Independent pharmacy groups sue PBMs in antitrust law violation

By James Frederick

PHILADELPHIA — In a conflict that underscores the fundamental rift between community pharmacies and the pharmacy benefit management industry, two independent pharmacy organizations have sued the nation’s two largest PBMs.

The National Community Pharmacists Association and the Pharmacy Freedom Fund filed separate class action lawsuits Aug. 15 in U.S. District Court here against Medco Health Solutions and AdvancePCS. The groups accuse the two PBMs of violating antitrust laws and harming millions of Americans and thousands of pharmacies through their business practices.

The suits charge that the two firms, which together administer benefits for nearly 140 million members, illegally have set pharmacy reimbursements at levels far below market rates and have steered patients into their own mail order pharmacies. In doing so, NCPA and the Freedom Fund allege, Medco and AdvancePCS have conspired to underpay pharmacies for their services and have restricted patients’ freedom of choice.

“Each of the ... PBMs has illegally reduced or eliminated competition,” an attorney representing NCPA asserted. He accused the firms of fixing payment levels, restricting services and “arbitrarily limiting the ability of retail pharmacies to compete on a level playing field.”

Also named in the suits is Medco’s former parent firm, Merck, “on the grounds that Medco is merely the alter ego for Merck in promoting its brand-name drugs,” the attorney noted.

The PBMs limit competition, according to the suits, by setting reimbursement rates “far below the rates that would apply in a competitive market” and by “arbitrarily depressing the prices to be paid to pharmacies for generic drugs.” They also prohibit retailers from providing more than a 90-day supply of drugs, “while the PBMs’ own mail order pharmacies routinely provide a 90-day supply,” the groups asserted.

Pharmacies on cost and service for consumers.”

Citing the Pharmacy Benefit Management Institute, NCPA estimated that the average fee PBMs pay pharmacies for dispensing a branded drug was $2.23 in 2001, down from $2.50 in 1995.

“It would be blatantly illegal for insurance companies or employers to agree on the rates they pay to pharmacies and the restrictions they place on consumers,” said Michael Freed of the Chicago law firm Much Shelist Freed Denenberg Azriel & Rubenstein, a spokesman for the plaintiffs. “Medco and AdvancePCS have abused their role as PBMs for many major insurance companies, Blue Cross plans, HMOs and large employers to accomplish the same result.”

However, the Pharmaceutical Care Management Association, which represents PBMs, dismissed the charges as baseless. The NCPA and the Freedom Fund, noted PCMA, are “only interested in the freedom to charge consumers higher drug prices.”

“Their agenda would drive health care costs higher, force consumers to pay more and make it more difficult for small and large employers to pro...”

PBM suits

CONTINUED FROM PAGE 15 vide health care coverage,” the organization added in a statement. “The retail pharmacy lobby is trying to achieve in the courtroom what they have been unable to impose on consumers in the marketplace.

“It’s time for them to put aside these sham lawsuits and work with others to expand consumers’ access to affordable medicines,” a PCMA spokesperson added.

The suits were filed just days before the completion of a deal by Merck to spin off its Medco subsidiary. It also came on the heels of a separate, $42.5 million settlement by Merck-Medco of another suit filed on behalf of federal employees under the Employee Retirement Income Security Act.

“Medco and AdvancePCS profit directly from this anti-competitive conduct in several ways,” NCPA and the Freedom Fund noted in a joint statement. “First, they have pushed reimbursement rates so far below a competitive level in recent years that they have created a ‘spread’ between what they bill the plan sponsor and what they pay the pharmacy. Second, they operate mail order pharmacy operations that compete with retail pharmacies.”

NCPA senior vice president John Recto added: “The mail order pharmacies ... refuse to compete fairly with community...”
Plaintiffs Bellevue Drug Co. and Robert Schreiber, Inc. d/b/a Burns Pharmacy, by their attorneys, bring this action on behalf of themselves and all others similarly situated, along with Plaintiffs Pharmacy Freedom Fund and National Community Pharmacists Association. On information and belief, Plaintiffs allege as follows:

**NATURE OF ACTION**

A. **Introduction**

1. AdvancePCS, the largest Prescription Benefit Manager ("PBM") in terms of persons covered, has used the power it wields as a common agent of many large insurance companies, managed health organizations, governmental and private employers, and unions to engage in illegal anticompetitive activities designed to increase AdvancePCS' own revenues and profits at the expense of community retail pharmacies across the nation, and often against the
Patiently lower-cost medications before using the more expensive ones are the most effective.

agree that promoting greater use of generic drugs in place of brand name drugs and lowering a
drug's introduction and aggressive marketing of more expensive drugs. Most experts
average 14% to 17% a year. In large part to the rising prices of brand name prescription

Employers are facing increases in prescription drug costs for their employees

of its drug spend for brand name drugs and 25% of its drug spend for generic drugs.

