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November 22, 2013

Honorable J.P. Stadtmueller
U.S. District Court
Eastern District of Wisconsin
Federal Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

Re: Watson v. King-Vassel
Case No: 11-CV-236
Our File No: 911.19

Dear Judge Stadtmueller:

Yesterday, on behalf of defendant Jennifer King Vassel (Dr. King), we filed a brief in opposition to the plaintiff's renewed motion in limine regarding false claims. Subsequent to that filing, we learned that the attorneys for the plaintiff met yesterday with Kimberly Smithers, employed by the state Department of Health Services as the Pharmacy and Quality Section Chief in the Bureau of Benefits Management, Division of Health Care Access and Accountability. *Affidavit of Neil Gebhart*, ¶ 2. She has been named as a lay witness on behalf of the plaintiffs. Because that discussion informed the plaintiff of the lack of a factual basis for his renewed motion in limine, we respectfully supplement Dr. King's brief in opposition with the attached Affidavit of Attorney Neil Gebhart¹, an attorney with the State of Wisconsin Department of Health Services (DHS) that represented Ms. Smithers during the telephone call.

Mr. Gebhart avers that the attorneys for the plaintiffs asked Ms. Smithers about what was the policy of the State to pay for psychotropic medications. *Affidavit of Neil Gebhart*, ¶ 4. Mr. Gebhart informed the attorneys that the policy of the State relative to Medicaid paying for prescription medications is contained in the statutes, administrative rules, and State Medicaid Plan and Provider Handbooks. *Id.*, ¶ 5. The State does not interpret the regulations, but rather applies them. *Id.*

¹Mr. Gebhart's affidavit is not currently notarized, but will be notarized on Monday, November 25, 2013, when he returns to the office. The notarized affidavit will be provided to the court at that time.

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Mr. Gebhart's affidavit provides further support for Dr. King's contention that claims presented to the State, which the plaintiff admits were reimbursed pursuant to its own criteria, are considered claims presented to the federal government, and that it is only the State (if applicable) that ensures on what basis payments are to be made, and not just based on the compendia. (Document 146, p. 8). The plaintiff's attorneys inquired about how the Medicaid program is administered and paid during the telephone call. *Affidavit of Neil Gebhart*, ¶ 7. Mr. Gebhart informed them that the federal and state governments are linked in the Medicaid system, and a claim to the State is a claim to the federal government. *Id.* He informed them that the federal government does not do anything to administer the program; it is only the State that ensures on what basis payments are to be made, and not just based on the compendia. *Id.*

Moreover, MHS, a state contracted HMO that paid for some of the prescription medications for N.B. (the patient identified in the complaint), pays for all Medicaid covered services under contracts between MHS and its participating providers, with MHS's own funds, not Medicaid funds. *Id.*, ¶ 6. Medicaid HMOs are permitted to pay for medical services, including prescription medications, that are not necessarily covered by Medicaid. *Id.*

Last, and perhaps most importantly, the plaintiff's confusion about Medicaid supports Dr. King's position that a reasonable psychiatrist cannot possibly know which governmental entity funds the reimbursement of prescription medication. (Document 146, p. 9). In response to the discussion about state and federal provisions governing Medicaid reimbursement for prescription medications, one of the attorneys said something to the effect that this was all new to them. *Affidavit of Neil Gebhart*, ¶ 8.

Thank you for your consideration of this matter.

Very truly yours,

s/Bradley S. Foley

BSF/cgw

cc: Attorney Rebecca Gietman
Attorney James Gottstein

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
and THE STATE OF WISCONSIN,
ex rel. DR. TOBY TYLER WATSON,

Plaintiffs,

v.

Case No. 11-CV-236

JENNIFER KING VASSEL,

Defendant.

AFFIDAVIT OF ATTORNEY NEIL GEBHART

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

NEIL GEBHART, being duly sworn under oath, deposes and states as follows:

1. I am an attorney employed by the State of Wisconsin, Department of Health Services (DHS). I have worked for DHS for over 30 years, and am very familiar with the Medicaid program, including the myriad of its federal and state statutes and regulations.

2. I represent Kimberly Smithers, who I was informed was recently named by the plaintiff as a lay witness. Ms. Smithers is employed by the Department of Health Services as the Pharmacy and Quality Section Chief in the Bureau of Benefits Management, Division of Health Care Access and Accountability.

3. Ms. Smithers was interviewed by telephone by both attorneys for the plaintiff on November 21, 2013. One of the attorneys for the plaintiff was originally going to depose Ms. Smithers during the time period scheduled for the call, but cancelled the deposition.

4. The telephone call lasted approximately 35 minutes. State Assistant Attorney General Thomas Storm was also present during the telephone call. This was the first time the attorneys for the plaintiffs had talked to Ms. Smithers about what was the policy of the State to pay for psychotropic medications.

5. I informed the attorneys that the policy of the state relative to Medicaid paying for prescription medications is contained in the statutes, administrative rules, State Medicaid Plan and Provider Handbooks, and Ms. Smithers would have nothing to add to the reimbursement policies set forth in those sources. The State does not interpret the regulations, but rather applies them. I informed the attorneys that their interpretation of the federal Medicaid reimbursement statutes as limiting states to paying only for prescription drugs for uses approved by the FDA or indications listed in the recognized drug compendia was not correct.

6. One of the attorneys inquired why the documents produced from the State in discovery did not list Managed Health Service claims. (Managed Health Services was a Medicaid HMO that managed health care for Medicaid members, including for prescription medication.) I informed the attorney that was because MHS was the HMO contractor, it pays its own claims. The State pays MHS per capitation, i.e., per member, per month, and MHS pays for all Medicaid covered services under contracts between MHS and its participating providers, with MHS's own funds, not Medicaid funds. Medicaid HMOs are permitted to pay for medical services, including prescription medications, that are not necessarily covered by Medicaid.

7. The plaintiffs' attorneys also inquired about how the Medicaid program is administered and paid. I informed them that the federal and state governments are linked in the Medicaid system, and a claim to the State is a claim to the federal government. I informed them that

the federal government does not do anything to administer the program; it is only the State that ensures on what basis payments are to be made, and not just based on the compendia.

8. In response to the discussion about state and federal provisions governing Medicaid reimbursement for prescription medications, one of the attorneys said something to the effect that this was all new to them.

s/Neil Gebhart
Neil Gebhart

Subscribed and sworn to before me
this 25th day of November, 2013.

s/
Notary Public, State of Wisconsin
My Commission expires: _____