STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN *ex rel.* MARCIA GURGANUS, Plaintiff/Appellee, v CVS CAREMARK CORPORATION; CVS PHARMACY INC.; CAREMARK, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY HOLDING, LLC; CVS MICHIGAN, LLC; WOODWARD DETROIT CVS, LLC; REVCO DISCOUNT DRUG CENTERS, INC.; KMART HOLDING CORPORATION; SEARS HOLDINGS CORPORATION; SEARS HOLDINGS MANAGEMENT CORPORATION; SEARS, ROEBUCK AND CO.; RITE AID OF MICHIGAN INC.; PERRY DRUG STORES, INC.; TARGET CORPORATION; THE KROGER CO. OF MICHIGAN; THE KROGER CO.; WALGREEN CO.; and WAL-MART STORES INC., Defendants/Appellants.	Case Nos. 146791 and 146793 Lower Court Case No. 09-03411-CZ Honorable James R. Redford Michigan Court of Appeals #299997 ***AMICUS CURIAE* BRIEF ON BEHALF OF THE MICHIGAN ASSOCIATION OF HEALTH PLANS**
CITY OF LANSING; and DICKINSON PRESS INC., individually and on behalf of all others similarly situated, Plaintiffs/Appellees, v RITE AID OF MICHIGAN, INC.; and PERRY DRUG STORES, INC., Defendants/Appellants.	Lower Court Case No. 09-07827-CZ Honorable James R. Redford Court of Appeals # 299998

CITY OF LANSING; DICKINSON PRESS INC.; and SCOTT MURPHY, individually and on behalf of all others similarly situated, Plaintiffs/Appellees, v CVS CAREMARK CORPORATION; CVS PHARMACY INC.; CAREMARK, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY HOLDING, LLC; CVS MICHIGAN, LLC; WOODWARD DETROIT CVS, LLC; REVCO DISCOUNT DRUG CENTERS, INC.; KMART HOLDING CORPORATION; SEARS HOLDINGS CORPORATION; SEARS HOLDINGS MANAGEMENT CORPORATION; SEARS, ROEBUCK AND CO.; TARGET CORPORATION; THE KROGER CO. OF MICHIGAN; THE KROGER CO.; WALGREEN CO.; and WAL-MART STORES INC., Defendants/Appellants.	Lower Court Case No. 10-00619-CZ Hon. James R. Redford Court of Appeals #299999
MOSBY LAW AND MEDIATION Lori Mosby(P74691) Attorney for *Amicus* Michigan Association of Health Plans 2100 Pine Nook Court NE Grand Rapids, MI 49525	VARNUM LLP Perrin Rynders (P38221) Bryan R. Walters (P58050) Attorneys for Plaintiffs/Appellees Bridgewater Place, P.O. Box 352 Grand Rapids, MI 49501-0352 (616) 336-6000
FOLEY & LARDNER LLP Jeffrey Scott Kopp (P59485) Larry S. Perlman (P71698) Attorneys for Defendants/Appellants CVS 500 Woodward Avenue, Suite 2700 Detroit, MI 48226-3489 (313) 234-7100	FOLEY & LARDNER LLP Robert H. Griffith David B. Goroff Attorneys for Defendants/Appellants CVS 321 North Clark Street, Suite 2800 Chicago, IL 60654 (312) 832-4500

HONIGMAN MILLER SCHWARTZ AND COHN Eric J. Eggan (P32368) Attorneys for Defendants/Appellants Kroger and Walgreens 222 North Washington Square, Suite 400 Lansing, MI 48933-1800 (517) 377-0726	HONIGMAN MILLER SCHWARTZ AND COHN Norman Ankers (P30533) Arthur T. O'Reilly (P70406) Attorneys for Defendants/Appellants Kroger and Walgreens 660 Woodward Avenue, Suite 2290 Detroit, MI 48226 (313) 465-7306
DYKEMA GOSSETT PLLC Jill M. Wheaton (P49921) Attorneys for Defendants/Appellants Kmart and Sears 2723 South State Street, Suite 400 Ann Arbor, MI 48104 (734) 214-7629	DYKEMA GOSSETT PLLC Todd Grant Gattoni (P47843) Attorneys for Defendants/Appellants Kmart and Sears 400 Renaissance Center Detroit, MI 48243 (313) 568-6943
MILLER CANFIELD PADDOCK & STONE PLC Robert L. DeJong (P12693) Joseph M. Infante (P68719) Attorneys for Defendants/Appellants Rite Aid and Perry Drug 1200 Campau Square Plaza 99 Monroe Avenue, NW Grand Rapids, MI 49503 (616) 454-8656	MILLER CANFIELD PADDOCK & STONE PLC Todd Alan Holleman (P57699) Attorneys for Defendants/Appellants Rite Aid and Perry Drug 150 West Jefferson Avenue, Suite 2500 Detroit, MI 48226-4415 (313) 496-7668
FAEGRE & BENSON LLP Wendy J. Wildung Craig S Coleman Attorneys for Defendant/Appellants Target 220 Wells Fargo Center Minneapolis, MN 55402 (612) 766-6981	DICKINSON WRIGHT PLLC Edward P. Perdue (P55888) Dennis C. Kolenda (P16129) Scott R. Knapp (P61041) Attorneys for Defendant/Appellants Target 200 Ottawa Avenue, NW, Suite 900 Grand Rapids, MI 49503 (616) 458-1300

