

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: West Virginia Department of Health and Human Resources
Docket No. A-09-81
Decision No. 2278

DATE: October 29, 2009

DECISION

In West Virginia Dept. of Health and Human Resources, DAB No. 2185 (2008), the Departmental Appeals Board (Board) concluded that the Centers for Medicare & Medicaid Services (CMS) was entitled, under the federal Medicaid statute, to an "appropriate or equitable" share of funds received by the state of West Virginia (State) in settling a lawsuit against manufacturers and marketers of the drug OxyContin. The Board also held, however, that CMS had not articulated a sufficient basis for upholding the amount of the disallowance. The Board remanded the matter to CMS, instructing it to recalculate the disallowance in a manner consistent with the Board's decision and taking into consideration any additional evidence and argument submitted by the State.

On March 20, 2009, CMS determined that the federal government was entitled to \$4,099,452 of the \$10 million OxyContin settlement (a slight reduction of the original disallowance) and explained the information and method used to calculate that federal share. The West Virginia Department of Health and Human Resources (DHHR), the agency that administers the State's Medicaid program (and a named plaintiff in the OxyContin lawsuit), now appeals CMS's March 20, 2009 determination, raising several objections to CMS's apportionment of the settlement proceeds among the Medicaid and non-Medicaid programs or agencies involved in the lawsuit and objecting to CMS's use of the gross settlement amount in its calculations as opposed to the net amount after the subtraction of court-ordered attorneys fees.

We reject all of DHHR's contentions except for the one regarding attorneys fees. In calculating the federal share, we reduce the

gross settlement amount by the amount of those fees. With that change, we conclude that CMS is entitled to \$2,732,968 of the \$10 million OxyContin settlement.

Background

In 2001, the State, acting through its Attorney General, sued Purdue Pharma L.P. (Purdue) and other companies in state court alleging that the defendants had engaged in a marketing campaign that misrepresented the appropriate uses, risks, and safety of OxyContin. DAB No. 2185, at 5. The State further alleged that the defendants' improper marketing had caused the State to incur costs for "excessive and unnecessary" OxyContin prescriptions and for health care services to diagnose and treat the adverse consequences of OxyContin use. Id.; see also WV Ex. 5, at 2.

In response to a motion to dismiss the lawsuit, the State amended its complaint to add three state agencies as plaintiffs: DHHR, which administers the State's Medicaid program (and other programs); the West Virginia Bureau of Employment Programs (BEP); and the West Virginia Public Employees Insurance Agency (PEIA). DAB No. 2185, at 5. Later, the plaintiffs informed the court of their intention to pursue only two causes of action at trial: count I of the amended complaint, which alleged that the defendants' marketing and promotion of OxyContin had violated the West Virginia Consumer Credit Protection Act; and count II, a common law nuisance claim. Id. at 6; see also WV Ex. 10, at 3; WV Br. at 5-6. In connection with these causes of action, the plaintiffs "developed two distinct theories of damage." WV Br. at 5; see also DAB No. 2185, at 6. First, the plaintiffs sought reimbursement for their expenditures on OxyContin prescriptions. DAB No. 2185, at 6; see also WV Ex. 9, at 2 (¶ 3). Second, the plaintiffs sought reimbursement for expenditures on substance abuse treatment and other services for citizens of West Virginia who had abused or become addicted to OxyContin. DAB No. 2185, at 6; see also WV Ex. 9, at 2 (¶ 3).

The litigants settled the case before trial. DAB No. 2185, at 6. Their settlement agreement, which the West Virginia trial court approved in a December 22, 2004 "Final Order," called on the defendants to pay the plaintiffs \$10 million in exchange for the plaintiffs releasing all of their claims relating to the marketing and sale of OxyContin. Id. The settlement agreement also required that these funds be "placed in trust in the Consumer Protection Fund of the Office of the Attorney General" and "used (subject to a determination of attorney fees and expenses by the Court) in conformity with the [court's] Final

Order[.]” CMS Ex. 13, at 2-3. In the Final Order approving the settlement, the court ordered that the plaintiffs pay their attorneys fees from the \$10 million in settlement proceeds. DAB No. 2185, at 7.

