IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2008-SA-01245

DIVISION OF MEDICAID, OFFICE OF THE GOVERNOR, STATE of MISSISSIPPI; and DR. ROBERT L. ROBINSON, in his Official Capacity as Executive Director of the Division of Medicaid. — APPELLANTS

V.

MISSISSIPPI INDEPENDENT PHARMACIES ASSOCIATION, INC, et al. — APPELLEES

BRIEF OF APPELLEES MISSISSIPPI INDEPENDENT PHARMACISTS ASSOCIATION AND MISSISSIPPI PHARMACY ASSOCIATION, ET AL.

On Appeal from the Chancery Court of the First Judicial District of Hinds County, the Honorable William Hale Singletary

ORAL ARGUMENT REQUESTED

J. Price Coleman
[redacted]
1100 Tyler Avenue #101
Oxford, MS 38655
Telephone: (662) 236-0047
Facsimile: (662) 513-0072

Lowry Lomax
[redacted]
1100 Tyler Avenue #102
Oxford, MS 38655
Telephone: (662) 234-0943
Facsimile: (662) 234-0943

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V. **CASE NO. 2008-SA-01245**

MISSISSIPPI INDEPENDENT PHARMACIES ASSOCIATION, ET AL. **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Lowry M. Lomax, Esq.
   Lomax Law Firm
   1100 Tyler Avenue, Suite 102
   Oxford, MS 38655
   662-234-0943

2. J. Price Coleman, Esq.
   Coleman Law Firm
   1100 Tyler Avenue, Suite 101
   Oxford, MS 38655
   662-236-0047

3. Barry K. Cockrell, Esq.
Baker, Donelson, Bearman, Caldwell & Berkowitz
P. O. Box 14167
Jackson, MS 39236

4. Mississippi Independent Pharmacies Association, Inc.
4209 Lakeland Drive, Suite 399
Flowood, MS 39232

5. Mississippi Pharmacy Association
341 Edgewood Terrace Drive
Jackson, MS 39206

6. John Edwin White, d/b/a Service Rexall Drugs
161 Main Street North
Mendenhall, MS 39114

7. Professional Drugs, INC., d/b/a Dicket's Professional Drugs
1107 Jefferson Street
Laurel, MS 39440

8. Sullivan's Discount Drugs
109 Northside Shopping Center
Kosciusko, MS 39090

9. BSW, INC., d/b/a Howell and Heggie Drug Company
389 N. West Depot Street
Durant, MS 39063

10. Listine Mosby
Shelby, MS

11. Annie L. Scott
Shelby, MS

12. Torneita Hardin
Shelby, MS.

13. Sherikee Grim
Shelby, MS

14. National Association of Chain Drug Stores
413 North Lee Street
PO Box 1417-D49
Alexandria, Virginia 22313-1480

15. Walgreen Company
200 Wilmot Road
Deerfield, IL 60015

16. Fred's Stores of Tennessee, INC.
4300 New Getwell Road
Memphis, TN 38118

17. Division of Medicaid in the Office of the Governor, State of Mississippi
550 High Street
Jackson, MS 39201

18. Dr. Robert L. Robinson
Executive Director of Division of Medicaid
550 High Street, Suite 1000
Jackson, MS 39201

This the 22nd day of May, 2009.

J. Price Coleman
Attorney of Record for Appellees, Mississippi
Independent Pharmacies Association, Inc. and
Mississippi Pharmacy Association, et al.

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I. STATEMENT OF ISSUES

A. Did the trial court err in vacating the new rule for reimbursement holding it created a new methodology of reimbursement not provided in Miss. Code Ann. § 43-13-117 (1972) in violation of the statutory mandate that rates and levels of reimbursement not be increased, decreased or changed without legislative action?

B. Alternatively, is the new rule for reimbursement invalid because it did not fulfill the legislative mandate in Miss. Code Ann. § 43-13-117 (1972) that pharmacists be reimbursed for the reasonable costs of filling and dispensing Medicaid prescriptions?

C. Alternatively, is the new rule for reimbursement invalid because the Division of Medicaid (DOM) failed to comply with the applicable administrative procedures in Miss. Code Ann. § 25-43-3.105 (1972) requiring a written report providing an economic impact statement?

D. Alternatively, is the new rule for reimbursement invalid because DOM's actions in implementing the new rule were arbitrary and capricious in that it did not conduct a fair and adequate oral proceeding and failed to base its decision on substantial evidence in the record?

II. STATEMENT OF THE CASE

This brief is filed by Mississippi Independent Pharmacies Association and Mississippi Pharmacy Association on behalf of all pharmacists and pharmacies of this state along with the individual pharmacists and Medicaid beneficiaries named as party plaintiffs/appellees. Oral argument is requested due to the complex and important public policy issues affecting many Mississippi citizens. This case originated with plaintiffs'/Appellees' [hereinafter Pharmacists] complaint filed in the Chancery Court of Hinds County, Mississippi for injunctive and declaratory relief to prevent the Mississippi Division of Medicaid [hereinafter DOM] from implementing a new rule changing the rates of reimbursement to pharmacies for generic drugs. R. Vol. 1, pp. 1-38. The proposed rule would have resulted in a reduction in reimbursements to pharmacies each year by over $32 Million, one of, if not the largest, single reduction in pharmacy reimbursement in the history of Medicaid in Mississippi. Many pharmacists would not even be reimbursed for their costs of filling and dispensing Medicaid prescriptions.

Consequently, many pharmacies would be forced to discontinue filling prescriptions for Medicaid beneficiaries which in some instances makes up over 70 percent of their business. Some pharmacists indicated in sworn affidavits that if the new rule were made permanent that they would be forced to close their doors. Other pharmacies would be forced to cut staff or services to make up for the substantial reduction in revenue that would have resulted from the new rule. This would have also been devastating to many Medicaid beneficiaries in small communities across the state where the only pharmacy in their community might be forced to close. R. Vol. 1, pp. 82-127 and Vol. 13, pp. 1294-1303. For this reason several Medicaid beneficiaries joined in the complaint as plaintiffs.

Pharmacists intended to offer evidence and testimony at trial as to the matters discussed above in support of their request for injunctive and declaratory relief and to demonstrate the irreparable harm they would have suffered under the new rule. However, the trial court granted DOM's motion for a protective order holding that this case was nothing more than an appeal of an administrative agency's decision and that its review would be limited to the administrative record. R. Vol. 2, pp. 236-237. Pharmacists respectfully disagreed with the Court's ruling, but proceeded accordingly.[1]

Thereafter, the trial court ruled in Pharmacists' favor granting its request for a declaratory judgment vacating the rule on the basis of the first of four grounds raised in their complaint: that the proposed rule was invalid because it created a new methodology for reimbursement not provided by statute and without required legislative action. R. Vol. 2, pp. 243-250 or Appellants' Record Excerpts Tab 3 The court ruled based upon the detailed pleadings, extended argument on DOM's motion for a protective order and the administrative record. No party provided a brief to the court but the detailed pleadings and extended argument on DOM's motion covered all legal issues. The court in its eight page opinion (R. Vol. 2, pp. 243-250 or Appellants' Record Excerpts Tab 3) stated that it had given careful consideration to Plaintiffs' Complaint and Motion for Temporary Restraining Order "... and currently having the entire record of the proceedings

[1] The trial court's decision to limit Pharmacists' relief to an appeal of an administrative agency's decision is not an issue raised by the parties to this appeal.

below including the 'official rule-making record', ... no oral argument is necessary." [2] R. Vol. 2, p. 244. DOM's bewailing that it did not get the opportunity to provide a brief with its "basis for interpretation" (Appellants' Brief p. 5) rings hollow when one considers that is was DOM that insisted that the Chancellor's review be limited to the administrative record. No party was given the opportunity to offer evidence, explanation or "basis for interpretation"—only legal argument which the court stated it did not need in order to resolve the case.

The court did not reach the three alternative grounds raised by plaintiffs in their complaint as to the invalidity of the rule although these issues were also fully developed in the pleadings and in argument before the trial court. Complaint R. Vol. 1, pp1-38 ¶ 28-37; 41; 45; 48 and 51; Motion for TRO R. Vol. 1, pp 39-135 ¶ 2-6; 9-16 and transcript of argument R. Vol. 15, pp. 10-13, 18-21 and 34-36. These alternate grounds of invalidity also justify the decision of the trial court to vacate the rule. It is respectfully submitted that this court should affirm the trial court's decision to vacate the proposed rule not only on the basis of lack of legislative action, but also on the basis of each of the three alternative grounds.

