



STATE OF WISCONSIN

CIRCUIT COURT
Branch 9

DANE COUNTY

STATE OF WISCONSIN,)	
)	
Plaintiff,)	Case No.: 04 CV 1709
)	
v.)	
)	
ABBOTT LABORATORIES, <i>et. al.</i> ,)	
)	
Defendants.)	
)	

DEFENDANT PFIZER INC.'S TRIAL BRIEF

The Court is intimately familiar with the claims and defenses generally at issue in the AWP litigation as a whole; Pfizer submits this brief to orient the Court to the key issues specific to this trial.

I. INTRODUCTION

The State alleges that Pfizer engaged in an “insidious, deceptive scheme” to cause Wisconsin to pay inflated prices for prescription drugs, (*see* Third Am. Compl. ¶¶ 1, 30, 34-41, 60), by “concealing the true price of [its] drugs” in order to obscure the prices actually paid by Wisconsin pharmacies. *Id.* ¶ 52. The evidence concerning Pfizer relates solely to branded, self-administered drugs, and differs sharply from the evidence concerning Pharmacia, which focused on multi-source, generic and physician-administered drugs. Moreover, the landscape in this litigation (and AWP litigation around the country) has changed materially since the Pharmacia trial. As a result, this is

not simply a “re-do” of the Pharmacia trial.¹ The trial evidence will refute the State’s theory that Pfizer engaged in any “deceptive scheme” and will make clear that Pfizer has done nothing wrong:

First, Pfizer never reported or even suggested AWP for its products. The only representations Pfizer ever made about its prices were contained in its price lists, which Pfizer openly circulated to the market and which reflected the prices at which Pfizer actually sold its products to its customers. In short, Pfizer’s price representations were true. Far from “concealing the true price” of its products, Pfizer provided them to the entire pharmaceutical marketplace.

Second, Pfizer sold its products to wholesalers; it did not have the pricing information the State now claims that Wisconsin Medicaid needed; that is, so-called “Accurate, Contemporaneous, and Electronic” (“ACE”) data regarding what Wisconsin pharmacies paid to wholesalers for Pfizer’s products. However, the evidence will show that Wisconsin Medicaid could have reimbursed pharmacies based on their acquisition costs but chose not to, and could have obtained so-called “ACE” data directly from the pharmacies, but chose instead to base reimbursement on AWP.

Third, the State chose to base reimbursement on published AWP knowing what everyone else in the pharmaceutical industry knew, *i.e.*, that published AWP for branded products simply were a tool for setting reimbursement rates, not actual prices.

¹ As set forth in Pfizer’s Opposition to the State’s Motion to Apply Issue Preclusion, the State’s attempt to side-step this Court’s grant of separate trials by preventing Pfizer from “relitigating” certain issues purportedly determined in the Pharmacia trial should be rejected. The State’s inability to prove violations of Wisconsin law in the context of Pfizer’s pricing and marketing of branded products, and in the face of the very different evidence related to Pfizer, does not provide an adequate basis to deprive Pfizer of arguments it has never had the opportunity to make against the backdrop of a factual record very different from the Pharmacia trial.

Nonetheless, the State chose to base reimbursement on AWP because it was administratively convenient and acceptable to pharmacists. .

Fourth, the State received millions of dollars in rebates, which were expressly designed to ensure that the State paid no more than the best prices available in the marketplace, and which the State expressly considered in calculating its net payments for pharmacy reimbursement. The State did not “overpay” for Pfizer’s products.

These facts simply cannot be squared with the elements of the State’s claims under Wis. Stat. §§ 100.18(1) and (10)(b) (Counts I and II of the Third Amended Complaint, respectively) or Wis. Stat. § 49.49(4m)(a)2 (Count IV). Accordingly, the State’s claims should fail.²

II. KEY ISSUES

A. **Pfizer Never Represented Anything But The True Prices At Which It Sold Its Products.**

For the entire time period at issue in this litigation, Pfizer openly circulated to the market price lists that reflected the true prices at which Pfizer actually offered its branded products for sale. These were the only price representations Pfizer made to the market. In other words, Pfizer’s price reporting was consistent and accurate, not “phony” or “deceptive,” as the State contends.

