



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

September 5, 2007

U.S. Department of Health and Human Services
Departmental Appeals Board, MS6127, Appellate Division
330 Independence Ave., S.W.
Cohen Building - Room G-644
Washington, D.C. 20201

Re: Notice of Intent to Appeal

Ladies and Gentlemen:

Enclosed is a copy of a Notice of Disallowance sent by the Department of Health & Human Services, Centers for Medicare & Medicaid Services on August 7, 2007, and received by me on August 10, 2007. The amount in dispute is "\$4,143,075.00 in Federal Financial Participation (FFP) for Medicaid's share of a legal settlement between the State of West Virginia and, among other defendants, Purdue Pharma, L.P., with respect to claims relating to the drug OxyContin." The case to which reference is made was a parens patriae action filed by the West Virginia Attorney General against PurduePharma and Abbott Laboratories; the case was settled on December 22, 2004, upon entry of an order by the Circuit Court of McDowell County, West Virginia.

Please be advised that West Virginia intends to appeal from CMS's decision.

West Virginia contends that the Notice of Disallowance cannot be sustained for the following reasons, all of which will be more fully explicated in the written record to be developed on appeal:

1. This case is not governed by 42 U.S.C. §1396b(d)(2)(A)-(3)(A), in that the third party defendants in the underlying case were not health insurers, group health plans, service plans, health maintenance organizations, or other parties that are, by statute, contract or agreement, legally responsible for payment of a claim.

2. Under the facts and circumstances of this case, West Virginia DHHR had no duty to recoup from Purdue Pharma or Abbott Laboratories. Title 42 U.S.C. §1396a(25)(A)(i) & (ii) requires the states to adopt and pursue subrogation claims; consistent with this mandate, the West Virginia Legislature enacted W. Va. Code §9-5-11, "Assignment of rights; right of subrogation by department of health and human resources to the rights of recipients of medical assistance; rules as to effect of subrogation." The parens patriae action filed by the West Virginia Attorney General was not a subrogation claim, but rather was the type of "class action or multiple plaintiff action" that, in fact, DHHR is specifically prohibited from bringing under state law. W. Va. Code §9-5-11(c).

3. Further, OMB circular A-87, Paragraph C.1.i, upon which CMS relies, imposes no substantive duties upon West Virginia beyond those set forth in the statute.

4. In the absence of a duty to recoup, there is no basis for the imputation of settlement dollars not received by DHHR.

5. The allocation methodology employed by CMS was wholly arbitrary, in that (a) CMS allocated settlement dollars among three plaintiffs without taking into account that there was a fourth plaintiff; (b) CMS allocated settlement dollars based on nothing other than the bald Complaint and a newspaper article, clearly an insufficient basis on which to determine what happened in a case that took three and one-half years to develop; and (c) CMS allocated settlement dollars without any adjustment for the legitimate costs of obtaining the settlement, including attorney fees.

6. By the time of the settlement in the underlying case, the Attorney General had abandoned the causes of action in which DHHR was entitled to participate as a plaintiff. The only causes of action that remained for trial, and were thus ripe for settlement, were: Count I, a cause of action under §46A-6-102(f) of the West Virginia Consumer Credit & Protection Act, which can only be filed by a natural person, W. Va. Code §46A-6-102(b); and Count II, a cause of action for continuing public nuisance, in which damages only to Oxycontin users was pled. The Attorney General's decision to abandon the remaining causes of action prior to trial was based on a good faith determination that these causes of action could not be successfully maintained.

7. It would be completely inequitable to permit a disallowance of \$4,143,075.00 in Federal Financial Participation under the facts and circumstances of this case. Specifically:

(a) CMS waited two and one-half years before instituting any action to pursue a disallowance;

(b) CMS instituted its action on the basis of an article in the West Virginia Record, a publication owned by the United States Chamber of Commerce; Pharma sits on the Chamber's Board. In this regard, it must be noted that we first learned of the proposed disallowance by reading an article in the Record, which had received CMS's letter of May 15, 2007 before the West Virginia Department of Health & Human Resources received it;

(c) CMS bases its disallowance on the bare allegations of a Complaint, without any consideration of what the defenses were, what the proof showed, or what stipulations the defendants attached to settlement; and

(d) The only money that the West Virginia Department of Health and Human Resources received from the suit against PurduePharma and Abbott Laboratories was a one-time grant of \$250,000.00.

West Virginia Department of Health & Human Resources will be represented in this appeal by:

Frances A. Hughes, Chief Deputy Attorney General
Barbara H. Allen, Managing Deputy Attorney General
Thomas W. Smith, Managing Deputy Attorney General
E-26 State Capitol Complex
1900 Kanawha Boulevard, East
Charleston, WV 25305
(304) 558-2021

We look forward to your notification of the next steps in the appeal process.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Marsha Morris

MARSHA MORRIS
COMMISSIONER

enc: Notice of Disallowance dated August 7, 2007,
Received on August 10, 2007

cc: Ted Gallagher, Associate Regional Administrator,
Centers for Medicare & Medicaid Services
Mike Leavitt, Secretary,
US Department of Health and Human Services
Carte Goodwin, General Counsel,
Office of the Governor of West Virginia
Martha Yeager Walker, Secretary,
WV Department of Health and Human Resources
Rocco Fucillo, General Counsel,
WV Department of Health and Human Resources