
STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CV-1709

AMGEN INC., et. al.,

Defendants.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO QUASH
DEFENDANTS' NOTICE OF DEPOSITION OF
WISCONSIN LEGISLATURE'S FISCAL BUREAU BUDGET ANALYSTS
MARLIA MOORE, RACHEL CARABELL, AND AMIE GOLDMAN

The Plaintiff advances two arguments in support of its motion to quash Defendants' Notice of Deposition. Both arguments provide independent bases upon which to grant the motion. The first issue is whether the Defendants may support what the law says, (or does not say), by using the testimony of the Legislature's Fiscal Bureau staff. The second issue is whether the Wisconsin Constitution grants these individuals immunity from civil process and the resulting deposition.

I. TESTIMONY BY THE THREE FISCAL BUREAU ANALYSTS IS INADMISSIBLE AND IRRELEVANT.

In their brief, Defendants claim that all they want to do is conduct discovery on issues that they believe are relevant to this case. Make no mistake, what the Defendants intend to do with these depositions of the Legislature's Fiscal Bureau is to elicit oral testimony the purpose of which is to impute knowledge and intent upon the State of Wisconsin and more particularly the Wisconsin Legislature and the Wisconsin Governor

for acts taken in the discharge of their official duties as part of the legislative budget process. This, the law in Wisconsin does not allow.

A. THE LEGISLATIVE BUDGET PROCESS

To fully understand the impact of what Defendants are asking they be allowed to do depends upon a clear understanding of how the formula for pharmaceutical reimbursement, (“AWP” minus a percent), and the dispensing fee are set. A clear understanding of that, in turn, is dependent upon a brief explanation of basic legislative process. In the end, Plaintiff submits, it will be clear that what Defendants are asking to do is prohibited by law.

Every other year, Wisconsin state government embarks on its biennial budgetary process. The Medicaid program, and pharmaceutical reimbursement, are just one part of the government’s budget. The budget process always begins within each state agency, (as well as other non-state agencies, for example, the state court system). By September 15th, in the even numbered years, each agency must submit its proposed budget to the Governor and the Legislature.

From an accounting standpoint, every agency organizes their proposed budget substantially the same. In essence, the agency begins by incorporating the prior year’s appropriation level, but makes various adjustments to reflect supplements for such items as state employee compensation. Any program or policy changes for the upcoming fiscal years appear in the next section of the individual agencies’ proposed budget, as additions or subtractions.

On the last Tuesday in January, the Governor submits his budget to the Legislature which represents the Governor’s modifications to what was submitted to him

by the various agencies. Accompanying the Governor's budget is the Executive Budget Book which outlines and elaborates on any program or policy change from the previous year. The Governor's budget is introduced by and referred to the Joint Committee on Finance which is staffed by the Legislative Fiscal Bureau.

The Fiscal Bureau prepares for the Legislature a summary of the Governor's budget and other various budget papers further explaining policy changes proposed in the Governor's budget. In addition, as staff to the Legislators on the Joint Committee on Finance, the Legislative Fiscal Bureau analysts independently advance policy alternatives to the Legislator on the Joint Committee for their consideration and action.

The Legislators on the Joint Committee on Finance vote on policy or program changes proposed by the Governor or suggested from within the Joint Committee. Upon completion of their work, the Joint Committee on Finance submits its version of the budget including its changes to the Governor's budget as amendments for further action or consideration by the Legislature. After final completion by both the Assembly and the Senate the Budget Bill is sent to the Governor.

B. THE MEDICAID REIMBURSEMENT FORMULA AND THE DISPENSING FEE ARE PART OF THE LEGISLATIVE PROCESS

The terms "Average Wholesale Price," "AWP," and "Dispensing Fee" do not appear in State Statutes. These terms are not going to be found in the language of the Budget Bill. What these terms represent, however, are the basis for calculating the Medical Assistance program benefit amount that appears in Wis. Stat. 20.005 to fund the program required under Wis. Stat. § 49.46(2)h. These terms form the basis for calculating the expenditures which appear in the Legislative Acts which are cited in the

“History” section following Wis. Stat. 20.005. These terms define the basis and method of calculating what is the law in Wisconsin as set forth as an expenditure in Wis. Stat. 20.005 as further required by Wis. Stat. § 20.435(4)(b).

