



STATE OF MISSISSIPPI  
OFFICE OF THE GOVERNOR  
DIVISION OF MEDICAID  
DR. ROBERT L. ROBINSON  
EXECUTIVE DIRECTOR

VIA HAND DELIVERY

March 22, 2011

The Honorable Phil Bryant  
Lieutenant Governor  
New Capitol  
Jackson, Mississippi 39201

The Honorable William J. McCoy  
Speaker of the House of Representatives  
New Capitol  
Jackson, Mississippi 39201

Senator Doug Davis  
Chairman, Senate Appropriations  
New Capitol  
Jackson, Mississippi 39201

Representative Johnny W. Stringer  
Chairman, House Appropriations  
New Capitol  
Jackson, Mississippi 39201

Re: AWP Settlements

Dear Gentlemen:

By letters to Attorney General Jim Hood dated March 14, 2011, and March 18, 2011, copies of which were previously provided to you, I asked whether the Attorney General had repaid the federal government for the federal share of expenditures related to his four recent settlements in the AWP litigation. Yesterday, I received a response from the Attorney General's Chief of Staff stating his opinion that the State does not owe "any federal share of expenditures" for three of the settlements; a copy of his letter is attached. However, the case on which Mr. Morgan relies did not exempt states from paying the federal share; it merely found that the CMS letter was an improperly promulgated rule because it did not follow required notice and comment procedures. A long line of court cases and established federal regulations remain clear that a State may not unilaterally decide to pursue and recover only the state share expenditures for these overpayments. As to the remaining settlement with Glaxo Smith Kline, Mr. Morgan acknowledges that the federal government has not been reimbursed its share of the \$10,000,000.00 settlement amount (\$8,000,000 for the State plus \$2,000,000 in attorney fees).

As Executive Director of the Division of Medicaid, I am responsible for administering the program; thus, ultimately I, not the Attorney General, am responsible for ensuring that all federal expenditures are repaid. CMS has consistently held that a State must repay the federal share of any overpayments recovered by the State and that a State may not unilaterally decide to simply

recover the State share. This position is re-stated in a letter from CMS dated October 28, 2008, and confirmed in a March 31, 2010 decision from the United States District Court for the Southern District of West Virginia. In addition, case law from other jurisdictions makes it clear that the federal expenditures must be repaid. Copies of both the letter and the Court's decisions are attached herewith for your convenience. According to the CMS letter (*see*, page 4), the "State must report the refund of the Federal share on the next quarterly expenditure report . . .". Our next quarterly report is for the period ending March 31, 2011.

Each of the four Settlement Agreements specifies that the total Settlement Amount includes not only the payment of funds to the State of Mississippi but also the payment of fees to the law firm of Copeland, Cook, Taylor and Bush and further provides that "the payment of costs and attorneys' fees determined by the State to be appropriate . . . is left to the *State's sole discretion* and without input from or further obligation on the part of the" defendant. (*See*, The Settlement Payment section of the Settlement Agreement.) Furthermore, these settlement agreements acknowledge that money may be owed to the federal government and mandate that the federal share be paid from the Settlement Amount. (*See Id.*) CMS has not informed the Division that the federal government has been repaid its share, and the Settlement Agreements clearly contemplate the payment of the federal share from the Settlement Amount, so the prudent course of action would be for the State to proceed with extreme caution in the use of these monies because the settlement agreements do not preclude future obligations to repay the federal share; indeed, they *require* the payment of the federal share from the settlement amount.

Setting aside the issue of whether the Attorney General may appropriate monies to a private law firm, the total amount payable by all the pharmaceutical companies combined is \$25,700,000 (\$20,241,000.00 purported State recovery and \$5,459,000.00 for attorney fees). Of the total portion attributable to medical services, the State would repay the federal share at the current FMAP rate of 82.03%, so that a total payment of \$16,603,692.30 would be owed to the federal government ( $\$20,241,000.00 * .8203 = \$16,603,692.30$ ). Assuming that the attorney fees are subject to repayment at the federal administrative match rate of 50%, then an additional payment of \$2,729,500.00 would be made to the federal government for this amount. Under this scenario, the Division of Medicaid directly loses \$19,333,192.30, the State of Mississippi nets \$907,807.70 and the law firm of Copeland, Cook, Taylor and Bush receives \$5,459,000.00. In other words, the trial lawyers will recover five times more than the State!

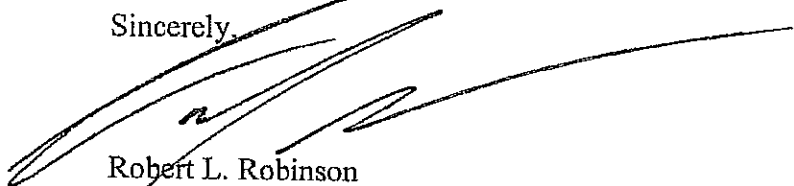
There are other possible scenarios to consider. Because the language in the settlement agreements is very broad, one scenario is that the federal government may claim that the entire \$25,700,000 is subject to the medical services match rate of 82.03%. If so, then the State will repay the federal government \$21,081,710 and will still be legally obligated to pay the attorneys \$5,459,000 in fees. This would result in a net loss to the State of \$840,710.

Under any scenario, the Division of Medicaid will have to repay millions of dollars to the federal government. This significant unanticipated expenditure will come directly out of Medicaid's budget and leave Medicaid without any ability to fill the budget hole created by the payout caused by the Attorney General.

Given the many uncertainties created by these settlements, our strong recommendations are that you neither include the settlement proceeds in the FY 2012 budget, nor rely upon the proceeds to plug holes in the FY 2011 budget. Also, we do not recommend transferring any funds from the Division of Medicaid during the remainder of FY 2011.

Thank you very much for your immediate attention to this matter.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'R. Robinson', is written over the word 'Sincerely,'.

Robert L. Robinson  
Executive Director

Enclosures

pc: The Honorable Haley R. Barbour