
State of Wisconsin,

Plaintiff,

v.

Case No. 04 CV 1709

AMGEN INC., et al.,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS'
NOTICE OF SECTION 804.05(2)(e) DEPOSITION

The defendants¹ have submitted to the Plaintiff a "Notice Of Section 804.05(2)(e) Deposition To The State of Wisconsin." Section 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."

On November 28, 2006, the defendants advised the Plaintiff that they desired to begin by deposing a designated person with respect to areas 3, 10 and 12. In particular, the defendants indicate that they desire to question one or more witnesses about:

- a. what kind of documents are possessed by the plaintiff in the categories indicated more particularly below, and
- b. the physical location of the documents, if any, identified above.

The defendants indicate that at this time the person so designated will not be asked substantive questions about the programs, categories, or matters listed in areas 3, 10, and 12.

Now Therefore, the Plaintiff responds to defendants' notice of Sec. 804.05(2)(e) deposition areas of inquiry 3, 10 and 12 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.

¹ All defendants except Boehringer, Roxane, and Ben Venue.

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). Section 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 Sec. 804.09 where the "area of inquiry" is nothing more than a demand for production of documents.

4. The Plaintiff OBJECTS to portions of this Notice on the ground that it demands that the Plaintiff produce for testimony persons retained by the Plaintiff as a consultant and as such is beyond the scope of discovery, at this time, pursuant to Wis. Stat. § 804.01(d)2.

5. 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

6. 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.

7. 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 - THREE, TEN AND TWELVE ONLY

3 Information, including but not limited to the existence, nature, and location of Documents, relating to the following:

a. Plaintiffs compliance with 42 U.S.C. § 1396a(a)(30), 42 U.S.C. § 1396a(a)(54), 42 C.F.R. § 447.201 et seq., or 42 C.F.R. § 447.333;

DESIGNATED KNOWLEDGEABLE PERSON:

The plaintiff OBJECTS to the Notice on the ground that the Notice does not designate with reasonable particularity the matters on which examination is requested. Instead, the matter is described in such a fashion as to make it impossible to designate a person who may testify to matters known by the Department of Health and Family Services or reasonably available to it. The statutes cited above pertain to the entire Medical Assistance Program.

Notwithstanding this objection, the plaintiff elects to produce the documents in response to "Defendants' Second Request For Production of Documents" paragraphs 2 and 6.

b. Any evaluations, audits, analyses, or reviews of any aspect of Plaintiff's Medicaid Program from January 1975 to the present;

DESIGNATED KNOWLEDGEABLE PERSON:

See Plaintiff's response to "a." above and accordingly to Plaintiff's response to "Defendants' Second Request For Production of Documents" paragraph 24.

c. Plaintiff's calculation, monitoring, processing, or payment of claims for Subject Drugs from January 1985 to the present;

DESIGNATED KNOWLEDGEABLE PERSON:

Subject to the objections stated above, Mr. James Vavra is designated to testify about the kinds and location of documents relating to the processing and payment of claims in the Wisconsin Medicaid Program. Mr. Vavra is also designated to testify about the kinds and location of documents relating to monitoring claims by the Department of Health and Family Services.

d. Plaintiff's knowledge, consideration, or use of AWP, MAC, WAC, AMP, EAC, Direct Price, Best Price, or any other possible price, cost, or reimbursement amount or benchmark, metric, or methodology for Subject Drugs from 1985 to the present;

DESIGNATED KNOWLEDGEABLE PERSON:

The plaintiff OBJECTS to the Notice on the ground that the Notice does not designate with reasonable particularity the matters on which examination is requested. Instead, the matter is described with such breadth as to make it impossible to designate a person who may testify to matters known by the Department of Health and Family

Services or reasonably available to it. See also Plaintiff's objection stated in response to Request No. 1 above.

