

Letter Report

Settlement and Judgment Awards

April 2010



Legislative Audit Bureau

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Janice Mueller
State Auditor

April 6, 2010

Senator Kathleen Vinehout and
Representative Peter Barca, Co-chairpersons
Joint Legislative Audit Committee
State Capitol
Madison, Wisconsin 53702

Dear Senator Vinehout and Representative Barca:

In follow-up to previous audit work, we reviewed the use of funds the Wisconsin Department of Justice (DOJ) is awarded in negotiated settlement agreements and court judgments related to its successful prosecution of consumer protection and antitrust cases. From fiscal year (FY) 2004-05 through FY 2008-09, DOJ's receipts from such cases totaled nearly \$11.8 million and included \$3.6 million for distribution to injured parties or as otherwise specified by the settlement or judgment, and \$8.1 million that may be used at the discretion of the Attorney General.

Over the past five years, DOJ has expended \$5.1 million of the discretionary receipts, which are deposited to its gifts, grants, and proceeds appropriation. Expenditures from that appropriation include approximately \$3.4 million to supplement DOJ's own operations or help it meet lapse requirements enacted through legislation. As of June 30, 2009, DOJ's gifts, grants, and proceeds appropriation had a balance of nearly \$4.2 million.

The Department of Administration currently reviews and approves all requests to expend the discretionary receipts DOJ is awarded in settlements and judgments. Past efforts to enhance or retain legislative oversight over their use have been limited by vetoes and by DOJ's incomplete compliance with a statutory reporting requirement. The Legislature may therefore wish to consider extending an existing reporting requirement to include all funds DOJ receives from settlements and judgments or to reconsider legislation that would increase its oversight and budgetary control.

We appreciate the courtesy and cooperation extended to us by DOJ staff as we conducted this review.

Sincerely,

Janice Mueller
State Auditor

JM/SH/ss

SETTLEMENT AND JUDGMENT AWARDS

The Wisconsin Department of Justice (DOJ) investigates statewide crimes; provides technical assistance and training to state and local law enforcement agencies; assists crime victims and witnesses; and provides legal representation and advice to the Governor, the Legislature, state agencies, district attorneys, and others. DOJ is authorized 578.9 full-time equivalent positions and had a fiscal year (FY) 2008-09 budget of \$90.9 million, including \$40.8 million in general purpose revenue (GPR).

DOJ's legal representation responsibilities include litigating consumer protection, antitrust, environmental protection, Medical Assistance fraud, and other cases and representing Wisconsin in multistate lawsuits. The FY 2008-09 budget for legal services totaled \$17.8 million, including \$15.2 million in GPR. DOJ allocated 22.3 full-time equivalent positions, including 7 attorneys, to litigate consumer protection, antitrust, Medical Assistance fraud, and other cases during FY 2008-09.

Certain settlement or judgment awards are deposited directly to state appropriations. For example, the Medical Assistance program receives awards from the successful prosecution of Medicaid fraud cases, while the Environmental Fund receives awards from the successful prosecution of cases involving violations of environmental protection statutes. Forfeitures awarded by the courts are remitted to the Common School Fund, a state trust fund that provides loans to school districts and municipalities. However, funds from consumer protection and antitrust cases are awarded to DOJ.

Although both the number and the size of awards vary, over the past five years DOJ has been awarded nearly \$11.8 million through negotiated settlements and court judgments related to consumer protection and antitrust cases. As shown in Table 1, \$3.6 million was designated for victim restitution and other nondiscretionary uses. However, \$8.1 million, which is 69.1 percent of DOJ's consumer protection and antitrust receipts from FY 2004-05 through FY 2008-09, has been awarded through settlements or judgments that may indicate preferred uses for the awarded funds but that permit them to be used at the discretion of the Attorney General. Amounts paid by specific defendants are shown in the appendix.

Table 1

Consumer Protection and Antitrust Receipts FY 2004-05 through FY 2008-09

Type	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	Total
Discretionary	\$ -	\$2,159,200	\$1,089,200	\$1,992,100	\$2,889,900	\$ 8,130,400
Nondiscretionary ¹	519,900	1,765,600	85,000	143,500	1,129,400	3,643,400
	\$519,900	\$3,924,800	\$1,174,200	\$2,135,600	\$4,019,300	\$11,773,800

¹ Funds awarded to DOJ for payment as restitution to specified injured parties, or to benefit groups of injured parties as determined by DOJ.

