



# THE PHOENIX LAW GROUP OF *Feldman Brown Wala Hall & Agena, PLC*

ACHIEVING | BALANCE

| [HOME](#) |

[CONTACT](#) |

[ATTORNEYS](#) |

January 2009

## PHARMACY BENEFITS MANAGEMENT UPDATE

### Quick Links

[About Us](#)  
[Related Topics](#)

To join our mailing list, please contact:  
[shamagel@phoenixlawgroup.com](mailto:shamagel@phoenixlawgroup.com)

Samantha Brown, Esq.



Laurel Wala, Esq.



Cami Agena, Esq.



ABOUT US

### AVERAGE WHOLESALE PRICE LITIGATION

Recent developments in the First DataBank ("FDB"), Medi-Span and McKesson average wholesale price litigation may lead to short-term and long-term consequences for PBMs and their prescription benefit plan clients. As most PBMs have been following these cases closely since their inception over three years ago, this bulletin will focus on the most recent activity and significant upcoming dates. If you have any questions about earlier events in the litigation, please let us know.

#### ***First DataBank and Medi-Span Proposed Settlement Agreements***

In May 2008, FDB and Medi-Span both entered into amended proposed settlement agreements with the plaintiffs (the "FDB and Medi-Span Amended Proposed Settlement Agreements"), which the Court preliminarily approved last summer and scheduled a final fairness hearing to address on December 17, 2008. The FDB and Medi-Span Amended Proposed Settlement Agreements include requirements that (i) FDB and Medi-Span pay \$1 million and \$500,000 respectively into a class settlement fund and (ii) FDB and Medi-Span rollback the WAC to AWP markup factor for approximately 1400 NDCs. Independent of the FDB and Medi-Span Amended Proposed Settlement Agreements, both FDB and Medi-Span have stated publicly that they intend to rollback the AWP for all drugs within 90 days after the Amended Proposed Settlement Agreements are approved and cease publishing AWP altogether within two years.

Third Party Payors ("TPPs"), PBMs (through PCMA), and pharmacy trade groups have been vocal and largely unresponsive of the FDB and Medi-Span Amended Proposed Settlement Agreements. Generally speaking, industry objections include (1) concerns that injured class members, including consumers and TPPs, are not adequately compensated by the settlement terms, (2) the rollback to AWP is unnecessary because the market has already corrected itself, (3) the rollback to AWP will result in exorbitant costs for non-parties in renegotiating their agreements to maintain relative economic positions, and (4) the timing of the proposed rollback not give the industry adequate time to renegotiate agreements, which will result in great harm to independent and community pharmacies.

The Court held the final fairness hearing as scheduled and a continuance of that hearing on January 27, 2009. In response to arguments about the appropriateness of the list of NDCs that would be affected by the settlement, the Court has now given the parties until February 6, 2009 to submit their oppositions related to that issue. This likely means that the Court will not make a decision whether to finally approve the FDB and Medi-Span Proposed Settlement Agreements at least until after the parties have the opportunity to comply with this February 6th filing deadline.

#### ***McKesson Proposed Settlement Agreement***

Although McKesson is a defendant to the same lawsuit that was filed against FDB, McKesson has not entered into a proposed settlement agreement similar to the FDB and Medi-Span Proposed Settlement Agreements. Rather, McKesson has entered into a separate proposed settlement agreement (the "McKesson Proposed Settlement Agreement") under which it has agreed to pay \$350 million to the classes, including consumers who paid cash, consumers who paid a coinsurance, and TPPs.

The Phoenix Law Group of Feldman Brown Wala Hall and Agena, PLC is one of the few law firms in the country with an entire practice group devoted exclusively to pharmacy benefits and operations. What sets our practice group apart? For starters, it is made up entirely of attorneys that have in-house counsel experience, giving us significant expertise in an extremely complex industry.

Primarily representing pharmacy benefit managers (PBMs) and retail pharmacy chains, we work with our clients daily as an extension of their in-house legal departments. Because we get to know our clients thoroughly, we understand how to achieve their business goals, and are able to provide each with pragmatic advice and workable solutions. From contract development and negotiation, to structuring operations to meet regulatory requirements, our experience allows us to handle a client's needs seamlessly without wasted time getting up to speed.