The terms “Average Wholesale Price,” “AWP,” or “Dispensing Fee” appear in the Governor’s Budget Book, accompanying documents, and in Legislative Reports and in the Fiscal Bureau’s Budget Analysis. For example, any proposal by the Governor to increase the discount off of the “Average Wholesale Price,” whether to even use a formula dependent upon Defendants’ published prices, or any other alternative involving pharmaceutical reimbursements is reflected in the Governor’s Budget as an expenditure and the formula is outlined and explained in the Governor’s Executive Budget Book. Any change to the reimbursement formula or to the dispensing fee is analyzed for the Joint Committee on Finance by Legislative Fiscal Bureau staff, by individuals such as Carabell, Moore, and Goldman.

The Legislature’s fiscal analysts also prepare papers for the Legislators on the Joint Finance Committee, discussing, among other things, the Governor’s proposal, including the reimbursement formula based on “AWP.” These persons analyze for the Legislature the fiscal impact to the State as a result of the Governor’s budget. These analysts also propose important alternative formulas, discounts and fees for the Committee on Joint Finance to consider as part of that Committee’s role in making legislation. These members of the Legislature consult with and rely on these analysts in the discharge of their official duties. Each legislator votes on whether to accept the Governor’s proposed change in reimbursement formula or to suggest something entirely different based in part, upon the information given to them by these analysts. These

legislators act within their independent constitutional authority as elected members of the Wisconsin Legislature. In the end, what “AWP” means rests in the mind of each legislator and the Governor as a result of their vote on a particular State Budget Bill.

C. THE 2005-06 & 2006-07 AND 2003-04 & 2004-05 BUDGETS ILLUSTRATE TWO EXAMPLES OF HOW THE “AWP” REIMBURSEMENT FORMULA AND DISPENSING FEE ARE DEBATED AND SET

The 2005 and 2006 budgets provide an excellent illustration of the legislative process described above. Each biennium the Legislative Fiscal Bureau prepares a “Comparative Summary of Budget Provisions” which succinctly describes the legislative process underlying the completed state budget.¹ This Summary describes the movement of policy alternative through the legislative process. For purposes here, it establishes that the decision on how to reimburse providers participating in the Medicaid program is the product of the work of many individual elected public officials.

1. The 2005/2006 and 2006/2007 Budget²

PHARMACY REIMBURSEMENT [LFB Paper 371]

	Governor (Chg. To Base)	Jt. Finance/Leg. (Chg. To Gov)	Veto (Chg. To Leg)	Net Change
GPR	-\$17,386,900	\$17,386,900	-\$13,141,600	-\$13,141,600
FED	-22,428,100	22,428,100	-16,773,000	-16,773,000
Total	-\$39,815,000	\$39,815,000	-\$29,914,600	-\$29,914,600

¹ These government records are publically available at the Fiscal Bureau and can also be found on-line at the Bureau website found at: www.legis.state.wi.us/lfb/

² I apologize for the space used in this brief to preprint these documents. But nowhere else can there be found a more concise description of how the budget was formed, debated, modified and passed as it relates to the “AWP” formula and the dispensing fee. The information provided in these documents provides a conclusive basis to accept Plaintiff’s characterization of the legislative process including the dispensing fee and the formula. I have bolded and underlined the most salient parts of these documents for emphasis only.

Governor: Reduce MA, BadgerCare, and SeniorCare funding by \$16,217,900 (-\$7,201,800 GPR and -\$9,016,100 FED) in 2005-06 and by \$23,597,100 (-\$10,185,100 GPR and -\$13,412,000 FED) in 2006-07 to reflect the administration's estimates of the savings that would be realized by reducing rates paid to pharmacies for the drugs pharmacies dispense to recipients under these programs. **The bill would: (a) reduce, from the average wholesale price (AWP) minus 13%, to the AWP minus 16%, reimbursement to pharmacies for brand name drugs; (b) reduce the dispensing fee from \$4.38 to \$3.88 per prescription; and** (c) eliminate the 5% enhancement the state pays to pharmacies for drugs dispensed under SeniorCare, a statutory change that would first apply to reimbursement for prescription drugs purchased on October 1, 2005. All of the projected savings assume an October 1, 2005, effective date.

The following table summarizes the projected cost savings of each of these three items.