For several years, restitution was the primary focus of settlement or judgment awards. However, discretionary settlements or judgments have become increasingly common because of DOJ's increased participation in multistate cases, for which settlements or judgments typically allow each participating Attorney General discretion in determining how the awarded funds are to be used. Attorneys General were provided this discretion in 8 of 11 multistate settlements or judgments we reviewed, and DOJ has most notably received large settlements and judgments from its participation in multistate litigation against pharmaceutical companies that have allegedly inflated their prices or engaged in deceptive marketing practices to overcharge consumers and the Medical Assistance program.

To date, DOJ has recovered \$31.2 million on behalf of the State of Wisconsin through its participation in multistate cases against pharmaceutical companies. While \$24.0 million, or 76.9 percent of proceeds from these cases, has been remitted to Medical Assistance and other programs, DOJ received \$6.3 million in discretionary funds and \$0.9 million in nondiscretionary funds as a result of these multistate settlements and judgments. (Those amounts are included in Table 1.) DOJ's litigation against pharmaceutical companies is expected to continue for the next several years, and a lawsuit involving 32 pharmaceutical companies is currently pending in Dane County Circuit Court.

Accounting and Expenditures

Section 20.455(1)(hm), Wis. Stats., permits DOJ to retain receipts from consumer protection and antitrust cases "to provide restitution to victims when ordered by the court." However, statutes do not address how DOJ is to retain or account for settlements and judgments that are awarded for use at the discretion of the Attorney General. DOJ and the Department of Administration (DOA) have agreed to use DOJ's gifts, grants, and proceeds appropriation, s. 20.455(3)(g), Wis. Stats., to account for these funds. The Attorney General identifies expenditures to be funded with discretionary consumer protection and antitrust receipts, and the expenditure authority for each transaction is provided by DOA.

As shown in Table 2, DOJ expended nearly \$5.1 million in discretionary consumer protection and antitrust receipts through its gifts, grants, and proceeds appropriation from FY 2004-05 through FY 2008-09.

Table 2

**Expenditures Funded with Discretionary Receipts
from Consumer Protection and Antitrust Cases
FY 2004-05 through FY 2008-09**

Type	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	Total
Information Technology Systems or Equipment Purchases	\$1,549,400	\$ -	\$ -	\$ -	\$159,100	\$1,708,500
Awards to Organizations	198,100	712,900	175,000	-	-	1,086,000
Meeting Lapse Requirements	156,900	-	-	400,000	200,000	756,900
Supplementing Operating Costs	192,700	62,300	16,100	250,000	196,800	717,900
Milwaukee Office	-	-	-	162,200	48,200	210,400
Public Service Announcements	10,000	55,100	10,300	41,600	80,000	197,000
Conferences	-	72,300	10,600	22,700	26,500	132,100
Officer Safety Fund	-	-	23,500	5,800	82,000	111,300
Other	-	32,600	700	7,500	115,600	156,400
Total	\$2,107,100	\$935,200	\$236,200	\$889,800	\$908,200	\$5,076,500

Some expenditures, such as \$197,000 for public service announcements, were directly related to consumer protection and antitrust activities. However, a significantly larger amount—approximately \$3.4 million—was used to supplement DOJ's own operations or to help it meet lapse requirements enacted through legislation. For example:

- \$1.7 million, or one-third of the expenditures shown in Table 2, related to information technology projects for which DOJ cited insufficient funding from other sources;
- \$756,900 was used to meet lapse requirements, including \$156,900 in FY 2004-05 to meet a lapse requirement enacted in 2003 Wisconsin Act 33, and \$600,000 during the 2007-09 biennium to meet an administrative efficiency lapse requirement as part of 2007 Wisconsin Act 20;
- more than \$700,000 funded DOJ's operating costs, including \$250,000 to supplement federal funding for methamphetamine enforcement activities, \$77,000 to purchase portable radios, nearly \$150,000 to supplement GPR funding for legal services, \$88,000 to supplement federal and state funding for DOJ's Internet Crimes Against Children program and to purchase additional equipment for local law enforcement, and \$46,600 for membership for the National Association of Attorneys General; and
- \$210,400 was spent to establish and operate a 1,400-square-foot satellite office in a state office building located in the City of Milwaukee for use by the Attorney General when he is in Milwaukee and to increase the Milwaukee presence of the Office of Crime Victim Services.

