

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
FIFTH DIVISION

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STATE OF ARKANSAS

PLAINTIFF
CIRCUIT-COUNTY CLERK

V. CASE NO. CV-04-634

DEY, INC.; WARRICK
PHARMACEUTICALS CORPORATION;
SCHERING-PLOUGH CORPORATION;
AND SCHERING CORPORATION

DEFENDANTS

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' JOINT
MEMORANDUM FOR JUDGMENT ON THE PLEADINGS**

Plaintiff, the State of Arkansas ("State"), submits the following memorandum of law in opposition to the Motion for Judgment on the Pleadings brought jointly by the Defendants Dey, Inc., Warrick Pharmaceuticals Corporation, Schering-Plough Corporation, and Schering Corporation (hereinafter "Defendants").

SUMMARY OF ARGUMENT

The State filed this lawsuit because the Defendants have engaged in a scheme that siphons off money intended for the Arkansas Medicaid program, a governmental program designed to help poor and disabled Arkansans, and instead directs that money to enrich the Defendants and gain market share for their products. Compl. ¶ 1. The Defendants report the prices of their drugs at levels that bear no relation to actual market prices. *Id.* at ¶ 35. They engage in this scheme to create a "spread" (or large price differential) between their reported average wholesale prices ("AWP") and the actual price at which health care providers (doctors and pharmacists) can acquire their drugs on the market. *Id.*

at ¶¶ 37-40. A Judge presiding over similar AWP litigation described the scheme as follows, “The defendants trumpeted a lie by publishing the inflated AWP, knowing (and intending) them to be used as instruments of fraud.” In re Lupron Marketing and Sales Practices Litigation, 295 F. Supp. 2d 148, 167 (D.C. Mass. 2003) These unconscionable business practices have not only harmed states, the federal government, beneficiaries of both Medicaid and Medicare, and purchasers of pharmaceuticals in general, but they have led to the promulgation of strict federal guidelines regarding pharmaceutical pricing. These regulations explicitly state that pricing schemes such as the one the Defendants perpetrate in Arkansas and throughout the country are illegal.¹

The Defendants’ awareness of the reimbursement methodologies used by state and federal governments serve their purposes well. Armed with this knowledge, they have designed their deceptions accordingly. The pricing scheme that took place in Arkansas is the same one that has occurred in other states where the Defendants are facing lawsuits over the same wrongful conduct.²

¹ “It is illegal for a manufacturer knowingly to establish or inappropriately maintain a particular AWP if one purpose is to manipulate the “spread” to induce customers to purchase its product.... We recommend that manufacturers review their AWP reporting practices and methodology to confirm that marketing considerations do not influence this process.” “OIG Compliance Program Guidance for Pharmaceutical Manufacturers,” United States Department for Health and Human Services, Office of Inspector General, Federal Register, Vol. 68, No. 86, Monday, May 5, 2003.

² *State of West Virginia ex rel. McGraw v. Warrick Pharmaceuticals Corp.*, Civil No. 01-C-3011 (D. W. Va.); *The Commonwealth of Massachusetts v. Mylan Laboratories, Inc.*, No. 1:03-cv-11865-PBS (D. Mass.); *Suffolk County, New York v. Abbott Laboratories*, No. 1:03-cv-10643-PBS (S.D.N.Y.); *County of Rockland, New York v. Abbott Laboratories, Inc.*, No. 1:03-cv-12347-PBS (N.D.N.Y.); *Connecticut, State of v. Dey, Inc.*, No. 1:03-cv-11351-PBS (D. Conn.); *Nevada, State of v. American Home Prod.*, No. 1:02-cv-12086-PBS (D. Nev.); *Montana, State of v. Abbott Laboratories*, No. 1:02-cv-12084-PBS (D. Mont.); *County of Westchester v. Abbott Laboratories, Inc.*, C.A. No. 7:03-6178 (S.D.N.Y.); *State of Florida v. Boehringer-Ingelheim Corp., ex rel., Ven-A-Care of the Florida Keys, Inc.*, Civil Action 98-3032A (Fla. 2d Jud. Cir.); *Commonwealth of Kentucky, ex rel., Albert B. Chandler III v. Warrick Pharmaceuticals Corp.*, Civil Action No. 03-C1-01135 (Ky. Franklin Cir. Ct). *Twin Cities Bakery v. Warrick Pharmaceuticals*, No. 1:02-cv-11258-PBS (D. Minn.); *Swanston v. TAP Pharmaceutical Products, Inc.*, No. 1:03-cv-11157-PBS; *Twin Cities Bakery v. Dey, Inc.*, No. 1:02-cv-10848-PBS (D. Minn.); 1:03-cv-10696-PBS; *Rice v. Abbott*

