

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

OHIO BUREAU OF WORKERS'
COMPENSATION, et al,

Plaintiffs,

v.

OPTUMRX ADMINISTRATIVE
SERVICES, LLC.

Defendant.

CASE NO. 19CV002263

JUDGE MICHAEL HOLBROOK

AMENDED COMPLAINT

(JURY DEMAND ENDORSED HEREON)

Plaintiffs, the Ohio Bureau of Workers Compensation (“BWC”), the Ohio Department of Administrative Services (“DAS”), and the State of Ohio (collectively, “Plaintiffs”) for their Amended Complaint against Defendant OptumRx Administrative Services, LLC (“OptumRx” or “Defendant”), allege as follows:

I. Nature of the Action

1. Plaintiffs bring this lawsuit to recover damages from OptumRx, which has been the pharmacy benefit manager (“PBM”) for BWC since 2009. OptumRx, formerly known as SXC Health Solutions, Inc., (“SXC”) was originally awarded the contract to perform PBM services (the “BWC Contract”) after submitting a proposal (the “2009 Proposal”) in response to the Request for Proposals issued by BWC and DAS on January 31, 2009 (the “2009 RFP”).

2. The BWC Contract is composed of a number of documents, including: (1) the 2009 RFP and its addendums; (2) all materials and documents incorporated by reference in the 2009 RFP; (3) SXC's proposal as amended, clarified, and accepted by BWC; (4) all materials and documents incorporated by reference in SXC's proposal; and (5) any related amendments issued subsequent to the contract award, including but not limited to the May 20, 2016 Agreement (the "May 2016 Agreement") referenced herein. The contract materials are attached as Exhibits 1.1 through 1.15 to this Amended Complaint.

3. Plaintiffs bring claims against OptumRx for breach of contract, including the breach of the covenant of good faith and fair dealing.

4. Plaintiffs allege that OptumRx breached a term of the BWC Contract requiring OptumRx to adjudicate and reimburse pharmacy claims for multi-source generic medications at the lesser of the following amounts: (1) the Maximum Allowable Cost or "MAC" set by OptumRx; (2) the Federal Upper Limit price set by the Centers for Medicare and Medicaid Services ("CMS"); (3) the Average Wholesale Price ("AWP") minus 9%; or (4) the pharmacy provider's Usual and Customary charge. As a result of OptumRx's breach of this pricing provision, Plaintiffs have been overcharged millions of dollars for multi-source generic drugs during the term of the BWC Contract.

5. Plaintiffs also allege that OptumRx breached a term of the BWC Contract that became effective on November 1, 2016 and required OptumRx to manage BWC's MAC pricing to achieve a MAC Effective Rate of AWP minus 73.5%, at a minimum. This contractual breach by OptumRx has caused Plaintiffs millions in direct monetary damages between November 1, 2016 and the date of this Complaint.

6. Plaintiffs further allege that OptumRx failed to meet its obligation under the BWC Contract to make timely adjustments to its MAC List, unreasonably delaying the addition of new drugs to the list and failing to update its pricing to account for decreases in generic drug costs, resulting in additional direct monetary damages to Plaintiffs.

7. Plaintiffs allege, moreover, that OptumRx's contractual breaches were committed in bad faith and were inconsistent with the Plaintiffs' justified expectations regarding OptumRx's conduct and its performance under the BWC Contract, and constitute breaches of the duty of good faith and fair dealing implied in every contract under Ohio law.

II. Parties

8. Plaintiff, the Ohio Bureau of Workers' Compensation, is a governmental agency of the State of Ohio and is the exclusive provider of workers' compensation insurance in the State of Ohio. With more than \$29 billion dollars in assets, BWC is the largest state-run insurance system in the United States, and its purpose is the protection of the citizens and employers of Ohio through the prevention, care, and management of workplace injuries and illnesses.

9. Plaintiff, The Ohio Department of Administrative Services, is a governmental department of the State of Ohio that provides centralized services, specialized support and innovative solutions to state agencies, boards and commissions, as well as to local governments and state universities. As part of the services it provides to governmental entities, DAS assists governmental entities with their procurement process for vendors.

10. Plaintiff, the State of Ohio, brings this action by and through its Attorney General, David A. Yost, in its sovereign capacity in order to protect the interests of the State of Ohio.

