

FILED

JAN 19 2023

INSURANCE COMMISSIONER
OKLAHOMA

Case No. 22-0419-DIS

Respondent.

COMES NOW Kelli Price and Dilan Lyda, Counsel for the Oklahoma Insurance Department (the “Department”), and Angela Ables, attorney for Respondent, Caremark, L.L.C. (also known as “CVS/Caremark” and “Caremark”), who stipulate and agree to the following findings of fact and conclusions of law;

1. Glen Mulready is the Insurance Commissioner of the State of Oklahoma and as such is charged with the duty of administering and enforcing all provisions of the Oklahoma Insurance Code, 36 O.S. §§ 101 *et seq.*, as well as the Third-Party Prescription Act, 15 O.S. §§ 781 *et seq.*; the Pharmacy Audit Integrity Act, 59 O.S. §§ 356 *et seq.*; and 59 O.S. §§ 357-360. Further, the Insurance Commissioner is charged with providing for the receipt and processing of complaints alleging violations of the Patient's Right to Pharmacy Choice Act, the Pharmacy Audit Integrity Act, and 59 O.S. §§ 357-360.

2. Caremark has engaged in the business of insurance as defined in 36 O.S. §§ 404 and 6103.2, and transacting insurance as defined in 36 O.S. § 105(4), in the State of Oklahoma. Caremark is a Pharmacy Benefits Manager or “PBM,” as defined in 59 O.S. §§ 356.1 and

357(6), and has engaged in the business of pharmacy benefits management, as defined and described in 59 O.S. § 357(6) and (7), in the State of Oklahoma. Caremark holds license #44201226 issued by the Insurance Department to engage in the business of pharmacy benefits management in Oklahoma, and Caremark's address of record is 750 W. John Carpenter Freeway, Mail Code 500, Irving, Texas 75039. Caremark is contracted with many health benefits plans and Oklahoma pharmacies to provide pharmacy benefits management services related to business transactions and the adjudication of claims made within Oklahoma.

3. The Department states that:
 - a. Pursuant to 36 O.S. § 6965(A), the Insurance Commissioner shall have power and authority to examine and investigate the affairs of every PBM engaged in pharmacy benefits management in this state to determine whether such entity is compliant with the Patient's Right to Pharmacy Choice Act.
 - b. Pursuant to 36 O.S. § 6961(C), a PBM shall not require patients to use pharmacies that are directly or indirectly owned by the pharmacy benefits manager, including all regular prescriptions, refills or specialty drugs regardless of day supply.
 - c. Pursuant to 36 O.S. § 6961(D), a PBM shall not in any manner on any material, including but not limited to mail and ID cards, include the name of any pharmacy, hospital or other providers unless it specifically lists all pharmacies, hospitals and providers participating in the preferred and nonpreferred pharmacy and health networks.
 - d. Pursuant to 36 O.S. § 6963(D), a PBM shall not restrict an individual's choice of in-network provider for prescription drugs.

- e. Pursuant to 36 O.S. § 6963(E), an individual's choice of in-network provider may include a retail pharmacy or a mail-order pharmacy. A health insurer or PBM shall not restrict such choice. Such health insurer or PBM shall not require or incentivize using any discounts in cost-sharing or a reduction in copay or the number of copays to individuals to receive prescription drugs from an individual's choice of in-network pharmacy.

RECITALS

4. The Department contends that during a time period beginning on or about January 1, 2022, through February 23, 2022, Caremark disseminated at least TWO HUNDRED NINETEEN (219) letters to Oklahoma residents enrolled in self-funded health plans served by Caremark requiring those members to fill their maintenance drug prescriptions either at CVS pharmacies or by Caremark mail. The Department further contends that these letters notified the members that if they choose to fill their prescriptions at their current pharmacy, the medications would not be covered, and the member would be required to pay one-hundred percent (100%) of the cost. Specifically, the Department contends that:

- a. the dissemination of the above-referenced letters to patients (also known in this context as “members” or “covered individuals”) violated 36 O.S. § 6961(C) approximately two hundred and nineteen (219) times by requiring patients to use pharmacies that are directly or indirectly owned by or affiliated with Caremark;
- b. the dissemination of the above-referenced letters violated 36 O.S. § 6961(D) approximately two hundred and nineteen (219) times by including in the said correspondence the name of a pharmacy while failing to also specifically list all pharmacies participating in the preferred and nonpreferred pharmacy networks;

c. Caremark has violated 36 O.S. § 6963(D) approximately two hundred and nineteen (219) times by restricting patients' choice of in-network providers for prescription drugs; and

d. Caremark has violated 36 O.S. § 6963(E) approximately two hundred and nineteen (219) times by restricting patients' choice of in-network providers and by using discounts in cost-sharing or reductions in copay or the number of copays to require or incentivize individuals to receive prescription drugs from CVS retail pharmacies or mail order, rather than from their choice of in-network pharmacy.

