

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
ex rel. DARRELL V. MCGRAW, JR.,
ATTORNEY GENERAL,

Plaintiff,

v.

CIVIL ACTION NO. 09-C-217

RITE AID OF WEST VIRGINIA, INC.,

Defendant.

ORDER DENYING MOTION TO DISMISS AMENDED COMPLAINT

On February 17, 2011, the parties appeared through counsel for argument on the Motion to Dismiss Amended Complaint of Defendant Rite Aid of West Virginia, Inc. ("Rite Aid").

After careful consideration, the Court DENIES Rite Aid's motion.

I. FINDINGS OF FACT

1. Plaintiff State of West Virginia, *ex rel.* Darrell V. McGraw, Jr., Attorney General ("the State") has filed a three-count First Amended Complaint against Rite Aid. The First Amended Complaint seeks injunctive relief, civil penalties, restitution and disgorgement against Rite Aid for alleged violations of West Virginia law governing generic prescription-drug pricing and the West Virginia Consumer Credit and Protection Act ("CCPA").

2. The First Amended Complaint alleges Rite Aid routinely violates West Virginia Code § 30-5-12b(g), a provision of the Pharmacy Act, which provides that pharmacies pass on to purchasers the cost-savings realized by the pharmacies' lower acquisition costs of generic drugs. Specifically, the statute states that "all savings in the retail price of the [generic] prescription shall be passed on to the purchaser," and that "in no event shall such savings be less than the

difference in acquisition cost of the brand name product prescribed and the acquisition cost of the substituted product.” *Id.*

II. CONCLUSIONS OF LAW

Motion to Dismiss Standard

3. “A motion to dismiss should be granted only where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. For this reason, motions to dismiss are viewed with disfavor, and [the Supreme Court] counsel[s] lower courts to rarely grant such motions.” *Forshey v. Jackson*, 671 S.E.2d 748, 755 (W. Va. 2008) (cited authority omitted). In reviewing Rite Aid’s motion to dismiss, this Court must view all facts in a light most favorable to the State, and may dismiss “only if it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim[.]” *Id.*

Challenges to All Counts

4. Rite Aid argues the First Amended Complaint fails to comply with Rule 8(a) of the West Virginia Rules of Civil Procedure, and should be dismissed on that ground. The Court disagrees. With respect to five generic-drugs sold by Rite Aid from January 1, 2008 through June 30, 2008, the First Amended Complaint alleges specifically the amount of Rite Aid’s overcharge. For example, the State alleges that Rite Aid overcharged its West Virginia purchasers of generic Cefdenir (the 250mg/5 ml suspension form, dispensed in 60 ml quantities) by \$37-48 per prescription. First Am. Compl. ¶ 29.

5. These allegations satisfy Rule 8(a), which requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” As the Supreme Court has stated, Rule 8(a) “requires clarity but not detail,” and “[t]he primary purpose of [the Rule] is rooted in fair notice.” *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 771, 776, 461

S.E.2d 516, 521 (1995). Contrary to Rite Aid's argument, Rule 8(e) is clear that, "[n]o technical forms of pleading...are required." Additionally, pursuant to Rule 8(f), "[a]ll pleadings shall be so construed as to do substantial justice." The Court concludes the State's allegations are more than sufficient to satisfy these requirements, and exceed the minimal requirement to "set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist." *Forshey*, 671 S.E.2d at 756.

6. Rite Aid contends the generic-drug statute applies only to substitution transactions -- *i.e.*, when a physician writes a prescription for a brand drug, but the pharmacist fills the prescription with a generic equivalent -- and argues the State has not alleged overpricing with respect to substitution transactions. This argument fails because the State in fact alleged Rite Aid overcharged for generic-drugs in substitution transactions, First Am. Compl. ¶¶ 30, 36, 42, 48, 54, and the Court must accept these allegations as true at this stage of the case.

7. Rite Aid also argues for dismissal on the ground that the allegations are not pled with specificity under Rule 9(b). The Court disagrees, and concludes the heightened Rule 9(b) pleading standard applies only to actions alleging fraud, and this action does not and need not allege fraud.

