

CAUSE # _____

STATE OF TEXAS,

Plaintiff,

v.

CAREMARK Rx, L.L.C, CAREMARK, L.L.C.
and CAREMARKPCS, L.L.C. formerly known
as ADVANCEPCS,

Defendants.

§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

98 th

____ JUDICIAL DISTRICT

FEB 14 2008 AM 10:41

**PLAINTIFF'S ORIGINAL PETITION AND
APPLICATION FOR INJUNCTIVE RELIEF**

TO THE HONORABLE JUDGE OF THE COURT:

COMES NOW, the State of Texas (hereinafter referred to as "State"), as Plaintiff, acting by and through Greg Abbott, Attorney General of the State of Texas, and complains of CAREMARK Rx, L.L.C, CAREMARK, L.L.C. and CAREMARKPCS, L.L.C. formerly known as ADVANCEPCS, (hereafter collectively referred to as "Caremark"), Defendants, and for cause of action alleges the following:

**I.
DISCOVERY CONTROL PLAN**

1. No discovery control plan is needed in this case because the allegations against Caremark have been settled contemporaneously with the filing of this lawsuit.

**II.
NATURE OF THIS LAWSUIT**

2. The Attorney General, acting within the scope of his official duties under the authority granted to him under the Constitution and the laws of the State of Texas, brings this lawsuit

in the name of the State of Texas and in the public interest through his Consumer Protection and Public Health Division upon the grounds that Defendants have violated the provisions of the Texas Deceptive Trade Practices — Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.41 *et seq.* (hereafter “DTPA”), arising out of the Defendants’ unfair or deceptive acts and practices in connection with the sale of prescription drugs and performance of pharmacy benefit management services. The Attorney General has authority to seek injunctive relief and civil penalties for violations of this statute’s provisions. TEX. BUS. & COM. CODE ANN. § 17.47.

III. JURISDICTION

3. This Court has jurisdiction over this action pursuant to TEX. BUS. & COM. CODE § 17.47(b).

IV. DEFENDANTS

4. Defendants Caremark Rx, L.L.C., Caremark, L.L.C., and CaremarkPCS, L.L.C. (collectively referred to as “Caremark” or “Defendants”) are Delaware Limited Liability 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 CaremarkPCS (f/k/a AdvancePCS), a wholly-owned, direct subsidiary of Caremark Rx. Caremark Rx acquired AdvancePCS on March 24, 2004. Caremark provides pharmacy benefit management services to over 2,000 health plan clients servicing persons in Texas and nationwide.

5. Caremark operates, or has operated, seven prescription drug mail order pharmacies in the states including but not limited to mail order pharmacies located in Alabama, Arizona,

Florida, Illinois, Pennsylvania, and Texas.

6. Caremark operates, or has operated, a retail pharmacy network with over 59,000 participating pharmacies, including pharmacies located in Travis County, Texas.

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

V. VENUE

8. Venue of this lawsuit lies in Travis County, Texas pursuant to TEX. BUS. & COM. CODE § 17.47(b).

VI. PUBLIC INTEREST

9. The Attorney General has reason to believe that the Defendants have engaged in, and will continue to engage in, unlawful practices in violation of the DTPA, as set forth below. The Attorney General also has reason to believe that the Defendants have caused and will continue to cause injury, loss or damage to many of its citizens and to other legitimate business enterprises lawfully conducting business in this State. The Consumer Protection and Public Health Division of the Office of the Attorney General of the State of Texas, therefore, believes that these proceedings are in the public interest, bringing this action pursuant to TEX. BUS. & COM. CODE § 17.47(a) and seeking, *inter alia*, injunctive relief against Defendants to restrain the use of such unlawful practices.

VII. NOTICE

10. The Consumer Protection and Public Health Division informed the Defendants in general of the alleged unlawful conduct described below, which violates the DTPA, at least seven

days before the filing of this Plaintiff's Original Petition and Application for Injunctive Relief, as required by TEX. BUS. & COM. CODE § 17.47(a).

**VIII.
TRADE AND COMMERCE**

11. Each Defendant is a "person" as defined by TEX. BUS. & COM. CODE ANN. § 17.45(3), and has, at all times as described below, engaged in conduct which constitutes "trade" and "commerce," as those terms are defined by TEX. BUS. & COM. CODE ANN. § 17.45(6), to wit: advertising, soliciting, offering for sale, and providing pharmacy benefit management services to Texas health plans and employers, including government employers. The conduct of the Defendants, therefore, has directly affected the citizens of the State of Texas.