On August 7, 2007, CMS disallowed \$4,143,075 in federal reimbursement for the State’s Medicaid program. DAB No. 2185, at 7. CMS believed that this amount was the federal government’s proper share of the OxyContin settlement – a settlement that, according to CMS, resolved claims made on behalf of the State’s Medicaid program (and other programs). Id. CMS determined the amount of the disallowance by “equitably distributing” \$5.5 million of the \$10 million gross settlement (not reduced for attorneys fees) to the State’s Medicaid program, then multiplying \$5.5 million by the State’s federal medical assistance percentage (FMAP). Id. (The FMAP is the rate at which the federal government reimburses a state for Medicaid expenditures.)

In September 2007, DHHR filed an appeal of the August 7, 2007 disallowance with the Board, which assigned the appeal docket number A-07-135. DAB No. 2185, at 1. On July 14, 2008, the Board issued DAB No. 2185, its decision in docket number A-07-135. In that decision, the Board concluded that the federal government (CMS) was entitled to a share of the OxyContin settlement proceeds under provisions of the federal Medicaid statute (title XIX of the Social Security Act) and Office of Management and Budget Circular A-87. Id. at 9-18. In reaching that conclusion, the Board found that when the state court litigation was settled, the plaintiffs, including the state Medicaid agency (DHHR), were seeking damages that included: (1) reimbursement for expenditures on OxyContin, some of which, the Board found, constituted “overpayments” under the federal Medicaid statute; and (2) reimbursement for expenditures to treat OxyContin abuse or addiction. Id. at 6, 12-13. Although the Board upheld CMS’s determination that the federal government was legally entitled to some share of the OxyContin settlement (having financed Medicaid expenditures that were implicated by the settled claims), the Board concluded that CMS had failed to explain how it determined that more than one-half of the settlement was allocable to the federal government (i.e., to Medicaid), and that CMS had conceded that it did not take into consideration that the court had ordered attorneys fees paid out of the settlement. Id. at 21. The Board also noted that CMS had indicated its willingness to reassess the amount of the disallowance based on any “sound evidence” that the State might provide. Id. Accordingly, the Board remanded the case to CMS

to reconsider the disallowance amount and to issue a revised determination that explained the information and method used to calculate that amount. Id. at 21-22. The Board also instructed CMS to "give DHHR a reasonable opportunity [on remand] to submit additional evidence and argument about what would constitute an appropriate or equitable distribution of the OxyContin settlement proceeds to Medicaid." Id. at 21.

After the Board issued DAB No. 2185, CMS reiterated to DHHR its willingness to revisit the amount of the disallowance "based on sound evidence provided by the State," but stated that its reassessment of the disallowance amount "must be data driven, supportable, and documented." CMS Ex. 1. CMS requested that DHHR submit, within 30 days, "any evidence and argument that you wish CMS to consider in reassessing the amount of the disallowance." Id.

With a letter dated November 12, 2008, DHHR submitted a table of information showing the amount of the State's Medicaid expenditures for "opioid" substance abuse treatment for calendar year 2000. CMS Ex. 1. The November 12 letter noted that OxyContin was an opioid and that its expenditure data did not differentiate between treatment for OxyContin abuse and treatment for abuse of other kinds of opioids (such as heroin or methadone). Id.

On November 14, 2008, CMS renewed its request for information, noting that DHHR's November 12, 2008 correspondence contained no expenditure information related to the "overpayment" theory of damages advanced by the plaintiffs. CMS Ex. 1. On December 15, 2008, DHHR responded that "all data addressing the . . . overpayment/reimbursement claim has long since been in your possession," having been "turned over as part of the informal discovery between the West Virginia Attorney General and CMS." Id.

On March 20, 2009, CMS issued a revised determination of disallowance, which reduced the original Medicaid disallowance from \$4,143,075 to \$4,099,452. WV Ex. 2. CMS explained that it had revised the disallowance based on information about the two categories of damages sought by the plaintiffs - reimbursement for expenditures by the plaintiffs (including DHHR) on OxyContin prescriptions, and reimbursement for expenditures on OxyContin-related substance abuse treatment. See id. at 2. With respect to the plaintiffs' claim for reimbursement of expenditures on OxyContin prescriptions (a claim that DHHR associates with count I of the plaintiffs' amended complaint), CMS reviewed