Subject to the objections stated above, Mr. James Vavra is designated to testify about the kinds and location of documents relating to the establishment of reimbursement amounts or methods used by the Department of Health and Family Services for the Medical Assistance Programs.

e. Plaintiff's internal or external assessments, studies, analyses, reviews, or audits conducted by or on behalf of Plaintiff regarding drug pricing or reimbursement amounts or rates of Subject Drugs from January 1985 to the present;

DESIGNATED KNOWLEDGEABLE PERSON:

See Plaintiff's response to "Defendants' Second Request For Production of Documents" paragraphs 10 and 24. Mr. James Vavra is designated to testify about location of documents and kinds of records relating to audits done by the Department of Health and Family Services Program Integrity Section.

f. Documents created by or received from any Wisconsin entity, including, but not limited to, the Governor's office, the Department of Human and Family Services, and any legislator to change the methodology for reimbursement of pharmacy-dispensed and physician-administered drugs;

DESIGNATED KNOWLEDGEABLE PERSON:

The plaintiff OBJECTS to the Notice on the ground that the Notice does not designate with reasonable particularity the matters on which examination is requested. Instead, the matter is described in such a fashion as to make it impossible to designate a person who may testify to matters known by the Department of Health and Family Services or reasonably available to it. It is unreasonable to suggest there is any person who is knowledgeable about every document retained by "any Wisconsin entity" or who could reasonably acquire such knowledge so as to provide meaningful information to the defendants.

Notwithstanding this objection, please see Plaintiff's response to "Defendants' Second Request For Production of Documents" paragraph 15. Additionally, notwithstanding this objection, the Plaintiff designates Mr. James Vavra who may testify as to the existence or location of records within the Department of Health and Family Services pertaining to the legislative budgetary process and the documents associated therewith relating to proposed changes in reimbursement of pharmaceutical products.

g. Documents created by, received from, or sent to, or communications with other state governments, including other state Medicaid programs, relating to prices, costs, or reimbursements for pharmaceutical products from January 1985 to the present;

DESIGNATED KNOWLEDGEABLE PERSON:

The plaintiff OBJECTS to the Notice on the ground that the Notice does not designate with reasonable particularity the matters on which examination is requested. Instead, the matter is described in such a fashion as to make it impossible to designate a person who may testify to matters known by the Department of Health and Family Services or reasonably available to it. The matter above is described in such a way as to be egregiously overly broad. There is no person who can testify about every document sent by any state employee to any person or all documents received by any state employee or agency, department or program “relating to prices, costs, or reimbursements for pharmaceutical products from January 1985 to the present.”

Notwithstanding this objection, please see Plaintiff’s response to “Defendants’ Second Request For Production of Documents” paragraph 33.

h. Documents created by, received from, or sent to, or communications with, the federal government or federal agencies, including the DOJ, National Association of Medicaid Fraud Control Units, National Association of Attorneys General, HHS-OIG, CMS, and the Department of Health and Human Services, relating to prices, costs, or reimbursements for pharmaceutical products from January 1985 to the present;

DESIGNATED KNOWLEDGEABLE PERSON:

The plaintiff OBJECTS to the Notice on the ground that the Notice does not designate with reasonable particularity the matters on which examination is requested. Instead, the matter is described in such a fashion as to make it impossible to designate a person who may testify to matters known by the Department of Health and Family Services or reasonably available to it. It is not possible to identify a person who has the knowledge or who could reasonably acquire the knowledge to testify about “documents created by, received from, or sent to, or communications with” the federal government or the other entities identified above. Furthermore, the plaintiff OBJECTS to the Notice to the extent that it demands testimony or the disclosure of information protected by attorney-client or work product privileges.

Notwithstanding this objection, please see Plaintiff’s response to “Defendants’ Second Request For Production of Documents” paragraph 34.

i. Plaintiffs application for Federal matching funds in connection with the Medicaid Program, as well as Plaintiff’s use, allocation, or disbursement of such funds;

DESIGNATED KNOWLEDGEABLE PERSON:

The plaintiff OBJECTS to this Request on the ground that it is vague and ambiguous. To the extent there is an “application” for federal money, see plaintiff’s response to “Defendants’ Second Request for Production of Documents.” The Plaintiff OBJECTS to this request on the ground that the use to the terms “use, allocation and

disbursement of funds” is ambiguous and overbroad. How the Medical Assistance Program uses taxpayer money to run the Program is a matter of public record and more than adequate information may be obtain on the Department’s public website found at: www.dhfs.state.wi.us.

j. Communications between Plaintiff and Participants or Beneficiaries relating to the Medicaid Program;

DESIGNATED KNOWLEDGEABLE PERSON:

The plaintiff OBJECTS to the Notice on the ground that the Notice does not designate with reasonable particularity the matters on which examination is requested. Instead, the matter is described in such a fashion as to make it impossible to designate a person who may testify to matters known by the Department of Health and Family Services or reasonably available to it. The plaintiff cannot identify a person or even a group of people who have the personal knowledge or who could acquire the knowledge to testify about every “communications between [the State] and Participants or Beneficiaries relating to the Medicaid Program.” The plaintiff further OBJECTS to this Request on the ground that communications between the State and persons covered by the Medicaid Program to the extent they are Health Care Records and are confidential under federal law.

