

# Department of Justice, CVS Caremark, Fraud and Whistleblowers



By *Chuck Dinerstein, MD, MBA* — May 24, 2018



Courtesy of Chris Potter [1]

## The Players

**Plaintiffs** – While the case is being brought by the Department of Justice the primary source is Sarah Behnke – actuarial head of Aetna’s Part D insurance program filing as a “whistleblower.” Since the filing of the suit she has been placed on administrative leave

**Defendants** – CVS Caremark and associated subsidiaries constituting the “largest provider of prescription and related healthcare services in the US filing more than 1 billion prescriptions in that time.” They control 26% of pharmacy benefit manager (PBM) market serving 3,150,000 Medicare beneficiaries. A specific subsidiary, SilverScript is the CVS Caremark’s Plan D insurance program.

## The Game

Medicare Part D is the drug reimbursement component of Medicare; it is a voluntary program administered by private companies like Aetna and SilverScript.

Every time we purchase a drug, irrespective of our insurance, the pharmacist checks that your prescription is medically correct, lawfully prescribed and then checks with your insurance company to determine the price to be charged and your co-payments. The amount you paid, [1] irrespective of any co-payments is recorded and reported as a prescription drug event or PDE.

Pharmacy benefit managers negotiate prices between wholesale and retail operations, their profit is the difference between what they pay the wholesaler and what they charge a pharmacy, their [spread](#) [2]. In 2010 Congress clarified that the PDE must reflect only the cost of the drug to the pharmacy, the administrative costs (and profits) contained in the spread were not to be included.

PDE information [2] is gathered by Medicare to set regional price benchmarks and are used by Part D providers in determining how much to bid and what premiums to charge patients for these Part D services. Medicare subsidizes and pays Part D providers for drugs, not administrative costs. Administrative costs are borne by the Medicare beneficiaries using Plan D reflected in their premiums and copayments. Medicare pays Plan D providers in monthly advances and balances the books annually based on the PDEs. Because of the central role of PDEs in bidding, projecting premiums and payments, Part D providers are required to certify that their PDE reports are true and accurate.

### **The Context**

SilverScript, CVS Caremark's Plan D provider has 3.4 million Medicare beneficiaries; Aetna's Plan D provider has 750,000 beneficiaries. Both plans contract with CVS Caremark for pharmacy benefits managers who as part of their services negotiated prices compiled PDE information and certified that information to be truthful and accurate. Together they account for 70% of Caremark's Part D beneficiaries. Silverscript is also the largest provider of Plan D benefits to low-income Medicare beneficiaries (25%) whose drug expenses are subsidized more heavily, at 65% of their costs, as compared to 18% for other Medicare beneficiaries.

### **The Alleged Fraud**

The allegation is one of fraud, in that CVS Caremark submitted false Part D drug costs through the prescription drug event information resulting in inappropriately increased subsidies to Aetna and Silverscript. Aetna is not a defendant because CVS Caremark certified the fraudulent records on their behalf and they had no knowledge of the misinformation; Silverscript, on the other hand, is felt to have known and been complicit.

Aetna entered into a contract with Caremark in which they were guaranteed to receive a 75% discount from the average wholesale price for a generic drug as well as a dollar for every PDE submitted by Caremark on their behalf. Since prices might change throughout the year, Caremark would manipulate the amount they paid the pharmacies for drugs to meet Aetna's agreed discount, keeping any additional discount for themselves. Irrespective of whether the contract required Caremark to pass along those additional savings to Aetna, they were required to report the actual price of the drug in the PDE which they did not.

The same manipulation of reported prices was employed with SilverScripts with two significant differences. First, because they hid revenue within the drug prices, they were able to submit lower bids to provide services to low-income beneficiaries which qualified them to auto-enroll recipients. Second, because low-income beneficiaries are subsidized at higher rates, the inappropriate payments were further falsely leveraged. While one dollar in false drug cost apportioned to Aetna yielded Caremark an additional eighteen cents, the same increase allocated to SilverScript generated 68 cents, a four-fold increase.

## **Blowing the Whistle**

Sarah Behnke, Aetna's Plan D auditor, noted that Caremark was raising drug prices in the generic market where prices tend to decrease. At one point, Caremark increased Aetna's prices for 229 generic drugs, representing 59% of their Part D beneficiaries purchases or about a 13% increase in the cost of a 30-day supply. This raised concerns and Behnke found that while Caremark was honoring their commitment to a 75% discount, Aetna was paying 25 to 40% more than their competitors. Alison Brown, Caremark's SVP of Underwriting and Actuarial stated that Caremark had in fact, negotiated lower prices on Aetna's behalf, but it was not required under the contract to provide these prices to Aetna. And while the law required reporting of the negotiated lower price, it was the higher price paid by Aetna paid that was reported to Medicare.

## **Points to ponder**

- These remain allegations, and the Department of Justice has yet to prove them in court.
- The events described should undoubtedly give people pause in considering "privatizing" health care costs. And before there is too much glee on the opposite end of the political spectrum, it also demonstrates how a "single-payer" can cheat the system.
- Mergers and acquisitions often flounder because of differences in corporate culture rather than the financial consequences of consolidation. Wouldn't it be interesting to see how Aetna and CVS merge the actuarial services that detected and defended the alleged fraud?
- I am grateful for the whistleblower's bringing this case forward, but somewhere a cynical part of me suspects that if CVS Caremark and Aetna could have come to an accommodation between themselves none of this would be reported and we would continue to unknowingly pay more, through our premiums and taxes than we should.

[1] The actual PDE recorded price includes the dispensing fee by the local pharmacy.

[2] The Plan D providers submit additional information on the administrative costs and price comparisons. But these are immaterial in the lawsuit.

Source: [Filing by Department of Justice](#) [3]

**Source URL:** <https://www.acsh.org/news/2018/05/24/departement-justice-cvs-caremark-fraud-and-whistleblowers-13008>

**Links**

[1] <https://www.flickr.com/photos/86530412@N02/8265405611>

[2] <https://www.acsh.org/Pharmacy%2520benefit%2520managers%2520negotiate%2520prices>

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