



NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL

Michael A. Cardozo, *Corporation Counsel*

Press Release

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**CITY PREVAILS IN TWO SIGNIFICANT MEDICAID CASES;
WINS CONTINUE CITY'S AGGRESSIVE EFFORTS
TO RECOVER MONIES OWED TO IT**

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New York, Feb. 12, 2010 – The New York City Law Department has prevailed in two important cases seeking Medicaid funds.

- *State to Reimburse City \$8.6 Million in Wrongfully-Charged Medicaid Payments*

In *City of NY v. State of NY*, Judge Thomas Scuccimarra of the New York State Court of Claims held that the State was required to reimburse the City for wrongfully charged Medicaid payments erroneously made by the State on behalf of ineligible people. The erroneous payments, which totaled over \$16 million, resulted from a glitch in the State's computer system that misinterpreted certain computer codes received from the federal Social Security Administration (SSA). The misinterpreted codes led the State to open new Medicaid cases for people whose applications had been rejected by SSA, and to continue eligibility for people who SSA had determined to be no longer eligible. The glitch went undetected for years before being discovered by the City in April 1999. Following the detection, the State did not weed out the ineligible cases until December 2002.

The City first filed a petition in New York State Supreme Court in May 2003. The Supreme Court dismissed the petition, holding that the case was primarily a money claim, not a challenge to an administrative decision. The Supreme Court's decision was upheld by the Appellate Division. In 2005, the City filed a claim in the Court of Claims, which resulted in the recent decision.

Because the City had withheld \$8.4 million previously, the amount of damages that will be awarded to the City are expected to be approximately \$8.6 million.

John Low-Ber, a Senior Counsel in the Affirmative Litigation Division of the New York City Law Department, handled the case on behalf of the City.

- *City Wins Major Motion in Ongoing Fraud Case Against Generic Drug Manufacturers*

In 2004, the City, represented by Kirby, McInerney, LLP and by the Law Department, filed an action in U.S. District Court for the Southern District of New York against 44 pharmaceutical companies and their subsidiaries, captioned *City of New York v. Abbott Laboratories*. The City alleged that these companies reported grossly inflated "Average Wholesale Prices" (AWPs) of drugs, which constituted Medicaid fraud and caused the City, State, and federal governments to overpay for those drugs for the Medicaid program. A Massachusetts federal court recently granted the motion for partial summary judgment of the City, along with virtually all of New York State's counties as co-plaintiffs, against 11 generic drug manufacturers concerning nine major drugs. In the ruling, the Hon. Patti Saris of the U.S. District Court for the District of Massachusetts found that the manufacturers had knowingly reported fictitious list prices on which Medicaid reimbursements were based, and that this conduct violated New York's Medicaid

fraud statute, Social Services Law § 145-b. Judge Saris also refused to dismiss the City and counties' Medicaid fraud, consumer fraud, and common law fraud claims. Judge Saris held that these 11 defendants knowingly reported fictitious prices on which Medicaid reimbursements were based. The plaintiffs' motion focused on the impact that the defendants' false price reporting had on the establishment of the Federal Upper Limit (FUL) price for nine pharmaceutical drugs. The FUL is set by the Federal Centers for Medicare and Medicaid Services (CMS) to take advantage of savings that are currently available in the marketplace for generic drugs.

For those generic drugs for which CMS sets FULs, New York Medicaid reimburses at that price. The Court found that the manufacturers had made CMS's and the plaintiffs' efforts to control and limit generic drug reimbursements "impossible," because they reported prices that were "crafted from thin air."

In its decision, the Court relied on the testimony of the City and counties' expert, who had calculated the differences between the manufacturers' published costs to acquire the drugs and the actual costs as consistently higher than 50 percent, frequently above 100 percent, and in some cases over 1,000 percent. The expert found cost differences as high as 33,641 percent for Mylan; 13,486 percent for Par; 59,936 percent for Sandoz; and 17,421 percent for Wyeth.

The Court held that the City and counties had proved that the manufacturers had knowingly made false statements or representations on behalf of themselves or others to attempt to obtain public payments.

The nine drugs that were the subject of this decision were chosen as examples. Many more drugs were subject to FUL prices, and total New York State Medicaid purchases for FUL drugs were in excess of \$300 million during the relevant period. The amount of damages and/or penalties will be determined in subsequent proceedings.

The lawsuit is before Judge Saris for pre-trial purposes and as part of a massive multi-district litigation. Unless settlements are reached, the remaining claims in the case will return to a U.S. District Court in New York for trial after the close of discovery.

The suit is being led by Joanne M. Cicala, a partner at Kirby McInerney, LLP, a law firm with expertise in health care and consumer litigation that is representing New York City. John Low-Beer, Senior Counsel in the Affirmative Litigation Division of the New York City Law Department, is co-counsel on the case. Defendants affected by this ruling include: Barr Laboratories, Inc.; Dey, L.P. and Dey, Inc.; Ivax Pharmaceuticals, Inc.; Mylan Pharmaceuticals, Inc., and UDL Laboratories, Inc.; Par Pharmaceuticals Companies, Inc.; Purepac Pharmaceutical Co.; Sandoz, Inc.; Schering-Plough/Warrick Corporation; Teva Pharmaceutical USA, Inc.; Watson Pharmaceuticals, Inc./Watson Pharma, Inc.; and Wyeth. This represents a sub-set of all defendants named in the lawsuit.

Discussing both Medicaid wins when taken together, Corporation Counsel Michael A. Cardozo of the New York City Law Department noted, "The City's victories are emblematic of our efforts to recover any -- and all -- monies owed to it, especially during these tough economic times. We will continue to be aggressive in ensuring that those doing business with New York City live up to their obligations, and act professionally and ethically."

Law Department Senior Counsel John Low-Beer added: "The City is pleased with these wins, as well as with the excellent work done by its outside counsel. The Court properly rejected the defendants' arguments, holding that the City had proven that defendants knowingly made false statements, that the law did not require proof of causation, and that there was no evidence that either the State or the federal government knew of the gross price inflations practiced by defendants."

The New York City Law Department is one of the oldest, largest and most dynamic law offices in the world, ranking among the top three largest law offices in New York City and one of the largest public law offices in the country. Tracing its roots back to the 1600's, the Department has an active caseload of 90,000 matters and transactions in 17 legal divisions. The Corporation Counsel heads the Law Department and acts as legal counsel for the Mayor, elected officials, the City and all its agencies. The Department's 650 attorneys represent the City on a vast array of civil litigation, legislative and legal issues and in the criminal prosecution of juveniles. For more information, please visit nyc.gov/law.