

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04 CV 1709

ABBOTT LABORATORIES, INC.,  
et.al.,

Defendants.

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PLAINTIFF'S RESPONSE TO DEFENDANTS' AMENDED NOTICE OF SECTION  
804.05(2)(e) DEPOSITION TO STATE OF WISCONSIN (AREAS 2, 5g, 5h, 5i, 5l, 8, 9, 10, 14,  
15 and 17)

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The Defendants have submitted to the Plaintiff a "Notice of Section 804.05(2)(e) Deposition to the State of Wisconsin." Wis. Stat. § 804.05(2)(e) allows parties to submit a notice of deposition to the other party naming "a governmental agency" as long as the party is willing or able to "designate with reasonable particularity the matters on which examination is requested."

The Defendants now advise the Plaintiff that they desire to depose a designated person with respect to the areas identified in the caption above.

**Now Therefore**, the Plaintiff responds to Defendants' notice of Wis. Stat. § 804.05(2)(e) deposition areas of inquiry 2, 5g, 5h, 5i, 5l, 8, 9, 10, 14, 15 and 17 by agreement the Plaintiff added areas 19 and 20 as follows:

## GENERAL OBJECTIONS

1. The Plaintiff OBJECTS to this Notice on the ground that it is not directed at an agency of the State of Wisconsin and is therefore broader than what is allowed by statute. Nonetheless, the Plaintiff will assume that the Notice is directed at the Department of Health and Family Services, the agency that operates the State's Medical Assistance Program.
2. The Plaintiff OBJECTS to this Notice on the ground that it purports to demand that the Plaintiff designate "one or more officers, officials, employees, or other representatives to testify on their [sic] behalf who are **most knowledgeable** about and will testify as to matters known or reasonably available to Plaintiff ...." (Emphasis added). Wis. Stat. § 804.05(2)(e) only requires a party to designate "one or more officers, directors, or managing agents, or other person who consent to testify on its behalf" and that these persons "shall testify as to matters known or reasonably available to the organization."
3. The Plaintiff OBJECTS to portions of this Notice on the ground that some of the matters described do nothing more than demand the Plaintiff identify an individual to testify to matters contained within documents maintained by the Plaintiff. As such, pursuant to Wis. Stat. § 804.05(d), the Plaintiff elects to use the procedure set forth in Wis. Stat. § 804.09 where the "area of inquiry" is nothing more than a demand for production of documents.
4. The Plaintiff OBJECTS to discovery purporting to discover "plaintiff's knowledge" on the grounds, that it is not possible to discern the "knowledge" of the State, that demands in this regard are over burdensome, seek irrelevant information, and that it is not likely to lead to the discovery of relevant and admissible evidence
5. The Plaintiff OBJECTS to portions of this Notice to the extent it seeks information prior to January 1, 1993, which corresponds to the period of time the Plaintiff alleges is at issue in this

case on the ground that because it is outside the scope of this lawsuit, and because of logistical difficulties retrieving information or knowledge back beyond that period of time it is overbroad and unduly burdensome.

6. Lastly, the Plaintiff incorporates by reference its general objections set forth in its response to “Defendants’ Second Set of Interrogatories” and “Defendants’ Second Request for Production of Documents” where applicable.

### AREAS OF INQUIRY

2. Plaintiff’s knowledge of actual acquisition costs for the Subject Drugs (including pharmacy-dispensed and physician-administered drugs) by any purchaser, including but not limited to, pharmacies, physicians, wholesalers, PBMs, drug purchasing pools, or the State itself.

**ANSWER:** Subject to the above stated objections, the Plaintiff designates Ms. Carrie Gray as a person knowledgeable within the DHFS, or lack thereof, relating the actual acquisition costs incurred by purchasers of pharmacy dispensed and physician administered drugs.

5. The manner in which reimbursement for both pharmacy-dispensed and physician-administered drugs is administered in the State of Wisconsin, including but not limited to:

- g. All reports, meetings and other information relating to any analysis by Plaintiff of any change to the reimbursement formula (including dispensing fee) for pharmacy-dispensed and physician-administered drugs;

**ANSWER:** The Plaintiff OBJECTS to this area of inquiry as stated above. Furthermore, Plaintiff OBJECTS on the ground that the request is ambiguous and overbroad. Notwithstanding

this objection, Plaintiff designates Ms. Carrie Gray to testify about what changes were made to the reimbursement formula, within the DHFS, regarding pharmacy dispensed and physician administered drugs.

- h. Plaintiff's reliance on pricing benchmarks, including AWP, WAC and Direct Price, published for Defendants' drugs;

**ANSWER:** Plaintiff OBJECTS to the term "pricing benchmark" on the ground that it is vague and ambiguous. Plaintiff also OBJECTS on the grounds stated above and on the ground that "reliance" is vague and ambiguous. Notwithstanding this objection, Plaintiff designates Ms. Carrie Gray who will be prepared to describe the application of these terms, (if any), to the programs administered by the DHFS.

