

STATE OF OREGON
MARION COUNTY COURTS
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4 #17

IN THE CIRCUIT COURT OF THE STATE OF OREGON

5 FOR THE COUNTY OF MARION

6 STATE OF OREGON ex rel HARDY
7 MYERS, Attorney General of the State of
8 Oregon,,
9

Plaintiff,

v.

10 CAREMARK Rx, L.L.C., CAREMARK
11 L.L.C. and CAREMARK PCS,
12 L.L.C., formerly known as ADVANCE PCS,
13

Defendants.

Case No. 08C11913

COMPLAINT ALLEGING VIOLATIONS OF
THE UNLAWFUL TRADE PRACTICES ACT
(ORS 646.605 TO ORS646.656)

CLAIM NOT SUBJECT TO MANDATORY
ARBITRATION

14 This complaint alleges claims for relief based upon violation of Oregon's Unlawful Trade
15 Practices act (UTPA), ORS 646.605 to 646.656. Plaintiff, State of Oregon for its Complaint
16 alleges that at all times material herein:

17 **JURISDICTION**

18
19 1. The Circuit Court for the State of Oregon has jurisdiction over Defendants
20 pursuant to ORCP 4A.

21 **PARTIES**

22 2. HARDY MYERS is the Attorney General for the State of Oregon and is suing in
23 his official capacity pursuant to ORS 646.632.

24 3. Defendants Caremark Rx, L.L.C., Caremark, L.L.C., and Caremark PCS, L.L.C.
25 (collectively referred to as "Caremark" or "Defendants") are Delaware Limited Liability
26 companies that conduct business nationwide. The Defendants' operations are conducted
primarily through Caremark L.L.C., a wholly-owned, indirect subsidiary of Caremark Rx and

1 Caremark PCS (f/k/a Advance PCS), a wholly-owned, direct subsidiary of Caremark Rx.
2 Caremark Rx acquired Advance PCS on March 24, 2004. Caremark provides pharmacy benefit
3 management services to over 2,000 health plan clients servicing persons in Oregon and
4 nationwide.

5 4. Caremark operates, or has operated, seven prescription drug mail order
6 pharmacies in the states including but not limited to mail order pharmacies located in Alabama,
7 Arizona, Florida, Illinois, Pennsylvania, and Texas.

8 5. Caremark operates, or has operated, a retail pharmacy network with over 59,000
9 participating pharmacies.

10 6. Caremark operates, or has operated, a prescription drug repackaging facility in
11 Northbrook, Illinois, located in Cook County, Illinois.

12 7. The Defendants were at all times relative hereto, engaged in trade and commerce
13 in the State of Oregon, to wit: advertising, soliciting, offering for sale, and providing pharmacy
14 benefit management services to Oregon health plans and employers, including government
15 employers.

16 NOTICE

17 8. Prior to filing this Complaint, Defendants waived receipt of the notice required by
18 ORS 646.632(2) that they had engaged in unlawful trade practices and the relief sought.
19 Defendants have not delivered an Assurance of Voluntary Compliance that complies with the
20 requirements contained in ORS 646.632.

21 DEFENDANTS' COURSE OF CONDUCT

22 Pursuant to the Attorney General's Investigation, the Plaintiff alleges the following:

23 9. The conduct of Defendants described in this Complaint was willful within the
24 meaning of ORS 646.605 (10).

25 10. Many Americans have a health benefit which includes a pharmacy benefit
26 component that pays for prescription drugs, in whole or in part. Whether provided by an

1 employer, a health plan, a government agency, a union or another entity (the “client” or “Client
2 Plan”), this pharmacy benefit is typically managed by a pharmacy benefit manager (“PBM”)
3 such as Caremark. A PBM is a business which specializes in administering the pharmacy benefit
4 in return for payment - in some form - by the Client Plan.

5 11. According to Caremark, it is one of the nation’s largest PBMs based on 2006 net
6 revenues of approximately \$36.8 billion.

7 12. As a PBM, Caremark represents that it performs the following services:

8
9 a) Organizing a network of retail pharmacies (“retail network”) that agree to fill
10 prescriptions for a negotiated price. The retail network may consist of some or all of
11 the approximately 59,000 retail pharmacies in the United States;

12 b) Operating mail order pharmacies which sell prescription drugs, including
13 more than 516 million prescriptions in 2006, directly to persons with a
14 pharmacy benefit (“Plan Participants”);

15 c) Administering the pharmacy benefit by processing and paying claims
16 through the operation of a proprietary computer system;

17 d) Providing Plan Participants, physicians, and Client Plans with information
18 about the operation of their pharmacy benefit and cards or other methods to access the
19 benefits; and,
20

21 e) Developing and managing formularies, as described further below.

