IN DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS
CIVIL COURT DEPARTMENT

STATE OF KANSAS, ex rel. STEVE SIX, in his official capacity as Attorney General for the State of Kansas,	)	
	)	**Case Number:**
Plaintiff,	)	**Division:**
	)	
v.	)	**(JURY TRIAL DEMANDED)**
	)	
SCHERING-PLOUGH CORPORATION, and, WARRICK PHARMACEUTICALS CORPORATION.	)	
Serve Registered Agent:	)	
Global Headquarters	)	
2000 Galloping Hill Road	)	
Kenilworth, NJ 07033-0530	)	
Defendants.		

PETITION PURSUANT TO K.S.A. CHAPTERS 50 AND 60

The State of Kansas, by and through its Attorney General (hereinafter "the State"), files this Petition against the above-named Defendants and alleges the following:

I. INTRODUCTION

1. The Defendants have engaged in false, misleading, willful, unfair, deceptive and unconscionable acts and practices in the pricing and marketing of its prescription drug products. The Defendants' fraudulent pricing and marketing of its prescription drugs has impacted the citizens of the State of Kansas by causing the Kansas Medicaid plan to over-pay for the Defendants' prescription drugs by grossly excessive amounts.

2. Fair and honest drug pricing is a matter of paramount importance to the State and its citizens. Each year, Kansas spends hundreds of millions of dollars on prescription drugs under the State Medicaid program. In the past year alone, Kansas Medicaid has spent over $160,431,177 on prescription drugs. Expenditures by the State and its agencies for prescription drug reimbursement have increased exponentially since 1990 as a result, in part, of Defendants' fraudulent pricing scheme. This increase in prescription drug costs in recent years has contributed to a health care funding crisis within the State that requires action to ensure reimbursement and fair dealing between the Defendants and the State and its agencies.

3. The State is accountable to its citizens and taxpayers as to how it spends limited State resources, and it is obligated to pursue any party whose unlawful conduct has led to the overspending of State funds. Consequently, the State, by and through its Attorney General, brings this action to recover amounts overpaid for prescription drugs by Medicaid and civil penalties as a result of the fraudulent and willful conduct of Defendants. The State further seeks to prohibit and permanently enjoin Defendants from continuing to perpetrate its drug-pricing scheme, to require Defendants to publicly disclose true drug prices, and to require Defendants to account for and disgorge all profits obtained by Defendants as a result of their improper and unlawful actions.

4. This lawsuit seeks legal and equitable redress for the fraudulent and willful marketing and pricing conduct of Defendants, who have profited from its wrongful acts and practices at the expense of the State.

II. PARTIES

PLAINTIFF

5. Plaintiff is the State of Kansas. The State brings this action in its capacity as sovereign and on behalf of the Kansas Medicaid program. The Attorney General of the State of Kansas, Steve Six, as chief law officer of the State of Kansas is statutorily authorized to prosecute and maintain this action. As an officer of the State of Kansas, the Attorney General is exempt from payment of a docket fee for filing this action. *See* K.S.A. 60-2005.

DEFENDANTS

6. Defendant Schering-Plough Corporation ("Schering-Plough") is a New Jersey corporation with its principal place of business located at 2000 Galloping Hill Road, Kenilworth, NJ 07033.

7. Defendant Warrick Pharmaceuticals Corporation ("Warrick"), a wholly-owned subsidiary of Schering-Plough, is a Delaware corporation with its principal place of business located at 12125 Moya Blvd., Reno, NV 89506-2600.

8. Schering-Plough and Warrick (collectively, the "Schering Defendants") are diversified healthcare companies that individually, and/or in combination with one another, engage in the business of manufacturing, distributing, marketing, and/or selling prescription drugs that are reimbursed by state Medicaid agencies nationwide. Pharmaceuticals that are manufactured, distributed, marketed, and/or sold by the Schering Defendants and reimbursed by Kansas Medicaid.

III. JURISDICTION AND VENUE

9. This Court has jurisdiction over the State's claims as they involve claims arising exclusively under Kansas law.

10. This Court has personal jurisdiction over Defendants pursuant to K.S.A. § 60-308 because Defendants transact business in Kansas, have committed a tortious act within Kansas, and purposefully directs or has directed their actions toward Kansas, and/or has the requisite minimum contacts with Kansas necessary to constitutionally permit the Court to exercise jurisdiction.

11. This Court also has jurisdiction pursuant to K.S.A. § 50-638 as the Defendants engaged in consumer transactions within this state that form the basis for the causes of action alleged in this petition.

12. Venue is proper in Wyandotte County, Kansas pursuant to K.S.A. § 60-604 as the cause of action arose in such county in that State has paid reimbursement through Kansas Medicaid for prescription drugs dispensed in this County and throughout the State. The events giving rise to the claims herein arose, in substantial part, in every County of the state including Wyandotte County. Furthermore, venue is proper in this County pursuant to K.S.A. § 60-604 as Defendant regularly and systematically conducts business in this County.