11. Defendant OptumRx is a Texas limited liability company registered to do business in the State of Ohio.

III. Jurisdiction and Venue

12. This Court has jurisdiction over the Plaintiffs' claims pursuant to R.C. 2305.01, which gives the Court of Common Pleas general jurisdiction over civil actions. This Court has personal jurisdiction over Defendant because OptumRx does business in Ohio and has the requisite minimum contacts with Ohio necessary to permit the Court to exercise jurisdiction.

13. Venue is proper in Franklin County, Ohio, pursuant to Ohio Civ. R. 3(B)(3).

14. Jurisdiction and venue are also proper because the terms of the BWC Contract provide that the parties will bring their disputes in the appropriate court in Franklin County, Ohio.

IV. Factual Background

OptumRx's Failure to Adhere to Pricing Provisions

15. The BWC Contract is a "pass-through" PBM contract. In a pass-through contract, the PBM warrants that it will receive *only* per-transaction administrative fees as compensation. The PBM is required to "pass-through" to the client (here, BWC) the costs of the drugs dispensed by pharmacies with no markup or "spread."

16. In a pass-through contract, pricing clauses are often written using "lesser of" logic, which means that the client will pay the *lesser of* one of several defined prices for a drug. In the case of most multi-source generic drugs, one of these options will generally be the PBM's MAC price, which is set by the PBM. PBMs consider their MAC pricing to be confidential and proprietary and do not share the methodology by which such pricing is set with their clients.

17. Due to the lack of transparency in MAC pricing, "lesser of" pricing clauses contain alternative pricing benchmarks to ensure that a PBM's MAC prices are competitive with the marketplace.

18. BWC’s reimbursement rates are set by Ohio Administrative Code § 4123-6-21. BWC’s reimbursement rates were included in the 2009 RFP, the BWC Contract, and they were also expressly readopted in each extension of the BWC Contract entered into between 2009 and 2016. They incorporate the above-described type of “lesser of” pricing logic for multi-source generic drugs, as follows:

BWC’s current rates of reimbursement are as follows:

Brand Name (Single Source) Drugs	The lesser of Blue Book Average Wholesale Price (AWP) - 9% + \$3.50 dispensing fee* or the provider’s Usual and Customary charge.
Generic (Multi-Source) Drugs	The lesser of its current Offeror’s proprietary Maximum Allowable Cost (MAC) for widely-available generic products, the Centers for Medicare and Medicaid (formerly Health Care Financing Administration) Federal Upper Limit (CMS FUL) + \$3.50 dispensing fee*, the Blue Book Average Wholesale Price (AWP) - 9% + \$3.50 dispensing fee*, or the provider’s Usual and Customary charge.

Exhibit 1.2, p. 105.

19. Pursuant to the BWC Contract’s pricing provision, when OptumRx determined how much to pay a pharmacy for a multi-source generic prescription dispensed to a BWC claimant, it was contractually obligated to pay the “lesser of” OptumRx’s MAC price, the Federal Upper Limit (FUL)¹, AWP minus 9%², or the pharmacy’s Usual and Customary charge.³ Determination of which was the “lesser of” pricing option was to occur on every claim such that, for example, in one instance the FUL could be the “lesser of” all other contractually provided reimbursement rate options for a claim and, in another instance, OptumRx’s MAC price could be the “lesser of” those options.

¹ The Federal Upper Limit is the highest amount at which federally-funded programs will reimburse for multi-source generic drugs.

² A \$3.50 dispensing fee is paid with all MAC, FUL and AWP based reimbursements.

³ Usual and Customary Charge is the price charged to the general public, including applicable discounts and discounted prices associated with loyalty programs. This price must be reported by pharmacies in accordance with 42 C.F.R §447.512(b).

20. OptumRx failed to follow the BWC Contract’s pricing terms to determine and apply the “lesser of” pricing option, and instead charged prices for multi-source generic drugs that, in many instances, significantly exceeded the Federal Upper Limit in effect at the relevant time, which was the “lesser of” the other reimbursement rate options.

