

**THIS IS AN IMPORTANT LEGAL NOTICE. THE MATTERS DISCUSSED HEREIN MAY AFFECT  
SUBSTANTIAL LEGAL RIGHTS THAT YOU MAY HAVE. READ THIS NOTICE CAREFULLY.**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re Medco Health Solutions, Inc., Pharmacy Benefits Management Litigation

This document relates to:

*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).

MDL No. 1508

**NOTICE OF PENDENCY OF CLASS ACTION, PROPOSED CLASS SETTLEMENT AND HEARING**

**TO:** All employee welfare benefit plans ("Plans") that have or have had contracts with Medco Health Solutions, Inc. ("Medco"), whether directly or indirectly (including through third party administrators, HMOs, insurance companies, Blue Cross Blue Shield entities or other intermediaries), 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 (the "Class Period"), *and* (b) subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

**PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. A SETTLEMENT HAS BEEN PROPOSED IN PENDING CLASS ACTION LITIGATION THAT MAY AFFECT YOUR RIGHTS. IF YOU ARE A MEMBER OF THE CLASS DESCRIBED BELOW, YOU MAY BE ENTITLED TO SHARE IN THE SETTLEMENT FUND.**

**I. PURPOSE OF NOTICE**

This Notice is given pursuant to Rule 23 of the Federal Rules of Civil Procedure and the July 31, 2003 Order of the Honorable Charles L. Briant of the United States District Court for the Southern District of New York (the "Court"). The purpose of this Notice is to inform you of certain pending lawsuits (the "Action"), and to advise you of a proposed settlement of the Action (the "Settlement") and of your rights as a member of the Class covered by the proposed Settlement (defined below as the "Class"), including, among other things, (1) to receive benefits, as applicable, in the Settlement if approved by the Court, (2) to exclude yourself, if you are a Plan fiduciary, from the proposed Settlement, or (3) to object to the proposed Settlement or the adequacy of representation of the Class provided by Plaintiffs and Class Counsel in the Action.

This Notice is also being sent to give you notice of a hearing to be held by the Court on December 11, 2003, at 9:00 a.m., in Courtroom 218 of the United States District Court for the Southern District of New York, 300 Quarropas Street, White Plains, New York, to determine whether the proposed Settlement should be approved by the Court as fair, reasonable and adequate and to consider such other matters as may properly come before the Court in connection with this hearing. The Court has preliminarily approved the Settlement as within the range of a fair, reasonable and adequate settlement and has scheduled the hearing to determine whether to grant the Court's final approval to the Settlement.

**II. THE CLASS**

The proposed Settlement is on behalf of the following Class:

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 the Settlement Agreement, as amended, *and* (b) subject to ERISA.

The term "contracts with Medco" refers to contracts to which Medco Health Solutions, Inc., its predecessors, its subsidiaries, or their predecessors are parties. Medco's predecessors include Merck-Medco Managed Care and Medco Containment Services. Its principal subsidiaries for this purpose include PAID Prescriptions, Systemed, and ProVantage, and its Merck-Medco Rx Services and National Rx Services (NRx) home delivery/mail service pharmacies. A list of Medco's principal subsidiaries may be found on the Settlement website, [www.erisasettlement.com/subs.html](http://www.erisasettlement.com/subs.html). If you have questions on this issue, you may contact the Claims Administrator. The term "directly" as used in the Class definition 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" refers to any situation in which Medco's client and contract counterparty is a TPA which in turn contracts with (or otherwise has a direct or indirect relationship with) ERISA Plans and Medco manages pharmacy benefits for such Plans under contract with the TPA. TPAs are excluded from the definition of the Class unless a TPA is a Plan sponsor within the meaning of ERISA Section 3(16)(B), in which limited circumstance a TPA shall be a Class member only in such capacity.

The Class does not include Plans that are not covered by ERISA, such as government and church plans.

**III. SUMMARY OF THE PROPOSED SETTLEMENT**

A proposed Settlement of the following class action lawsuits, asserting alleged claims for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq. ("ERISA"), has been reached: *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 Court has preliminarily approved the Settlement by an Order dated July 31, 2003. As is more fully described below, under the terms of the Settlement, Defendants will pay \$42.5 million in cash into a fund (the "Settlement Fund") and will issue a check to each Class member identified as an

employee benefit plan covered by ERISA during the relevant time period. In addition, as part of the Settlement, Medco has agreed to change and/or continue certain business practices within the Company that Plaintiffs' Counsel believe to be of substantial benefit to the Class. The details of the cash payment and the business practice requirements are discussed in full in paragraphs V.B.1 and 2 below.