**IX.
ACTS OF AGENTS**

12. Whenever in this petition it is alleged that Caremark did any act or thing, it is meant that Caremark, or its subsidiaries, affiliates, directors, officers, agents, or employees, performed or participated in such act or thing, and in each instance where its subsidiaries, affiliates, directors, officers, agents, or employees performed or participated in such act or thing, they were authorized to and did in fact act on behalf of Caremark.

**X.
FACTUAL ALLEGATIONS**

Pursuant to an investigation conducted by the Attorney General, the State alleges the following:

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

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

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

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

- (a) Organizing a network of retail pharmacies (“retail network”) that agree to fill prescriptions for a negotiated price. The retail network may consist of some or all of the approximately 59,000 retail pharmacies in the United States;
- (b) Operating mail order pharmacies which sell prescription drugs, including more than 516 million prescriptions in 2006, directly to persons with a pharmacy benefit (“plan participants”);
- (c) Administering the pharmacy benefit by processing and paying claims through the operation of a proprietary computer system;
- (d) Providing Plan Participants, physicians, and Client Plans with information about the operation of their pharmacy benefit and cards or other methods to access the benefits; and,
- (e) Developing and managing formularies, as described further below.

16. Formularies are lists of drugs for which a Client Plan agrees to pay on behalf of the plan participant, either in whole or in part. For example, “open formularies” permit payment

for any prescription drug. “Closed formularies” limit payment to specific drugs - for example, only generics, or only one preferred brand drug within a so-called “therapeutic class.” “Tiered formularies” require plan participants to pay lower or higher co-pays depending on whether a drug is a generic, preferred brand, or non-preferred brand.

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

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

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

20. Caremark provides mail order pharmacy services to Client Plans including governmental entities and private parties.

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

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

23. When Caremark solicits prospective and existing Client Plans, Caremark fails to clearly and conspicuously disclose material information about its drug switching programs,

including the fact that it will retain rebates that it receives from the drug manufacturers as a result of drug switching.

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

25. With respect to certain drug therapies, a switch from one drug to another in the same therapeutic class often requires the plan participant to undergo one or more tests, and may require one or more doctor visits, to monitor the new drug therapy and ensure the new drug's efficacy. Plan participants would not have incurred these additional health care costs but for Caremark's drug switches.

26. Caremark, in its contracts with retail network pharmacies, fails to require the pharmacy to disclose to the plan participant if the pharmacy's usual and customary ("U&C") price for the drug is less than the applicable co-payment and fails to require the retail pharmacy to allow the plan participant to pay the U&C price, if it is lower than the applicable co-payment.

27. Caremark engages in a variety of programs and activities for which drug manufacturers and other business entities pay Caremark to perform. For example, Caremark sells various kinds of data it derives from its records of prescription sales to plan participants. Caremark distributes this information and marketing materials to physicians and plan participants to promote particular drugs to those physicians and plan participants.

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

physicians.

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

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

31. Caremark employs licensed professional pharmacists and licensed, certified, or designated pharmacy technicians who perform or assist in performing professional pharmacy services for plan participants.

32. Caremark represents to Client Plans and to plan participants, directly or by implication, that it will provide the same professional pharmacy services performed by professional pharmacists at non-mail order pharmacies. These services, if properly performed, assure quality of care for plan participants through prevention of adverse drug interactions, verification of drug strength and dosage regimens, recommendation of alternative medically appropriate drugs, and monitoring outcomes.

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

- (a) failing to fully disclose to plan participants, Client Plans, and physicians all of the material facts concerning proposed drug switches, including the nature and

amount of Caremark's financial interest, and savings to the plan participant and the Client Plan, if any; and

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

**XI.
TEXAS DECEPTIVE TRADE PRACTICES–
CONSUMER PROTECTION ACT VIOLATIONS**

34. The allegations contained in paragraphs 1 - 34 are incorporated herein by reference.

35. The Defendants, CAREMARK Rx, L.L.C, CAREMARK, L.L.C. and CAREMARKPCS, L.L.C. formerly known as ADVANCEPCS, have violated the Texas Deceptive Trade Practices – Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41 *et seq.* by engaging in various unfair and deceptive acts or practices, including but not limited to the following:

- (a) engaging in certain unfair and/or deceptive acts or practices and procedures at Caremark's mail order pharmacies, retail pharmacies, customer call centers, and corporate offices, related to Caremark's drug interchange practices, and disclosures to Client Plans, health care providers, prescribers, and plan participants concerning Caremark's drug interchange practices;
- (b) engaging in certain unfair and/or deceptive acts or practices relating to disclosures to prescribers and plan participants relating to drug interchange practices and potential cost savings;