III. STATEMENT OF FACTS

A. The state of affairs in the spring of 2008

The State of Mississippi was in a budget crisis during the spring and summer of 2008 over Medicaid funding, largely because of the recent rejection by the federal government of Mississippi's method of taxing hospitals. The Mississippi Legislature and the Office of the Governor could not agree on how to resolve the $90 Million shortfall created in the Medicaid budget for the 2008-2009 fiscal year. The Governor repeatedly stated the problem was not spending too much, but lack of funding: "[L]et's correct a myth... Medicaid doesn't have a spending problem; the total cost of the program has actually decreased 5 percent in the last four fiscal years.... Medicaid's budget problems stem not from overspending but from the disqualification of $90 Million in state matching funds back in 2005...." *The Clarion Ledger*, Article by Governor Haley Barbour, June 22, 2008, p G-1. The battle among the Governor, the

[2] As indicated in the Agreed Order on Briefing Schedule, DOM did not request oral argument, only Pharmacists did. Moreover, the trial court made it clear that it might rule before hand. R. Vol. 2, p. 241 or Appellants' Record Excerpts Tab 2.

Legislature and hospitals over funding continued throughout the summer of 2008 in a special session of the legislature and in fact continues to this day.

B. A quick fix to a part of DOM'S budget woes

As a quick (and partial) fix to the Medicare budget, DOM in March of 2008 proposed, and ultimately implemented, a cut in pharmacy provider reimbursements for generic drugs. The reimbursement cuts to Mississippi pharmacists for generic drugs totaled $32 Million per year. This would have purportedly saved the State of Mississippi approximately $7.7 Million per year and reduced matching funds from the federal government an additional $24.3 Million per year. R. Vol. 7, p. 319. On March 5, 2008, The Mississippi Division of Medicaid (DOM) filed a Notice of Proposed Rule Adoption (AP2008-20) to the Medicaid State Plan. The Proposed Rule Adoption changed the methodology of reimbursement for generic drugs. R. Vol. 5, pp. 1-3 or Appellees' Record Excerpts Tab B.

Miss. Code Ann. § 43-13-117(9) (b) (1972, as amended)[3] sets out the specific method and rate of reimbursement to pharmacies for generic drugs and provides, in part:

> Payment by the Division for covered multi-source drugs shall be limited to the lower of [1] the upper limits established by the Centers for Medicare and Medicaid Services plus a dispensing fee, or [2] the estimated acquisition cost (EAC) as determined by the division, plus a dispensing fee, or [3] the providers' usual and customary charge to the general public.
>
> .....
>
> It is the intent of the legislature that pharmacist providers be reimbursed for the reasonable costs of filing and dispensing prescriptions for Medicaid beneficiaries.
>
> Emphasis [numbers] added

The first method of drug cost reimbursement in Section 43-13-117(9) (b) is the rate established by Federal Centers for Medicare and Medicaid Services (CMS) as to the upper limits the federal government will reimburse states for multi-source drugs. This is known as the Federal Upper Limit (FUL). That upper limit is currently set at one hundred fifty (150) percent of the lowest wholesale price listed in the published compendia of cost information of drugs.

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[3] §43-13-117 (9) (b) is copied in full for the court's convenience in Appellees' Record Excerpts Tab A

The second method of calculating drug cost reimbursement is an Estimated Acquisition Cost (EAC). That calculation has historically been defined, sometimes by the Mississippi legislature and sometimes by DOM, as Average Wholesale Price (AWP) less some percentage. AWP is the average price in published compendia at which a drug product is available for purchase from pharmaceutical wholesalers. This method or the FUL method usually provides the lowest of the three methods of reimbursement for generic drugs. In spite of DOM's criticism of AWP in its brief, AWP remains an approved method of calculating EAC by the federal government and by most states, including Mississippi.

The third method allowed by the statute is the customary charge to the general public. This would be the amount pharmacies charge cash customers who do not have insurance.

In preparing to establish this new methodology known as state maximum allowable cost (State MAC) for calculating the reimbursement for the ingredient costs of generic prescriptions, DOM contracted with Myers & Stauffer, LC, an accounting firm in Kansas, to determine the average **actual** acquisition costs for some 838 generic drug groups that are currently being dispensed to Medicaid beneficiaries in Mississippi. Myers & Stauffer sent survey forms to every Medicaid pharmacy provider in Mississippi. The purpose of the survey was to determine from actual invoices what the average actual acquisition costs were for Mississippi pharmacies. This was a departure from the statutorily created method of utilizing an **estimated** acquisition cost based on the published compendia of average wholesale prices (AWP).

Myers & Stauffer clearly stated that their methodology calculates ingredient costs on an **actual** acquisition cost-based pricing approach based on what pharmacies **actually** pay rather than on published costs in AWP which only **estimates** what pharmacists pay. Myers & Stauffer further stated they "do not recommend AWP...based formulae for establishing State MAC rates." R. Vol. 6, pp. 170-171.

Initially DOM directed Myers & Stauffer to adjust the actual acquisition cost upward by applying a 1.2 multiplier[4] to the average actual acquisition cost for each of the 838 drug groups

[4] The final rule adoption on May 1, 2008 applied a 1.3 multiplier. This change was made after the administrative record was closed and Pharmacists were not given a chance to comment. However, the same

to establish the State MAC reimbursement rate for each of the drugs. As stated by DOM, the multiplier "ensures that each rate is sufficient to allow reasonable access by providers to the drug at or below the established SMAC rate." R. Vol. 5, pp. 2, 6. Even with the 1.2-multiplier adjustment to the average actual acquisition costs for the 838 drug groups on the State MAC list, Myers & Stauffer concluded that 10.1% of Mississippi pharmacy providers would incur costs of the ingredients at an amount greater than the proposed State MAC reimbursement rate. R. Vol. 8, p.558. In other words, 10% of the pharmacists would lose money. A cursory examination of some of the top prescribed drugs in the Mississippi on the State MAC reimbursement lists indicates that as many as 30% to 40% of Mississippi pharmacy providers would have ingredient costs at an amount greater than the State MAC reimbursement rate for those popular drugs. For example, 37.7 % of pharmacists could not buy Keflex (Cephalevin) for what they were reimbursed; 20% could not buy Coumadin (Warfarin) for what they were reimbursed; and 30.1% could not buy "Zpack"—zithromax (Azithromycin) for what they were reimbursed. R. Vol. 8, pp. 537-558. Moreover, the pharmacists would have been called upon periodically during the year to spend the time and money to compile reports and provide DOM purchase information on each of the 838 drug types.

C. Pharmacists are notified of rule change, express concern and request an oral proceeding

As indicated above, with the completion of a State MAC list of 838 generic drug groups, DOM noticed the proposed rule (AP2008-20) to adopt this new methodology for calculating reimbursement for the ingredient portion of the prescription. R. Vol. 5, pp. 1-3 or Appellees' Record Excerpts Tab B. Upon receiving the notice, the pharmacists met with DOM to advise it that the proposed rule change adopting a fourth and legislatively unauthorized methodology for reimbursement of generic drugs resulted in too low a level of reimbursement and was contrary to law. Objection was also made that an Economic Impact Study was not done. R. Vol. 5, pp 48-50 and Vol. 13, pp. 1307-1308. Independent and chain pharmacies and their trade associations objected to the proposed rule and filed requests for Oral Proceeding. R. Vol. 5, pp 14-16 and 19-

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arguments apply to the 1.3 multiplier: It is inadequate. The multiplier is not meant to provide a profit, but to assure that a certain percentage of pharmacists can actually buy the drug for the stated acquisition cost.

26 or Appellees' Record Excerpts Tab E. Also, many pharmacists wrote the Governor and copied DOM expressing their concerns about the new rule. R. Vol. 5, pp. 27-47 or Appellees' Record Excerpts Tab E.

On April 1, 2008, DOM withdrew its first notice and filed a second Notice of Proposed Rule Adoption. R. Vol. 5, pp. 4-8 or Appellees' Record Excerpts Tab C. This second notice differed only slightly from the first notice. Instead of the actual acquisition cost reimbursement methodology being listed for what it was-- a fourth and new methodology of calculating reimbursement for the cost of the drug, it was listed as an alternative method of calculating Estimated Acquisition Costs (EAC). As was pointed out by the Chancellor in his opinion, this was DOM's weak and futile attempt to get around the requirement in the statute that any change in the rate or method of reimbursement be done only by the legislature. R. Vol. 2, pp. 248-249. Moreover, regardless of what the change was called, it resulted in a rate of reimbursement below that mandated by statute. The second notice also included a one page purported Economic Impact Study which is inadequate. R. Vol. 5, p.8 or Appellees' Record Excerpts Tab C. At the request of the pharmacists an oral proceeding was scheduled for April 21, 2008.

Subsequent to the second Notice of Proposed Rule Adoption, and in preparation for the Oral Proceeding counsel for the plaintiffs requested depositions of DOM representatives, Myers & Stauffer and Dr. Noel Wilkin, the principal author of the University of Mississippi Pharmacy School study on the cost of dispensing. Alternatively, counsel for plaintiffs requested the right to confer with these individuals and that DOM make them available at the oral proceeding for questioning. R. Vol. 13, pp 1306, 1309. Under the "procedures" dictated by DOM, Pharmacists' counsel had no subpoena power to require the appearances of the deponents. DOM declined to make the individuals available for deposition and would not allow the individuals to meet with plaintiffs with attorneys present. At the oral proceeding, DOM would not allow any questions from anyone and these individuals did not appear. R. Vol. 12, pp.1128, 1143.