If you are an individual who receives prescription drug services through an employee benefit plan or otherwise benefits from such Plan (a "Participant" or "Beneficiary"), you need not do anything in order for your Plan to participate in the Settlement; the decision to participate will be made by your Plan fiduciary or Sponsor. If you are a Sponsor or fiduciary of a Plan, you must provide identifying and other information using the form appended hereto in order for the Plan to receive its share of the Settlement Fund. All Plans are expected to benefit from the business practice requirements to which Medco has agreed as part of the Settlement.

#### **IV. DESCRIPTION OF THE CLASS ACTION**

The above Action was commenced on December 17, 1997, with the filing of a complaint entitled *Gruer v. Merck-Medco Managed Care, L.L.C.*, No. 97 Civ. 9167 (CLB). Five separate cases asserting substantially similar claims were filed subsequently and the cases were consolidated by Order of the Court for pre-trial purposes. The complaints that comprise the Action together sought class action status on behalf of the classes of all individuals who were fiduciaries, beneficiaries, or participants of or in employee welfare benefit plans that provided prescription benefit coverage and that: (a) had contracts with Medco or any subsidiaries of Merck & Co., Inc.; (b) received prescription benefit services from Medco (or one of its predecessors or subsidiaries) during the Class Period; and (c) used on an "open" formulary basis Medco's Preferred Prescriptions Formulary or Medco's Rx Selections Formulary (or similar predecessor standardized formularies). The Action asserts claims against Medco and Merck for breaches of fiduciary duty and other violations under ERISA.

The Plaintiff in one of the five later-filed cases, *Blumenthal v. Merck-Medco Managed Care, L.L.C.*, No. 99 Civ. 4970 (CLB), has determined not to participate in the proposed Settlement. It is anticipated that the Plaintiff Plan in the *Blumenthal* action will either exclude itself from or object to the Settlement.

The Court has not ruled on the merits of either the Plaintiffs' claims or the Defendants' defenses in the Action, and the Settlement is not based on any finding or ruling by the Court with respect to those claims and defenses. The following summarizes the allegations of Plaintiffs and the defenses asserted by Defendants.

In summary, the Action alleges that Medco has a fiduciary duty under ERISA because it has discretionary authority over the management and administration of employee benefit plans' prescription benefit coverage. Plaintiffs allege that, as an ERISA fiduciary, Medco is obligated to act solely in the interests of the beneficiaries of the employee benefit plans with which it contracts. Plaintiffs allege that, during the Class Period, Medco and Merck breached their fiduciary duties under ERISA in several ways. First, Plaintiffs allege that Medco's formulary-related decisions violate Medco's fiduciary obligations under ERISA because, in making formulary decisions, Medco systematically favors the products of its parent company, Merck, as well as certain products of other drug manufacturers that pay Medco discounts and rebates, in order to increase the market share of Merck and the profits of Merck and Medco at the expense of the interests of the Plans. Second, Plaintiffs allege that Medco breached its fiduciary obligations under ERISA by developing programs to cause pharmacists and physicians to switch Plan beneficiaries' prescribed drugs to Merck's products in a manner that may increase cost to Plans. Third, Plaintiffs allege that Medco breached its fiduciary duties to Plans by entering into contracts with drug manufacturers that increase the costs and market share of Merck products to the detriment of the Plans. Plaintiffs allege further that Plans delegate authority to Medco to manage the pharmacy benefit plans, and to communicate to Plans and beneficiaries, and that Medco is an ERISA fiduciary with respect to all disclosures it makes to Plans. Plaintiffs allege that Medco breached its fiduciary duties by making affirmative misrepresentations of fact to Plans and their beneficiaries and by failing to disclose material facts affecting the interests of Plans and beneficiaries.

Defendants vigorously deny these allegations. Defendants consistently have maintained that Medco is not an ERISA fiduciary and that Plaintiffs' claims, all of which hinge on that fact, must therefore fail. Medco has also maintained that it administers prescription benefit plans according to Plan design choices made in arms-length negotiations, which are outside the scope of ERISA, and that, consequently, Plaintiffs cannot attack implementation of programs to which they agreed. Likewise, Medco has maintained that its acts are not "fiduciary acts" within the meaning of ERISA as interpreted by the United States Supreme Court. Medco has maintained that the competitive market for pharmacy benefit management services causes Medco to act in the best interest of its clients. Specifically, Medco has maintained that its formulary-related decisions, therapeutic interchange programs, contracts with pharmaceutical manufacturers (including Merck), and other activities are designed to and do, in fact, result in significant savings for its clients. For example, Medco has maintained that its formularies play a significant role in generating discounts and rebates from pharmaceutical manufacturers, which allows Medco to reduce costs to its clients, either through directly passing such rebates to clients or through subsidization of the costs of drugs and services Medco provides. Medco has also maintained that its therapeutic interchange programs ensure the highest quality care for members, allow Medco to maximize the level of rebates and discounts it can obtain from manufacturers by promoting formulary compliance, and provide guaranteed savings to clients even before giving effect to such rebates. Medco has specifically maintained that it is, and has been, managed independently of Merck, and has steadfastly denied favoring Merck products in order to increase Merck's market share or profits at the expense of the Plans. Medco has further maintained that its communications with Plans and beneficiaries are accurate and completely consistent with its legal obligations relating to such communications.

