

By way of background, Judge Saris certified three classes of plaintiffs.

Class 1 was a multi-state class consisting of Medicare beneficiaries in 40 states, including Wisconsin, who made co-payments for certain drugs based on AWP. In re AWP, 233 F.R.D. 229 (D. Mass. 2006) (class certification order). Class 1's claims were governed by the laws of each class member's home state. Class 2 consisted of private health insurers who made co-payments on behalf of Medicare beneficiaries for drugs purchased in Massachusetts. Id. Class 2's claims were governed by Massachusetts law. Class 3 consisted of private insurers who reimbursed for drugs purchased in Massachusetts based on contracts that expressly referenced AWP as a pricing standard. Id. Class 3's claims were also governed by Massachusetts law.

The trial before Judge Saris involved claims by Classes 2 and 3, but, after hearing the evidence, Judge Saris entered judgment in favor of the J&J Defendants against all three classes, including Class 1. In re AWP, No. 01-12257-PBS, 2007 U.S. Dist. Lexis 96537 (D. Mass. Nov. 20, 2007), at *6, *9 (copy attached). She did so after rejecting plaintiffs' argument -- identical to the State's argument here -- that defendants were liable to Class 2, and, by extension, Class 1, because their AWP's were not "true" average wholesale prices. In re AWP, 491 F. Supp. 2d at 32 (rejecting plaintiffs' theory that defendants acted "unfairly and deceptively by having any spread between the published AWP and the true average of prices charged to providers"). In lieu of this per se liability standard, Judge Saris found that the J&J Defendants did not violate the Massachusetts consumer protection statute, because the spreads on their drugs "never substantially exceeded the range of what generally was expected by the industry and government." Id. at 31.

In its brief, the State mistakenly asserts that the J&J Defendants prevailed because, under Massachusetts law, liability attaches only if a defendant engages in “egregious misconduct,” and that use of the word “egregious” raises the bar for a finding of liability. (St. Opp. Br. at 59.) This argument erroneously conflates two separate prongs of the Massachusetts consumer protection law. In Massachusetts, unlike in Wisconsin, a defendant violates the state consumer protection statute if its practices are either “deceptive” or “unfair.” See Massachusetts Gen. Laws Ch. 93A, § 2 (prohibiting “unfair or deceptive acts or practices in the conduct of any trade or commerce”). While a practice may be both unfair and deceptive under the Massachusetts statute, liability may be premised solely on a finding that a practice is “unfair.” In re AWP, 491 F. Supp. 2d at 93; Service Publications, Inc. v. Goverman, 396 Mass. 567, 578, 487 N.E.2d 520, 527 (1986).

Because the concept of “fairness” is somewhat elusive, Massachusetts courts give this prong of the statute a comparatively narrow construction, holding that conduct is not “unfair” if it is not “egregiously wrong.” In re AWP, 491 F. Supp. 2d at 94 (quoting Mass. School of Law v. Am. Bar Assoc., 142 F.3d 26, 41 (1st Cir. 1998) (“the defendant's conduct must be not only wrong, but also egregiously wrong”)); see also Commercial Union Ins. Co. v. Seven Provinces Ins. Co., Ltd., 217 F.3d 33, 40 (1st Cir. 2000) (unfair conduct is “immoral, unethical, oppressive or unscrupulous”); PMP Associates, Inc. v. Globe Newspaper Co., 366 Mass. 593, 596, 321 N.E.2d 915, 917 (1975) (citing FTC precedents interpreting the “elusive, but Congressionally mandated standard of fairness”). Judge Saris’ finding that the J&J Defendants did not engage in

“egregious misconduct” reflects her conclusion that their published AWP’s were not “unfair.”