² The evidence also will show that the State’s claims against Pfizer did not accrue within the applicable statutes of limitations and repose and, therefore, the State’s claims should be barred. *See* Wis. Stat. § 100.18(11)(b)3 (“No action may be commenced under this section more than 3 years after the occurrence of the unlawful act or practice which is the subject of the action.”); *Kain v. Bluemound East Indus. Park, Inc.*, 2001 WI App 230, ¶ 14, 248 Wis. 2d 172, 635 N.W.2d 640 (statute of repose requires that a cause of action be “commenced within a specified amount of time after the defendant’s action which allegedly led to injury, *regardless of whether the plaintiff has discovered the injury or wrongdoing.*”); *see also* July 29, 2008 Order, at 2 (claim pursuant to Wis. Stat. § 49.49(4m) is subject to a ten-year statute of limitations); 1995 Wisconsin Act 27, § 3066 (Wis. Stat. § 49.49(6), pursuant to which State seeks to recover damages, became effective July 1996).

For a period of roughly 20 years—from the early 1980s until 2001—Pfizer disseminated two prices for its drugs: “direct price” and “wholesale price.” “Direct price” was Pfizer’s price for sales directly to retail customers. “Wholesale price,” also called “list price,” was the price for sales to wholesalers. Until January 2001, both prices were provided to First DataBank, which in turn published and distributed these prices to the marketplace, including payors like Wisconsin Medicaid. Over time, Pfizer’s customer base shifted away from retail pharmacies and toward wholesalers and, by early 2001, Pfizer discontinued its “direct price” and became a “single-price company” with “list price” as its standard. Pfizer’s price lists included its “Terms of Sale,” which identified a 2% “prompt pay” discount available to customers that paid within 30 days of sale.

As a matter of practice and policy, Pfizer did not represent, provide, report or suggest an AWP for its products to First DataBank or any other entity. First DataBank independently calculated and published AWPs for Pfizer’s drugs. Pfizer had no control over First DataBank’s calculation and dissemination of AWPs for Pfizer’s products.

Thus, the evidence refutes the State’s claims that Pfizer engaged in deceptive price reporting practices that concealed its true prices. Pfizer cannot be found to have perpetuated an “insidious, deceptive scheme” to hide its prices when the record shows unequivocally that the *only* prices Pfizer communicated to First DataBank and the rest of the market were its true prices.

B. The State Knew That AWP Did Not Represent Actual Prices, But Rather Was Simply A Starting Point For Setting Reimbursement Rates.

For more than 30 years, all players in the pharmaceutical industry—including the State of Wisconsin—recognized AWP as a benchmark used in the drug reimbursement process, not as an actual price at which drugs were sold. Indeed, the State has repeatedly acknowledged that it knew that AWP published by First DataBank did not reflect pharmacies’ actual acquisition costs, including in its opening statement in the trial against Pharmacia. (*See, e.g.*, Feb. 4, 2009 Trial Tr. at 57:23-58:2, attached hereto as Exhibit 1 (“For brand[ed] drugs the argument is well, wait a minute, Wisconsin knew these prices were not accurate when they discounted [AWP]. Well, of course they knew they were not accurate. That’s why they discounted it. That’s not the issue.”).) The State nevertheless attempts to cast First DataBank’s publication of AWP as the cornerstone of Pfizer’s so-called “scheme” to conceal the true prices of its drugs. This is nothing more than an after-the-fact attempt to escape the consequences of legislative compromises to adopt drug reimbursement rates that would balance the State’s need for manageable drug costs against its need to ensure access to pharmacy services for its Medicaid beneficiaries.