- i. Plaintiff's use or consideration of published price information regarding Defendants' drugs, including how or if such information has been used, relied upon, referenced, or considered in evaluating, revising, or setting payments to Providers under Wisconsin's Medicaid Program;

**ANSWER:** Plaintiff designates Ms. Carrie Gray.

- l. Plaintiff's use or consideration of any pricing information provided to the State directly by any defendant, including how or if such information has been used, relied upon, referenced, or considered in evaluating, revising, or setting payments to Providers under Wisconsin's Medicaid Program.

**ANSWER:** Plaintiff designates Ms. Carrie Gray.

8. Plaintiff's adoption, rejection, or consideration of recommendations and information related to AWP received from other states or the federal government including but not limited to:

**ANSWER:** Plaintiff OBJECTS to the areas of inquiry in paragraph 8a, d and h on the ground that the Defendants have not described some of the areas with "reasonable particularity" sufficient to meaningfully prepare for this deposition. Additionally, Plaintiff OBJECTS to the Defendants characterization of these reports and submits that these reports speak for themselves.

- a. HCFA's 1988 decision to disapprove Medicaid State Plans that base reimbursement for pharmaceutical products on an undiscounted AWP;
- b. 1984 HHS-OIG report indicating that on average, pharmacists buy pharmaceutical products at AWP – 15.9%. *See* Department of Health and Human Services, Office of the Inspector General, *Changes to the Medicaid Prescription Drug Program Could Save Millions* (A-06-40216) (Sept. 1984);
- c. 1989 HHS-OIG report indicating that on average, pharmacists buy pharmaceutical products at AWP – 15.5%. *See* Department of Health and Human Services, Office of the Inspector General, *Use of Average Wholesale Prices in Reimbursing Pharmacies Participating in Medicaid and the Medicare Prescription Drug Program* (A-06-89-00037) (Oct. 1989);
- d. 1989 HCFA Medicaid Manual indicating that pharmacies buy pharmaceutical products at AWP – 10-20%;

- e. 1996 HHS-OIG report indicating potential for significant Medicare savings. See Department of Health and Human Services, Office of the Inspector General, *Appropriateness of Medicare Prescription Drug Allowances* (03-05-00420) (May 1996);
- f. 1997 HHS-OIG report indicating that on average, pharmacists buy pharmaceutical products at AWP – 18.3%. See Department of Health and Human Services, Office of the Inspector General, *Medicaid Pharmacy – Actual Acquisition Cost of Prescription Drug Products for Brand Name Drugs* (A-06-96-00030) (Apr. 1997);
- g. 1997 HHS-OIG report indicating that on average, pharmacists buy generic drugs at AWP – 42.5%. See Department of Health and Human Services, Office of the Inspector General, *Medicaid Pharmacy – Actual Acquisition Cost of Generic Prescription Drug Products* (A-06-97-00011) (Aug. 1997);
- h. The revised AWP prices provided by the United States Department of Justice and National Association of Medicaid Fraud Control Unit in 2000;
- i. 2001 HHS-OIG report indicating that AWP bears little to no resemblance to actual wholesale prices. See Department of Health and Human Services, Office of the Inspector General, *Medicare Reimbursement of Prescription Drugs* (03-01-00310) (Jan. 2001);
- j. 2001 HHS-OIG report indicating that continued reliance on average wholesale prices as a reimbursement metric is flawed. See Department of

- Health and Human Services, Office of the Inspector General, *Medicaid's Use of Revised Average Wholesale Prices* (03-01-00010) (Sept. 2001);
- k. 2001 HHS-OIG report indicating that pharmacy actual acquisition cost was an average 21.84% below AWP. *See* Department of Health and Human Services, Office of the Inspector General, *Medicaid Pharmacy – Actual Acquisition Cost of Brand Name Prescription Drug Products* (A-06-00-00023) (Aug. 2001);
  - l. 2002 HHS-OIG report, *Medicaid Pharmacy – Additional Analyses of the Actual Acquisition Cost of Prescription Drug Products* (A-06-02-00041) (Sept. 2002); and
  - m. 2003 HHS-OIG report indicating that Wisconsin was negotiating with drug manufacturers for supplemental rebates. *See* Department of Health and Human Services, Office of the Inspector General, *State Strategies to Contain Medicaid Drug Costs*.

**ANSWER:** Plaintiff designates Mr. James Vavra for topics a. through g and topics i through l. Plaintiff designates Ms. Carrie Gray for topics h and m.

9. The preparation of survey responses to, participation in, and interviews with the OIG regarding the reports referenced in paragraph 8 above.