Judge Saris found, in addition, that the J&J Defendants did not violate the deception prong of the statute, because the spreads on the J&J Defendants’ drugs did not exceed the range of spreads generally expected by the industry and government. See In re AWP, 491 F. Supp. 2d at 104 (finding “no secret or deceptive spreads”). This finding directly undermines Wisconsin’s case against the J&J Defendants, because the courts in Massachusetts interpret the “deception” prong liberally in favor of consumers. In Massachusetts, conduct is “deceptive” if it possesses a tendency to deceive. Leardi v. Brown, 394 Mass. 151, 474 N.E.2d 1094 (1985). “In determining whether an act or practice is deceptive, ‘regard must be had, not to fine spun distinctions and arguments that may be made in excuse, but to the effect which it might reasonably be expected to have upon the general public.’” Leardi, 394 Mass. at 156 (quoting P. Lorillard Co. v. FTC, 186 F.2d 52, 58 (4th Cir. 1950)). A plaintiff claiming deception need not prove that the deception was intentional. Aspinall v. Philip Morris Cos., Inc., 442 Mass. 381, 394, 813 N.E.2d 476, 486 (2004). Thus, Judge Saris’ finding that the J&J Defendants’ AWP’s were not deceptive reflects her conclusion that they did not have a tendency to deceive.

The State’s assertion (St. Opp. Br. at 58-59) that Judge Saris’ decision “does not help defendants here,” because “Massachusetts consumer fraud law contains a requirement of proving ‘egregious misconduct,’” is thus flatly incorrect for two reasons. First, Massachusetts only requires a showing of “egregious misconduct” to prove unfairness, not deception. Wisconsin is claiming deception, not unfairness.

Second, the suggestion that the Massachusetts “unfairness” standard somehow denotes a less rigorous approach to consumer protection finds no support. The Massachusetts consumer protection statute is considered one of the most pro-consumer statutes in the country. See Aspinall, 442 Mass. at 401, 813 N.E.2d at 491 (“G.L. c. 93A is a ‘statute of broad impact,’ which forms a ‘comprehensive substantive and procedural business and consumer protection package.’”); see also Harold K. Gordon, “Eat, Drink, and Sue: A New Mass Tort?,” New York Law J. 235:5 (Mar. 30, 2006) (noting that Massachusetts is a favored forum for consumer class actions due to its “liberal consumer protection law”). Thus, the State’s assertion that the J&J Defendants prevailed based on “a conservative theory of what constitutes deceptive conduct” is incorrect. (St. Opp. Br. at 59).

The State is also mistaken when it says that plaintiffs in the MDL voluntarily chose to limit their case to intentional fraud. (St. Opp. Br. at 59-60). It is true that the MDL plaintiffs, in seeking certification of Class 1, represented to Judge Saris that they would prove that defendants intentionally defrauded class members in Class 1. At the Class 2 and 3 trial, however, plaintiffs pressed different theories. For Class 3, they argued that AWP’s were deceptive and unfair if the difference between a drug’s AWP and its average selling price exceeded 30%. For Class 2, plaintiffs argued that spreads were unlawful per se, because manufacturers are allegedly required to report “true” average wholesale prices. In re AWP, 491 F. Supp. 2d at 97. Plaintiffs’ Class 2 liability theory was identical to the State’s liability theory in this case.

Judge Saris rejected plaintiffs’ Class 2 liability theory as a matter of law. In re AWP, 491 F. Supp. 2d at 32 (“The Court rejects plaintiffs’ position with respect to

the Medicare Class 2, that defendants acted unfairly and deceptively by having any spread between the published AWP and the true average of prices charged to providers”) She subsequently extended this ruling to Class 1. Because AWP is generally understood not to refer to an actual average of wholesaler prices, she dismissed the consumer protection claims by Medicare beneficiaries in all 40 states, including Wisconsin:

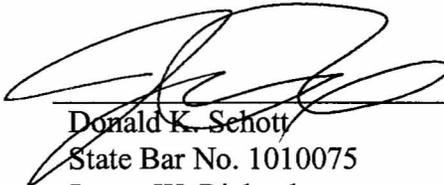
“[J&J’s conduct] did not violate Mass. Gen. Laws ch. 93A, in part because the spreads on the J&J Defendants’ subject drugs (Procrit® and Remicade®) never substantially exceeded the range of spreads generally expected by the industry and government. *491 F. Supp. 2d at 104*. As a result, the Court ruled that the claims of Class 2 and Class 3 should be dismissed. *Id. at 109*. The claims by Class 1 are dismissed for the same reason.”