5. The Department contends that beginning on or about September 1, 2021, through September 15, 2022, Caremark denied at least nine (9) prescription claims submitted by Oklahoma pharmacies on behalf of member patients, whereupon, and in summary, Caremark notified such pharmacies that the prescription claims were being denied in accordance with the member plan restrictions and/or that the members were required to have their prescriptions filled at other specific pharmacies, pharmacy chains, or mail order.

6. After having received and reviewed responses and documentation provided by Caremark in connection with OID Complaints numbered 92235, 92237, 92232, 92091, 92249, 92267, 92268, 93114, and 94895 and the Department's investigation of the aforementioned nine (9) prescription claims submitted by Oklahoma pharmacies on behalf of member patients, the Department contends that by and through its conduct described in paragraph numbered five (5) above, Caremark has violated the following provisions of the Patient's Right to Pharmacy Choice Act:

a. 36 O.S. § 6961(C) by requiring patients to use pharmacies that are directly or indirectly owned by Caremark;

b. 36 O.S. § 6961(D) by including in its correspondence to covered individuals in Oklahoma the name of a pharmacy while failing to also specifically list all pharmacies, hospitals, and providers participating in the preferred and nonpreferred pharmacy and health networks;

c. 36 O.S. § 6963(D) by restricting patients' choice of in-network providers for prescription drugs; and

d. 36 O.S. § 6963(E) by restricting patients' choice of in-network providers and by using discounts in cost-sharing, reductions in copay or the number of copays, to require or incentivize individuals to receive prescription drugs from their choice of in-network pharmacy.

7. Caremark asserts that the period utilized by the Department and during which the relevant member letters were transmitted pre-dates a final determination by the Department that it would apply the relevant statutes to out-of-state self-funded plans and that Caremark was in constant communication with the Department seeking guidance and a written decision on this issue to fully comply with Oklahoma law.

8. Caremark further reiterates its opinion that federal law permits Caremark's actions related to out-of-state and in-state plans governed by federal law and preempts Oklahoma's law relative to the complaint filed herein.

9. Caremark asserts that each letter to its contracted members should not constitute a separate offense of the statutes cited by the Department as no Oklahoma statute so mandates such an approach.

10. Caremark asserts that this Consent Agreement and Order is neither an admission of liability or any fact by Caremark nor a concession by Caremark regarding the applicability of

36 O.S. §§ 6961(C), 6961(D), 6963(D), and 6963(E) to self-funded, federally-regulated plans.

Caremark denies each and all the claims and allegations of wrongdoing asserted by the

Department in this matter.

11. This Consent Agreement and Order is not a concession by the Department that its allegations of violations are not well founded.

12. Caremark and the Department have determined that it is preferable to resolve the Department's claims through a cooperative and mutually agreeable Consent Agreement and Order. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above-alleged violations, and in consideration of the mutual promises and obligations of this Consent Agreement and Order, the Parties agree, and covenant as follows:

TERMS AND CONDITIONS

13. The "Covered Conduct" referred to in this Consent Agreement and Order includes any action and inaction, correspondence and lack of correspondence, information provided, and lack of information provided, by and from Caremark related to:

a. at least TWO HUNDRED NINETEEN (219) letters, which are substantially similar to EXHIBIT A (attached hereto and incorporated herein by reference), and which were disseminated to Oklahoma members of self-funded plans during a time period beginning on or about January 1, 2022, through February 23, 2022, requiring those members to fill their maintenance drug prescriptions either at CVS Pharmacies or by mail; and

b. at least NINE (9) prescription claims, submitted by Oklahoma pharmacies on behalf of members during a time period beginning on or about September 1, 2021, through September 15, 2022, as cited and described in paragraph numbered five (5)

above and as addressed in complaints received by the Department against Caremark, numbered 92235, 92237, 92232, 92091, 92249, 92267, 92268, 93114, and 94895.

14. For purposes of this Consent Agreement and Order, “Maintenance Choice plan design” refers to a plan design selected by Caremark’s clients that allows members to refill their long-term (maintenance) medications in 90-day supply increments, and that further requires prescriptions for such medication be either delivered by mail through Caremark’s mail-order pharmacy, or filled at a CVS pharmacy.

