

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**WISCONSIN DID NOT
REPORT AND REFUND
THE FULL FEDERAL SHARE OF
MEDICAID-RELATED SETTLEMENTS
AND A JUDGMENT**

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A-05-17-00041

Office of Inspector General

<https://oig.hhs.gov>

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OFFICE OF AUDIT SERVICES FINDINGS AND OPINIONS

The designation of financial or management practices as questionable, a recommendation for the disallowance of costs incurred or claimed, and any other conclusions and recommendations in this report represent the findings and opinions of OAS. Authorized officials of the HHS operating divisions will make final determination on these matters.

Report in Brief

Date: December 2018

Report No. A-05-17-00041

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES
OFFICE OF INSPECTOR GENERAL



Why OIG Did This Review

Through previous work performed at the Wisconsin Medicaid Fraud Control Unit, OIG learned that Wisconsin had recovered significant damages from Medicaid-related settlements and a legal judgment with various pharmaceutical companies. Wisconsin is required to report recoveries for these damages on the Quarterly Medicaid Statement of Expenditures for the Medical Assistance Program (Form CMS-64) and to refund the Federal share to the Federal Government. We could not determine whether Wisconsin reported the recoveries it received without conducting an audit because it did not report any amount where it should have reported settlements and a judgment on the Form CMS-64.

Our objective was to determine whether Wisconsin reported and returned the entire Federal share of Medicaid-related settlements and judgments for the period October 2008 through September 2016.

How OIG Did This Review

We worked with Wisconsin to identify what portion of the \$159.5 million for eight settlements and one judgment received was included on the Form CMS-64 reports. We obtained legal documents related to the settlements and the judgment, and we obtained Wisconsin's documentation supporting its reporting of the settlements and judgment on the Form CMS-64 to determine whether Wisconsin reported the correct Federal share.

Wisconsin Did Not Report and Refund the Full Federal Share of Medicaid-Related Settlements and a Judgment

What OIG Found

Wisconsin did not report and return \$27.6 million (Federal share) of Medicaid-related settlements and a judgment for the period October 2008 through September 2016. Specifically, it (1) underreported \$18.7 million (Federal share) for six settlements and one judgment by computing the Federal share only on the net proceeds received after fees and interest were removed and (2) failed to report any of the \$9.0 million (Federal share) for two settlements.

Wisconsin did not properly report the settlements and a judgment because it (1) lacked policies that addressed the reporting of recoveries from State actions taken because of harm to its Medicaid program and (2) did not have procedures to help ensure that it reported recoveries on the Form CMS-64.

What OIG Recommends and Wisconsin Comments

We recommend that Wisconsin (1) refund \$27.6 million to the Federal Government; (2) determine whether settlements and judgments received after September 30, 2016, were reported, and refund the Federal share of any recoveries not reported in their entirety; and (3) implement policies to ensure that all settlements and judgments are reported properly.

In written comments on our draft report, Wisconsin considered CMS's State health official letter regarding the refunding of the Federal share of Medicaid-related settlements or judgments as unlawful and not applicable to the audit. Wisconsin did not concur with the amount to be refunded in our first recommendation because it objected to awarded attorney fees, forfeitures, penalties, and other judgment costs and related interest being included in the amount that it should have reimbursed the Federal Government. Wisconsin accepted the second and third recommendations and stated that they had been implemented.

After reviewing the State agency's comments, we maintain that our findings and recommendations are valid. During the period of our audit, CMS's letter was effective in Wisconsin and applied to Wisconsin's refunding of the Federal share of Medicaid overpayments, damages, fines, penalties, and any other component of a settlement or judgment. We are unsure whether Wisconsin followed our second and third recommendations properly because we consider settlements and judgments to be properly reported when they are in accordance with CMS's letter.

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INTRODUCTION

WHY WE DID THIS REVIEW

Through previous work performed at the Wisconsin Medicaid Fraud Control Unit, the Office of Inspector General (OIG) learned that Wisconsin had recovered significant damages from multiple settlements and a legal judgment with various pharmaceutical companies.¹ Wisconsin is required to report recoveries for these damages on the Quarterly Medicaid Statement of Expenditures for the Medical Assistance Program (Form CMS-64) and to refund the Federal share to the Federal Government.²

We could not determine whether the Wisconsin Department of Health Services (State agency) reported recoveries it received without conducting an audit because it did not report any amount where it should have reported settlements and a judgment on the Form CMS-64.

OBJECTIVE

Our objective was to determine whether the State agency reported and returned the entire Federal share of Medicaid-related settlements and judgments for the period October 1, 2008, through September 30, 2016 (Federal fiscal years (FYs) 2009 through 2016).

BACKGROUND

The Medicaid Program

The Medicaid program provides medical assistance to certain low-income individuals and individuals with disabilities (Title XIX of the Social Security Act (the Act)). The Federal and State Governments jointly fund and administer the Medicaid program. At the Federal level, CMS administers the program. Each State administers its Medicaid program in accordance with a CMS-approved State plan. The State plan establishes which services the Medicaid program will cover. Although a State has considerable flexibility in designing and operating its Medicaid program, it must comply with Federal requirements.

The Federal Government pays its share of a State's medical assistance costs (Federal share) under the Medicaid program on the basis of the Federal medical assistance percentage (FMAP), which changes each FY and varies depending on the State's relative per capita income. The State agency is responsible for computing and reporting the Federal share, which is based on

¹ *Wisconsin State Medicaid Fraud Control Unit: 2016 Onsite Review* (OEI-07-16-00240), issued May 31, 2017.