#### **V. THE PROPOSED SETTLEMENT**

##### **A. Background of the Settlement**

Class Counsel have sought and obtained substantial formal and informal discovery from Defendants. That discovery has included the review and analysis of over 150,000 pages of documents produced by Defendants and the taking of several multi-day depositions of employees of Medco with knowledge of the subject matter of this litigation, including senior Medco executives. In addition, Class Counsel have conducted their own investigation into the facts at issue in this lawsuit, including the retention of independent experts, and have engaged in extensive discussions with Defendants' Counsel with regard to the foregoing and other issues relevant to this Action. Class Counsel have also undertaken an extensive analysis of the legal principles applicable to the Class' claims against Defendants and the potential defenses thereto.

On May 18, 2001, Defendants moved for summary judgment of the Action. Plaintiffs opposed the summary judgment motion in pleadings filed on June 19, 2001. Defendants filed their reply for summary judgment on June 29, 2001. After the summary judgment motion was fully briefed and argued, settlement talks, which had commenced several times over the course of the lawsuit without result, began again in earnest. Those discussions continued for many months and resulted in an agreement in principle on the terms of the Settlement here described.

Based on their review and analysis of the relevant facts and legal principles, Class Counsel believe that the terms and conditions of the Settlement are fair, reasonable and adequate, and beneficial to and in the best interests of Plaintiffs and the Class. Class Counsel determined to agree to the Settlement and urge approval by the Court of the Settlement after considering: the defenses asserted by the Defendants to the claims in the Actions, which render the outcome of the Actions uncertain; the substantial benefits that the Class will receive pursuant to the Settlement, including significant changes in Medco's disclosures regarding its actions affecting the Plans; the fact that the Settlement allows Plans to receive the payments and business practice benefits to which they are entitled under the Amended Settlement Agreement, dated July 31, 2003 ("Settlement Agreement"), in the most expeditious and efficient manner practicable, and thus much sooner than would be possible were the claims asserted to be litigated through trial and appeal; the provisions of the Settlement that oblige Defendants, at their expense, to administer the process of identifying members of the Class and providing the benefits of the Settlement based on submission by Plans of identifying and other information; and the fact that the Settlement allows fiduciaries or Sponsors of Plans to exclude those Plans from the Class (to opt out of the Settlement) and to seek to pursue the claims alleged in the Action or any other claims relating to the conduct of Defendants at issue in the Action.

Despite their belief that they are not liable for the claims asserted and have good defenses thereto, Defendants have agreed to enter into this Settlement solely to avoid the further expense, inconvenience and burden of this 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.

## **B. Summary of Terms of Proposed Settlement**

### **1. Compensation to Plans.**

Defendants have agreed to pay \$42.5 million to the Settlement Fund which, after deduction of fees and expenses, will be used to compensate the Plans for the harms alleged in the Actions.

### **2. Disclosures and Changes in Practices.**

In addition, as part of the Settlement, Medco has agreed to forward-looking changes to its business practices, as well as disclosures regarding the basis for, and expenses to its clients of, changes in its formularies and interchange programs, that Plaintiffs' Counsel believe to be of substantial benefit to the Class.

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) direction by Medco's independent Pharmacy and Therapeutics Committee (the "P&T Committee") 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 Average Wholesale Prices ("AWPs") or formularies that include drugs with relatively lower AWPs, 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 2(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; Drug Utilization Review 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. The terms of this Settlement do not impose any duty on Medco or require 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 (i) with respect to contracts executed after the effective date of the Settlement Agreement, in advance of execution of such contracts, furnish prospective clients with (A) 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 (B) with respect to such pairs, (1) the AWP price of the targeted drug and the preferred drug, and (2) the AWP price of the targeted drug and preferred drug less (a) applicable ingredient cost discounts and (b) applicable Formulary Rebates; and (ii) with respect to clients with contracts in force and effect as of and after the effective date of the Settlement Agreement, Medco will furnish such clients, together with the information referred to in paragraph 2(a) above, (A) 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 (B) with respect to such pairs, (1) the AWP price of the targeted drug and the preferred drug, and (2) 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 Data File, or other nationally recognized source determined by Medco, or the direct cost listed in those instances in which only the direct cost is listed. Under Medco’s retail pharmacy program, AWP is based on the package size submitted. Under Medco’s home delivery pharmacy program, AWP is based on package sizes of 100 units for capsules and tablets and 16 oz. quantities for liquids (or smaller quantities if such quantities are not available), and all other covered drugs are priced as individual units or smallest package size available (e.g., per vial, per suppository, etc.).