- (c) engaging in certain unfair and/or deceptive acts or practices relating to Caremark's receipt of payment from pharmaceutical manufacturers for the distribution of information and materials to health care providers, prescribers, and plan participants, and disclosures to Client Plans, health care providers, prescribers, and plan participants concerning that practice, and the disclosure and retention of rebates and other payments received from pharmaceutical manufacturers;
- (d) engaging in certain unfair and/or deceptive acts or practices relating to Caremark's disclosures to Client Plans, health care providers, prescribers, and plan participants related to Caremark's receipt of manufacturer payments;
- (e) engaging in certain unfair and/or deceptive acts or practices relating to Caremark's provision, or lack of a provision, in its contracts with retail network pharmacies requiring the pharmacy to disclose to the plan participants if such pharmacy's U&C price for the particular drug dispensed is less than the applicable co-payment;
- (f) engaging in certain unfair and/or deceptive acts or practices relating to Caremark's provision, or lack of a provision, in its contracts with retail network pharmacies allowing the plan participant to pay either the co-payment or the U&C price, whichever is lower;
- (g) engaging in certain unfair and/or deceptive acts or practices relating to provisions in Caremark's contracts with retail pharmacies regarding procedures that the retail pharmacies must follow when implementing a drug interchange as part of any Caremark drug interchange program; and

- (h) engaging in certain unfair and/or deceptive acts or practices relating to compliance by Caremark pharmacists with pharmaceutical ethical principles and guidelines, to the extent failure to comply violated consumer protection statutes.

36. The above-described acts and practices constitute violations of the DTPA in that Caremark is:

- (a) engaging in false, misleading, or deceptive acts and practices in the conduct of trade and commerce, in violation of TEX. BUS. & COM. CODE § 17.46(a);
- (b) causing confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services, in violation of TEX. BUS. & COM. CODE § 17.46(b)(2);
- (c) causing confusion or misunderstanding as to the affiliation, connection, or association with, or certification by, another, in violation of TEX. BUS. & COM. CODE § 17.46(b)(3);
- (d) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have, in violation of TEX. BUS. & COM. CODE § 17.46(b)(5);
- (e) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions, in violation of TEX. BUS. & COM. CODE § 17.46(b)(11); and
- (f) failing to disclose information relating to the goods and services offered to consumers which was known at the time of the transaction where the failure to disclose the information was intended to induce consumers into transactions which

the consumers would not have entered had the information been disclosed, in violation of TEX. BUS. & COM. CODE § 17.46(b)(24).

XII.

INJUNCTION AND PENALTIES

37. The State may request, and this Court may grant, a temporary restraining order, temporary injunction, or permanent injunction without bond to restrain any act or practices declared to be unlawful by the Deceptive Trade Practices Act. The Deceptive Trade Practices Act also provides for civil penalties of not more than \$20,000.00 per violation. TEX. BUS. & COM. CODE ANN. §§ 17.47 (a) and (c).

XIII.

ATTORNEY'S FEES AND COSTS

38. Lastly, the State may seek to recover all costs incurred in this proceeding, including reasonable attorney's fees, investigative costs and court costs, pursuant to TEX. GOV'T CODE ANN § 402.006.

XIV.

PRAYER

WHEREFORE PREMISES CONSIDERED, the State prays that this court:

A. Render a judgment in favor of the State against the Defendants for penalties, injunctive relief and other relief authorized under Texas Deceptive Trade Practices — Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.47;

B. Issue a permanent injunction prohibiting CAREMARK Rx, L.L.C, CAREMARK, L.L.C. and CAREMARKPCS, L.L.C. formerly known as ADVANCEPCS, their agents, employees,

and all other persons and entities, corporate or otherwise, in active concert or participation with any of them, from engaging in the unfair or deceptive conduct specifically alleged herein;

C. Make such additional orders or judgments as are necessary to compensate identifiable persons or to restore money or property, real or personal, which may have been acquired by means of any unlawful act or practice, pursuant to TEX. BUS. & COM. CODE § 17.47(d);

D. Order the Defendants to pay the State attorneys' fees and costs pursuant to TEX. GOV'T CODE § 402.006; and

E. Not require the State post a bond for all costs of these proceedings.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas
KENT C. SULLIVAN
First Assistant Attorney General
JEFF L. ROSE
Deputy First Assistant Attorney General
PAUL D. CARMONA
Chief, Consumer Protection and
Public Health Division



RAYMOND G. OLAH
State Bar No. 00794391
Assistant Attorney General
Consumer Protection and
Public Health Division
P.O. Box 12548
Austin, Texas 78711-2548
(512) 475-4360 Telephone
(512) 463-1267 Facsimile

**ATTORNEYS FOR PLAINTIFF
STATE OF TEXAS**