15. The date upon which this Consent Agreement and Order is effective (the “Effective Date”) is the date of signature of the Chairman of the Patient’s Right to Pharmacy Choice Commission. Facsimiles and electronic transmissions of signatures shall constitute acceptable, binding signatures for purposes of this Consent Agreement and Order.

16. Conditioned upon Caremark’s full payment of the civil fines assessed and ordered herein, and conditioned upon Caremark’s full compliance with all other agreements and Orders issued herein, the Department releases Caremark from any civil or administrative monetary claim the Department otherwise has pertaining to the Covered Conduct (as specifically addressed herein) under the Patient’s Right to Pharmacy Choice Act, including but not limited to 36 O.S. §§ 6961(C), 6961(D), 6963(D), and 6963(E); the Pharmacy Audit Integrity Act; 59 O.S. §§ 357 through 360; and any common law theories, including but not limited to payment by mistake, unjust enrichment, and fraud.

17. Caremark agrees that within THIRTY (30) days of this Consent Agreement and Order, Caremark shall work with its clients to remove the Maintenance Choice plan design in its current form for members of ERISA self-funded health plans who are domiciled in Oklahoma.

18. The Parties agree that no later than October 30, 2023, Caremark shall verify to the Department it has taken actions in compliance and accordance with paragraph numbered seventeen (17) herein above or that it needs an extension for a period that is mutually agreeable to both parties.

19. The Department specifically reserves its right to pursue, through separate action, any civil or administrative remedy or monetary claim the Department has pertaining to any complaint, investigation, evaluation, examination or review against Caremark for conduct by Caremark to the extent that conduct is not specifically addressed herein or included as Covered Conduct.

20. Caremark reserves the right to continue to object to the application of the Oklahoma Patient's Right to Pharmacy Choice Act to ERISA and other self-funded plans. The Agreement set forth herein does not invalidate that objection or waive Caremark's ability to pursue any challenges regarding the application of the Act. In the event that a court of competent jurisdiction deems any provision of Oklahoma law at issue herein unenforceable as it pertains to a portion or portions of the Covered Conduct, this Consent Agreement and Order shall not obligate Caremark to continue to conform its conduct to be in compliance with such provision(s), except that Caremark shall otherwise comply with and abide by all other provisions and orders of this Consent Agreement and Order, and Caremark may resume any conduct that is not validly prohibited by law.

21. This Consent Agreement and Order is intended to be for the benefit of the Parties only.

22. Each Party shall bear its own legal expenses and other costs incurred in connection with this matter, including the preparation and performance of this Consent Agreement and Order.

23. Each Party and signatory to this Consent Agreement and Order represents that it freely and voluntarily enters into this Consent Agreement and Order without any degree of duress or compulsion.

24. This Consent Agreement and Order is governed by the laws of the State of Oklahoma. Except as otherwise provided herein, the jurisdiction and venue for any dispute relating to this Consent Agreement and Order is the District Court of Oklahoma County.

25. For purposes of construing this Consent Agreement and Order, this Consent Agreement and Order shall be deemed to have been drafted by all Parties in the above-captioned case and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

26. This Consent Agreement and Order constitutes the complete agreement between both Parties. This Consent Agreement and Order may not be amended except by written consent of the Parties and approval of the Patient's Right to Pharmacy Choice Commission.

27. This Consent Agreement and Order may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Consent Agreement and Order.

28. This Consent Agreement and Order is binding on Caremark's subsidiaries, successors, transferees, heirs, and assigns.

29. This Consent Agreement and Order is subject to the Oklahoma Open Records Act, 51 O.S. § 24.A.1 *et seq.*

30. Caremark has been apprised of its rights, including the right to a public hearing, and has knowingly and freely waived this right, and enters into this Consent Agreement and Order.

31. Notwithstanding the releases given in paragraph sixteen (16) of this Consent Agreement and Order, or any other term of this Consent Agreement and Order, the Commissioner has no authority over the following claims:

- a. Any liability arising under Okla. Stat. tit. 68, Revenue and Taxation (the Oklahoma Tax Code);
- b. Except as explicitly stated in this Agreement, any administrative liability, including mandatory or permissive exclusion, from federal or state health care programs;
- c. Any liability to the State of Oklahoma (or its agencies) for any conduct other than the Covered Conduct;
- d. Any liability based upon obligations created by this Agreement; and
- e. Any liability of individuals except as explicitly stated in this Agreement;

32. Caremark waives and shall not assert any defenses it may have to any administrative action and other judicial action relating to the Covered Conduct that may be based in whole or in part on a contention that the Excessive Fines Clause in the Eighth Amendment of the United States Constitution and Article II, § 9 of the Oklahoma Constitution, this Agreement bars a remedy sought in such administrative and other judicial action.