expenditure data contained in exhibits to the deposition of the plaintiffs' expert on damages, David Selby. Id. According to the revised disallowance determination, that data showed that the three state agency plaintiffs (DHHR, WCD, and PEIA) expended \$21,096,689.37 for OxyContin prescriptions from 2000 through 2002. Id. Of that total, CMS found, **59.079 percent** were Medicaid expenditures by DHHR. Id. Regarding the claim for reimbursement of substance abuse treatment expenditures (a claim that DHHR associates with count II of the plaintiffs' amended complaint), CMS reviewed a one-page spreadsheet furnished by DHHR on November 12, 2008 as well as the plaintiffs' "Pre-Trial Form" filed with the West Virginia trial court on October 8, 2004. Id. Based on the information in those documents, CMS estimated that expenditures by DHHR, WCD, and PEIA on OxyContin-related substance abuse treatment totaled \$11,360,271.24 from 2000 through 2002. Id. Of that total, CMS found, **47.184 percent** were Medicaid expenditures by DHHR. Id.

Based on the expenditure information described above, CMS allocated to each damages category a percentage of the \$10 million settlement in the following manner. WV Ex. 2, at 3. CMS found that for calendar years 2000-2002, state agency (DHHR, WCD, and PEIA) expenditures for OxyContin prescriptions and substance abuse treatment totaled \$32,456,960.61 - that is, \$21,096,689.37 for OxyContin prescriptions plus \$11,360,271.24 for OxyContin-related substance abuse treatment. Id. Expenditures for OxyContin prescriptions represented 64.999 percent of that total; substance abuse treatment expenditures represented 35.001 percent. Id. Using these percentages, CMS allocated 64.999 percent of the \$10 million settlement - or **\$6,499,900** - to the plaintiffs' count I-related claim for reimbursement of OxyContin prescription expenditures, and 35.001 percent of the settlement - or **\$3,500,100** - to the plaintiffs' count II-related claim for reimbursement of substance abuse treatment expenditures. Id. Thus, before making its allocation, CMS did not reduce the gross settlement amount by the amount of the court-ordered attorneys fees.

Next, to each of these allocated amounts CMS applied the percentage attributed to Medicaid (DHHR) for the relevant expenditure category, as follows:

\$6,499,900 (settlement proceeds allocated to count I for expenditures on Oxycontin prescriptions) **x**
.59079 (Medicaid percentage of OxyContin prescription expenditures for 2000-2002) =

3,840,075.92 (Medicaid's share of the settlement allocated to count I)

\$3,500,100 (settlement proceeds allocated to count II for expenditures on substance abuse treatment) **x .47184** (Medicaid percentage of OxyContin-related substance abuse treatment expenditures for 2000-2002) = **\$1,651,487.18** (Medicaid's share of the settlement allocated to count II)

WV Ex. 2, at 3. Based on these calculations, CMS determined that **\$5,491,563.10** - or **\$3,840,075.92 plus \$1,651,487.18** - was the portion of the OxyContin settlement that constituted a recovery of Medicaid expenditures. WV Ex. 2, at 3. CMS multiplied that total by the State's FMAP of 74.65 percent to arrive at the revised disallowance amount of \$4,099,452.

DHHR timely appealed CMS's March 20, 2009 revised determination of disallowance.

Discussion

DHHR contends that CMS's calculation of the federal government's share of the OxyContin settlement is "arbitrary and capricious" and otherwise unreasonable. DHHR contends that CMS, in applying its allocation methodology, did not account for certain damages claims, improperly relied on the cost or expenditure information produced on remand, and failed to recognize the plaintiffs' costs of bringing the lawsuit. We reject all but one of DHHR's contentions, as we now explain.¹

1. Losses sustained by individual consumers

As outlined above, CMS allocated the OxyContin settlement proceeds among the three state agencies (DHHR, WCD, and PEIA) that were named plaintiffs in the underlying lawsuit. DHHR contends that CMS's allocation overlooked a fourth plaintiff - namely, the class of individual (i.e., private) West Virginia consumers who purchased OxyContin. WV Br. at 2, 5, 11, 12-13.

¹ DHHR also reiterates issues that it concedes were resolved by the Board in DAB No. 2185. WV Br. at 9-10. Since those issues were resolved in our earlier decision, we do not revisit them here.