Notwithstanding this objection, please see Plaintiff’s response to “Defendants’ Second Request For Production of Documents” paragraphs 13 and 14.

k. Communications between Plaintiff and any Defendant concerning pricing of pharmaceutical products;

DESIGNATED KNOWLEDGEABLE PERSON:

Please see Plaintiff’s response to “Defendants’ Second Request For Production of Documents” paragraph 31.

l. Communications with third-parties relating to pharmaceutical pricing, costs, or reimbursement, including but not limited to communications concerning data;

DESIGNATED KNOWLEDGEABLE PERSON:

The plaintiff OBJECTS to the Notice on the ground that the Notice does not designate with reasonable particularity the matters on which examination is requested. Instead, the matter is described in such a fashion as to make it impossible to designate a person who may testify to matters known by the Department of Health and Family Services or reasonably available to it. The plaintiff cannot identify a person who has the personal knowledge or who could acquire the knowledge to testify about every “communications with third-parties relating to pharmaceutical pricing, costs, or reimbursement.”

Notwithstanding this objection, please see Plaintiff's response to "Defendants' Second Request For Production of Documents" paragraphs 13, 14, 55, and 56.

m. Plaintiffs potential or actual contractual relationships with PBMs, Third Party Administrators, Benefit Consultants, Auditors, Wholesalers, Manufacturers, Group Purchasing Organizations, Insurers, Independent Practice Associations, Retailers, Mail Order Pharmacies, Providers, Trade Associations, or Lobbyists, insofar as they cover reimbursement, purchasing, rebates, or expenditures concerning Subject Drugs;

DESIGNATED KNOWLEDGEABLE PERSON:

The plaintiff OBJECTS to the Notice on the ground that the Notice does not designate with reasonable particularity the matters on which examination is requested. Instead, the matter is described in such a fashion as to make it impossible to designate a person who may testify to matters known by the Department of Health and Family Services or reasonably available to it. Not only does the request ask about contracts, but it includes "potential ... contractual relationships" whatever that means. Even if this was understandable, the request suggests that this person or persons testify about every contract with every "PBMs, Third Party Administrators, Benefit Consultants, Auditors, Wholesalers, Manufacturers, Group Purchasing Organizations, Insurers, Independent Practice Associations, Retailers, Mail Order Pharmacies, Providers, Trade Associations, or Lobbyists."

Notwithstanding this objection, please see Plaintiff's response to "Defendants' Second Request For Production of Documents" paragraph 14.

n. Documents or data received from or published by a publisher and Plaintiffs reliance on such data or documents;

DESIGNATED KNOWLEDGEABLE PERSON:

The plaintiff OBJECTS to the Notice on the ground that the Notice does not designate with reasonable particularity the matters on which examination is requested. Instead, the matter is described in such a fashion as to make it impossible to designate a person who may testify to matters known by the Department of Health and Family Services or reasonably available to it. This request asks the plaintiff to identify a person who can answer questions about:

"Information, including but not limited to the existence, nature, and location of Documents, relating to ...documents or data received from or published by a publisher and Plaintiffs reliance on such data or documents."

This request is incomprehensible. No other conclusion can be drawn other than it is tendered for the sole purpose of creating consternation for the person(s) who are assigned the task of providing a meaningful response.

If the request is intended to inquire about the plaintiff's reliance on the defendants' AWP's published by First Data, then plaintiff directs the defendants to those historical documents. The plaintiff's contractor, EDS utilizes the data maintained by First Data. The defendants have been provided with both the records it acquired from First Data Inc, and the utilization data relating to the Medical Assistance Program produced by EDS.

Notwithstanding these objections, the Plaintiff designates Mr. James Vavra to answer questions about the kinds of documents and their location produced by publishers like First Data, Inc.

o. Documents reflecting losses or damages as a result of Defendants' alleged conduct from January 1985 to the present;

DESIGNATED KNOWLEDGEABLE PERSON:

The plaintiff OBJECTS to the Notice on the ground that the Notice does not designate with reasonable particularity the matters on which examination is requested. Instead, the matter is described in such a fashion as to make it impossible to designate a person who may testify to matters known by the Department of Health and Family Services or reasonably available to it. The plaintiff cannot produce a person to testify about the damages caused to the State as a result of plaintiff's publication of false and fraudulent pricing because the defendants continue to hide the true average wholesale price of their pharmaceutical products. To the extent that the Plaintiff has begun formulating a damage model for purposes of this litigation, the Plaintiff OBJECTS to its production on the ground of attorney work product privilege.

