

## How Robbins Geller Kept A Suit Against Rite Aid In Court

By **Emma Cueto**

*Law360 (June 7, 2021, 3:53 PM EDT)* -- Amid a growing interest from clients in cases related to pharmaceutical pricing, Robbins Geller Rudman & Dowd LLP secured a key Ninth Circuit victory in a suit against Rite Aid Corp., allowing the proposed class action to stay in California federal court instead of being pushed into arbitration.

Partners David W. Mitchell and Brian O. O'Mara told Law360 Pulse that Rite Aid's bid to push the suit into arbitration was a frustrating but unsurprising move that slowed the litigation. The firm prevailed, they said, by keeping the focus where it belonged: on the fact that the pharmacy customers the firm represents never signed an arbitration agreement with Rite Aid and could not be bound by agreements Rite Aid had with intermediaries.

"The Ninth Circuit got it right," Mitchell said, saying that he was gratified by the decision.

The lawsuit, which was filed in 2017, accuses Rite Aid of inflating the drug prices it reports to insurance companies, forcing consumers to pay more than they would if the stores were to report the prices correctly.

In the complaint, lead plaintiff Bryon Stafford says that the drug store chain offers a discount plan called Rite Aid's Rx Savings Program, which offers cash-paying customers low prices on hundreds of common generic drugs, such as charging \$9.99 for a 30-day supply. The plan's prices are cheaper than the "usual and customary" prices that Rite Aid reports to insurance companies, the complaint says, leading to falsely inflated co-payments for customers who use insurance.

Mitchell and O'Mara said it's the sort case their practices are seeing more of an interest in. Robbins Geller represents a lot of health and welfare funds that are increasingly focused on the cost of pharmaceuticals and in the type of pricing schemes in which Rite Aid allegedly engaged.

"They keep us working," O'Mara said.

In the Rite Aid case, Robbins Geller successfully fought off a motion to dismiss in 2018, with U.S. District Judge Anthony Battaglia saying in September of that year that Stafford had laid out a plausible case. The suit then moved into discovery, but in June 2019, Rite Aid tried to push the dispute into arbitration.

The company argued that Stafford's claims rested on prices that were dictated by the pharmacy's

contracts with pharmacy benefit managers, who act as intermediaries, coordinating things such as insurance reimbursements and co-payments. Even though Stafford and the other consumers who might make up a potential class are not party to those contracts, the company said, their claims rested on the contracts.

Under California's equitable estoppel rules, the company said in its brief, even if a plaintiff isn't a party to a contract, if the plaintiff makes claims based on that contract, they are still bound by the contract's arbitration requirements. Therefore, the company argued, the case should move to arbitration.

"It is undisputed that plaintiff sues [Rite Aid] for alleged breaches of obligations he contends are imposed by the pharmacy contracts [with pharmacy benefit managers]," the company's appellate brief said. "It is undisputed that those contracts contain arbitration agreements. ... On these undisputed facts, a straightforward application of California's equitable estoppel doctrine and the Federal Arbitration Act requires plaintiff to arbitrate."

Mitchell and O'Mara told Law360 Pulse that they saw the move as an effort to slow the litigation.

"They took a shot at stopping the case at the motion to dismiss and slowing everything after that," O'Mara said. "And this was the next step in that, trying to slow the case down and prevent us from moving forward to trial."

It wasn't a shock, Mitchell added, although it also wasn't ideal.

"At times, unfortunately, these cases do obtain a longer life cycle than we would like," he said. "We do aim to get these cases positioned for a dispositive determination and/or trial as quickly as we can, and something like this does slow the process down. But we understood it, and we prepared for it."

Robbins Geller successfully defeated the motion to compel arbitration at the district court, prompting Rite Aid to appeal.

Mitchell and O'Mara said they felt confident heading into the appeal, where they argued that Stafford was not a party to the contracts between Rite Aid and the pharmacy benefit managers, would have no standing to enforce them, and was at most an "incidental beneficiary," meaning the arbitration clause should not apply to the case. Their confidence eventually proved justified when the Ninth Circuit ruled in their favor on May 21.

"Under California law, Stafford's claims did not depend on Rite Aid's contractual obligations to the pharmacy benefit managers," a three-judge panel wrote. "Consequently, equitable estoppel did not apply to bind Stafford to the arbitration agreements in those contracts."

The claims, the panel said, did not hinge on Rite Aid breaching its contracts with the pharmacy benefit managers, but rather that the company misrepresented prices to those intermediaries, resulting in higher prices for consumers like Stafford.

"Rite Aid's duty not to commit fraud is independent from any contractual requirements with the pharmacy benefit managers," the panel said.

Rite Aid has filed for a rehearing, although the Ninth Circuit has yet to rule on that request.

Assuming that the decision stands, Mitchell and O'Mara said they look forward to getting back to discovery and the heart of the case.

"The goal is to get this back on the litigation track, so we can move forward expeditiously with our substantive claims at the district court here in San Diego," Mitchell said.

In addition to Mitchell and O'Mara, appellate partner Andrew S. Love and others also worked on the appeal.

Attorneys from Morgan Lewis & Bockius LLP, which represented Rite Aid, did not respond to a request for comment.

--Additional reporting by Adam Lidgett. Editing by Orlando Lorenzo.

---

All Content © 2003-2021, Portfolio Media, Inc.