Indeed, as early as the mid-1970s, Wisconsin officials knew that AWP did not represent actual average wholesale drug prices:

- In 1975, the Governor of Wisconsin appointed a task force, including the heads of relevant state agencies, which surveyed more than 500 Wisconsin pharmacies and concluded that published AWP “overstate actual drug costs” to pharmacies. (Draft Medicaid Pharmacy Task Force Report, at 3 (Jan. 16, 1976).)
- Since 1984, Wisconsin’s Department of Health and Family Services (“DHFS”) received, reviewed and distributed more than a dozen federal

reports that concluded that AWP does not represent actual average wholesale drug prices. Additionally, at various times, DHFS received invoices from pharmacies showing their actual acquisition costs. DHFS's employees admitted that they understood AWP differed significantly from the actual acquisition costs of drugs.

- As early as 1998, Wisconsin Medicaid officials referred to published AWP as “ain’t what’s paid” because they knew that published AWP did not reflect the prices at which providers actually bought pharmaceutical products.
- That same year, Wisconsin published an issue paper noting that, “[f]or most drugs Wisconsin Medicaid bases drug cost on Average Wholesale Price (AWP). . . . The Office of the Inspector General (OIG) recently published results for MA payments, which found that pharmacies generally obtain brand drug products from their wholesaler at an average price of AWP minus 18.3%. . . . Wisconsin MA’s policy of reimbursing for brand name drugs at AWP minus 10% overcompensates providers for the cost of drugs.” Department of Health and Family Services, 1999-2001 Biennial Budget Issue Paper, at 2 (Sept. 15, 1998).
- Wisconsin’s Legislative Fiscal Bureau published a series of papers acknowledging that published AWP did not reflect actual acquisition costs: “The AWP is the manufacturer’s suggested wholesale price of a drug and is analogous to the ‘sticker price’ of a car. It does not reflect the actual cost of acquiring the drug.” (Legislative Fiscal Bureau, Drug Reimbursement Paper No. 479, at 3 (June 1, 1999).)
- In 2002, HHS-OIG specifically studied pharmacy acquisition costs in Wisconsin, obtaining thousands of invoices for drugs from Wisconsin pharmacies. Based on this study, OIG informed Wisconsin that pharmacies commonly bought branded drugs at 20% below AWP. In response, Wisconsin acknowledged that “the pharmacies’ actual acquisition cost is significantly lower than the Wisconsin Medicaid reimbursement level of AWP minus 11.25%.” (DHHS, Office of the Inspector General, Review of Pharmacy Acquisition Costs for Drugs Reimbursed Under the Medicaid Prescription Drug Program of the Wisconsin Department of Health and Family Services, App. 6 (March 2002).)

Even with this knowledge, the State consistently set reimbursement rates at levels it knew gave pharmacies more than they paid to acquire pharmaceutical products. Put differently, the State knowingly and purposefully chose to make what it now claims were

“overpayments.”³

C. The State Elected To Base Reimbursement On AWP Despite Having Had Access To The Very Pricing Data It Now Claims Was Concealed.

The State contends that First DataBank’s publication of AWP’s deprived Wisconsin Medicaid of the “transparency” it needed to make an informed decision about drug reimbursement levels. This contention is false on multiple levels.

1. Wisconsin Medicaid Had Access To Pfizer’s Direct Prices.

For a period of roughly 20 years, the State of Wisconsin reimbursed Wisconsin pharmacies using the “direct prices” that Pfizer provided to First DataBank. In 1986, Wisconsin reimbursed payors for the products of eight pharmaceutical manufacturers, including Pfizer, using direct price data. As of 1990, Wisconsin reimbursed for the products of four manufacturers, including Pfizer, based on direct price data. Wisconsin continued to reimburse payors for Pfizer products based on Pfizer’s direct prices until about 2000, at which point Wisconsin elected, for the sake of administrative simplicity, to switch to an AWP-based reimbursement system for Pfizer’s products. Thus, the State chose to switch reimbursement from the pharmacies’ actual acquisition costs to something it knew to be more than pharmacies’ actual acquisition costs.

2. The State Had The Ability To Obtain So-Called “ACE” Data Directly From Pharmacies, But Made A “Policy Decision” Not To Do So.

