

Docket in MDL 1508

ORIGINAL
U.S. DISTRICT COURT
FILED
JUL 31 2003
S.D. OF N.Y.
[Signature]

AMENDED SETTLEMENT AGREEMENT

THIS AMENDED SETTLEMENT AGREEMENT is made as of the 31st day of July, 2003 by defendants Merck & Co., Inc. ("Merck") and Medco Health Solutions, Inc. ("Medco") (collectively, the "Defendants") and plaintiffs ("Plaintiffs"), as class representatives, in *Gruer v. Merck-Medco Managed Care, L.L.C.*, No. 97 Civ. 9167 (CLB); *Green v. Merck-Medco Managed Care, L.L.C.*, No. 98 Civ. 0847 (CLB); *Bellow v. Merck-Medco Managed Care, L.L.C.*, No. 98 Civ. 4763 (CLB); *Janazzo v. Merck-Medco Managed Care, L.L.C.*, No. 99 Civ. 4067 (CLB); and *O'Hare v. Merck-Medco Managed Care, L.L.C.*, No. 01 Civ. 3805 (CLB) (the "Actions").

WHEREAS, Plaintiffs have alleged, among other things, that Medco is a fiduciary within the meaning of the Employee Retirement Income Security Act ("ERISA"), and that Merck is a party-in-interest within the meaning of ERISA; that Medco has breached fiduciary duties allegedly owed under ERISA to its clients by, *inter alia*, favoring pharmaceutical products made by Merck and by certain other pharmaceutical manufacturers that pay rebates or other funds to Medco; that Merck and Medco have participated in prohibited transactions within the meaning of ERISA; and that Medco's clients have suffered damages as a result of such conduct;

WHEREAS, Defendants have denied each and every one of Plaintiffs' allegations of unlawful conduct and have asserted a number of defenses to Plaintiffs' claims;

WHEREAS, Plaintiffs and Defendants agree that this Settlement Agreement shall not be deemed or construed to be an admission or evidence of any violation of ERISA or of any other statute or law or of any liability or wrongdoing or of the truth of any of the claims or allegations alleged in the Actions;

WHEREAS, arm's length settlement negotiations have taken place between counsel for Plaintiffs and Defendants, and this Settlement Agreement, which embodies all of the terms and conditions of the settlement between Plaintiffs and Defendants, both individually and on behalf of the Class, has been reached, subject to the final approval of the Court;

WHEREAS, Plaintiffs' counsel have concluded, after extensive investigation and discovery of the facts, and after carefully considering the circumstances of the Actions and the applicable law, that it would be in the best interests of the Class to enter into this Settlement Agreement in order to avoid the uncertainties of litigation, particularly complex litigation such as this, and to assure the benefits of the Settlement to the Class, and further, that Plaintiffs' counsel consider the settlement set forth herein to be fair, reasonable, and adequate and in the best interests of Plaintiffs, including all members of the Class; and

WHEREAS, the Defendants have concluded, despite their belief that they are not liable for the claims asserted and have good defenses thereto, that they will enter into this Settlement Agreement solely to avoid the further expense, inconvenience and burden of this protracted litigation, and the distraction and diversion of its personnel and resources, and thereby to put to rest this controversy to avoid the risks inherent in uncertain complex litigation;

NOW THEREFORE, it is agreed by the undersigned, on behalf of the Defendants, Plaintiffs and the Class they represent, that the Actions and all actions consolidated therein and the Class claims described below be settled, compromised and dismissed on the merits and with prejudice as to each of the Defendants, and, except as

hereinafter provided, without costs as to Plaintiffs or Defendants, subject to the approval of the Court, on the following terms and conditions:

1. Plaintiffs and Defendants agree that the Court may certify a class (the "Class") pursuant to Fed. R. Civ. P. 23 for all purposes, defined as follows:

All employee welfare benefit plans that have or have had contracts with Medco, whether directly or indirectly (including through third party administrators, HMOs, insurance companies, Blue Cross Blue Shield entities or other intermediaries (collectively, "TPAs")) where the contracts with Medco were *both* (a) in force at any time between December 17, 1994 and the date of the final approval of the settlement contemplated by this Settlement Agreement, *and* (b) subject to ERISA.

