



National Association of State Medicaid Directors

an affiliate of the American Public Human Services Association

September 18, 2009

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National Community Pharmacists Association
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Becky Snead, R.Ph.
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National Alliance of State Pharmacy Association Executives
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Steve Anderson, IOM, CAE
President and CEO
National Association of Chain Drug Stores
413 North Lee Street
Alexandria, VA 22314

Dear Mr. Roberts, Ms. Snead, and Mr. Anderson:

I am writing in response to your September 8, 2009 letter to The Honorable Kathleen Sebelius, Secretary of the U.S. Department of Health and Human Services regarding the impact of the First DataBank settlement on Medicaid patients' access to pharmacy services. As the Chair of the National Association of Medicaid Directors, I would like to address each issue you raised.

AWP Rollback Could Reduce Patients' Access to Pharmacies: In your letter, you state "These reductions may force many pharmacies to close, reduce hours, or stop providing Medicaid pharmacy services.....The AWP rollback will reduce the state pharmacy reimbursement rates to such a degree that many pharmacies may not be able to continue to provide services to the Medicaid population". However, a United States District Court has recently ruled that AWP is an inflated, unreliable pricing benchmark¹. Judge Patti Saris, in her Final Order and Judgment regarding the FDB/AWP adjustment issue, says: "[d]espite its name, AWP is not an average of prices charged by wholesalers to providers (such as pharmacies and doctors) and it does not necessarily bear any relationship to any prices actually charged in the marketplace"¹. In addition, several states have received substantial jury verdicts in civil actions against certain pharmaceutical companies, and various states and the federal government have entered

into various multi-million dollar settlements, for conduct related to the inappropriate reporting of AWP prices. Based on the evidence received during the discovery process and presented at trials in the Alabama AWP lawsuits, it has been found by juries that Alabama paid inflated reimbursement amounts to pharmacists resulting from the misrepresenting, misreporting and inflating of drug prices by the defendant pharmaceutical companies².

In the AWP/FDB Final Judgment, Judge Saris continues to say "...these pharmacies (both chain and independent) and PBMs, reimbursed on the basis of AWP, were unjustly enriched when drug prices were fraudulently inflated during the scheme, yet they have not been asked to disgorge their profits. None of the pharmacies protested the windfalls they received when prices were unilaterally inflated by five percent. Further, the pharmacies seem to have survived prior to the start of this fraudulent scheme, making it seem likely that they will survive after it has been undone."¹ Her findings are inconsistent with your comments that pharmacies' doors will close as a result of the adjustment to the inflated AWP prices.

States Must Actively Determine "EAC" for Brand Name Drugs: You say in your letter, referring to a State's EAC: "If [States] do not adjust their reimbursement rates when AWP's are reduced, then they will no longer be in compliance with these regulatory requirements, because reimbursement will be artificially reduced by about 4% below the States' best estimate of pharmacies' actual acquisition costs". Again, a federal court ruled that AWP was *inflated*, and States cannot bear the burden of continuing to overpay providers based on inflated, false prices that are, in actuality, unrelated to the EAC. Regardless of any budgetary crisis which may (or may not) be present in a State Medicaid Agency, it is not appropriate for the State, its taxpayers, or CMS to be held responsible for continued overpayment based on fraudulent and inflated prices. Referring specifically to the AWP markup, it was recently determined that "by 2002, 95% of all prescription drug manufacturers used the inflated 25% markup, and by 2004, 99% of all prescription drug manufacturers did so."¹

Therefore, the AWP adjustment scheduled for September 26, 2009 is necessary and very much overdue. The problem has been that the States are dependent upon the accurate and truthful reporting of drug prices by the pharmaceutical companies to the FDB system used by virtually all Medicaid agencies. Because access to other pricing data has been limited, problematic and usually unavailable, it is vital for FDB to receive and publish accurate information.

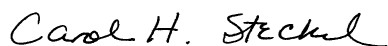
Reimbursement Must be Consistent with Access Standards: Your letter quotes a section of 42 U.S.C 1396, that an Agency's payments "must be sufficient enough to enlist enough providers so that services under the plan are available to recipients at least to the extent that those services under the plan are available to the general population". I could not agree more with this statement. In a recent publication by the Journal of Managed Care Pharmacy, a "survey of 223 employers representing about 15 million members showed that average community pharmacy reimbursement for brand drugs was AWP

minus 16.1%, plus an average dispensing fee of \$1.73”.³ Compared to the majority of States, the “general population” is reimbursing community pharmacies at a much lower rate than Medicaid, which by law is required to pay EAC plus a reasonable dispensing fee.⁴ Therefore, it appears your belief that if States “do not take prompt remedial action to ameliorate the inequitable effects of this of the [FDB] settlement, there may be a significant disparity in the access of Medicaid recipients to pharmacy providers and needed medications in contrast to other state residents” is an unfounded concern. In fact, assuming accurate pricing data becomes available, the States will want to adopt systems within the parameters of federal requirements which ensure that the States are not continuing to *overpay* as compared to the general population of their respective areas.

Recognizing the complicated nature of pharmacy reimbursement, I challenge all parties involved -- pharmacies, associations, States, and CMS -- to take this unique opportunity to work together to clearly define and appropriately pay drug ingredient costs and the cost of providing professional services by our pharmacists, once and for all recognizing the contributions pharmacists make to the health of our recipients. Now is not the time to place the proverbial “band-aid” on the issue of pharmacy reimbursement, but to work collectively and move forward to find pricing data and reimbursement methodologies which accurately reflect pharmacies’ acquisition costs, thereby putting an end to inflationary and inappropriate reimbursements.

NASMD remains committed to the States we represent, the providers in those States, and ultimately the recipients for whom we serve. We hope that by opening the lines of communication we can bring together invested parties and address this issue directly. If you should have further questions or concerns, please do not hesitate to contact me at (334) 242-5600.

Regards,



Carol H. Steckel, MPH

¹ New England Carpenters Health Benefits Fund, et al., v. First Data Bank, Inc. and McKesson Corporation. United States District Court; District of Massachusetts. Filed 3/17/2009. <http://www.firstdatabank.com/download/pdf/FinalJudgment.pdf>. Accessed September 11, 2009.

² Alabama Attorney General Press Release; May 22, 2009. “AG Secures \$89 Million in New Drug Companies Settlements – Total Settlements and Verdicts Nearing Half a Billion Dollars.” http://www.ago.state.al.us/news_template.cfm?Item=1270. Accessed September 11, 2009.

³ AMCP Guide to Pharmaceutical Payment Methods, 2009 Update (Version 2.0); Academy of Managed Care Pharmacy. Journal of Managed Care Pharmacy August 2009; Vol 15, No 6-a (supplement). <http://www.amcp.org/amcp.ark?p=1529B561>. Accessed September 11, 2009.

⁴ Pharmaceutical Benefits Under State Medical Assistance Programs. National Pharmaceutical Council: Reston, VA, 2007. <http://www.npcnow.org/Research.aspx>. Accessed September 11, 2009.

CHS/kdl

cc: The Honorable Kathleen Sebelius, Secretary, US Dept of Health and
Human Services
The Honorable Max Baucus, Chairman, US Senate Committee on Finance
The Honorable Charles Grassley, Ranking Member, US Senate Committee
on Finance
The Honorable Henry Waxman, Chairman, US House of Representatives,
Committee on Energy and Commerce
The Honorable Joe Barton, Ranking Member, US House of Representatives,
Committee on Energy and Commerce