g. In connection with interchange communications with physicians, when a generic equivalent to a branded drug (whether the target or preferred drug of the interchange) is available on the market, Medco will notify physicians during such a communication of the generic equivalent to the drug prescribed by the physician or the preferred drug of the interchange.

h. Medco will notify clients when a generic equivalent is available on the market with respect to branded drugs for which prescriptions could be written.

i. Medco will advise its clients in the proposed PDRG that, if a Plan member rejects a preferred drug dispensed by Medco, Medco will dispense the originally prescribed drug at no cost to the Plan member. Clients will decide whether and how Plan members will be advised of this policy. Medco will also advise clients that they may request information regarding the cost to them resulting from a Plan member’s rejection of a preferred drug dispensed by Medco. In the event Medco obtains a credit for the returned drug from the drug’s manufacturer, Medco will credit its client for such returned drug.

j. On an ongoing basis, Medco will facilitate the ability of representatives of clients to observe the periodic meetings of the P&T Committee as requested and as space/capacity permits.

k. During the period when Merck is a majority owner of Medco, Medco will invite major manufacturers of drugs that compete with drugs manufactured by Merck to confer with Medco for the purpose of engaging in discussions and negotiations that could lead to a contract between Medco and such manufacturers for product rebates and/or discounts on terms acceptable to Medco. Medco shall contact such manufacturers at least annually for the purpose of initiating such discussions and negotiations, *provided however*, that Medco shall not be obligated to engage in such discussions or negotiations with any manufacturer that refuses Medco’s invitation to confer; and Medco shall not be obligated to extend any such invitation to a manufacturer in any year in which Medco has a contract with such manufacturer. Medco shall maintain a record of the invitations it extends to such manufacturers pursuant to this paragraph 2(k). For purposes of this paragraph 2(k) only, a drug manufacturer will be considered “major” if its market share in any therapeutic category in which Merck offers drugs exceeds five percent (5%) based on number of prescriptions, as reported by IMS Health, Inc. or other nationally recognized prescription drug data service determined by Medco.

l. Annually, during the period when Merck is a majority owner of Medco, Medco will advise all Medco employees of the Independence Policy and audit compliance with such Policy.

m. For any client that participates in a health management program, Medco will disclose whether any manufacturer underwrites such program by stating, in all written materials, that the program is sponsored in part by the relevant manufacturer.

Medco’s commitment to modify or continue its business practices as outlined here will expire either (a) five (5) years from the date the Settlement becomes final; or (b) with respect to a specific client, when the client agrees in writing to different business practices applicable to that client. In addition, if Medco reasonably believes that it cannot continue any of these business practices in light of competition or a change in market conditions, Medco may make an application to the Court, on notice to Class Counsel, to suspend or modify specific practices. Any member of the Class that has opted out of the Settlement shall not have the right to oppose such application. Class members that do not opt out shall have the right to oppose such application.

### 3. Release of Claims.

If and when the Settlement becomes final, members of the Class will release certain claims against Defendants as well as certain claims against TPAs and Plan Sponsors that have contracted with such TPAs, to the extent claims or potential claims against such TPAs or Plan Sponsors are based on the same alleged conduct of Merck and Medco that is hereby being released. The release will extend to Defendants’ present and former parents, subsidiaries, divisions, affiliates, stockholders, officers, directors, employees, agents and any of their legal representatives (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing) with respect to the issues raised, or that could have been raised, in the litigation regarding certain of Medco’s practices, excluding Defendants’ obligations under the terms of the Settlement. The release only will cover claims that could be asserted by or on behalf of Plans. Moreover, the release does not release Medco from antitrust claims or from contract claims asserted by parties with which Medco has contracted to provide services, including (where permitted by applicable state law) contract claims for breach of the implied covenant of good faith and fair dealing. Further, the release is not intended to release TPAs from contract claims asserted by parties with which any TPA has contracted to provide services, including (where permitted by applicable state law) contract claims for breach of the implied covenant of good faith and fair dealing.