MILLER JOHNSON PLC Matthew L. Vicari (P44049) Joseph J. Gavin (P69529) Attorneys for Defendant/Appellants Wal-Mart 250 Monroe Avenue, NW, Suite 800 P.O. Box 306 Grand Rapids, MI 49501-0306 (616) 831-1700	JONES DAY Tina M. Tabacchi Brian J. Murray Dennis Murashko Attorneys for Defendant/Appellants Wal-Mart 77 West Wacker Drive, Suite 3500 Chicago, IL 60601 (312) 269-4078

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State Cases

Federal Case

State Statutes

State Rule

Other Authorities

QUESTION PRESENTED FOR REVIEW

WHETHER THE HEALTH CARE FALSE CLAIM ACT PROVIDES AN EXPRESS CAUSE OF ACTION FOR HEALTH CARE INSURERS WHEN THOSE ENTITIES ARE PRESENTED WITH CLAIMS OR HAVE PAID CLAIMS THAT THE CLAIMANT KNEW THAT IT WAS NOT ENTITLED TO RECEIVE?

The trial court answered: No.

The Court of Appeals answered: Yes.

The Plaintiffs-Appellees answered: Yes.

The Defendant-Appellant Pharmacy Owners answered: No.

The *Amicus Curiae* filing on behalf of the Michigan Association of Health Plans answers: Yes.

STATEMENT OF INTEREST

The amicus curiae Michigan Association of Health Plans (MAHP) is a nonprofit corporation that serves as a voice for Michigan's health care plans. Its membership includes 15 health care plans, covering more than 2.5 million Michigan residents, and 45 businesses affiliated with the health care industry. The mission of the MAHP is to provide leadership for the promotion and advocacy of high quality, affordable, accessible health care for the citizens of Michigan. A principal function of MAHP is to facilitate communication among member health plans, government, and the health care industry regarding health care issues of common concern. MAHP member health plans (Medicaid, Medicare, and private plans) are rated among the best in the nation, according to the independent 2010-2011 National Committee on Quality Assurance (NCQA) Health Insurance Plan Rankings.

One of the essential functions of MAHP member plans is to ensure health care dollars are being spent appropriately in Michigan. In fact, member plans are obligated under contracts with the State of Michigan and the federal government, and now under the Affordable Care Act, to research, investigate and cooperate with state and federal health care fraud units. Through their health care fraud investigation units, MAHP member plans have saved or recovered millions of dollars associated with health care fraud in this state.

This case presents an issue of critical interest to the MAHP because it addresses the Michigan Health Care False Claim Act (HCFCA) civil liability remedy for health care insurers. Specifically, this Court is called to examine the section of the HCFCA imposing liability on one who presents a false claim to a health care insurer. According to the HCFCA, one who presents a claim to a health care insurer for which that person knows he/she is not entitled to receive or who

presents a claim to a health insurer that contains a false statement, makes the presenter liable, "for the full amount of the benefit of payment made." (MCL 752.1009)

The ability of health care plans to combat fraud is critical, given health care fraud poses significant costs to the U.S. health care system. The Court of Appeals' recognition of a civil liability remedy in the HCFCA is of significant importance to health care insurers because having such a remedy is an essential tool for Michigan insurers in their battle against the growing and costly problem of health care fraud.

MAHP submits this brief to demonstrate that the Court of Appeals' recognition of a civil liability remedy under the HCFCA is not just of importance to the parties involved, but also to health care plans in their continuing efforts to fight health care fraud and its pervasive and costly drain on our State's health care system.

