

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, Maryland 21244-1850



Center for Medicaid and State Operations

MAY 15 2007

Leonard Kelley
Deputy Commissioner
Bureau for Medical Services
Commissioner's Office
350 Capitol Street, Room 251
Charleston, WV 25301-3706

Dear Mr. Kelley:

The Centers for Medicare & Medicaid Services (CMS) has learned that the State of West Virginia received the proceeds of a legal settlement relating to the drug OxyContin. This settlement was, as we understand, based at least in part on allegations of harm to the State's Medicaid program. Moreover, to the best of our knowledge, no proceeds of this settlement have been paid or credited to the federal government as repayment of the Federal share of Medicaid expenses.

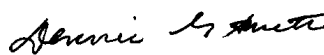
In or around 2001, the State of West Virginia pursued legal action against Purdue Pharma, L.P. and several other defendants, alleging that defendants manufactured, promoted, and marketed the drug OxyContin for management of pain by making misrepresentations or omissions regarding the appropriate uses, risks, and safety of OxyContin. West Virginia alleged in its complaint that "[a]s a result of the excessive and unnecessary prescriptions of OxyContin, Medicaid recipients in the State of West Virginia have been inappropriately and unnecessarily prescribed OxyContin, and the State and the Department of Health and Human Resources (D.H.H.R.) have incurred excessive and unnecessary expenses as a result thereof." (Complaint, ¶ 36).

The Complaint additionally alleges that "[t]he State is responsible for the costs of prescription, health care and medical costs for Medicaid recipients pursuant to the State Medicaid Plan and statute," and that "[m]any of West Virginia's citizens who use or have used OxyContin are or were poor, uneducated, and unable to provide for their own medical care [such that] [t]hese citizens rely or relied upon the State to provide their medical care, facilities, and services." (Complaint, ¶ 64 - 65). Likewise, the Complaint states that as a proximate result of their conduct, defendants "have caused the State to incur excessive prescription costs and health care costs and medical costs related to diagnosis, treatment and cure of addiction or risk of addiction to OxyContin, in that many of these citizens of West Virginia are Medicaid . . . recipients." (Complaint, ¶ 80).

We understand that this legal action was settled by an agreement between defendants and the Attorney General for the State of West Virginia (on behalf of, among others, the West Virginia Department of Health and Human Resources) that called for the payment of \$10 million payable in four equal annual installments beginning on December 15, 2004. CMS is not aware that any of these funds have ever been credited to the Federal Government in repayment of the Federal share of the State of West Virginia's Medicaid expenses. Bolstering that impression, we understand that the West Virginia Chief Deputy Attorney, General Fran Hughes, stated in a hearing before the state legislature that if the money had gone to the Department of Health and Human Resources, the Federal Government would have retained the portion it contributed through Medicaid. Ms. Hughes apparently further stated that "[w]e have arranged a methodology that has prevented the federal government from coming back and seizing the money." (Steve Korris, McGraw Hill, top deputy says, The Record, Feb. 16, 2007).

In making Medicaid payment to states, the Secretary is required to adjust payments to account for overpayments. 42 U.S.C. 1396b(d)(2)(A) - (3)(A). The State of West Virginia's settlement was clearly predicated on, among other things, allegations of harm to the state Medicaid program. The State of West Virginia's methodology in arranging its settlement does not change the nature of the settlement nor the Secretary's obligation to account for overpayments. Please advise CMS of any reason you may offer for which it should not assert a disallowance against the Medicaid program of the State of West Virginia in the amount of the settlement.

Sincerely,



Dennis Smith
Director