In contrast, the discounts it receives from retail network pharmacies are more than 15%
during its fiscal year ended March 31, 2003, was $1.4 billion or roughly 7% of its total drug

and administrative fees it received from drug manufacturers

not from drug manufacturer discounts or rebates. AdvantagePCS reported, for example, that the

the overall savings that they obtain on brand name drugs come from retail pharmacy discounts.

that PBMs obtain on generic drugs and the substantial majority of

while the rebates that PBMs receive from brand name drug makers are highly publicized, the

1995, a decline of 11.6% in nominal terms and 24% when adjusted for inflation. In the same

dispensing a prescription for a brand name drug in 2001 was a mere $2.21 compared to $2.90 in

greater barriers in healthcare. The average fee that PBMs paid community retail pharmacies for

business from them. Retail pharmacy is a highly competitive industry that offers one of the
costs. It concentrates its efforts on extracting more money from retail pharmacies and diverting
management on its head. Instead of attacking the real causes of escalating prescription drug

By its abuse of power, AdvantagePCS has used the concept of prescription benefits

interests of the more than 75 million Americans covered by prescription benefit plans that
ways to contain the increasing cost of prescription drugs that employers are experiencing. AdvancePCS claims it does both. Yet, its actions demonstrate an inconsistent commitment at best. AdvancePCS has been steadily reducing the amount it pays retail pharmacies, especially for generic drugs, in order to generate greater profits for itself. In doing so, it actually penalizes the retail pharmacies that vigorously promote the greater use of generic drugs that would save employers much more money. Indeed, AdvancePCS is paid significant sums by major pharmaceutical companies to promote expensive brand-name drugs (such as Celebrex and Nexium) to physicians and patients, thereby encouraging greater use of expensive brand name drugs.

B. AdvancePCS Is the Common Agent for Plan Sponsors

4. AdvancePCS is a Prescription Benefit Manager. On behalf of Plan Sponsors, AdvancePCS contracts for the purchase of brand name and generic prescription drugs and dispensing services from retail pharmacies; manages networks of retail pharmacies; and handles the processing, adjudication (determination of the claim validity and amount), and payment of claims made by retail pharmacies for prescriptions they fill for members of prescription benefit plans that AdvancePCS administers ("Plan Members").

5. "Plan Sponsors" are entities that contract with and pay PBMs to administer prescription drug benefit programs. While some large employers contract directly with AdvancePCS for programs covering their employees, most employers whose employees are included in a PBM plan administered by AdvancePCS obtain the PBM benefits through an insurance company, Blue Cross Blue Shield plan, or managed care company. Such companies account for a substantial majority of the persons in PBM Plans administered by AdvancePCS and
convenience for the Plan Members. On the other hand, if they agreed not to bid up the price of
higher payments for filling prescriptions as Plan Sponsors, it would provide dispensing
pharmacies for prescription drugs and dispensing services. Vigorous competition would have led
competitors actively compete with one another can be expected to affect the price to be paid to
dispensers of prescription drugs and dispensing services. As in any market, the extent to which those
employees of AdvancedPCS as their agent. In that regard, Plan Sponsors compete in buying
also purchase prescription drugs and dispensing services -- and would have done so had they not
retail pharmacies where other Plan Sponsors of the benefit plan administered by AdvancedPCS
administers will certainly purchase prescription drugs and dispensing services from the same

Each Plan Sponsor of a prescription drug benefit plan that AdvancedPCS

C. AdvancedPCS's Anticompetitive Conduct and Abuse of Power

Plan Sponsor bears all the material risk relating to the prescription drug benefit plan.

The pharmacies, but only after the Plan Sponsor has paid AdvancedPCS for the prescriptions. The
claims from retail pharmacies, sends them to the Plan Sponsor for payment, and pays the retail
benefits plan, especially as it relates to the retail pharmacy network. AdvancedPCS accumulating
policy of HMO plan, AdvancedPCS bears virtually no risk relating to the cost of the prescription
paid a premium and bears the healthcare cost risk for the people covered under a health insurance
risk and is not an insurance company. In contrast to an insurance company or HMO, which is
purchasing agent on behalf of the Plan Sponsors that retain it. AdvancedPCS takes no insurance
dispensers or prescription drugs from network retail pharmacies. Rather it acts as a

In its role as plan administrator, AdvancedPCS is not itself the real purchaser of

include many of the leading insurance, Blue Cross Blue Shield, and managed care companies in
keep from bidding against each other, they reduce the apparent demand for filling prescriptions and would thereby reduce the market price for prescription drugs and dispensing services provided by retail pharmacies. Of course, this kind of horizontal agreement would be price-fixing. However, by jointly conferring their pharmacy purchase decisions upon AdvancePCS, Plan Sponsors accomplished the same thing. Each Plan Sponsor was certainly aware that AdvancePCS negotiates and deals with network retail pharmacies on behalf of not only itself but also many Plan Sponsors. By using AdvancePCS as a common agent, the Plan Sponsors confronted retail pharmacies with coordinated offers and bargaining positions, the terms of which AdvancePCS was able to manipulate to force lower prices for prescription drugs and dispensing fees than independent negotiations by each Plan Sponsor separately would have otherwise generated. For that reason, the actions of AdvancePCS as a common agent for the Plan Sponsors constitute horizontal restraints of trade between and among direct competitors and, where those actions affect price, constitute horizontal price fixing.

8. AdvancePCS and its Plan Sponsors also engage in price-fixing when the Plan Sponsors delegate price-setting authority to AdvancePCS. For example, Plan Sponsors have effectively given AdvancePCS the function of setting the reimbursement rates for generic drugs, which is called “Maximum Allowable Cost” or “MAC”, for the Plans that AdvancePCS administers.