The State's Complaint describes to the Defendants the facts establishing their wrongdoing. The State has more than adequately pled its claims for common law fraud. The Defendants made false representations of material fact to the State about the AWP's of their drugs, intending that the State rely upon those inflated prices when the State paid for the Defendants' drugs. The State justifiably relied upon those representations and that reliance caused the State and its citizens financial injury. Compl. ¶¶ 60-63.

By reporting inflated AWP's that have no relationship to actual average wholesale prices, the Defendants violated the Arkansas Deceptive Trade Practices Act. The Defendants' price reporting practices are "unconscionable, false, or deceptive act(s) or practices in business, commerce, or trade." The State will present evidence at trial showing that the Defendants' actions have caused the State and its citizens financial injury.

Judgment on the Pleadings in this matter would be inappropriate for any number of reasons, not the least of which is the fact that there are significant issues of material fact in dispute. Because the Defendants have disputed the facts alleged in the State's Complaint, and because these factual disputes go to the heart of issues that are vitally important to the interests of the State and its citizens, the Defendants' motion should be denied.

BACKGROUND

An overview of the Arkansas Medicaid reimbursement methodology for prescription drugs is necessary to inform the Court of the significance of the reporting of AWP's by pharmaceutical manufacturers. The State of Arkansas provides prescription

Laboratories, No. 1:03-cv-11285-PBS; *Citizens for Consumer Justice, et al. v. Abbot Laboratories*, 1:01-12257-PBS

drug coverage to poor and disabled citizens. The State reimburses health care providers for providing these services. Medicaid's reimbursement is based upon the lowest price that comes from the application of several formulas. For each prescription drug, from the period beginning as early as 1995 until March 1, 2002, Medicaid reimbursements were based on whichever of the following formulas that, when applied, resulted in the lowest cost: a) pharmacy's usual and customary charge to the general public; or b) the Estimated Acquisition Cost ("EAC") of the drug dispensed, plus a dispensing fee (the EAC equaled AWP minus 10.5%); or c) the State or Federal Generic Upper Limit ("GUL"), plus a dispensing fee.

For each generic prescription drug from the period beginning March 1, 2002 until the present, Medicaid reimbursements were based on the following formulas: For generic drugs having a State or Federal Upper Limit, the State/Federal Generic Upper Limit ("GUL") plus a dispensing fee of \$5.51; for generic drugs not having a State/Federal Generic Upper Limit, the Estimated Acquisition Cost ("EAC") of the generic drug dispensed, plus a dispensing fee of \$5.51 (the EAC equals AWP minus 20%), with an additional differential dispensing fee of \$2.00; or the lowest of the pharmacy's usual and customary charge to the general public, whichever formula that, when applied, resulted in the lowest cost. Compl. ¶¶ 13-15.

In the year 2002, the Arkansas Medicaid program provided health benefits for 582,379 Arkansans, or slightly more than 20% of the state's entire population. In 2002, total Medicaid expenditures reached \$2,292,617,286.00. Of that amount, over \$266 million was allocated to cover the cost of prescription drug reimbursement. Compl. ¶ 11.

The State Medicaid program relies on reported AWP's to determine the amount of reimbursement paid to health care providers, in accordance with the above formulas. When AWP's are inflated and bear no resemblance to actual average wholesale prices, the State is injured since an inflated AWP causes the State to pay an excessive reimbursement.

The Defendants' fraudulent and deceptive practices with regard to the reporting of AWP information have, in turn, greatly exacerbated these problems. The Defendants' practices have damaged not only the Arkansas Medicaid program, but also Arkansas Medicare, Part B beneficiaries, Arkansas Medicaid beneficiaries, and Arkansas consumers.