Specifically, if the Settlement is approved, the Order and Final Judgment will provide that Defendants and their present and former parents, subsidiaries, divisions, affiliates, stockholders, officers, directors, employees, agents and any of their legal representatives (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing) shall be released and forever discharged from those claims, demands, actions, suits, causes of action, whether class, representative, derivative, individual, or otherwise in nature, including claims that have been commenced or that could have been commenced pursuant to ERISA § 502 (a)(2) – (3), damages whenever incurred, liabilities, including costs, expenses, penalties and attorneys’ fees, in law or equity, arising out of or relating to the transactions or occurrences that are the subject of the Actions, including, but not limited to, claims based on any legal theory, including, without limitation, claims arising under ERISA or arising from or relating in any way to (i) Medco’s establishment, amendment or termination of its standardized formularies; (ii) Medco’s contracting with pharmaceutical manufacturers (including Merck) regarding formularies, drug switching or interchanges, the payment of discounts, rebates, or health management fees, or drug pricing

generally; (iii) Medco's establishment, modification or termination of drug switching programs, including its selection of drugs as targeted or preferred; (iv) Medco's advising, requesting or otherwise communicating with physicians regarding interchanges and implementing such interchanges; (v) Medco's determination on how to categorize, and whether and how to pass through to its clients, manufacturer rebates, discounts, and health management fees, as well as Medco's pricing to its clients generally; (vi) Medco's contracting with retail pharmacies, including negotiating contracts with retail pharmacies, creating pharmacy networks and reimbursing retail pharmacies; and (vii) Medco's communications (or failures to communicate) with Plans, Plan fiduciaries and/or Plan beneficiaries or participants, that any Plaintiff or any member or members of the Class who has not timely excluded himself or herself from the Class (including any of their past, present or future officers, directors, legal representatives, trustees, heirs, executors, purchasers, predecessors, successors and assigns), whether or not he, she, it or they object to the Settlement and whether or not he, she, it or they make a claim upon or participate in the Settlement Fund, whether directly, representatively, derivatively or in any other capacity, ever had, now has or hereafter can, shall or may have, *except that* (A) antitrust claims are not hereby released, and (B) the limitations periods applicable to such antitrust claims are deemed tolled from January 1, 2000, to July 31, 2003. TPAs and any Plan Sponsors that have contracted with TPAs for pharmacy benefit and related services administered by Medco shall be released and forever discharged from all manner of claims, demands, actions, suits, causes of action, damages wherever incurred, liabilities, including costs, expenses, penalties and attorneys' fees, in law or equity, that are based upon, arising from, or related to the conduct of Merck or Medco released herein. Subject to the terms of the release, the Settlement Agreement will not have any effect on claims that state attorneys general may bring directly or on behalf of citizens of their respective states.

### **C. Attorneys' Fees and Expenses**

Class Counsel has been aggressively prosecuting this case on behalf of the Class on a contingency basis, without charge to the Class. Class Counsel intends to apply for an award of attorneys' fees in an amount not to exceed thirty percent (30%) of the Settlement Fund. Class Counsel also intends to seek reimbursement of expenses, including the cost of experts and other expenses incurred in the litigation, from the Settlement Fund.

### **D. Claims-Making Process**

Participants and beneficiaries need not do anything in order for their Plans to participate in the Settlement. If you are a Sponsor or other fiduciary of a Plan and you wish the Plan to participate in the Settlement, you must complete the Identification Form ("Form") that appears at the end of this Notice and send it to the address indicated on the Form **postmarked no later than February 9, 2004**. If you received this Notice by mail, a copy of the Form should be attached. To obtain additional Forms, please call the Claims Administrator at 1-877-267-9449 or write to Medco ERISA Settlement, c/o Complete Claim Solutions, Inc., P.O. Box 24612, West Palm Beach, FL 33416, or download a Form from the internet at [www.erisasettlement.com](http://www.erisasettlement.com). **IF YOU ARE A SPONSOR OR OTHER FIDUCIARY OF A PLAN AND DO NOT TIMELY AND PROPERLY SUBMIT AN IDENTIFICATION FORM OR DECLARE YOUR INTENTION TO OPT OUT OF THE SETTLEMENT, THE PLAN FOR WHICH YOU ARE A FIDUCIARY WILL NOT BE COMPENSATED FROM THE SETTLEMENT FUND BUT WILL BE BOUND BY THE TERMS OF THE SETTLEMENT AND THE RELEASE OF CLAIMS AGAINST DEFENDANTS.**

