



Virginia MIRC <vamirc@mirc.virginia.gov>

Unbalanced Medicaid Drug Rebate financials

1 message

Robert Young <[REDACTED]>

Sat, Feb 14, 2015 at 5:06 PM

To: [REDACTED]

MIRC Members,

Last July 25, I sent you information on specific missing Virginia Medicaid Rebate funds, hoping someone on the Committee would get back to me, thinking that potentially "missing a billion or more in Medicaid Drug Rebates would at least draw some attention.

In 2009, a suit was filed by The ACLU, the Government Accountability Project and OMB Watch, in U.S. District Court in Alexandria, VA. In *ACLU v. Mukasey*, plaintiffs contended the False Claims Act [FCA] process of sealing cases prohibited relators from speaking freely; allowing the government, sometimes for years, to silence their speech which harms public health and safety. The government filed to dismiss the case in June, 2009 which was granted on August 21, 2009 and on September 18, 2009 Plaintiffs appealed to the then *ACLU v., Holder* case to the Forth Circuit Court of Appeals where it was sustained, for the ACLU couldn't show standing by not showing any case sealed for more than 2 years. I sat in Midlothian my second case then being led by the Virginia MFCU, that was 7 years old, still sealed, and my first 1998 case voluntarily dismissed without prejudice, 10 years old.

My Main Street Richmond attorneys and the 7 "expert "Qui Tam" attorneys they added, told me in late 2013 that they knew I would lose my case because of the adverse "first to file" bar, which the Fourth District Court had ruled held true in a 2011 in the "Carter False Claims Act case", but the Fourth District Circuit Court overturned that decision in 2012, which was just argued to the Supreme Court on January 13, 2015 and is awaiting a final ruling. They abandoned me in that matter as did the Virginia MFCU. But this doesn't change the facts that the Medicaid Financial Management Reports differ from Virginia Medicaid Rebate Audits by some half to one and a half billion dollars.

Regardless of what the Supreme Court rules, citizens and government officials are still bound by the 1st American fraud law enacted by Congress on July 30, 1778, as the first whistleblower protection law: "all persons in the service of the United States, as well as all other inhabitants thereof, to inform the Continental Congress or proper authorities of misconduct, frauds or misdemeanors committed by any officers in the service of these states, which may come to their knowledge."

Whether my case ends up being appealed or not doesn't make a huge difference while Virginia legislators debate how to pay for Medicaid and Medicare along with the \$1 trillion of annual waste, fraud and abuse known to be in our healthcare system, while spending more each year on education which when combined with Medicaid is over 50% of the budget, with both always pushing for more. I hope you read the attached documents and if you have any questions please tell me what they may be.

Robert N. Young

3 attachments



MIRC Members.doc

134K



VA Plaintiff MFMR.xls

28K



CA Plaintiff MFMR.xls

23K

Robert Nelson Young

Midlothian, Virginia

(Cell)

February 13, 2015

Medicaid Innovation and Reform Commission

201 North 9th Street

General Assembly Building

Richmond, Virginia 23219

Dear Commission Members,

I've watched and collected information and all public State and Federal data on Medicaid Prescription Drug Rebates for all states and D.C. since Medicaid rebates began in 1991.

I've been involved with prescription drugs since 1969 and in Virginia since 1979, as Senior Vice President of the Virginia Shared Services in 1982, which was associated with the Virginia Hospital Association, where I did the first computerized hospital bid of pharmaceuticals, providing Virginia hospitals the lowest prices in the nation. In 1984 I developed and ran a retail drug buying program associated with The Virginia Pharmaceutical Association whose Director then was Paul Galanti.

I then started a drug repackaging business in Powhatan, as a neighbor of mine David Shepherd RPh. was in charge of Virginia's Medicaid Drug Rebate collections, and nodded affirmatively in response when I asked him in the early 1990's if Virginia's Medicaid Drug Rebates were half what they should have been. Brand drug manufacturers refused to sell to me even though I was licensed and inspected by both the FDA and the Commonwealth, restraining my trade. This was as drug store chains and wholesalers were repackaging the Top 200 brand drugs which sell 80% of all drugs sold who were using arbitrage and violating FDA labeling law by repackaging drugs using the original manufacturers NDC's and not their own to evade paying Medicaid rebates on them.