Summary of Projected Cost Savings of Reducing Pharmacy Reimbursement Rates

Item	2005-06			2006-07		
	GPR	FED	Total	GPR	FED	Total
Reduce MA Reimbursement to AWP - 16%	-\$4,017,500	-\$5,248,700	-\$9,266,200	-\$5,692,400	-\$7,662,100	-\$13,354,500
Reduce Dispensing Fee to \$3.88	-1,275,400	-1,626,800	-2,902,200	-1,746,500	-2,316,600	-4,063,100
Eliminate SeniorCare Enhanced Rate	<u>-1,908,900</u>	<u>-2,140,600</u>	<u>-4,049,500</u>	<u>-2,746,200</u>	<u>-3,433,300</u>	<u>-6,179,500</u>
Total	-\$7,201,800	-\$9,016,100	-\$16,217,900	-\$10,185,100	-\$13,412,000	-\$23,597,100

In the Executive Budget Book, the Governor indicates that he has directed DHFS to research alternatives to the AWP methodology to reform pharmacy reimbursement for drugs dispensed under these programs.

Joint Finance/Legislature: Delete provision.

Vetoes by Governor [C-8 and C-9]: Reduce MA, BadgerCare, and SeniorCare benefits funding by a total of \$11,955,600 (-\$5,241,100 GPR and -\$6,714,500 FED) in 2005-06 and by a total of \$17,959,000 (-\$7,900,500 GPR and -\$10,058,500 FED) in 2006-07 to reflect projected savings of: (a) **reducing the pharmacy reimbursement rate from AWP-13% to AWP-16%, beginning in 2005-06 [C-8]; and (b) reducing the dispensing fee from \$4.38 to \$3.88 per prescription, beginning in 2005-06 [C-9].**

The following table identifies the funding reductions associated with these partial vetoes, by program.

Fiscal Effect of the Governor's Partial Vetoes -- Pharmacy Reimbursement Rates

	2005-06			2006-07		
	<u>GPR</u>	<u>FED</u>	<u>Total</u>	<u>GPR</u>	<u>FED</u>	<u>Total</u>
Discount to AWP -16%						
MA	-\$2,270,300	-\$3,111,800	-\$5,382,100	-\$3,430,900	-\$4,637,500	-\$8,068,400
BadgerCare	-234,100	-558,900	-793,000	-386,400	-912,000	-1,298,400
SeniorCare	<u>1,416,900</u>	<u>-1,416,900</u>	<u>-2,833,800</u>	<u>-2,202,700</u>	<u>-2,202,700</u>	<u>-4,405,400</u>
Subtotal	-\$3,921,300	-\$5,087,600	-\$9,008,900	-\$6,020,000	-\$7,752,200	-\$13,772,200
Dispensing Fee to \$3.88						
MA	-\$613,100	-\$840,000	-\$1,453,100	-\$865,900	-\$1,170,400	-\$2,036,300
BadgerCare	-57,800	-138,000	-195,800	-89,200	-210,500	-299,700
SeniorCare	<u>-648,900</u>	<u>-648,900</u>	<u>-1,297,800</u>	<u>-925,400</u>	<u>-925,400</u>	<u>-1,850,800</u>
Subtotal	-\$131,800	-\$1,626,900	-\$2,946,700	-\$1,880,500	-\$2,306,300	-\$4,186,800
Grand Total	-\$5,241,100	-\$6,714,500	-\$11,955,600	-\$7,900,500	-\$10,058,500	-\$17,959,000

Veto Override Consideration [C-8 and C-91: Sustain the Governor's partial vetoes. On September 27, 2005, the Assembly sustained the Governor's partial vetoes of both changes by a vote of 64 ayes and 33 nays.

[Act 25 Vetoes Section: 140 (as it relates to s. 20.435(4)(b),(bc),&(bv))]

2. The 2003/2004 and 2004/2005 Budget

MA PAYMENTS - PRESCRIPTION DRUG REIMBURSEMENT RATES [LFB Paper 389]

	Governor (Chg. to Base)	Jt. Finance/Leg. (Chg. to Gov)	Veto (Chg. to Leg)	Net Change
GPR	-\$26,588,200	\$22,500,600	-\$3,044,200	-\$7,131,800
FED	-30,291,700	25,188,200	-3,781,400	-8,884,900
PR	<u>-3,444,200</u>	<u>3,372,700</u>	<u>-19,300</u>	<u>-90,800</u>
Total	-\$60,324,100	\$51,061,500	-\$6,844,900	-\$16,107,500

Governor: Reduce MA, BadgerCare, and SeniorCare benefits funding by \$27,556,500 (-\$12,085,900 GPR, -\$13,989,600 FED, and -\$1,481,000 PR) in 2003-04 and by \$32,767,600 (-\$14,502,300 GPR, -\$16,302,100 FED, and -\$1,963,200 PR) in 2004-05 to reflect projected savings that would result by reducing the MA reimbursement rate DHFS pays to pharmacies and pharmacists for brand name and non-readily available generic prescription drugs and the reimbursement rate paid to providers under SeniorCare.