9. The tremendous aggregated economic power that AdvancePCS can impose has enabled it to set reimbursement rates for retail pharmacies’ brand name and generic prescription drugs and dispensing services well below the levels that would prevail in a competitive marketplace. Those rates are so low that AdvancePCS generates the largest part of its net revenue by retaining the “spread” between what the Plan Sponsors pay it for prescription drugs
Pharmacies. For example, AdvancedPCS charges fees to participating pharmacies each time they
AdvancedPCS network and the added costs and inefficiencies that AdvancedPCS imposes on retail
by the various terms of the contracts that retail pharmacies must sign in order to participate in an
12. The shared and extended economic power wielded by AdvancedPCS also is evidenced
discrimination measurement is exclusive, uncompetitive, and harmful to consumers.
line, however, AdvancedPCS’s mail order pharmacies routinely dispense a 90-day supply. This
problem, retail pharmacies from providing more than a 30-day supply of drugs. At the same
time, AdvancedPCS’s mail order pharmacies perform pharmacy operations. For example, AdvancedPCS
own dispensing activity, deriving profitable retail and follow-on prescription business from
combination of its Plan Sponsors also can be used effectively to create artificial advantages for its
through its own mail-order pharmacy operations. The power AdvancedPCS derives from the
AdvancedPCS go even further. AdvancedPCS competes directly with network retail pharmacies
11. Important effects of the horizontal combination that rests behind

service.

Pharmaceutical consumers, especially Plan Members, face fewer dispensing options and reduced
Hence, another effect of the horizontal power collected and wielded within AdvancedPCS is that
would have gone hand in hand with enhanced quality and availability of dispensing services.
competition been able to develop to its full extent? Any higher prices paid for dispensing services
otherwise lower the plans in providing better coverage options to their members. Had that
AdvancedPCS as an agent on behalf of all Plan Sponsors eliminated the competition they might
10. More than that, however, the delusion of dispensing arrangements to
and dispensing services provided by retail pharmacies and what AdvancedPCS pays to the

pharmacies.
submit a claim, check on patient eligibility, or try to determine what drug is on the applicable formulary. At the same time, AdvancePCS routinely delays sending reimbursement payments to retail pharmacies, refuses to transfer funds by wire to independent pharmacies and delays updating its price lists to reflect increases in drug prices.

13. Prescription benefit managers have contributed to better management of drug therapy in the past and could continue to do so in the future. In the end, the problem here is not that the concept of prescription benefit management is wrong. Rather, the problem here lies in the fact that Plan Sponsors are working in combination with AdvancePCS to aggregate and use their buying power for their own benefit and to the detriment of retail pharmacies and consumers.

JURISDICTION AND VENUE

14. Plaintiffs bring this action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to obtain injunctive relief and to recover damages, including treble damages, costs of lawsuit, and reasonable attorneys’ fees against the Defendant for injuries Plaintiffs and members of the Class have sustained as a result of violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, as alleged in this Complaint.

15. This Court has jurisdiction over the subject matter of this action under Sections 4(a) and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26, and under 28 U.S.C. §§ 1331 and 1337(a).

16. Venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. §§ 1391(b) and (c). Defendant AdvancePCS maintains offices, has representatives, may be found, and/or transacts business within this District within the meaning of Section 12 of the Clayton Act, 15 U.S.C. § 22. Further, a substantial part of the events giving
Plaintiffs seeks injunctive relief on annual sales and dispense approximately half of all outpatient prescriptions. Its headquarters is located at 205 Daingerfield Road, Alexandria, Virginia 22314. NCPA seeks injunctive relief on 24,000 pharmacies. These independently owned pharmacies generate more than $67 billion in profits annually.

NCPA represents the nation's community pharmacies including the owners of several thousand independent community pharmacy owners. Its headquarters is located at 1500 Clarendon Circle, Fort Worth, Texas 76112. PFP seeks injunctive relief on behalf of its members.

OPENING ARMS

1. Plaintiff Pharmacy Freedom Fund ("PFF") is a not-for-profit organization of
"Pharmacies". Plaintiffs Believe and Schreiber collectively are referred to herein as the
operators a pharmacy located in Montville, Pennsylvania.

18. Plaintiff Bellevue Drug Co. ("Bellevue") owns and operates a pharmacy located in
Hammons, New Jersey.

19. Plaintiff Robert Schreiber, Inc. d/b/a Burns Pharmacy ("Schreiber") owns and
operates that Defendant AdvantageCare networks managed by Defendant AdvantageCare on behalf of one or more prescription drug benefit
currently, or was during the Class Period, a retail pharmacy that participated in one or more

17. Each of the named pharmacy plaintiffs and each member of the Plaintiff Class is

THE PARTIES

commerce discussed below have been carried out in this District.
behalf of its members, and does not seek status as a representative plaintiff or Class member under Fed. R. Civ. P. 23.

23. Defendant AdvancePCS is a PBM. Its principal executive offices are located at 750 West John Carpenter Freeway, Suite 1200, Irving, Texas 75039. In 2000, Advance Paradigm, Inc. acquired all of the equity of PCS Health Systems, Inc., and the two companies combined to form AdvancePCS.

24. AdvancePCS also has operations that operate through one or more of its subsidiaries. As used in this Complaint, “AdvancePCS” includes AdvancePCS, its predecessors and all subsidiaries and other entities owned or controlled by any of them.

UNNAMED CO-CONSPIRATORS TO DEFENDANT’S

ANTICOMPETITIVE CONDUCT

25. Various persons and/or firms not named as Defendants herein have participated as co-conspirators in the violations alleged in this complaint, and have performed acts in furtherance of the violations alleged. The acts alleged in this Complaint have been done by Defendant in conjunction with the Plan Sponsors, and were authorized, ordered, and performed by Defendant’s officers, directors, agents, employees, or representatives while engaged in the management, direction, control, or transaction of its business affairs.

