

LETTERS TO THE EDITOR

'First Databank' litigation

SHERMAN JOYCE'S opinion piece, "Pharmaceutical pricing: Stop regulation by lawsuit" [NLJ, Jan. 22], epitomizes the tendency of self-proclaimed "tort reformers" to decry any litigation they don't like as "regulation by lawsuit." Like many so-called "tort reform" arguments, it conveniently ignores salient facts.

The facts are these: We, and other plaintiffs, alleged that First Databank and McKesson Corp. conspired to intentionally mislead millions of consumers and insurers as to the true cost of prescription drugs. We claimed that they unlawfully and fraudulently altered computer algorithms used to reimburse pharmacies nationwide, causing huge overpayments for hundreds of drugs. The recent settlement, with First Databank alone, will prospectively unwind the artificial inflation for those drugs and many more, resulting in savings for buyers far in excess of what could have been recovered against First Databank. The settlement also requires First Databank to cease publishing a controversial drug-pricing benchmark, the average wholesale price. Importantly, we continue to pursue our case against McKesson, which was not part of the settlement.

Prices for drugs are not dictated through "public processes," as Mr. Joyce implies—they are dictated, for good or ill, largely in secret by sellers in the private marketplace. Mr. Joyce portrays the settlement as usurping "our system of constitutional government." But this argument is a straw man, and a tired one at that. The settlement will not determine government policy, but rather address purported fraud in the private marketplace by requiring the dissemination of correct pricing information. Fraud against private parties is most certainly an issue for the courts. That is precisely why legislatures throughout the country enacted consumer protection laws. Mr. Joyce seems to argue that because the fraud, and the settlement addressing it, have nationwide effect, they somehow are transformed into "regulation." This is a silly argument. The kind

of wrongful act alleged here is classically within the power of a court to remedy.

This settlement also illustrates the importance of class actions. Only by aggregating their claims can millions of consumers and insurers receive any relief from the alleged fraud and harm they suffered. Without a class action, the perpetrators of the alleged fraud would retain their ill-gotten gains. Mr. Joyce's critique that the settlement does not award cash damages ignores the fact that its provisions will produce far greater relief to class members through future savings than any one-time cash settlement would have achieved. Conservative estimates

put first-year savings at \$4 billion. As representatives of a class of consumers and insurers, we carefully weighed the settlement terms and view it as a fair resolution of this portion of the case. Mr. Joyce also offers a knee-jerk criticism of the attorney fees. They are modest in comparison to the time and expense spent in bringing the case.

Finally, "tort reformers" seem to reserve their accusations of "regulation by litigation" for consumers seeking redress for harms inflicted by corporations. Inexplicably, the pharmaceutical industry's misuse of the court system to maximize profit is not subjected to the same charge. Frivolous patent infringement suits are routinely used by brand-name drug companies specifically to thwart congressionally mandated policy to speed generic drugs to market. Where is Mr. Joyce's lamentation for "our system of constitutional government" when corporate plaintiffs misuse the courts to undermine the generic drug system mandated by our elected representatives at the expense of consumers and the health care system as a whole?

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**Fraud, not
setting
policy, is
real issue.**