In April 1998 my attorney from the first False Claims Act firm and I visited with Virginia Assistant Attorney General and MFCU Director Mr. John Moriarty and Ms. Kristine E. Coning, Senior Auditor of the Virginia Medicaid Fraud Control Unit; before filing a False Claims Act suit that excluded the Commonwealth of Virginia until it passed a False Claims Act in 2003.

In 1998 and 1999 my case was reviewed by the USAO in Tampa, FL, I was interviewed by the FBI who sent my case on to Main Justice, to a DOJ trial attorney. In May 1999 she informed us that the FDA "allows" multiple manufacturers to use the same drug identifiers, while a HCFA review found a third of the Top 200 brand named drugs were all using the identical identifying NDC's [National Drug Codes]. As these "repacks" were sold at 10% higher than list price with 10% higher profits, all consumers dispensed

these were overcharged, but didn't have contracts while all Medicaid plans had contracts based on the AWP of the NDC posted prices and were also overcharged 10%.

When Virginia passed its False Claims Act I added our state to the other 11 states that then had these, while now 2/3rds of states do, which benefits none of them. I filed another False Claims Act in May of 2002 in Philadelphia, using a Main Street Richmond Firm, and one of the attorneys from that firm who worked on my case, is now with the Virginia Attorney Generals Office and is knowledgeable of these and my cases.

By this time the Justice Department trial lawyer I encountered in 1999, reappeared at CMS as CMS Deputy Associate Attorney General for Program Integrity, Office of General Counsel; where she "counseled on program integrity issues and served as a liaison with the Department of Justice regarding the investigation and litigation of False Claims Act and other program integrity matters, from June 2003 to February 2013 (9 years 9 months). Single handedly she caused hundreds of drug "Qui Tam: cases to be derailed. In February, "As Acting Director of CDER's Office of Compliance, Carol Bennett, J.D., leads efforts to protect the American public from unsafe and ineffective drug products by ensuring that companies comply with federal standards for quality and safety, and previously served as deputy director of the Office of Regulatory Policy (ORP), where she oversaw the development and implementation of regulations, policies, and procedures that affect nearly every aspect of the Center. Ms. Bennett served as the Acting Assistant Commissioner for Compliance Policy in the Office of Regulatory Affairs (ORA). In this role, she served as principal advisor in ORA in matters related to developing and implementing compliance policy. She was responsible for leading the development, design, and initial implementation of risk-based approaches to optimize ORA resource allocations, programs, and operations." In this position she controls the 90% of drugs used in America made primarily in India and China that are distributed to American consumers.

In 2003 my Main Street Richmond attorneys had a meeting in Chicago that Virginia didn't attend, as HHS released a Nationwide Medicaid Rebate Audit, which included Virginia, which wasn't "graded" because their computer program wasn't adequate to collect the data. [REDACTED] Each state received a separate report. Virginias was [REDACTED] The data was there though and rebates were being audited in Virginia somehow since 1993. The national audit showed \$2.56 billion was missing, \$1.34 billion in California and \$35 million in Virginia and about the same amounts in most states. But Virginia was the only state I can find that did audits routinely. However State Audits show Virginia collected \$1.4 billion [21.8%] while the rebates sections from Medicaid Financial Management Reports, over the past 22 years only shows \$816 million, [12.3%] of the \$6.598 billion Virginia Medicaid reported they spent on drugs. A 12.3% average in rebates while brand rebates were 15% and generics 11% just doesn't add up.

California was embarrassed by the 2003 nationwide audit, the year before claiming they collected the most, and since then their state Audit Bureau "found" \$7.7 billion and tightened Medicaid Rebates and were the "best State" in collections for 6 of the 22 years,

based on federal records alone at 29.5%, excluding the past 4 years that haven't yet been audited. The hypothetical "Best State" [the average of the highest percent collected each year] was 38.1%. At 29.5% Virginia would have collected \$1.947 over \$1 billion more, while at 38.1% the Commonwealth would have collected \$1.7 billion more. At this point it seems nobody knows how much was billed or collected or what the state auditors audited, for the over 22 years!

Virginia and all other states invoiced the brand drug manufacturers owning the drug NDC's, who had signed Medicaid Rebate agreements and then disputed invoices and didn't pay them at all or fully. The claims were supplied by First DataBank who collected them and HCFA and later CMS set the rebates based on prices manufacturers gave them and the manufacturers still have the liability of paying rebates by the fact that they owned the name and patents, yet they disputed them, to the tune of at least \$666 million.