In re AWP, No. 01-12257-PBS, 2007 U.S. Dist. Lexis 96537 (D. Mass. Nov. 20, 2007), at *6 (emphasis added) (copy attached).

Lastly, the State argues that Judge Saris’ ruling should not apply to state Medicaid agencies because, unlike “private payers,” they are not free to reimburse physicians and pharmacies however much they please. (St. Opp. Br. at 60). Judge Saris’ ruling was not limited to payments made by private insurance companies. To the contrary, she dismissed the claims by individual Medicare beneficiaries in Class 1 who were required by federal law to make AWP-based co-payments for drugs administered to them under Medicare. See 42 U.S.C. § 1395. Judge Saris dismissed these Medicare-based claims because federal officials, no less than private insurance companies, understood and expected AWP to exceed actual selling prices. As demonstrated in defendants’ cross-motion for summary judgment, Wisconsin’s Medicaid officials had exactly the same understanding.

Dated: April 3, 2008

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LEXSEE 2007 US DIST. LEXIS 96537

IN RE PHARMACEUTICAL INDUSTRY AVERAGE
WHOLESALE PRICE LITIGATION; THIS DOCUMENT
RELATES TO 01-CV-12257

MDL NO. 1456; CIVIL ACTION NO. 01-12257-PBS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS

2007 U.S. Dist. LEXIS 96537

November 20, 2007, Decided
November 20, 2007, Filed

JUDGES: [*1] Patti B. Saris, United States
District Judge.

OPINION BY: Patti B. Saris

OPINION

**FINDINGS AND ORDER ON MOTION OF
TRACK 1 DEFENDANTS FOR THE
ENTRY OF JUDGMENT PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE
54(b)**

November 20, 2007

Saris, U.S.D.J.

Defendants AstraZeneca Pharmaceuticals LP ("AstraZeneca"); Bristol-Myers Squibb Company and Oncology Therapeutics Network Corporation ("BMS"); Johnson & Johnson, Centocor, Inc. and Ortho Biotech Products, L.P. (together "the J&J Defendants"); and Schering-Plough Corporation, Schering Corporation and Warrick Pharmaceuticals Corporation (together "Schering/Warrick") have moved for the entry of judgment pursuant to *Fed. R. Civ. P. 54(b)* (Docket No. 4880). Upon consideration of the motion and the submissions of the parties, the Court **ALLOWS** the motion. In accordance with *Rule*

54(b), the court makes the following findings. See *Spiegel v. Trs. of Tufts Coll.*, 843 F.2d 38, 42-43 (1st Cir. 1988).

FINDINGS

1. This is a multi-district litigation ("MDL") consolidating a number of class actions that were brought against 16 pharmaceutical manufacturers beginning in 2001. The actions, as originally pleaded, included federal claims under the Racketeer Influenced and Corrupt Organizations [*2] Act ("RICO") and various state consumer protection statutes.

2. The essence of the claims was that Defendants caused various industry publications - such as the Red Book, First DataBank and MediSpan - to publish fictitious average wholesale prices ("AWPs"). These AWPs were used by Medicare and third party payors ("TPPs"), such as insurance companies, to reimburse doctors for physician-administered drugs, such as chemotherapy agents. Plaintiffs claimed that the AWPs were fictitious because they grossly exceeded the true average prices. Plaintiffs also claimed that each Defendant unlawfully marketed the 'spread' or difference between the AWP, the benchmark for reimbursement, and the actual

acquisition price of the drugs paid by providers such as doctors and pharmacies.

3. In March 2004, the Court created a "fast track" consisting of five defendants or defendant groups: AstraZeneca, BMS, GlaxoSmithKline ("GSK"), the J&J Defendants and Schering/Warrick. The remaining defendants were placed in a "regular track" for discovery and trial.¹ The fast track defendants became known as the "Track 1" defendants, and the remaining defendants became known as the "Track 2" defendants.

