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Merck to Pay \$42.5 Million to Settle Lawsuits Against Its Pharmacy-Benefit Unit

By MILT FREUDENHEIM
Published: December 10, 2002

Merck & Company yesterday agreed to pay \$42.5 million to settle long-running class-action lawsuits against its pharmacy-benefit unit, Medco Health Solutions.

But lawyers for the plaintiffs were split over whether to accept the agreement. Some lawyers said it was too small, considering that Medco had pocketed billions of dollars in rebates from manufacturers and other fees that they said should have gone to thousands of health plans and millions of consumers. Medco has 65 million holders of its drug cards.

Medco said it did not admit any liability in agreeing to the settlement, which is subject to approval by Judge Charles L. Brieant in Federal District Court in White Plains.

Medco is one of the largest of a handful of pharmacy-benefit management companies, including AdvancePCS and Express Scripts, that negotiate with drug manufacturers to obtain discounts for employers and health plans.

In lawsuits across the country, Medco, AdvancePCS and Express Scripts have been accused of violating fiduciary duties to customers under the federal Employee Retirement Income Security Act by failing to disclose the extent of their financial ties with the manufacturers.

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Russ M. Herman, a lawyer from New Orleans who has been active in class-action suits against the tobacco industry, asked Judge Brieant yesterday to delay the settlement process for 90 days so that his partnership, Herman, Mathis, Casey, Kitchens & Gerel, based in Atlanta, could examine 67 boxes of Medco business records.

Mr. Herman said that, based on a preliminary analysis by expert consultants, Medco had held back \$2.85 billion in incentive rebates from 1995 to 1999 and \$1.29 billion more in rebates and various fees last year. (No figures were given for 2000.) Herman, Mathis represents individual, corporate and municipal clients -- including the cities of Atlantic City, N.J., and Paterson, N.J. -- in cases against pharmacy-benefit managers.

Anita Kawatra, a spokeswoman for Medco, based in Franklin Lakes, N.J., said contracts varied according to negotiations between Medco and health plans.

Philippe Selendy of Boies, Schiller & Flexner, a law firm for plaintiffs that agreed to the

settlement, said the incentive rebates, which rewarded Medco for gaining market share for particular drugs, generally were not supposed to be passed along to the customers.

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