

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.;
KSMART 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.

**AMICUS CURIAE BRIEF OF
THE MICHIGAN PHARMACISTS
ASSOCIATION**

Supreme Court No. 146791

CITY OF LANSING; and DICKINSON
PRESS INC., individually and on behalf of
all others similarly situated,

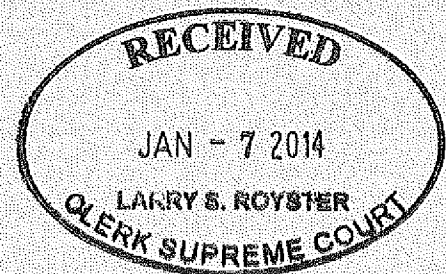
Plaintiffs/Appellees/Cross-Appellants,

Supreme Court No. 146792

v

RITE AID OF MICHIGAN, INC.; and
PERRY DRUG STORES, INC.,

Defendants/Appellants/Cross-Appellees.



CITY OF LANSING; DICKINSON PRESS INC.; and SCOTT MURPHY, individually and on behalf of all others similarly situated,

Plaintiffs/Appellees/Cross-Appellants,

Supreme Court No. 146793

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.;
K MART 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/Cross-Appellees.

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)
Attorneys for Defendants/Appellants CVS
500 Woodward Avenue, Suite 2700
Detroit, MI 48226-3489
(313) 234-7100

FOLEY & LARDNER LLP

Robert H. Griffith
Attorneys for Defendants/Appellants CVS
321 N. Clark Street, Suite 2800
Chicago, IL 60654
(312) 832-4500

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

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

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

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

FAEGRE & BENSON LLP
Wendy J. Wildung
Craig S Coleman
Attorneys for Defendant/Appellants Target
220 Wells Fargo Center
Minneapolis, MN 55402
(612) 766-6981

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

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
Todd Alan Holleman (P57699)
Clifford W. Taylor (P21293)
Attorneys for Defendants/Appellants
Rite Aid and Perry Drug
150 West Jefferson Avenue, Suite 2500
Detroit, MI 48226-4415
(313) 496-7668

DICKINSON WRIGHT PLLC
Edward P. Perdue (P55888)
Dennis C. Kolenda (P16129)
Attorneys for Defendant/Appellants Target
200 Ottawa Avenue, NW, Suite 900
Grand Rapids, MI 49503
(616) 458-1300

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

INTRODUCTION.....	1
ARGUMENT	2
CONCLUSION.....	5

TABLE OF AUTHORITIES

Statutes

42 C.F.R §1001.1-1001.901	3
42 U.S.C. §1320a-7(b).....	3
42 U.S.C. §1320a-7(b)(7).....	3
42 U.S.C. §1320a-7a(a)(1)(B).....	3
42 U.S.C. §1320a-7a(a)(10)	3
42 U.S.C. §1320a-7b(a).....	3

INTRODUCTION

The Michigan Pharmacists Association (“MPA”) submits this Amicus Curiae Brief in support of the defendants’ position.

The MPA does not seek to revisit the legal arguments addressed by the parties but to bring to the Court’s attention some possible implications of this case and the potentially adverse impact for patients throughout the state. This case not only impacts large national pharmacy chains, but also traditional local pharmacists in various settings throughout Michigan. Because of the impact on pharmacists throughout the State, there is also impact on the patients who need and rely on their pharmacists for information, advice, and pharmacy services.

Formed in 1883, the MPA is the organization of pharmacy professionals in Michigan, providing professional development, information and practice innovations. The MPA is not a trade organization and does not represent individual pharmacies, but rather the interest of the individual pharmacists. Through the active involvement of its members, the MPA helps develop health policy and improve patient care, health, and safety.

The MPA currently has over 3,000 pharmacist members and over 450 associate members. It represents pharmacists working in diverse settings, from hospitals and hospice/long-term care facilities, to national retail chain pharmacies and local independent pharmacies.

ARGUMENT

The lawsuits at issue essentially seek to impose retroactive liability for generic prescription drug orders filled by pharmacists, and further, to find that these pharmacists acted deceptively – fraudulently – in those transactions. Plaintiffs in effect seek a determination that these pharmacists be unfairly and improperly labeled as having engaged in fraudulent activity, despite the absence of any intent to deceive or false statement, and, as the pharmacy defendants have pointed out, no legitimate statutory basis for doing so. The pharmacists simply dispensed generic prescription drugs as ordered by physicians and pursuant to contracts they held with various health plans and insurance companies. It is the pharmacy benefit managers for the health plans that are responsible for the development of the medication formularies (rules) that dictate to the pharmacy the amount the pharmacy will receive on the transaction and whether to dispense a brand drug or substitute a generic, and, if a substitution is called for, which generic to substitute.