D. The oral proceeding

On April 21, 2008 at 2:00 p.m., DOM conducted an oral proceeding in Jackson, MS at The Division of Medicaid. As counsel for Medicaid had previously indicated to pharmacists'

counsel, the oral proceeding was not a "hearing" in the traditional or due process sense, but an "opportunity for folks to voice their concerns." R. Vol. 12, p. 1128. There was no court reporter, presenters were not sworn, there was no opportunity to question DOM officials, nor its agents that assisted in formulating the new rule. Dirk Dedeaux, Chairman of the Mississippi House of Representatives Medicaid Committee and member of the Medical Care Advisory Committee[5] attended the oral proceeding. Mr. Dedeaux attempted to question one of the presenters and was not permitted to do so by the Medicaid officials conducting the oral proceeding. R. Vol. 12, p.1143. The DOM moderator of the proceeding also restricted each presenter to five minutes. R. Vol. 12, p.1128. For this reason, many of the persons wishing to make presentations had to yield their time to others, so that their counsel could at least get their remarks on the record during the time DOM set aside for the hearing.

Despite the limitations placed on the presenters at the oral proceeding, counsel for the pharmacists and a few others were able to provide comment and evidence on the proposed rule. The recording of the oral proceeding did not work properly R. Vol. 12, p 1151and the statements by two of the individuals representing chain drug stores travelling to Jackson, Mississippi from their residences in Nebraska and Horn Lake, MS, were not recorded and therefore their statements were not available to DOM officials in reaching their ultimate decision, nor for this Court's judicial review. Several of the presenters offered written statements and other evidence (including an expert report) to be included in the record but these documents were not made a part of the record compiled by DOM and initially provided to the court. The documents not in the initial record include letters from Mississippi pharmacists R. Vol. 13, pp. 1294-1303 or Appellees' Record Excerpts Tab E; letters from members of the Medical Care Advisory Committee expressing their opinions that the new rule should not be implemented R. Vol. 12, pp. 1152-1156 or Appellees' Record Excerpts Tab E and the report of plaintiffs' expert providing detailed information and opinions as to: (a) the devastating effect of the new rule on Mississippi pharmacists, (b) a comparison of reimbursement under the new rule with reimbursement in other states and (c) the actual cost of dispensing in Mississippi. R. Vol. 13, pp. 1286-1293 or

[5] Miss. Code Ann § 43-13-107 (3)(a) (1972) established a Medical Care Advisory Committee made up of health care providers/consumers and members of the legislative leadership to advise DOM with respect to, among other things, amendments, modifications and changes to the state plan.

Appellees' Record Excerpts Tab D. These documents were only added to the administrative record reviewed by the trial court when plaintiffs' counsel notified counsel for DOM of their absence and provided copies. This is pointed out because it is questionable as to whether DOM considered this evidence before reaching its decision.

Pharmacists advised DOM at the oral proceeding that the proposed rule creating the State MAC, was invalid because such a change required legislative action. They further advised the Division that the proposed rule was invalid because the resulting reimbursement was inadequate and that DOM did not conduct an Economic Impact Study as required by applicable administrative law. R. Vol. 12, pp. 1130-1135.

Pharmacists also pointed out the devastating economic impact the Proposed Rule Adoption creating a State MAC would have on Mississippi pharmacies. R. Vol. 12 pp. 1135-1144. During the oral proceeding pharmacists provided DOM a copy of a report from their experts, Medical Marketing Economics, LLC (MME). MME concluded in its report that the proposed rule would lead to reimbursement to pharmacy providers for generic prescriptions in amounts less than what the pharmacy providers pay for the ingredients on many drugs and that pharmacies would lose on average $85,000.00 per year on filling Medicaid generic drug prescriptions. R. Vol. 13, pp. 1286-1293 or Appellees' Record Excerpts Tab D.

With regard to the $5.50 dispensing fee proposed in the new rule, pharmacists provided DOM with the results of the 2007 national Cost of Dispensing Survey done by the accounting firm of Grant Thornton. Vols. 12-13, pp. 1157-1220. This comprehensive study gathered information from over 24,400 pharmacies from across the country and determined the cost of dispensing in each state, including Mississippi. The Grant Thornton study determined the Cost of Dispensing for prescriptions in Mississippi was $10.39 per prescription. R. Vol. 12, p. 1186. It is important to note that the Grant Thornton survey received responses from 204 pharmacies in Mississippi, approximately twenty-five percent of all Mississippi pharmacies. The Grant Thornton Study established the cost of dispensing in neighboring states: Alabama-- $11.06; Arkansas -- $10.56; Louisiana -- $10.50; Georgia -- $11.99; Florida -- $11.83; Kentucky-- $11.24; and South Carolina -- $11.13. R-p.1187. Grant Thornton found a national average cost of dispensing of $10.50. R. Vol. 12, pp. 1173, 1186-1187.

Other presenters at the oral proceeding from Walgreens, Fred's and the National Association of Chain Drug Stores provided evidence as to the devastating effect the new rule would have on their pharmacies. They also provided evidence of significantly higher reimbursements in other states in which they did business compared to the rates under the new rule. R. Vol. 12, pp. 1148-1151 and Vol. 13, pp. 1304-1305.

Individual independent pharmacists Joe McGuffie and Bob Lominick testified as to the devastating financial effect that the new rule would have on their pharmacies and on all independent pharmacies in Mississippi. R. Vol. 12, pp. 1144-1148. The room was full of pharmacists with many standing along the wall and some in the halls because they could not get into the room.

Also in attendance were members of the Medical Care Advisory Committee, a statutorily created committee mandated to advise DOM on any rule change. At the conclusion of the oral proceeding, four of the committee members wrote the Director of Medicaid advising that they disagreed with the proposed rule and advised that it should be withdrawn. R. Vol. 12, pp. 1152-1156 or Appellees' Record Excerpts Tab E. The members that wrote the Director were Nolan Mettetal, a pharmacist and member of the State Senate; Dr. Sid Bondurant, a physician and member of the Mississippi House of Representatives; Dr. Juanita Dong, a pharmacist; and Dirk Dedeaux, the Chairman of the Mississippi House of Representatives Medicaid Committee.

At the conclusion of the oral proceeding, pharmacists introduced into the record summaries of their written remarks, a copy of their experts' report R. Vol. 13, pp. 1286-1293 or Appellees' Record Excerpts Tab D, and numerous letters from pharmacists across Mississippi expressing their concerns about the devastating financial impact the new rule would have on their pharmacies. R. Vol. 13 pp. 1294-1303 or Appellees' Record Excerpts Tab E.

On May 1, 2008 the Director of Medicaid issued a short Memorandum to all pharmacies dismissing all concerns and rejecting compromise proposals offered by Pharmacists stating:

> A proposal was received by the Mississippi Independent Pharmacies Association... [T]his proposal without even considering the bonus dispensing fee would save $3.7 Million State dollars on an annual basis....A second similar proposal from the chain pharmacy ... showed without considering the bonus dispensing fee the savings would be

$5.34 Million State dollars on an annual basis. **The cost containment offered by these two proposals are not sufficient to meet the savings needs of the State....**

Robinson Memorandum mailed to pharmacists, May 1, 2008, R. Vol. 13, pp. 1279-1280.

This statement clearly shows that DOM "worked backwards" from an arbitrary number by which it intended to reduce pharmacy reimbursements regardless of its authority or the reasonableness of the number.

IV. SUMMARY OF ARGUMENT

A. The four grounds on which the new rule is invalid

The new rule for reimbursement is invalid on numerous grounds. These grounds were pointed out to DOM throughout the administrative process, in the complaint and in argument before the trial court. These grounds are listed in the statement of issues *supra*. The trial court correctly vacated the rule on the first of these grounds: that the new rule created a new methodology for reimbursement which required legislative action. This is the only ground addressed by DOM in its brief. The proposed rule, by DOM's own admission, is a change in the method and the rate of reimbursement for pharmacists. The proposed State MAC program adds a fourth formula for determining reimbursement to the three methods specified in Miss. Code Ann. § 43-13-117 (9) (b) (1972, as amended). It creates a new and different method and rate of reimbursement which according to the DOM will reduce reimbursements to pharmacies each year by approximately thirty-two million dollars. Such a change requires legislative action and cannot be done on the whim of DOM. Moreover, the trial court's decision to vacate the rule is also justified on each of the alternative grounds.

The first alternative ground justifying the court's decision is that the new rule on reimbursement does not provide reimbursement "for the reasonable costs of filling and dispensing Medicaid prescriptions" as required by Miss. Code Ann. § 43-13-17 (1972, as amended). The new rule cuts the reimbursement for filling prescriptions below the cost that many Mississippi pharmacies can purchase the drug. Likewise, the new rule does not provide reasonable reimbursement for dispensing Medicaid prescriptions, the second component of reimbursement provided in the controlling statute. The administrative record provides

uncontradicted evidence that the actual cost of dispensing in Mississippi is over $10.00. The reimbursement of $5.50 in the new rule is inadequate.