On December 11, 2008, the Court held a hearing on a motion to preliminarily approve the McKesson Proposed Settlement. On January 21, 2009, the Court preliminarily approved the McKesson Proposed Settlement (which is slightly revised from the version initially filed with the Court). Several events now must occur before the McKesson Proposed Settlement can be finalized, which include (1) notice to the TPPs who opted out of the class, allowing them to get back in for settlement purposes and (2) notice to the class informing them of the McKesson Proposed Settlement and of their rights to object to the Proposed Settlement by a certain date. Then, the Court will hold a final fairness hearing to decide whether to finally approve the Settlement. The dates when these events will occur are undetermined.

Of note, the McKesson Proposed Settlement Agreement documents filed with the Court include a Draft TPP Claim Form. Although PBMs are specifically excluded from the definition of TPPs, the Draft Claim Form permits PBMs to file the Form as the authorized agent of a TPP Class Member.

#### **What does all this mean for PBMs?**

The next few weeks should be telling for PBMs. Assuming the Court decides whether to finally approve the FDB and Medi-Span Amended Proposed Settlement Agreements after the February 6, 2009 filing deadline a couple of things could occur: (1) if the Court approves the Settlement Agreements, the timeframes within which the rollbacks of AWP and the eventual demise of AWP as a pricing index will start ticking, and PBMs will have to ensure that they can accommodate these changes operationally and contractually, especially with respect to their relationships with pharmacies and clients; or (2) if the Court does not approve the Settlement Agreements, the outcome of the litigation is uncertain as the parties will either amend the Settlement Agreements or proceed to trial. It is also unknown how and whether such a decision by the Court could affect FDB and Medi-Span's longer term business plans for AWP reporting.

Now that the Court has preliminarily approved the McKesson Proposed Settlement, PBMs will likely be called upon by their TPP clients to help evaluate whether the clients should participate in the settlement class and what the clients' potential claims will be.

We are tracking this litigation very closely. If you want further information about the litigation or how it could impact your business, don't hesitate to give us a call.

For additional information contact:

Suzanne Broderick ([sbroderick@phoenixlawgroup.com](mailto:sbroderick@phoenixlawgroup.com)), at The Phoenix Law Group Of Feldman Brown Wala Hall & Agena.

Phoenix Business Journal named The Phoenix Law Group Of Feldman Brown Wala Hall & Agena to the list of largest specialty firms in Phoenix for its Pharmacy Benefits and Operations practice.

For additional information that impacts the pharmaceutical benefit industry, visit [PLGTRACK.COM](http://PLGTRACK.COM) or contact Samantha Brown [sbrown@phoenixlawgroup.com](mailto:sbrown@phoenixlawgroup.com), Laurel Wala [lwala@phoenixlawgroup.com](mailto:lwala@phoenixlawgroup.com), or Cami Agena [cagena@phoenixlawgroup.com](mailto:cagena@phoenixlawgroup.com) at The Phoenix Law Group [www.phoenixlawgroup.com](http://www.phoenixlawgroup.com).

The information contained herein is informational only, does not constitute legal advice, and may not be relied on as such. No attorney-client relationship is formed by the provision of this information.

| [HOME](#) |

| [CONTACT](#) |

| [ATTORNEYS](#) |

[Forward email](#)

✉ [SafeUnsubscribe®](#)

This email was sent to [sbrown@phoenixlawgroup.com](mailto:sbrown@phoenixlawgroup.com) by

[sbroderick@phoenixlawgroup.com](mailto:sbroderick@phoenixlawgroup.com).

[Update Profile/Email Address](#) | Instant removal with [SafeUnsubscribe™](#) | [Privacy Policy](#).

Email Marketing by



The Phoenix Law Group of | Feldman Brown Wala Hall & Agena, PLC | 8765 E Bell Road, Suite 110 | Scottsdale | AZ | 85260