Should plaintiffs' effort succeed -- should the simple act of dispensing of generic prescription drugs pursuant to the terms of agreed upon contracts without any intention to deceive and without any actual false statement being made nevertheless be found to constitute false and deceptive acts as plaintiffs have urged -- the results could have serious adverse consequences, not only for pharmacists throughout Michigan, but for the general public as well.

Federal law provides that an individual or entity that has engaged in enumerated activities, including fraud, may be excluded from participating in any Federal or State

health care program. See, 42 U.S.C. §1320a-7(b); 42 C.F.R. §1001.1-1001.901. Specifically, 42 U.S.C. §1320a-7(b)(7) authorizes exclusion of an individual or entity that has committed any act of fraud described in §1320a-7a or §1320a-7b, without any criminal conviction for fraud. These acts warranting exclusion include: improperly filing a claim for an item or service where “the person knows or should know the claim is false or fraudulent” (42 U.S.C. §1320a-7a(a)(1)(B)); knowingly failing to report and return any overpayment (42 U.S.C. §1320a-7a(a)(10)); and any false representations in applying for or determining rights to payment under a Federal health care program (42 U.S.C. §1320a-7b(a)).

The consequences of being placed on the exclusion list are dire. No payment may be made by any federal or state program for any item or service furnished, ordered or prescribed by an excluded individual or entity. That prohibition applies not only to the excluded individual but to any business that employs or contracts with the excluded individual and to any hospital or other provider or supplier where the excluded person provides services. There are serious fines and penalties for health care businesses that employ an excluded individual. An individual or entity may be added to the exclusion list by the Department of Health and Human Services Office of Inspector General (OIG), the General Services Administration (GSA) or on the state level, through the Michigan Department of Community Health. These rules apply to pharmacists.

To find, as plaintiffs in effect claim, that the actions of Michigan pharmacists and pharmacies were false and deceptive – that they acted fraudulently – would subject them to being put on the exclusion list and thereby preclude them from participating in any

Federal or Michigan health care program. Once a pharmacist is banned, that pharmacist is essentially out of business. A judicial determination of fraud certainly could result in a person or entity being put on the exclusion list.

Plaintiffs' sweeping interpretation of the Michigan statute at issue could potentially result in a finding that many Michigan pharmacists and pharmacies have violated the statute, and thus committed false and deceptive acts, without having made any false statements, without any knowledge of the violation, and without any intent to deceive. Those pharmacists and pharmacies would face the real possibility of being added to the exclusion list and being banned from participating in Medicare, Medicaid, and virtually any other health insurance plan.

Should that occur, it could leave Michigan with few pharmacists or pharmacies, since as a practical matter, it would be virtually impossible to maintain a practice without any Medicare or Medicaid or health plan business. Aside from the inability of these pharmacists to work, and aside from the economic impact on them, the public would be adversely affected. Pharmacists do not simply dispense prescriptions. Patients seek and count on their advice on many matters – to advise them of potentially dangerous drug interactions between their various medications and potential side effects from their newly prescribed medication, as well as for advice on the best over-the-counter products to treat their ailments. In many instances, the pharmacist is the individual's "first responder" for health care and medication information. The pharmacist is often the knowledgeable person most available and accessible to patients, often a person in the local community

who they know and trust. That vital link in the patient's health care is potentially at risk here.

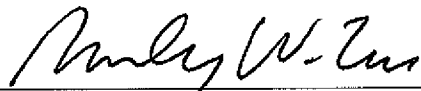
In short, should the generic drug prescription transactions involved be labeled as false and deceptive, there could be detrimental consequences not merely for the affected pharmacists, but for the general public.

CONCLUSION

It is for these reasons that we urge this Court to rule in favor of the defendants.

Respectfully submitted,

BARRIS, SOTT, DENN & DRIKER, PLLC

By: 

Morley Witus (P30895)

Attorneys for The Michigan Pharmacists
Association

211 West Fort Street, 15th Floor

Detroit, MI 48226

(313) 965-9725

Jesse C. Vivian (P36312)

General Counsel for The Michigan Pharmacists
Association

408 Kalamazoo Plaza

Lansing, MI 48933

(517) 484-1466

Dated: January 7, 2014

435125.4