Count I

8. Count I alleges Rite Aid has repeatedly violated the provisions of the generic drug-pricing law, and under West Virginia Code § 30-5-23, seeks equitable relief to enjoin the violations. That Code provision allows any "person," defined as "any . . . legal entity, including government," *id.* § 30-5-1b(24), to "apply to a court having competent jurisdiction . . . for a writ of injunction to restrain repetitious violations of the provisions of this article." *Id.* § 30-5-23.

Rite Aid seeks dismissal of Count I because it contends the State must first exhaust

administrative remedies by filing an administrative complaint under West Virginia Code § 30-5-12b(q) with the Pharmacy Board alleging the violations of the generic-drug pricing law. The Court disagrees. The remedy of injunctive relief in the statute is a specific grant of authority to the State allowing it to seek to enjoin violations of the Pharmacy Act in circuit court. Nothing in Section 23 or the administrative complaint provision in Section 12b(q) indicates an administrative complaint remedy is mandatory or exclusive. The administrative complaint provision states only that a person “shall have the right” to file an administrative complaint; this language is not mandatory. The Court concludes that because the grant of authority to any legal entity to seek injunctive relief to enjoin violations of the Pharmacy Act is made by statute, no common law principle that purportedly requires exhaustion of administrative remedies can vitiate the statutory right.

Count II

9. Count II alleges that by violating the provisions of the Pharmacy Act, W. Va. Code § 30-5-1, a statute that was enacted to protect the consuming public, Rite Aid has engaged in “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce,” or “UDAP,” in violation of West Virginia Code § 46A-6-104. “Trade or commerce” is defined as the sale of goods in “any trade or commerce, directly or indirectly, affecting the people of this state.” *Id.* § 46A-6-102(6). This provision is “among the most broadly drawn provisions” in the CCPA, *McFoy v. Amerigas*, 295 S.E.2d 16, 19 (W. Va. 1982), and must be interpreted liberally to further its remedial purposes. *Scott Runyan*, 461 S.E.2d at 524.

10. Rite Aid argues Count II fails to allege what it calls “predicate acts” – one or more of the acts or practices contained in the definition of “unfair or deceptive acts or practices”

in West Virginia Code § 46A-6-102(f). The Court disagrees. The UDAP definition states the term “includes, but [is] not limited to” the twelve listed acts or practices. This language indicates the definition is not exclusive, and other conduct can constitute unfair or deceptive acts or practices. Enforcement of the UDAP provisions in the face of Rite Aid’s alleged overcharging for generic-prescription drugs fits within the Attorney General’s “broad powers to supervise, investigate and prosecute violations [of the CCPA] or to see that compliance with the Act is maintained.” *Harless v. First Nat. Bank in Fairmont*, 246 S.E.2d 270, 276 (W. Va. 1978).

11. Rite Aid also seeks dismissal of Count II to the extent it alleges overcharges to third-party prescription-drug payors. Analyzing as it must the provisions of the statute at issue here, the Court finds that neither the Consumer Protection Act (W. Va. Code § 46A-6-104) nor the accompanying provisions authorizing the Attorney General to enforce the statute (W. Va. Code §§ 46A-7-108 & -111) limit the protections of the CCPA to direct consumers.

Count III

12. Count III alleges that by violating the generic-drug pricing provisions, Rite Aid has collected excess charges under West Virginia Code § 46A-7-111(1). As a provision of the CCPA, the excess charge statute must be interpreted liberally in favor of the statute’s remedial purposes, and has been so interpreted by the Supreme Court. For example, in *Scott Runyan*, the Court held the Attorney General had authority under the CCPA to collect a refund of excess charges relating to the unlawful sale of extended vehicle warranties. 461 S.E.2d at 526. The State has stated a claim for relief under Count III.

III. CONCLUSION

For these reasons, the Court DENIES the Defendant’s Motion to Dismiss. The Clerk is

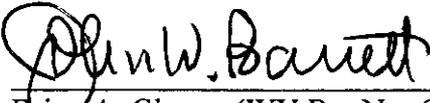
directed to send a certified copy of this Order to counsel of record.

Enter this 15th day of March, 2011.



Hon. William Thompson, Judge

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CIRCUIT COURT