

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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THE PEOPLE OF THE STATE OF NEW YORK, :
by ELIOT SPITZER, Attorney General of the :
State of New York, :
:
Plaintiffs, :
- against - : COMPLAINT
PHARMACIA CORPORATION, : Index No.
Defendant. :
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TO: THE SUPREME COURT OF THE STATE OF NEW YORK

The People of the State of New York, by their attorney, Eliot Spitzer, Attorney General of the State of New York, allege the following upon information and belief:

PRELIMINARY STATEMENT

1. Pharmacia Corporation ("Pharmacia"), a pharmaceutical manufacturer with net earnings in excess of \$1.5 billion in 2001, makes fraudulent and deceptive misrepresentations that conceal the true average wholesale price of its drugs from consumers, government agencies, and drug price reporting services. Government health plans, such as Medicare, Medicaid and EPIC (Elderly Pharmaceutical Insurance Coverage Program), base reimbursement for covered drugs in large measure on the average wholesale price. Consumers pay a coinsurance or copayment for drugs reimbursed by Medicare, Medicaid and EPIC. As a result of Pharmacia's misrepresentations, doctors and other healthcare providers are improperly induced to prescribe

Pharmacia's drugs and government payers and consumers, including the elderly and the catastrophically ill, pay artificially inflated sums for chemotherapy and other drugs.

2. The Attorney General of the State of New York brings this action to stop Pharmacia's illegal and deceptive actions and to obtain restitution for the consumers and state government agencies defrauded by Pharmacia.

JURISDICTION AND PARTIES

3. Eliot Spitzer is the Attorney General of the State of New York. He is authorized: to institute all actions and proceedings in which the State is interested, N.Y. Executive Law § 63(1); to seek an order that enjoins repeated or persistent fraudulent or illegal business acts or practices and awards damages and restitution for such acts, N.Y. Executive Law § 63(12); to bring an action to enjoin deceptive acts or practices in the conduct of business and to obtain restitution and civil penalties, including additional civil penalties for fraud perpetrated against the elderly, N.Y. General Business Law ("GBL") §§ 349, 349-c, 350-d; and to recover treble damages for overpayments of public funds obtained by means of false statements or other fraudulent schemes, N.Y. Social Services Law § 145-b(2).

4. Pharmacia Corporation is a Delaware corporation that regularly conducts business within the State of New York and derives substantial revenues from goods consumed in New York. (Defendant Pharmacia Corp. includes all of its predecessors and its past and current components, which are collectively referred to as "Pharmacia.")

5. The Attorney General provided Pharmacia with the pre-litigation notice required by GBL §§ 349(c) and 350-c, a copy of which is annexed as Exhibit A.

FACTUAL ALLEGATIONS

I. Government Health Plans

A. THE MEDICARE PROGRAM

6. Medicare is a health insurance program created by the federal government for the elderly and disabled. 42 U.S.C. §§ 1395, et seq. Individuals become eligible for Medicare health insurance benefits when they turn 65 years of age or become disabled. The vast majority of Medicare beneficiaries are 65 years of age or over. There are two major components of the Medicare Program: Part A and Part B.

7. Medicare Part A is financed by a dedicated federal payroll tax, premiums paid by beneficiaries and general federal tax revenues. It pays for inpatient hospital, skilled nursing, hospice and some home healthcare services for eligible recipients. 42 U.S.C. §§ 1395e through 1395i-5. Medicare Part A pays for prescription drugs only if they are administered on an inpatient basis in a hospital or similar setting.

8. Medicare Part B is an optional program that provides coverage for some healthcare services not covered by Part A. 42 U.S.C. §§ 1395j through 1395w-4. Medicare Part B is supported by government funds and premiums paid by eligible individuals who choose to participate in the program.

9. Medicare Part B pays for a few categories of prescription drugs administered outside a hospital setting, including those administered by injection or infusion by physicians and their staff in the doctor's office and other outpatient settings or by other specified healthcare providers at other sites (collectively "physician-administered drugs"); some orally administered anticancer chemotherapy drugs and anti-emetics, which control the vomiting and nausea caused by such chemotherapy agents; and drugs administered through durable medical equipment such

as a nebulizer (collectively "Part B-covered" drugs). 42 U.S.C. §§ 1395k(a), 1395x(s)(2); 42 C.F.R. § 405.517. Anticancer chemotherapy drugs and anti-emetics are the dominant types of physician-administered drugs covered by Part B.