In addition, we identified:

- nearly \$1.1 million in awards by a former Attorney General, including several during her final months in office, to organizations that included advocacy groups, fire departments, and social service agencies; and
- expenditures ranging from a \$100,000 matching contribution for a baseball program to promote positive relationships between law enforcement officers and youth to a \$3,500 purchase of pens and mugs for distribution to visiting officials and DOJ employees.

As of June 30, 2009, DOJ's continuing gifts, grants, and proceeds appropriation had a balance of nearly \$4.2 million.

Cost Recoveries

Since FY 2004-05, DOJ has been permitted by s. 20.455(1)(gh), Wis. Stats., to recover and retain certain of its litigation costs in antitrust, marketing and trade practices, environmental protection, and Medical Assistance fraud cases. Before FY 2004-05, statutes allowed DOJ to retain only 10.0 percent of such cost recoveries. All recovered costs in areas other than antitrust, marketing and trade practices, environmental protection, and Medical Assistance fraud are required to be deposited to the General Fund.

As shown in Table 3, DOJ recovered \$1.5 million in litigation costs from FY 2004-05 through FY 2008-09 and retained \$1.4 million as program revenue. The remaining \$92,000 was deposited to the General Fund.

Table 3

DOJ's Cost Recoveries FY 2004-05 through FY 2008-09

	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	Total
Retained as Program Revenue	\$219,700	\$481,800	\$172,100	\$298,000	\$228,900	\$1,400,500
Deposited to the General Fund	20,700	6,600	17,800	21,300	25,600	92,000
Total	\$240,400	\$488,400	\$189,900	\$319,300	\$254,500	\$1,492,500

Over the past several years, DOJ has used this retained program revenue largely to pay rent and other operating costs related to legal services. However, \$413,100 was used to meet lapses required by recent legislation, including:

- \$249,700 to meet lapses enacted in 2003 Wisconsin Act 33;
- \$30,300 to meet program revenue lapses required under 2005 Wisconsin Act 25; and
- \$133,100 to meet administrative efficiency lapse requirements for FY 2006-07 as part of 2005 Wisconsin Act 25.

As of June 30, 2009, DOJ's continuing program revenue appropriation had a balance of \$400,000.

Future Considerations

DOJ's increasing success in multistate litigation efforts has increased the level of funding from settlements and judgments available for use at the discretion of the Attorney General. It may be appropriate for the agency responsible for successful litigation to also be the agency that principally benefits from these efforts, and as noted, DOA reviews the Attorney General's requests for funding with discretionary consumer protection and antitrust receipts. However, to enhance or retain legislative oversight and budgetary control, some other states have designated specific appropriations to account and budget for their receipts from discretionary settlement and judgment awards.

If the Legislature wishes to increase transparency or budgetary control, it could consider statutory changes. For example, it could modify DOJ's restitution appropriation, s. 20.455(1)(hm), Wis. Stats., to include all receipts from settlements and judgments, and thereby increase transparency. Alternatively, it could increase budgetary control by creating an appropriation specifically to account for the receipts from settlements and judgments that DOJ currently deposits to its gifts, grants, and proceeds appropriation. We note that other state agencies typically use such appropriations to account for honoraria, donations, bequests, and other gifts and grants. However, past attempts by the Legislature to increase oversight of funds awarded through settlements and judgments have been unsuccessful. For example, 2003 Wisconsin Act 309 included the following provisions, which were vetoed:

- creation of a joint legislative committee on court judgments and settlements;
- a requirement that DOJ establish an application process for awards of \$100,000 or more unless settlement agreements or judgments specifically enumerate recipients for awarded funds; and
- a requirement that DOJ deposit any funds it is awarded in consumer protection and antitrust cases into the Budget Stabilization Fund unless settlement agreements or judgments designate a specific purpose or use for the awarded funds.

Under provisions enacted in 2001 Wisconsin Act 16, DOJ is currently required to submit semiannual reports to the Joint Committee on Finance and DOA on its restitution receipts from consumer protection and antitrust settlements and judgments, including its itemized payments to recipients and its methodology for selecting those recipients and allocating available funds. However, we found that DOJ did not file reports for the period from July 2005 through December 2006. In February 2009, DOJ reported on restitution activity for the period from January 2007 through December 2008. DOJ has provided semiannual reports thereafter.

