary judgment to SuperValu.

United States of America ex rel. Thomas Proctor v. Safeway, Inc.

Case Details

- Summary: Relator alleged that Safeway “knowingly submitted false claims to government health programs when it reported its ‘retail’ price for certain drugs as its ‘usual and customary’ price, even though many customers paid much less than the retail price. As a result, the government effectively subsidized Safeway’s low prices for cash customers by reimbursing Safeway based on the higher retail price.”³²
- File Date: November 7, 2011³³
- At -Issue Time Period: 2006-2015³⁴
- Additional Cases Against Safeway/Albertsons by Third-Party Payors:³⁵
 - *Maine Cmty. Health Options v. Albertsons Companies, Inc.*, (D. Idaho No. 1:19-cv-00448-JMM).
 - *Health Care Serv. Corp. v. Albertsons Companies, LLC*. (Minn. District Ct., Dakota Cty. No. 19HA-CV-21-213).

Program Details

Safeway offered three programs to lower the cost of drugs:³⁶

- 1) “**Individual Price Matching**” was in effect from 2006-2015, which allowed pharmacists to match competitors’ lower prices on certain drugs. The program was not publicized and

³⁰ *Id.* at 2.

³¹ *Id.* at 6, 14.

³² Appeal from the United States District Court for the Central District of Illinois. *United States of America ex rel. Thomas Proctor v. Safeway, Inc.* (7th Cir. No. 3:11-cv-3406) (20-3425) (April 5, 2022) at 2.

³³ “The United States of America v. Safeway, Inc. (3:11-cv-03406).” *Court Listener* (July 20, 2022). <<https://www.courtlistener.com/docket/5183905/the-united-states-of-america-v-safeway-inc>> (accessed July 20, 2022).

³⁴ Appeal from the United States District Court for the Central District of Illinois. *United States of America ex rel. Thomas Proctor v. Safeway, Inc.* (7th Cir. No. 3:11-cv-3406) (20-3425) (April 5, 2022) at 8.

³⁵ Appeal from the United States District Court for the Northern District of California, Opening Brief. *Carl Washington, et al v. CVS Pharmacy, Inc.* (N.D. CA. No. 15-cv-03504-YGR-JSC) (No. 21-16162) (Jan. 26, 2022) at 51 n. 5.

³⁶ Appeal from the United States District Court for the Central District of Illinois. *United States of America ex rel. Thomas Proctor v. Safeway, Inc.* (7th Cir. No. 3:11-cv-3406) (20-3425) (April 5, 2022) at 4.

required a customer to request a match which would only be applied for that purchase. The purchases made here were not reported as U&C.

- 2) **“The \$4 Generics Program”** was in effect from 2008-2010 (in limited locations) and offered discounts on a changing formulary of generics for all customers *including* insured customers. The program was advertised and sales made under this program were reported as U&C.
- 3) **“Discount Club Programs”** began in 2008 under the name “Matching Competitor Generic Program” and was in locations which were not included in the \$4 Generics Program. The discounts offered were the same as the \$4 Generics Program; however, customers weren’t automatically eligible – instead the program was limited to cash customers who completed a limited enrollment form, though no fee was required. These prices were not included in Safeway’s U&C. In July 2010 the program was renamed the “Loyalty Membership Program.”

U&C determination

Following the same court’s decision in *Garbe*, the court held that “discount-program prices for prescription drugs were offered to ‘the general public,’” and as the parties consider the U&C price as the “the cash price charged to the general public,” Safeway should have reported the prices as U&C.³⁷ Following *United States ex rel. Schutte v. SuperValu Inc.*, the court also found that Safeway had an objectively reasonable interpretation of U&C prices and did not receive authoritative guidance against their interpretation. Thus, the court affirmed the lower court’s decision for summary judgement for Safeway.³⁸

United States of America, et al. ex rel. Marc D. Baker v. Walgreens, Inc.

Case Details

- Summary: Relator alleged that Walgreens overcharged Medicaid by excluding discount prices from its Prescription Savings Club program from its reported U&C prices. The government later intervened in this qui tam action.³⁹
- File Date: 2012⁴⁰
- At-Issue Time Period: January 2008 – December 2017⁴¹
- Other Related Cases:⁴²
 - *Forth, et al. v. Walgreen Co.* (N.D. Ill. No.17-cv-2246).

³⁷ *Id.* at 3.

³⁸ *Id.* at 8-10.

³⁹ Intervenor Complaint. *United States of America, et al. ex rel. Marc D. Baker v. Walgreens, Inc.* (S.D.N.Y. 12 Civ. 0300 (JPO)) (Dec. 27, 2018) ¶¶ 1-3.