The term "contracts with Medco" as used in this paragraph 1 and in this Settlement Agreement means contracts to which Medco Health Solutions, Inc., its predecessors, its subsidiaries or their predecessors are (or were) parties, and references to Medco in this paragraph 1 and in this Settlement Agreement mean Medco Health Solutions, Inc., its predecessors, its subsidiaries and their predecessors. The term "directly" as used in this paragraph 1 and in this Settlement Agreement includes contracts pursuant to which Medco has serviced or administered any pharmacy benefit for or on behalf of any entity, including welfare benefit plans, or the employer, union or other sponsor or representative of such plans. The term "indirectly" as used in this paragraph 1 and in this Settlement Agreement refers to any situation where Medco's client and contract counterparty is a TPA or an entity which in turn contracts with (or otherwise has a direct or indirect relationship with) an ERISA plan or plans and Medco has serviced or administered any pharmacy benefit for such plans under contract with the TPA or entity. TPAs are excluded from the definition of the Class, except that, to the extent a given TPA is a plan

sponsor with respect to an employee benefit plan, the TPA shall be a member of the Class solely in such capacity. Defendants reserve the right to move to decertify the Class in the event that this Settlement Agreement does not become final as provided in paragraphs 7 or 8 hereof. In the event that Defendants make such a motion, the parties to this Settlement Agreement agree that, with regard to such motion, the parties shall be in the same position as they would have been if this Settlement Agreement had not been executed.

2. Counsel for the undersigned agree to recommend approval of this Settlement Agreement by the Court and to undertake their best efforts, including all steps and efforts contemplated by this Settlement Agreement and any other steps and efforts that may be necessary or appropriate, by order of the Court or otherwise, to carry out the terms of this Settlement Agreement.

3. If requested by the Court, Plaintiffs shall submit to the Court a supplemental motion for preliminary approval of the settlement and final judgment contemplated by this Settlement Agreement. Such motion shall include (a) a proposed form of notice of the settlement to the Class; (b) a proposed form of Order and Final Judgment; (c) a proposed form of order preliminarily approving this Settlement Agreement; and (d) a proposed short form of notice of settlement to the Class for purposes of publication notice. The schedule of proposed publications shall be submitted to the Special Master for approval in advance of publication.

4. In the event that the Court preliminarily approves the settlement, Defendants, at their sole cost and expense, shall, within forty-five days (45) of such preliminary approval, provide Class members with reasonable notice of the settlement

pursuant to Rule 23 of the Federal Rules of Civil Procedure, including providing publication notice nationwide. In addition, Medco shall (a) provide mail notice to the clients with which it directly contracts and (b) attempt to cause such notice to be provided to its clients' clients by mailing the notice to its clients together with a letter requesting its clients to provide the notice to their clients and requesting, alternatively, that its clients provide information to Medco sufficient to allow Medco to mail the notice to its clients' clients.

5. If the Court preliminarily approves the settlement, Defendants may move to have the Court stay any action likely to be affected by the settlement. Plaintiffs agree not to oppose such motion.

6. Within fifteen (15) business days after the last date by which members of the Class must provide notice of their election to opt out of the Class, Defendants shall serve on Plaintiffs and the Court a list of all members of the Class who have opted out. In the event that employee benefit plans within the class whose drug expenditures constitute 20% or more of the total drug expenditures of plans within the Class during the Class period opt out by the date required, Defendants shall have the right, in their sole discretion, to withdraw from this Settlement Agreement by filing with the Court and serving on Plaintiffs written notice of withdrawal within five (5) days after Defendants have served Plaintiffs' counsel and the Court the list of opt-outs. If Defendants timely withdraw, this Settlement Agreement shall be terminated, canceled, null and void.

7. If the Court approves this Settlement Agreement, then the parties hereto shall jointly seek entry of an Order and Final Judgment:

- a. as to the Actions, approving finally this settlement as a fair, reasonable and adequate settlement as to Plaintiffs and the Class

within the meaning of Rule 23 of the Federal Rules of Civil Procedure and directing its consummation pursuant to its term;

- b. as to the Class, certifying the Class pursuant to Rule 23 of the Federal Rules of Civil Procedure;
- c. finding that the applicable limitations period was tolled only with respect to claims asserted in the Actions from December 17, 1997 except as to antitrust claims, as set forth in paragraph 16(a);
- d. directing that, as to each Defendant, the Actions and any other action that was or could have been brought by or on behalf of one or more members of the Class (whether such action was or could have been commenced directly by a member of the Class or by a representative, including participants or beneficiaries of an employee welfare benefit plan governed by ERISA) and which raises claims and issues described in paragraph 16 hereof, be dismissed with prejudice and, except as provided for herein, without costs, *except* that any action brought by members of the Class who timely opt out from this settlement shall not be dismissed;
- e. reserving exclusive jurisdiction over the settlement and this Settlement Agreement, including the administration and consummation of this settlement;
- f. determining pursuant to Fed. R. Civ. P. 54(b) that there is no just reason for delay and directing that the judgment of dismissal shall be final and appealable; and
- g. directing that, for a period of five (5) years, the Clerk of the Court shall maintain the record of those members of the Class who have timely excluded themselves from the Class and that a certified copy of such records shall be provided to the Defendants and to Plaintiffs, each at their separate expense.