10. For drugs covered by Part B, the healthcare provider receives the lower of the charge the healthcare provider actually bills Medicare or 95 percent of the drug's average wholesale price. Medicare pays eighty percent of this amount, and the beneficiary is responsible for 20 percent as a coinsurance payment. 42 U.S.C. §§ 1395u(o), 1395l(a).

B. THE MEDICAID PROGRAM

11. The Medicaid Program is a program jointly funded by the federal, state and county government that is administered by the state. It pays for prescription drugs, whether administered by physicians or dispensed by pharmacies, as well as other healthcare services, for low income persons, including individuals who work and children in government custody as foster children. Medicaid recipients pay a copayment for covered drugs, the amount of which depends on the cost of the drugs.

12. Reimbursement to pharmacists for drugs dispensed under the Medicaid Program generally is limited to the lower of the "[e]stimated acquisition costs plus reasonable dispensing fees" or the "[p]roviders' usual and customary charges to the general public." 42 C.F.R. § 447.331. In New York State, Social Services Law § 367-a defines "estimated acquisition cost" as "the average wholesale price of a prescription drug...as reported by the prescription drug pricing service used by the department, less ten percent thereof..." for drugs that have no Federal Upper Limit.¹

¹A Federal Upper Limit limits the amount that a Medicaid Program can pay for some generic drugs. The "Federal Upper Limit" is defined at 42 C.F.R. § 447.332 as "150 percent of the

C. THE EPIC PROGRAM

13. EPIC is a voluntary New York State-funded and state-administered program that provides prescription drug coverage to lower income consumers who are 65 years of age or older and are not eligible for full Medicaid coverage. It covers prescription drugs dispensed by pharmacies. Individuals who choose to participate in the program must pay a fee or satisfy an annual deductible based on income, as well as a copayment for each drug purchase based on the price charged for the drug. A participant's copayments for the year are subject to an upper limit based on the participant's income.

14. For drugs for which no Federal Upper Limit has been established or that cannot be replaced by a generic for a particular patient, EPIC reimburses the dispensing pharmacy at the lower of 90 percent (95 percent before 2002) of average wholesale price or the pharmacy's usual and customary charge to the general public. N.Y. Exec. Law § 547-j(1)(b).

II. Pharmacia's Fraud and Deception Improperly Increase the Cost of Drugs to Medicare Beneficiaries, Medicaid Recipients, EPIC Participants and the State of New York.

At least quarterly, Pharmacia reports to national drug price publishing services (collectively "price reporting services") an amount as the average wholesale price for each of its prescription drugs (the price a physician or pharmacist pays a wholesaler, distributor or other middleman).²

published price for the least costly therapeutic equivalent."

²Pharmacia consistently used the term "average wholesale price" in its reports to price reporting services until litigation alleged drug manufacturers committed fraud by grossly overstating the value of average wholesale price to price reporting services. Pharmacia may now use a different name for the same information it previously reported as "average wholesale price." This complaint refers to this information as "average wholesale price."

15.

These average wholesale prices are reported virtually without modification in generally available compendia published by the price reporting services, other than *First DataBank*. *First DataBank*, which merged with and succeeded Medispan, Inc. (Medispan and First DataBank, Inc. are collectively referred to as “*First DataBank*.”), reports these average wholesale prices, essentially without modification, in a computer file which it sends to the New York Department of Health.

16. Pharmacia knows of and relies on the practice of the price reporting services, including *RedBook* and *First DataBank*, of reporting the information the drug manufacturers provide to them without significant alteration.

A. MEDICARE

17. Medicare Part B imposes no legal duties on Pharmacia, but Pharmacia manipulates the Program's reimbursement system to defraud New York Medicare beneficiaries.