According to DHHR, the State, through its Attorney General, sued Purdue and the other defendants in its *parens patriae* capacity. Id. at 3. Under the *parens patriae* doctrine, a state may sue to protect its sovereign or quasi-sovereign interest in the well-being of its populace. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600-02 (1982). DHHR contends that the group of individual consumers who purchased OxyContin was a party to the lawsuit under the *parens patriae* doctrine, and that this party (rather than the three state agency plaintiffs) sustained most of the "losses" for which reimbursement was sought under count I of the amended complaint. WV Br. at 2, 12-13. DHHR asserts that these losses totaled \$100,169,345.65 from 1996 through 2002, and that had these losses been factored into CMS's calculations, Medicaid's share of the damages sought for expenditures on OxyContin prescriptions would have been 18 percent, not 59.1 percent (as CMS found). Id. at 6-7, 12-13, 15.

We find no merit in this argument. It is not evident from the record that the State was, at the time of settlement, seeking damages on behalf of individual consumers. During an August 18, 2004 pre-trial hearing, the State plainly indicated that it was pursuing damages on behalf of state agencies that made expenditures for OxyContin, not seeking to recover losses sustained by individual consumers. WV Ex. 10, at 13-14, 30, 34, 36-37. The State's witness designations reflect this intention. According to the transcript of an August 18 pre-trial hearing, the State had designated at least one witness from each of the three state agency plaintiffs. Id. at 47. No mention is made, however, of any witness being designated to testify on behalf of the class of individual West Virginia consumers. Id. (indicating that no witness had been designated from the West Virginia Attorney General's office).

Even assuming the State was seeking damages on behalf of individual West Virginia consumers, DHHR has provided no valid estimate of those damages. In their complaint and elsewhere, the plaintiffs, including the State (in its *parens patriae* capacity), characterized their damages as reimbursement for "expenditures" or costs incurred for OxyContin or OxyContin-related substance abuse treatment. WV Ex. 9, at 15 (¶ 54A-C); WV Ex. 10, at 13, 34. Accordingly, DHHR demands that CMS account for individual consumers' "losses" - a term that we construe to mean actual expenditures or payment obligations incurred by those consumers. In support of that demand, DHHR points to section VIII of its October 8, 2004 Pre-Trial Form. WV Ex. 11. On its face, that document contains no estimate of

losses sustained by individual consumers, only a statement that Purdue's "sales revenue" or "earnings" from its West Virginia operations totaled \$100,169,345.65 from 1996 through 2002. DHHR does not explain how, or from what sources, this figure was derived, and the available evidence suggests that the figure does not, in fact, represent consumers' "losses." In particular, a September 27, 2004 legal memorandum prepared by the plaintiffs' attorneys states that the \$100 million figure represented sales revenue to Purdue "as opposed to what was paid by the state and its citizenry (or their various private third party payors), as the latter would be impossible to calculate without knowing what each drug store charged." CMS Ex. 7 (emphasis added). "Therefore," says this memorandum, "it is difficult to categorize these as 'actual damages' on behalf of the entire State citizenry." Id.

Another difficulty with the \$100 million figure is that it relates to years for which the plaintiffs were not seeking damages. The figure purports to represent OxyContin sales revenue from 1996 through 2002. However, DHHR concedes in its appeal brief that because of the State's two-year statute of limitations, the plaintiffs would have been able to recover only damages running from June 11, 1999 to the date of the settlement. WV Br. at 7 n.4. DHHR made the same representation prior to this appeal, telling CMS in its December 15, 2008 letter that the State's Attorney General had "sought damages only for losses occasioned from 1999 to the date of the settlement." CMS Ex. 1. Thus, even if we agreed (which we do not) that \$100 million constituted an appropriate measure of consumers' "losses" from 1996 through 2002, only losses from June 11, 1999 forward could be considered in calculating the federal share of the OxyContin settlement, and DHHR offered no estimate of consumers' post-June 11, 1999 losses.

Because there is no hard evidence that the State was seeking damages on behalf of individual West Virginia consumers at the time of the OxyContin settlement, and because DHHR failed to furnish information that would enable CMS (or the Board) to place a value on any claim for reimbursement of consumers' losses, we hold that CMS acted reasonably in allocating the settlement proceeds among only the three named state agency plaintiffs.