ARGUMENT

THE HEALTH CARE FALSE CLAIM ACT PROVIDES AN EXPRESS CAUSE OF ACTION FOR HEALTH CARE INSURERS WHEN THOSE ENTITIES ARE PRESENTED WITH CLAIMS OR HAVE PAID CLAIMS THAT THE CLAIMANT KNEW THAT IT WAS NOT ENTITLED TO RECEIVE.

Introduction

This Court is presented with the issue of whether the Health Care False Claim Act (HCFCA) provides an express cause of action to health care insurers who have paid or are presented with claims that the claimant knows that it was not entitled to receive. As the Court of Appeals ruled, the civil cause of action language of the HCFCA is broadly stated. This broad language provides health care insurers a valuable tool to combat health care fraud in Michigan. Nonetheless, defendants have appealed this ruling, asking this Court to limit the HCFCA, although defendants' proposed limitation is contrary to the plain meaning of the statute. The Michigan Association of Health Plans (MAHP) submits that the proposed limitation, that the HCFCA should not apply to conduct that is prohibited in the Public Health Code, is a limitation that the Legislature never intended. Further, MAHP contends that case law does not support the imposition of such a limitation of the HCFCA. Most importantly, such a limited interpretation of the HCFCA would unduly limit this valuable tool, creating circumstances where health care insurers whom are defrauded are without the civil liability remedy in the HCFCA. This result would not honor the legislative intent. Removing the deterrent of civil liability would drive up health costs and compromise the integrity of the Michigan health care system.

A. Background and Procedure

At issue in this case is the plaintiffs' claim that defendant pharmacies violated MCL 333.17755(2), a provision in the Public Health Code that requires that if a pharmacist dispenses a generically equivalent drug product, that pharmacist shall "pass on" the savings in cost to the purchaser or to the third party payment source. MCL 333.17755(2). Plaintiffs in Appellate Docket No. 299998, the City of Lansing, Dickinson Press, Inc., and Scott Murphy alleged, in part, that the defendant pharmacies' repeated violations of Section 333.17755(2) constituted a violation of the HCFCA. The trial court dismissed the plaintiffs' complaint.

In reversing the trial court on this issue, the Appellate Court ruled that the HCFCA creates a private cause of action for the plaintiff health insurers. (Slip op at 12) In so ruling, the Court of Appeals relied primarily on the plain language of the statute. HCFCA, MCL 752.1009 provides that:

> A person who receives a health care benefit from a health care corporation or health care insurer which the person knows he or she is not entitled to receive or be paid; or a person who knowingly presents or causes to be presented a claim which contains a false statement, *shall be liable to the health care corporation or insurer for the full amount of the benefit or payment made*. MCL 752.1009 (emphasis added)

Specifically, the Appellate Court reasoned that the reading of the plain meaning of the statute leads to the conclusion that one who receives a benefit from a health care insurer that they are not entitled to receive, or one who knowingly presents a false claim to a health care insurer is liable for the full amount of payment made. (Slip op at 12) The court further examined the HCFCA definition of "false" as "wholly or partially untrue or deceptive." (Slip

op at 19) After applying this definition to the alleged conduct in this case, the court concluded that the plaintiffs had alleged false claims as defined in the HCFCA. (Slip op at 20)

B. The defendants' exclusive remedy argument must be rejected because it is unsubstantiated by the plain meaning of the statute or case law, and is also waived.

The defendants urge this Court to carve out an exception to the plain meaning of the statute and overturn the decision of the Court of Appeals. According to the defendants, violations of MCL 333.17755(2) may only be addressed by remedies provided in that statute. However, this proposed "carve out" would be contrary to established principles of statutory judicial review. First, such an interpretation of the HCFCA would be clearly contrary to the plain language of the HCFCA. Second, this argument must fail because the case law that the defendants cite in support of their exclusive remedy argument does not apply to negate remedies contained in a different statute. Third, the defendants' exclusive remedy argument should be rejected because it is raised for the first time in this Court, and is therefore waived.

