

Claiming Damages and Evaluating New Prescription Drug Pricing Methodologies in the Wake of Two Settlements of a Class Action AWP Lawsuit: Action Needed by July 9, 2009

Effective September 26, 2009, the Average Wholesale Price (AWP) of more than 400 brand-name drugs will decrease as the result of final settlements in a class action lawsuit involving two major publishers of AWP information. The lawsuit alleged that the AWP indices published by First Databank (FDB) and Medi-span were not based on a survey of wholesalers, as claimed. The suit also alleged that only one wholesaler (McKesson Corporation) was surveyed and that FDB arbitrarily raised the markup on more than 400 brand-name drugs from 20 percent to 25 percent starting in 2002.¹

THE SETTLEMENTS

FDB, while denying any wrongdoing, has agreed to change its calculation methodology, thereby reducing the AWP price by 4 percent overall on the drugs in question. In addition, FDB will also discontinue publishing AWP prices by 2011.

A separate settlement with the McKesson Corporation sets aside \$288 million to resolve third-party payer (TPP) damages. Plan sponsors are considered a member of the settlement class if they (1) are a TPP² that reimbursed for prescription drugs based on the AWP published by FDB or

the AWP published by Medi-Span and (2) purchased the subject drugs³ between August 1, 2001 and March 15, 2005.

CLAIMING DAMAGES

Plan sponsors that are eligible for damages under the McKesson settlement must complete a claim form by July 9, 2009.⁴ Because the form requires actual claims data, plan sponsors will need assistance from the pharmacy benefit managers (PBMs) that administered their programs between 2001 and 2003 (the required sample period used in the settlement).

EVALUATING NEW PRESCRIPTION DRUG PRICING METHODOLOGIES

The settlements did not address PBM pricing methodologies. Because most PBMs set pricing terms as a percentage discount from published AWP, in the absence of any action by PBMs, the effect of the rollback of AWP prices would be to lower reimbursements to retail and mail order pharmacies and, in turn, lower plan sponsor costs. However, most PBM contracts with plan sponsors contain a clause permitting the PBM to adjust drug costs after the price rollback to bring plan costs to a cost-neutral position. Consequently, the drug prices would be economically equivalent to the plan sponsor after the rollback, although the pricing terms may be calculated differently. PBMs are now activating these contract clauses in light of the settlement. This means plan costs should neither increase nor decrease as a result of the rollback.

Because PBM contract language generally does not specify the actual methodology that will be used to create a cost-neutral pricing scenario, plan sponsors will be

¹ The lawsuit was *New England Carpenters Health Benefits Fund et al v. First Databank, Inc., et al*, D. Mass., No. 1:05-CV-11148-PBS.

² TPPs include union health and welfare benefit plans. Entities with self-funded plans that contract with a health insurance company or other entity to serve as a third-party claims administrator to administer their prescription drug benefits qualify as TPPs.

³ A list of these drugs is available on the following Web page: <http://www.mckessonawpsettlement.com/PDFs/SubjectDrugList.pdf>

⁴ The form is available on the following Web page: <http://www.mckessonawpsettlement.com/TPPClass.htm>

approached by their PBMs and asked to verify and accept an AWP equalization methodology. It is important to thoroughly review the suggested methodology, even though, as a practical matter, it may be difficult to suggest modifications or measure results going forward in order to assure that plan payments are appropriate.

Segal recently surveyed major PBMs and insurers regarding their proposed methodologies to equalize the plan sponsor drug costs. All respondents indicated an intention to perform calculations to determine appropriate changes to published AWP (or plan sponsor discount levels) to equalize costs before and after the scheduled price rollback. According to Segal's survey, most PBMs indicate that they will employ one of two methods to maintain plan sponsor costs at pre-rollback levels:

- **Method 1** Create a pricing file which artificially maintains AWP prices at the inflated, pre-rollback levels. At contract renewal, the plan will be offered new terms.
- **Method 2** Plan sponsor AWP discount guarantee levels will be adjusted downward to reflect the lower post-rollback AWP levels. This method seeks to measure current plan sponsor costs for brand-name medications and relate these costs to post-rollback AWP levels.

The table below illustrates how both methods would work for a sample brand-name drug.

	Pre-Rollback for Brand-Name Drug X	Post Rollback	
		Method 1: Maintain Inflated AWP	Method 2: Reflect Roll-back AWP
AWP	\$100	\$100*	\$96
Discounted Price to Plan	\$84	\$84	\$84
Discount Rate	16.0%	16.0%	12.5%
* This new methodology is based on a \$96 post-settlement price times an AWP increase factor (determined by the PBM) of 1.042.			

When considering AWP equalization methodologies plan sponsors should keep the following important points in mind:

- PBMs may suggest different methods.
- PBMs should be required to provide written guarantees and documented proof that their suggested pricing methodology will guarantee stable plan costs for the months until AWP disappears in 2011.
- A detailed audit of current electronic claim data is essential to independently validate PBM calculations and discount guarantees. Auditing method 1 will require recreating the pre-rollback AWP, which will no

longer be published, by applying the PBM's increase factor to historical data.

- If a PBM's post-rollback terms are unacceptable to a plan sponsor, it may be necessary to go to market for new bids to obtain best-available pricing terms.

By 2011, before AWP disappears, PBMs and plan sponsors will need to agree on entirely new prescription drug pricing methodologies. Plan sponsors are encouraged to work with PBMs to implement more precise contracting methodologies that are verifiable and produce competitive costs. In the final analysis, while these changes will no doubt create some disruption, we view the rollback and eventual replacement of the AWP methodology as an opportunity. It allows plan sponsors to work with the PBMs to set more transparent PBM pricing terms for future contracting.⁵



As with all issues involving the interpretation or application of laws, regulations and litigation, plan sponsors should rely on their attorneys for authoritative advice on the final settlements in the AWP class action lawsuit. Segal can be retained to assist plan sponsors to negotiate with PBMs on pricing methodologies and performance guarantees.

⁵ For information on alternative prescription drug pricing methodologies that could be used once AWP disappears, see the following online supplement to Segal's October 2007 *Bulletin*, "Effect on Prescription Drug Pricing of Expected Settlement of a Class Action Lawsuit on AWP": <http://www.segalco.com/publications/presentations/AWPalt07.pdf>



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