2. *Substance abuse treatment expenditures*

DHHR's next two objections relate to how CMS valued and allocated the plaintiffs' claim for reimbursement of substance

abuse treatment expenditures. The plaintiffs' October 2004 Pre-Trial Form states that DHHR's Office of Behavioral Health Services (an office whose expenditures are not reimbursed by Medicaid) spent \$2 million annually on "detoxification and in-patient substance abuse treatment." WV Ex. 11, at 10. In addition, DHHR's November 12, 2008 letter to CMS states that the West Virginia Medicaid program expended \$1,786,757.08 for substance abuse treatment from January 1 through December 31, 2000. CMS Ex. 1. Based on this information, CMS determined that the state agency plaintiffs expended \$11,360,271.24 for OxyContin-related substance abuse treatment from 2000 through 2002.² WV Ex. 2, at 2. CMS tabulated these expenditures as follows:

Calendar Year (1)	DHHR -- Behavioral Health (2)	DHHR -- Medicaid (3)	Total (4)
(a) 2000	\$2,000,000	\$1,786,757.08	\$3,786,757.08
(b) 2001	\$2,000,000	\$1,786,757.08	\$3,786,757.08
(c) 2002	\$2,000,000	\$1,786,757.08	\$3,786,757.08
(d) Total Lines a+b+c	\$6,000,000	\$5,360,271.24	\$11,360,271.24
Percent of amount in col. 4, line d	52.815%	47.184%	100%

DHHR contends that CMS's calculation of Medicaid's relative share of substance abuse treatment expenditures overlooks evidence of "drug treatment costs" incurred by another state agency - the West Virginia Department of Military Affairs and

² Because DHHR provided no data about Medicaid expenditures for substance abuse treatment during calendar years 2001 and 2002, CMS assumed that Medicaid expenditures on OxyContin-related substance abuse treatment for each of those years were \$1,786,757.08, which was the amount of expenditures that CMS found had been made by Medicaid for that purpose in calendar year 2000. WV Ex. 2. DHHR takes no issue with that assumption, nor does it question CMS's finding that the State's Medicaid program expended \$1,786,757.08 for treatment of OxyContin abuse or addiction in calendar year 2000.

Public Safety (DMAPS).³ WV Br. at 2. The "evidence" that DHHR cites for this proposition is the following passage from the plaintiffs' Pre-Trial Form:

[T]he West Virginia Department of Public Safety, after conducting an exhaustive case file review on current incarcerated, has calculated the annual impact of OxyContin on its operations as \$2,833,112.

WV Ex. 11, at 10-11. For the following reasons, we disagree that CMS acted unreasonably in not accounting for the costs mentioned in this passage. First, despite ample opportunity and specific requests by CMS to produce evidence of relevant expenditures on remand, DHHR inexplicably failed to identify these alleged DMAPS costs on remand. Second, neither the complaint nor the amended complaint in the underlying lawsuit asserted claims on behalf of DMAPS. Unlike DHHR, WCD, and PEIA, DMAPS was not a named plaintiff, and there is no other evidence in those documents that the State was asserting (or could have asserted) a claim on DMAPS's behalf in its *parens patriae* capacity. In fact, no mention at all is made of DMAPS in either the amended complaint or the parties' settlement agreement.

Third, there is no evidence that the DMAPS costs mentioned in the Pre-Trial Form were for substance abuse treatment. The Pre-Trial Form states that those costs were related to correctional "operations" but failed to provide any additional detail about the nature of those operations. The apparent basis for the statement in the Pre-Trial Form was a survey of prisoners' files to determine the extent to which OxyContin played a role in the criminal activity that resulted in their incarceration, or in the commission of prison infractions. CMS Ex. 11. DMAPS reported the survey results in an August 19, 2004 letter to the West Virginia Attorney General's Office, stating there that OxyContin's total annual "impact" on correctional costs was \$2,933,112. Nothing in the August 19 letter, however, indicates that this impact reflected costs of substance abuse treatment.

³ DHHR refers in its appeal brief to costs incurred by the West Virginia State Police, a division of the WVDPS, but it is clear that DHHR is actually speaking of costs incurred by WVDPS's Division of Corrections. Compare CMS Ex. 11 and WV Ex. 11, at 10.