The second alternative ground justifying the court's decision is that DOM did not provide an economic impact statement as required by the Mississippi Administrative Procedures Act (hereinafter MAPA) codified in Miss. Code Ann. § 25-43- 01, *et seq.* (1972, as amended). Section 25-43-3.105 of MAPA requires an administrative agency, including DOM, provide a written report of the agency's analysis of the economic impact of a "significant rule amendment" to the citizens of Mississippi. The statute is very specific as to what the study and the report must include. MAPA is clear that a failure by an agency to substantially comply with this provision renders a proposed rule invalid. DOM's one page statement falls so short of compliance with the statute that it demonstrates, in and of itself, DOM's arbitrary and capricious conduct.

The third alternative ground justifying the court's decision is that DOM's actions in implementing the new rule were arbitrary and capricious because it failed to conduct a fair and adequate oral proceeding and ignored the substantial and uncontradicted evidence in the record. Looking at the definition of capricious, this Court has stated: "an act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and controlling principles." Environmental Quality v. Weems, 653 So.2d 266, 274 (Miss. 1995). The Court has also held that an administrative act is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency..." Id at 281. The decision by DOM to implement the new rule for reimbursement to pharmacists was truly one that runs "counter to the evidence before the agency" Id. 274. It is submitted that DOM's decision was reached to satisfy a goal of saving thirty-two Million dollars, regardless of whether it is supported by the record or in compliance with the mandate of the legislature that levels of reimbursement not be changed and be reasonable. The fact that DOM "worked backwards" knowing the conclusion it wanted to reach before it considered the evidence in the record is made clear by the DOM Director's own words quoted above. R. Vol. 13, pp. 1278-1280.

This court has long recognized its inherent power to affirm a decision on grounds other than those relied upon by the trial court. Therefore, even if this Court should disagree with the

trial court on its decision vacating the rule on the first of the four grounds, it is respectfully submitted that the trial court reached the correct decision and this Court with its de novo review of the trial court's ruling should affirm on the basis of each of the three alternative grounds for vacating the rule.

In Cucos v. McDaniel, 938 So.2d 238 (Miss. 2006) this Court stated: "... [A] trial court judgment may be affirmed on grounds other than those relied upon by the trial court.... It is well established in our jurisprudence that the right result reached for the wrong reason will not be disturbed on appeal." Id. at 246, citations omitted. *See also*, Aldridge v. West, 929 So.2d 298, 303 (Miss. 2006) ("A long-standing rule of this Court is that we will not reverse a lower court's decision where that court reaches the right conclusion although for the wrong reason."); Hobson v. City of Vicksburg. 848 So.2d 199, 202 (Miss. 2003) ("It is standard practice of this Court to affirm the decision of the trial court when we conclude that the right result has been reached even though the trial court employed reasoning different from that which we decide controls the issue."); Bechtel Power Corp. v. MMC Materials, Inc., 830 So.2d 672, 678 (Miss. 2002); Briggs v. Benjamen, 467 So.2d 932, 934 (Miss. 1985); Lee v. Memphis Publishing Co., 195 Miss 264, 14 So.2d 351 (Miss. 1943).

Moreover, because Pharmacists prevailed before the trial court and received the relief they were seeking, they are not required to file a cross appeal to preserve these alternative grounds for vacating the new rule of reimbursement. Dunn v. Dunn, 853 So.2d 1150, 1152-1153 (Miss. 2003) ("... [W]e conclude that an appellee should not be required to file a cross-appeal unless he or she is aggrieved by the trial court's judgment. Because [appellee] won a favorable judgment ... her position on appeal was to have this court affirm the judgment.... Therefore, she is not required to raise any issues on cross-appeal"); Brocato v. Mississippi Publishers Corp., 503 So.2d 241, 244 (Miss. 1987) (upholding summary judgment on grounds other than those relied upon by the trial court and finding that no cross-appeal was required to preserve the alternate grounds on appeal); Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 56 So.2d 709 (Miss. 1952).

B. The standard of review of the trial court's decision

The first three grounds for vacating the proposed rule for reimbursement specified above in issues 1-3, are questions as to whether DOM violated constitutional or statutory law. As stated by this Court in McGowan v. Mississippi State Oil & Gas Board, 604 So.2d 312,317 (Miss. 1992) "as they [issues for judicial review] partake of law and not fact, our review is de novo." In Sierra Club v. Mississippi Environmental Quality Permit Board, 943 So.2d 673 (Miss 2006) this Court stated: "Generally, this Court accords great deference to an agency's interpretation of its own rules and regulations. However, where an administrative agency's interpretation is contrary to the unambiguous terms or best reading of a statutory provision, the agency is not entitled to deference." Id. at 679. See also, Mississippi State Department of Health v. Southwest Mississippi Regional Medical Center, 580 So.2d 1238, 1240 (Miss. 1991) and 2 Am. Jur. 2d Administrative Law Sec. 490 ("The final word on matters of law belongs to the courts, which may substitute their judgment for that of the agencies....").

As to the fourth grounds for vacating the proposed rule for reimbursement specified above in issue 4, the standard of review is whether the actions of DOM were arbitrary and capricious and not based on substantial evidence. Looking at the definition of capricious, this Court has stated: "an act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and controlling principles." Environmental Quality v. Weems, 653 So.2d 266, 274 (Miss. 1995). The Court has also held that an administrative act is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency...." Id. at 281.

V. ARGUMENT

A. The new rule creates a new methodology of reimbursement not provided in Miss. Code Ann. § 43-13-117 (1972) and in violation of the statutory mandate that rates and levels of reimbursement not be increased, decreased or changed without legislative action.

1. The Mississippi Legislature has delegated the administration of Medicaid to DOM, but with very specific limitations on its authority. In this case DOM over-stepped its authority

Mississippi Department of Medicaid (DOM) initially filed a Notice of Proposed Rule Adoption on March 5, 2008, for the stated purpose to "reflect changes...that are being made to the Mississippi State Plan regarding pharmacy reimbursement." Appellees' Record Excerpts Tab B. On April 1, 2008 DOM re-noticed the proposed rule change giving Pharmacists the oral proceeding they had requested and changing the wording of the rule slightly in an attempt to skirt the concerns raised by pharmacists as to the need for legislative action. Appellees' Record Excerpts Tab C. The notice cited the legal authority authorizing the promulgation of the rule as Miss Code Ann. § 43-13-121 (1972) which provides in part:

> "(1) **The Division** shall administer the Medicaid program under the provisions of this article and **may do the following**:
> (a) Adopt and promulgate reasonable rates, regulations, standards, with the approval of the Governor, and in accordance with the Administrative Procedures Law, Section 25-43-1 et seq.:
> ...
> (iii)**Establishing reasonable fees, charges and rates for medical services and drugs**; in doing so, the division shall fix all of those fees, charges and rates at the minimum levels absolutely necessary to provide the medical assistance authorized by this article, **and shall not change any of those fees charges or rates except as may be authorized by Section 43-13-117...."**

§ 43-13-121 [emphasis added]

Section 43-13-117 referenced in the above quoted statute specifies the medical services provided by Medicaid to eligible citizens of Mississippi. Appellees' Record Excerpts Tab A. Sub-section (9) (b) deals with multisource (generic) prescription drugs, the subject of the new

rule at issue in the case at bar. This section specifically sets out the method and rate of reimbursement to pharmacies for generic drugs. It provides in part:

> "(b) Payment by the division for covered multisource drugs shall be limited to the lower of the upper limits established by Centers for Medicare and Medicaid Services (CMS) plus a dispensing fee, or the estimated acquisition cost (EAC) as determined by the division, plus a dispensing fee, or the providers' usual and customary charge to the general public
> ...
> **It is the intent of the legislature that pharmacist providers be reimbursed for the reasonable costs of filling and dispensing prescriptions for Medicaid beneficiaries.**"

Section 43-13-117 concludes with an unnumbered paragraph (fourth from the end) which prohibits changes in the payments and rates of reimbursement once set by statute or initial action by the DOM without amendment by the Legislature:

> Notwithstanding any provision of this article, except as authorized in the following paragraph and in Section 43-13-139, **neither** (a) the limitations on quantity or frequency of use of or the fees or charges for any of the care or services available to recipients under this section, nor (b) **the payments or rates of reimbursement to providers** rendering care or services authorized under this section to recipients, **may be increased, decreased or otherwise changed from the levels in effect on July 1, 1999, unless they are authorized by an amendment to this section by the legislature**. Except...whenever those changes are required by federal law or regulation, or whenever those changes are necessary to correct administrative errors or omissions in calculating those payments or rates of reimbursement.

§ 43-13-117 [emphasis added]

It is perhaps telling that DOM did not include the "intent of the legislature" paragraph in the portion of the statute it chose to quote in its brief. Nor did it include the last unnumbered paragraph specifically prohibiting DOM from changing payments and rates of reimbursement. These portions of the statute are not even addressed in DOM's brief! Not only did DOM ignore these portions of the statute in its brief, it is submitted that DOM ignored them in making its decision to go forward with the rule change.