Under this item, DHFS would reimburse pharmacies and pharmacists for these drugs at a rate equal to the average wholesale price (AWP), as reported by manufacturers, minus 15%, plus the applicable dispensing fee (currently \$4.88 for most drugs). DHFS currently pays pharmacies and pharmacists a rate equal to the AWP minus 11.25%, plus a dispensing fee, for these types of drugs. DHFS would continue to pay pharmacies and pharmacists for readily available prescription drugs a rate equal to the maximum allowable cost, which is determined by DHFS, plus the applicable dispensing fee.

In addition, modify the current provision that specifies that the SeniorCare program payment rate is the MA reimbursement rate plus 5% to instead specify that the SeniorCare program payment rate equals the MA reimbursement rate. Specify that this provision would take effect January 1, 2004.

Joint Finance/Legislature: Provide \$23,453,000 (\$10,281,600 GPR, \$11,722,800 FED, and \$1,448,600 PR) in 2003-04 and \$27,608,500 (\$12,219,000 GPR, \$13,465,400 FED, and \$1,924,100 PR) in 2004-05 **to provide a maximum MA reimbursement rate for brand name and non-readily available generic drugs at AWP- 12%** and restore the 5% enhancement for drugs purchased under SeniorCare.

Veto by Governor [C-11]: Reduce GPR funding in 2004-05 by: (a) \$2,244,200 for MA; (b) \$64,300 for BadgerCare; and (c) \$735,700 for SeniorCare to reflect savings associated with **reducing the reimbursement rate to AWP minus 13%, beginning in 2004-05.**

This partial veto would reduce estimated federal matching funds in 2004-05 by: (a) \$3,152,500 for MA; (b) \$131,100 for BadgerCare; and (c) \$497,800 for SeniorCare. In addition, it is estimated that PR from rebates paid by pharmaceutical manufacturers under SeniorCare would be reduced by \$19,300 in 2004-05.

The following table summarizes the fiscal effect of changes to the drug reimbursement rates under SB 44, as introduced, and Act 33.

**PRESCRIPTION DRUG REIMBURSEMENT RATES
FUNDING CHANGES
ACT 33**

	2003-04				2004-05			
	<u>GPR</u>	<u>FED</u>	<u>PR</u>	<u>Total</u>	<u>GPR</u>	<u>FED</u>	<u>PR</u>	<u>Total</u>
Senate Bill 44								
MA Rate AWP-15%	-\$8,203,600	-\$11,125,200	\$0	-\$19,328,800	-\$9,320,600	-\$12,540,600	\$0	-\$21,861,000
SeniorCare Enhancement	<u>-3,882,300</u>	<u>-2,864,400</u>	<u>-1,481,000</u>	<u>-8,227,700</u>	<u>-5,181,700</u>	<u>-3,761,700</u>	<u>-1,963,200</u>	<u>-10,906,600</u>
Subtotal – SB44	-\$12,085,900	-\$13,989,600	-\$1,481,000	-\$27,556,500	-\$14,502,300	-\$16,302,100	-\$1,963,200	-\$32,767,600
Legislature-Change to SB 44								
MA Rate AWP-12%	\$6,399,300	\$8,858,400	-\$32,400	\$15,225,300	\$7,037,300	\$9,703,700	-\$39,100	\$16,701,900
SeniorCare Enhancement	<u>3,882,300</u>	<u>2,864,400</u>	<u>1,481,000</u>	<u>8,227,700</u>	<u>5,181,700</u>	<u>3,761,700</u>	<u>1,963,200</u>	<u>10,906,600</u>
Subtotal Change to SB 44	\$10,281,600	\$11,722,800	\$1,448,600	\$23,453,000	\$12,290,000	\$13,465,400	\$1,924,100	\$27,608,500
Governor’s Partial Vetoes								
MA Rate AWP-13% in 2004-05	\$0	\$0	\$0	\$0	-\$3,044,200	-\$3,781,400	-\$19,300	-\$6,844,900
SeniorCare Enhancement	<u>0</u>							
Subtotal Change to Enrolled SB 44	\$0	\$0	\$0	\$0	-\$3,044,200	-\$3,781,400	-\$19,300	-\$6,844,900
Net Change in Act 33								
MA Rate	-\$1,804,300	-\$2,266,800	-\$32,400	-\$4,103,500	-\$5,327,500	-\$6,618,100	-\$58,400	-\$12,004,000
SeniorCare Enhancement	<u>0</u>							
Total Change to Current Law	-\$1,804,300	-\$2,266,800	-\$32,400	-\$4,103,500	-\$5,327,500	-\$6,618,100	-\$58,400	-\$12,004,000

