

## **NEW YORK CITY RECOVERS APPROXIMATELY \$67 MILLION FROM PHARMACEUTICAL COMPANIES IN MEDICAID FRAUD**

### ***COURT FINDS THAT THE INFLATION OF AVERAGE WHOLESALe PRICES OVER AND ABOVE A CERTAIN AMOUNT IS FRAUDULENT***

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New York, New York, May 9, 2013 – The City has prevailed and recovered over \$66.9 million from its Medicaid fraud litigation against 44 pharmaceutical companies concerning inflation of Average Wholesale Prices (AWPs) for drugs. The last settlement is now being finalized.

This litigation, in which the City was represented by the Law Department and by outside counsel Kirby McInerney LLP, will bring to the City \$66,857,393 after attorneys fees and costs. To date, the City has been paid \$60,693,180, with the remainder still being processed. These amounts represent approximately 35 percent of the total recoveries on behalf of all New York Medicaid payors, which include the State, the federal government, and the other New York State counties' Social Services Districts as well as the City.

The City's litigation, captioned *City of New York v. Abbott Laboratories*, began in August 2004 in the Southern District of New York. The case was subsequently joined with cases brought by almost all the other New York counties, all but a few also represented by Kirby, and transferred to a multi-district litigation before Judge Patti Saris in the District of Massachusetts.

The City alleged that the defendants fraudulently reported grossly inflated AWPs of drugs, sometimes by hundreds and even thousands of percentage points over the true AWPs. By statute, reported AWP forms the basis for most Medicaid drug reimbursement to doctors and pharmacists. The doctors and pharmacists can lawfully pocket the difference between what they pay for the drug and the amount they can claim as reimbursement from the Medicaid program. The practice of inflating the reported prices developed as companies competed for market share by "marketing the spread" between the actual wholesale prices paid by doctors and pharmacies and the amount of reimbursement those same doctors and pharmacists could claim from the State.

By inflating its reported AWPs, each company sought to make its spreads higher than its competitors', and thereby to induce doctors and pharmacists to purchase its drugs as opposed to its competitors'.

The companies' primary defense was that the practice of inflating AWPs was widely known and accepted in the industry. Indeed, AWP was known in the industry as "Ain't What's Paid." Nevertheless, the Court rejected the defense, finding that because Medicaid reimbursement rates were set by statute, and because the enormous extent of AWP inflation was not known to legislators or regulators, the inflation of the AWP over and above a certain amount was fraudulent.

Although various class actions and actions on behalf of other states were brought concerning AWP, the New York City and counties case was the only one to include claims concerning generic drugs. Generic drugs were not included in other actions because Medicaid generally reimburses for such drugs at the Federal Upper Limit (FUL), or at the State Maximum Allowable Cost (MAC) rather than at AWP. In an important decision, Judge Saris held that because FUL and MAC reimbursement are calculated based on reported AWP, the generic drug manufacturers could be held liable for inflation of those prices as well as for AWP inflation. Competition -- and hence the incentive to inflate reported prices -- was in fact more intense among generic drug manufacturers who manufactured the same drug than among brand-name manufacturers, who often faced less competition.

Because generic drugs' prices were inflated the most, the largest settlements were with seven pharmaceutical companies that manufacture generic drugs (Actavis, Mylan, Par, Sandoz, Schering, Teva, and Watson). The City will receive \$48,826,137 as a result of these seven settlements alone. Other large settlements were with Bristol-Myers Squibb (\$7.2 million); Merck (\$2.3 million); and Pfizer (\$1.2 million).

"This litigation resulted in over \$190 million in Medicaid recoveries by the City, State and federal government, said John Low-Beer, of the New York City Law Department. "It exemplifies what the City can accomplish in fighting Medicaid fraud."

"Kirby McInerney was honored to successfully prosecute the City of NY's claims for fraud against the public's fiscal trust," said Joanne Cicala of Kirby McInerney LLP.

This case was handled by Joanne Cicala and Daniel Hume of Kirby McInerney LLP and John Low-Beer of the New York City Law Department's Affirmative Litigation Division, assisted by Division Chief Gail Rubin, and by Richard Costa, Ashley Baker, Kristin Glover, and Ari Biernoff.

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