

“When They Give You the Money, You’ve Won” Drug Makers Settle Discriminatory Pricing Suit. Or Do They?

Herbert L. Weinberg, PharmD, JD

In the motion picture, *The Verdict*, Paul Newman plays the part of a down-on-his-luck, alcoholic lawyer who represents a horribly and permanently injured plaintiff. One of the defendants, the Archdiocese of Boston, makes the lawyer a substantial settlement offer, which he declines. When Newman informs his mentor, played by Jack Warden, that he refused the offer because “I can win this case,” Warden responds, “Are you nuts? You’ve won; when they give you the money, you’ve won.”

Recently, 15 manufacturers of brand-name prescription drugs, defendants in a consolidation of class-action antitrust lawsuits brought on behalf of approximately 40,000 pharmacy owners, have decided to pay the money, rather than go to trial. In the opinion of some observers, the drug makers prefer to settle than to try the case, during which they would be required to disclose, and to make public, their pricing practices. The offer on the table is more than \$400 million. Currently, eight other defendants have chosen not to join in the settlement. On March 27, 1996, as this issue goes to press, Judge Charles P. Kocoras will hold a hearing in the United States Courthouse for the Northern District of Illinois, for the purpose of determining whether the proposed settlements with the settling defendants are fair. Notwithstanding the conventional wisdom, which holds that “when they give you the money, you’ve won,” my best guess is that the majority of plaintiff-pharmacy owners will reject the offer and announce, as did Paul Newman, “I can win this case.” How, you may query, does a \$400 million settlement not equate to winning this case? I’m glad you asked.

Address correspondence to: Herbert L. Weinberg, PharmD, JD, King, Weiser, Edelman, and Bazar, 2049 Century Park East, Suite 900, Los Angeles, CA 90067

The suits allege that the drug makers have been overcharging the plaintiff-pharmacies, in violation of various federal antitrust and anticompetition laws. The defendants deny all charges, one of them asserting that it “is forced to discount to certain customers as a result of the competitive environment in which we operate...” However, no less a personage than Robert E. Lucas Jr, University of Chicago economist and recent Nobel prizewinner, alleges the existence of a “cartel” and states, “It is my opinion that the defendant manufacturers in the brand-name prescription drug market have been involved in ongoing price collusion to deny discounts to retail pharmacies at least since the 1980s.”

Since then, pharmaceutical manufacturers have provided large discounts to bulk buyers, such as mail-order pharmacies, health maintenance organizations, and other managed care providers. The drug makers argue that these big buyers, by virtue of their size and nature, create and control significant segments of the prescription drug market, and that large discounts must be offered in order to capture their market share. The large-discount incentives are not offered to other retail pharmacies, which have neither the negotiating clout of managed care organizations nor the ability to shift market share from one drug product to another. These pharmacies, therefore, must pay the full wholesale price for their purchases, which often is twice as much as that paid by managed care providers. As a result, the pharmacies cannot compete with the mail-order giants and health maintenance organizations, which are increasing their market share at the expense of the excluded pharmacies. Last year alone, between 3,000 and 4,000 independent drug stores nationwide went out of business; this trend is expected to continue.

The trouble with the settlement, according to the majority of plaintiff-pharmacy owners with whom I

have spoken, is that it provides only money, but does not require the offending pharmaceutical companies to cease charging them more than they charge managed care organizations. In short, the settlement does not solve the problem of discriminatory pricing, as it fails to restrain drug makers from continuing their two-tiered pricing practices. One plaintiff, when informed of the settlement offer, is reported to have said, "My share will be about \$8,000, and that will be just about enough to pay my bankruptcy lawyer."

Notwithstanding the result of the impending settlement hearing, it is clear that the dispute over multi-tier pricing will continue for some time. Thousands of pharmacies and such powerhouse retail chains as Albertson's, Kroger, Rite-Aid, and Safeway are not parties to the proposed settlement. They plan to press forward with their suits. They are alleging violations not only of federal antitrust statutes, but also of the Robinson-Patman Act, which prohibits price discrimination between different buyers of the same goods. Regardless of the ultimate disposition of the pending class actions, the cat has been let out of the bag. The consumer is becoming aware that the 50% of prescription buyers who are not members of managed care organizations are, in effect, subsidizing the other 50% who are.

Recently, in an article in *Time*, the public was treated to a peek at multi-tiered pharmaceutical pricing. *Time* reported that a popular brand name psychotherapeutic drug, which costs \$69.95 in the United States, sells for \$31.60 in Mexico, where 90 10-mg tablets of a commonly used brand name tranquilizer retail for \$8.75, rather than for \$138.

Until now, the federal government has avoided interfering with the pricing practices of the drug makers. However, the relatively recent explosion of class-action suits against the pharmaceutical industry has caught the attention of federal antitrust regulators, who may be moved to action, if not by pharmacy retailers, then by legislators on behalf of their constituent consumers. Should the regulators become involved, determine that present pharmaceutical industry pricing practices violate federal anticompetition and/or antidiscrimination laws, and enjoin their continued application, the drug makers would be forced to earn their market shares the old-fashioned way. If this were to happen, market shares might shift, but total sales of the drug makers, in the aggregate, would not be affected. In fact, without the ability and, therefore, the necessity, to discount their products, profits would rise. The big losers would be managed care organizations and their members, who then would face increased prescription prices.

The big winners clearly would be the independent pharmacies, which suddenly would find themselves on a level playing field. This scenario is desired by most of the dozens of independent pharmacy retailers whom I have interviewed about this subject. Many consider the pending class-action lawsuits as their last chance for survival. They do not subscribe to the notion that "when they give you the money, you've won."

Herbert L. Weinberg is a pharmacist and attorney, who practices law in Los Angeles, specializing in pharmacy-related matters.

Editor's note: After this issue went to press, the settlement offered by drug makers was rejected by Judge Charles P. Kokoras. The drug makers will now have to appear in court to settle the suit.