⁴⁰ “Historic Whistleblower Case Exposes Walgreens’ Overbilling Prescription Drugs Paid by Government Healthcare Plans Like Medicaid.” *The Orange Leader* (Feb. 3, 2019). <<https://www.orangeleader.com/2019/02/03/historic-whistleblower-case-exposes-walgreens-overbilling-prescription-drugs-paid-by-government-healthcare-plans-like-medicaid>> (accessed July 21, 2022).

⁴¹ Intervenor Complaint. *United States of America, et al. ex rel. Marc D. Baker v. Walgreens, Inc.* (S.D.N.Y. 12 Civ. 0300 (JPO)) (Dec. 27, 2018) ¶ 2.

⁴² Appeal from the United States District Court for the Northern District of California, Opening Brief. *Carl Washington, et al v. CVS Pharmacy, Inc.* (N.D. CA. No. 15-cv-03504-YGR-JSC) (No. 21-16162) (Jan. 26, 2022) at 51 n. 5.

- *BCBSM, Inc. v. Walgreen Co. and Walgreens Boots Alliance, Inc.* (N.D. Ill. No. 1:20-cv-1853).
- *Maine Cmty. Health Options v. Walgreen Co.* (W.D. Wisc. No. 3:18-MC-0009).
- *Health Care Service Corp. v. Walgreen Co. and Walgreens Boots Alliance.* (Ill. Circuit Ct., Cook Cty. No. 2021-L-000621)

Program Details

Starting in 2007, Walgreens offered a discount generic drug program called the "Prescription Savings Club" ("PSC"). As detailed in a similar case against Walgreens, "[t]he PSC allows customers that pay directly for prescriptions, whether by cash, check, or credit, to purchase more than 500 widely prescribed generic drugs for \$5, \$10, and \$15 for 30-day prescriptions, and \$10, \$20, and \$30 for 90-day prescriptions, depending on the drug's tier classification. To take advantage of the PSC's prices, customers must pay a yearly membership fee of \$20 per individual or \$30 per family. All pharmacy patrons other than Medicare and Medicaid beneficiaries are eligible to participate in the PSC, and a majority of Walgreens' direct-pay customers pay the PSC prices."⁴³

U&C determination

Defendant Walgreens admitted to all factual allegations against it and settled the claims with the United States for over \$46 million.⁴⁴

It is also worthwhile to note that, in a similar third-party case against Walgreens, the court rejected Walgreens' argument that, "because cash-paying customers need to opt-in to the PSC and pay a yearly membership fee to access PSC prices, such prices cannot qualify as U&C prices" due to the finding in *Garbe*.⁴⁵

United States of America et al. ex rel. Jane Doe v. Houchens Industries, Inc.

Case Details

- Summary: Relator alleged that Houchens, which owned the "Hometown IGA" chain of stores and its accompanying pharmacies, overcharged federal drug programs by excluding prices charged under its generic drugs rewards program from its reported U&C prices.⁴⁶
- File Date: February 4, 2013⁴⁷

⁴³ Memorandum Opinion and Order. *Forth, et al. v. Walgreen Co.* (N.D. Ill. No.17-cv-2246) (Mar. 9, 2018) at 3-4.

⁴⁴ See Stipulation and Order of Settlement and Dismissal. *United States of America, et al. ex rel. Marc D. Baker v. Walgreens, Inc.* (S.D.N.Y. 12 Civ. 0300 (JPO)) (Jan. 19, 2017).

⁴⁵ Memorandum Opinion and Order. *Forth, et al. v. Walgreen Co.* (N.D. Ill. No.17-cv-2246) (Mar. 9, 2018) at 11-12.

⁴⁶ Entry on Defendant's Motion to Dismiss. *United States of America, et al. ex rel. Jane Doe v. Houchens Industries, Inc.* (S.D. Ind. No. 1:13-cv-00196-RLY-MJD) (Jan. 09, 2015) at 2.

⁴⁷ Plaintiffs' Complaint. *United States of America, et al. ex rel. Jane Doe v. Houchens Industries, Inc.* (S.D. Ind. No. 1:13-cv-00196-RLY-MJD) (Feb. 4, 2013).