The Defendants commonly refer to the difference between the price they reported as the AWP for a drug (the figure upon which Medicaid reimbursement would be calculated) and the actual price charged to health care providers to purchase the drug, as the "spread" for that drug. Compl. ¶ 37. The higher the reported AWP, the greater the "spread." This "spread" was marketed to the providers purchasing their drugs as an inducement to purchase Defendants' drugs instead of a competitor's product. Compl. ¶ 38. The results of this scheme were higher market share and profits for Defendants as well as greater expenses for Medicaid, Arkansas citizens who are beneficiaries of Medicaid and Medicare, and other consumers in the State of Arkansas. This fraudulent practice of creating and reporting false AWP's while "marketing the spread" on their drugs as an inducement to providers to purchase Defendants' drugs has resulted in the State of Arkansas and its citizens paying millions of dollars in excessive Medicaid payments, while at the same time unjustly enriching the Defendants.

I. THE DEFENDANTS FAIL TO MEET THE BURDEN REQUIRED FOR A JUDGMENT ON THE PLEADINGS.

The only issue the Defendants' Motion for Judgment on the Pleadings "clearly establishes" is that numerous factual disputes exist and that a dismissal is entirely inappropriate. The Defendants deny numerous facts within the State's Complaint. These denials, coupled with the "disfavor" which Arkansas courts treat motions for judgment on the pleadings, confirm that this motion should be denied in full.

Motions for judgments on the pleadings are **not** favored by the courts (Emphasis added). Reid v. Karoley, 229 Ark. 90, 92, 313 S.W.2d 381, 382 (1958). When considering a motion for judgment on the pleadings, the facts in the complaint must be treated as true and viewed in the light most favorable to the party seeking relief. Smith v. American Greetings Corp., 304 Ark. 596, 599, 804 S.W.2d 683, 685 (1991); Battle v. Harris, 298 Ark. 241, 244, 766 S.W.2d 431, 432 (1989). A judgment on the pleadings should be granted only if the moving party **clearly** establishes that there are no material issues of fact and that it is entitled to judgment as a matter of law (Emphasis added). Porous Media Corporation v. Pall Corporation, 186 F.3d 1077, 1079 (8th Cir. 1999). "Neither Rule 12 nor Rule 56 authorizes the trial court to summarily dismiss a complaint where there are matters before the court that show there is an issue of fact to be decided." Maas v. Merrell Associates, Inc., 13 Ark. App. 240, 244, 682 S.W.2d 769, 771 (1985).

"Where Defendants' have denied material allegations in the complaint, they fail to meet the standard for judgment on the pleadings." E.E.O.C. v. Ingersoll Johnson Steel Co. 583 F.Supp. 983, 985 (S.D. Ind.1984). Judgment on the pleadings is not properly granted unless the moving party has clearly established that **no material issue of fact**

remains to be resolved and the party is entitled to judgment as a matter of law (Emphasis added). U.S. v. All Radio Station Trans. Equip., 207 F.3d 458, 462 (8th Cir. 2000).

The Defendants make numerous denials in their Answer that “clearly establish” that the State’s Complaint should not be dismissed. While the State could write for pages about the numerous factual disputes, it will simply highlight a few for the Court’s consideration. Many other factual disputes can be gleaned from the pleadings in this matter.

First, the Defendants deny they “created a spread on their drugs, and marketed the “spread” on their drugs.” Warrick Answer ¶ 38; Dey Answer ¶ 38. Second, they claim that the State knew and approved of the Defendants’ price reporting practices, thereby condoning their illegal scheme. Warrick Answer ¶ 36. Third, the Defendants deny that their action[s] have “resulted in the State of Arkansas paying millions of dollars in excessive Medicaid payments, while at the same time enriching the Defendants with excessive, unjust and illegal profits.” Warrick Answer ¶ 41; Dey Answer ¶ 41. The Defendants deny that their actions have “resulted in Arkansas’ Medicare, Part B beneficiaries, many of whom are elderly and/or disabled, paying excessive co-payments for covered drugs.” Warrick Answer ¶ 44; Dey Answer ¶ 44. Furthermore, the Defendants deny that their actions forced Medicaid recipients to pay increased co-payment amounts. Warrick Answer ¶ 48; Dey Answer ¶ 48. Finally, the Defendants deny that “reporting of false and inflated AWP amounts by the Defendants to the drug reporting services causes consumers who are not Medicaid beneficiaries to pay grossly inflated amounts for their prescription drugs.” Warrick Answer ¶ 53; Dey Answer ¶ 53.

