



NCPA Reports Encouraging News about AWP Lawsuit

On Thursday, January 24, Bruce Roberts, R.Ph., Executive Vice President and CEO of the National Community Pharmacists Association (NCPA), commented on the Average Wholesale Price (AWP) lawsuit:

We got some very encouraging news out of a Boston courtroom earlier this week. In a nutshell, U.S. District Court Judge Patti B. Saris took the AWP roll back and phase out off the table in the First DataBank/Medi-Span antitrust case.

Virtually the first words from Judge Saris, according to NCPA General Counsel John Rector, were: "I don't want to hurt any independent pharmacies. This should not be about them."

...The proposed settlement agreed to by FDB, Medi-Span, and the union health plans that brought the suit would roll back published AWP figures for some 8,600 brand names drugs by 4%. In our brief opposing the proposal, PAAS National President Ed Heckman reported to the court that such a radical scheme would cost the average independent \$105,000—about \$3,800 more than their annual profit.

NCPA's voluminous filing, including dozens of affidavits and Ed's report, surely struck a nerve and was right on target since it was attacked and its conclusions distorted by the plaintiff lawyers in a filing late last week. We intend to file a reply to that spurious, and ultimately ineffectual, attack.

The judge mentioned the Heckman report and NCPA favorably several times during the two-hour fairness hearing last Tuesday. "I heard very little that wasn't positive to our interests," Rector reported.

The judge said she didn't want to be "the czar of AWP," and that was a job for legislators or regulators, and not a judge. She said she wanted the parties (NCPA is not a party) to focus on monetary damages for consumers whose copays were based on higher AWP's. She said that an independent economic expert satisfactory to her would be hired to help in coming up with a damages formula. When all that was done, she suggested, that would be the essence of a new proposed settlement.

"I'm telling you to go back to the drawing table," Judge Saris told FDB and Medi-Span.

The parties promised to get back to her in two weeks. If they come up with a new proposed settlement, affected consumers must be notified, other interested nonparties (such as NCPA) allowed time to comment, and another fairness hearing scheduled. Or, the settlement route could be scrapped and the trial along with McKesson could proceed. In any event, final resolution is a long way off.

"This was a good development," Rector said. "It refocuses settlement on consumer monetary damages paid by the plaintiffs, not the unwise eliminating AWP."

NCPA was represented during the two-hour fairness hearing by John Rector and David Balto, our expert antitrust counsel. Thanks to them, and again also to Ed Heckman and the pharmacy owners who took the time, effort, and expense to submit affidavits on behalf of all independent community pharmacies. We will continue to be active and to keep you posted with further developments in this case.

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