18. The "average wholesale price," as published in the price reporting services, is virtually the only information used to determine the amount Medicare will pay a New York Medicare provider for a Part B-covered drug. This has been true for over a decade, and Pharmacia knows of and relies on this practice.

19. Both directly and through middlemen, Pharmacia sells its Part B-covered drugs to physicians, other healthcare providers and pharmacists. Pharmacia knows the prices middlemen pay for its drugs and the amount these middlemen charge providers and pharmacists for Pharmacia's drugs.

20. The amount Pharmacia transmits to the price reporting services as the average wholesale price of its Part B-covered drugs is greatly inflated and bears no relationship either to the price middlemen pay Pharmacia or to the price physicians, other healthcare providers and pharmacists actually pay to purchase these drugs. Pharmacia knowingly reports these false, misleading and deceptive amounts as average wholesale price.

21. Physicians, other healthcare providers and pharmacists are routinely reimbursed by Medicare for Pharmacia's Part B-covered drugs in an amount equal to 95 percent of the drug's fraudulently inflated average wholesale price, and Pharmacia is aware of this fact.

22. The difference between the amount a physician, other healthcare provider or pharmacist pays for a drug and the amount Medicare (or other healthcare program) reimburses for that drug is profit to the provider. These profits can be enormous when the provider selects one of Pharmacia's drugs. In the pharmaceutical industry, this guaranteed profit is referred to as the "spread."

23. The following are examples of the spreads Pharmacia created when, in providing information to the price reporting services, it misrepresented and concealed the average wholesale price of its Part B-covered drugs: 76 percent for Doxorubicin HCl (Pharmacia's brand name is Adriamycin RDF[®]/PFS[®]), an injectable drug used to treat various cancers including breast and ovarian cancer; and 16 percent for Pharmacia's Camptosar[®] (Irinotecan HCl), a chemotherapy drug prescribed for colon and rectal cancer. These spreads were calculated based on middlemen's catalog prices, but under terms negotiated with or on behalf of Pharmacia, physicians and other healthcare providers actually pay middlemen far

less than their catalog prices for some drugs. In just one year, the overcharge to Medicare for Pharmacia's Camptosar[®] was \$13 million.

24. Pharmacia manufactures other Part B-covered drugs for which it has reported deceptive average wholesale prices and thereby created significant spreads, including the cancer treatments Bleomycin, Etoposide (brand name Toposar[™]), and Vincristine (brand name Vincasar PFS[®]); the anticoagulant Heparin; and the anti-fungal Amphotericin B (brand name Amphocin[®]).

25. Pharmacia maintains or increases the sales volume for its Part B-covered drugs by actively marketing the spread to doctors and pharmacists. Pharmacia encourages New York physicians, other New York healthcare providers and New York pharmacists to select Pharmacia drugs by informing them of the amount of profit they can reap if they administer or dispense the Defendant's drugs, a profit the Defendant can guarantee the doctor because Medicare pays for the drugs based on Pharmacia's deceptive reporting of average wholesale price. Pharmacia advises New York physicians, other New York healthcare providers and New York pharmacists about the availability of this artificially inflated and guaranteed profit.

26. Pharmacia benefits from the fraudulent and deceptive misrepresentations it makes to the price reporting services that inflate its Part B-covered drugs' average wholesale prices.

B. MEDICAID

27. As Pharmacia has known for years, the New York Medicaid Program reimburses pharmacist-dispensed drugs for which no Federal Upper Limit has been set exclusively on the basis of the average wholesale price reported in *First DataBank*. Thus, by

reporting false and fraudulently inflated average wholesale prices for its products to *First DataBank*, Pharmacia controls the reimbursement amount paid by Medicaid for these drugs, irrespective of any change in their market prices.

28. As a result, Pharmacia deceptively causes the State to pay more for these drugs than is permitted by law.

29. Pharmacia fraudulently creates and markets the spread on its drugs to New York pharmacists who are Medicaid providers. Pharmacia does this to induce pharmacists to recommend Pharmacia drugs to Medicaid recipients and their physicians, to purchase more of its drugs, and to bill those drugs to Medicaid. Pharmacia thereby offers reimbursement that it has enhanced through its fraudulent acts as the quid pro quo for recommending Pharmacia drugs and, together with those providers who accept this offer, intentionally causes Medicaid to pay the falsely overstated prices. The amount of the spread on Pharmacia's drugs has not been disclosed to the State and to Medicaid recipients who purchase such drugs, and it has not been reflected in claims for Medicaid reimbursement.

