

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

STATE OF WISCONSIN,

PLAINTIFF

VS.

ABBOTT LABORATORIES, ET AL.,

DEFENDANTS

**DECISION ON PLAINTIFF'S MOTION TO
COMPEL DEFENDANT PHARMACIA TO MAKE
"FULL RESPONSES" TO PLAINTIFF'S FIRST
AND SECOND CONSOLIDATED DISCOVERY
REQUESTS TO ALL DEFENDANTS**

[OCTOBER 17, 2008]

CASE No. 04-CV-1709

Appearances

Atty. Charles Barnhill for the Plaintiff

Attys. Beth Kushner and John C. Dodds for Defendant Pharmacia

Introduction

The state has moved to compel defendant Pharmacia to “respond fully” to several discovery requests. The requests seek admissions and, in each instance, if the response is “anything other than an unqualified admission,” Pharmacia is asked to answer an interrogatory on the subject.

Requests Nos. 1, 2 and 3 ask Pharmacia to admit that it has never approved of Pharmacia’s practice of reporting (to private pharmaceutical price compendia—notably First DataBank)—the average wholesale prices (AWPs), suggested wholesale prices (SWPs), or wholesale acquisition costs (WACs) of its drugs that were not the “true” prices or costs. Requests Nos. 4, 5 and 6 ask for admissions that the reported AWPs, SWPs and WACs were not the “true” prices or costs, but were in fact higher. Requests Nos. 7, 8 and 9 ask for admissions that “at no time” have Pharmacia and the State “agreed on the meaning or definition” of the terms AWP, SWP or WAC.

The State contends that answers to the requests are relevant to significant issues in the action—including what it refers to as the Defendants’ “estoppel” argument that (in the State’s words) “Wisconsin somehow approved of defendants’ conduct in publishing false prices...” As to the questions on the existence of an “agreement,” the State quotes from Judge Niess’s decision on the summary judgment motion, which suggests the existence of a dispute of fact as to whether there was an “agreement” or “common understanding” between the State and defendants on “the definition of AWP’s and WACs...”

Discussion

I. The “Approval” Requests

As indicated, Requests Nos. 1, 2 and 3 ask Pharmacia to admit that, “[a]t no time has the State [or any of its employees] explicitly approved your practice of reporting to First DataBank ... [AWPs, SWPs and WACs] ... for your drugs that were not the true average prices charged by wholesalers to customers...” After interposing several objections, and without waiving them, Pharmacia answered Request No. 1 (relating to AWP’s) as follows: “... at times, Pharmacia ... provided ‘suggested AWP’s’ to First DataBank that were usually consistent with First DataBank’s historical markup of Pharmacia products. Accordingly, this request is DENIED.”¹ Then, instead of answering the accompanying interrogatory, Pharmacia simply said: “See response to Request ... No. 1.”

Pharmacia first points out that its defense is not that “plaintiff approved of or ratified its conduct,” and that the “approval” requests are thus “predicated on [a] false and mistaken premise, which Wisconsin knows not to be true..,” as it set forth in its initial objections. And it stresses its companion response² that “at no time has it had any communications or discussions with the State” with respect to pricing.

¹ Pharmacia raised several objections to each request and, again without waiving them, answered the requests as discussed above.

² See, section III, *infra*.

It is apparent from prior discovery proceedings in this litigation that Defendants are exploring (if not taking) the position that the State should be barred from claiming reliance on reported prices because state officers and employees were aware all along that the reported prices are commonly and universally regarded as not reflecting true prices. And it is this “estoppel” issue that the State says these requests bear upon. The requests, however, are phrased in terms of “approval”: Pharmacia is asked to admit whether, at any time, the State, its departments or employees, ever “*explicitly approved* your practice of reporting to First DataBank ... AWP’s ... for your drugs that were not the true average prices charged ...” (Emphasis added.) As indicated, Pharmacia has indicated that, not only does it have no intention of “defend[ing] this case on the basis that plaintiff approved of or ratified its conduct,” but it challenges the request as being predicated on “the false and mistaken premise ... that the state *had any right, basis or ability to approve* any manufacturer’s reporting” of AWP’s, SWP’s or WAC’s. (Emphasis added.)