22 13. Formularies are lists of drugs for which a Client Plan agrees to pay on behalf of
23 the Plan Participant, either in whole or in part. For example, “open formularies” permit
24 payment for any prescription drug. “Closed formularies” limit payment to specific drugs - for
25 example, only generics, or only one preferred brand drug within a so-called “therapeutic
26

1 class.” “Tiered formularies” require Plan Participants to pay lower or higher co-pays
2 depending on whether a drug is a generic, preferred brand, or non-preferred brand.

3 14. Caremark enters into contracts with drug manufacturers in which the
4 manufacturer agrees to pay rebates to Caremark based on placement of a manufacturer’s drug
5 on a formulary.

6 15. Many drug manufacturers pay Caremark “base” rebates, typically calculated by
7 applying a flat percentage to Caremark’s purchases of that manufacturer’s drugs.
8

9 16. Many manufacturer contracts also contain more targeted rebates that are tied to
10 specific sales or performance goals. For example, manufacturers will typically pay Caremark
11 “market share” or “performance” rebates, where Caremark is paid a percentage rebate on a
12 sliding scale, that is tied to an increase in the market share for a specific drug.

13 17. Caremark provides mail order pharmacy services to Client Plans including
14 governmental entities and private parties.
15

16 18. While managing its clients’ prescription drug benefits, Caremark engages in a
17 “therapeutic interchange” or “drug switching” program, in which certain drugs that physicians
18 prescribed for Plan Participants are targeted by Caremark for a switch from the prescribed drug
19 to a different drug.

20 19. Caremark’s drug switching programs are determined largely by Caremark’s
21 desire to maximize its receipt of rebates from drug manufacturers.
22

23 20. When Caremark solicits prospective and existing Client Plans, Caremark fails to
24 clearly and conspicuously disclose material information about its drug switching programs,
25 including the fact that it will retain rebates that it receives from the drug manufacturers as a
26 result of drug switching.

1 21. Caremark represents to physicians and to Plan Participants that drug switches
2 save Plan Participants and/or the Client Plan money, when that is not necessarily the case. In
3 fact, some drugs to which Plan Participants are switched actually cost more or approximately
4 the same amount as the originally prescribed drug.

5 22. With respect to certain drug therapies, a switch from one drug to another in the
6 same therapeutic class often requires the Plan Participant to undergo one or more tests, and may
7 require one or more doctor visits, to monitor the new drug therapy and ensure the new drug's
8 efficacy. Plan Participants would not have incurred these additional health care costs but for
9 Caremark's drug switches.
10

11 23. Caremark, in its contracts with retail network pharmacies, fails to require the
12 pharmacy to disclose to the Plan Participant if the pharmacy's usual and customary ("U&C")
13 price for the drug is less than the applicable co-payment and fails to require the retail pharmacy
14 to allow the Plan Participant to pay the U&C price, if it is lower than the applicable co-
15 payment.
16

17 24. Caremark engages in a variety of programs and activities for which drug
18 manufacturers and other business entities pay Caremark to perform. For example, Caremark
19 sells various kinds of data it derives from its records of prescription sales to Plan Participants.
20 Caremark distributes this information and marketing materials to physicians and Plan
21 Participants to promote particular drugs to those physicians and Plan Participants.
22

23 25. Caremark also enters into contractual agreements with drug manufacturers to
24 market and promote specific drugs to physicians, through mailings and other communications
25 with those physicians.
26

1 26. Caremark fails to clearly and conspicuously disclose to Client Plans and
2 physicians that it engages in these marketing and promotional activities on behalf of drug
3 manufacturers, that it receives fees from the drug manufacturers for performing these activities,
4 and that it collects those fees for its own benefit.

5 27. Previously dispensed drugs are sometimes returned to Caremark's mail order
6 pharmacies, either because the drug could not be successfully delivered to the Plan Participant,
7 or because the drug was returned or rejected by the Plan Participant, or for some other reason.
8

9 28. Since at least 1999, through at least June 2003, Caremark has restocked and re-
10 shipped previously dispensed drugs that have been returned to its mail order pharmacies.

11 29. Caremark fails to clearly disclose to Plan Participants that it restocks and re-ships
12 previously dispensed drugs.