² "CMS" refers to the Centers for Medicare & Medicaid Services. Settlements and judgments should be reported first on line 3, Settlements/Judgments, of the Form CMS 64.9C1; the reported amount then flows as a credit to line 9c of the Form CMS-64.

total computable costs multiplied by the FMAP. The total computable amount and the Federal share are both reported on the Form CMS-64.

The Federal Share of Recoveries Is Computed on the Entire Recovery

On October 28, 2008, CMS issued to State health officials (SHOs) a letter (SHO #08-004) that interprets section 1903(d) of the Act regarding overpayments. This letter states: “Any State action taken as a result of harm to a State’s Medicaid program must seek to recover damages sustained by the Medicaid program as a whole, including both Federal and State shares The Federal Government is entitled to the applicable FMAP share of a State’s entire recovery.” This applies irrespective of whether the State action is pursuant to a State False Claims Act or other State statutory or common law cause of action.

Wisconsin Settlements and Judgment Received

According to information provided by the State agency, during FYs 2009 through 2016, Wisconsin received 14 settlements and 1 judgment totaling \$201,448,861.³ Six of the fourteen settlements involved only the State share because the Federal Government pursued its share separately.⁴ These six settlements did not need to be reported on the Form CMS-64 because they did not include the Federal share in the settlement amount. The remaining eight settlements and one judgment, totaling \$159,532,745, contained Federal and State shares, and the State agency should have reported the FMAP-proportionate share of the entire settlement or final judgment amount on the Form CMS-64.

State Agency Process for Recording Recoveries

Although the State agency did not have written policies, State agency officials explained to us how they record recoveries. When entities pay settlements or judgments, the State agency’s Office of Inspector General receives the payments from the Wisconsin Department of Justice (DOJ). Next, the State agency official who completes the Form CMS-64 is informed of these payments. If DOJ lawyers are able to determine the years covered by the settlement or judgment, the State agency uses an average FMAP to compute the Federal share. If the DOJ

³ State agency staff told us they were not aware of other settlements or judgments during FYs 2009 through 2016. We conducted web searches and found news articles and Wisconsin Department of Justice news releases that involved recoveries made by the U.S. Department of Justice, which are known as global recoveries. Global recoveries are facilitated by the National Association of Medicaid Fraud Control Units, which remove the Federal share from settlements or judgments before distributing State shares to the States involved; therefore, the Federal share of global recoveries is not reported as a credit on the Form CMS-64. We could not find any other State action regarding Medicaid that resulted in recoveries for Wisconsin and that would contradict what State agency staff said.

⁴ According to CMS’s SHO #08-004 letter, a State may seek to recover only the State share if appropriate Federal and State authorities agree to sever the Federal and State portions and pursue them as separate actions.

lawyers cannot determine the years covered by the settlement or judgment, the State agency uses the FMAP in effect at the time the settlement or judgment payment is received. The State agency official responsible for completing the Form CMS-64 computes the Federal share based on the average FMAP or current FMAP. The computed Federal share is reported on line 9D of the Form CMS-64 for the quarter in which the proceeds are received.

HOW WE CONDUCTED THIS REVIEW

We worked with the State agency to identify what portion of the \$159,532,745 for eight settlements and one judgment received from October 1, 2008, through September 30, 2016, was included on the Form CMS-64 reports. We obtained legal documents related to the settlements and the judgment, and we obtained the State agency's documentation supporting its reporting of the settlements and judgment on the Form CMS-64 to determine whether the State agency reported the correct Federal share.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix A contains the details of our audit scope and methodology, Appendix B contains the Federal share of the settlements and judgment to be refunded, and Appendix C contains the Federal requirements related to reporting settlements and judgments.

FINDINGS

The State agency should have reported \$153,636,947 (\$90,767,177 Federal share) on the Form CMS-64 for eight Medicaid-related settlements and a judgment for the period October 1, 2008, through September 30, 2016, but reported only \$63,154,397 (Federal share).⁵ The State agency did not report and return \$27,612,780 (Federal share) of Medicaid-related settlements and a judgment for the period October 1, 2008, through September 30, 2016. Specifically, it:

- underreported \$18,653,767 (Federal share) for six settlements and one judgment by computing the Federal share only on the net proceeds received after fees and interest were removed and
- failed to report any of the \$8,959,013 Federal share for two settlements.

⁵ The State agency did not need to report on the Form CMS-64 the remaining recoveries of \$5,895,798; \$5,759,750 was non-Medicaid recoveries from the judgment, and \$136,048 was part of a Federal settlement in which a portion of the Federal share was already removed.

The State agency did not properly report Medicaid-related settlements and a judgment because it lacked policies to address the reporting of recoveries from State actions taken because of harm to the State's Medicaid program, and the State agency did not have procedures to help ensure that it reported recoveries on the Form CMS-64.

THE STATE AGENCY DID NOT REPORT THE FULL FEDERAL SHARE OF SETTLEMENTS AND A JUDGMENT

The CMS SHO letter #08-004 interprets section 1903(d) of the Act regarding overpayments. The letter states: "Any State action taken as a result of harm to a State's Medicaid program must seek to recover damages sustained by the Medicaid program as a whole, including both Federal and State shares The Federal Government is entitled to the applicable FMAP share of a State's entire recovery."