While the unnumbered paragraph of the statute has not been the subject of judicial review, a similar moratorium on reduction of reimbursements to pharmacists at the Federal level has been reviewed and enforced by several Federal courts. In each of these cases the court held that a reduction in the level of reimbursement was prohibited by the statute. Pharmaceutical Society of the State of New York, Inc. v. New York State Department of Social Services, et al., 50 F.3d 1168 (2nd Cir. 1995); Andrulonis v. U.S., 26 F.3d 1224, 1235 (2nd Cir. 1994); Indiana Pharmacists' Association v. Indiana Family and Social Services Administration, 881 F. Supp. 395 (S.D. Ind. 1994) (moratorium precludes reductions in reimbursements); Nebraska Pharmacists Ass'n, Inc. v. Nebraska Dep't of Social Services, 863 F. Supp. 1037, 1043 (D. Neb. 1994) (a co-payment scheme such as Nebraska's "would render the prohibition against reduction in limits... meaningless.").

In *Pharmaceutical Society of the State of New York, Inc. v. New York State Department of Social Services* cited above the state of New York attempted to change the co-payment system of reimbursements which would have resulted in a substantial reduction on overall payment to pharmacists for filling Medicaid prescriptions. The Court held that such a reduction was in violation of the moratorium on such reductions. In so holding, the court stated:

> In 1990, Congress passed the Omnibus Budget Reconciliation Act ("Omnibus Act"), as amended, codified at 42 U.S.C. § 1396r-8, subsection (e) of which provides:
>
> Treatment of pharmacy reimbursement limits
>
> (1) In general
>
> During the period beginning on January 1, 1991, and ending on December 31, 1994-
>
> (A) a State may not reduce the payment limits established by regulation under this subchapter or any limitation described in paragraph (3) with respect to the ingredient cost of a covered outpatient drug or the dispensing fee for such a drug below the limits in effect as of January 1, 1991, and
>
> (B) except as provided in paragraph (2), the Secretary [of Health and Human Services] may not modify by regulation the formula established under sections 447.331 through 447.334 of title 42, Code of Federal Regulations, in effect on November 5, 1990, to reduce the limits described in subparagraph (A).
>
> ...
>
> The State urges that a literal reading of the statute indicates that only "payment limits" may not be reduced. Under this reasoning, the State may use other methods to reduce the amount of money that pharmacists receive as long as the "limits" are not reduced. We reject this position.

> We first note that New York's position would appear to justify the denial of all reimbursement to pharmacists, as long as the state did not alter the formula for calculating the limits. Such a result would be absurd, and we therefore refuse to adopt an interpretation that would lead to it. Instead, we conclude that in enacting the moratorium, Congress intended to protect the actual level of reimbursement flowing to pharmacists.

50 F.3d at 1171-1172

Likewise, the Mississippi Legislature intended to protect the actual "payments or rates of reimbursement to providers" specified in the unnumbered paragraph toward the end of Section 43-13-117. No changes can be made without legislative action.

The proposed rule change, by DOM's own admission, is a change in the method and the rate of reimbursement for pharmacists. The proposed State MAC program adds a fourth formula for determining reimbursement to the three methods specified in Section 43-13-117 (9) (b). It creates a new and different method and rate of reimbursement which according to the DOM will reduce reimbursements to pharmacies each year by approximately thirty-two million dollars. Such a change requires legislative action and cannot be done on the whim of DOM.

The Mississippi Attorney General has been called upon on several occasions to determine if various actions by DOM were in compliance with the above referenced unnumbered paragraph which prohibits DOM's ability to make changes without legislative action. See, e.g. 1986 WL 81869 (Miss. A.G.) (DOM may add new drugs to formulary without legislative action); 1989 WL 503270 (Miss. A.G.) (DOM may add new procedures and injectables to formulary without legislative action so long as priced relevant to existing procedures and drugs); 1990 WL 548035 (Miss. A.G.) (legislative action required before DOM could change eligibility coverage for children under 6 years of age and pregnant women); 1993 WL 346033 (Miss A.G.) (DOM may not modify or expand the statutory framework of reimbursement for mental health services without legislative authority); and 2002 WL 1057947 (Miss. A.G.) (DOM may adjust amount, duration, and scope of services and adjust income limits for eligibility without legislative action). While not binding, this Court has considered Attorney General's Opinions as part of its analysis. State ex rel. Holmes v. Griffin, 667 So.2d 1319 (Miss. 1995), reh'g denied, (Feb. 15, 1996); State v. Heard, 246 Miss. 774, 151 So.2d 417 (1963); 8 MS Prac. Encyclopedia MS Law Sec. 68:115.

In each of the opinions cited above in which DOM or providers requested guidance, the Attorney General carefully considered the particular action by DOM to determine if, in fact legislative action was required. The clearest recognition of the limitation on action by DOM is contained in the September 4, 1990 opinion[6] requested by DOM which the Attorney General states, in part:

> State agencies are given only that authority and power which is conferred by legislative act [citation omitted] therefore, pursuant to Miss. Code Ann. 43-13-117, without legislation or amendment to the statute the division of Medicaid, which is a state agency, has no authority to implement additional services or add new groups or categories or recipients unless ordered by a court of competent jurisdiction. **Further, any changes in the payments or rates of reimbursement to providers from levels in effect on July 1, 1986 [previous act] also require enabling legislation**....

1990 WL 548035, p.2 [emphasis added] or Appellees' Record Excerpts Tab F.

The above referenced statute and past opinions of the Mississippi Attorney General make it clear that the legislature has placed limitations on the authority of DOM, specifically in the area of determining rates and levels of reimbursement. It is beyond the pale that DOM would take the position that creating a whole new method of determining drug costs and reducing reimbursement by over $32 Million is not a change in rates and levels of reimbursement. The proposed rule change is beyond the authority granted DOM in that it is a change in the payments or rates of reimbursement that can only be done by legislative action.

2. Estimated and Actual are two different words with two different meanings and the creation of an actual acquisition cost based methodology for reimbursement is different than an estimated acquisition cost methodology

a. History of § 43-13-117 9(b) and Estimated Acquisition Cost (EAC)

Each year the legislature reenacts the statutes covering Medicaid services. From July 1, 1999 until the rule change at issue in this case, the payments and rates of reimbursement under § 43-13-117 (9) have been tied to the pharmacists' estimated acquisition cost (EAC). EAC is a term of specific meaning within the guidelines established by the Federal Medicaid program that provides 3 to 1 reimbursement to the state of Mississippi for dollars spent on the care provided to

[6] A copy of this opinion is copied in full for the convenience of the court in Appellees' Record Excerpts Tab F.

low income and needy citizens. In 1999 the statute gave DOM the discretion of determining EAC. At that time DOM defined EAC as the average wholesale price of the drug less 10 %. This definition continued in 2000 and 2001. In 2002 and 2003 the **legislature** reduced the reimbursements to pharmacists by increasing the discount off AWP. In doing so the legislature specifically defined EAC in the statute stating:

> As used in this paragraph (9) "estimated acquisition cost" means twelve percent (12%) less than the average wholesale price for a drug.

In 2004 the legislature changed the statute back to the language it had used from 1999 until 2002: "EAC as determined by the division". Thereafter, from 2005 until the present rule change in 2008, DOM defined EAC as average wholesale price less 25%. Appellees' Record Excerpts Tab G.

The Center for Medicaid Services (CMS), the federal agency that oversees state Medicaid programs and approves reimbursement to states, discussed the universally accepted definition of EAC in a publication sent to DOM and which is part of the record:

> States generally use published commercial compendia prices as the basis for establishing EAC. That is, states use average wholesale price (AWP) and apply a discount (generally in the range of 10 percent to 15 percent); or states might use wholesale acquisition cost (WAC) plus a percentage markup.

R. Vol. 7, p. 325(fn 6)

This Court addressed the methodology of pharmacy reimbursement and estimated acquisition cost (EAC) in an unrelated context in Jones v. Howell, 827 So.2d 691 (Miss. 2002):

> The Division of Medicaid reimburses each provider at the end of each month according to a specific formula. The formula was established by statute prior to 1992, and the formula cannot be varied by the Division of Medicaid. *See* Miss.Code Ann § 43-13-117(9) (Supp.2001). The formula for prescription drugs provides that, for every prescription filled, the provider receives a dispensing fee of $4.91, without regard to the cost of the medicine. In addition to the dispensing fee, the provider also receives the average wholesale price of the medicine less ten percent of the average wholesale price. The provider usually receives a discount from the drug company from which he or she purchases the medicine. This discount is generally sixteen to eighteen percent of the wholesale price. Thus, taking into account the formula, a provider may realize a gross profit of approximately six to eight percent on the cost of the medicine purchased, plus the dispensing fee of $4.91.

827 So.2d at 694

The *Jones v. Howell* case arose at a time when the definition of EAC was fixed by DOM at AWP less ten percent. This Court in Jones v. Howell correctly stated that DOM cannot make changes in the methodology of reimbursement set by the legislature. This Court also recognized that pharmacists receive a discount from drug companies and that there is an expectation of a reasonable profit for filling Medicaid prescriptions.