INTERSTATE COMMERCE

26. Defendant’s activities, including activities related to its concerted actions, illegal contracts, combination, and conspiracy with others to restrain competition in the market for the dispensing and sale of brand name and generic prescription drugs, are in the flow of, and substantially affect, interstate commerce.
prescription drugs by artificially setting the amounts that Plans and
the market for the distribution and sale of brand name and generic
competition, or conspire with Plan Sponsors to restrict competition in
whether AdvancedPCS engaged in concerted action under a contract,
that would prevail in a competitive market,
been fixed, depressed, standardized, and/or stabilized at levels below those
distributors and sale of brand name and generic prescription drugs have
during the period as well as for the Class for the
whether amounts paid to Plans and members of the Class for the
members is irremediable.
numerous and are geographically dispersed throughout the United States, Joiner of all Class
contacts with more than 79,000 pharmacies nationwide. Because Class members are so
Plaintiffs do not know the exact size of the Class, but AdvancedPCS claims that it
affiliates, and government entities,
from the Class are Decedent’s, is patient companion, subsidiaries and
connected with AdvancedPCS to dispense and sell brand name and generic
behave the claim of the complainant through the period (the "Class Period").
All pharmacies that at any time during the period commencing four years
is defined as follows:

28. The Plaintiffs bring this action on behalf of themselves and all others similarly

PLAINTIFF CLASS ALLEGATIONS

Billions of dollars of goods and services from out-of-pocket sources.
AdvancedPCS also obtains billions of dollars in payments from out-of-pocket sources and purchasers
Lines using Internet Telcommunications networks, the Internet, and the United States mail.
Among other things, AdvancedPCS communicates with Plan Sponsors across state

27.
members of the Class can charge to Plan Members for dispensing prescription drugs;

(c) Whether AdvancePCS, for and on behalf of Plan Sponsors, has fixed the terms and conditions under which Plaintiffs and members of the Class dispense and sell brand name and generic prescription drugs, including limiting the quantity of drugs that Plaintiffs and members of the Class may dispense to Plan Members and/or requiring Plan Members to use AdvancePCS’ mail order pharmacies for maintenance drugs;

(d) Whether Defendant’s conduct causes and has caused a substantial decrease in competition by diverting Plan Members’ business from Plaintiffs and members of the Class to AdvancePCS’s own mail-order pharmacy operations;

(e) Whether Plaintiffs and members of the Class have been injured by Defendant’s conduct, and, if so, the appropriate class-wide measure of damages; and

(f) Whether Plaintiffs and members of the Class are entitled to injunctive relief.

31. The Plaintiffs’ claims are typical of the claims of all members of the Class. The Plaintiffs’ interests are not antagonistic to the interests of other members of the Class, and the Plaintiffs will fairly and adequately protect the interests of members of the Class. Plaintiffs are represented by counsel experienced in the prosecution of antitrust class actions.

32. Defendant has acted, and has refused to act, on grounds generally applicable to the Class, thereby making final injunctive relief appropriate as to the Class.

33. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

34. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The Class is readily defined and prosecution of a class action
and members of the Class.

(4) Impose unreasonable and unnecessary additional costs on the Plaintiffs and

AdvancePCS's mail-order pharmacy, and

(5) Divert business from the Plaintiffs and members of the Class to

brand name and generic prescription drugs.

members of the Class can change Plan Members for dispensing and selling

Set arbitrarily the maximum and minimum amounts that Plaintiffs and

compliance.

significantly below levels that would prevail but for the combination and

for the dispensing and sale of brand name and generic prescription drugs

Depress the prices that Plaintiffs and members of the Class have received

combination, conspire and concern with Defendant have engaged in the Relevant markets is to:

38. The effect of the anti-competitive activities in which the Defendant and others in

Retail pharmacies.

pharmacy prescription claims, it processes and pays for annually and the dollar amount paid to

through PBMs. Defendant AdvancePCS is the largest PBM in terms of the number of retail

37. Today, claims for more than 70% of all outpatient prescription are processed

and generic prescription drugs.

36. The relevant product market consists of the dispensing and sale of brand name

States.

35. The relevant geographic market for purposes of Plaintiff's claims is the United

RELEVANT MARKETS

In some instances may be too small to warrant the expense of individual complex litigation,

will eliminate the possibility of repetitive litigation, while also providing redress for claims that
AdvancePCS AS A PRESCRIPTION BENEFIT MANAGER

A. Background

39. The term “PBM” applies to a variety of firms that assist Plan Sponsors in developing or implementing a prescription drug plan for Plan Members. The basic concept of a PBM is to manage effectively a drug benefit program for a Plan Sponsor, including the purchase of prescription drugs from a network of pharmacies at a cost savings to the Plan Sponsor. PBMs typically develop formularies (lists of preferred drugs) and negotiate rebates from brand-name drug manufacturers for including some of their drugs in the Plan’s formulary or increasing the usage of their drug(s). PBMs also contract with pharmacies to provide prescription drugs and related services. Typically, the PBMs handle the adjudication (the determination of the validity and amount of claims) and processing of prescription drug claims electronically.

40. The original model for negotiating reimbursement levels between third-party payers (such as insurance companies) and pharmacies was developed in 1969 by Pharmaceutical Card Systems, Inc. Pharmaceutical Card Systems, Inc. (which became widely-known as PCS Health Systems (“PCS”) is the principal predecessor of Defendant AdvancePCS) established an administrative network under which insurance companies or other third-party payers could reimburse the pharmacies for filling prescriptions of people whose health plan had a drug benefit. Under this system, each individual pharmacy and each individual insurance company determined between themselves one-to-one the amount to be paid for the ingredient dispensed, the amount to be paid as the professional (dispensing) fee, and the amount to be collected from the patient as a deductible or co-pay. Pharmaceutical Card Systems, Inc. did not consult or advise either pharmacies or third-party payers on the establishment of fee levels. The Antitrust Division of the United States Department of Justice advised Pharmaceutical Card Systems, Inc. that the Division
AdvancEPC administrators.

the Plan Sponsor's, it is able to use the combined bargaining power of all the Plans that
fees and independent fees that AdvancEPC pays to pharmacists because the common agent of
costs with today AdvancEPC is the major force involved in setting the levels of the dispensing
Systen's was not involved at all in setting the amounts of the dispensing fees. Independent fees on
the cost of the drug (the "independent fee"). But while thirty years ago, Pharmacists Card
administrative network model, Pharmacists still receive a dispensing fee plus an amount to cover
administration.