The SHO letter also explains that legal expenses or other administrative costs arising from litigation may not be deducted from the Federal portion of the entire proceeds of the litigation. It states: "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 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 regular administrative percentage rate."

The State agency underreported \$18,653,767 (Federal share) for six settlements and one judgment during our audit period. The State agency computed the Federal share of the net proceeds after legal fees and court fees were removed and not on the State agency's entire recovery. For the judgment, which included interest, the State agency did not include the Federal share of interest on the Form CMS-64. The State agency believed that CMS was not entitled to any Federal share of the interest because the State, not CMS, funded the case. The State agency lacked policies to address the proper reporting of recoveries from State action.

THE STATE AGENCY DID NOT REPORT ANY OF THE FEDERAL SHARE FOR TWO SETTLEMENTS

The *Medicaid Program Integrity Manual* (chapter 11, 11035) instructs the State agency to report on line 3 of CMS-64 Feeder Form 64.9C1 overpayments collected from settlements or judgments "against a Medicaid provider for violations of Medicaid laws, rules, regulations or policies. A settlement occurs when there is a negotiated agreement of the overpayment amount between the State and the provider."

The State agency failed to report \$8,959,013 (Federal share) that it received for two settlements. The State agency said that it did not report the settlements on the Form CMS-64 because of an oversight on its part. The State agency lacked policies that addressed reporting of recoveries from State action, and the State agency did not have procedures to help ensure that it reported recoveries on the Form CMS-64.

RECOMMENDATIONS

We recommend that the State agency:

- refund \$27,612,780 to the Federal Government;
- determine whether settlements and judgments received after September 30, 2016, were reported, and refund the Federal share of any recoveries not reported in their entirety; and
- implement policies to ensure that all settlements and judgments are reported properly.

STATE AGENCY COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE

STATE AGENCY COMMENTS

In written comments on our draft report, the State agency partly agreed and partly disagreed with our findings and recommendations. The State agency said that the Federal Government is not entitled to share in attorneys' fees, non-Medicaid damages and civil forfeitures, or interest on such sums. The State agency said that the CMS SHO letter #08-004 is unlawful and not applicable to the audit. The State agency also stated that reliance on the SHO letter is inappropriate under the directive issued in the January 25, 2018, memorandum from United States Associate Attorney General Rachel Brand ("Brand memo"). The State agency said that the Brand memo made it clear that guidance documents such as the CMS SHO letter #08-004 cannot create binding rules.

Regarding our first recommendation, the State agency did not concur with the amount to be refunded to the Federal Government. The State agency objected to including attorneys' fees, forfeitures, penalties, and other judgment costs and related interest in the amount to be refunded, and asserted that the amount should be \$6,064,976 after the State agency reduced the amount by \$1,401,256 that it believed it overpaid. The State agency accepted our second recommendation to review settlements and judgments received after September 30, 2016, and stated that it had determined that any such receipts were properly reported and the appropriate Federal share refunded. The State agency accepted our third recommendation and stated that it had implemented this recommendation.

The State agency also provided technical comments. The State agency's comments, excluding the technical comments, are included as Appendix E.

OFFICE OF INSPECTOR GENERAL RESPONSE

After reviewing the State agency's comments, we maintain that our findings and recommendations are valid. OIG audits are not subject to the directives issued in the Brand memo. The Brand memo clearly states that it "does not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal" (Brand memo, page 2). During the period of our audit, the CMS SHO letter #08-004 was effective in Wisconsin and applied to the State agency's refunding of the Federal share of Medicaid overpayments, damages, fines, penalties, and any other component of a settlement or legal judgment. It applied to any State action taken as a result of harm to a State's Medicaid program irrespective of whether the State action was pursuant to a State False Claims Act or other State statutory or common law cause of action. The CMS SHO letter #08-004 explains that legal expenses or other administrative costs may not be deducted from the entire recovery before returning the Federal portion at its applicable FMAP rate for medical services. The letter further explains that the State agency may claim these as administrative costs and that the Federal Government reimburses these costs at the regular administrative percentage rate.

Regarding our first recommendation, we maintain that the Federal Government is entitled to the applicable FMAP share of a State's entire recovery and that the State agency should refund the applicable FMAP for attorneys' fees and other amounts recovered in accordance with the CMS SHO letter #08-004. In its comments regarding the judgment, the State agency used amounts different from the amounts shown on the documentation given to us during our fieldwork. We added an appendix (Appendix D) to describe how we identified \$26,817,995 as the entire Medicaid amount recovered from the judgment. We based our amounts on DOJ's actual breakdown of the \$32,577,745 received from the judgment. The judgment awarded damages for violations of both Medicaid and consumer fraud laws and awarded forfeitures under the State's Medicaid fraud forfeiture statute. We classified the Medicaid damages, forfeitures, and accrued interest on those values as amounts directly recovered for Medicaid, and we classified the damages awarded for violation of the consumer fraud law and related interest accrued as non-Medicaid recoveries. We apportioned the remainder based on the ratio of Medicaid to non-Medicaid damages awarded in the original judgment.

Although the State agency accepted our second and third recommendations and said it had implemented them, we did not confirm that they had been implemented. Furthermore, considering the State agency's position on the CMS SHO letter #08-004, we are unsure whether the State agency followed our recommendations properly. We consider settlements and judgments to be properly reported when the Federal share returned is based on the entire recovery in accordance with the CMS SHO letter #08-004.