You may recall the McKesson First DataBank national 5% AWP overcharge, but I don't know where the VA AG Office got their data, for Medicaid Financial Management Reports shows from 2002 to 2009 when these 5% higher prices were in effect, Virginia Medicaid bought \$3,211,309,435 in drugs, that 5% of is \$160,565,472. Yet on October 18, 2013, Virginia Attorney General Ken Cuccinelli, who was then seeking the governor's office, celebrated a \$37 million settlement windfall for the state treasury. He correctly reported his payout is 10 times what has typically been received by states that experienced comparable impacts under the pricing scheme, and even dwarfed amounts recouped by more populous states such as California \$24 million and New York \$36 million. Most states collected zero, yet the Virginia settlement was only 11% of the overcharge and none of it went back to Virginia Medicaid funds, but was split between law enforcement agencies.

Each Quarter every state must submit Drug Utilization Reports collected by NDC's for the exact drug and strength, number of pills and prescriptions dispensed, and amounts paid to pharmacies to be reimbursed by their makers for the appropriate rebates, which can be found at:

First DataBank collected all these claims and adjudicated each as they were dispensed to make sure they were accurate and also to invoice manufacturers for both the original rebates at a standard 15% and 11% rate, or "Best Price" which is over twice as much, as well as for state "side bar" rebates which Virginia used some years. These rebates must be reported to CMS quarterly on CMS-64R forms to be placed into Medicaid Financial Management Reports along side each states amounts drawn down on for pharmaceuticals for that year

Medicaid Financial Management Reports separate CMS and state amounts for all expenditures and can be accessed above for the years of 1997 through 2013, as years 1991 through 1996 are no longer available at that site. All reports were reformatted in 2007 to add a section in include a 13 digit field in the Medicaid State Drug Utilization Data Web File

structure entitled “Non-Medicaid Amount Reimbursed”, which added a form of retroactive credits for manufacturers for rebates paid between 1997 and 2007, as QMB’s transferred from Medicaid to Medicare Part D for drugs in 2006. When this happened, while Medicaid drug costs went down, and “Claw Backs” added, by some mystical manner rebates percentages doubled. Now how does one reduce spending by half and double rebates?

I collected all the reports for all states and the national totals, including those from 1991 to 1997 shown in the attached Excel spreadsheets for Virginia and California. For the past few years rebates show as 2 types of rebates one for the Managed Care Tax Component of PPACA and standard Tax for OBRA 1990 rebates. All components of Medicaid finances appear and are separated into federal “National” and “state supplemental rebates” called “sidebar rebates” which are submitted to CMS by states using CMS 64R drug rebate appearing on Medicaid Financial Management Reports as in the example below:

Medicaid Financial Management Report
 FY 2011
 Net Services
 Virginia
 Medicaid Assistance Program

Service Category	Total Computable	Federal Share	State Share
Inpatient Hospital- Reg.	534,816,050	304,269,002	230,547,048
Inpatient Hospital – DSH	189,370,089	94,685,046	94,685,043
Inpatient Hospital - Sup.	0	0	0
Inpatient Hospital - GME	161,534,982	92,864,584	68,670,398
Mental Health Facility Serv - Reg.	115,873,184	65,890,577	49,982,607
Mental Health Facility - DSH	5,882,489	2,941,245	2,941,244
Nursing Facility Services - Reg.	834,332,421	473,532,540	360,799,881
Nursing Facility Services - Sup.	0	0	0
Intermediate Care Facility - Pub	219,877,498	125,652,263	94,225,235
Intermediate Care - Private	65,316,192	37,111,455	28,204,737
Intermediate Care - Ment.Ret: Sup	0	0	0
Physician & Surgical - Reg.	180,345,574	103,316,050	77,029,524
Physician & Surgical - Sup.	21,238,006	12,234,792	9,003,214
Outpatient Hospital - Reg.	148,880,928	85,022,008	63,858,920
Outpatient Hospital Sup.	0	0	0
Prescribed Drugs	242,333,159	138,763,319	103,569,840
Drug Rebate Offset - National	(86,343,749)	(48,063,740)	(38,280,009)
VA Rebate Audit - National			(68,373,601)
Drug Rebate - State Sidebar	(22,757,751)	(13,848,182)	(8,909,569)
VA Rebate Audit – State Sidebar			(3,571,370)

HHS OIG did another audit of states rebate [REDACTED]
 Including Virginia in January 2008 [REDACTED] Finding

Virginia had an “inadequate rebate collection system” while states audits showed much higher amounts were being collected and evidently somehow not being reported.