¹The remaining [*3] defendants are Abbott, Amgen, the Aventis Group, Baxter, Bayer, Dey, the Fujisawa Group, Immunex, Pfizer/Pharmacia, Sicor and Watson.

4. In January 2006, the Court certified three classes for trial against the Track 1 Defendants: (a) Class 1 -- consumers in 40 states who made co-payments for drugs under Medicare Part B; (b) Class 2 -- TPPs in Massachusetts who made co-payments for drugs under Medicare Part B; and (c) Class 3 -- consumers and TPPs in Massachusetts who paid for drugs in non-Medicare transactions based on contracts expressly using AWP. Class 1 was not certified as to Schering/Warrick, because there was no class representative who had made a co-payment for a Schering or Warrick product under Medicare Part B. *In re Pharm. Indus. Average Wholesale Price Litig.*, 233 F.R.D. 229 (D. Mass. 2006) (class certification order).

5. By order dated November 2, 2006, the court denied Plaintiffs' motion for partial summary judgment as to the Class 1 and Class 2 claims, and also denied the Track 1 Defendants' motions for summary judgment as to the Class 1 and Class 2 claims, except with respect to Medicare Part B drugs furnished in 2004. *In re Pharm. Indus. Average Wholesale Price Litig.*, 460 F. Supp. 2d 277, 288 (D. Mass. 2006). [*4] The Court also denied the

Track 1 Defendants' motions for summary judgment on the Class 3 claims.

6. GSK has settled the claims of all three classes.

7. A settlement of the Class 1 claims against AstraZeneca and BMS has been reached and awaits final approval of the Court.

8. The Class 2 and 3 claims against AstraZeneca, BMS, the J&J Defendants, and Schering/Warrick, alleging violations of Mass. Gen. Laws ch. 93A, proceeded to a bench trial before the Court in November of 2006. On June 21, 2007, the Court issued Findings of Fact and Conclusions of Law holding AstraZeneca, BMS and Warrick liable with respect to certain drugs for certain time periods as set forth in the Court's opinion. *In re Pharm. Indus. Average Wholesale Price Litig.*, 491 F. Supp. 2d 20, 109 (D. Mass. 2007). The Court hereby incorporates that opinion as if set forth fully herein.

9. In the same opinion, the Court dismissed all Class 2 and 3 claims against Schering. *Id.* at 108 - 09. The Court found no damages in Class 3 for Warrick. *Id.* at 109. The Court also dismissed the claims against the J&J Defendants. *Id.* at 109.

10. On August 27, 2007, the Court held an additional hearing on damages.

11. On November 1, 2007, the [*5] Court issued a Memorandum and Order on damages. *In re Pharm. Indus. Average Wholesale Price Litig.*, No. 01-12257, 2007 WL 3225922 (D. Mass. Nov. 1, 2007). The Court found that AstraZeneca's conduct was knowing and willful as to Class 2 and awarded double damages as to AstraZeneca for Class 2. *Id.* at *3. The Court also found that BMS' conduct was knowing and willful as to Class 2 when "less than ten percent of its sales were made within 5% of the list price, and the spreads were huge," and thus awarded double damages as to Taxol for 2002, Cytosin in 1999 and

2001, and Rubex in 1998 and 2002. *Id.* at *3-4. The Court found that neither BMS's nor AstraZeneca's conduct was knowing and willful as to Class 3 and accordingly did not

award multiple damages as to Class 3. *Id.* at *4. The Court issued a final award of damages and interest against AstraZeneca and BMS as follows:

	Class 2		Class 3	Overall
	Single Damages with Prejudgment	Total Damages with Doubling	Single Damages with Prejudgment Interest	Total Award for Classes 2 and 3
AstraZeneca	\$ 3,467,267	\$ 5,557,370	\$ 7,384,499	\$ 12,941,869
BMS	\$ 309,267	\$ 388,557	\$ 307,037	\$ 695,594

Id. at *4 - 5.

12. As to Warrick, after considering further expert testimony, [*6] the Court found in its November 1, 2007 Order, that "Warrick has produced undisputed evidence that its unfair and deceptive conduct in inflating the AWP for albuterol did not cause Class 2 any damages because of the methodology for calculating Medicare reimbursement for multi-source drugs based on a median." *Id.* at *4. Thus, the Court ordered entry of judgment in favor of Warrick. *Id.* at *4.