APPENDIX A: AUDIT SCOPE AND METHODOLOGY

SCOPE

We reviewed \$159,532,745 for eight settlements and one judgment Wisconsin received during our audit period, October 1, 2008, through September 30, 2016. We obtained supporting documentation for the settlements and judgment to determine whether the State agency reported the correct Federal share.

We did not review the State agency's overall internal control structure. Rather, we reviewed only those internal controls related to our objective.

We performed fieldwork at the State agency offices in Madison, Wisconsin, from September 2017 through March 2018.

METHODOLOGY

To accomplish our objective, we:

- reviewed applicable Federal laws, regulations, and guidance;
- worked with CMS staff to obtain an understanding of where on the Form CMS-64 States should report settlements and judgments;
- obtained a document that summarized the settlements and judgment Wisconsin received during our audit period;
- obtained legal documents related to the settlements and the judgment;
- obtained the State agency's documentation supporting its reporting of the settlements and judgment on the Form CMS-64;
- obtained policies and procedures for depositing the receipt of State recoveries;
- interviewed State agency personnel to understand:
 - actions Wisconsin has taken as a result of harm to the State's Medicaid program,
 - how information regarding settlements and judgments was shared among staff, and
 - how settlements and judgments were reported to the Federal Government;

- reviewed the documents received to determine whether the State agency returned the entire Federal share of its recoveries;
- calculated the difference between what the State agency should have reported to CMS and what the State agency actually reported; and
- discussed the results of our review with State agency officials on March 29, 2018.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

APPENDIX B: FEDERAL SHARE OF SETTLEMENTS AND A JUDGMENT TO BE REFUNDED

Table 1: Difference Between Federal Share of Actual and Reported Judgment and Settlement Amounts*					
Recoveries	Total Computable	FMAP	Federal Share Should Be	Federal Share Reported	Difference
Judgment	\$26,817,995**	0.5841	\$15,664,391	\$7,646,347	\$8,018,044
Settlement 1	59,863,952***	0.59225	35,454,426	29,531,925	5,922,501
Settlement 2	23,580,000	0.6025449	14,208,009	11,840,008	2,368,001
Settlement 3	17,200,000	0.5870784	10,097,748	8,415,183	1,682,565
Settlement 4	7,750,000	0.59	4,572,500	4,181,507	390,993
Settlement 5	2,000,000	0.5938	1,187,600	1,009,460	178,140
Settlement 6	1,050,000	0.5938	623,490	529,967	93,523
Total	\$138,261,947		\$81,808,164	\$63,154,397	\$18,653,767

* Dollar amounts are rounded to the nearest dollar.

** The total amount received from the judgment was \$32,577,745, but \$5,759,750 was related to non-Medicaid damages and their apportioned share of the judgment recovered (see Appendix D).

*** The settlement was for \$60,000,000, but \$136,048 was part of a Federal settlement in which a portion of the Federal share was already removed.

Table 2: Federal Share of Two Settlements Not Reported*					
Recoveries	Total Computable	FMAP	Federal Share Should Be	Federal Share Reported	Difference
Settlement 7	\$8,975,000	0.5827	\$5,229,733	\$0	\$5,229,733
Settlement 8	6,400,000	0.5827	3,729,280	0	3,729,280
Total	\$15,375,000		\$8,959,013	\$0	\$8,959,013

* Dollar amounts are rounded to the nearest dollar.

Table 3: Summary	
Finding	Amounts
The State agency did not report the full Federal share of settlements and a judgment (Table 1).	\$18,653,767
The State agency did not report any of the Federal share for two settlements (Table 2).	8,959,013
Total	\$27,612,780

APPENDIX C: FEDERAL REQUIREMENTS

FEDERAL LAWS

Section 1903(d)(2)(A) of the Act provides that “[t]he Secretary shall . . . pay to the State, in such installments as he may determine, the amount so estimated, reduced or increased to the extent of any overpayment or underpayment which the Secretary determines was made under this section to such State for any prior quarter and with respect to which adjustment has not already been made under this subsection.” Section (d)(3)(A) of the Act provides that “[t]he pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision thereof with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection.”

CMS STATE HEALTH OFFICIAL LETTER

The CMS SHO #08-004 letter dated October 28, 2008, states:

The Act requires that the amounts recovered by a State through a State FCA [False Claims Act] action be refunded at the Federal Medical Assistance Percentage (FMAP) rate. The Act’s broad mandate 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.

Any State action taken as a result of harm to a State’s Medicaid program must seek to recover damages sustained by the Medicaid program as a whole, including both Federal and State shares.⁶ A State may not seek to recover merely the ‘State share’ of computed fraud damages unless appropriate Federal and State authorities formally agree to sever the Federal and State portion of the overpayment and pursue them as separate actions. If there is no formal agreement to sever, a State may not claim in a State FCA case that it is only recovering damages incurred by the State, but not the Federal Government. Nor may a State return merely the Federal portion of ‘single’ damages and retain all other amounts, such as double and treble damages. The Federal Government is entitled to the applicable FMAP share of a State’s entire recovery.

States are also required to return the FMAP percentage on State recoveries based upon actions brought against third parties, such as actions against pharmaceutical companies, alleging inappropriate Medicaid expenditures. Though these third parties are not necessarily directly reimbursed by Medicaid,

⁶ Footnote 1 to CMS’s letter SHO #08-004 explains: “This applies irrespective of whether the State action is pursuant to a State FCA or other State statutory or common law cause of action.”

they may be liable under a State FCA for having caused false or fraudulent claims to be submitted by others. A State may not avoid adhering to the requirements set forth in section 1903(d) of the Act by virtue of pursuing legal action against a person or entity that has caused false or fraudulent claims to be submitted rather than the party that directly submitted false or fraudulent claims.