13. Venue is also proper in Wyandotte County, Kansas pursuant to K.S.A. § 50-638 as the Defendants caused the state Medicaid Agency to be overcharged for prescription drug reimbursement in Wyandotte County such that the Defendants committed an act or practice declared to be in violation of the Kansas Consumer Protection Act in Wyandotte County, Kansas.

IV. FACTUAL BACKGROUND

Kansas Medicaid

14. The Kansas Medicaid program is a state-administered program performing a governmental function, which, among other things, pays for prescription drug benefits for Kansas' citizens. The Kansas Health Policy Authority oversees the Kansas Medicaid program that currently covers approximately 260,000 individuals.

15. Kansas Medicaid reimburses medical providers, including physicians and pharmacists, for drugs prescribed for, and dispensed to, Kansas Medicaid recipients pursuant to statutory and administrative formulas.

16. Reimbursement for pharmacy-dispensed prescription drugs under the Kansas Medicaid program is based on internal market and pricing information supplied by Defendants to industry reporting services. This information includes the following price indices: (i) Average Wholesale Price ("AWP"), which is commonly understood as the average price charged by wholesalers to retailers, such as hospitals, doctors and pharmacies, for prescription drugs, (ii) Wholesale Acquisition Cost ("WAC"), which is commonly understood as the average price paid by wholesalers to the manufacturers for prescription drugs, and (iii) Direct Price, which is commonly understood as the price charged by drug manufacturers to non-wholesaler customers for prescription drugs.

17. At all times relevant to this action, Defendants were aware of Kansas Medicaid's drug reimbursement formulas and procedures for pharmacy-dispensed drugs.

The Defendants' Reporting of Inflated Pricing Information

18. Defendants knowingly, willfully, wantonly, and/or intentionally provided, or caused to be provided, false and inflated AWP, WAC, and/or Direct Price information

for its drugs to various nationally known drug industry reporting services, including First DataBank (a/k/a Blue Book), Medical Economics, Inc. (a/k/a Red Book), and Medispan (collectively referred to herein as "various nationally known drug industry reporting services" or "reporting services"). These reporting services published the pricing information to various reimbursers, including Kansas, who have contracted to receive the information (either in electronic or hard copy form) as a basis to provide reimbursement to the medical or pharmacy providers who provide the drugs to patients.

19. The pricing information published by the Defendants was and is used by Kansas Medicaid with respect to reimbursement for pharmacy-dispensed drugs.

20. At all relevant times to this action, Kansas Medicaid relied upon the AWP, WAC, and/or Direct Price provided by Defendants to the industry reporting services in determining the amount Kansas Medicaid reimbursed providers of prescription drugs.

21. Defendants knew the false and deceptive inflation of AWP, WAC, and/or Direct Price for its drugs would inflate the reimbursement amount determined by the Kansas reimbursement formula, and thus cause Kansas Medicaid to over-pay for these drugs by grossly excessive amounts. Defendants' inflated AWPs, WACs, and Direct Prices greatly exceeded the actual prices at which they sold their drugs to retailers (physicians, hospitals, and pharmacies) and wholesalers. Defendants' reported AWPs, WACs, and/or Direct Prices were false and misleading and bore no relation to any price, much less a wholesale or actual sales price.

22. Defendants knowingly, willfully, wantonly, and/or intentionally concealed the true AWP, WAC, and/or Direct Price information for their respective drugs from Kansas Medicaid. Defendants know its own AWP, WAC, and Direct Price which it

reports to the industry reporting services for use by Kansas Medicaid. Defendants also know whether the prices it reports to the reporting services accurately and truthfully represent the actual prices as reflected by market experience and conditions. Unless governmental or industry surveys, lawsuits, or criminal or regulatory investigations publicly reveal the true AWP, WAC, or Direct Price for a particular drug at issue, Kansas Medicaid is not privy to the actual market prices which it can then compare against the reported prices. Defendants have concealed true market pricing information from the State for the purpose of avoiding detection of the fraudulent scheme described herein.

23. Defendants used undisclosed discounts, rebates and other inducements, which had the effect of lowering the actual wholesale or sales prices charged to its customers as compared to the reported prices. In addition, Defendants employed secret agreements to conceal the lowest prices charged for its pharmaceutical products. As a result of these concealed inducements, Defendants prevented third parties, including Kansas Medicaid, from determining the true prices it charges customers.