21. The effects of OptumRx’s failure to employ the “lesser of” provisions in the BWC Contract can be demonstrated by looking at the amounts charged by OptumRx to BWC during several time periods for common multi-source generic drugs. During each period, the OptumRx MAC price charged to BWC exceeded the Federal Upper Limit, as follows:

Drug Name	Q1 2014 OptumRx MAC Price as Percentage of Federal Upper Limit	Q1 2015 OptumRx MAC Price as Percentage of Federal Upper Limit	Q1 2016 OptumRx MAC Price as Percentage of Federal Upper Limit	Q1 2017 OptumRx MAC Price as Percentage of Federal Upper Limit
Baclofen Tab 10mg	137.90%	335.24%	201.44%	172.83%
Baclofen Tab 20mg	106.38%	619.26%	287.50%	198.96%
Prednisone Tab 10mg	405.69%	405.69%	292.56%	177.61%
Tramadol HCL 50mg	158.33%	158.33%	118.56%	204.32%
Alprazolam Tab 1mg	180.79%	180.79%	149.12%	232.62%
Amitriptylin Tab 25mg	117.92%	267.99%	220.03%	126.47%
Ibuprofen Tab 800mg	177.27%	177.27%	175.89%	158.50%
Oxycodone Tab 5mg	144.23%	256.88%	176.93%	137.43%

22. As a result of OptumRx’s breach of its express duty to accurately adjudicate claims and correctly apply the “lesser-of” pricing provisions contained in the BWC Contract, Plaintiffs have been overcharged millions of dollars over the term of the BWC Contract.

OptumRx's Failure to Meet Discount Guarantees

23. In its response to the 2009 RFP, OptumRx represented that its basic MAC pricing, as used for various other state-managed plans, generated a Generic Effective Rate or “GER”, which is the average discount off Average Wholesale Price for all generic drugs utilized by BWC, of between AWP minus 74% and AWP minus 78%.⁴ Based on the drug utilization data provided by BWC as part of the RFP, OptumRx further represented that its MAC list would produce a “weighted generic effective rate of AWP – 80.88%.”⁵

24. After the BWC Contract was in place, BWC observed that the promised savings in prescription drug expenses had not materialized. In 2015, BWC retained a consultant to examine OptumRx's performance.

25. The results of the 2015 investigation showed that OptumRx was not meeting the discounts represented in the 2009 RFP and that BWC's Generic Effective Rate was falling considerably short of the 74% OptumRx represented as the minimum discount BWC would receive. OptumRx's failure to meet this obligation was costing Plaintiffs millions per year in additional health care costs.

26. BWC approached OptumRx with these concerns, threatening to terminate the BWC Contract on October 31, 2016 unless they were addressed. The threat of termination prompted OptumRx to finally address Plaintiffs' concerns and enter into an agreement on May 20, 2016.

27. The May 2016 Agreement states, among other things, that OptumRx was obligated, beginning November 1, 2016, to manage BWC's MAC list to a MAC Effective Rate of AWP

⁴ Exhibit 1.5, Attachment 10, Cost Summary Form, p. 5.

⁵ (*Id.*)

minus 74%.⁶ In exchange for this and other concessions, OptumRx’s administrative fee was increased dramatically, by nearly 300%, and the BWC Contract was extended to October 31, 2018.⁷ The May 2016 Agreement was incorporated into the BWC Contract, as was expressly noted and agreed in the extension to the BWC Contract executed by the parties.⁸

28. Between November 1, 2016 and the termination of the BWC Contract on October 31, 2018, OptumRx failed to meet its obligation to manage BWC’s MAC list to an Effective Rate of AWP minus 74% causing significant damage to Plaintiffs.

29. When challenged by BWC about its failure to abide by the May 2016 Agreement, OptumRx, tellingly, did not deny its obligations. Instead, OptumRx admitted it had breached the May 2016 Agreement (and thus the BWC Contract). OptumRx attempted to justify its actions by citing a January 1, 2017 change to the Ohio Administrative Code that altered the reimbursement rate for *non-MAC drugs* from AWP minus 9% to AWP minus 15%.⁹ Instead of giving Plaintiffs the agreed-upon AWP minus 74% discount, OptumRx argued that, in order to maintain “agreed-upon cost models,” it had been “managing the BWC MAC List to a MAC Effective Rate of AWP-67.”¹⁰ Plaintiffs have consistently rejected OptumRx’s post-hoc explanations for its failure to manage BWC’s MAC list to an Effective Rate of AWP minus 74%.¹¹

OptumRx’s Failure to Adjust Generic Drug Prices

30. The BWC Contract provided that OptumRx would make timely additions and adjustments to its MAC prices to account for changes in the status (*i.e.*, brand, generic, single-

⁶ Exhibit 1.13.