The FMAP proportionate share of State FCA-based fines, penalties, or assessments imposed against providers or entities are to be refunded. The HHS Departmental Appeals Board has long recognized the Federal Government's entitlement to its proportionate share of civil penalties assessed by States against providers or other entities.

For State FCA legal actions neither the relator's share, nor 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 regular administrative percentage rate. Federal reimbursement is not available for administrative costs that are not directly related to Medicaid recoveries.

CMS MANUALS

The *State Medicaid Manual*, Pub. No. 45, chapter 2, section 2500.1, includes instructions for reporting on line 9.D of the Form CMS-64, where the State agency reported recoveries: "Line 9.D – Other Collections. – Enter the total computable amount in Column (a) and the Federal share in Column (b) of all collections other than TPL [third party liability], probate and overpayment identified through fraud and abuse effort recoveries. Enter refunds, cancellations, and amounts collected by the imposition of a lien under §1917 of the Act and 42 CFR 433.36."

The *Program Integrity Manual*, Pub. No. 100-15, chapter 11 – Form CMS 64 (Rev. 1, Issued: 09-23-11), gives instructions on how to report settlements or judgments.

Chapter 11, section 11035, states: "The Form CMS 64.9C1 feeder form is used to provide detail about the fraud, waste and abuse collection efforts and flows into line 9c of the Form CMS 64."

Chapter 11, section 11035, provides instructions for reporting settlements or judgments on the Form CMS 64.9C1: "Line 3 – Overpayments Collected from Settlements or Judgments Used to report overpayments collected from settlements and/or judgments against a Medicaid provider

for violations of Medicaid laws, rules, regulations or policies. A settlement occurs when there is a negotiated agreement of the overpayment amount between the State and the provider.”

APPENDIX D: MEDICAID SHARE OF JUDGMENT

Table 4: Judgment Amount Received and Amount Apportioned to Medicaid			
Description	Total Judgment Amount Received*	Medicaid Amount	Non-Medicaid Amount
Damages	\$9,000,000	\$7,000,000	\$2,000,000
Interest on damages**	5,291,628	4,115,711	1,175,917
Forfeitures (including related interest)***	6,658,864	6,658,864	0
Attorney fees (including related interest)**	9,458,895	7,356,919	2,101,976
Penalties, other costs, and related interest**	2,168,358	1,686,501	481,857
Total	\$32,577,745	\$26,817,995	\$5,759,750

* We based this column on DOJ’s breakdown of funds and amounts distributed. The State agency received the damages and interest on those damages.

** We apportioned interest on damages, attorney fees, penalties, other costs, and related interest to Medicaid and non-Medicaid amounts based on the ratio of Medicaid to non-Medicaid damages awarded in the original judgment.

*** The court awarded forfeitures under the State’s Medicaid fraud forfeiture statute that were the result of harm to the State’s Medicaid program and not due to violations of a law unrelated to Medicaid. Therefore, we apportioned the full amount of forfeitures and interest received for the forfeitures to Medicaid.



APPENDIX E: STATE AGENCY COMMENTS

State of Wisconsin
Department of Health Services
Scott Walker, Governor
Linda Seemeyer, Secretary

September 14, 2018

Sheri L. Fulcher
Regional Inspector General for Audit Services
Office of Audit Services, Region V
233 North Michigan, Suite 1360
Chicago, IL 60601

Response to OIG Report Number A-05-17-00041 received August 14, 2018
Review of Reporting and Refunding Federal Share of Medicaid-Related Settlements
and a Judgment.

Dear Ms. Fulcher:

This is the Wisconsin Department of Health Services (WI DHS) response to the draft report by the Office of Inspector General (OIG) regarding their review of Wisconsin's reporting and refunding the federal share on Medicaid-related settlements and a judgment. WI DHS agrees in part and disagrees in part with the proposed findings and proposed recommendations.

The WI DHS requests the OIG to revise the proposed findings in accordance with the law as follows:

1. Remove the claim for federal reimbursement in the amount of \$14,984,408 based upon the award of attorneys' fees in six settlements and one judgment.
2. Recognize that WI DHS has a \$1,401,256.00 credit for two overpayments WI DHS made based on court ordered awards to other state agencies for forfeitures, costs and related surcharges.
3. Reduce the claim for federal reimbursement of \$8,959,013 for not reporting two settlements to \$7,466,233, so that it excludes FMAP on awarded attorney fees.
4. Remove reference and reliance on SHO # 08-004 letter, which is an unlawfully promulgated rule.

1. Remove the claim for federal reimbursement in the amount of \$14,984,408 based upon the awarded attorneys' fees in six settlements and one judgment.

A. Remove awarded attorney fees from the refund calculation.

The OIG should revise the proposed findings to eliminate the claim of federal reimbursement based on the award of attorneys' fees in each of the reviewed settlements and judgments. The WI DHS did not claim the attorneys' fees awarded as an administrative expense, nor did the attorneys directly represent WI DHS, so there is no basis for OIG to seek recovery of a federal share. Without federal contribution toward the expense, it is inequitable and unreasonable for the federal government to expect to share in the award.