A common theme running throughout the Defendants' Motion is their complete inability to support their assertions with **undisputed** facts. The State strongly disputes the Defendants' assertions raised by their pleadings and will present testimony and documentation that will prove otherwise. This extensive list of factual disputes shows that the dismissal at this stage of the proceedings is wholly unsupported. The core allegation of the Defendants' motion is that it is common knowledge that the State understands that AWP is a "reference price." Interestingly, the Defendants produce no "public records" showing that such a common universal understanding of AWP as a "reference price" exists.

II. The State's Complaint Alleges Facts Sufficient to State a Claim and Alleges Fraud with Sufficient Particularity to Meet the Requirements of Rule 8(a).

The Defendants contend that the State's Complaint is insufficient under Rule 8(a), of the Arkansas Rules of Civil Procedure. As an initial matter, the Defendants' allegations that the State's Complaint contains "conclusory" allegations is untimely and should have been raised through a Motion For More Definite Statement under Rule 12 (e) before they answered the State's Complaint. White v. Welsh, 327 Ark. 465, 469, 939 S.W.2d 299, 301 (1997). If the State's Complaint left "unanswered numerous questions central to the preparation of a defense" then the Defendants concerns would have been appropriately raised through a Rule 12 (e) motion. Rather than file that motion, they chose to file an Answer, responding with numerous denials and making factual assertions, which standing alone show the Defendants are intimately familiar with the allegations of their wrongdoing.

"Pleadings are to be liberally construed and are sufficient if they advise a party of its obligations and allege a breach of them." Bethel Baptist Church v. Church Mutual

Insurance, 54 Ark. App. 262, 265, 924 S.W.2d 494, 496 (1996). Rule 8(a) specifies that a pleading “shall contain (1) a statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim and is the proper venue and that the pleader is entitled to relief, and (2) a demand for the relief to which the pleader considers himself entitled.”

The State’s Complaint has clearly set forth facts that allege a basis for jurisdiction, venue, that the Defendants’ misrepresentations about their price of their drugs have caused the State injury and that the State is entitled to relief. The State also pled a demand for relief to which it is entitled. The Defendants responded to each and every allegation in the State’s complaint with not only denials but specific factual responses to the underlying issues involved. This is quite simply not a case where the Defendants are in the dark about issues that are before them. They are more than “sufficiently advised” of their obligations to report accurate drug prices and their failure to do so, which has caused the State and its citizens injury.

III. THE STATE HAS SUFFICIENTLY PLED A CAUSE OF ACTION FOR COMMON LAW FRAUD UNDER RULE 9 (b).

The Defendants contend that the State has failed to plead allegations of fraud with the particularity required by Arkansas Rule of Civil Procedure 9(b). “The purposes of the pleading requirements set out in Rule 9(b) are to protect a defending party’s reputation from harm, to minimize strike suits, and to provide a detailed notice of a fraud claim to a defending party. The Rule also discourages meritless fraud accusations that can do serious damage to the goodwill of a business or professional person. The requirements of Rule 9(b) effectively prevent a claimant from searching for a valid claim after a civil

action has been commenced.” See, 2 *Moore’s Federal Practice*, §9.03[1][a] (*Matthew Bender 3d ed. 1986*).

In support of their argument, Defendants rely on the case of Evans Indus. Coatings, Inc. v. Chancery Court of Union County, 315 Ark. 728, 732, 870 S.W.2d 701, 703 (1994). The Evans court cited with approval the following language in Prairie Implement Co. v. Circuit Court of Prairie County, 311 Ark. 200, 205, 844 S.W.2d 299, 302 (1992): “The facts and circumstances constituting the fraud shall be set forth. There should be some concealment, misrepresentation . . . by which another is misled, to his detriment, and these, or some of them, must be alleged and proved.”

The State’s Complaint plainly alleges a concealment or misrepresentation by Defendants regarding their inflated reporting of AWP’s for their drugs. Compl. ¶ 34. This concealment is not as complicated as the Defendants would like the Court to believe. Rather it occurred when the Defendants failed to report accurate pricing information for their drugs and made the conscious decision to report inflated prices. As the court recognized in Lupron, “the defendants trumpeted a lie by publishing the inflated AWP’s, knowing (and intending) them to be used as instruments of fraud. Whether one views the defendant’s actions as involving the dissemination of information that was wholly false, or false because of an incomplete depiction of the truth, they are actionable.” Lupron, *supra*, 295 F. Supp. 2d at 167.