Beginning in at least 1999, the State’s electronic claims processing systems permitted Wisconsin Medicaid to require all providers to electronically submit actual acquisition cost data with each claim for Medicaid reimbursement. Wisconsin Medicaid nevertheless made a “policy” decision not to require the submission of such information.

³ The federal government consistently approved these “overpayments.”

In short, the State knowingly and purposefully chose not to obtain precisely the information it now contends it needed to properly reimburse for Pfizer's drugs.

For the entire damages period, Wisconsin had an electronic claims submission system by which it could specify how pharmacy claims should be submitted, including what fields and data were required. Starting in 1999, Wisconsin shifted from its own proprietary electronic claims system to the National Council for Prescription Drug Programs ("NCPDP") electronic claims submission system. The NCPDP claims-submission system allowed payors like the State to specify what fields pharmacies would be required to complete, and Wisconsin provided instructions to pharmacists on "Payer sheets," defining the data elements and information it required in order to adjudicate a claim. Had the State actually wanted to obtain acquisition cost data, it could have obtained that information with a simple instruction. To do so, the State would have only had to instruct providers to program their computer systems to (a) select the "Acquisition" value in the "Basis of Cost Determination" field, and (b) input acquisition cost in the "ingredient cost" field. However, the State made a "policy" decision not to do so, but now seeks to avoid the consequences of that decision.

D. Wisconsin Medicaid Received Rebates From Pfizer, Which It Expressly Treated As An Offset To Its Reimbursement Costs.

The State's theory that Pfizer profited from a deceptive scheme to cause Wisconsin Medicaid to pay inflated prices fails in the face of the federal and state supplemental rebate programs, which were expressly designed to offset the State's reimbursement costs and under which Pfizer paid *millions of dollars* to the State. These rebates were specifically designed to ensure that Medicaid agencies received the lowest

drug prices at which pharmaceutical manufacturers sold their products, regardless of the basis for or level of reimbursement used.

The federal rebates paid by Pfizer were the product of the Omnibus Budget Reconciliation Act of 1990 (“OBRA 90”), which was expressly aimed at securing savings by obtaining rebates from manufacturers. In 2004, the State took steps to enhance these savings by enacting a supplemental rebate program, which was expressly designed to further reduce Wisconsin Medicaid’s costs of prescription drugs. Consistent with their purpose to ensure that Wisconsin Medicaid received the best prices available in the marketplace, the evidence will show that Wisconsin Medicaid considered these rebates in calculating its actual costs for pharmaceutical products. Indeed, the State’s own damages expert will confirm that these rebates “lower the damages” (9/15/15 T. DiPrete Tr. at 86:1-2, 7-9 (relevant excerpt attached hereto as Exhibit 2)), and that there are no damages if the rebates exceed the alleged “overpayment.” (*Id.* at 85:11-13, 17.) Against a claimed “overpayment” of \$31,802,977, Pfizer paid Wisconsin a total of \$104,007,707 in federal and supplemental rebates for the drugs at issue in this case.

In short, the system under which Wisconsin reimbursed pharmacies for filling Medicaid prescriptions envisioned that the State could compensate pharmacies on the front end but receive offsetting payments from pharmaceutical manufacturers on the back end. When the entire picture is considered—which it fairly must be—Wisconsin Medicaid did not “overpay” for Pfizer’s products.

III. CONCLUSION

Based on the evidence, the State will be unable to prove that Pfizer violated any Wisconsin statutes. Therefore, judgment should be entered in Pfizer's favor.

January 22, 2016



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Attorneys for Pfizer Inc.

Exhibit 1

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 9

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 04 CV 1709

PHARMACIA CORPORATION,

Defendant.

PROCEEDINGS: JURY TRIAL - DAY 1

BEFORE: HONORABLE RICHARD G. NIESS

DATE: February 4, 2009

TIME: 8:42 a.m.

APPEARANCES: P. JEFFREY ARCHIBALD,
Attorney at Law,
Madison, Wisconsin,
appearing on behalf
of the Plaintiff.

CHARLES BARNHILL, JR.,
BENJAMIN BLUSTEIN, and
ELIZABETH EBERLE,
Attorneys at Law,
Madison, Wisconsin,
appearing on behalf
of the Plaintiff.