Now, for the first time, the defendants contend that because the allegation in the present case is that defendants dispensed prescription drugs in violation of MCL 333.17755(2), that the only remedy that could be sought is the administrative remedy provided in MCL 333.16221(1); MAC R 338.497. Defendants contend that because there is no remedy for civil damages in MCL 333.17755(2), the plaintiffs are left without a civil remedy at all, even the one provided under the HCFCA. (Defendants Brief at 14) The defendants' proposed "carve out" of the HCFCA is unsubstantiated by the plain language of the statute. Rather, the plain language establishes that the civil liability for violation of the statute exists regardless of the availability of other statutory remedies. Had the Legislature intended to limit the scope of the HCFCA, it

could have done so by including limiting language in the statute. It has included such limitations in other statutes. See, e.g. MCL 418.354(14) ("This section does not apply to any payments received under a disability pension plan provided by the same employer"); see also MCL 712A.23 ("This section does not apply to a criminal conviction under this statute.") Because the HCFCA does not include any such limiting language, excepting the conduct in the present case or any other statutorily prohibited conduct from the statute, no such limitations should be "read into" the HCFCA.

The defendant's citation to case law is similarly unconvincing that the plaintiffs here should not have a remedy under the HCFCA. None of the cases that the defendant pharmacies cite for the principle that the lack of a civil remedy under one statute precludes application of a separate express cause of action under a different statute. *City of South Haven v. Van Buren County Bd of Comm'rs,* 478 Mich 518; 734 NW2d 533 (2007) (where a party seek[s] a remedy under...[an] act, [that party] is confined to the remedy conferred thereby.); *Conboy v. ATT Corp,* 241 F3d 242 (Ca 2 2001) (the Court ruled that the lower court had correctly dismissed the claim where the plaintiff had failed to allege a violation of the relevant anti-deception statute.)

Finally, because the exclusive remedy argument has not been raised previously, it is waived. *Butcher v. Department of* Treasury, 425 Mich 262, 276, 389 NW2d 412 (1986). The defendants have abandoned an argument that they made unsuccessfully in the Court of Appeals, that HCFCA is a penal statute, and thus does not provide a civil remedy. In rejecting the defendants' argument, the Court of Appeals ruled that the broad language of the statute which contemplates civil liability, belies the defendants' claim that the statute is penal. (Slip op at 12) Now, for the first time, the defendants raise the exclusive remedy argument. Because, as explained above, the

exclusive remedy argument is contrary to the plain meaning of the statute, and also unsupported by Michigan case law, the exclusive remedy argument also must fail.

C. The exception to the HCFCA that the Defendant pharmacies propose would lead to significant weakening of the HCFCA as a tool to combat health care fraud in Michigan.

The Legislative wisdom of drafting the HCFCA without carving out exceptions is clear in that the statute is a powerful tool for use by health care insurers to combat fraud. "Health care fraud is a pervasive and costly drain on the U.S. health care system," according to the The National Health Care Anti-Fraud Association (NHCAA).[1] The FBI estimates that financial losses resulting from health fraud account for a staggering 3 to 10 percent of the total annual health care expenditures in this country, somewhere between $70 billion and $234 billion.[2]

As the NHCAA has observed, the devastating economic impact of health care fraud falls on employers, private insurers, individuals, and government:

> The enormous costs of health care fraud are borne by all Americans. Whether an individual has employer-sponsored health insurance, purchases his own insurance, or pays taxes to fund government health care programs, health care fraud inevitably translates into higher premiums and out-of-pocket expenses for consumers, as well as reduced benefits for consumers.
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> For employers, health care fraud increases the cost of purchasing health care for their employees, which in turn drives up the cost of doing business.
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[1] *Combating Health Care Fraud in a Post-Reform World: Seven Guiding Principles for Policymakers, A White Paper Presented by The National Health Care Anti-Fraud Association October 6, 2010.* Available: http://www.nhcaa.org/resources/government-affairs/nhcaa-white-papers.aspx

[2] U.S. Federal Bureau of Investigation, *Financial Crimes Report to the Public, Fiscal Year 2007.* Available: http://www.fbi.gov/stats-services/publications/fcs_report2007

> For governments, health care fraud translates into higher taxes, fewer benefits and increased budgetary problems."3"/>4"

In short, health care fraud poses a serious threat that all of us pay for through higher health insurance premiums, increased taxes to pay for social service programs, or in the form of reduction of health care services. The FBI has succinctly stated the extent of the problem: "[Health care fraud] increases healthcare costs for everyone. It is as dangerous as identity theft. Fraud has left many thousands of people injured. * * * Keeping America's health care system free from fraud requires active participation from each of us."4

In addition, because of the projected rise in health care costs, the cost of health care fraud is projected to keep rising as well.5"/> 5 In short, the massive losses from health care fraud will continue to grow which only underscores the need to have every weapon available to combat such fraud.