International Association membership in Pharmacists who are covered by Plans administered by PBMs, according to the PBMs, trade
were paying for more than 75% of all prescriptions filled by retail pharmacists. Today, over 200
themselves, and 13% were paid by Medicare. By 2001, third-party payers (primarily PBMs)
of all prescriptions filled in pharmacies (60% of prescriptions were paid in cash by the patients
of all prescriptions filled in pharmacies. In 1990, third-party payers (including PBMs) paid for only 27%
4.2. During the late 1990s, PBMs quickly assumed a central role in administering
means of administering prescription drug benefit plans.

employers, insurance companies, and managed healthcare organizations that were interested in
Pharmaceutical Card Systems, Inc.) became PBMs and began to solicit as claims major
4.1. In the late 1980s and early 1990s, firms involved in claims processing (such as
or third-party payers as to the level of payment.

would not prosecute it under the antitrust laws as long as it did not conspire or advise pharmacists
B. **AdvancePCS’s PBM Operations**

44. Measured by number of lives covered, AdvancePCS is the largest PBM in the United States. More than 75 million people, one of every four Americans, are members of a Plan administered by AdvancePCS. AdvancePCS also is the largest PBM in terms of the number of pharmacy prescription claims that it processes and pays for annually and the total amount paid to retail pharmacies. This reflects the fact that PCS, which merged with Advance Paradigm in 2000 to form AdvancePCS, is and was the dominant claims processor, administrator and payer handling prescription claims from pharmacies. AdvancePCS processes and pays claims for more than 488 million retail pharmacy prescriptions a year. Including its mail-order operations, AdvancePCS handles claims processing and payment for some 540 million prescriptions a year amounting to over $28 billion in prescription drug spending.

45. Since PCS did not operate a mail-order pharmacy until 1996, fewer than 10% of the prescriptions it processed were filled by mail until recently. In the past two years, however, one of AdvancePCS’s primary corporate strategies has been to “increase the percentage of prescriptions filled by our mail pharmacies by aggressively promoting our mail services to the members of our health plan sponsors.” AdvancePCS Form 10-K for Fiscal Year ended March 31, 2002, at page 6. The effect of AdvancePCS’s program is reflected in a 40% increase in mail order prescriptions in its fiscal year ended March 31, 2003, versus the prior fiscal year and a 170% increase in prescriptions over the past two years.

46. AdvancePCS’s PBM operation has four primary revenue streams:

(a) Administrative fees from Plan Sponsors;
(b) Rebates from drug manufacturers (on brand-name drugs only);
(c) Retail margin on drugs sold through its mail-order operations; and
Spread pricing, the difference between what Plan Sponsors pay AdvancePCS and what AdvancePCS pays pharmacies.

On information and belief, AdvancePCS generates more than 60% of its revenue from its mail-order operations and spread pricing. The growth in net revenue from mail-order and spread pricing is expected to continue as AdvancePCS pursues aggressive mail order marketing efforts and as AdvancePCS drives reimbursement levels lower to generate a greater "spread." Administrative fees from Plan Sponsors and rebates to manufacturers together represent less than 40% of AdvancePCS's net revenue. AdvancePCS receives no manufacturer rebates on prescriptions filled with generic drugs.

C. AdvancePCS' Retail Pharmacy Network

47. Because the number of people enrolled in prescription benefit plans expanded from 26% of the U.S. population in 1990 to some 70% today, it has become increasingly important for Plaintiffs and members of the Class to be included in the provider networks established by each of the major PBMs. Exclusion from a network may result in a significant reduction in customers for Plaintiffs and members of the Class.

48. AdvancePCS contracts with Plaintiffs and members of the Class through PCS, which is wholly owned by AdvancePCS, as well as through other wholly-owned entities including, but not limited to, AdvanceParadigm. AdvancePCS (including PCS and its affiliates) has a contract with virtually all of the 60,000 pharmacies in the United States. Every year or so, AdvancePCS modifies the contractual terms unilaterally by sending Plaintiffs and members of the Class amendments or revised pages to the agreement.
49. Supplements to AdvancePCS’ agreements with retail pharmacies set the amount AdvancePCS will pay Plaintiffs and members of the Class as reimbursement for the cost of the drug (usually the average wholesale price ("AWP") minus a designated discount for a brand-name drug and maximum allowable cost ("MAC") for a generic drug), the amount it will pay as a "dispensing fee" (compensation for the service of filling a prescription; for example, $2.00), and other terms regarding the amount to be paid to Plaintiffs and members of the Class. The retail network pharmacies are also required to charge the Plan Member the co-pay or co-insurance that is indicated by AdvancePCS’ computer system. The pharmacy is not permitted to charge more or less than the designated amount of the co-pay or co-insurance.

