

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	MDL NO. 2724 16-MD-2724 HON. CYNTHIA M. RUFE
<i>IN RE: CLOBETASOL CASES</i>	DPP CASE: 16-CB-27242
<i>IN RE: CLOMIPRAMINE CASES</i>	DPP CASE: 16-CM-27242
THIS DOCUMENT RELATES TO: <i>EPP BELLWETHER ACTIONS</i>	

**ORDER GRANTING END-PAYER PLAINTIFFS’ MOTION FOR APPROVAL
OF PROPOSED NOTICE PLAN AND APPOINTMENT OF NOTICE
ADMINISTRATOR**

On March 7, 2025, this Court granted the End-Payer Plaintiffs’ (“EPPs”) Motions for Class Certification under Federal Rule of Civil Procedure 23(b)(3), as well as EPPs’ motion for appointment of class counsel.¹ On April 11, 2025, EPPs filed a motion for approval of their proposed notice plan and for the appointment of a notice administrator, which has been opposed by certain Defendants and by Direct Action Plaintiffs Humana Inc. (“Humana”) and Health Care Service Corp. (“HCSC”).

Defendants object to (1) the form and content of the notice, (2) the content of the notice insofar as they claim it reinforces and exacerbates alleged ascertainability issues, and (3) opt-out procedures, which EPPs contend are burdensome and vague.²

¹ Order Grant Class Cert. [MDL Doc. No. 3275].

² Defs.’ Opp’n Mot. Approval Proposed Notice Plan & Appointment Notice Administrator at 1 [MDL Doc. No. 3351].

First, Defendants argue that the proposed notice is impermissibly vague, broad, and that important information, such as exclusions, are difficult to find and shrouded in technical language. This, Defendants argue, will lead certain recipients, such as Pharmacy Benefit Managers (“PBMs”) and Administrative Service Only (“ASO”) customers of insurers,³ to mistakenly believe that they are included in one of the classes.⁴ Notice must include “sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class.”⁵ EPPs’ proposed notices meet this standard as they include the definition of the classes, clear descriptions of entities that are excluded from those classes, and detailed information on the opt-out process.⁶ The EPPs’ plan is laid out with sufficient clarity, particularly given that the intended recipients are sophisticated business entities.

Second, Defendants argue that the notice framework is not ascertainable.⁷ Defendants contend that EPPs’ proposed notices are both “overbroad” and “underinclusive” and will require significant individualized inquiry. The Court rejects this argument for the same reasons explained in the class-certification opinion as to why the classes are ascertainable.⁸

³ Humana’s ASO customers are “employers that self-fund their employees’ health benefit plans and contract with institutional health insurers” to administer those plans pursuant to ASO contracts. Humana Inc.’s Opp’n to Mot. Approval Proposed Notice Plan & Appointment Notice Administrator at 1 [MDL Doc. No. 3350]. “Under these contracts, insurers facilitate and monitor their ASO group customers’ prescription drug purchases and seek recoveries for overcharges paid for medical and pharmaceutical products and services.” *Id.*

⁴ *Id.* at 3-5.

⁵ *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013).

⁶ See EPPs’ Mot. Approval Proposed Notice Plan & Appointment Notice Administrator Ex. 2 [MDL Doc. No. 3329-3].

⁷ See Defs.’ Opp’n Mot. Approval Proposed Notice Plan & Appointment Notice Administrator at 6 [MDL Doc. No. 3351].

⁸ See *In re Generic Pharms. Pricing Antitrust Litig.*, 16-CB-27242, 2025 WL 754567 (E.D. Pa. Mar. 7, 2025).

Finally, Defendants argue that the opt-out process is unduly burdensome and confusing, calling it “impossible for a class member to navigate without legal or economic expertise.”⁹ This process, they argue, is a particularly high burden for entities that act as administrators on behalf of others.¹⁰ Plaintiffs Humana and HCSC raise similar objections, directed to EPPs’ proposed requirement that health insurers seeking to exclude their ASO customers must provide a declaration from each ASO attesting to the health insurer’s authority to opt-out on behalf of the ASO. Those Plaintiffs argue that the requirement for each third-party payer to produce a declaration for each ASO customer it intends to opt-out of the bellwether classes is burdensome and impractical.¹¹

The contested language in the EPPs’ Notice Plan states that:

If you are an entity seeking to exclude another entity, *e.g.*, an insurer seeking to exclude its Administrative Services Only (“ASO”) customers, you must identify with specificity each such entity that you seek to exclude, **and** you must provide a declaration from each entity’s authorized representative, substantially in the form set forth below and executed specifically in connection with this litigation, attesting to your authority to opt the entity’s claims out of the Classes.¹²

Humana contends that this proposal “requires thousands of ASOs, who contract with health insurers to act on their behalf to recover overpayments in pharmaceutical litigation, to submit individual declarations to their health insurers to opt out of the Bellwether Classes” and

⁹ See Defs. Opp’n Mot. Approval Proposed Notice Plan & Appointment Notice Administrator at 8 [MDL Doc. No. 3351].

¹⁰ *Id.*

¹¹ See Humana Inc.’s Opp’n to Mot. Approval Proposed Notice Plan & Appointment Notice Administrator [MDL Doc. No. 3350].