Further, the State’s Complaint clearly states the circumstances by which it was misled to its detriment, by the Defendants’ misrepresentations of AWP’s. The Defendants’ misrepresentations caused the State and its citizens to pay unreasonably inflated prices for their drugs. The State’s Complaint also sets forth the justifiable reliance that is

necessary to a common law fraud action. The State justifiably relied upon the Defendants' reported AWP's when reimbursing providers since the State uses AWP as a method of reimbursement. That justifiable reliance injured the State and its citizens. The factual allegations of the Complaint are more than sufficient to advise the Defendants of the specific conduct for which the State seeks recovery. In sum, the State's complaint easily meets the minimum standards of Rule 9(b).

IV. THE DEFENDANTS MISSTATE THE LAW SURROUNDING ACTIONS BROUGHT UNDER THE ARKANSAS DECEPTIVE TRADE PRACTICES ACT.

The State has satisfied the requirements of Rule 9(b) and more than adequately pled a cause of action under both common law fraud and the Arkansas Deceptive Trade Practices Act ("DTPA"), A.C.A. § 4-88-101 *et. seq.* The State does not share the Defendants' view that the pleading standard for the DTPA is the same as common law fraud. Other jurisdictions share the State's view. In State of Delaware v. Publisher's Clearinghouse, the Delaware appellate Court held that the standard applicable to pleading common law fraud and the standard applicable to pleading a violation under the Uniform Deceptive Trade Practices Act were not the same. State of Delaware v. Publisher's Clearinghouse, 787 A.2d 111, 117 (2001). The court found that "actions brought under the UDTPA have little in common with claims for common law fraud" and the remedial goals of consumer protection actions brought by the Attorney General were "inconsistent with the application of the particularized pleading requirements of Rule 9(b)." *Id.* at 117. Indeed, other courts have recognized the difference between a common law fraud case and cases brought pursuant to state consumer protection laws. An Oregon court held that "the elements of common law fraud are distinct and separate from the elements of a cause

of action under the Unlawful Trade Practices Act.” State of Oregon v. Discount Fabrics, Inc, 615 P.2d 1034, 1038 (1980). Under the Arkansas DTPA, no showing of intent to deceive is required; nor is it required to show that any consumer, was, in fact, deceived. No Arkansas cases speak to the standard of proof required. However, all that is required under most consumer statutes is that a violation has a “tendency” to deceive. Benrus Watch Co. v. FTC, 352 F.2d 313, 322 (8th Cir. 1965).

The State has more than adequately pled its complaint for common law fraud and as such will clearly meet the burden to establish a violation of the DTPA. Reporting an inflated average wholesale price that bears no relation to an actual average wholesale price is a deceptive trade practice and falls within the confines of the DTPA. The Defendants price reporting practices have a “tendency” to deceive.

V. THE DEFENDANTS SEEK TO CONFUSE THE ISSUES BEFORE THE COURT BY ARGUING THAT THE STATE CONDONES THEIR PRICING SCHEME.

Much of the Defendants’ Motion is devoted to allegations that the State condones or has been complicit in its fraudulent and unconscionable schemes. The State strongly disputes this contention, which alone should entitle it to withstand this motion. Much of the Defendants’ brief alludes to a 1991 Department of Health and Human Services (“HHS”) hearing as well as Medicaid audits, which show that Arkansas providers “generally” pay less than a drug’s reported AWP. The Defendants believe that statements gleaned from these documents show that the State could not reasonably have relied upon AWPs when reimbursing providers.

The Defendants are correct in recognizing that the State discounts off AWP for purposes of Medicaid reimbursement. Compl. ¶¶ 13-15. The 1991 HHS hearing referred

to by the Defendants simply addressed whether the State should reimburse providers based on an **undiscounted** AWP. HHS found that the State should not reimburse based on an **undiscounted** AWP. Clearly from the Complaint, the State followed through on that pronouncement since it applies a discount off AWP when calculating reimbursement.