C. EPIC

30. The Department of Health sets reimbursement for drugs covered by EPIC using information from *First DataBank*. By reporting false and fraudulently inflated average wholesale prices to *First DataBank*, Pharmacia knowingly causes the EPIC Program to pay excessive amounts for covered drugs for which no Federal Upper Limit had been set.

31. Pharmacia manipulates and markets the spread on its EPIC-covered drugs to New York pharmacies by informing them of the increased and guaranteed profits available for

dispensing Pharmacia's drugs. By doing this, Pharmacia increases or maintains its sales of these drugs.

D. INJURY TO CONSUMERS AND THE STATE

32. New York Medicare beneficiaries, Medicaid recipients and EPIC participants spend far more than their statutory share of the unmanipulated average wholesale price of Pharmacia's drugs. For example, in many cases the Medicare beneficiary's coinsurance payment is significantly greater than 20 percent of the bona fide average wholesale price.

33. Pharmacia knows that Medicare beneficiaries are responsible for 20 percent of the amount Medicare allows for a Part B-covered drug and that Medicaid recipients and EPIC participants are responsible for a copayment based on the amount the government healthcare program allows for the purchased drug. Pharmacia also knows that Medicare beneficiaries, Medicaid recipients and EPIC participants suffer significant economic injuries as a consequence of the Defendant's deceptive reporting of false average wholesale prices.

34. Pharmacia's fraudulent misrepresentations that conceal the average wholesale price of its drugs deceive, and have the potential to deceive, New York Medicare beneficiaries, Medicaid recipients and EPIC participants into believing they are paying the legally permitted amount for the drugs covered by these government healthcare programs.

35. In New York, physicians have fiduciary obligations to their patients, including the duty to use their independent professional judgment in making treatment decisions and not to accept any consideration to alter that judgment. Pharmacia creates and markets the spread on its prescription drugs to New York doctors without the consent or knowledge of their

patients and with the intent to influence the physicians' choice of drugs to administer or prescribe to their patients.

36. Persons 65 years of age and older comprise the vast majority of Medicare beneficiaries, many Medicaid recipients and all of the EPIC participants, and Pharmacia knows this. The nature and severity of the illnesses that require the use of drugs covered by Part B, Medicaid and EPIC, as well as the beneficiaries' age, render the victims of the Defendant's fraud and deception especially vulnerable. Medicare beneficiaries, Medicaid recipients and EPIC participants who are 65 years of age or older have suffered economic damages as a result of Pharmacia's fraud and deception.

37. Pharmacia has knowingly made false statements and representations concerning the average wholesale price of its Medicaid- and EPIC-covered drugs on behalf of New York pharmacists, and has fraudulently engaged in marketing the spread on these drugs, resulting in the overpayment of public funds for Pharmacia's prescription drugs covered by the New York Medicaid Program or EPIC.

FIRST CAUSE OF ACTION
DECEPTIVE ACTS AND PRACTICES

38. GBL § 349 provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York] are ... unlawful."

39. By engaging in the acts and practices described above, Pharmacia has engaged in and continues to engage in deceptive business practices in violation of GBL § 349.

SECOND CAUSE OF ACTION
REPEATED AND PERSISTENT FRAUD

40. Executive Law § 63(12) makes "repeated fraudulent ... acts or ... persistent fraud ... in the carrying on, conducting or transaction of business" actionable by the Attorney General.

41. By engaging in the acts and practices described above, Pharmacia has engaged in and continues to engage in repeated fraudulent acts or persistent fraud in violation of Executive Law § 63(12).