8. This Settlement Agreement shall become final upon the occurrence of all of the following three events:

- a. it is approved in all respects by the Court as required by Rule 23(e) of the Federal Rules of Civil Procedure;
- b. entry, as provided for in paragraph 7 herein, is made of the Final Judgment of dismissal with prejudice as to Defendants against all

Plaintiffs and members of the Class who have not timely excluded themselves from the Class; and

- c. the time for appeal or to seek permission to appeal from the Court's approval of this Settlement Agreement as described in (i) hereof and entry of the Final Judgment as described in (ii) hereof has expired or, if appealed, approval of this Settlement Agreement and the final judgment have been affirmed in their entirety by the Court of last resort to which such appeal has been timely taken and such affirmance has become no longer subject to further appeal or review.

It is agreed that the provisions of Rule 60 of the Federal Rules of Civil Procedure shall not be taken into account in determining the above-stated times.

9. Subject to the provisions hereof, and in full, complete and final settlement of the Actions and each other action raising similar claims or issues on behalf of part or all of the Class, as such claims and issues are described in paragraph 16 hereof, Defendants agree to pay, ten (10) days after preliminary approval hereof, the amount listed in Exhibit A ("Settlement Payment Schedule") hereto into an escrow account (the "Settlement Fund"), held and administered by an appropriate institution agreed to by the parties as escrow agent, to be invested in instruments secured by the full faith and credit of the United States. The escrow account shall be established and administered pursuant to an escrow agreement in a form satisfactory to the parties. All interest and other income accruing thereupon will be paid to the Class. Any taxes due as a result of income earned by the Settlement Fund will be paid from the Settlement Fund. In the event any tax liability is finally assessed against and paid by any Defendant as a result of income earned by the Settlement Fund, such Defendant shall be entitled to reimbursement of such payment from the Settlement Fund. Such Defendant will use its best efforts to resist any such assessment or payment.

10. In the event that the settlement contemplated by this Settlement Agreement does not become final, the Settlement Fund, including any and all income earned thereon, but less any amounts already expended as permitted by this Agreement, shall be repaid to Defendants and the release and covenant not to sue pursuant to paragraph 16 shall be of no force or effect.

11. Plaintiffs and any members of the Class who have not timely excluded themselves from the Class defined in paragraph 1 shall look solely to the Settlement Fund for settlement and satisfaction against the Settling Defendants of all claims that are released hereunder. Except as provided by order of the Court, no Class member shall have any interest in the Settlement Fund or any portion thereof.

12. If the Court approves the Settlement Agreement, Plaintiffs' counsel intend to apply for an award of attorneys' fees in an aggregate amount not to exceed 30% of the Settlement Fund, plus reimbursement of expenses. Defendants shall not be liable for any costs, fees or expenses of any of Plaintiffs' respective attorneys, experts, advisors, agents and representatives, but all such costs, fees and expenses as approved by the Court shall be paid out of the Settlement Fund. Defendants, however, shall be solely responsible for all costs and expenses incurred in (i) providing notice to the class and (ii) administering and distributing the Settlement Fund, pursuant to procedures to be agreed upon with Plaintiffs and approved by the Court.

13. Plaintiffs reserve the right to approve the methodology by which each plan's allocable share of the Settlement Fund is determined, and to review the final distribution plan, before such plan is submitted to the Court. Plaintiffs' approval of the allocation methodology and distribution plan shall not be unreasonably withheld. The

allocation of the Settlement Fund shall be made primarily on the basis of each settling plan's proportionate share of the total drug spend of all settling plans for the class period. After this Settlement Agreement becomes final pursuant to the provisions of paragraph 8 hereof, the Settlement Fund shall be distributed as ordered by the Court.

14. Except as provided in paragraph 9 herein, no distribution of the Settlement Fund shall be made until the conditions contained in paragraphs 7 and 8 shall have been fulfilled.

