STATE OF WISCONSIN | CIRCUIT COURT BRANCH 7 | DANE COUNTY

---

State of Wisconsin,

Plaintiff,

v. Case No. 04 CV 1709

AMGEN INC., et al.,

Defendants.

---

PLAINTIFF'S RESPONSE TO DEFENDANTS' FOURTH JOINT SET OF REQUESTS TO ADMIT

---

The Plaintiff responds to the Defendants' Joint Set of Requests for Admissions as follows.

The Plaintiff incorporates herein by reference the general objections it has made in response to Defendants' previous discovery as if it were more fully set forth herein. Although it has been stated many times before, the Plaintiff specifically OBJECTS to Defendants' definition number two on the ground that it is overbroad and therefore unduly burdensome. Notwithstanding this objection, the Plaintiff will respond to this request on behalf of the Department of Health and Family Services.

The Plaintiff OBJECTS to Defendants' "instructions" as follows:

1. Instruction number one is contrary to Wis. Stat. § 804.11. Answers to Requests to Admit do not have to be made under oath. Furthermore, sec. 804.11(1)(b) does not obligate a party to answer on behalf of "agents, consultants, or anyone acting on [the party's] behalf," but only obligates a party to make reasonable inquiries.

2. Instruction number three and four are beyond the scope of Wis. Stat. § 804.11.

## REQUESTS FOR ADMISSION

### REQUEST NO. 134

That the statements made by Frank D. Remington contained in the e-mail from Frank D. Remington to Jennifer A. Walker, dated July 11, 2007, attached hereto as Exhibit A, are true, correct and admissible.

### PLAINTIFF'S RESPONSE

The Plaintiff OBJECTS to this Request on the ground that many of the statements made by Plaintiff's counsel are beyond the scope of Wis. Stat. §§ 804.11 and 804.01(2). Notwithstanding this objection, the Plaintiff ADMITS the following factual statements contained in the referenced correspondence as follows:

> Beginning in 1990 onward, the dates and rates are as follows:
>
> Wisconsin Medicaid priced physician administered drug claims using the AWP formula:
>
> AWP-10% prior to 07/01/01
> AWP-11.25% 07/01/01
> AWP-12% 09/01/03
> AWP-13% 7/1/04
> Beginning October 1, 2005, WI MA changed to ASP+6%.

### REQUEST NO. 135

That the statements made by Frank D. Remington contained in the e-mail from Frank D. Remington to Jennifer A. Walker and Steven F. Barley, dated March 16, 2007, attached hereto as Exhibit B, are true, correct and admissible.

**PLAINTIFF'S RESPONSE**

The Plaintiff OBJECTS to this Request on the ground that many of the statements made by Plaintiff's counsel are beyond the scope of Wis. Stat. §§ 804.11 and 804.01(2). Notwithstanding this objection, the Plaintiff ADMITS the following factual statements contained in the referenced correspondence as follows:

The Plaintiff used a system for the payment of physician administered drugs based in whole or in part on the AWP or the Maximum Allowable Cost, (hereafter "MAC"), (which itself relies in part on Defendants' AWPs) whichever is less. Currently, reimbursement in the Physician Fees Schedule relies in part on the Average Sales Price, (hereafter "ASP"), provided to the Center for Medicaid and Medicare Services by the Defendants. Further and complete information on Plaintiff's method of reimbursing physicians is available online at: http://www.dhfs.state.wi.us. Every Wisconsin reimbursement system has been adversely impacted in one way or another by Defendants' failure to publish truthful and accurate average wholesale prices and by Defendants' concealment of these true prices.

Reimbursements for J codes are made according to the Physician Fee Schedule. Currently this fee schedule is based on the ASPs provided to CMS by the manufacturer. Thus, the Defendant manufacturers are ultimately in the best position to describe the ASP and the derivative fee schedule and how they are computed. Prior to using the ASP, in Wisconsin, the fee schedule was built off of the reported AWP or the MAC if there was one. The fee schedule was not built off the usual and customary. The physician administered drugs are part of this action and the reimbursement methodology is according to the physician fee schedule.