DOM's references in its brief to the Pharmaceutical Industry Average Wholesale Price Litigation, 520 F. Supp.2d 267 (MDL 2007) is misplaced and misleading. Pharmacists were actually plaintiffs in the litigation against two drug manufacturers alleging unfair and deceptive trade practices in overpricing certain expensive physician-administered drugs. The case at bar is over generic drugs dispensed and filled by Mississippi pharmacies. With reference to the prescription drug market in general, the court in the Pharmaceutical Industry Litigation stated: "... the government understood that AWP did not represent a true average of wholesale prices, but that there was a spread of 20 to 25 percent between AWP and wholesale list (or acquisition) price...." 520 F.Supp,2d at 270. In the case at bar, the 25 percent discount off AWP applied by DOM since 2005 more than compensates for the difference between AWP and what pharmacists pay for the drugs—and in fact leads to very little profit to pharmacies under the current methodology of reimbursement. To refer to litigation against drug manufacturers caught fraudulently over-pricing specific drugs is misleading and unproductive to resolving the case at bar. It also is insulting to the pharmacists of this state. DOM's proposed rule change will not reduce the profit of pharmaceutical manufacturers by one dime. Nor will it lower the price retail pharmacists pay for the drugs from wholesalers. It will; however, reduce reimbursement to retail pharmacists by over 32 Million dollars per year.

b. Acquisition Cost is different and distinct from estimated cost

According to Black's Law Dictionary, 'estimate' is defined as "A valuing or rating by the mind, **without actually measuring**, weighing or the like, a rough or approximate calculation only." *Black's Law Dictionary* 550 (6th ed.1990) (emphasis added). This definition of the word "estimate" coincides with the common-sense understanding of the word, which, of course, is not indicative of a number based on actual figures. See, e.g. Blue Diamond, Inc. v. Liberty Mutual

Ins. Co., 21 F.Supp.2d 631, 636 (S.D. Miss. 1998) (using definition of estimate in insurance bad faith case over use of estimated audit of premium).

It is clear that the estimated acquisition cost (EAC) is a term of art that has been commonly defined by DOM, other states and the Federal Medicaid authorities by using "commercial compendia prices". This is to be distinguished from the proposed rule, which is clearly based upon actual invoices from pharmacists. After pharmacists raised with DOM their concern for the need for legislative action before implementation of such a change, DOM changed the wording of the proposed rule so that the new methodology of using acquisition cost data no longer appeared as a fourth method of reimbursement, but appeared as an alternative way of calculating an estimated acquisition cost. Compare R. Vol. 5 p. 2 to p. 5 or Appellees' Record Excerpts Tab 2 to Tab 3. As pointed out by the Chancellor in his opinion, this transparent ruse is an attempt to hide the true character of the change and mischaracterize it so DOM could avoid the inconvenience (and time) of having the legislature consider the matter. R. Vol. 2, pp. 248-249.

Pharmacy economics expert, Brian Reisetter of MME, provided sworn uncontested testimony that the proposed rule change created a new fourth methodology for reimbursement. He stated:

> The proposed language adds a fourth method or formula for reimbursement called "State Maximum Allowable Cost (SMAC)." **The proposal to add a SMAC is, in my opinion, changing the payments and rates for reimbursement** by adding a new methodology which changes the levels of reimbursement to pharmacists.
>
> The opinion provided in the preceding paragraph is based on the fact that SMAC estimations of acquisition cost are not traditionally considered an "estimated acquisition cost (EAC)." **That term (EAC) is used exclusively to represent a cost that is estimated as a percent discount off of "Actual Wholesale Price (AWP)"** e.g., AWP minus 18% or above "Wholesale Acquisition Cost (WAC)" e.g. WAC plus 5%. This opinion is consistent with the language used in Section 6305.1B of the CMS Medicaid Manual.

Reisetter Affidavit, para. 3-4, R. Vol. 1, p. 71 or Appellees' Record Excerpts Tab H. [emphasis added].

DOM in its brief confuses the terms State Maximum Allowable Cost (SMAC) and actual acquisition cost. Maximum allowable cost is nothing more than a statement as to the amount a

state will pay for a drug, that maximum being computed by various methodologies available in a particular state under its statutes. A state maximum allowable cost does not always include the use of an actual acquisition cost methodology. In fact, while many states have a state maximum allowable cost, only a few utilize an actual acquisition cost methodology. Moreover, many of these states that have implemented the use of actual acquisition cost have done so after legislative action. See, e.g. 2004 Virginia General Assembly, Item 326 WW (1) of 2004-2006 Appropriations Act (requiring Virginia Department of Medical Assistance Services to amend state plan to include new drug pricing methodology); IA ST T. VI, Subt. 6, ch. 249 A, 2001 Iowa Human Services Appropriations Acts 2001 (79 G.A.) ch. 155, §12 (enacted by the General Assembly requiring the Department of Human Services to implement a State Maximum Allowable Cost based on actual acquisition cost basis); and NY Soc. Serv. §367-9(e) (authorizing New York commissioner of health to establish state maximum allowable cost (SMAC) for generic drugs with no federal upper limit and contract with entity to provide technical assistance).

Whether legislative action is required in a particular state depends upon that state's statutes. Mississippi's methodology for reimbursement for generic drugs is set by Section 43-13-117 9(b). It does not include an actual acquisition cost methodology and prohibits changes without legislative action. If DOM wants an actual cost methodology it must obtain legislative approval. The issue in the case at bar is not which methodology is best, but whether such a change in methodology requires legislative action.

Actual acquisition cost is a totally different methodology for determining the rate and level of reimbursement requiring the use of actual invoices as opposed to commercial compendia. Moreover, the application of the new rule results in levels of reimbursement far below that existing July 1, 1999 and in each year thereafter and such a change is prohibited by the "whereas" paragraph of Section 43-13-117. Such a change in the rate of reimbursement (adding a actual cost based methodology) and change in the level of reimbursement (reducing it by over $32 Million) certainly falls within the statutory mandate that no changes be made without legislative action. The Chancellor was correct in his opinion vacating the proposed rule.

B. The new rule does not fulfill the legislative mandate in Miss. Code Ann. § Sec. 43-13-117 (1972) that pharmacists be reimbursed for the reasonable costs of filling and dispensing Medicaid prescriptions

Even if DOM had the authority to unilaterally change the methodology and level of reimbursement, which it clearly does not as discussed above, the new rule is in violation of the paragraph added to § 43-13-117 9(b) in 2004 which states:

> It is the intent of the legislature that pharmacist providers be reimbursed for the reasonable costs of filling and dispensing prescriptions for Medicaid beneficiaries."

This portion of the controlling statute is also ignored by DOM in its brief, and more importantly ignored by DOM in implementing the new rule. This section was added to § 43-13-117 9(b) by the legislature in 2004 when it gave Medicaid the discretion to adjust the percentage to be discounted from AWP in determining EAC. In the two previous years the legislature had specifically defined EAC as AWP less 12%. Thereafter, when given the discretion to do so, DOM promptly increased the percentage discount to be applied to AWP from 12% to 25%. Compare R. Vol. 7, p. 337 to p. 329 or Appellees' Record Excerpts Tab G p. 1 to p. 3. But the legislature added the "intent" paragraph to the pharmacy reimbursement provisions contained in subsection (9) to the statute. It is unique and does not appear in paragraphs of the statute dealing with reimbursements to other medical service providers such as hospitals, doctors, nurses, nursing homes, ambulance service, etc. This provision assures pharmacists that the reimbursement levels will cover their costs and provide a reasonable profit. It provides the standard that DOM must follow in setting reimbursement levels for pharmacists. If DOM sets a level of reimbursement below pharmacists' costs of filling and/or dispensing then the rate is in violation of the statute and is void. Therefore, an analysis by the court of the new rule's effect on the payment and level of reimbursement must be carefully conducted to determine if, in fact, the new rule complies with the legislative mandate cited above.

1. Two components of reimbursement must add up to reimbursement that is reasonable

Any analysis of the payment and level of reimbursements to pharmacists must begin with an understanding that reimbursement has two components: (1) reimbursement for the cost of the drug and (2) reimbursement for the cost of dispensing. The two components together make up the total dollars received by the pharmacist in filling a Medicaid prescription. Each of these

components must be analyzed separately to determine if it is reasonable as mandated by the "intent paragraph" of Section 43-13-117 (9)(b).

2. The cost of the drug component of reimbursement

Reimbursement for the cost of the drug component is made on the lower of the three methods/rates set out in § 43-13-117 discussed previously in this brief. Usually, the lowest has been either the FUL method or the EAC method (AWP less 25%). Traditionally, the lower method resulted in a reimbursement for the cost of the drug in excess of the pharmacist's cost for the drug – in other words, the pharmacist made a reasonable profit.[7]

However, the new rule which utilizes actual acquisition costs based on the pharmacists' invoices for purchasing the drugs, is predictably and consistently the lowest method of reimbursement. Moreover, there is no longer any profit to the pharmacist in the cost of the drug component of reimbursement. In fact, as pointed out previously, a significant percentage of pharmacists will not even be able to purchase many drugs for the amount they receive in reimbursement.