15. As part of the settlement, Medco agrees to make the following changes to its business practices, or to continue such practices, commencing 180 days after this Settlement Agreement becomes final pursuant to paragraph 8 hereof for five (5) years thereafter (except as otherwise provided for below):

- a. With respect to those clients that have elected to use one of the standard formularies offered to clients by Medco, after the end of each calendar quarter, Medco will furnish its clients with a list of all formulary changes, including changes in the composition of the formulary (*i.e.*, the list of drugs included in the formulary), changes in the designation of which drugs are "preferred," and changes in relative cost indicators. In addition, Medco will identify all drugs in its brand-to-brand formulary therapeutic interchange program, and any changes in the drugs involved in such program, for the next calendar quarter. Clients may decline changes in the composition of their formulary and changes in the drugs subject to interchange, subject to (i) Medco's right to adjust contract pricing and (ii) the P&T Committee's direction to require, solely for clinical reasons, addition or deletion of certain drugs. In connection with changes in the composition of the formulary and the designation of which drug-pairs are involved in its brand-to-brand formulary therapeutic interchange program, Medco will (i) make available to its clients, on request, the minutes of the P&T Committee relating to such changes, (ii) identify the manufacturer of each drug involved in such interchanges, and (iii) state the reason for each such change.

- b. As part of the contracting process, Medco will provide its clients with a copy of each of Medco's standard formularies. Medco will introduce formulary mechanisms that (i) allow clients to modify Medco's standard formularies or to select a formulary in which clients choose drugs from a list provided by Medco; and (ii) allow clients to elect to use formularies that include drugs with relatively higher AWP's or formularies that include drugs with relatively lower AWP's, based on the client's objectives, subject to (A) Medco's right to adjust contract pricing and (B) the P&T Committee's direction to require, solely for clinical reasons, addition or deletion of certain drugs. In order to enable a meaningful selection under this subpart (ii), Medco shall disclose, as to each therapeutic category of drugs, which of its formularies include drugs with relatively higher and relatively lower cost.
- c. As part of the contracting process, Medco will provide those clients that elect to participate in Medco's brand-to-brand formulary therapeutic interchange program with (i) a list of the interchange pairs subject to the program; and (ii) greater detail regarding formulary compliance methodology, as reflected in paragraph 14(d) hereof.
- d. Medco will provide prospective clients a Plan Design Review Guide ("PDRG") (or similar document) with regard to the elements of plan design selected by the client. The PDRG will, *inter alia*, describe the Medco Savings Guarantee; DUR programs (including a description of the information provided to retail pharmacies at the point of dispensing); and the brand-to-brand formulary therapeutic interchange process, including the methodology employed by Medco's pharmacists during calls to physicians and methodology for recording physician approval of such interchanges. With regard to calls to physicians, Medco will provide requesting clients with copies of scripts used during such calls and copies of form letters to physicians and plan members regarding such interchanges. Nothing in this Settlement Agreement imposes any duty on Medco or requires Medco to modify such scripts or letters.
- e. In connection with brand-to-brand formulary therapeutic interchanges, Medco will provide clients, on request and at the client's cost, a report regarding such interchanges performed on a quarterly basis.

f. In connection with Medco's brand-to-brand formulary therapeutic interchange program, Medco will (a) with respect to contracts executed after the effective date of this Settlement Agreement, in advance of execution of such contracts, furnish prospective clients with (i) a list of drug pairs which may be subject to interchange and which would appear, based solely on AWP pricing, to result in a higher cost to Medco's client on a per prescription basis; and (ii) with respect to such pairs, (a) the AWP price of the targeted drug and the preferred drug, and (b) the AWP price of the targeted drug and preferred drug less (a) applicable ingredient cost discounts and (b) applicable Formulary Rebates; and (b) with respect to clients with contracts in force and effect as of and after the effective date of this Settlement Agreement, Medco will furnish such clients, together with the information referred to in paragraph 14(a) of this Settlement Agreement, (i) a list of drug pairs which may be subject to interchange in the forthcoming calendar quarter and which would appear, based solely on AWP pricing, to result in a higher cost to Medco's client on a per prescription basis; and (ii) with respect to such pairs, (a) the AWP price of the targeted drug and the preferred drug, and (b) the AWP price of the targeted drug and preferred drug less (a) applicable ingredient cost discounts and (b) applicable Formulary Rebates. In the case of both prospective clients and existing clients, a client may notify Medco that it elects to forego any such interchange in its plan design, subject to Medco's right to adjust contract pricing based on such election. Medco will advise clients that they may request an annual report (for which Medco reserves the right to assess a reasonable charge) that provides the final cost to the client of the relevant targeted and preferred drugs in the interchange pairs referred to in this paragraph, provided that Medco shall not be required to make such report available before it has received the data necessary to prepare such report. For purposes of this subsection, "AWP" and "Formulary Rebates" shall have the meaning set forth in Medco's contracts with its clients. For purposes of this subsection, the term "ingredient cost discount" shall have the same meaning as the mail service and retail pharmacy pricing for brand drugs provided in Medco's contracts with its clients. In the event that the term "AWP" is not defined in such written contract, "AWP" shall mean the average wholesale price of the covered drug, as set forth in the current price list in recognized sources such as First DataBank's National Drug