As noted in Section 1903(d)(3)(A) of the Social Security Act (42 U.S.C. § 1396b(d)(3)(A)), reimbursement should be made only when the "United States is equitably entitled" to a pro rata share of "the net amount recovered." Without federal participation in the payment of attorneys' fees, it is not equitable for the federal government to seek a "refund."

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OIG's proposed recovery contradicts the law, which limits the federal government to a pro rata share of a State's net recovery, not the gross amount recovered and awarded. The OIG's proposed findings also inappropriately seek a punitive federal share on attorneys' fees, despite the fact that the attorneys were not representing WI DHS. Furthermore, the federal government did not contribute toward those fees and the OIG's claim is without legal authority. The audit findings fail to recognize the distinction between the recovery of attorneys' fees, which were originally paid by joint federal/state contributions, and the "award" of attorneys' fees as exists in these circumstances. Since neither WI DHS nor the federal government contributed to the expense of the attorneys, imposing a federal tax of roughly 60% on the award of such costs is inherently unfair as well as violative of the shared responsibilities of the Medicaid program.

A review of one example of OIG's proposed conclusion demonstrates this point. In Settlement 1, if OIG claims a federal share of 59.225% of the entire award, including attorneys' fees, the state share will be reduced to 24.07%, instead of 40.775%. This is because the federal share exceeds its pro rata share of WI DHS's net recovery. Of the roughly \$60 million award, the OIG concluded the federal government is entitled to \$35,454,426, and WI DHS is only entitled to \$14,409,526. OIG's findings would force WI DHS to expend state agency funds for attorney fees paid to a private entity that was retained to provide legal services for a non-Medicaid state agency. This clearly exceeds OIG's federal authority.

We are aware of other similar actions in which CMS acknowledged that it is inequitable for the federal government to seek to share in amounts recovered for violations other than direct damages to the Medicaid program. In 2013, Alaska objected to CMS's attempt to overreach in claiming federal reimbursement. The Attorney General of Alaska argued, as does Wisconsin, that CMS's reliance on SHO Letter #08-004 to collect a federal share on awards of attorneys' fees is not supported by law.¹ WI DHS is informed that in response, CMS abandoned its attempts to seek payments on attorneys' fees and other non-Medicaid related forfeitures.

The Appellate Division of the Departmental Appeals Board (DAB) also found that CMS overreached in its attempt to claim a federal share on attorneys' fees in West Virginia Dept. of Health Services, Decision No. 2278 (October 29, 2009). The DAB found that the proposed course of action "fails to recognize that the state trial court, in compliance with the litigants' settlement agreement, expressly ordered that attorney fees be paid from the proceeds of the settlement, leaving the State with a net recovery of ..." The DAB reduced the federal claim to a pro rata share of the State's net award.

This distinction is compelling because the settlement agreements at issue here clearly distinguish between the award to the state and the award to the private law firm. The litigants' settlement agreement provided that the aggregate settlement be "allocated as follows: (i) \$7,479,170 to the State of Wisconsin and (ii) \$1,495,830 to the law firm of Miner, Barnhill and Galland, P.C." WI DHS did not receive the awarded attorneys' fees. Similar language is found in each settlement agreement.

CMS also acknowledged that damages recovered by states related to non-Medicaid claims are not subject to FMAP recovery in a matter stemming from West Virginia's recovery against Dey, LP.² CMS reduced its disallowance calculation to reflect its actual pro rata share of the state's net recovery, by reducing the portion of the settlement amount allocable to non-Medicaid damages. CMS originally claimed it was entitled to \$634,525, but reduced that figure to \$446,607.

¹ Letter Michael Geraghty, Attorney General to Carol J. Peverly, Centers for Medicare & Medicaid Services, dated January 24, 2013. Copy attached.

² *West Virginia v. Sebelius*, 709 F. Supp.2d 487 (S.D. WV 2010).

In yet another case, also stemming from West Virginia, the DAB “determined to require deduction of the plaintiffs’ attorney’s fees ... from the gross settlement amount ... prior to calculation of Medicaid’s share of the settlement.”³ OIG inappropriately seeks a refund of \$14,984,408 for awarded attorney fees in the six settlements and one judgment.

- B. Reduce the claim of federal reimbursement⁴ in the Judgment to require a federal share solely on the net receipts of Medicaid-related damages plus interest. This would reduce the amount by \$3,669,359.

The federal share of the Judgment should be limited to Medicaid damages only. The OIG’s draft report acknowledges that pursuant to the judgment, the defendant manufacturer paid both Medicaid and non-Medicaid related damages. Pursuant to the Judgment the defendant paid attorneys’ fees and costs which are addressed above. OIG’s findings fail to recognize that forfeitures and the attendant court costs and fees are not program revenue subject to federal share.

The finding asserts that WI DHS owes a federal share on state recovered funds that are not Medicaid-related damages. The payments from the manufacturer included sums related to convictions of Wisconsin deceptive trade practices statutes, as well as forfeitures imposed for prohibited claims violations. Such damages and forfeitures are not recovered overpayments as contemplated by the Social Security Act. OIG’s calculations should not include such funds in its claim for federal recovery.

The defendant manufacturer was found to have violated provisions of Wis. Stat. § 100.18(10)(b), which states in part:

It is deceptive to represent the price of any merchandise as a manufacturer’s or wholesaler’s price, or a price equal thereto, unless the price is not more than the price which retailers regularly pay for the merchandise.