[Act 33 Vetoes Section: 286 (as it relates to 20.435(4)(b),(bc)&(bv))]

D. THERE IS NO PERSON WHO CAN TESTIFY ABOUT WHY “THE STATE OF WISCONSIN” DID WHAT IT DID REGARDING PHARMACY REIMBURSEMENT

When the Defendants argue or ask what “the Plaintiff” or “the State of Wisconsin” did or did not do with regard to “AWP,” the answer falls squarely and inescapably upon the proper interpretation of the actions of our elected members in the State Legislature and in the Office of the Wisconsin Governor. In passing the state

budget and in codifying the final expenditures in the state statutes, these three Fiscal Bureau analysts can no more testify on why a decision was made or upon what that decision finally rested than anyone else. The final legislative product is the result of the legislative process by that which we call our state government. As the court said in *Moorman Mfg. Co. v. Industrial Comm.* 241 Wis. 200, 208, 5 N. W. 29 743 (Wis. 1942) what is meant by what was done cannot be shown by any person.

On page one of their brief, the Defendants claim that “relevant officials in the State of Wisconsin have known for years that AWP’s were not the same as (or even a close approximation of) the actual acquisition costs ...” and they suggest that “those officials made an informed and intentional decision to reimburse Medicaid providers at a level which they believed would ensure continued participation by providers” Similarly, on page six of their brief, the Defendants confess that these “depositions are sought to develop evidence that contradicts the State’s assertion concerning State official’s understanding of the pharmaceutical pricing term “AWP.” The Defendants do not name these “officials.” But because reimbursement is set by an Act of the Legislature, with the expenditure codified in the statutes, the Defendants must be alluding to legislative leaders or the Wisconsin Governor and what they did or did not do in passing or signing that portion of the biennial budget dealing with the Medicaid pharmaceutical reimbursement formula or the dispensing fee. Presumably Defendants do not identify these “officials” because to demand a deposition of the “Governor” or a “Legislator” would frame the issue in such clear and stark terms so as to be impossible under the law to garner judicial approval.

The budget cycles discussed above expose why the Defendants cannot do what they claim they have a right to do. These budget cycles clearly demonstrate that “AWP” and the reimbursement formula and the dispensing fee are the product of the legislative process. For example, in the 2005/2006 and 2006/2007 budget, codified in Wis. Stat. 20.005, the dispensing fee was actually set by the Governor through the exercise of his veto power.

As reflected in the budget summary reprinted above, in 2005 the Governor had proposed in his original budget to reduce the dispensing fee from \$4.38 to \$3.88 per prescription, but Joint Finance and the Legislature deleted that proposal. The final Budget Bill sent to the Governor assumed a \$4.38 dispensing fee. Exercising his constitutional authority, the Governor vetoed the amount set by the Legislature and unilaterally directed \$3.88 be paid to providers rather than the \$4.38 assumed in the Bill sent to his desk by the Legislature.

Similarly, in the 2003/2004 and 2004/2005 budget the DHFS had been paying AWP minus 11.25% for drug reimbursement. Senate Bill 44, reflecting the Governor’s original proposal, included a change to the formula increasing the discount to AWP minus 15%. But the Legislature exercised its prerogative and changed the formula to AWP minus 12%. When the Bill reached the Governor’s desk, he changed the appropriation but assumed an entirely different formula than what he initially proposed and different from what the Legislature passed in its Budget Bill, that is, AWP minus 13%. The final appropriation thus appeared in Chapter 20 of the State Statutes, calculated according to a 13% discount off of AWP, to be spent for the purpose set forth in Wis. Stat. § 49.46(2)h.

The purpose of this tedious exercise is to advance the critical point that there is no person who can or should testify about what the law means because the law is the product of no one person. Instead, the reimbursement rate and the dispensing fee are both the product of a complex and interdependent legislative process that begins with the agency and ends at the end of the Governor's veto pen. Claiming a right to depose three Legislative fiscal analysts, Defendants ignore this critical point and perhaps unwittingly offend the integrity of our legislative process.