Notwithstanding this objection, please see Plaintiff's response to "Defendants' Second Request For Production of Documents" paragraph 51.

p. Documents reflecting Defendants' alleged misrepresentations, omissions, or manipulation of spreads from January 1985 to the present;

DESIGNATED KNOWLEDGEABLE PERSON:

Please see Plaintiff's response to "Defendants' Second Request For Production of Documents" paragraph 46.

q. Defendants' alleged use of free goods, samples, educational grants, secret discounts or rebates, or other incentives to induce providers to purchase Defendants' drugs.

DESIGNATED KNOWLEDGEABLE PERSON:

The defendants' pervasive practice described above occurs between the defendants and providers and/or wholesalers. It is not reasonably disputed that the

defendants all use one or more of these marketing tactics. Information about them possessed by the defendants are not the kind of matter known or reasonably available to the organization as those terms are used in Section 804.05(2)(e), Stats.

r. Plaintiff's efforts to reduce or limit expenditures for Subject Drugs; and

DESIGNATED KNOWLEDGEABLE PERSON:

The plaintiff OBJECTS to the Notice on the ground that the Notice does not designate with reasonable particularity the matters on which examination is requested. Instead, the matter is described in such a fashion as to make it impossible to designate a person who may testify to matters known by the Department of Health and Family Services or reasonably available to it. There are countless cost saving efforts used including, but not limited to, changes in the reimbursement formula, requirement of prior authorizations, detection and prosecution of fraud, quality assurance review to ensure program integrity and so forth. A significant effort is made by the Plaintiff to reduce or limit expenditures by setting a maximum allowable cost for certain drugs.

Mr. James Vavra is designated to testify about the kinds of document and their location relating to the establishment of reimbursement methodologies including the establishment of the Maximum Allowable Cost in the Medicaid Program.

s. Plaintiff's responses and objections to the following:

- (i) Defendants' First Set of Interrogatories and Document Requests Directed to Plaintiff;
- (ii) Defendants' Second Set of Interrogatories Directed to Plaintiff; and
- (iii) Defendants' Second Set of Document Requests Directed to Plaintiff.

DESIGNATED KNOWLEDGEABLE PERSON:

The plaintiff OBJECTS to this request on the ground that not only does it ask for privileged information and on the ground that Sec. 804.05(2)(e) does not authorize a party to ask another to provide "information, including but not limited to the existence, nature, and location of documents relating to" the documents which are the subject of the defendants' first request for production of documents.

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:

- 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 Assistance 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.

DESIGNATED KNOWLEDGEABLE PERSON:

The Plaintiff OBJECTS to this request on the ground that the Notice does not designate with reasonable particularity the matters on which examination is requested. Instead, the matter is described in such a fashion as to make it impossible to designate a person who may testify to matters relating to: "any proposed reimbursement methodology for pharmaceutical products and Plaintiff's adoption, rejection or consideration of such proposals." Given the nature of the legislative process, there is no person who could possess, much less gather this kind of information. Notwithstanding this objection, the Plaintiff designates Mr. James Vavra who will endeavor to educate himself on the kinds of documents the State may have relating to a. through g. above and their suspected current location.

12. Plaintiffs computer systems, networks, or databases that might store or contain Documents, data, and communications, including but not limited to e-mail, responsive to Defendants' discovery requests or relevant to the subject matter of the claims or allegations asserted in the Complaint

DESIGNATED KNOWLEDGEABLE PERSON:

Mr. Eli Soto is designated to answer questions about the kinds of computer systems, networks or databases that are used at the Department of Health and Family Services and he is able to testify about how the plaintiff assembled records maintained by the Department that were provided to the defendants that were responsive to defendants' discovery request.

Dated this 18th day of December, 2006.



One of Plaintiff's Attorneys

PEGGY A. LAUTENSCHLAGER
Attorney General
State Bar #1002188

FRANK D. REMINGTON
Assistant Attorney General
State Bar #1001131

CYNTHIA R. HIRSCH
Assistant Attorney General
State Bar #1012870

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3542 (FDR)
(608) 266-3861 (CRH)

Attorneys for Plaintiff,
State of Wisconsin