⁷ Id.

⁸ Id.

⁹ See O.A.C. §4123-6-21(G).

¹⁰ Exhibit 4.

¹¹ Exhibit 5

source generic or multi-source generic) of drugs and other market factors, including decreases in generic drug costs. Such adjustments were required to be made once per quarter, *at a minimum*.

31. The BWC Contract also provided that OptumRx would refrain from entering into any other agreements that would restrict OptumRx's ability to perform its duties under the BWC Contract.¹²

32. Analyses of the historical MAC prices charged to BWC show that OptumRx failed to update its MAC Lists to include new generic drugs or to make timely adjustments to the prices of drugs already included on its MAC List that moved from single-source to multi-source. As a result, BWC was regularly charged commercially unreasonable prices for generic drugs.

33. For example, during the fourth quarter of 2016, OptumRx's average charge to BWC for Celecoxib 200 mg capsules, which had been available in the marketplace as a multiple-source generic since late 2014, was more than 200% of the Federal Upper Limit and more than 300% of the National Average Drug Acquisition Cost ("NADAC"), another federal drug-pricing benchmark maintained by CMS.¹³

34. Upon information and belief, OptumRx's unreasonable delays in adjusting the prices of MAC drugs were directly related to contracts OptumRx entered into with retail pharmacy groups that required OptumRx to pay the pharmacies a certain average price for generic drugs *across its book of business*. By charging BWC higher prices for generic drugs, OptumRx thereby offset more aggressive pricing on those same medications for its other customers.¹⁴

35. Throughout the term of the BWC Contract, OptumRx's failure to properly update its MAC List and MAC pricing resulted in damages to BWC which are in addition to, and in excess

¹² Exhibit 1.2, Attachment 3, General Warranties.

¹³ These percentages have been adjusted to account for the \$3.50 dispensing fee provided for by the BWC Contract.

¹⁴ See Exhibit 2, Complaint to Vendor.

of, the damages caused by OptumRx's failure to adhere to the BWC Contract's "lesser of" pricing provisions.

36. On October 31, 2018, OptumRx's contract with BWC expired and was not renewed.

COUNT I

BREACH OF CONTRACT

37. Plaintiffs hereby incorporate by reference all previous paragraphs.

38. The BWC Contract is a valid and enforceable contract.

39. Plaintiffs have fully performed or tendered all performance required under the BWC Contract.

(Failure to Adhere to Pricing Provisions)

40. Pursuant to the terms of the BWC Contract, OptumRx was required, at all times, to ensure that pharmacy providers were paid for multi-source generic drugs, and that BWC was in turn charged for those drugs, at the lowest of the following prices:

- (a) OptumRx's MAC price for the drug plus a \$3.50 dispensing fee;
- (b) The Federal Upper Limit price plus a \$3.50 dispensing fee;
- (c) AWP minus 9% plus a \$3.50 dispensing fee; *or*
- (d) The pharmacy provider's Usual and Customary charge.

41. OptumRx failed to comply with these pricing provisions, and regularly charged BWC amounts for multi-source generic drugs that exceeded the Federal Upper Limit established by CMS which was the "lesser of" pricing available for a particular claim.

42. As a consequence of Defendant's breach of its contractual duty to accurately apply the pricing provisions of the BWC Contract, Plaintiffs have been damaged by paying to OptumRx overcharges on certain multi-source generic medications over the life of the BWC Contract.

(Failure to Meet Pricing Guarantees)

43. Pursuant to the terms of the BWC Contract as clarified by the May 2016 Agreement, OptumRx was required, from November 1, 2016, forward, to manage BWC's MAC Price List to a MAC Effective Rate of AWP minus 74%.

44. OptumRx failed to meet this obligation, intentionally managing BWC's MAC Price List to a MAC Effective Rate of AWP-67%, rather than AWP-74%.