The exact and complete fee current schedule is located at:
http://dhfs.wisconsin.gov/medicaid4/maxfees/maxfee.htm#Physician

**REQUEST NO. 136**

That the statement made by Frank D. Remington contained in the letter from Frank D. Remington to Steven F. Barley and Jennifer Walker, dated May 7, 2007, attached hereto as Exhibit C, are true, correct and admissible.

**PLAINTIFF'S REPONSES**

The Plaintiff OBJECTS to this Request on the ground that many of the statements made by Plaintiff's counsel are beyond the scope of Wis. Stat. §§ 804.11 and 804.01(2). Notwithstanding this objection, the Plaintiff ADMITS the following factual statements contained in the referenced correspondence as follows:

The Plaintiff may approximate the average wholesale price based on actual wholesale pricing data provided to it from various sources, like wholesalers, large retail chain drug stores, and hopefully from the Defendants themselves if they ever submit to actually producing the data previously requested by the Plaintiff.

With respect to Defendants' **INTERROGATORY NO. 4:**

The Plaintiff stated that it relied on Wis. Stats. §§ 100.18(1), 100.18(10)(b), 100.264(2), 133.05, 49.49(4m)(a)(2) and all policies, procedures and manuals properly promulgated there under. Information regarding the operation of the Medical Assistance Program is contained in various sources including but not limited to such things as the Medicaid Provider Handbook and other public information, most of which is readily available online. Additionally, every state Medicaid program, including Wisconsin, is bound by various federal enabling statutes, rules and regulations. Various aspects of the Wisconsin Medical Assistance Program are contained in things other than statutes, like the policies and procedures and that these may be found in the Medicaid Provider Handbook, (previously provided to the Defendants). Additionally, please see the Pharmacy Handbook and accompanying tables and exhibits also previously provided to the Defendants by reference to the online material available at www.dhfs.wisconsin.gov.

With respect to Defendants' **INTERROGATORIES NO. 6 and 7**

The Plaintiff previously informed the Defendants that it used a system for the payment of physician administered drugs based in whole or in part on the AWP or the Maximum Allowable Cost, (hereafter "MAC"), whichever is less and that currently the Plaintiff reimbursed using a Fee Schedule that relied on the Average Sales Price, (hereafter "ASP"), provided to the Center for Medicaid and Medicare Services by the Defendants.

According to Ted Collins the maximum allowable cost (MAC) is determined by reviewing publicly available drug prices to the extent they are available. Mr. James Vavra possesses generalized knowledge about the Medicaid program

The State of Wisconsin does not individually "negotiate" agreements with providers to participate in the Medicaid program. Instead, the agreement is available online and providers are free to participate by filling out the details and submitting the

document to the DHFS. The Plaintiff does not negotiate AWPs. These are set by the Defendants.

With respect to Defendants' **INTERROGATORY NO. 12**

The Department of Health and Family Services does not possess information sufficient for it to determine on a programmatic level the provider's actual acquisition costs.

The States were charged with estimating the provider's acquisition costs and a reasonable dispensing fee. In any process of estimation, it may be that some providers might be reimbursed an amount greater than what was their actual acquisition costs.

With respect to Defendants' **INTERROGATORY NO. 15**

The Wisconsin Medical Assistance Program is comprised of Medicaid, Badger Care, Senior Care and Family Planning Waiver. Many Medicaid recipients are enrolled in Managed Care. There are many parts of these programs that do not involve pharmaceutical products, so by implication, reimbursement is not and cannot be based on Defendants' published average wholesale prices. More particularly, all of these programs have at least part of its reimbursement system that uses some other basis than the Defendants' published average wholesale prices. For example, reimbursement for J-coded drugs is by fee schedule. On the fee for service side of the Medicaid pharmaceutical benefit, some products are reimbursed using a maximum allowable cost. Additionally, occasionally, a product is reimbursed according to the provider's reported usual and customary charge when that amount is the lesser of all others. Finally, birth control products and certain contraceptives in the Family Planning Waiver are made by set fee.