13 30. Caremark, itself and through the mail order pharmacies, is engaged in the
14 practice of pharmacy and is licensed to do so under the laws of various states in which its mail
15 order pharmacies are located. As a licensed pharmacy, Caremark owes certain duties to the
16 Plan Participants whose prescriptions it receives, fills, or arranges to fill.
17

18 31. Caremark employs licensed professional pharmacists and licensed, certified, or
19 designated pharmacy technicians who perform or assist in performing professional pharmacy
20 services for Plan Participants.

21 32. Caremark represents to Client Plans and to Plan Participants, directly or by
22 implication, that it will provide the same professional pharmacy services performed by
23 professional pharmacists at non-mail order pharmacies. These services, if properly performed,
24 assure quality of care for Plan Participants through prevention of adverse drug interactions,
25
26

1 verification of drug strength and dosage regimens, recommendation of alternative medically
2 appropriate drugs, and monitoring outcomes.

3 33. Caremark has committed unfair or deceptive acts or practices through its
4 violation of pharmacy ethics by:

5 a. failing to fully disclose to Plan Participants, Client Plans, and physicians all of
6 the material facts concerning proposed drug switches, including the nature and amount of
7 Caremark's financial interest, and savings to the Plan Participant and the Client Plan, if any;
8 and
9

10 b. failing to require that its pharmacists form an independent, professional
11 judgment about the propriety of a drug switch before proposing it, and by promoting
12 protocols and work environment that operate counter to this obligation.

13 **CAUSE OF ACTION**

14 34. The allegations contained in paragraphs 1 - 33 are incorporated herein by this
15 reference.
16

17 35. The Defendants violated ORS 646. 608(1)(e) by:

18 a. engaging in certain unfair and/or deceptive acts or practices and procedures at
19 Caremark's mail order pharmacies, retail pharmacies, customer call centers, and corporate
20 offices, related to Caremark's drug interchange practices, and disclosures to Client Plans, health
21 care providers, prescribers, and Plan Participants concerning Caremark's drug interchange
22 practices;
23

24 b. engaging in certain unfair and/or deceptive acts or practices relating to
25 disclosures to prescribers and Plan Participants relating to drug interchange practices and
26 potential cost savings;

1 c. engaging in certain unfair and/or deceptive acts or practices relating to
2 Caremark's receipt of payment from pharmaceutical manufacturers for the distribution of
3 information and materials to health care providers, prescribers, and Plan Participants, and
4 disclosures to Client Plans, health care providers, prescribers, and Plan Participants concerning
5 that practice, and the disclosure and retention of rebates and other payments received from
6 pharmaceutical manufacturers;

7
8 d. engaging in certain unfair and/or deceptive acts or practices relating to
9 Caremark's disclosures to Client Plans, health care providers, prescribers, and Plan Participants
10 related to Caremark's receipt of manufacturer payments;

11 e. engaging in certain unfair and/or deceptive acts or practices relating to
12 Caremark's practice of restocking returned drugs;

13 f. engaging in certain unfair and/or deceptive acts or practices relating to
14 Caremark's provision, or lack of a provision, in its contracts with retail network pharmacies
15 requiring the pharmacy to disclose to the Plan Participants if such pharmacy's U&C price for
16 the particular drug dispensed is less than the applicable co-payment;

17
18 g. engaging in certain unfair and/or deceptive acts or practices relating to
19 Caremark's provision, or lack of a provision, in its contracts with retail network pharmacies
20 allowing the Plan Participant to pay either the co-payment or the U&C price, whichever is
21 lower;

22
23 h. engaging in certain unfair and/or deceptive acts or practices relating to provisions
24 in Caremark's contracts with retail pharmacies regarding procedures that the retail pharmacies
25 must follow when implementing a drug interchange as part of any Caremark drug interchange
26 program; and

1 i engaging in certain unfair and/or deceptive acts or practices relating to
2 compliance by Caremark pharmacists with pharmaceutical ethical principles and guidelines, to
3 the extent failure to comply violated consumer protection statutes.

4
5 **PRAYER FOR RELIEF**

6 WHEREFORE, the plaintiff prays that this honorable Court enter an Order:

7 A. Issuing a permanent injunction prohibiting the defendants, their
8 agents, employees, and all other persons and entities, corporate or otherwise, in
9 active concert or participation with any of them, from engaging in unfair or
10 deceptive conduct.

11 B. Ordering the defendants to make full and complete restitution to
12 each person injured by their unfair or deceptive acts or practices.

13 C. Ordering the defendants to pay all costs for the prosecution and
14 investigation of this action; and

15 D. Granting such other and further relief as the Court deems equitable
16 and proper.

17
18 Dated February 14, 2008.

19 Respectfully submitted,

20 HARDY MYERS
21 Attorney General

22
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