Report of the Vermont State Auditor

January 15, 2010

LITIGATION REPORT

As Required by Act No. 80, Sec. 22a of the Vermont General Assembly, 2007-2008 Session

(Pharmacy Benefit Manager and other Prescription Drug-related Legislation of Act No. 80)

Thomas M. Salmon, CPA
Vermont State Auditor
RPT. No. 10-1

Mission Statement

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THOMAS M. SALMON, CPA
STATE AUDITOR

STATE OF VERMONT
OFFICE OF THE STATE AUDITOR

January 15, 2010

Mr. Donald G. Milne, Clerk of the House
115 State Street, Drawer 33
Montpelier, VT 05633-5501

Mr. David Gibson, Secretary of the Senate
115 State Street, Drawer 33
Montpelier, VT 05633-5501

Legislative Council
115 State Street, Drawer 33
Montpelier, VT 05633-5301

Dear Colleagues:

As required by Act No. 80, Sec. 22a, of the Public Acts of the 2007 Session, we are submitting our second annual report to the General Assembly on the State's litigation costs related to challenges to Act No. 80.

Litigation overview

The statute cited above states:

LITIGATION REPORT; AUDITOR

Beginning January 1, 2008, and annually thereafter, the state auditor shall provide a report to the general assembly with a detailed accounting of all amounts paid by the state with state or federal funds in connection with any litigation challenging the validity of this act or a section of this act. The report shall include costs, fees, damages, amounts paid to expert witnesses, salaries and benefits of state employees who work on the litigation, amounts paid to individuals under contract with the state who work on the litigation, attorney's fees awarded to the other party, any other amounts awarded by the court, and the number of hours spent by state employees involved in the litigation.

As noted in our January 2008 report, upon inquiry with the Attorney General's Office, we learned that two lawsuits had been filed challenging the Act in the United States District Court for the District of Vermont.

These were:

IMS HEALTH INCROPORATED; VERSIPAN, LLC; and SOURCE HEALTHCARE ANALYTICS, INC., a subsidiary of WOLTERS KLUWER, HEALTH INC., Plaintiffs, v. WILLIAM H. SORRELL, as Attorney General of the State of Vermont, Defendant.
Civil Action No: 2:07 – cv – 00188 Filed August 29, 2007

PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PhRMA), Plaintiff, v. WILLIAM H. SORRELL, in his official capacity as Attorney General of the State of Vermont, JIM DOUGLAS, in his official capacity as Governor of the State of Vermont, and CYNTHIA D. LaWARE, in her official capacity as the Secretary of the Agency of Human Services of the State of Vermont, Defendants.
Civil Action No: 2:07 – cv – 00220 Filed October 22, 2007

The first lawsuit was filed by data-mining firms that acquire information from prescription records, including prescriber-identifiable information, and sell and/or license the information for use in marketing pharmaceutical drugs. The second lawsuit was filed by a pharmaceutical trade association on behalf of pharmaceutical manufacturers.

According to the Attorney General's Office, both cases primarily challenged Section 17 of the Act, which prohibits the use of prescriber-identifiable information in marketing pharmaceutical drugs unless the prescriber consents to that use.

Further, the lawsuit filed by PhRMA also challenges Section 20 of the Act, which creates a remedy under the Consumer Fraud Act for violations of federal law, and Section 21, which imposes a fee on manufacturers of pharmaceutical drugs. Plaintiffs in both cases argued that the Act violates the First Amendment and the Commerce Clause and is preempted by federal law, according to information from the Attorney General's Office.

Pretrial preparations included depositions of approximately 40 witnesses over a period of several months in 2008, according to the Attorney General's Office. A trial was conducted in the federal district court in Brattleboro in July and August 2008. The trial schedule included in last year's report identified witnesses and proposed witnesses in the case. The parties filed written arguments and rebuttals over a period of several months after the trial.

On April 23, 2009 federal district court issued its decision in the two lawsuits. The court rejected arguments that the law was unconstitutional. Both plaintiffs appealed that decision to the Second Circuit Court of Appeals and asked that Court to enjoin the enforcement of the law until the appeal was decided. On June 26, 2009 the Court of Appeals denied the request for an injunction, so the law went into effect on July 1, 2009.

On October 13, 2009 the Court of Appeals heard arguments on the merits of the appeal from the federal district court decision. It is expected that the Court of Appeals will issue its opinion later this year.

Cost Summary

We have received and reviewed a cost summary from the business manager of the Attorney General's Office which summarizes the 2009 litigation costs related to the legislation passed in Act No. 80 of the 2007 Session, and are shown in the table below. The total reported costs are $41,600.64. The reported salary and benefit costs do not include those of the Attorney General or other high-level supervisors involved in the litigation.

OFFICE OF THE ATTORNEY GENERAL

Act No. 80 Litigation Report Employee Labor Cost Format

Calendar Year 2009

Position Number	Avg. Hourly Pay Rate 1/01/09-12/31/09	Worked Hours PAID	Salary Hours PAID	Benefit Hours PAID	Total Salaries Benefits PAID	Worked Hours UNPAID	Salaries Hours UNPAID	Benefits Hours UNPAID	Total Salaries Benefits UNPAID	Total Salaries	Total Benefits	Total All
Attorney												
197045	33.41	563	18,809.83	3,072.37	21,882.20	67	2,238.47	365.04	2,603.51	21,048.30	3,437.41	24,485.71
197051	33.51	50	1,675.50	676.89	2,352.39	0	0.00	0.00	0.00	1,675.50	676.89	2,352.39
197011	28.85	10	288.50	137.50	426.00	0	0.00	0.00	0.00	288.50	137.50	426.00
197048	35.55	45	1,599.75	506.27	2,106.02	0	0.00	0.00	0.00	1,599.75	506.27	2,106.02
197010	23.83	54	1,286.82	374.71	1,661.53	47	1,120.01	325.63	1,445.64	2,406.83	700.34	3,107.17
Staff												
190069	23.63	40	945.20	464.18	1,409.38	0	0.00	0.00	0.00	945.20	464.18	1,409.38
190008	24.94	39	972.66	536.43	1,509.09	0	0.00	0.00	0.00	972.66	536.43	1,509.09
		801	**25,578.26**	**5,768.35**	**31,346.61**	**114**	**3,358.48**	**690.67**	**4,049.15**	**28,936.74**	**6,459.02**	**35,395.76**
										Operating Overhead	**17.53%**	**6,204.88**
											Total Personal Services and Operating	**41,600.64**

The 2008 and 2009 reports are available on the State Auditor's website. The 2008 report contains the following information: (1) Act No. 80 of the Vermont General Assembly, 2007-2008 Session as Appendix I, (2) IMS HEALTH INC; VERISPAN, LLC; AND SOURCE HEALTHCARE ANALYTICS, INC. v. WILLIAM H. SORRELL as Appendix II, and (3) PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA v. WILLIAM H. SORRELL, JIM DOUGLAS, AND CYNTHIA LaWARE as Appendix III.

Please feel free to contact me about this report at anytime.

Sincerely,

Thomas M. Salmon CPA

Thomas M. Salmon, CPA
Vermont State Auditor

Note: Nine copies of this report are being provided to the State Librarian and a copy has been posted on our website at: www.auditor.vermont.gov.