E. ASKING WHAT THE LEGISLATURE INTENDED CAN ONLY BE DONE IF THE WORDS THEY USED ARE AMBIGUOUS BUT EVEN THEN INTENT CANNOT BE DERIVED BY ELICITING TESTIMONY FROM LEGISLATIVE AIDES, LEGISLATORS OR THE GOVERNOR.

The Supreme Court's decision in *Moorman Mfg. Co. v. Industrial Comm.* 241 Wis. 200, 208, 5 N. W. 29 743 (Wis. 1942) begins the analysis of how litigants interpret state law after the court finds the words chosen are ambiguous. The Defendants seek to distinguish this case by claiming that these depositions are only to illuminate "the State's understanding of the published pricing term" (Brief at p. 6, f.n. 6) and are not an attempt to say what the law means. But again, the reimbursement formula for Defendants' pharmaceutical products is set by the Legislature, subject to veto by the Governor. The State's understanding of the published pricing term cannot be found by asking the Legislature's fiscal analyst what she thinks it means, or what she believes the Legislature or the Governor thinks these terms mean.

Perhaps given the legislative history shown above, it may be reasonable to assume that only the Governor knows why he used his veto pen to decrease the dispensing fee or discount off of AWP by 13% not 12% as proposed to him by the Legislature in the final

Bill presented to him for his signature. Similarly, it is equally reasonable to assume that only the Legislature knows what it collectively intended when it adopted a particular reimbursement formula in the final Biennial Budget Bill. (Perhaps it would be more accurate to say only the individual legislators in the Legislature know why he or she voted the way he or she did on the particular Bill involving pharmaceutical reimbursement.) What is crystal clear, however, is that these depositions, if allowed, will not illuminate “the State’s understanding of the published pricing term.” (Defendants’ brief at p. 6, f.n. 6). The meaning of the published pricing term rests only in the mind of each person who participated in the legislative process.

The Defendants attempt to further distinguish the holding of the Wisconsin Supreme Court by claiming that these cases dealt with the question of what the legislature intended in passing “a statute.” (*Id.*). The Defendants misconstrue the holding in *Moorman Mfg. Co.* which discussed legislative Acts³ not statutes:

What the framer of an act meant by the language used cannot be shown by testimony. *Northern Trust Co. Case, supra; Casper v. Kalt-Zimmers Mfg. Co.* 159 Wis. 517, 520, 149 N. W. 754, 150 N.W. 1101; *Robinson v. Krenn*, 236 Wis. 21, 294 N. W. 40. Much less can it be shown by mere statements by the framer or anyone else. The meaning of a legislative act must be determined from what it says – not by what the framer of the act intended to say or what he thought he was saying. The question always is what did the legislature mean, not what the framer meant, and that meaning must be drawn from the language used in the act in view of the purpose of the legislature as expressed in its act or facts of which the court can take judicial notice.

³ Defendants’ confusion may arise from unawareness that all laws in Wisconsin are introduced as Bills, when signed become Acts, and that all Acts appear in the Laws of Wisconsin and most are reprinted in the Wisconsin State Statutes.

Moorman Mfg. Co. v. Industrial Comm. 241 Wis. 200, 208, 5 N. W. 29 743 (Wis. 1942).

The Supreme Court held that the meaning of the legislative Act must be determined from what it says not the statements of the framers or anyone else.

If the Defendants are to argue what is meant by the Act which is predicated on a set formula for pharmaceutical reimbursement, the Defendants must look to the plain meaning of three words, “average,” “wholesale,” and “price,” not to what someone may think these three words mean. The Defendants hope to be allowed to conduct unrestricted discovery of any person involved in the process that led to the adoption, or rejection, of anything having to do with AWP or pharmaceutical reimbursement in general. But the law is clear. What the Legislature and the Governor meant must be drawn from the language used in the Act in view of the purpose of the legislation as expressed in its Act, or in the accompanying government records, or facts of which the court can take judicial notice. *See Moorman Mfg. Co. v. Industrial Comm.* 241 Wis. 200, 208, 5 N. W. 29 743 (Wis. 1942).