- At-Issue Time Period: 2008 – ongoing at time of litigation⁴⁸

Program Details

In 2008, Houchens created a rewards program for cash customers which offered 500 generic pills on a formulary for \$5. The program was open to the public and only required filling out a form and a nominal fee which was then refunded with a gift card. Later the program was adjusted to offer 30-, 60-, and 90-day supplies for \$3.99, \$6.99, and \$9.99 respectively. The relator claims this wasn't reflected in charges to 3rd party payors unless the customer's co-pay was greater than \$3.99.⁴⁹

U&C determination

When deliberating on Defendant's motion to dismiss, the court decided based on the *Garbe* understanding that the rewards program enrollment process was "rudimentary and open to anyone" and that therefore, "Relator's allegation that the Rewards Program price is its U&C price for Medicare Part D and Illinois Medicaid for reporting purposes, is plausible."⁵⁰ The case subsequently settled in 2015.⁵¹

United States ex rel. J. Douglas Strauser, et al. v. Stephen L. Lafrance Holdings, Inc., et al.

Case Details

- Summary: This qui tam action alleged that a pharmacy chain owned by Defendants had defrauded government health programs by reporting inflated U&C prices for prescription drugs that did not factor in prices from its discount program.⁵²
- File Date: May 14, 2013⁵³
- At-Issue Time Period: October 2008 – May 2013⁵⁴

Program Details

Beginning in 2008, Defendants' pharmacies began matching Walmart's \$4 prices for 30-day supplies of generic medications for cash paying customers who requested the lower price. If a customer did so, a note was generally made in the customer's file to continue that pricing for almost all generic drugs on Walmart's \$4 formulary.⁵⁵ This discount was not offered to insured

⁴⁸ *Id.* ¶ 2.

⁴⁹ Entry on Defendant's Motion to Dismiss. *United States of America, et al. ex rel. Jane Doe v. Houchens Industries, Inc.* (S.D. Ind. No. 1:13-cv-00196-RLY-MJD) (Jan. 09, 2015) at 2.

⁵⁰ *Id.* at 4.

⁵¹ Stipulation of Dismissal. *United States of America, et al. ex rel. Jane Doe v. Houchens Industries, Inc.* (S.D. Ind. No. 1:13-cv-00196-RLY-MJD) (July 30, 2015).

⁵² Opinion and Order. *United States of America ex rel. J. Douglas Strauser, et al. v. Stephen L. Lafrance Holdings, Inc., et al.* (N.D. Okla. No. 18-CV-673-GKF-FHM) (Nov. 14, 2019) at 3.

⁵³ Opinion. *United States of America ex rel. Chris Phillips, et al. v. Stephen L. Lafrance Holdings, Inc. et al.* (N.D. Okla. No. 14-CV-0567-CVE-PJC) (Oct. 4, 2018) at 3.

⁵⁴ *Id.* at 4.

⁵⁵ Opinion and Order. *United States of America ex rel. J. Douglas Strauser, et al. v. Stephen L. Lafrance Holdings, Inc., et al.* (N.D. Okla. No. 18-CV-673-GKF-FHM) (Mar. 7, 2019) at 6-7.

customers, but a majority of cash customers received the discount. By the 2009-2010 fiscal year, more than 90 percent of the pharmacies' drug transactions with uninsured customers were made at the \$4 discounted pricing.⁵⁶ After the pharmacies were acquired by Walgreens in 2012, the discounts continued until the pharmacies adopted Walgreens' computer system.⁵⁷

U&C determination

The court denied Lafrance's motion to dismiss, in part based on four factors that made it plausible for Relator to allege that the \$4 generic pricing was the pharmacies' U&C pricing:

- Any cash customer could request it, and the pharmacies sometimes generated the \$4 generic pricing even without the customer's request (e.g., when the pricing would continue automatically).
- A majority of the pharmacies' cash transactions were made at the \$4 generic pricing for almost all medications on the Walmart formulary.
- For many of these drugs, the percent of cash customers with the discount applied was greater than 90 percent.⁵⁸

Moreover, the court noted that this case was "not the first qui tam suit alleging a scheme to defraud government health programs by reporting inflated U&C prices for prescription drugs" and referenced the fact that "[s]everal other courts have denied motions to dismiss in cases involving similar allegations" in support of its own denial, including *Garbe* and *Schutte v. SuperValu*.⁵⁹

Carl Washington, et al. v. CVS Pharmacy Inc.⁶⁰

Case Details

- Summary: Plaintiffs alleged that "CVS had engaged in deceptive and unfair business practices by (1) excluding Health Savings Pass prices from its reporting of the usual and customary price; [and] (2) misrepresenting to plaintiffs that the copayments that CVS demanded and charged (tethered to CVS's inflated usual and customary price) were accurate[.]"⁶¹
- File Date: July 2015⁶²

⁵⁶ *Id.*

⁵⁷ *Id.* at 7-8.

⁵⁸ *Id.* at 15.