The distinction between damages related to non-Medicaid activities, civil forfeitures and recovery of Medicaid overpayments is recognized by both CMS and the federal courts.⁵ CMS is only entitled to share in the recoveries that are attributable to Medicaid damages.⁶ In the Judgment, over \$11 million of the payments made by the company were not attributable to Medicaid damages. OIG’s proposed findings fail to recognize that distinction.

The forfeitures (\$4,578,000), costs and related interest should also be excluded. WI DHS has included a copy of the judgment entered by the Court on November 30, 2009, which lists the costs and surcharges, all of which (plus the related interest) should be excluded from the reimbursement calculation. Restitution and forfeitures serve different goals.⁷ Restitution is akin to recovery of previous payments that the federal government contributed to. Forfeitures are penal in nature, designed as punishment for violation of Wisconsin law. Under the Wisconsin constitution, those forfeitures are not paid to the Department but rather to the school fund for the benefit of the Wisconsin taxpayers. The federal government has no equitable interest in demanding a share of those forfeitures. If OIG were to enforce this collection, it would effectively be directing Wisconsin’s Medicaid agency to use its state funds to pay for the funding of an unrelated state agency – this grossly exceeds OIG’s authority.

³ *West Virginia v. Sebelius*, 172 F.Supp3d 904, 912 (C.D. WV 2016)

⁴ The Judgment contains three major components, see Attachment A for breakdown of allocations and estimated applicable FMAP amounts for each component.

⁵ *West Virginia v. Sebelius*, 649 F.3d 217 (4th Cir. 2011)

⁶ *West Virginia v. Sebelius*, 172 F. Supp.3d 904 (S.D. WV 2016)

⁷ *U.S. v. Bane*, 720 F.3d 818 (11th Cir. 2013)

Restitution is intended to put the victims in the same position as if the offense had never been committed, not a better one.⁸ The OIG's finding related to the Judgment uses the penalties issued against the manufacturer company to further punish WI DHS, and unjustly enrich the federal government. The total of all damages, forfeitures, attorneys' fees, costs, and interest paid by the defendant was \$32,577,744. OIG determined that \$5,759,750 is not Medicaid related, despite the fact that WI DHS was only awarded \$7,000,000. OIG recommends claiming \$15,664,391 as a refund to the federal government, which is \$1,372,764 more than WI DHS received.

WI DHS received two payments totaling \$14,291,627. The balance of the funds paid by the defendant was given, pursuant to the court judgment, to other entities, i.e. private attorneys, the Wisconsin Department of Justice and the Wisconsin Court system. Under this finding, the federal government reaps a windfall, which is effectively created by improperly taking the judgment awarded to non-Medicaid state agencies, forcing WI DHS to pay \$1,372,764 to cover CMS's claimed appropriation. This leaves no state share for the WI DHS. This is not an equitable outcome as envisioned by 42 U.S.C. § 1396b(d)(3)(A).

This would reduce the amount by \$3,669,359.

2. Recognize that WI DHS has a \$1,401,256.00 credit for the two overpayments WI DHS inadvertently made based on awards received under the Wisconsin Deceptive Trade Practices Act.

The Judgment was misreported by the WI DHS at the time of receipt. The portion of the economic recovery related to Medicaid overpayments is \$7 million plus statutory interest at 12% per year from the date of jury verdict (February 17, 2009) until the date paid (Sept. 9, 2013). WI DHS calculates the total Medicaid recovery (damages plus interest) subject to repayment of FMAP to be \$10,780,000. The balance of the payments from the Judgment is attributable to non-Medicaid damages, forfeitures, costs and attorneys' fees.

WI DHS requests that the findings be corrected to reflect that the refund to the Federal Government is \$6,296,598. WI DHS has previously provided the federal government with \$7,646,347 from this judgment. WI DHS requests that the audit findings be corrected to reflect the Department actually overpaid the FMAP in the amount of \$1,349,749.

As noted, WI DHS reported two sums on Settlement 4. This resulted in an overpayment of federal share by \$51,507. Thus the federal government received \$1,401,256 in excess reimbursement ($\$1,349,749 + \$51,507 = \$1,401,256$) from Settlements 1 through 6 and one Judgment.

3. Reduce the claim of federal reimbursement for not reporting two settlements to \$7,466,233 for the damages awarded excluding attorney fees.

As explained above, the federal government is not entitled to receive reimbursement on an award of attorneys' fees where there has been no federal participation in the expense. WI DHS did not correctly report the receipts in Settlements 7 & 8. The Medicaid damage portions of those settlements, excluding attorneys' fees, are \$7,479,170 and \$5,334,000 respectively.

The federal government is entitled to a return at the FMAP rate of .5827 on the damages received. The amount owed is \$7,466,233. This should be offset further by the overpayment of \$1,401,256 noted above.

⁸ *Id.*, headnote 16.