D. **AdvancePCS Is the Common Negotiating Agent for Plan Sponsors**

50. As noted above, AdvancePCS has structured its PBM operations so that it is not the real purchaser of the pharmacy services and drugs provided by retail pharmacies to Plan Members. The real purchaser is the Plan Sponsor, and AdvancePCS assumes no risk. It merely passes on to Plan Sponsors the claims it receives from Plaintiffs and members of the Class (after adding an administrative fee). By the terms of its Provider Agreement with Plaintiffs and members of the Class, Plaintiffs and members of the Class have no claim for payment against AdvancePCS unless and until AdvancePCS is paid by the Plan Sponsor. If the Plan Sponsor fails to pay, Plaintiffs and members of the Class bear the loss. Further, the levels of the discounts from Plaintiffs and members of the Class are locked in by contract (which is self-enforcing since AdvancePCS itself pays Plaintiffs and members of the Class) so that AdvancePCS has no real risk in meeting minimum savings clauses in contracts with Plan Sponsors.

51. Over the years, AdvancePCS has exercised more and more power in negotiating and contracting with Plaintiffs and members of the Class concerning the level of reimbursement
combination of Plan Sponsors, who are otherwise direct competitors for those same prescription
decisions, reimbursement rates on retail pharmacies. Insurers, as their competitors in the
collective economic power of all Plan Sponsors, impose a one-sided contract and coer-
of the Plan Sponsors it represents and the number of people covered. AdvantageCS uses the
Sponsors, indeed, in marketing to Plan Sponsors, AdvantageCS emphasizes the number and size
negotiations and deals with network retail pharmacies on behalf of not only itself but many Plan
vis-a-vis individual retail pharmacies. Each Plan Sponsor is fully aware that AdvantageCS
services from retail pharmacies, it clearly is the common agent representing all the Plan Sponsors
services and is not the real purchaser of prescription drugs and dispensing.

53. While AdvantageCS is not the real purchaser of prescription drugs and dispensing
Classes have to take all the Plans in the network.

business of members of any Plans in an AdvantageCS network. Plan sponsors and members of the
Pharmacies and members of the Class are confronted with a "unitary front." If they want to get the
into networks and then prescribing the network’s purchasing power as a single united block,
reliability few plan members in the market area of the stores or chains. But by grouping the Plans
pharmacy chain might not be willing to offer a significant discount to a Plan Sponsor that had
bargaining power vis-a-vis Plan sponsors and members of the Class. An individual pharmacy or a
With the advent of networks, AdvantageCS and its Plan Sponsors enhanced their
participation in and influencing the reimbursement level for each network.

agreement but with added indemnifying each of AdvantageCS’s networks they had agreed to
levels were divided into separate “networks,” all operating under the same basic pharmacy
levels were divided into separate “networks,” all operating under the same basic pharmacy
common in the 1970s has been replaced not only by use of a common negotiation agent but also
they will receive. The one-to-one negotiation between third-party payers and the pharmacies
drugs and dispensing services, its legal and economic effect is the same as if the Plan Sponsors had agreed on the contracts and reimbursement rates among themselves. That, of course, would be a per se violation of the antitrust laws. So too then is this.

54. AdvancePCS uses the combined economic power of its Plan Sponsors to drive reimbursement levels below a competitive level on their behalf and, at the same time, create more income for itself. Until the mid-1990’s, the amount paid by a Plan Sponsor for a prescription was generally the same (except for the administrative fee that that the Plan Sponsor paid the AdvancePCS) as the amount that AdvancePCS paid the retail pharmacy for that same prescription. As AdvancePCS has driven reimbursement levels lower and lower, it has also created a “spread” between what the Plan Sponsor pays for a prescription and what AdvancePCS pays the pharmacy for the same prescription. On information and belief, this so-called “spread pricing” is the largest source of net revenue for AdvancePCS’s PBM operations.

55. Plan Sponsors have also effectively delegated price-setting authority to AdvancePCS with regard to reimbursement for the cost of generic drugs. Acting with this power in hand, AdvancePCS sets and changes the MAC price lists that are used to set reimbursement amounts for generic drugs for the Plans it administers. AdvancePCS has used its control of its MAC price lists continually to reduce reimbursement levels to Plaintiffs and members of the Class, thereby further “ratcheting down” the amounts paid to Plaintiffs and members of the Class. As a result, generic drugs have a far greater spread (on a percentage basis) between what the Plan Sponsor pays and the retail pharmacy receives than brand name drugs.

56. AdvancePCS has compounded the impact on retail pharmacies of the reduced reimbursement levels by increasing their operating costs and delaying payment to them in order to generate even more income for AdvancePCS. These actions by AdvancePCS include:
and AdvancePCS will not reimburse a pharmacy, including another mail order pharmacy, for
prohibited benefits and members of the class from providing more than a 30-day supply of a drug,
if AdvancePCS would order the same drug for the same plan member. Virtually all the plans administered by AdvancePCS
for such specialty drugs are administered by AdvancetR
The effect of this collusion on consumer choice is especially evident with regard

58. Freedom of choice.

Sponsors is that consumers have fewer dispensing options and service alternatives and less
effect of the horizontal collusion embodied in AdvancePCS role as the common agent of its Plan
offering a greater variety of pharmacy services from a wider array of pharmacies. Hence, another
provide a wider range of pharmaceutical coverage options to their Plan Members including
anticompetitive restrictions in a competitive market. Plan Sponsors might well compete to
against charging any Plan Member more or less than the managed care pay. Without these
order to divert retail business to AdvancePCS mail order operations, and (ii) the prohibition
limitations placed on network retail pharmacies (and all other mail order pharmacies as well) in
amount Plan Sponsors would not otherwise support. These restrictions include: (i) the arbitrary
impose anticompetitive restrictions on the activities of retail pharmacies that create competition
among Plan Sponsors also gives AdvancePCS the ability to

57. The combined power of the Plan Sponsors also gives AdvancePCS the ability to

E. AdvancePCS Has Used the Combined Power of Its Plan Sponsors to Drive Retail Business

 Increases:

(a) Requiring Plan Sponsors to provide alternative service networks.