3. The dispensing fee component of reimbursement

As discussed above, § 43-13-117 9 (b) mandates "that pharmacists be reimbursed for the reasonable costs of filling **and dispensing** Medicaid prescriptions". The cost of dispensing includes the direct and indirect costs associated with the operation of a pharmacy and dispensing a prescription. The direct costs include professional salaries, equipment, supplies, and professional insurance. Indirect costs include salaries of clerks, rent, utilities, maintenance, advertising and business insurance. R Vol. 7, pp. 310-314. Unfortunately, for many years the reimbursement for the cost of dispensing has been far below the actual costs incurred by

[7] As will be discussed in the next section of this brief, until the implementation of the new rule, the reimbursement for the other component, the cost of dispensing, was set at $4.91. This level was far below the actual cost of dispensing which, as hereinafter discussed, is $10.39. The pharmacists were satisfied with the total dollars received when the components were combined so they did not complain about the low rate of reimbursement for the cost of dispensing. In other words, until the implementation of the new rule the pharmacist made enough money on reimbursement for the cost of the drug to offset the inadequate level of reimbursement on the cost of dispensing.

pharmacists. This same phenomenon exists in most states (R. Vol. 13, pp. 1221-1222) resulting in most of the pharmacists' reimbursement dollars coming from the cost of the drug component. This is not a problem for pharmacists so long as the total reimbursement is satisfactory—it's the total dollars the pharmacists are concerned with. Even the Center for Medicaid and Services [hereinafter CMS] recognized that any change in reimbursement for the cost of the drug must be done with a careful review of the dispensing fee. CMS stated in a December 15, 2006 letter to state medical directors, including Mississippi's director:

> CMS also expects to provide States a monthly national survey of retail prices beginning in January, 2007. States may use these data to revise or validate their current drug payment methodologies. **When using these new drug data sources, States should reexamine and reevaluate the reasonableness of the dispensing fee** paid as part of the pharmacy claim. **If States adjust their payment methodologies to reflect the ingredient cost of the prescription drug, we suggest that they also reevaluate their dispensing fees to ensure that these fees are reasonable....**

R. Vol. 8, p. 467-468, Department of Health & Human Services, Centers for Medicaid Services, Release No. 144, dated December 15, 2006 [emphasis added]

The CMS initiative to provide a national survey of retail drug prices has been delayed by an injunction entered by a Federal court in the District of Columbia but the necessity of reevaluating dispensing fee reimbursement if there is an adjustment on reimbursement for drug costs still applies. The new rule drastically cuts reimbursement for the drug costs but fails to adequately adjust the cost of dispensing. Simply stated, if DOM (after obtaining legislative authority) wants to implement a rule utilizing **actual** acquisition costs for the drugs, it should likewise implement a rule utilizing **actual** dispensing fees.

In an attempt to reevaluate the dispensing fee, DOM contracted with the University Of Mississippi School Of Pharmacy to conduct a cost of dispensing study. R. Vol. 7, pp. 302-305. The study was completed January 5, 2007. R. Vol. 7, pp. 306-318. Unfortunately, DOM has chosen to distort and mischaracterize the study and attempt to use it to support a $5.50 cost of dispensing. This is contrary to the study itself and inconsistent with the known cost of dispensing in Mississippi, surrounding states and, in fact, every state in the nation. DOM's gambit is to claim the study supports its conclusions; to hide the principal author from explaining the study and its conditions for use, and to ignore the testimony of Mississippi pharmacists as to their true

costs. It is submitted that this is the reason why DOM fought to prevent plaintiffs from deposing or even meeting with Dr. Wilkin, the principal author of the study, and to exclude supplemental evidence at trial. DOM has successfully prevented plaintiffs from examining, or even meeting with Dr. Wilken, but fortunately another participant author of the study, Dr. William Lobb, R. Vol. 7, p. 318 is a principal in Medical Marketing Economics (MME) and provided his opinions regarding the dispensing study in the MME report submitted to DOM and made a part of the record. R. Vol. 13, pp. 1286-1293 or Appellees' Record Excerpts Tab D. His comments are the only evidence in the record from an author of the study as to the true meaning and proper use of the study. The study does not support a $5.50 cost of dispensing fee. Moreover, the evidence in the record is overwhelming and uncontradicted that the actual cost of dispensing in Mississippi is over $10.00.

It is noteworthy that unlike other Cost of Dispensing Surveys, the authors in the University of Mississippi came to no conclusion as to an overall Cost of Dispensing amount for prescriptions in Mississippi. Instead, they listed ranges of dispensing costs depending on whether the pharmacy was urban, rural, chain, or independent. R. Vol. 7, p. 316.

More than once in the survey the authors of the survey indicated that the survey was not a reliable basis for establishing the Cost of Dispensing in Mississippi. When discussing urban vs. rural, the authors stated that "caution should be exercised when interpreting this result because of the small number of pharmacies included from the Jackson area.". R. Vol. 7, p. 315. In their conclusion of the survey the authors stated a final caveat: "Given the tremendous fluctuations in cost of dispensing based on pharmacy location and pharmacy type, any changes to the reimbursement formula based on this estimate must be made with caution." R. Vol. 7, p. 317. Moreover, the study found that the average cost of dispensing for independent pharmacies is between $7.47 and $8.67. R. Vol. 7, p. 316. DOM ignored this fact in setting a $5.50 dispensing fee. In effect, DOM has decreed (contrary to statute) that the independent pharmacies will lose money on dispensing Medicaid prescriptions.

Pharmacists provided DOM with the results of the 2007 national Cost of Dispensing Surveys done by the accounting firm of Grant Thornton. R. Vols. 12-13, pp. 1157-1220. This comprehensive study gathered information from over 24,400 pharmacies from across the country

and determined the cost of dispensing in each state, including Mississippi. The Grant Thornton study determined the Cost of Dispensing for prescriptions in Mississippi was $10.39 per prescription. R. Vol. 12, p. 1186. It is important to note that the Grant Thornton COD survey received responses from 204 pharmacies in Mississippi, approximately twenty-five percent of all Mississippi pharmacies. The Grant Thornton survey actually surveyed all fifty states, District of Columbia and Puerto Rico. The University of Mississippi study only received data from 15% of the pharmacists in Mississippi and the vast majority of those were chain drug stores. The results in the Grant Thornton Study for neighboring states revealed that COD in Alabama was $11.06, Arkansas was $10.56, Louisiana was $10.50, Georgia was $11.99, Florida was $11.83, Kentucky was $11.24 and South Carolina was $11.13. R. Vol. 12, p.1187. The survey further indicated that the Cost of Dispensing nationwide was $10.50. R. Vol. 12, p.1173, 1186-1187.

Pharmacists further asked DOM to consider that pharmacists in Mississippi typically earn an average of $55 an hour ($70/hour when Social Security, insurance, retirement, etc. are added to the base pay). The typical pharmacy operates ten hours a day for a total of $700 per day for the pharmacist's salary. A technician is paid a total of $140 per day. Those two salary expenses alone totals $840 per day. The average Mississippi pharmacy fills 150 prescriptions per day; therefore, the Cost of Dispensing just for the professional salary component of the overhead equals $5.60 ($840÷150) without including the costs of the store (rent/mortgage and maintenance), utilities, supplies, prescription vials, equipment, computers, and many other items included in the overhead of a pharmacy. R. Vol. 12, p. 1138. This testimony is uncontradicted in the record.