THIRD CAUSE OF ACTION
REPEATED AND PERSISTENT ILLEGAL CONDUCT:
COMMERCIAL BRIBERY

42. Penal Law § 180.00 provides that "a person is guilty of commercial bribing in the second degree when he confers, or offers or agrees to confer, any benefit upon any ... fiduciary without the consent of the latter's ... principal, with intent to influence his conduct in relation to his ... principal's affairs."

43. By engaging in the acts and practices described above, Pharmacia has engaged in and continues to engage in commercial bribing in the second degree in violation of New York Penal Law § 180.00.

44. Defendant's violations of Penal Law § 180.00 constitute repeated and persistent illegal conduct in violation of Executive Law § 63(12).

**FOURTH CAUSE OF ACTION
REPEATED AND PERSISTENT ILLEGAL CONDUCT:
MEDICAID KICKBACKS AND FRAUD**

45. The Regulations of the New York Department of Health, 18 N.Y.C.R.R. § 515.2(b)(5) provide that, “[u]nless the discount or reduction in price is disclosed to the client and the department and reflected in a claim,” an “Unacceptable Practice” within the New York Medicaid Program is committed by “offering or paying either directly or indirectly any payment (including any kickback, bribe, ... rebate or discount), whether in cash or in kind, in return for purchasing, ... ordering or recommending any medical care, services or supplies for which payment is claimed under the program.”

46. By engaging in the acts and practices described above, Pharmacia has engaged in and continues to engage in Unacceptable Practices within the New York Medicaid Program as defined at 18 N.Y.C.R.R. § 515.2(b)(5).

47. Defendant's violations of 18 N.Y.C.R.R. § 515.2(b)(5) constitute repeated and persistent illegal conduct in violation of Executive Law § 63(12).

**FIFTH CAUSE OF ACTION
REPEATED AND PERSISTENT ILLEGAL CONDUCT:
OBTAINING PUBLIC FUNDS BY FALSE STATEMENTS**

48. Social Services Law § 145-b provides that “[i]t shall be unlawful for any person, firm or corporation knowingly by means of a false statement or representation, or by deliberate concealment of any material fact, or other fraudulent scheme or device, on behalf

of himself or others, to attempt to obtain or to obtain payment from public funds for ... supplies furnished ... pursuant to” the Medicaid Program or EPIC.

49. By engaging in the acts and practices described above, Pharmacia has knowingly made false statements and representations or engaged in a fraudulent scheme on behalf of New York pharmacists, resulting in the overpayment of public funds for Pharmacia’s prescription drugs covered by the New York Medicaid Program or EPIC in violation of Social Services Law § 145-b.

50. Defendant's violations of Social Services Law § 145-b constitute repeated and persistent illegal conduct in violation of Executive Law § 63(12).

PRAYER FOR RELIEF

WHEREFORE, the People of the State of New York respectfully request that a judgment and order be entered that:

A. Permanently enjoins Pharmacia Corporation from engaging in the deceptive, fraudulent and unlawful practices alleged herein;

B. Directs Pharmacia Corporation to pay restitution and damages to all aggrieved consumers, including those not known at the time the order is entered;

C. Directs Pharmacia Corporation to pay a civil penalty of \$500 to the State of New York pursuant to GBL § 350-d for each instance of a deceptive or unlawful act or practice that violates GBL Article 22-A;

D. Directs Pharmacia Corporation to pay an additional civil penalty of \$10,000 to the State of New York pursuant to GBL § 349-c for fraud committed against the elderly;

E. Directs Pharmacia Corporation to pay restitution and damages to the State of New York based on Pharmacia's fraudulent, deceptive and illegal practices, for the economic injuries suffered by the New York Medicaid and EPIC programs;

F. Directs Pharmacia Corporation to pay to the State of New York damages equal to three times the amount by which the State or any political subdivision, based on Pharmacia's false statement or representation or other fraudulent scheme, overpaid public funds for Pharmacia's prescription drugs under the New York Medicaid or EPIC program;

G. Awards Plaintiffs costs, including additional costs in the amount of \$2,000 pursuant to C.P.L.R. § 8303(a)(6); and

H. Grants all other relief that is just and proper.

Dated: New York, New York
February 13, 2003

Respectfully submitted,

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