With respect to Defendants' **INTERROGATORY NO. 18**

The Plaintiff submits that during every budget cycle the Joint Finance Committee considers the Administration's proposed budget for DHFS pertaining to the reimbursement of pharmaceutical products and the payment of dispensing fees. Additionally, the Governor previously established his advisory commission that among other things looked at this issue. The Defendants are also aware of a study done by UW Professor Krehling.

With respect to Defendants' **INTERROGATORY NO. 20**

The Plaintiff maintains that efforts to determine accurate and reliable "actual acquisition costs" are and have been thwarted by the Defendants' concerted and calculated practice of secreting reliable and readily accessible information or pricing data. Calculating the maximum allowable cost is part of the process of estimating acquisition costs and was done by Mr. Ted Collins. At one time, the DHFS employed Professor David Krehling to study pharmacist dispensing fees.

With respect to Defendants' **INTERROGATORY NO. 21**

In the exercise of its prosecutorial discretion, the State has not sought to recover from the Providers any overpayments as a result of their reliance on the publication of the Defendants' false prices.

With respect to Defendants' **INTERROGATORY NO. 22**

The Plaintiff formerly used the accounting firm Miliman and presently uses Price Waterhouse.

With respect to Defendants' **INTERROGATORY NO. 23**

The EDS employee with whom many communications flow between the State of Wisconsin and EDS was Mr. Mark Gajewski whose title was Client Delivery Executive.

With respect to Defendants' **INTERROGATORY NO. 30**

In Wisconsin persons generally do not testify before the state legislature and no person can recall such occurrence relating to pharmaceutical pricing. As to the Joint Committee on Finance, the Administrator of the Division of Health Care Financing generally presents the DHFS budget relating to pharmaceutical pricing and reimbursement. At one time that office was occupied by Jason Helgerson and prior administrators who may have presented to the Joint Committee would have been Mark Moody, Peggy Handrich, and Kevin Piper. Furthermore, it is likely that these Administrators would have relied on James Vavra for assistance or on some other individual as the need arose.

**REQUEST NO. 137**

That the statements made by Frank D. Remington contained in the letter from Frank D. Remington to Laurice Chen, dated December 5, 2007, attached hereto as Exhibit D, are true, correct and admissible.

**PLAINTIFF'S RESPONSE**

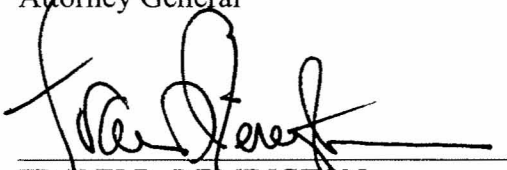
The Plaintiff OBJECTS to this Request on the ground that many of the statements made by Plaintiff's counsel are beyond the scope of Wis. Stat. §§ 804.11 and 804.01(2). Notwithstanding this objection, the Plaintiff ADMITS the following factual statements contained in the referenced correspondence as follows:

With respect to Defendants' interrogatory no. 2, the only documents relating to the use (or non-use as the case may be), of the ASPs are the documents sent to the Plaintiff by the Defendants.

With respect to Defendants' interrogatory no. 4, the claims data that was produced to Defendants contains the record of the dispensing fee paid. The Plaintiff has provided claims data for the J-coded drugs. This data contains the payments made for the ingredient cost of the product administered. Prior to October 2005, the cost of administering or injecting the drug was incorporated into the one J-code. Since 2005, there may be separate J codes for administration or injection.

Dated this 28th day of April, 2008.

J.B. VAN HOLLEN
Attorney General



FRANK D. REMINGTON
Assistant Attorney General
State Bar #1001131

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3542

Attorneys for Plaintiff,
State of Wisconsin