⁵⁹ *Id.* at 11. The court referenced the following cases where motions to dismiss were denied: *United States of America ex rel. Thomas Proctor v. Safeway, Inc.*; *United States of America ex rel. Tracy Schutte, et al., v. SuperValu, Inc., et al.*; *United States of America ex rel. Jane Doe v. Houchens Industries, Inc.*; and *United States of America ex rel. Garbe v. Kmart Corp.* (in its first, second, and third iterations).

⁶⁰ This case is filed for specified classes following the jury decision favoring CVS in *Corcoran v. CVS Health Corp.* Thus, *Carl Washington* and *Corcoran* are treated as the same case. See Appeal from the United States District Court for the Northern District of California, Opening Brief. *Carl Washington, et al v. CVS Pharmacy, Inc.* (N.D. CA. No. 15-cv-03504-YGR-JSC) (No. 21-16162) (Jan. 26, 2022) at 18.

⁶¹ Appeal from the United States District Court for the Northern District of California, Opening Brief. *Carl Washington, et al v. CVS Pharmacy, Inc.* (N.D. CA. No. 15-cv-03504-YGR-JSC) (No. 21-16162) (Jan. 26, 2022) at 17-18.

⁶² *Id.*

- At-Issue Time Period: November 2008 – July 2015.⁶³
- Additional cases against CVS:⁶⁴
 - *Blue Cross and Blue Shield of Alabama v. CVS Health Corp.* (D.R.I. No. 1:20-cv-00236-WES-PAS).
 - *Horizon Healthcare Services, Inc. v. CVS Health Corp.* (D.R.I. No. 1:20-cv-00458-WES-PAS).
 - *Highmark Inc. v. CVS Pharmacy, Inc.* (D.R.I. No. 1:20-cv-00507-WES-PAS).
 - *Capital BlueCross v. CVS Health Corp.* (D.R.I. No. 1:20-cv-00520-WES-PAS).
 - *Carefirst of Maryland, Inc. v. CVS Health Corp.* (D.R.I. No. 1:21-cv00223-WES-PAS).
 - *Maine Cmty. Health Options v. CVS Pharmacy, Inc.* (D.R.I. No. 1:20- cv-00010-JJM-PAS).
 - *Plumbers Welfare Fund, Local 130 v. CVS Health Corp.* (D.R.I. No. 1:16-cv-00447-S)
 - *Sheet Metal Workers Local No. 20 Welfare and Benefit Fund v. CVS Pharmacy, Inc.* (D.R.I. No. 1:16-cv-00046-WES-PAS).
 - *Mississippi v. CVS Health.* (Miss. State Ct., Desoto Cty., 3d. Chancery Dist. No. 16-CV-01392).

Program Details

CVS created the “Health Savings Pass” program in September 2008, which gave *any* cash customer discounted generic prices (\$9.99 or \$11.99) on 90-day quantities, given that the customer filled out a form and paid a \$10 annual enrollment fee.⁶⁵

U&C determination

The first judge for this case denied multiple motions from the Plaintiffs, finding that the contract language between CVS and PBMs concerning U&C price supported that, “even ignoring contracts that expressly exclude membership programs from their definition of U&C, the showing before the Court demonstrates significant variation with how the different contracts define U&C” and that “[s]econd, and more importantly, several executives from the largest PBMs in the industry have submitted declarations expressing their understanding that the HSP prices at issue in this litigation were not considered U&C prices.”⁶⁶ In doing so, the court became the first court anywhere to conflict with *Garbe* by concluding that discount program prices did not need to be submitted as U&C prices.⁶⁷ In appeal, the 9th circuit found that a jury should decide

⁶³ *Id.* at 7.

⁶⁴ *Id.* at 49-50.

⁶⁵ *Id.* at 10.

⁶⁶ Order Denying Motion for Class Certification; Denying Motions to Strike as Moot. *Christopher Corcoran, et al. v. CVS Health Corporation, et al.* (N.D. Cal. No. 15-cv-03504-YGR) (Mar. 21, 2017) at 7-8.

⁶⁷ Appeal from the United States District Court for the Northern District of California, Opening Brief. *Carl Washington, et al v. CVS Pharmacy, Inc.* (N.D. CA. No. 15-cv-03504-YGR-JSC) (No. 21-16162) (Jan. 26, 2022) at 18.

the issue,⁶⁸ but the jury also ultimately decided that CVS had not violated the law via its treatment of U&C prices.⁶⁹

⁶⁸ See Appeal from the United States District Court for the Northern District of California. *Christopher Corcoran, et al. v. CVS Health Corporation, et al.* (9th Cir. No. 17-16996) (June 12, 2019).

⁶⁹ Verdict Form. *Carl Washington, et al v. CVS Pharmacy, Inc.* (N.D. CA. No. 15-cv-03504-YGR) (June 23, 2021).