¹² EPPs’ Mot. Approval Proposed Notice Plan & Appointment Notice Administrator Ex. 2, at 9 [MDL Doc. No. 3329-3] (emphasis in original). Each declaration must include the following information in substantial part: Date, Declarant Name, Declarant Address, Declarant Telephone Number, Declarant Email Address, Declarant EIN, Signature, Name, and Title of the Officer or Employee, and Date Signed, as well as text stating the intention to request exclusion authorizing the submitting entity to request exclusion “I am [Name and Title of Officer or Employee of Declarant Requesting Exclusion]. [Declarant] has authorized [Submitting Entity] to request exclusion from the EPP [Clobetasol and/or Clomipramine] Classes on [Declarant]’s behalf in the case *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, No. 2:16-MD-02724 (E.D. Pa.).” *Id.* at 9-10.

that contractual agreements with those ASOs give health insurers the right to pursue claims on behalf of their ASO customers.¹³ Thus, Humana contends that EPPs' proposed plan puts impermissible barriers to ASOs' due process rights to be excluded from the classes.¹⁴

“Considerable flexibility” is appropriate when determining whether an entity has opted out of a class.¹⁵ The Court agrees that “contemporaneous authorization” by the ASO customer is not necessary if there is a specific contractual agreement that explicitly authorizes the insurer to exercise the opt-out right on behalf of the ASO customer.¹⁶ EPPs argue that Humana's proposal to allow insurers to opt out on behalf of their ASO customers violates the due process rights of individual potential class members who have the right to individually choose whether to opt out of the classes.¹⁷ Insofar as an ASO contract may include specific language assigning any opt-out rights to the ASO administrator, then the ASO administrator has obtained effective consent to act on behalf of those ASO customers to request exclusion from the class. Where such contracts exist, and the contractual language establishes that the client did exercise its individual right by explicitly assigning the opt-out decision to the ASO administrator, the ASO administrator may submit a declaration, as to each ASO customer, that it has the authority to opt-out of the classes on behalf of that ASO customer—provided that the declaration sets forth the specific contract language and identifies the ASO customer that signed the contracts with that language. EPPs will be directed to include appropriate language in the Notice to avoid any possibility of confusion.

¹³ See Humana Inc.'s Opp'n to Mot. Approval Proposed Notice Plan & Appointment Notice Administrator at 1-2 [MDL Doc. No. 3350].

¹⁴ *Id.* at 7.

¹⁵ *In re Linerboard Antitrust Litig.*, 223 F.R.D. 357, 365 (E.D. Pa. 2004), *amended*, 223 F.R.D. 370 (E.D. Pa. 2004) (quoting 7A Wright, Miller & Kane, Federal Practice & Procedure § 1787 (1972)).

¹⁶ *Id.*

¹⁷ Letter from Roberta D. Liebenberg (Feb. 24, 2025) [MDL Doc. No. 3261].

AND NOW, on this 30th day of April 2025, upon consideration of End-Payer Plaintiffs' Motion for Approval of Proposed Notice Plan and Appointment of Notice Administrator [MDL Doc. No. 3329] and the responses thereto, it is hereby **ORDERED** that the motion is **GRANTED** as follows:

1. The Court finds that the proposed form and manner of notice of class certification, set forth in the Declaration of Eric J. Miller of A.B. Data Regarding Proposed Notice Plan to Third Party Payers ("A.B. Data Declaration") and the exhibits attached to the Memorandum of Law in Support of the Motion, satisfy the requirements of Rule 23 and due process, are otherwise fair and reasonable, and therefore are approved.

2. The Court appoints A.B. Data as the Notice Administrator.

3. The Court directs A.B. Data to execute the Notice Plan in the manner described in the A.B. Data Declaration using notices substantially similar in form and content to the Long Form Notice, The Email Notice, the Postcard Notice, and the Banner Notice attached as Exhibits 2-5 to the Memorandum of Law in Support of the Motion. Notice shall commence within 10 days of the entry of this Order.

4. Members of the Certified Classes may request exclusion from the Certified Classes at any time within 60 days from the date that Notice Commences. To be valid, requests for exclusion must use the procedure in the Long Form Notice attached as Exhibit 2 to the Memorandum of Law in Support of the Motion, must provide all information requested therein, and must be postmarked before the 60-day period expires.

5. Within 14 days following the deadline for Class members to exclude themselves from the Classes, Lead Counsel for EPPs shall file a report to the Court confirming that Notice was sent according to these procedures, and identifying the Class members, if any, who

requested to be excluded from the Classes and who meet the requirements for a valid request for exclusion as set forth in the Notice.

6. EPPs shall amend their proposed notice to provide that an entity seeking to exclude another entity, e.g. an insurer seeking to exclude its ASO customers, must identify with specificity each such entity that it seeks to exclude, and must provide **either** (1) a declaration from each entity's authorized representative attesting to its authority to opt the entity's claims out of the Classes **or** (2) a declaration that establishes its authority to opt out of the Bellwether classes on behalf of those entities, based on its legal rights and obligations, e.g., as detailed in an ASO contract, as to each entity it seeks to exclude. For each entity, such declaration shall include the name of the entity to be excluded and the contractual language on which the right to assert exclusion is based.

7. Any class member who does not properly and timely request exclusion from the Certified Classes as provided above shall be bound by the District Court's rulings in the lawsuit, including any final judgment.

It is so **ORDERED**.

BY THE COURT:

/s/Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.