There are innumerable reasons for applying a discount to AWP. The primary reason is that the State, likely to the disappointment of the Defendants, does not want to be the highest price payer for prescription drugs. After all, a reported average wholesale price should be plainly understood to be an **average** of several wholesale prices and not a “sticker” or “reference” price. The fact that the State desires a discount off the “average” price so that it can provide drugs at a low price to the hundreds of thousands of Arkansans who depend on Medicaid should come as no surprise. It is worth pointing out that this same argument was considered and rejected in Lupron:

“. . . As defendants portray the Congressional purpose in setting the reimbursement at 95% of AWP, Congress meant to turn a blind eye to the inflated AWP as a means of enticing physicians to treat Medicare patients. In other words, Congress deliberately invited the very fraud of which defendants are accused . . . **The suggestion that Congress would deliberately condone a bribery scheme using public funds to enrich drug manufacturers and physicians is, to say the least, unusual.** It is far more likely that by setting the Medicare reimbursement rate below the AWP, Congress took a tentative step towards using Medicare’s purchasing power as a means of driving down the cost of prescription drugs to the Medicare program. “Average,” after all, means that in a competitive market, some prices will be higher and some prices will be lower than the median. Congress might reasonably have wished to put Medicare on the lower rung of the equation (emphasis added).” In re: Lupron Marketing and Sales Practices Litigation, 295 F. Supp. 2d at 163 (D.Mass. 2003).

The Lupron court then considered the numerous public records in existence that discussed how AWP often exceeded the drug’s acquisition price. The court held the Defendants’ arguments to be “ultimately unpersuasive” and further held that “there is a difference between a sticker price and a sucker price.” Id at 168, n.19.

VI. THE ATTORNEY GENERAL HAS STATUTORY AUTHORITY TO BRING THIS SUIT UNDER THE ARKANSAS DECEPTIVE TRADE PRACTICES ACT.

Under the Arkansas Deceptive Trade Practices Act (“DTPA”), the Attorney General “shall represent and protect the state, its subdivisions....and the general public as consumers.” § 4-88-105(c). The Defendants argue that the Attorney General is barred from pursuing this litigation because the “transactions at issue” are excluded from coverage under section § 4-88-101(3) of the DTPA. The Defendants also claim that the Attorney General cannot seek money damages on behalf of the State. They are wrong on both fronts.

Under § 4-88-101(3), “actions or transactions” permitted by the Highway Commission, the Securities Commissioner, the Bank Commissioner and the Insurance Commissioner are excluded from coverage under the DTPA. Also included in the list of exclusions are “other regulatory [bodies] or officer [s] acting under statutory authority of this state or the United States.” *Id.* In support of their belief that the “transactions at issue” in this case are excluded from coverage under the DTPA, the Defendants cite the case of Robertson v. White, 633 F.Supp. 954, 978 (W.D.Ark. 1986). That case held that transactions which fell under the authority of the State Commissioner of Securities were expressly excluded from coverage under the DTPA. *Id.* at 978.

The Defendants’ reliance on Robertson reveals the fatal flaw in their argument. The exclusions under 101(3) only apply to “actions or transactions” that are governed by “regulatory” bodies. Absent from the list is the Arkansas Department of Human Services (“DHS”), which administers the Medicaid program. Including DHS in the statutory scheme of DTPA exclusions would not make sense since DHS is not a “regulatory” body.

“When a statute is clear, however, it is given its plain meaning, and this court will not search for legislative intent; rather, that intent must be gathered from the plain meaning of the language used.” Cave City Nursing Home, Inc. v. Arkansas DHS, 351 Ark. 13, 21, 89 S.W.3d 884, 889 (2002).

DHS does not regulate the sale or registration of pharmaceuticals in Arkansas. In fact, there is no express “regulatory body” that covers the sale of pharmaceuticals in Arkansas that is comparable to the commissions mentioned in 101(3). If the Defendants’ interpretation of the DTPA is correct, then conceivably all “actions or transactions” related to the sale of pharmaceuticals would be excluded from the DTPA. Given the DTPA’s strong policy of regulating fraudulent or deceptive conduct related to consumer “goods,” excluding fraudulent or deceptive conduct relating to their purchase of one of the most prevalent consumer goods (prescription drugs) does not make sense. If the Defendants’ interpretation of the DTPA is correct, then in a situation such as this one, there would be no regulatory scheme for the State and other consumers to pursue a cause of action.

The State firmly believes that the Defendants’ arguments are misplaced in this regard. However, if the Court were to find that the Medicaid transactions are excluded under the DTPA, the State’s Complaint complies with the requirements of §4-88-101 (3) by stating that the Attorney General was “authorized” to bring suit on behalf of Medicaid. Compl. ¶ 4.