33. Caremark fully and finally releases the Department, its officers, agents, employees, and servants from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Caremark has asserted, could have asserted, or may assert

in the future against the Department, its officers, agents, employees, and servants, related to the Covered Conduct and the Department's investigation and prosecution thereof.

34. Caremark agrees not to submit, resubmit, charge, recharge, or cause to be submitted, charged, resubmitted or recharged to any Oklahoma pharmacist or pharmacy any charges or fees related to the Covered Conduct on the basis of the Department's investigation of the Covered Conduct.

35. Caremark agrees that it waives and shall not seek payment or reimbursement for any portion of the civil fine assessed herein below ("Settlement Amount") required to be paid under this Consent Agreement and Order from any pharmacists, pharmacies, providers, health care beneficiaries or their parents, sponsors, legally responsible individuals, or third-party payors that it could have charged under Oklahoma law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Patient's Right to Pharmacy Choice Commission finds clear and convincing evidence to support the following findings and orders:

- A. Caremark is considered a Pharmacy Benefits Manager under the Patient's Right to Pharmacy Choice Act, 36 O.S. § 6960 *et seq.*;
- B. By and through the Covered Conduct, as described in paragraph numbered thirteen (13) herein above, Caremark has violated:
 - a. 36 O.S. § 6961(C) at least two hundred and twenty-eight (228) times by requiring patients to use pharmacies that are directly or indirectly owned by Caremark;
 - b. 36 O.S. § 6961(D) at least two hundred and twenty-eight (228) times by including in its correspondence to covered individuals in Oklahoma, the name of a pharmacy

while failing to also specifically list all pharmacies, hospitals, and providers participating in the preferred and nonpreferred pharmacy and health networks;

- c. *36 O.S. § 6963(D)* at least two hundred and twenty-eight (228) times by restricting patients' choice of in-network providers for prescription drugs; and
- d. *36 O.S. § 6963(E)* at least two hundred and twenty-eight (228) times by restricting patients' choice of in-network providers and by using discounts in cost-sharing, reductions in copay or the number of copays, to require or incentivize individuals to receive prescription drugs from their choice of in-network pharmacy.

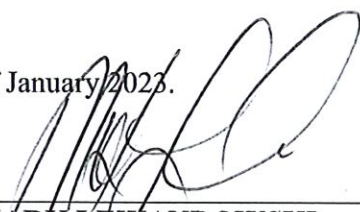
IT IS THEREFORE ORDERED by the Patient's Right to Pharmacy Choice Commission and **Agreed and Consented** to by Caremark and the Department that Caremark is assessed a civil fine in the total amount of FIVE HUNDRED SEVENTY THOUSAND FIVE HUNDRED DOLLARS and ZERO CENTS (\$570,500.00) to be paid by Caremark to the State of Oklahoma, through the Department, based on TWO HUNDRED TWENTY-EIGHT (228) counts of violations of 36 O.S. §§ 6961(C), 6961(D), 6963(D), and 6963(E) by Caremark at approximately a TWO THOUSAND FIVE HUNDRED DOLLARS AND ZERO CENTS (\$2,500.00) penalty per count. The payment shall reference Caremark's case number 22-0419-DIS and is due no later than thirty (30) days after the Effective Date of this Consent Agreement and Order.

IT IS FURTHER ORDERED by the Patient's Right to Pharmacy Choice Commission and **Agreed and Consented** to by Caremark and the Department that in the event a court of competent jurisdiction deems a provision of Oklahoma law at issue herein unenforceable as it pertains to a portion or portions of the Covered Conduct or the agreements and covenants included in paragraphs numbered seventeen (17) and eighteen (18) herein above, this Consent Agreement

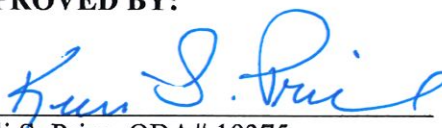
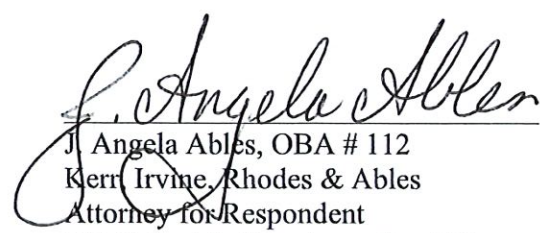
and Order shall not obligate Caremark to continue to conform its conduct to be in compliance with such provision(s), except that Caremark shall otherwise comply with and abide by all other provisions and orders of this Consent Agreement and Order, and Caremark may resume any conduct that is not validly prohibited by law.