II. THE WISCONSIN CONSTITUTION PROHIBITS THESE DEPOSITIONS.

As an independent basis to grant Plaintiff’s motion to quash, State Senator Fred Risser and State Representative Michael Huebsch invoke the protection of Article IV,

Section 16 which protects individual legislators and ask that it extend to these three Legislative Fiscal Bureau Analysts.⁴

The Defendants reject the invocation of this privilege by arguing that these three aides are not the kind of employee to which the privilege can apply. The court in *Beno* interpreted the State Constitution by looking at the Constitutional text and the underlying debates. The Court concluded:

For resolution of the meaning of section 16, we consider the objectives the framers sought to achieve. The framers' objectives in adopting section 16 were to ensure the independence of the legislature and integrity of the legislative process by precluding the possibility of intimidation or harassment of members of the legislature. In the English parliamentary struggles the privilege was initially viewed as a protection of members of Parliament against action by the Crown. The privilege was expanded over the years to protect legislators against harassment by the executive or individuals and to foreclose accountability of the legislator before a possibly hostile judiciary. Yankwich, *The Immunity of Congressional Speech-Its Origin, Meaning and Scope*, 99 U. Pa. L. Rev. 960 (1951). Section 16 thus reinforces the separation of powers doctrine, protecting the independent functioning of the legislative branch by preventing interference, intrusion, or intimidation by the other branches. The framers' judgment was that the courts are not the proper place to hold legislators accountable as elected representatives for "words spoken in debate."

State v. Beno, 116 Wis.2d 122, 141, 341 N.W.2d 668 (Wis. 1984).

The *Beno* court was clear, however, to extend this protection "only so far as is necessary to achieve its objective of protecting the integrity of the legislative process." Thus, the court accepted a limitation on the privilege defined not just by looking at who

⁴ In practice, the invocation of privilege is done by counsel. Defendants' counsel have never submitted an affidavit from their client evidencing proof that the client has invoked an attorney-client privilege; nor should they have. If counsel's invocation, as an officer of the court, is insufficient, Plaintiff respectfully reserves the right to submit proof of the fact that the Plaintiff's motion was filed at the request of Senator Risser and Representative Heubsch.

the person was or what he or she did. A critical component of the court's analysis rested on two other considerations: 1) the subject of the inquiry as compelled by civil process, and 2) the impact of the inquiry on the independent functioning of the legislative branch.

In discussing the extension of this privilege beyond the legislator, the court stated:

We recognize that the complexities of the modern legislative process have increased legislators' reliance upon the assistance of employees. It is an aide's relationship with a particular member of the legislature, not the mere fact of employment, that makes it a realistic possibility that questioning of the aide in a judicial forum might have an inhibiting effect upon the member's performance and might infringe upon the member's legislative independence. When the aide is acting as the member's alter ego in carrying out an activity which falls within the scope of section 16, the purposes of section 16 will be served if the aide and the member are treated as one under section 16 and the member is allowed to assert his or her privilege to prohibit the questioning of an aide. An opposite conclusion would compel the legislator to perform all legislative tasks personally to secure the protection of section 16.

The privilege of not being compelled to testify is the legislator's not the aide's, and only the legislator may invoke the privilege. If an aide is subpoenaed to testify, the aide has no privilege under section 16 not to testify unless the member of the legislature approves the aide's assertion of the privilege. To assert the privilege under section 16 to protect the aide from being compelled to testify, the member must demonstrate that the aide was in fact acting at the member's request and that the act about which the aide will be questioned falls within the scope of legislative functions protected under section 16 if performed personally by the legislator. The member must thus formally and publicly take personal responsibility for the aide's activity.

State v. Beno, 116 Wis.2d 122, 146, 341 N.W.2d 668 (Wis. 1984).

There is no reasonable dispute that the Legislative Fiscal Bureau and its staff act at the request of the Legislators on the Joint Committee for Finance and that the entire budget process including the determination of the discount off of the AWP and the dispensing fee are uniquely legislative functions that would clearly be protected were they performed personally by the individual legislator.

It is also not reasonably disputed that the Legislature's Fiscal Bureau analysts are not like the aide in the *Beno* case. In *Beno* the aide, Richard White, was the administrative assistant to then Assembly Speaker Ed Jackamonis. These fiscal analysts are employed by the Director of the Fiscal Bureau who serves at the pleasure of the Legislature. In this regard, these persons in general serve the legislative body as a whole, but on occasion may act at the direction of a particular legislator. These people are not an individual legislator's "alter ego."