4. Remove Reference and Reliance on SHO # 08-004 Letter.

The proposed findings incorrectly rely on SHO #08-004, which has been vacated by a federal district court because CMS attempted to create new law/rules through the letter, without providing notice and opportunity to comment.⁹ Additionally, the letter, written in 2008, is not consistent with the requirements of the Affordable Care Act. The reliance on the SHO letter is also inappropriate under the directive issued by Associate Attorney General Rachel Brand, on January 25, 2018, which makes it clear that guidance documents, such as the 2008 SHO letter, cannot create binding rules.¹⁰

Regardless, the 2008 SHO letter is not applicable to this audit. The introductory paragraph of the letter states that it is intended to explain the process of refunding the Federal share “when a State recovers pursuant to legal action under its State False Claims Act.” Wisconsin’s false claim act was found in Wis. Stat. § 20.931 (since repealed). As referenced above in the discussion of the Judgment, the basis of Wisconsin’s recovery is rooted in Wis. Stat. § 49.49 (Medical Assistance Offenses) and/or § 100.18 (Deceptive Trade Practices Act). Because these recoveries are based upon violations of state law distinct from the false claims act process, the SHO letter is not applicable.

This distinction is recognized by DAB Decision No. 2278, issued October 29, 2009.

By its terms, SHO 08-004 applies to damages, fines, and other recoveries made under a state False Claim Act. Nothing in the record indicates that the OxyContin lawsuit was brought under a state False Claim Act.

None of the settlements were premised on Wisconsin’s False Claim Act, either. The preamble in each settlement agreement recites:

The following claims have been asserted in the State Lawsuit: violations of Wisconsin’s Deceptive Trade Practices Act, violations of Wisconsin’s Trust and Monopolies Act, violations of Wisconsin Medical Assistance Fraud Act, and a claim for Unjust Enrichment.

None of the settlements reference Wisconsin’s False Claims Act as a basis for recovery. Under the express language of the SHO letter, it is inapplicable to these settlements.

Conclusion

The proposed audit finding is based upon three individual categories. OIG requests FMAP for unreported legal fees/court fees, interest on six settlements, and one judgment. Two settlements were not reported, for which OIG seeks \$8,959,013.

As noted above, the federal government is not equitably entitled to share in the attorneys’ fees, non-Medicaid damages and civil forfeitures, or interest on such sums. For the six settlements and one judgment in the first category, the finding should be changed to show that WI DHS is entitled to a credit for excessive FMAP payments made on Settlement 4 and the Judgment in the total amount of \$1,401,256.00.

⁹ *Alabama v. CMS*, 780 F. Supp.2d 1219, (N.D. Ala. 2011) *See also Alabama v. CMS*, 674 F.3d 1241 (2012) finding that SHO # 08-004 “is vacated and of no effect.”

¹⁰ Copy enclosed.

The following chart contains the calculations of applicable federal share based upon the correct application of federal-state joint responsibility. The proposed findings should be corrected to reflect the amount to be refunded to the federal government is \$6,064,976.00.

Settlement #	Medicaid Damages Recovered ⁱ	FMAP Rate	Correct Federal Share	Federal Share previously submitted	Federal Share Due
Settlement 1	\$49,863,952.00	0.59225	\$29,531,925.00	\$29,531,925.00	\$0.00
Settlement 2	\$19,650,000.00	0.60254490	\$11,840,007.00	\$11,840,007.71	\$0.00
Settlement 3	\$14,334,000.00	0.58707840	\$8,415,182.00	\$8,415,182.67	\$0.00
Settlement 4	\$7,000,000.00	0.5900	\$4,130,000.00	\$4,181,507.00	-\$51,507.00
Settlement 5	\$1,700,000.00	0.5938	\$1,009,460.00	\$1,009,460.00	\$0.00
Settlement 6	\$892,500.00	0.5938	\$529,966.50	\$529,966.50	\$0.00
Judgment payment 1	\$10,780,000.00	0.5841	\$6,296,598.00	\$6,912,944.00	-\$616,396.00
Judgement payment 2	\$0.00	0.5841	\$0.00	\$733,353.00	-\$733,353.00
Settlement 7	\$7,479,170.00	0.5827	\$4,358,112.36	\$0.00	\$4,358,112.36
Settlement 8	\$5,334,000.00	0.5827	\$3,108,121.80	\$0.00	\$3,108,121.80
					\$6,064,979.00

WI DHS accepts the recommendation to review the settlements and judgments received after September 30, 2016. WI DHS has determined that any such receipts were properly reported and the appropriate federal share refunded. WI DHS accepts the recommendation to implement new policies to ensure that all settlements and judgments are properly reported. WI DHS has fulfilled this recommendation.

WI DHS does not concur in the amount recommended to be refunded to the Federal Government. WI DHS asserts that the amount to be refunded to the Federal Government is \$6,064,976.00.

WI DHS has consulted with our legal representatives, the Wisconsin Department of Justice, regarding the proposed findings and our objections. WI DHS's positions, as stated herein, correctly and accurately reflect the relevant legal requirements. As previously stated, any findings inconsistent with our objections will be vigorously opposed.

Sincerely

/ Linda Seemeyer /

Linda Seemeyer
Secretary

Attachment A
Applicable FMAP Amounts on Judgment

Description of items included in Judgment	Dollar Amount received under Judgment including post judgment interest	FMAP claimed by DHHS-OIG In Draft Report	Appropriately Allowed FMAP
Awarded Attorneys' Fees	\$9,855,195	\$5,756,420	No federal share
Medicaid damages	\$10,780,000	\$6,296,598	\$6,296,598
Damages for Deceptive Trade Practices Act violations, forfeitures, costs and attendant fees	\$11,942,549	\$6,975,642	No federal share
Totals	\$32,577,744	\$19,028,660	\$6,296,598

ⁱⁱ Reflects Medicaid recovery only, excluding attorneys' fees awarded and non-Medicaid related damages, forfeitures and costs