There were several states then involved in “investigating” my case including a few NAMFCU Global settlement teams involving many states led by Tracey D.S. Sanders, Virginia Assistant Attorney General, Medicaid Fraud Control Unit, Office of the Attorney General, Commonwealth of Virginia. From 2003 until today Ms. Sanders or nobody else in government ever interviewed me about these matters, but I found a way to calculate missing Medicaid Rebates by comparing states percentage of collections with each other, as well as their own audits in Virginia and California comparing state audits with Medicaid Financial Management Reports, which should “mirror each other”, however the rebates are not audited by the preponderance of states.

Each state for each year records amounts collected from OBRA 90 rebates as well as State supplemental rebates that started in 1993 which when added together and divided by their drug spend produces the percentage of each states collected rebates. The “promise” of the Medicaid Drug Rebate Program was that brand drug manufacturers would rebate their drugs so that the prices Medicaid paid for them would equal the prices of generics. While states vary in size, they all use the same drugs especially brand drugs, but even generics which all have the same molecule name and are segregated from one another by their NDC identifiers. Most importantly every Medicaid Program was “guaranteed” to pay the same price after rebates. So I entered all the states information into a large spreadsheet and calculated the percentage of rebates paid to each state each year and averaging them annually marking the states with the lowest and highest rebate collection percentages that always varied too much to be related to drug usage. I then solved for what each state should have collected had they all collected the rates that the “Best State” collected annually, knowing that since every state paid the same price they all should all be about equal in percentages collected.

In the attached California’s file, when they found they were missing \$1.34 billion in Medicaid Rebates, they used the information and methods they discovered in attending the 2003 meeting in Chicago and the California Bureau of State Audits, did audits and collected \$7.7 billion more than appears on California’s Medicaid Financial Management Reports; while my formula of using the “best states” averages predicted \$6.1 Billion. Did California give back the U.S. Treasury its federal share? If so how was this done? After they discovered this and collected billions more that they didn’t “share” with CMS, the next year they declined my case?

In Virginia, why does the Medicaid Financial Management Reports show \$816 million collected while State Public Audits show \$1.44 billion was? The Medicaid program told me they don’t report amounts of drugs purchased to the Medicaid Financial Management Reports, perhaps unaware that each quarter that Virginia draws down funds from the Federal coffers they are automatically recorded and the Medicaid required CMS 64R’s provide the rebate input.

Governor McAuliffe announced we face a projected \$2.4 billion revenue gap over three years. And you legislators trimmed more than \$1 billion, leaving \$882 million to be cut over the next two years, \$346 million this year and \$536 million in the next. Will my revelations to you “find” some of this, or perhaps reveal an unknown debt of some \$350 million owed by Virginia to CMS?

Virginia is 2nd best” and above average in reported rebate collections while obviously California is the best, even though they are 4 years behind in Audits and say they know of “a few hundred million” they still known to be owed by drug manufacturers. But note the amounts of Virginia drug spending last year doubled while rebates for 2013 about tripled. This is caused by biological drugs that will drain all states treasury coffers soon, by increased Purchases of biologic drug products, even after larger rebates. The President now wants to Add drug rebates to Medicare that won’t “trickle down” to states or offset the Medicare costs States pay for over 65 Medicaid recipients.

I have done projections Nationwide for all states and the larger states while showing average, Collection percentages spend much more on drugs and receive more rebates but net out no advantage at all in collection percentages. Doing my reports projects \$40 billion in missing rebates, based on calculations between the “best state” collected percentages and what each state collected as a percentage, in the far right columns, that I have done for all states. In Virginia this is \$700 million dollars.

I as all Virginia citizens pay federal and states taxes and any and all misspent or defrauded funds all come out of every federal and stste Taxpayers pockets, so:

Would someone please tell me which Medicaid Rebate figures are correct, and if Virginia Medicaid collected the audited amounts and “forgot” to give CMS their share back, or if somehow over a billion dollars of Medicaid Drug rebates went somewhere else or to someone not entitled to receive it. Governor’s McAuliffe’s desire to increase Medicaid recipients when Virginia and no other state can manage their Medicaid Plans should only be considered when and if Virginia’s finances are sound. With large states like New York and New Jersey wasting huge amounts in Medicaid funds, their citizens will always get more Virginia tax money than Virginians will ever get back from them.