But these concessions only mean that the facts in *Beno* were different and that to apply the holding, this Special Master need apply some degree of interpretation. In this sense, the question is whether the court's observations in *Beno* conclusively define the protection offered by Article IV, Section 16 or whether the language simply provides an explanation of why Section 16 applied to the facts presented in that case. Plaintiff respectfully submits that the *Beno* case supports its interpretation of Article IV, Section 16 as applied to the facts of this case.

It is clear that Section 16 recognizes the existence of the constitutional separation of powers at least between the judicial and legislative branches. The framers intended that the privilege created by the provision would protect the independent functioning of the legislative branch by preventing interference, intrusion, or intimidation by the other branches. It is also given that to assert the privilege under Section 16 to protect the aide from being compelled to testify, the facts must show that the aide was acting at the member's request and that the activities about which the aide will be questioned falls within the scope of legislative functions protected under Section 16 as if performed personally by the legislator.

The court in *Beno* stated that “for resolution of the meaning of Section 16, we consider the objectives the framers sought to achieve.” It is not possible to determine what kind of aide the framers thought would enjoy this immunity because in 1848 there would have been no legislative aides. It is thus, not necessarily dispositive to only look at the relationship between the legislator and the aide. If this Special Master examines the service these individuals provide to the Legislature as staff to the Joint Committee on Finance, and if this Special Master considers the nature of the inquiry desired, Plaintiff respectfully suggests the conclusion is that this immunity extends to these persons at this time in this case and in consideration of what the Defendants state they want to accomplish: to examine the intent and knowledge of “the State of Wisconsin” as it relates to pharmaceutical reimbursement and the payment of dispensing fees.

The Defendants do not deny that their intent in having these depositions is to support their defense that the Legislature knew Defendants were not publishing truthful AWP. Defendants admit that they intend to prevail in this litigation by proving that the Legislature made a choice to pay more for pharmaceutical products than the “real” AWP. The only reasonable inference from the Notice of deposition is that the Defendants hope to further these aims and elicit sworn testimony from the persons whose job it was to assist the Legislature in its work in the hope of imputing any concessions or admissions made by them on the body as a whole.

Section 16 extends to legislative aides who are acting “within the sphere of protected legislative functions.” *Beno*, 116 Wis. 2d at 147. The work done by these fiscal analysts is clearly a “legislative function.” If there were no fiscal analysts, the Legislature would have to do the work him or herself. It cannot be reasonably argued that

an analysis of the impact from biennial budget is not necessary. For the orderly and efficient operation of the state Legislature, this work has to be done.

The court in *Beno* said “[t]o assert the privilege under Section 16 to protect the aide from being compelled to testify, the member must demonstrate that the aide was in fact acting at the member’s request and that the act about which the aide will be questioned falls within the scope of legislative functions protected under Section 16 if performed personally by the legislator” *Beno*, 116 Wis.2d at 146. The facts here show all three elements are satisfied. These aides act at the member’s request. The work that they do which Defendants hope to examine them about is a critical legislative function. The fact that in modern times the Legislature relieved the individual legislators of this burden by creating this Bureau makes no difference. Plaintiff respectfully requests that this Special Master recognize the privilege asserted on behalf of these individuals by the President of State Senate and the Speaker of the State Assembly.

III. THE LEGISLATURE’S IMMUNITY HAS NOT BEEN WAIVED

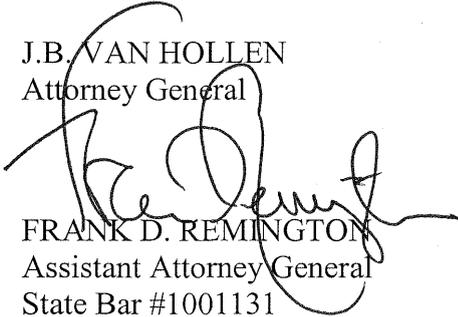
In complaining that the Legislature’s invocation of its privilege denies Defendants’ rightful access to discovery, Defendants incredibly claim that the Plaintiff should have withheld discoverable records and documents and failing to do so, constitutes a waiver of immunity. This Special Master should summarily reject this unsupported defense.

First, the immunity belongs to the Legislature. The responsibility to produce documents in discovery is the obligation of the Plaintiff, in this case the State of Wisconsin, or more particularly the Department of Health and Family Services. The

documents produced to the Defendants were all public records and there would be no rational or legal basis for the Plaintiff to do what the Defendants seem to suggest. If the privilege can be waived, only the owner of the immunity can waive it and there is no evidence to suggest that any individual legislator has done so here.

Dated this 12th day of November, 2007.

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