DHHR next contends that the expenditure information on substance abuse treatment that it provided to CMS in its November 12, 2008 letter was an improper basis for allocating settlement proceeds to Medicaid because the information "was not part of the evidence in the underlying litigation." WV Br. at 11. West Virginia refers to this information as "newly mined data." Id. at 14. Based on the information provided on November 12, 2008, CMS determined that from 2000 through 2002, Medicaid had made annual expenditures of \$1,786,757.08 for treatment of OxyContin abuse or addiction. CMS Ex. 1, at 2. Suggesting that the plaintiffs did not intend, or were unable, to prove the existence of those expenditures during the litigation, DHHR asserts that "CMS cannot base disallowance decisions on what amounts to second-guessing of the state's discovery and litigation strategy, and on claims that were never brought in the litigation." WV Br. at 11; see also id. at 14. We reject this argument as well. The amended complaint indicates that the plaintiffs, including DHHR, sought reimbursement for "all costs expended" for OxyContin-related substance abuse treatment. WV Ex. 9, at 18 (¶ 62) (emphasis added). We see no contemporaneous evidence that DHHR dropped or waived its claim for reimbursement of Medicaid's substance abuse treatment expenditures prior to the settlement. Moreover, in a letter dated December 15, 2008, DHHR represented to CMS that the Medicaid expenditure information provided on November 12, 2008 constituted "Count Two substance abuse treatment data relevant to the allegations contained in the OxyContin Complaint." CMS Ex. 1. DHHR does not explain why it submitted this information if it did not intend for CMS to rely upon it.

DHHR asserts that CMS's use of this "newly mined data" is contrary to the Supreme Court's holding in Arkansas Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268 (2006). WV Br. at 14-15. DHHR suggests, with no supporting argument, that CMS is using this evidence unfairly to "maximize" Medicaid's claim against the settlement relative to the claims of other plaintiffs. Id. at 15. We have already rejected DHHR's characterization of the expenditure data as "newly mined," and Ahlborn is not on point. That case involved construction of third party liability statutes which are not at issue here. Furthermore, in Ahlborn, the party that was attempting to "maximize" its recovery was the state, not the federal government. In any event, we see no unfairness here. As we have explained, CMS has (with the one qualification discussed in the next section) reasonably determined the amount of the settlement that represents a recovery of Medicaid expenditures.

3. Attorneys fees

DHHR contends that CMS's method of calculating the federal government's share of the OxyContin settlement is arbitrary and capricious because it "fails to take into account the legitimate costs of settlement, including attorney fees." WV Br. at 1-2, 18-21 (emphasis added). DHHR states, and CMS does not dispute, that the plaintiffs paid \$3,333,333 in court-ordered attorneys fees from the settlement proceeds.⁴ WV Br. at 8.

When CMS re-calculated (on remand) the federal government's share of the settlement, CMS did not, in fact, subtract the plaintiffs' attorneys fees from the total settlement payment of \$10 million, even though the trial court had ordered that attorneys fees be paid out of that amount. In its revised determination of disallowance, CMS asserted that the issue of attorneys fees would be resolved in accordance with State Health Official (SHO) Letter 08-004 if and when DHHR claims those expenses as "administrative costs" of its Medicaid program. CMS Ex. 1.

SHO 08-004, issued by CMS on October 28, 2008, states that its purpose is to "explain[] [CMS] policy regarding the refunding of the Federal share of Medicaid overpayments, damages, fines, penalties, and any other component of a legal judgment or settlement when a State recovers pursuant to legal action under its State False Claims Act (SFCA)." WV Ex. 14. The letter also "explains what amounts must be returned to the Federal Government on any recovery, the proper accounting of the [qui tam] relator's share and litigation expenses, and the time frame for refunding the Federal share of any State FCA recovery." Id. As legal support for the announced refunding policies, SHO 08-004 cites sections 1903(d)(2)(A) and 1903(d)(3)(A) of the Social Security Act. Id. According to SHO 08-004, these provisions "require[] that the amounts recovered by a State through a State FCA action be refunded at the Federal Medical Assistance Percentage (FMAP) rate." Id. This mandate, says the letter, "demands that a State return not only the Federal amount originally paid attributable to fraud or abuse, but also an FMAP-rate proportionate share of any other recovery." Id.

⁴ DHHR proposes that CMS take into account only plaintiffs' "attorneys fees" and no other related litigation costs or expenses.