**ANSWER:** Plaintiff designates Mr. Alan White.

10. Information, including but not limited to the existence, nature, and location of documents, concerning any proposed reimbursement methodology for pharmaceutical products

and Plaintiff's adoption, rejection or consideration of such proposals, including, but not limited to:

**ANSWER:** Plaintiff OBJECTS to the areas of inquiry identified below on the ground that the Defendants have not described the areas with "reasonable particularity" sufficient to meaningfully prepare for this deposition. The Plaintiff requested the Defendants produce in advance to the deposition the document, (if any exists) characterized in the area of inquiry so as to reasonably and meaningfully allow the designated witness to prepare as required by Section 804.05(2)(e). No documents were provided relevant to this section. Additionally, Plaintiff OBJECTS to the Defendants' characterization of the actions allegedly taken, proposals allegedly made, legislation or decisions allegedly made and submits that these proposals, legislation or decisions, if they exist, speak for themselves.

- a. Governor's proposal in Wisconsin's 1996-1997 state budget of a "best price" reimbursement methodology;
- b. Department of Health and Family Service's 1999 proposal to decrease reimbursement from AWP – 10% to AWP – 18%;
- c. Governor's proposal in 2001 and 2003 to decrease reimbursement to AWP – 15%;
- d. Documents between the Governor's office and the Joint Committee on Finance regarding reimbursement of pharmaceuticals in the Wisconsin Medical Assistant Program;
- e. The 2005-2007 state budget proposal to set reimbursement for brand name and certain generic drugs under Medicaid, BadgerCare, and SeniorCare to AWP – 16%;

- f. The 2005 legislation to increase the reimbursement rate for pharmaceutical drugs dispensed by pharmacies from AWP – 16% to AWP – 13%; and
- g. The Governor’s decision in 2005 to establish a Pharmacy Reimbursement Commission to find alternatives to decreasing the reimbursement rates for pharmacies.

**ANSWER:** The Plaintiff designates Mr. James Vavra to testify about information, knowledge possessed by or actions taken by the Department of Health and Family Services. To the extent the Defendants expected a person from within the Office of Wisconsin Governor to testify, the Plaintiff OBJECTS on the ground that the matter was not stated with sufficient particularity so as to make that clear.

14. Any efforts by Plaintiff to define, calculate, determine, investigate, understand or interpret AWP or WAC.

**ANSWER:** Plaintiff designates Ms. Carrie Gray as to those efforts, if any, taken within the DHFS.

15. The organizational structure of the Wisconsin Medicaid Program, the Department of Health and Family Services, the Wisconsin Legislative Fiscal Bureau and the Wisconsin legislature, including but not limited to identifying which individuals held what positions, how long the individuals held those positions, and what were the job duties of those positions.

**ANSWER:** Plaintiff designates Mr. James Vavra to testify only about the organizational structure of the Wisconsin Medicaid Program and the DHFS.

17. Communications between Plaintiff and other states or Federal Agencies, including but not limited to, Documents received from or sent by Plaintiff to the National Association of Medicaid Fraud Control Units and the National Association of Attorneys General concerning prices, costs, or reimbursements for pharmaceutical products from January 1, 1985 to the present.

**ANSWER:** Plaintiff designates Mr. Alan White.

19. Communications between Plaintiff and the National Association of Medicaid Fraud Control Units (“NAMFCU”), concerning the Bayer 2001 Settlement or the TAP 2001 Settlement (or any investigation or inquiry that preceded either Settlement, including internal analyses, memoranda, reports, and reviews related to communications with NAMFCU).

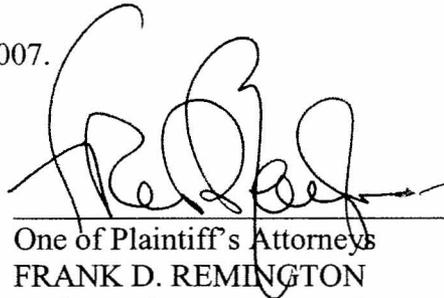
**ANSWER:** Plaintiff OBJECTS to this area on the ground that it potentially violates attorney client and attorney work produce privileges. After confessing to fraud, and in the case of TAP which involved criminal investigation and prosecution, the Defendants and TAP have no right to depose the State about the subject of prior enforcement actions taken in consultation or in coordination with other law enforcement agencies. Notwithstanding this objection, the Plaintiff designates Mr. Alan White who may testify as to what actions the program integrity unit within the DHFS did as part of these settlements.

20. Plaintiff’s consideration, evaluation, or analysis of the Bayer 2001 Settlement or the Tap Settlement.

**ANSWER:** Plaintiff OBJECTS to this area on the ground that it potentially violates attorney client and attorney work produce privileges. After confessing to fraud, and in the case of TAP which involved criminal investigation and prosecution, the Defendants and TAP have no right to

depose the State about the subject of prior enforcement actions taken in consultation or in coordination with other law enforcement agencies. Notwithstanding this objection, the Plaintiff designates Mr. Alan White who may testify as to what actions the Program Integrity Unit within the DHFS did as part of these settlements.

Dated this 25th day of September, 2007.

A handwritten signature in black ink, appearing to read 'Frank D. Remington', written over a horizontal line.

One of Plaintiff's Attorneys  
FRANK D. REMINGTON  
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