### **E. Plan of Allocation and Distribution of Settlement Fund**

Should the Settlement be approved and after the Settlement Agreement becomes final, the Settlement Fund, plus interest, less attorneys' fees, costs and taxes, will be disbursed to the Plans that have properly submitted the Identification Form appended hereto. 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. If your Plan pays for prescription drug benefits on an insured or capitated basis (e.g., a fixed premium or per-member, per-month sum) or if your Plan does not participate in any brand-to-brand therapeutic interchange program administered by Medco, your proportionate share of the total drug spend will be reduced by fifty-five percent (55%) to reflect the fact that your Plan could not have been damaged directly by certain of the conduct that Plaintiffs allege increase costs to Plans. As set forth in Section IV, Medco maintains that its brand-to-brand therapeutic interchange programs have provided substantial value to its clients. The methodology by which each Plan's allocable share of the Settlement Fund is determined, as well as the final distribution plan, will be reviewed and approved by Plaintiffs' Counsel before such plan is submitted to the Court. The Settlement Fund will be distributed only after Court approval of the final plan of distribution.

## **VI. HOW TO PARTICIPATE IN THIS ACTION AND SETTLEMENT**

If you are a Plan Sponsor or fiduciary, and intend that your Plan remain a member of the Class and participate in the Settlement Fund, you must complete the Identification Form that appears at the end of this Notice and send it to the address indicated on the Form **postmarked no later than February 9, 2004**. All members of the Class are entitled to share in the benefits of the Settlement as described above if it is finally approved by the Court and will be bound by the final judgment and release of claims entered by the Court. Class Counsel appointed by the Court will represent the Class on your behalf. All fees and expenses of Class Counsel will be paid out of any recovery by the Class, as described above under "Attorneys' Fees and Expenses", together with such other attorneys' fees and expenses as may be awarded by the Court to other lawyers who may have done work benefiting the Class. You will not have to pay Class Counsel any additional amounts and in no event will you be obliged to pay any judgment, court costs, or attorneys' fees for participating in this Class Action and Settlement. In addition, any Class member who does not request exclusion from the Class may also enter an appearance through their own counsel at their own expense. However, by remaining in the Class, you will be bound by any final judgment that may result from the Class Action, including any judgment at trial in the event that this Settlement is not finally approved by the Court. The pleadings and other public records in this litigation may be examined and copied at any time during regular business hours at the Office of the Clerk of the Court, United States District Court for the Southern District of New York, 300 Quarropas Street, White Plains, New York.

## **VII. HOW TO BE EXCLUDED FROM THE CLASS**

Sponsors or fiduciaries of Plans may request that the Court exclude the Plans from the Class. Plans as to which Sponsors or fiduciaries request exclusion will not be entitled to share in the settlement proceeds, nor will they be bound by the final judgment in the Action. If you represent a Plan and wish the Plan to be excluded from the Class on whose behalf these Actions are being maintained, please mail a letter **postmarked no later than November 14, 2003**, requesting exclusion to the Claims Administrator at the following address:

***Medco ERISA Settlement, c/o Complete Claim Solutions, Inc., P.O. Box 24612, West Palm Beach, FL 33416.***

Your request for exclusion must include the following information: Plan Name and Address, and a Contact Name, Address, Phone Number, Fax Number and Email. If your Plan contracted directly with Medco, please provide the date range of services and your Medco carrier numbers or bill code assigned to your Plan. If Medco provided services to your Plan through one or more TPAs, please identify for each TPA: the identity of the TPA; Date range(s) of services; Medco carrier number(s) or bill code(s) applicable to your Plan; Medco contract numbers applicable to your Plan (if the carrier number(s) did not apply exclusively to your Plan); Medco group number(s) applicable to your Plan if the contract number(s) did not apply exclusively to your Plan; other identifying information (e.g., policy number, etc.) to the extent you do not have or cannot obtain your Plan's Medco carrier, contract, and/or group numbers. We are not able to identify your Plan if you do not provide this information and cannot process your request for exclusion as a result.

Please sign your exclusion request and indicate the capacity in which you are signing (e.g., Plan fiduciary, Plan Sponsor).

#### **VIII. OBJECTIONS TO THE PROPOSED SETTLEMENT AND SETTLEMENT FAIRNESS HEARING**

You may appear, in person or through your counsel, at your own expense, and be heard in opposition to the fairness, adequacy or reasonableness of the Settlement, or the payment of attorneys' fees and reimbursement of expenses.