SHO 08-004 further states in relevant part:

For State FCA legal actions neither the relator's share, or legal expenses (whether borne by the State or the relator) or other administrative costs arising from such litigation, may be deducted from the Federal portion of the entire proceeds of the litigation. A state must return the Federal portion of such recoveries at its applicable FMAP rate for medical services in recognition of the overpayment that resulted from a payment for Medicaid services. Historically, costs that are in support of the proper and efficient administration of a State's Medicaid program are recognized as administrative costs and not service costs. To the extent attributable to Medicaid recoveries, these costs may be the basis for claims for reimbursement as an administrative cost that benefits the Medicaid program and reimbursed at the regulatory administrative percentage rate. . . .

WV Ex. 14, at 3 (footnote omitted, emphasis added). Thus, it appears from CMS's reliance on these passages and the revised determination of disallowance in this case that CMS is requiring the State here to return the FMAP share of the entire Medicaid-related recovery, including any relevant portion of that recovery that was used to pay the State's attorneys fees. Once this occurs, according to CMS, DHHR must separately claim federal reimbursement for any litigation-related attorneys fees as "administrative costs" of the Medicaid program. (The federal government reimburses most Medicaid administrative costs at a rate of 50 percent. Social Security Act § 1903(a)(2)(B).)

DHHR responds that CMS has reneged on a concession in the prior proceeding (Docket No. A-07-135) that attorneys fees would be factored into its calculation of the federal government's share of the OxyContin settlement proceeds. WV Br. at 18-20. DHHR further contends that CMS is seeking to apply SHO 08-004 retroactively in violation of DHHR's right to due process and section 706(2)(C) of the Administrative Procedure Act (APA). Id. at 20. In addition, citing positions taken by the state of Alabama in a pending federal lawsuit, DHHR contends that SHO 08-004 is legally invalid on various grounds. Id. at 19-20. Finally, DHHR raises policy (as opposed to legal) objections to SHO 08-004. Id. at 20.

For the following reasons, and based on the particular circumstances of this case, we have determined to require

deduction of the plaintiffs' attorneys fees (totaling \$3,333,333) from the gross settlement amount (\$10 million) prior to calculation of Medicaid's share of the settlement. First, CMS has not persuaded us that the OxyContin settlement falls within the ambit of SHO 08-004. By its terms, SHO 08-004 applies to damages, fines, and other recoveries made under a state False Claims Act. Nothing in the record indicates that the OxyContin lawsuit was brought under a state False Claims Act.⁵

Second, CMS's reliance on SHO 08-004, which was issued after the original disallowance determination, raises potential notice and retroactivity concerns that CMS did not fully explore in its brief. See 5 U.S.C. § 552(a)(1) (providing that "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."); Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, . . . administrative rules will not be construed to have retroactive effect unless their language requires this result."). Since there are other reasons for our conclusion that attorneys fees should be deducted from the gross settlement, it is unnecessary to resolve the notice and retroactivity issues here, except to note that they are matters of concern that could not be resolved without further development of the parties' arguments and the record.

Third, CMS's proposed course of action fails to recognize that the state trial court, in compliance with the litigants' settlement agreement, expressly ordered that attorneys fees be paid from proceeds of the settlement, leaving the State with a net recovery of approximately \$6.67 million. We recognize that

⁵ We recognize that the policies announced in SHO 08-004 purport to be based, in part, on provisions of section 1903(d) of the Social Security Act - provisions which the Board relied upon in DAB No. 2185 to conclude that the federal government was entitled to a share of the OxyContin settlement. However, those provisions do not directly address the handling of attorneys fees in settlements of overpayments. Furthermore, CMS has not explained why the policies in SHO 08-004 would necessarily extend to a recovery, like the State's, that was made outside the context of state false claims act litigation.

the way in which a State's recovery is defined or structured by a state court or the parties to the litigation is not dispositive of the issue before us. How a Medicaid recovery is defined for these purposes is ultimately a matter of federal law. However, CMS has not persuaded us that federal law requires or even suggests that we ignore, in the circumstances presented here, the substance of the underlying transactions, which, as indicated, left the State with a net recovery of \$6.67 million.⁶