IT IS SO ORDERED.

WITNESS My Hand this 19 day of January 2023.


**MARK LEWANDOWSKI,
CHAIRMAN OF THE PATIENT'S RIGHT
TO PHARMACY CHOICE COMMISSION
STATE OF OKLAHOMA**


APPROVED BY:


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9501 E. Shea Boulevard
Scottsdale, Arizona 85260

and Order shall not obligate Caremark to continue to conform its conduct to be in compliance with such provision(s), except that Caremark shall otherwise comply with and abide by all other provisions and orders of this Consent Agreement and Order, and Caremark may resume any conduct that is not validly prohibited by law.

IT IS SO ORDERED.

WITNESS My Hand this 19 day of January 2023.

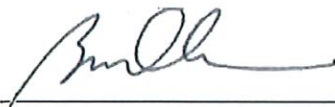


**MARK LEWANDOWSKI,
CHAIRMAN OF THE PATIENT'S RIGHT
TO PHARMACY CHOICE COMMISSION
STATE OF OKLAHOMA**

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CERTIFICATE OF MAILING

I, Sherry Standerfer, hereby certify that a true and correct copy of the above and foregoing *Consent Agreement and Order* was sent by regular mail, postage prepaid, on this 19th day of January 2023 to:

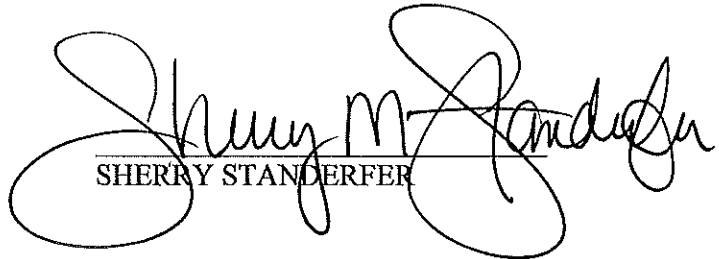
J. Angela Ables, OBA # 112
Kerr, Irvine, Rhodes & Ables
Attorney for Respondent
201 Robert S. Kerr Ave., Ste. 600
Oklahoma City, Oklahoma 73102

And that a copy was sent to:

National Association of Insurance Commissioners

And that a copy was hand-delivered to:

Tracy Keeley
Sarah Smith-Drozdo
PBM Compliance and Enforcement Division
Oklahoma Insurance Department


SHERRY STANDERFER



January 22, 2022

**Your action is needed for
medications you take regularly**

- 30-day refills are no longer covered
- To avoid paying full cost, change to 90-day refills

Dear [REDACTED]

When it comes to keeping medication costs affordable, where and how you fill your prescriptions matters. Working closely with your plan sponsor, we determined that filling prescriptions in 90-day supplies at CVS Pharmacy® or by mail is the most cost-effective way for you to get the medications you take regularly. This is now required by your plan.

If you choose to fill at your current pharmacy or in 30-day supplies, the medications will not be covered and you'll have to pay 100 percent of the cost.

You need 90-day prescription(s) for these medications:

6119888 LARIN FE

Choose where you want to get your prescriptions.

You can pick-up at any CVS Pharmacy or have them delivered by mail.

It is convenient to make the change.

1. **Call your doctor** to request new 90-day refills and tell them where to send your prescriptions

OR

2. **Go online to transfer your prescriptions.**

To fill at CVS Pharmacy, go to Caremark.com/MoveMyMeds

To choose to have your prescriptions delivered to your home by mail with no-cost shipping, go to Caremark.com/MailService

We are committed to helping you make the most out of your benefits. To avoid paying the full cost, change to 90-day refills at CVS Pharmacy or CVS Caremark® Mail Service Pharmacy. To find a nearby CVS Pharmacy and for answers about your cost benefits, visit Caremark.com.

Sincerely,
Your CVS Caremark Team

What you need to do...

1. **Call your doctor** and request a new 90-day prescription and send it to a local CVS Pharmacy or CVS Caremark Mail Service Pharmacy.

OR

2. **Go online** to transfer your prescriptions yourself.

to fill at CVS Pharmacy, go to Caremark.com/MoveMyMeds.

To choose delivery by mail with no-cost shipping, go to Caremark.com/MailService.

EXHIBIT A