(b) Requiring Plan Sponsors to provide alternative service networks.

(c) Requiring Plan Sponsors to provide alternative service networks.

(d) Requiring Plan Sponsors to provide alternative service networks.

(e) Requiring Plan Sponsors to provide alternative service networks.

(f) Requiring Plan Sponsors to provide alternative service networks.

(g) Requiring Plan Sponsors to provide alternative service networks.

(h) Requiring Plan Sponsors to provide alternative service networks.

(i) Requiring Plan Sponsors to provide alternative service networks.

(j) Requiring Plan Sponsors to provide alternative service networks.

(k) Requiring Plan Sponsors to provide alternative service networks.

(l) Requiring Plan Sponsors to provide alternative service networks.

(m) Requiring Plan Sponsors to provide alternative service networks.

(n) Requiring Plan Sponsors to provide alternative service networks.

(o) Requiring Plan Sponsors to provide alternative service networks.

(p) Requiring Plan Sponsors to provide alternative service networks.

(q) Requiring Plan Sponsors to provide alternative service networks.

(r) Requiring Plan Sponsors to provide alternative service networks.

(s) Requiring Plan Sponsors to provide alternative service networks.

(t) Requiring Plan Sponsors to provide alternative service networks.

(u) Requiring Plan Sponsors to provide alternative service networks.

(v) Requiring Plan Sponsors to provide alternative service networks.

(w) Requiring Plan Sponsors to provide alternative service networks.

(x) Requiring Plan Sponsors to provide alternative service networks.

(y) Requiring Plan Sponsors to provide alternative service networks.

(z) Requiring Plan Sponsors to provide alternative service networks.

{E}
more than a 30-day supply absent special circumstances. In contrast, AdvancePCS’s mail-order operations routinely dispense a 90-day supply of prescription drugs to Plan Members. Some Plans administered by AdvancePCS refuse to reimburse Plaintiffs and members of the Class for any maintenance drugs dispensed other than the initial prescription.

59. AdvancePCS aggressively pursues prescription drug refill and follow-on business that otherwise would be provided by the Plaintiffs and members of the Class. Using Plan Members’ medical information that it receives from the retail pharmacy that filled the Plan Member’s initial prescription, AdvancePCS contacts the Plan Member to encourage the Member to use AdvancePCS’s mail-order operations for any refill and follow-on prescriptions rather than returning to the pharmacy to have them filled. A typical “sales pitch” AdvancePCS offers to Plan Members is that they will pay only one co-pay (for example, $15) for a 90-day supply if the refill is filled by AdvancePCS’s mail-order operation compared to the three co-pays (at $10 each for a total of $30, for example) that the Plan Member would pay at a pharmacy, which, under its agreement with AdvancePCS, can only provide a 30-day supply.

60. Loss of refill and follow-on prescription business (which together represent the majority of all drugs dispensed) to mail order depletes Plaintiffs and members of the Class of the most profitable part of their pharmacy business. Handling refill and follow-on prescriptions is considerably less expensive than handling the initial prescription because filling the initial prescription involves, by far, the most data entry into the applicable computer systems (including the PBM’s), the most interaction with the patient (to determine patient eligibility and to inform the patient when and how to take the medication), and is much more likely to encounter problems that need to be resolved with the PBM (or other third-party payer), the doctor and/or the patient,
DEFENDANTS' ANTI-COMPETITIVE CONDUCT

administered by AdvancePCS.

acts to the detriment of the 75 million Americans covered under prescription benefit plans
their negotiated power. Such lessening of competition, however, damages retail pharmacies and
between and among them, thereby increasing the benefits they derive from the exercise of
part of AdvancePCS's role as common agent for its Plan Sponsors is to limit the competition
provide more and better dispensing alternatives to Plan Members. It is evident, however, that
members in the United States, not to mention large employers (to compete with each other to
largest insurance companies. Blue Cross Blue Shield companies, HMOs and managed care
Sponsor. But this again might prompt AdvancePCS' Plan Sponsors (including some of the
service, the Plan Member has a greater array of options available at no additional cost to the Plan
the Plan Member is willing to pay more because she feels she is getting better or enhanced
it will pay for filling a given prescription. If the pharmacy is willing to accept a lower co-pay or
and no less than the co-pay indicated by AdvancePCS' computer system. An obvious
Consumer choice is also limited by the requirement that retail pharmacies charge
such as patient eligibility, formulary compliance, drug interaction and change of medication or

Class (9)

combined bargaining power, AdvancePCS has engaged in anticompetitive conduct to:

62. By acting as the common agent of Plans and Plan Sponsors and using their
(b) Pay less to Plaintiffs and members of the Class than AdvancePCS charges
to Plan Sponsors for the cost of dispensing and providing brand name and
generic prescription drugs to Plan Members;

(c) Set and change prices to be paid to Plaintiffs and members of the Class for
generic drugs, on behalf of Plan Sponsors, as AdvancePCS chooses;

(d) Artificially limit the ability of Plaintiffs and members of the Class to
compete with AdvancePCS’s mail-order pharmacies;

(e) Prohibit Plaintiffs and members of the Class from filling prescriptions for
more than 30 days’ supply;

(f) Charge an effectively greater co-pay for using a Plaintiff or member of the
Class rather than AdvancePCS’s mail-order pharmacy, even in situations
where there is no increased cost to the Plan Sponsor and/or the Plan
Member is willing to pay an additional amount to use the retail pharmacy;

(g) Use patient information provided to AdvancePCS in its capacity as an
agent of the Plan Sponsor to contact the patient for the purpose of
marketing AdvancePCS’s mail-order pharmacy service;

(h) Prohibit Plaintiffs and members of the Class from charging an additional
amount to informed, consenting patients who are willing to pay more for a
particular pharmacy’s enhanced or better service;

(i) Require Plaintiffs and members of the Class to sign one-sided contracts
and impose contract changes on Plaintiffs and members of the Class
unilaterally.