45. As a result of OptumRx's breach of this contractual obligation, Plaintiffs suffered significant financial damages in the form of overpayments for generic drugs dispensed to BWC claimants.

(Failure to Adjust Generic Pricing)

46. Pursuant to the terms of the BWC Contract, OptumRx was required to provide to BWC accurate and timely information on the pricing of prescription medications, including generic medications.

47. Pursuant to the terms of the BWC Contract, OptumRx was required to make timely and accurate adjustments to its MAC Lists and MAC pricing.

48. Pursuant to the terms of the BWC Contract, OptumRx was required to refrain from entering into any agreement or contract that would prevent it from fulfilling its obligations under the BWC Contract, including its obligation to secure advantageous pricing for BWC on generic drugs.

49. OptumRx breached these duties by failing to add new generic drugs to its MAC List within a reasonable period of time.

50. OptumRx breached these duties by failing to adjust its MAC prices to reflect decreases in the cost of generic drugs, or by delaying such adjustments for an unreasonable period of time.

51. OptumRx further breached these duties by entering into contracts with pharmacy providers that required OptumRx to meet certain pricing guarantees on a book-of-business basis, a practice which created irreconcilable conflicts between BWC's interests and those of OptumRx's other clients.

52. As a consequence of OptumRx's breaches of duty as stated above, Plaintiffs have suffered damages in the form of overcharges for generic drugs dispensed to BWC claimants. These damages are in addition to and in excess of the damages to Plaintiffs caused by OptumRx's failure to adhere to the "lesser of" pricing provisions contained in the BWC Contract. While the precise amount of such damages are impossible to calculate until the claims for all contractual periods are re-adjudicated to use the the correct "lesser of" pricing, these damages are substantial, and will be proven to a specific quantum at trial.

(Breach of the Covenant of Good Faith and Fair Dealing)

53. OptumRx's failures in performance and other acts detailed herein constitute breaches of contract, and also constitute breaches of the duty of good faith and fair dealing that exists in all contracts under Ohio law. OptumRx's breaches of duty were committed knowingly and in bad faith and with the intent to deprive Plaintiffs of the benefit of their bargain and to frustrate their reasonable expectations under the BWC Contract.

(Contractual Damages)

54. As a direct result of OptumRx's breaches of the express and implied duties detailed herein, Plaintiffs have suffered direct economic harm in the form of wrongful overcharges for prescription drugs dispensed to claimants under Ohio's workers' compensation system. Plaintiffs seek an award of such damages, upon sufficient proof thereof, as will place them in the same economic position they would have occupied in the absence of any breach of duty by OptumRx.

55. Furthermore, to the extent that it is impossible to prove with specificity the precise amount of any class or type of damages suffered by the Plaintiffs as a result of OptumRx's breaches of contract, Plaintiffs rely on the express provisions of the BWC Contract permitting the recovery of stipulated damages in the amount of \$5,000 per day, from the first day of a proven breach until the breach is cured, as a basis for recovery and for the calculation of damages.¹⁵

WHEREFORE, Plaintiffs respectfully pray for judgment against Defendant, OptumRx, as follows:

1. Compensatory damages in excess of \$25,000; or, alternatively or additionally;
2. Liquidated damages in the amount of \$5,000 per day for each day from the date of the first breach of contract through the date of such award;
3. An award of prejudgment and post judgment interest;
4. An award of the costs of this litigation, including reasonable attorneys' fees; and
5. Such other relief as the Court deems appropriate and just.

Respectfully submitted,

OHIO BUREAU OF WORKERS'
COMPENSATION, and OHIO
DEPARTMENT OF ADMINISTRATIVE
SERVICES, and STATE OF OHIO,
Plaintiffs.

¹⁵ Exhibit 1.2, p. 70, Liquidated Damages.

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*Special Counsel for the Attorney General of
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JURY DEMAND

Plaintiffs hereby demand a trial by jury of all issues herein.

/s/ Donald W. Davis, Jr.
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2019, a copy of the foregoing was filed electronically and served upon the following by email:.

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EXHIBITS

Exhibits 1.1 – 1.15, 2, 3 and 4 will be filed under seal.

4839-6799-9149, v. 1