The Defendants next argue that the Attorney General has no authority to recover funds on behalf of the State since Medicaid is not a purchaser of the Defendants’ drugs. The Defendants are greatly mistaken. Under § 4-88-113 (2) (a), the Attorney General can

“restore to any purchaser who has suffered any ascertainable loss by reason of the use or employment of the prohibited practices any moneys or real and personal property, which may have been acquired by means of any practice declared to be unlawful by this chapter, **together with other damages sustained** (emphasis added).”

The plain language of the DTPA states that “any purchaser” is entitled to recovery. Clearly, the statute makes no distinction between direct or indirect purchases. Moreover, it is worth noting that the Attorney General routinely brings pharmaceutical pricing cases to recover Medicaid overpayments as a result of DTPA violations.³ The State’s Complaint alleges an “ascertainable loss” due to the grossly inflated AWP. As such, the State is entitled to recover monies for overpayments made due to the Defendants practices along with “other damages sustained.”

VII. THE DEFENDANTS MISTAKENLY ARGUE THAT ANY PAYMENT THAT OCCURS WITHOUT REFERENCE TO AWP SHOULD FAIL AS A MATTER OF LAW.

The Defendants are incorrect in their assertion that any payment made without reference to AWP should fail as a matter of law. The State reimburses providers based on the lesser of three formulas. One of these formulas is based on a discount off the drug’s AWP. Compl. ¶¶ 13-15. When the State reimbursed providers based upon the Defendants’ inflated AWP, clearly there is a cause of action when that AWP bore no relation to an actual average wholesale price. The same also holds true for Arkansas citizens as well that were forced to pay inflated amounts due to the Defendants’ inflated AWP.

³ In re: Buspirone Antitrust Litigation; MDL No. 1413 (S.D.N.Y); The State of Ohio, et. al v. Bristol-Myers, Squibb Co., Case No: 1:02CV01080 (D.D.C);

The Defendants fail to point out that had they reported accurate AWP's, the State would have reimbursed less if the accurate AWP resulted in an amount less than either the usual and customary charge or the state/federal upper limit. Without the benefit of examining the Defendants' pricing records, the State is unsure of the precise amount it overpaid at this point in the proceedings. However, given the benefit of discovery, the State will put on evidence that will show how an accurate representation of the true AWP's would have saved the State and its citizens money.

VII. THE DEFENDANTS MISTAKENLY ARGUE THAT THE STATUTE OF LIMITATIONS APPLIES TO THE STATE'S CAUSE OF ACTION.

The Defendants claim that the State should be limited to the three year limitations period for common law fraud and the five year limitations period under the DTPA. The statute of limitations is not applicable to the State under the maxim *nullum tempus occurrit regi*. This doctrine holds that time does not run against the king. BLACK'S LAW DICTIONARY 1068 (6th ed. 1990). "Statutes of limitation do not run against sovereign states unless by the terms of the limitations statute it is made applicable to the state." Jensen v. Fordyce Bath House, 209 Ark. 478, 483, 190 S.W.2d 977, 980 (1945); See Ark. Dep't of Environmental Quality v. Brighton, 352 Ark. 396, 412, 102 S.W.3d 458, 469 (2003).

The statute of limitations found at A.C.A. §16-56-105 is not applicable to the State's common law fraud cause of action since it is not made expressly applicable to the State. The Defendants' argument that the State should be limited to only pursuing its fraud claims back to January 21, 2001 is wholly without merit.

Likewise, the State's DTPA cause of action should not be limited to January 20, 1999. First, the State will prove that the Defendants' scheme of reporting inflated AWP's and concealing actual market prices extended far beyond January 20, 1999. Clearly they reported an AWP that bore no relation to prices available on the market and the State believes this activity extends beyond January 20, 1999. At this early stage in the proceeding a dismissal without allowing the State to conduct discovery on this issue would be improper. The State should be able to explore whether the Defendants' scheme extended beyond the five year limitations period governed by the DTPA.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff respectfully requests that the Court Deny the Defendants' Motion for Judgment on the Pleadings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bradford J. Phelps, Assistant Attorney General, do hereby certify that a copy of the foregoing was served by hand delivery on this 5th day of May, 2004:

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