13. As to the J&J Defendants, the Court ruled, among other things, that although J&J's conduct was troubling, it did not violate Mass. Gen. Laws ch. 93A, in part because the spreads on the J&J Defendants' subject drugs (Procrit® and Remicade®) never substantially exceeded the range of spreads generally expected by the industry and government. *491 F. Supp. 2d at 104*. As a result, the Court ruled that the claims of Class 2 and Class 3 should be dismissed. *Id. at 109*. The claims by members of Class 1 are dismissed for the same reason.

14. *Rule 54(b)* provides, in pertinent part:

When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the

entry of a final judgment as to one or more but fewer than all of the claims or parties [*7] only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Fed R. Civ. P. 54(b).

15. Here, there are no other claims between Plaintiffs and the J&J Defendants and Schering/Warrick. Accordingly, with respect to these parties, the judgments would have the requisite degree of finality.

16. Plaintiffs will be moving to certify nationwide classes for Classes 2 and 3 against BMS and AstraZeneca. However, there are no further claims against these companies under Massachusetts law.

17. For the reasons set forth below, the Court finds that there is no just reason to delay the entry of judgments with respect to the Track 1 Defendants.

18. There are no subsequent proceedings between the parties that threaten to moot the need for ultimate resolution of these issues in the Court of Appeals. Nor are there any issues with respect to the Track 2 defendants that will affect my decision with respect to the Track 1 Defendants.

19. Plaintiffs will not be prejudiced by the immediate entry of judgments against AstraZeneca and BMS pursuant to *Rule 54(b)*; rather, if this Court's decision were to be affirmed, Plaintiffs will benefit from [*8] having judgments capable of enforcement and distribution to class members prior to resolution of the Track 2 claims. There is no just reason to delay entry of judgments against Plaintiffs with respect to the claims against the J&J Defendants, and Schering/Warrick.

ORDER

IT IS THEREFORE ORDERED THAT:

Pursuant to *Fed. R. Civ. P. 54(b)*, the Clerk shall enter judgments in the form of Appendices A through D as follows: in favor of Class 2 and Class 3 and against AstraZeneca in the amounts stated; in favor of Class 2 and Class 3 and against BMS in the amounts stated; in favor of Schering/Warrick and against Class 2 and Class 3; and in favor of the J&J Defendants and against Class 1, Class 2 and Class 3.

Dated: 11/20/07

/s/ Patti B. Saris

United States District Judge

Judgment

IT IS ADJUDGED AND DECREED THAT:

Judgment is entered in favor of Class 2 against AstraZeneca Pharmaceuticals LP in the amount \$5,557,370, including pre-judgment interest, and in favor of Class 3 against AstraZeneca Pharmaceuticals LP in the amount \$ 7,384,499, including pre judgment interest, for a total of \$ 12,941,869.

Dated: November 20, 2007

/s/ Patti B. Saris

Judgment

IT IS ADJUDGED AND DECREED THAT:

Judgment [*9] is entered in favor of Class 2 against Bristol-Myers Squibb Company in the amount \$ 388,557, including pre-judgment interest, and in favor of Class 3 against Bristol-Myers Squibb Company in the amount \$ 307,037, including pre-judgment interest, for a total of \$ 695,594.

Dated: November 20, 2007

/s/ Patti B. Saris

Judgment

IT IS ADJUDGED AND DECREED THAT:

Judgment is entered in favor of Johnson & Johnson, Centocor, Inc. and Ortho Biotech Products, L.P. and against Class 1, Class 2 and Class 3.

Dated: November 20, 2007

/s/ Patti B. Saris

Judgment

IT IS ADJUDGED AND DECREED THAT:

Judgment is entered in favor of Schering-Plough Corporation, Schering Corporation, and Warrick Pharmaceuticals Corporation and against Class 2 and Class 3.

Dated: November 20, 2007

/s/ Patti B. Saris