Although the Legislature crafted a powerful tool to combat fraud in its drafting of the HCFCA, and the Court of Appeals interpreted the statute according to its plain meaning, one of the *amici* arguments in support of the granting of the petition for leave to appeal in this case contends that the affirmation of the Court of Appeals' interpretation of the HCFCA would lead to liability for fraud under HCFCA for conduct that amounts to a "technical" or "innocent" violations of the Public Health Code. Such a concern is simply unfounded. As previously

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3"/>3 *Combating Health Care Fraud in a Post-Reform World: Seven Guiding Principles for Policymakers, A White Paper Presented by The National Health Care Anti-Fraud Association October 6, 2010.* Available: http://nhcaa.org/resources/government-affairs/nhcaa-white-papers.aspx

4"/>4 U.S. Federal Bureau of Investigation, *Financial Crimes Report to the Public, Fiscal Year 2003.* Available: http://www.fbi.gov/stats-services/publications/fcs_report2006

5"/>5 U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, *National Health Care Ecpenditure Projections*, Table 1. Available: http://www.cms.hhs.gov/NationalHealthExpendData/downloads/proj2008.pdf

discussed, the HCFCA requires proof of a false claim, and defines "false" as "wholly or partially untrue or deceptive." MCL 752.1002(c); MCL 400.602(d). "Deceptive", in turn, is defined, in part, as the failure to reveal a material fact leading to the belief that the state of affair is something other than it actually is. MCL 752.1002(b) In including this *scienter* requirement, the Legislature has provided a valuable safeguard against the concern that the *amici* express - that the statute be unduly extended to create liability for innocent conduct. As the plain language of the statute requires, the Court of Appeals did conduct an analysis of the facts presented to determine whether the alleged conduct in this case was deceptive, and determined that it was. (Slip op at 20)

The HCFA provides a valuable weapon for health insurers to fight health care fraud in Michigan, and a health insurer's private cause of action under the HCFCA is core to its fraud prevention and fighting purpose. The preamble to the HCFCA provides, in pertinent part, that the Act is "to prohibit fraud in the obtaining of benefits or payment in connection with health care coverage and insurance" and "to provide for ... certain civil actions." Preamble to 1984 PA 323 (HFCFA). In short, one of the underlying purposes of the HCFCA is to prevent fraud against health care insurers and to provide a civil action to health insurers who have been defrauded. This civil remedy provision provides an essential deterrent to health care fraud in this State where perpetrators may, in addition to criminal penalties, also face civil liability exposure for fraud committed against a health insurer. The civil remedy provision also provides health insurers with an economic incentive to investigate and pursue suspected fraud. Both the deterrent effect and economic incentive to investigate fraud that the civil remedy provides are essential to the fulfillment of the HCFCA's fraud prevention and protection purpose.

The defendants' "exclusive remedy" argument, if adopted, would remove a key deterrent to health care fraud in Michigan. For example, if the exclusive remedy argument prevails, a physician would be immunized from civil liability under the HCFCA for submitting a claim to a health insurer for services never rendered, because the physician is subject to administrative action under the Public Health Code. With no private right of action under the HCFCA in such scenario, a health insurer would have no standing to seek civil redress for a violation of the HCFCA in a court of law. And wrongly, anyone who might violate the HCFCA would be shielded from paying damages if that person is regulated somewhere and in some way by the Public Health Code. Such a protection from civil liability exposure would be totally inconsistent with the HCFCA's "broad and mandatory statement of civil liability" as the Court of Appeals observed on page 20 of its opinion.

Narrowing the scope of liability under the HCFCA would be contrary its statutory language and Michigan case law. Additionally, such an interpretation would be inconsistent with the HCFCA fraud protection purpose. For the reasons discussed, preservation of the private cause of action for health insurers under the HCFCA is essential to help address the continuing and growing problem of health care fraud and, as such, serves as an important tool for Michigan health insurers to seek redress for being defrauded.

CONCLUSION

The Michigan Association of Health Plans respectfully requests this Court to affirm the Court of Appeals' Ruling that the Health Care False Claim Act provides an express cause of action to health care insurers that are defrauded.

Respectfully Submitted,

Lori L. Mosby (P74691)
2100 Pine Nook Court NE
Grand Rapids, MI
49525
616.558.2858

Attorney for Amicus Curiae
Michigan Association of Health Plans