Defendants' Marketing of the "Spread"

24. Defendants refer to the difference between the reported AWP and WAC, on the one hand, and the actual price of a drug, on the other, as the "spread" or, alternatively, "return to practice" or "return on investment." Defendants knowingly and intentionally created a "spread" on its drugs and used the "spread" to increase its sales and market share of these drugs, thereby increasing its profits. Defendants induced physicians, pharmacies, and pharmacy chain stores to purchase its drugs, rather than competitors' drugs, by persuading them that the larger "spread" on Defendants' drugs

would allow the physicians and pharmacies to receive more money, and make more profit, through Medicaid reimbursement at the expense of Kansas Medicaid.

25. Defendants manipulated and controlled the size of the "spread" on its drugs by both increasing its reported AWPs, WACs, and Direct Prices and decreasing its actual prices to wholesalers and providers over time.

26. In addition to manipulating the reported AWP, WAC, and/or Direct Price, Defendants used free goods, educational grants and other incentives to induce providers to purchase its drugs, all of which lowered the actual prices of the Defendants' drugs, resulting in increased profits for providers, as well as increased market share and profits of the Defendants, at the expense of Kansas Medicaid.

27. The unfair, fraudulent, willful, wanton, deceptive and unconscionable practices engaged in by the Defendants in creating and reporting, or causing to be reported, false and inflated AWP, WAC, and/or Direct Price information for its drugs, or otherwise concealing actual pricing information, and marketing the "spread" on its drugs as an inducement to providers to utilize Defendants' drugs, has resulted in the State paying millions of dollars in excess Medicaid payments, while at the same time enriching Defendants with excessive, unjust and illegal profits.

28. The unfair, fraudulent, willful, wanton, deceptive and unconscionable practice engaged in by the Defendants has been continuing in nature and has persisted on a day by day basis since 1991.

V. CAUSES OF ACTION

29. The State asserts only state law claims in this Petition and makes no claims herein under the United States Constitution or any federal law. Additionally, none of the claims at issue are subject to federal preemption.

FIRST CAUSE OF ACTION
(K.S.A. CHAPTER 50: KANSAS CONSUMER PROTECTION ACT)

30. The State hereby repeats, incorporates by reference and realleges each and every allegation set forth above in this Petition.

31. In providing reimbursement for prescription drugs through the State Medicaid Program, the Attorney General brings suit to enforce the provisions of the Kansas Consumer Protection Act (KCPA), on behalf of the State of Kansas and its Medicaid recipients, as consumers of prescription drugs.

32. The Defendants, as pharmaceutical manufacturers, are suppliers of prescription drugs.

33. The Defendants willfully represented the pricing information outlined more fully above to the State by reporting such information to industry reporting agencies knowing that the State depended on the reporting agencies to determine the amount they would reimburse providers for prescription drugs.

34. Defendants' pricing data representations to the State, outlined more fully above, were false in the manner more fully delineated above.

35. Defendants' pricing data misrepresentations to the State, outlined more fully above, were material as the Defendants had knowledge that the State would utilize such data to determine the amount they would reimburse providers for prescription drugs and thus, pay gross and excessive amounts for such prescription drugs.

36. The misrepresentations, actions and practices of the Defendants as described above constitute unfair and/or deceptive methods as defined by the Kansas Consumer Protection Act (KCPA), K.S.A. 50-623, *et seq.*

37. The misrepresentations, actions and practices of the Defendants as described above also constitute unconscionable methods as defined by K.S.A.§ 50-627.

38. The Defendants' aforementioned practices are offensive to public policy, immoral, unethical, and/or oppressive and violate sections K.S.A. §§ 50-626 and 50-627. Furthermore, Defendants' actions have a direct impact upon the public interest since said actions and deceptive/unconscionable practices are longstanding and possess the continued potential for repetition.

39. As an actual and proximate result of the Defendants' deceptive practices, the State has suffered actual damages.

40. In addition to actual damages, and on account of the Defendants' continuing deceptive and unconscionable conduct the State is entitled to all penalties, costs, fees, etc. prescribed in K.S.A. § 50-634, as the Defendants have willfully used a method, act, and/or practice, which it knew or should have known is unlawful pursuant to K.S.A. 50-623.

WHEREFORE, the State prays for judgment on Count I of this Petition for such sums that are fair and reasonable in excess of seventy-five thousand dollars ($75,000.00), for all statutory fees, expenses and penalties pursuant to K.S.A. § 60-636, for any and all costs expended or incurred, and for any and all relief permitted by law this Court deems just and proper.

SECOND CAUSE OF ACTION
(FRAUD AND MISREPRESENTATION)

41. The State hereby repeats, incorporates by reference and realleges each and every allegation set forth above in this Petition.

42. There existed at all relevant times a duty owed to the State and its agency, Kansas Medicaid, by the Defendants not to mislead the State when voluntarily reporting the prices of its drugs to the various nationally known drug industry reporting services.