Virginia doesn’t have enough caregivers, and can’t get more, to care for 400,000 more Medicaid Recipients; and only Medicaid State Block Grants can isolate well run states from those where waste, fraud and abuses run wild, and allow reform within individual States.

Very respectfully,

Robert N. Young

YEAR	Medi-Cal SPENT	MFMR Medi-Cal REBATES	BSA Medi-Cal AUDITS	BSA Medi-Cal AUDIT #	BSA AUDITS RECOVERED	Lowest Rebate State	Total CA Rebate %	Best State Rebate %	Best State	Percent "spread"	Unpaid Amount
1991	735,522,942	11,915,596	\$93,149,575		81,233,979	IO	1.6%	5.60%	UT	3.98%	\$ 29,273,689
1992	917,361,814	47,377,396	163,630,038		116,252,642	MA	5.2%	22.52%	ND	17.36%	\$ 159,212,485
1993	1,090,707,844	51,121,668	193,205,376		142,083,708	VA	4.7%	26.90%	MA	22.21%	\$ 242,278,742
1994	1,232,865,845	116,238,043	233,746,865		117,508,822	DC	9.4%	24.48%	NJ	15.05%	\$ 185,594,346
1995	1,272,283,111	105,573,479	267,053,200		161,479,721	DC	8.3%	22.82%	VA	14.52%	\$ 184,791,519
1996	1,370,080,121	127,690,031	307,934,206	96038	180,244,175	NY	9.3%	28.67%	OR	19.35%	\$ 265,111,940
1997	1,492,657,172	150,668,067	347,186,364		196,518,297	KS	10.1%	21.42%	PA	11.33%	\$ 169,084,354
1998	1,702,949,506	174,128,534	465,401,298		291,272,764	UT	10.2%	25.70%	NM	15.48%	\$ 263,601,065
1999	2,032,662,106	257,464,568	610,109,919		352,645,351	TN	12.7%	26.56%	CA	13.90%	\$ 282,464,215
2000	2,472,137,448	292,464,280	755,708,623		463,244,343	NV	11.8%	24.31%	CA	12.48%	\$ 308,431,431
2001	2,984,162,770	380,766,967	966,691,920		585,924,953	MD	12.8%	26.55%	NV	13.79%	\$ 411,631,969
2002	3,591,537,830	445,261,905	1,286,699,685		841,437,780	KS	12.4%	26.36%	CA	13.96%	\$ 501,389,213
2003	4,219,504,969	571,916,301	1,613,533,738		1,041,617,437	WY	13.6%	28.62%	CA	15.07%	\$ 635,884,565
2004	4,817,590,501	761,462,179	1,953,372,951	2004-033	1,191,910,772	OK	15.8%	33.46%	CA	17.65%	\$ 850,479,653
2005	5,187,275,034	1,001,192,928	2,220,474,806		1,219,281,878	UT	19.3%	39.65%	CA	20.34%	\$ 1,055,322,930
2006	3,537,243,549	985,834,687	1,105,968,558		120,133,871	NM	27.9%	61.87%	MI	34.00%	\$ 1,202,750,828
2007	2,709,028,320	487,914,421	1,230,937,009	2007-501	743,022,588	DC	18.0%	47.92%	OH	29.91%	\$ 810,195,068
2008	2,997,065,774	591,904,753	1,416,226,002		824,321,249	CT	19.7%	56.89%	NM	37.14%	\$ 1,113,143,890
2009	3,125,813,464	537,962,772	1,484,632,596		946,669,824	NM	17.2%	57.78%	RI	40.57%	\$ 1,268,132,247
2010	3,082,106,130	590,400,434				HI	19.2%	57.10%	IA	37.95%	\$ 1,169,510,752
2011	3,348,511,220	486,566,266		2011-402		WI	14.5%	85.406%	NH	70.87%	\$ 2,373,250,109
2012	2,656,737,891	767,816,638				HI	28.9%	88.10%	NJ	59.20%	\$ 1,572,769,444
Total	\$ 56,575,805,361	\$ 8,943,641,913	\$ 16,715,662,729		\$ 7,772,020,816		13.75%	38.12%	0	24.37%	\$ 15,054,304,455