However, because the current reporting requirement captures only restitution receipts, it does not capture the increasing level of discretionary receipts DOJ has been awarded in consumer protection and antitrust cases. As was shown in Table 1, discretionary receipts represented 69.1 percent of all receipts in such cases, or \$8.1 million, from FY 2004-05 through FY 2008-09. The Legislature may therefore wish to consider extending the current reporting requirement to include all funds DOJ receives from settlements and judgments.

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Appendix

Settlements and Judgments

FY 2004-05 through FY 2008-09

Fiscal Year ¹	Type	Case	Amount
2008	Discretionary	Merck and Company, Inc. ²	\$1,542,000
2009	Discretionary	Eli Lilly and Company ²	1,500,900
2009	Discretionary	Pfizer, Inc. ²	945,200
2006	Nondiscretionary	Work Digital	943,700
2009	Nondiscretionary	Countrywide Financial Corporation	824,200
2006	Nondiscretionary	Tap Pharmaceutical Products, Inc. ²	798,000
2007	Discretionary	Purdue Pharmacueticals ²	714,000
2006	Discretionary	Pfizer, Inc./Warner Lambert Co. ²	678,600
2008	Discretionary	Guidant Corporation	416,500
2005	Nondiscretionary	Cortec Coated Products	350,000
2006	Discretionary	Ameriquet Mortgage Company	269,300
2006	Discretionary	Pfizer, Inc. ²	272,100
2009	Discretionary	Mattel, Inc. and Fisher Price, Inc.	230,500
2007	Discretionary	Bayer Corporation ²	200,200
2005	Nondiscretionary	Salton, Inc.	150,800
2009	Discretionary	Airborne Health, Inc. ²	145,900
2006	Discretionary	Lensfast, LLC (ContactLens.com)	132,900
2007	Discretionary	Applied Card Bank	130,000
2006	Discretionary	Ford Motor Credit Company	117,000
2006	Discretionary	Publishers Clearing House	111,100
2006	Discretionary	Hoechst-Marion Roussel, Inc. ²	107,800
2009	Nondiscretionary	Watertown Tire Recyclers, LLC	100,000
2006	Discretionary	Wireless Ads	86,000
2006	Discretionary	Mylan, Inc. ²	85,900
2007	Nondiscretionary	Schering-Plough Corporation ²	81,300
2006	Discretionary	New Access, LLC	80,100
2009	Nondiscretionary	American Travel and Management	76,100
2009	Nondiscretionary	Radical Persson, Inc.	74,300
2006	Discretionary	Time, Inc.	60,000
2008	Nondiscretionary	Darrell Dickinson	55,000
2008	Nondiscretionary	JK Harris Financial Recovery Systems	50,900
2006	Discretionary	Oxmoor House, Inc.	42,400
2006	Discretionary	Bristol-Myers Squibb Company ²	41,900
2009	Nondiscretionary	Kool View Company	40,000

Fiscal Year ¹	Type	Case	Amount
2009	Discretionary	Dell, Inc. and Dell Financial Services, LLC	\$ 34,700
2007	Discretionary	America Online, Inc.	30,000
2006	Discretionary	SmithKline Beecham Corporation d/b/a GlaxoSmithKline ²	27,600
2009	Nondiscretionary	Havenwood Nursing and Rehabilitation Center	25,000
2008	Discretionary	Berkeley Premium Nutraceuticals ²	20,000
2005	Nondiscretionary	Appleton Paper Company	19,100
2006	Discretionary	EWC Corporation	16,900
2009	Nondiscretionary	Bristol-Myers Squibb Company ²	16,400
2006	Discretionary	State Farm Mutual Automobile Insurance Company	15,000
2006	Discretionary	Newport Creative Communications	13,100
2008	Discretionary	CD Minimum Advertised Pricing	11,400
2006	Nondiscretionary	Serono, Inc. ²	10,700
2006	Discretionary	McNeil-PPC, Inc. ²	10,000
2006	Nondiscretionary	Dresser Tie and Lumber Co.	9,400
2006	Discretionary	Blockbuster, Inc.	7,300
2006	Discretionary	Fort James Corporation	7,000
2007	Discretionary	ChoicePoint	5,500
2006	Discretionary	CVS Caremark Corporation	5,400
2009	Nondiscretionary	Asphalt Specialists, LLC	5,000
			11,744,100
		Settlements under \$5,000	29,700
			\$11,773,800

¹ Amounts were aggregated for payments made in installments, some of which cross fiscal years. The fiscal year of final payment is presented.

² Defendant in a multistate case involving pharmaceutical company pricing or marketing practices.