43. Defendants breached their duty of care to provide accurate pricing information to the State and its agency, Kansas Medicaid by reporting false and/or misleading prices to the various nationally known drug industry reporting services.

44. In falsely inflating its AWP, WAC, and/or Direct Price information for its drugs when reporting that information to various nationally known drug industry reporting services, the Defendants made false and untrue representations of existing and material fact to the State.

45. Defendants also provided false information to the State and its agency, Kansas Medicaid, by providing inaccurate pricing information, which representations were material, and the Defendants knew the representations were false at the time they were made and/or had a reckless disregard for the truth or falsity of those representations.

46. Defendants fraudulently concealed the falsity and inaccuracy of the price representations from the State.

47. The misrepresentations made to the State and its agency, Kansas Medicaid, were intended by Defendants to induce the State to pay higher Medicaid reimbursement resulting in a larger "spread" on its drugs and ultimately resulting in larger market share for its drugs.

48. The State and its agency, Kansas Medicaid, did not know that the prices reported to the various nationally known drug industry reporting services were, in fact, false.

49. The State and its agency, Kansas Medicaid, reasonably relied on Defendants' pricing representations and did in fact pay the higher Medicaid reimbursements.

50. The State and its agency, Kansas Medicaid, had a right to rely on the pricing representations made by the Defendants.

51. The State and its agency, Kansas Medicaid, have suffered and continue to suffer pecuniary loss as a result of the Defendants' fraudulent and illegal conduct.

52. The State and its agency, Kansas Medicaid, are entitled to judgment against the Defendants for the pecuniary loss it has suffered as a direct and proximate result of the Defendants' fraudulent conduct.

WHEREFORE, the State prays for judgment against the Defendants for such sums as are fair and reasonable in excess of seventy-five thousand dollars ($75,000.00), together with any and all costs expended and incurred, and for any and all other relief permitted by law this Court deems just and proper.

THIRD CAUSE OF ACTION
(UNJUST ENRICHMENT)

53. The State hereby repeats, incorporates by reference and realleges each and every allegation set forth above in this Petition.

54. As a result of the false and misleading statements and representations regarding drug prices contained in each Defendants' reporting of AWP, WAC, and Direct

Price, Kansas Medicaid has paid excessive amounts in connection with purchases or reimbursements of purchases of Defendants' prescription drugs.

55. Defendants knew that medical providers, including pharmacies and physicians, who obtained Medicaid reimbursement for Defendants' drug products were not entitled to improperly inflated reimbursement rates that were based on Defendants' falsely reported AWPs, WACs, and Direct Prices.

56. As a result of the excessive payments to providers by Kansas Medicaid of all or part of the "spread," Defendants obtained increased sales and market share for its products, and, therefore, increased profits, and were unjustly enriched at the expense of Kansas Medicaid.

57. Defendants knew they were not entitled to the unjust and increased profits that resulted from the sales obtained through the use of the spreads they created, and Defendants should be required to account for and make restitution to the State all such amounts obtained through the use of such spreads.

58. The fraudulent and illegal method by which the Defendants obtained increased profits make it inequitable for Defendants to retain such benefit without payment of its value.

WHEREFORE, the State prays for judgment on Count III of this Petition for such sums as are fair and reasonable in excess of seventy-five thousand dollars ($75,000.00), for any and all costs expended and incurred, and for any and all other relief permitted by law this Court deems just and proper.

VI. JURY DEMAND

Plaintiff hereby demands a trial by jury on all claims so triable pursuant to K.S.A. § 60-238.

VII. PRAYER FOR RELIEF

Wherefore, Plaintiff prays for relief as follows:

(1) An award of actual damages to the State in such amount as is proved at trial, together with prejudgment interest;

(2) All statutory penalties, expenses and fees awarded under the KCPA;

(3) An accounting of all profits or gains derived in whole or in part by Defendants through the misconduct complained of herein and disgorgement of all improper and ill-gotten profits;

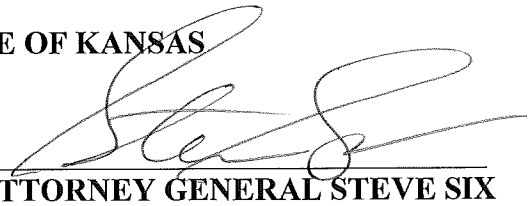
(4) An order enjoining Defendants from continuing the fraudulent, wanton, deceptive and/or unfair acts or practices complained of herein, and requiring corrective measures;

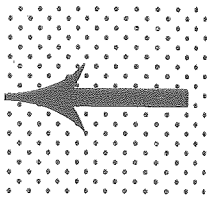
(5) An award of costs and prejudgment interest on all actual damages at the statutory rate; and

(6) Such other and further relief as the Court may deem appropriate and just.

Respectfully Submitted,

STATE OF KANSAS





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