COUNT I
VIOLATION OF SECTION 1
OF THE SHERMAN ACT, 15 U.S.C. § 1

63. Plaintiffs reallege and incorporate by reference each and every allegation set forth
above.

64. Defendant has contracted, combined, and conspired and acted in concert with
other co-conspirators unreasonably to restrain interstate trade and commerce in violation of
Constitute per se illegal price fixing in the market for the dispensing and sale of brand name and generic prescription drugs below what they would be paid absent such illegal restraints and actions. As such, they may be found liable for the reimbursement and fee for the dispensing and sale of brand name and generic prescription drugs by members of the Class or any insurance or other plan. The agreements mentioned below have the purpose and effect of prohibiting meaningful levels of competition in a number of related ways, including:

64. Denial of coverage for plan members;
65. Denial, active in concert with others, namely the Plan Sponsors, illegally competitive prescription drugs;
66. Denial, active in concert with others, namely the Plan Sponsors, illegally competitive prescription drugs;
67. Denial, active in concert with others, namely the Plan Sponsors, illegally competitive prescription drugs;
68. Denial, active in concert with others, namely the Plan Sponsors, illegally competitive prescription drugs;
69. Denial, active in concert with others, namely the Plan Sponsors, illegally competitive prescription drugs;
70. Denial, active in concert with others, namely the Plan Sponsors, illegally competitive prescription drugs;
generic prescription drugs, or otherwise violate Section 1 of the Sherman Act as an unreasonable restraint of trade in the market for the dispensing and sale of brand name and generic prescription drugs.

68. The illegal restraints and actions alleged herein also have the purpose and effect of artificially setting the prices that Plaintiffs and members of the Class can charge to Plan Members for the dispensing and sale of brand name and generic prescription drugs. As such, they constitute *per se* illegal price fixing in the market for the dispensing and sale of brand name and generic prescription drugs, or otherwise violate Section 1 of the Sherman Act as an unreasonable restraint of trade in the market for the dispensing and sale of brand name and generic prescription drugs.

69. The illegal restraints and actions alleged herein also have the purpose and effect of imposing unconscionable contracts, unnecessary costs, operating inefficiencies, and payment delays and denials on Plaintiffs and members of the Class. As such, they constitute *per se* illegal agreements and actions to raise competitors’ costs in the market for the dispensing and sale of brand name and generic prescription drugs, or otherwise violate Section 1 of the Sherman Act as an unreasonable restraint of trade in the market for the dispensing and sale of brand name and generic prescription drugs.

70. The illegal restraints alleged herein also have the purpose and effect of injuring Plaintiffs and members of the Class by diverting Plan Members from the pharmacies operated by Plaintiffs and members of the Class to the mail-order pharmacy owned and operated by AdvancePCS. As such, they constitute per se illegal concerted actions to unreasonably injure them, divert their business to mail order and refuse to deal with them for refill and follow-on
Defendants and members of the Defendant Class, as follows:

WHEREFORE, Plaintiffs and members of the Class pray for judgment against

have been damaged to their business and property in amounts to be determined.

As a result of Defendant's violations of the antitrust laws during the period from

as a result of the illegal restrictions.

members of the Class have sustained substantial losses and damage to their business and property.

injuries, and losses and delays of payment, Plaintiff's and members of the Class have suffered loss of a significant portion of their customers; recall and follow-on business; and have

compensated substantially less for their services and for their brand name and generic

illegal restrictions alleged herein. Among other things, Plaintiffs and members of the Class were

22. During the Class Period, Plaintiffs and members of the Class were injured by the

conspiratorial activities described.

As defined in the market for the dispensing and sale of brand name and generic prescription drugs.

prescriptions or otherwise violate Section 1 of the Sherman Act as an unreasonable restraint of

B. Counsel.

Class Representatives and designee of their counsel as Plaintiffs, and (q)(3) of the Federal Rules of Civil Procedure, certifying Plaintiffs as

Certifying this action as a plaintiff class action under Rule 23(a) (q)(3) of

members of the Class and aver that the Plaintiffs and members of the Class

B. Counsel.

Class Representatives and designee of their counsel as Plaintiffs, and (q)(3) of the Federal Rules of Civil Procedure, certifying Plaintiffs as

Certifying this action as a plaintiff class action under Rule 23(a) (q)(3) of

members of the Class and aver that the Plaintiffs and members of the Class

ize

members of the Class and aver that the Plaintiffs and members of the Class
three times actual damages against Defendant for its violations of Section 1 of the Sherman Act;

C. Under Section 16 of the Clayton Act, 15 U.S.C. § 26, enjoining all aspects of Defendant’s continuing violations of Section 1 of the Sherman Act;

D. Granting Plaintiffs and members of the Class the costs of prosecuting this action, together with pre- and post-judgment interest and reasonable attorneys’ fees and costs; and

E. Granting such other relief as this Court may deem just and proper under the circumstances.

JURY DEMAND

Plaintiffs demand trial by jury on all issues so triable.

Dated: ________________________________ Respectfully submitted,

Plaintiffs Bellevue Drug Co., Robert Schreiber, Inc.d/b/a Burns Pharmacy, Pharmacy Freedom Fund, National Community Pharmacists Association

By: ________________________________
    One of their Counsel