Finally, CMS's position is seemingly inconsistent with the approach it took in another recent and factually analogous case involving the State. In West Virginia Dept. of Health and Human Services, DAB No. 2250 (2009), the State, on behalf of three of its agencies, including DHHR, sued Dey, Inc. and other drug manufacturers in state court, alleging that the defendants had deliberately and fraudulently overstated the average wholesale prices of their drugs. DAB No. 2250, at 3-4. The plaintiffs reached a pre-trial settlement with Dey in which Dey agreed to pay the plaintiffs \$850,000. Id. at 4-5. The settlement separately required Dey to pay another \$250,000 for attorneys fees and other costs incurred by the plaintiffs for legal work performed by its outside (private) attorneys. Id. at 5. Asserting that a portion of the settlement proceeds constituted a recovered Medicaid overpayment, CMS issued a disallowance to recover the federal share of that overpayment. However, in calculating the disallowance, CMS did not include the attorneys fees and costs awarded to the plaintiffs as part of the settlement. Although that case was pending before the Board for approximately six months after the issuance of SHO 08-004, CMS made no attempt to revise its disallowance determination to

⁶ CMS indicates that treating attorneys fees as administrative costs would be consistent with Board precedent, citing our decisions in California Dept. of Health Services, DAB No. 1139 (1990) and California Dept. of Health Services, DAB No. 1240 (1991). Response Br. at 19 & n.67. Although the cases cited did treat attorneys fees as administrative costs, neither decision addresses whether a state Medicaid agency's attorneys fees should be deemed part of a Medicaid recovery in the circumstances here. DAB No. 1240, for example, concerned "administrative hearing and handling costs," not attorneys fees. The other California decision, DAB No. 1139, did not involve a Medicaid overpayment recovery.

conform with the policies announced in that letter. CMS has not explained why it is seeking to handle the attorneys fees issue differently in the pending appeal.

For these reasons, we agree with DHHR that, in the specific circumstances of this case, calculation of the disallowance should account for the plaintiffs' attorneys fees. We thus exclude the attorneys fees paid from the OxyContin settlement proceeds from CMS's calculation of the federal share of those proceeds.⁷ As a result, total allocable settlement proceeds, net of attorneys fees, are \$6,666,667, not \$10,000,000. With that change, the federal share of the net settlement proceeds is calculated as follows:

(1) Net Settlement Proceeds:	\$6,666,667
(2) Net Settlement Proceeds Allocable to Count I (line 1 multiplied by .64999)	\$4,333,267
(3) Net Settlement Proceeds Allocable to Count II (line 1 multiplied by .35001)	\$2,333,400
(4) Medicaid Share of Net Settlement Proceeds Allocated to Count 1 (line 2 multiplied by .59079)	\$2,560,051
(5) Medicaid Share of Net Settlement Proceeds Allocated to Count II (line 3 multiplied by .47184)	\$1,100,991
(6) Total Net Settlement Proceeds Allocated to Medicaid (line 4 plus line 5)	\$3,661,042
(7) Federal share of Net Settlement Proceeds (line 6 multiplied by .7465)	\$2,732,968

⁷ Our decision to take this approach should not be viewed as an indicator of how we would necessarily decide this issue in another case in which circumstances differ or the issue arises after SHO 08-004 was in effect.

Based on these calculations, we conclude that under our decision in DAB No. 2185, CMS is entitled to recover a total disallowance amount of \$2,732,968.⁸

Conclusion

The Board previously determined that the federal government is entitled to an appropriate or equitable share of the funds received by the state of West Virginia pursuant to the Settlement Agreement and Release in State of West Virginia ex rel. Darrell V. McGraw, Jr., et al. v. Purdue Pharma, L.P., et al. West Virginia Dept. of Health and Human Resources, DAB No. 2185, at 22. We now conclude that the federal government's appropriate or equitable share of those settlement funds is \$2,732,968.

_____/s/
Stephen M. Godek

_____/s/
Leslie A. Sussan

_____/s/
Sheila Ann Hegy
Presiding Board Member

⁸ In its reply brief, DHHR asks that we offset the disallowance with amounts paid by Purdue to settle a federal lawsuit which alleged that Purdue had caused the submission of false claims for OxyContin to Medicaid and other governmental health care programs. Reply Br. at 7-9. However, DHHR cites no legal authority requiring CMS or the Board to make the proposed offset, nor does DHHR propose any method by which we could allocate a portion of the federal settlement, which has nationwide applicability, to the State's Medicaid program.