Any objection must be in the form of a written statement from a member of the Class and must set forth: (1) the caption of this case; (2) the objector's name; (3) a statement as to whether the Class member intends to appear at the Settlement Fairness Hearing; (4) a statement of the specific basis for the objection, including identification of all papers the objector intends to rely on at the hearing; (5) the names of all witnesses the objector intends to call at the Settlement Fairness Hearing; (6) the objector's current address and telephone number; (7) the objector's signature or that of his or her authorized representative; (8) verification that the objector is a member of the Class. The written objection must be filed with the Clerk of the Court, United States District Court for the Southern District of New York, 300 Quarropas Street, White Plains, New York, 10601 *on or before November 14, 2003*, and copies must be served by mail on counsel for the parties (as shown below) *on or before November 14, 2003*, at the following addresses:

##### **Counsel for Plaintiffs**

David Boies  
Robert Silver  
Philippe Z. Selendy  
Edward Normand  
Boies, Schiller & Flexner LLP  
570 Lexington Avenue  
New York, NY 10022

Arthur N. Abbey  
Karin E. Fisch  
Abbey Gardy, LLP  
212 East 39th Street  
New York, NY 10016

##### **Counsel for Defendants**

Kenneth Kramer  
James P. Tallon  
Shearman & Sterling  
599 Lexington Avenue  
New York, NY 10022

#### **IX. NON-SETTLING COUNSEL**

Certain Plaintiffs' Counsel, including Linda Cahn and the law firm of Herman, Mathis, Casey, Kitchens & Gerel, LLP, have not joined in the proposed Settlement. Based on their review of the relevant facts and law, said Counsel do not believe that settlement is in the best interests of Plaintiffs and the Class. They have raised concerns about the proposed settlement, including, but not limited to: (1) the sufficiency of the monetary relief; (2) the treatment of insured Plans relative to self-funded Plans; and (3) ambiguities regarding the scope of the release and the parties being released.

If you would like to consult with Counsel opposed to the Settlement at no charge, you may write or contact:

Herman, Mathis, Casey, Kitchens & Gerel, LLP -or-  
230 Peachtree Street, Suite 2260  
Atlanta, GA 30303  
Toll-Free Number: 1-866-OPTS-OUT (1-866-678-7688)  
Website: [www.pbmlitigation.com](http://www.pbmlitigation.com)

Linda Cahn  
13 Lynn Court  
Morristown, NJ 07960  
Toll-Free Number: 1-866-216-6111 (pin 6099)

#### **X. SETTLEMENT FAIRNESS HEARING**

The Court has scheduled a Settlement Fairness Hearing on December 11, 2003, at 9:00 a.m. in Courtroom 218 of the United States District Court for the Southern District of New York, 300 Quarropas Street, White Plains, New York, before the Honorable Charles L. Briant. At the Settlement Fairness Hearing, the Court will consider, among other issues, whether the Settlement is fair, reasonable and adequate, and is in the best interests of the Class. Although you may attend this hearing, you are not required to do so in order to participate in the Settlement. The Settlement Fairness Hearing may from time to time and without further notice to Class members be continued or adjourned by Order of the Court.

#### **XI. SCOPE OF THIS NOTICE AND ADDITIONAL INFORMATION**

The foregoing description of the litigation, the terms of the Settlement, and other matters described herein provides a summary of the litigation and the Settlement and is qualified by the full terms of the Settlement Agreement among the parties. For the full details of the litigation and the full terms of the Settlement, you are referred to the Settlement Agreement, and the pleadings, records and other papers on file in this litigation, which may be inspected during regular business hours at the Office of the Clerk.

Additional information will be available by calling 1-877-267-9449 or writing to the Claims Administrator, P.O. Box 24612, West Palm Beach, FL 33416 or on the internet at [www.erisasettlement.com](http://www.erisasettlement.com). Please check the website for up-to-date information about the Settlement and the schedule.

**PLEASE DO NOT CONTACT THE COURT.**

Dated: White Plains, New York  
July 31, 2003

By Order of the United States District Court  
for the Southern District of New York

RETURN THIS FORM BY  
FEBRUARY 9, 2004

## MEDCO ERISA SETTLEMENT IDENTIFICATION FORM

Official Use Only

PLEASE FILL OUT AND RETURN THIS FORM IF YOU ARE A PLAN SPONSOR, A PLAN FIDUCIARY OR OTHERWISE AUTHORIZED TO ACT ON BEHALF OF A PLAN AND YOU WISH TO PARTICIPATE IN THE SETTLEMENT.