I find Pharmacia’s arguments persuasive on the point; and the State, having elected to phrase its request solely in terms of “approval,” rather than using language that might more closely relate to its acknowledged purpose, has not satisfied me that it is entitled to an order compelling further response to these requests.

II. The “Reporting Untrue Prices” Requests

Request No. 4 asks Pharmacia to admit that the AWP’s it reported to First DataBank for its drugs “were not the true average prices charged by wholesalers to their customers,” but rather were “more than true average prices....” Pharmacia’s response was to refer the State to its answer to Request No. 1 (*e.g.*, that, “at times,” it reported “suggested AWP’s” to First DataBank “that were usually consistent with First DataBank’s historical mark-up of Pharmacia products”), and went on to “otherwise den[y]” the admission. Pharmacia says that its response should be considered sufficient compliance with the interrogatory asking for explanations of any answer other than an outright admission. As indicated, however, Pharmacia’s answer acknowledges that it had

provided “suggested AWP” to First DataBank at various times, and I believe the State is entitled to have the explanation of that acknowledgement in response to the accompanying interrogatory.

Request No. 5 asks the same question with respect to SWPs. In response to this Request, Pharmacia refers the State back to its response to Request No. 2, which states that ‘it did not provide SWPs to First DataBank, except as to Greenstone, Ltd.,’ and that, accordingly, “this Request is DENIED.” That seems to be an adequate explanation in answer to the accompanying interrogatory.³

Request No. 6 asks Pharmacia to admit that the WACs it reported to First DataBank “were not the true average prices, net of discounts, rebates, chargebacks and incentives, paid by wholesalers to you for your drugs,” but were instead more than the “true average prices.” Again, after objecting, Pharmacia responded: “WACs are list prices, which by common and universal definition, usage and practice, do not reflect or incorporate discounts, chargebacks or incentives,” and went on to state: “Wisconsin fully understands what a list price is ...” Then, in response to the accompanying interrogatory, Pharmacia refers the State to dictionary definitions of “list price,” to its catalogs, to “wholesaler transactional data,” and to the federal Medicaid statute. In its brief, it also argues that, on this basis, the State’s request should be denied because it is based on a “false characterization of published WACs.”

The State does not specifically address Request No. 6 in its briefs. It says only that, in light of its allegations that Pharmacia and the other Defendants reported inflated prices and that such reports caused damage to the State, it is “indefensible” to argue that they have no obligation “to provide full and complete discovery” on the issue. On that record, it seems to me that here, too, Pharmacia’s response constitutes an adequate explanation of its answer.

³ If the State indicates that it desires explanatory information with respect to the Greenstone, Ltd., SWPs, Pharmacia should provide it as requested in the accompanying interrogatory.

III. The “Agreement” Request

Requests 7, 8 and 9 ask Pharmacia to admit that “at no time has the State ... and [Pharmacia] agreed on the meaning or definition of [AWP, SWP or WAC].” Pharmacia’s response in each instance was to state that it “ADMITS that at no time has it had any communications or discussions with the State ... concerning the meaning or definition of [AWP, SWP or WAC].”

It seems to me to be a simple matter to respond to the “agreement” request. It may be arguable, as Pharmacia contends, that a response that it had no discussions or communications with the State as to drug pricing is pretty much the equivalent of a direct response to the inquiry: that there was no agreement on the subject. But Pharmacia has not indicated any reason why it chose to answer the request in an indirect manner, rather than directly. Knowing well the vagaries of language—and the propensity lawyers (myself included) have to weave words—it seems to me that the State is entitled to a direct answer to the question it poses.⁴

IV. Conclusion

For the reasons stated above, I grant the State’s motion with respect to Requests Nos. 4, 7, 8 and 9, and deny the motion with respect Requests Nos. 1, 2, 3, 5 and 6.

Dated at Madison, Wisconsin, this 17th day of October, 2008

William Eich
Special Discovery Master

⁴ While it is difficult to see how a representation that there have been no communications between the parties on the subject is something other than a representation that there has been no agreement between them, I have always remembered the answer given many years ago by a witness (a lawyer) to the question whether he owned a home at a particular address. His answer was a firm “no.” After several minutes of cross-examination on the point, it was learned that it was indeed his house, but that because he had given a mortgage to a local bank he did not have a full “ownership” interest.