1 one. They will tell that you AWP is simply not a
2 price. Listen very carefully to that testimony.

3 But what are their excuses? They'll start
4 with the generics, and they will say well, wait a
5 minute, Mr. Collins doesn't even use AWP because he
6 goes out and gets real-world marketplace prices. Well,
7 Mr. Collins, I want you to listen to his testimony, and
8 he'll tell you that that is his biggest problem. He
9 used to go to wholesalers, and then as soon as he found
10 out he was monitoring them they would shut down. He
11 even went to veterinary supply houses to try to get the
12 price that is the veterinarians were buying drugs for
13 themselves. He used every source he could. But in the
14 end he had to guess.

15 But most importantly for these generic drugs
16 he'll tell you that if he had true prices there
17 wouldn't have been any problem. I would have used
18 those true prices.

19 So this is kind of a cart before the horse or
20 horse before the cart, whichever it is, argument that
21 just doesn't fly. Listen very carefully to Mr.
22 Collins's testimony.

23 For brand of drugs the argument is well, wait
24 a minute, Wisconsin knew these prices were not accurate
25 when they discounted it. Well, of course they knew

1 they were not accurate. That's why they discounted it.
2 That's not the issue. The real problem is the State of
3 Wisconsin never knew what the real prices were because
4 of this nontransparency created by Pharmacia. That is
5 the real problem. And every one of our people will
6 admit that it's not an accurate price. And -- but,
7 again, listen to them very carefully. That's not the
8 issue. The issue is what is the real price, and I'll
9 talk to them about their difficulties in figuring that
10 out. They'll tell you they have no access to these
11 contracts. They have no access to figuring out how
12 these prices are, these confidential discounts or
13 rebates or price incentives, and we'll name about 30 of
14 them, as long as my arm, the list goes on and on and
15 on, but Wisconsin Medicaid doesn't know anything about
16 it.

17 The third argument. They'll talk to you
18 about well, it was irresponsible for Wisconsin to use
19 the AWP when there were other more accurate prices.
20 One of the arguments is you could go out and just audit
21 pharmacists, you could just ask them for their invoice
22 prices.

23 Well, there's over 1200 of them. There's six
24 people handling this program. Each one that I call
25 will tell you that's just impossible. They don't have

Exhibit 2

IN THE CIRCUIT COURT
STATE OF WISCONSIN
DANE COUNTY

-----x
STATE OF WISCONSIN,

Plaintiff,

-against- Civil Action No.

ABBOTT LABORATORIES, ET AL., 04-CV-1709

Defendants.
-----x

VIDEOTAPED DEPOSITION OF:
THOMAS A. DiPRETE, Ph.D. - VOLUME I
Tuesday, September 15, 2015
New York, New York
9:36 a.m. - 4:54 p.m.

Reported in stenotype by:
---- Rich Germosen, CCR, CRCR, CRR, RMR ----
NCRA & NJ Certified Realtime Reporter
NCRA Realtime Systems Administrator

1 Q. Right. And so rebates to the state
2 would lower the damages; correct?

3 MR. LIBMAN: Objection to form.
4 Incomplete hypothetical. Vague and ambiguous as
5 answered and beyond the scope of the opinions in the
6 report.

7 **A. Yeah, rebates -- rebates to the**
8 **provider would raise the damages. Rebates to the**
9 **state would lower the damages. Any changes to these**
10 **two columns will have some impact.**

11 Q. Do you know what the rebates that the
12 state received for brands were on average?

13 MR. LIBMAN: Which rebates are you
14 talking about, Steve, please?

15 MR. EDWARDS: The rebates that the
16 state received, the Medicaid rebates.

17 MR. LIBMAN: From whom? From
18 manufacturers? Just could the record please be
19 clear because rebates as you know can be different
20 from different sources to different entities. If
21 you can --

22 BY MR. EDWARDS:

23 Q. Well, do you know it from any source?

24 MR. LIBMAN: Well, if I could just
25 complete my objection and request. If you're