**SECTION 1: PLEASE PROVIDE THE FOLLOWING INFORMATION:**

Name Of Claimant (Plan): \_\_\_\_\_

Plan Address: \_\_\_\_\_

Contact Name: \_\_\_\_\_

Contact Address: \_\_\_\_\_

\_\_\_\_\_

Contact Phone Number

\_\_\_\_\_

Contact Fax Number

\_\_\_\_\_

Contact Email

**SECTION 2: If You Contract Directly With Medco, Please Provide The Following Information:**

\_\_\_\_\_

Date Range Of Services

\_\_\_\_\_

Medco Carrier Numbers Or Bill Code Assigned To Your Plan

**SECTION 3: If Medco Provided Services To Your Plan Through One Or More TPAs (Third Party Administrator, HMO, Insurance Company, Blue Cross Blue Shield Or Other Intermediary), Please Complete This Section.**

**(A) Identify Each TPA:**

|   |   |                           |                 |   |                           |
|---|---|---------------------------|-----------------|---|---------------------------|
| _____   | / | _____                     | _____           | / | _____                     |
| Identity Of TPA   |   | Date Range(s) Of Services | Identity Of TPA |   | Date Range(s) Of Services |
| <i>(If you require additional space, attach extra schedules in the same format as above. Sign and print your name on each additional page.)</i> |   |                           |                 |   |                           |

**(B) When Completing This Section, Please Refer To The Reverse Side Of This Page. In Some Instances, The Medco Carrier, Contract, Group Number And/Or Other Identifying Information May Be Printed There.**

Medco Carrier Number(s) Or Bill Code(s) Applicable To Your Plan: \_\_\_\_\_

Medco Contract Number(s) Applicable To Your Plan (If The Carrier Number(s) Did Not Apply Exclusively To Your Plan): \_\_\_\_\_

Medco Group Number(s) Applicable To Your Plan(s) (If The Contract Number(s) Did Not Apply Exclusively To Your Plan): \_\_\_\_\_

Other Identifying Information (e.g., Policy Number) If You Do Not Have Or Cannot Obtain Contract, Carrier, And/Or Group Numbers: \_\_\_\_\_

**(C) Please check **one** of the following boxes to indicate the basis for your Plan's payment for the cost of prescription drug benefits administered by Medco through your TPA:**

- During the Class Period, the Plan has paid for prescription drug benefits **primarily** through payment of a premium or based on a fixed, per-member charge (e.g., on an insured or capitated basis)
- During the Class Period, the Plan has paid for prescription drug benefits **primarily** based on the volume of drugs and type of drugs dispensed to Plan members (e.g., on a self-insured or administration fee plus cost of claims basis)

**SECTION 4:** By signing below, I hereby swear or affirm that (a) I have the authority to submit this claim on behalf of the Plan or Plans identified in this Form; (b) the information contained in this Form (and any attachments) is true and accurate; and (c) the Plan or Plans identified in this Form and I submit to the jurisdiction of the United States District Court for the Southern District of New York for all purposes associated with this Form. I acknowledge that any false information included in this Form may subject me and the Plan or Plans identified in this Form to sanctions, including criminal prosecution. The Plan or Plans identified in this Form and I agree to furnish additional information requested by the Court or in connection with distribution of the funds.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Title

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Date

**MAIL TO: MEDCO ERISA SETTLEMENT,  
C/O COMPLETE CLAIM SOLUTIONS, INC., P.O. BOX 24612, WEST PALM BEACH, FL 33416**

Medco ERISA Settlement  
c/o Complete Claim Solutions, Inc.  
P.O. Box 24612  
West Palm Beach, FL 33416

## **IMPORTANT COURT DOCUMENTS**

Attention – President/CEO, Benefit Plan Administrator or Legal Department

### **PLEASE NOTE:**

- *Medco Health Solutions, Inc. used to be known as Merck-Medco Managed Care and Medco Containment Services. You may also know Medco's subsidiaries by the names PAID Prescriptions, Systemed, ProVantage, and as Merck-Medco Rx Services and National Rx Services (NRx) home delivery/mail service pharmacies.*
- *Each employee welfare benefit plan should only file one (1) Identification Form, regardless of the number of carrier, contract, or group numbers Medco assigned to your Plan.*
- *In the event you believe the carrier, contract, group, or other identifying information listed above is incorrect or does not apply to your Plan, please provide the Plan's correct information in Section 3.*

### **REMINDER CHECKLIST**

1. Please complete the Identification Form on the reverse side.
2. Be sure to sign and date the Identification Form in Section 4.
3. Please keep a copy of the Identification Form for your records.
4. Mail the Identification Form to:

**Medco ERISA Settlement**  
**c/o Complete Claim Solutions, Inc.**  
**P.O. Box 24612**  
**West Palm Beach, FL 33416**  
**Phone: (877) 267-9449**  
**Website: [www.erisasettlement.com](http://www.erisasettlement.com)**