

The State's Amended Complaint as to Amgen Inc. ("Amgen") hinges on a single allegation of a single "spread" for a single year for a single dosage and NDC for one of Amgen's products, Epogen. For the reasons set forth more fully in the defendants' joint reply memorandum, the State's allegations fall far short of the requirements of Wis. Stat. Ann. § 802.03(2), which requires that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."¹

The State bases its only allegations against Amgen on an undefined and unexplained "2000 Available Price" as its benchmark for identifying supposedly fraudulent spreads. Similar efforts to bolster claims with such self-serving and unsupported calculations have been squarely rejected by the federal district court in the consolidated federal proceedings in Boston in dismissing claims against Amgen and 18 other defendants brought by the County of Suffolk, New York. *See County of Suffolk v. Abbott Labs., Inc.*, MDL 1456, C.A. No. 1:03-cv-10643 (D. Mass. Apr. 8, 2005).

Moreover, nothing in the State's opposition diminishes the fact that Epogen's reimbursement under Medicare Part B is *not* based upon AWP, but is instead set by statute and has remained unchanged for nearly a decade.² In response, all the State can muster is the argument that "such assertions by lawyers, unsupported by evidence, cannot be considered on a motion to dismiss." (State's Mem. in Resp. to the Individual Mots. to Dismiss Certain Defs. at 3). The State, however, is wrong. Far from relying on the arguments of counsel, Amgen relies

¹ Amgen does not here repeat here the section 802.03(2) arguments set forth in the defendants' joint reply memorandum, which arguments plainly apply to the barebones allegations on which the State's claims as to Amgen rely.

² Because of its unique reimbursement methodology, the State's reference to Epogen – the only Amgen product mentioned in the amended complaint – underscores why the State's reliance on "group pleading" is fundamentally flawed and cannot serve as a surrogate for alleging specifics as to each defendant and each product.

on a federal statute, 42 U.S.C. § 1395rr(b)(11)(B), this Court's judicial notice of which is clearly proper. *See* Wis. Stat. Ann. §902.02(1) ("Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.").

Not only does this *fact* – that Medicare Part B reimbursement for Epogen is not based on AWP – warrant dismissal of the State's claims to the extent they seek to recover Medicare Part B co-payments (either on behalf of Wisconsin citizens who may have made Medicare Part B co-payments, or in its own right in connection with Medicare Part B co-payments made on behalf of Medicaid eligible individuals), it also undermines any effort by the State to recover non-Medicare Part B payments of Epogen, given that, whatever its reported AWP, the reimbursement rate set by Congress and CMS for Epogen was both publicly available and widely known. As a result, the State cannot reasonably claim that it was somehow deceived into paying falsely inflated reimbursements for Epogen.

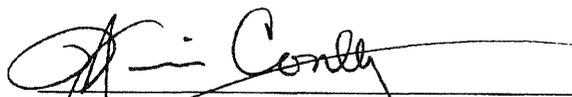
The State's response also completely misses the mark regarding the commonsense conclusion that a "spread" of 22% – all that the State alleges as to Epogen – cannot support the State's claims against Amgen. This is not a "rehash" of defendants' argument that the State cannot demonstrate causation because of the government's widespread knowledge that spreads existed, as the State suggests. Amgen's point is that the government has conceded that spreads *greater those alleged by the State* in connection with Epogen were both expected and intended by Congress. (*See* Amgen Supp. Mem. In Support of Mot. To Dismiss at 5-6). As a result, a spread of 22% – less than what the government has conceded Congress itself intended – cannot conceivably support the State's allegation that Amgen's conduct was in any way improper and mandates a dismissal of the State's claims against Amgen.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in defendants' consolidated reply memorandum, Amgen requests that the Amended Complaint filed against it in this action be dismissed with prejudice.

Respectfully submitted,

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Dated: April 18, 2005