

**Best Price Fraud** occurs when a pharmaceutical company intentionally provides the government with incorrect information regarding the best price available (“Best Price”) for its products on the open market. By manipulating this data, manufacturers are able to increase their profits at the expense of government assistance programs. It is one of many offenses that falls under the False Claims Act, which imposes liability on companies that defraud the United States government.

### **Overview**

Medicaid guarantees that enrollees pay the Best Price for their prescription medications. Medicaid ensures the Best Price through a rebate program that requires pharmaceutical manufacturers to provide the government with the lowest, Best Price they offer across the entire drug marketplace. This includes local rebates at pharmacies and volume discounts paid by the wholesale market, the government, and private providers.

If an enrollee pays a higher amount than this Best Price, Medicaid will supplement the price difference between the two so that the individual receiving Medicaid never pays more for a drug than the lowest amount. After a Medicaid enrollee is covered for the difference, the product’s manufacturer is responsible for reimbursing Medicaid’s costs in the form of a rebate. This is based upon the “spread” between the Best Price and the Average Wholesale Price (“AWP”) of the product. For example, if the recipient pays \$58 per pill on a product whose Best Price is calculated at \$40 per pill, the manufacturer will pay \$18 per overcharged pill to Medicaid.

Medicaid lacks the manpower and resources to verify that it is paying the correct Best Price for all medications at all pharmacies and wholesalers. Manufacturers track the Best Price data for their own sales and marketing purposes, but Medicaid cannot request this information from the companies because federal law considers it proprietary. The result is a system of self-regulation, with the Best Price and effective rebate amount determined entirely by the pharmaceutical manufacturers themselves.

Best price fraud is when the manufacturer artificially inflates the Best Price that they report to the government. This reduces the “spread” between the Best Price and the Average Wholesale Price, decreasing the required rebate. If the manufacturer falsely reports the \$58 pill to the government with a Best Price of \$50 instead of \$40, the company illegally lowers the amount it owes Medicaid to \$8 a pill instead of \$18. Over time, this tactic can defraud Medicaid of millions of dollars in funds.

A company may also falsify its Average Wholesale Price in order to charge Medicaid more than it charges hospitals, doctors and private insurers. For example, if a pharmaceutical company sells a drug for \$2 a pill and then charges the government for \$10 a pill, that is Drug price manipulation and another example of best price fraud. Because pharmaceutical manufacturers also do not have to disclose their actual Average Wholesale Price to the government, they are often able to manipulate or misrepresent that price. This allows them to charge Medicaid for far more than they actually make private insurers pay for a drug.

### **The Costs of Best Price Fraud**

Best Price Fraud and Average Wholesale Price manipulation have been pervasive issues for more than a decade. Since 1986, the government has recovered a staggering \$27 billion. Pricing fraud is so pervasive that According to a report filed by CBS' "60 Minutes," in 2010 some drug company executives have quipped that "AWP" actually stands for "Ain't What's Paid."

In some cases of price manipulation, companies have charged Medicare and Medicaid up to 1000% more than the actual Average Wholesale Price. In 2013, it was found that manufacturer Baxter International had been charging \$928 for saline bags that cost \$1.71 to provide.

Recently, Federal Enforcement officers have made prosecuting pricing fraud a top priority. In the Obama administration's first three years alone, the Department of Justice recovered \$5 billion from pharmaceutical manufacturers for price manipulation and best price fraud.

### **Identifying Best Price Fraud**

As pharmaceutical manufacturers alone have access to the proprietary information for the correct rebate amounts, best price fraud is a crime that can only originate with them. Almost all successful lawsuits against this sort of fraud have been *qui tam* cases built by whistleblowers with insider information. These whistleblowers have included pharmaceutical manufacturing employees, healthcare providers, wholesale purchasers, and private pharmacies. Company employees may become aware of erroneous Best Price data or of intentions to defraud the government, and business affiliates may receive improper offers in order to perpetuate the fraud.

Examples of best price fraud are often not as straightforward as a company reporting a false Best Price to Medicaid. As more violations have been exposed and tried by the Department of Justice, pharmaceutical manufacturers' tactics have become more sophisticated and varied.

Some companies have kept their Best Prices artificially high by disguising their price discounts. Pharmaceutical companies have disguised discounts to private purchasers as processing fees, educational grants, financial investments, or other arrangements that effectively lower the cost of the purchased drugs. In some cases, drug manufacturers have enlisted the help of private insurers, local pharmacists, and healthcare providers in their false reporting by providing kickbacks and other illegal financial deals.

If you are aware of any of the below situations, you may have the basis of a Best Price fraud False Claims Act whistleblower claim:

- 1) Does the manufacturer provide kickbacks to a Managed Care Provider, Specialty

Pharmacy, or Prescription Benefit Manager in order to to influence their decision to favor a particular product or treatment?

2) Does the manufacturer provide incentives to these drug purchasers in the form of research and/or educational grants?

3) Did the manufacturer provide discounts and/or rebates off-the-record, or disguised as a payment of another sort?

### **Past Cases and Variations**

- March 2003: Bayer AG paid the Justice Department \$14 million to settle a 1990s best price fraud scheme that manipulated the entire “spread” of several products. The company used kickbacks to encourage healthcare providers and pharmacies to over-prescribe their more expensive products, in order to increase sales and artificially inflate their Average Wholesale Prices. At the same time, Bayer AG executives report an inflated Best Price to Medicaid on these products. This kept the spread on pace, or smaller than, the sales growth. Bayer AG grew their profits and market share while limiting their rebate liability to Medicaid. The fraud was eventually exposed by a group of whistleblowers from an independently-owned Florida pharmacy.

- February 2008: Merck paid the Justice Department \$650 million, in one of the largest False Claims Act settlements in history. The case was born out of evidence from former Merck employee H. Dean Steinke, whose information showed that the company violated Best Price laws on its products Zocor and Vioxx. For his whistleblower efforts, he was awarded over \$44 million.

- May 2010: Dey Pharma L.P. agreed to a \$280 million settlement after it was proven that the company was intentionally reporting incorrect Best Prices for four of its best-selling products. The whistleblower, a home-infusion company-turned-whistleblower organization called Ven-A-Care, received a \$67.2 million reward.

### **Report Best Price Fraud**

If you know of a company falsely reporting the Best Price to Medicaid or manipulating its Average Wholesale Price through hidden discounts or kickbacks, you may have a whistleblower claim. You can help the millions of people who rely on federal programs by speaking to an attorney about becoming a Medicaid whistleblower.