

I. WARRICK'S MAC THEORY MISSTATES BOTH WISCONSIN'S CLAIM AND HOW THE SYSTEM WORKS.

Warrick's argument that Wisconsin cannot show any damages in connection with drugs that are MAC'd simply misstates Wisconsin's claim and how Wisconsin's Medicaid system works.

In support of Warrick's part of Schering's motion for summary judgment, Dr. Addanki has calculated the number of times a Warrick drug was MAC'd by Wisconsin. These calculations are designed to support the argument that Wisconsin cannot recover for MAC'd drugs because payment for them was not made on the basis of an AWP-based formula. But the central premise of this argument—that MAC'd drugs are unaffected by defendants' false AWPs—is dead wrong and there is nothing Dr. Addanki's calculations can do to save it.

Wisconsin's claim is that had Schering chosen to publish true prices in the pricing compendiums, Wisconsin would have reimbursed providers based on those true prices as Federal law required. By publishing false prices, Schering deliberately masked its true prices. Doing so impacted Wisconsin's MAC program in two different ways. First, the misleading nature of Warrick's published prices made it difficult for Wisconsin to determine the true acquisition cost of the drugs and, consequently, Wisconsin was forced to guess at what their actual acquisition cost was. In connection with the MAC program, Wisconsin systematically guessed too high and thereby paid providers more than it would have had it known what Warrick's true prices were. Had Warrick provided true, lower prices, Wisconsin would have relied on them as it was required to do by Federal law.

Second, defendants' false prices interfered with the Medicaid processing system. Wisconsin's drug reimbursement processing system is programmed to pay the lowest reported price, as Dr. Addanki recognized at his deposition. (Deposition of Sumath Addanki, Ph.D.,

May 16, 2008 (“Addanki Dep.”) at 82-84.) What this means is that if Warrick had published its true average wholesale prices—which were, in every instance, lower than the MAC price set by Wisconsin—then Wisconsin would have paid this lower average wholesale price purely as an operational imperative. Thus, defendants’ false AWP’s misled Wisconsin’s processes as well as Wisconsin’s employees.

Dr. Addanki’s calculations in his affidavit do not dispute either of these causation models.

II. DR. ADDANKI’S AFFIDAVIT DOES NOT ATTEMPT TO IMPEACH WISCONSIN’S AWP CLAIMS AGAINST SCHERING.

Because Schering is a brand house its drugs are rarely MAC’d—MACing is generally directed at multi-source drugs, not patented drugs like those sold by Schering. (Warrick is Schering’s generic house.) Thus, Schering’s argument is different than Warrick’s argument. Schering argues that its false prices were within what it characterizes as the normal range of falsity for the industry—20% to 25%. Aside from the fact that no Wisconsin statute provides for a normal range of falsity in connection with prices—nor does any FTC case—the Addanki affidavit does not prove even this argument.¹

Dr. Addanki did not compare Schering’s published average wholesale price with the actual wholesale price of Schering’s drugs as he would have needed to do if he wanted to show that Schering had inflated its average wholesale prices by 20% to 25%. Instead, he computed the spread between Schering’s published price and its AMP—the average manufacturer price. (AMP is the price defendant sells its drugs to wholesalers for resale to a certain class of retail customers.) And he further testified that he did not have any knowledge of what the wholesalers

¹ Dr. Addanki does not purport to provide evidence of the normal range of falsity in the industry.

charged for Schering's drugs. (Addanki Dep. at 30, et seq.) What his charts do reveal, however, is that the spreads he has calculated are mostly greater than the 20% to 25% he states is the fictional norm for the industry. This hardly supports Schering's position.

What is even more peculiar about this result is that Dr. Addanki had access, through Schering's attorneys, to data from wholesalers showing the actual wholesale prices of Schering's drugs. (Addanki Dep. at 39-40, 59-67.) He, therefore, could have calculated the actual spread between Schering's published average wholesale price and the actual wholesale price charged for its drugs. Why he chose to ignore this data is not known. Perhaps the defendant was nervous that if it revealed the actual spread between Schering's published price and the true price of its drugs, plaintiff would simply file a motion for summary judgment against it. Whatever the motive, Dr. Addanki's failure to analyze real selling prices constitutes a failure of proof.²

Dr. Addanki's other calculation, comparing Schering's actual sales prices to its wholesalers with its WAC, is also completely unhelpful to Schering's motion for obvious reasons. First, Wisconsin does not reimburse off the WAC so Schering's WAC is irrelevant. And, second, Dr. Addanki testified that Schering sells virtually all of its products at a price below WAC, proving that the term wholesale acquisition cost is also a misrepresentation, just not as gross a variety as Schering's false and inflated average wholesale prices. (Addanki Dep. at 118, 124-26, 131-33.)

In sum, the data submitted by Schering and Warrick through the affidavit of Dr. Addanki does not support Schering's motion for summary judgment.

² Dr. Addanki did not even compute the spread between Warrick's published price and its AMP saying he had not gotten around to it. (Addanki Dep. at 51-54.) But the real reason for not following through on such a project can be plucked from his admission that if he did such a report the spreads between Warrick's AMP and its published average wholesale prices would have been greater than the spread of Schering's brand drugs—which put them well outside of the norm of fictional prices he asserts was commonplace for the industry. (Addanki Dep. at 84-87.)

CONCLUSION

For the reasons stated above, Wisconsin asks the Court to deny Schering's motion for summary judgment

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