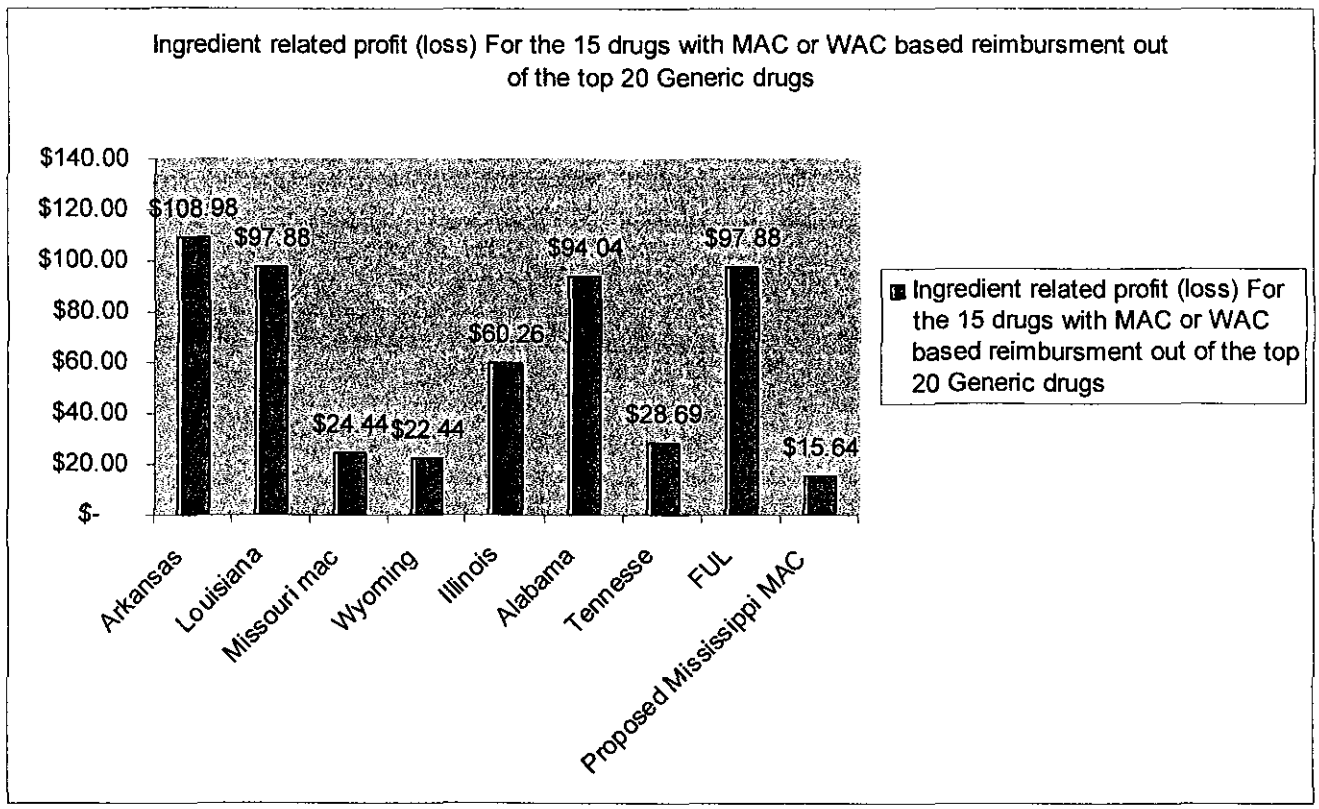
Pharmacists also pleaded with DOM to consider uncontradicted findings in the report prepared by their experts, Medical Marketing Economics. According to these experts in pharmacy economics Mississippi already had the lowest level of reimbursement for generic drugs of all Southern states and that Mississippi pharmacies would actually lose over $85,000 per pharmacy per year when reimbursed under the proposed State MAC. R. Vol. 7, p. 347 or Appellees' record Excerpts Tab D. The MME report provides the only expert opinion as to the

effect the proposed rule would have on pharmacy reimbursement. The report stated:

> For Mississippi pharmacies and pharmacists, the proposed MAC represents the lowest reimbursement of any the states analyzed. In addition, the proposed MAC represents a departure from FUL based reimbursement.

R. 13 p. 1291 or Appellees' Record Excerpts Tab D

The expert report then provides the graph appearing below comparing reimbursement for 15 of the most popular generic drugs under the proposed rule, the former rule and reimbursement in other states:



Following the graph, MME then analyzed the cumulative effect of the proposed rule on Mississippi pharmacists:

> For demonstrative purposes, suppose an average pharmacy fills 1,500 prescriptions per week and half of those prescriptions are generic and one fifth are reimbursed by Medicaid. Also, assume these 15 prescription items, which are among the top 20 used across the nation, are representative of the effect of the proposed MAC, the total revenue lost across generic prescriptions for a single year based on this proposed MAC would be $85,529.60. A dispensing fee increase of $2.00 would leave over $50 in lost revenue to the pharmacies for this market basket alone and make the lost revenue total $54,329.60.
>
> Conclusion:
>
> Several issues arise that are important for the Division of Medicaid to address. First, pharmacies have to receive a certain level of revenue to be able to operate; revenues that exceed costs of operation enable the pharmacy to remain viable as a provider of pharmacist care. Second, if the MAC is set to make certain that providers have reasonable access to listed medications at or below the state MAC rate, then the necessary operational revenue must be derived from the other portion of the reimbursement equation, or the dispensing fee. Third, if the dispensing fee is established near the lowest average cost of dispensing calculated in the study, then the fee is potentially not set to make certain that providers can continue to provide access to Medicaid beneficiaries. In essence, if pharmacies are reimbursed at their drug costs and at their dispensing costs, there remains no fiscal incentive to provide care to Medicaid beneficiaries, and Medicaid is relying on the goodwill of the pharmacies to provide care. This is untenable at best and requires a true evaluation of the effects on access, especially in rural areas of Mississippi.
>
> It is MME's conclusion that pharmacies in the State of Mississippi will lose money on a significant number of generic prescriptions they dispense under this new reimbursement metric or, at the very least, have no financial incentive to provide access. This formula for reimbursement does not adequately cover the costs of dispensing by pharmacists in Mississippi. In fact, there are some instances where drugs were reimbursed at levels less than the pharmacies paid for the actual drug (regardless of profit). With over 60% of prescriptions dispensed being generic, this change to reimbursement for generics will have an overall impact on pharmacy profitability and viability that should be fully understood and studied before implemented by the State.

Analysis of Proposed Change in Mississippi Pharmacy Reimbursement, R. Vol. 13, pp. 1291-1292 or Appellees' Record Excerpts Tab D

Carey Potter, representing the National Association of Chain Drug Stores (NACDS), also appeared at the oral proceeding. Her testimony was only partially recorded. R. Vol. 12, pp. 1150-1151. However, she submitted a written version of her remarks. R. Vol. 13, pp. 1269-1277. She testified that NACDS had calculated that the reimbursement pursuant to the new State MAC list would produce losses for Mississippi retail pharmacies of about $44.8 million annually – about two-thirds of what the Medicaid program spent on generics in Calendar Year 2006. R. Vol. 13, p. 1270. She also advised DOM that NACDS calculated that the new Medicaid dispensing fee proposed under the regulations would cover only about three-fifths of the cost of dispensing. R. Vol. 13, p. 1271 Ms. Potter predicted that many pharmacies may be forced to discontinue as providers or close their doors altogether under the new reimbursement formula, resulting in lack of access for beneficiaries across the state. R. Vol. 13, pp. 1271-1272. She warned DOM that studies over the last 15 years have repeatedly shown that reduced access to medications frequently leads to increased visits to hospital emergency room and prolonged institutional stays. R. Vol. 13, p 1273. Ms. Potter also discussed the Grant Thornton COD Survey ($10.50 per prescription nationwide and $10.39 per prescription in Mississippi). R. Vol. 13, p. 1274. She informed DOM that the Grant Thornton survey results were consistent with other recent surveys in Arkansas, Louisiana, Maine, Minnesota, Vermont and Maryland indicating Cost of Dispensing ranging from $9.25 to $11.71. R. Vol. 13, p. 1150. This testimony and the facts Ms. Potter provided are uncontradicted in the record.

Garry McFerrin, Vice-President of Pharmacy with Fred's Stores of Tennessee, Inc. (Fred's) also appeared at the oral proceeding. His testimony was not recorded; however, he has provided his notes and an affidavit as to his remarks. R. Vol. 13, pp. 1304-1305, 1323-1324. He advised DOM that Fred's has eighty-two stores in Mississippi which represents ten percent (10%) of the retail pharmacies in the state. R. Vol. 13, pp. 1304-1305. He testified,

> [T]he average cost of the pharmacists alone (consisting of the salary and wages of the pharmacists, pharmacy clerks and pharmacy technicians, and the health insurance for those individuals) is approximately $5.67 per prescription. This average cost information is for the services of the pharmacists and pharmacy staff alone, and does not take into account any other direct and indirect costs of filling the prescription (such as rent/mortgage, maintenance, insurance, inventory, utilities, etc.).

R. Vol. 13, p. 1323-1324.

This testimony is also uncontradicted in the record.

It is clear from the record that the rate of reimbursement to pharmacists in the new rule is inadequate and in violation of the statutory mandate. It drastically reduces the amount of reimbursement on the drug cost component without providing reasonable reimbursement for the cost of dispensing. The evidence as to the actual cost of dispensing in Mississippi consists of an accurate reading of the UM Cost of Dispensing Study, the uncontradicted testimony of Mississippi pharmacists (Lomax, McFerrin, McGuffie and Lominick) , the report by plaintiffs' expert (Dr. William Lobb) and the testimony of Ms. Potter of the National Association of Chain Drug Stores. There is no evidence in the record to support DOM's calculation of the cost of dispensing. The new rule provides a level of reimbursement that is contrary to the mandate of the Mississippi Legislature and also contrary to the instructions from CMS that "If States adjust their payment methodologies to reflect the ingredient cost of the prescription drug ... they should also reevaluate their dispensing fees to ensure that these fees are reasonable." R. Vol. 8, pp. 467-468.

C. The new rule is invalid because DOM failed to comply with the applicable administrative procedures in Miss. Code Ann. § 25-43-3.105 (1972) requiring a written report providing an economic impact statement.

Miss. Code Ann. Sec. 25-43-3.105[8] provides, in part:

(1) Prior to giving the notice required in Section 25-43-3.103 each agency proposing the adoption of a rule or significant amendment of an existing rule imposing a duty, responsibility or requirement on any person shall consider the economic impact the rule will have on the citizens of our state and the benefits the rule will cause to accrue to those citizens. For purposes of this section, a "significant amendment" means any amendment to a rule for which the total aggregate cost to all persons required to comply with that rule exceeds One Hundred Thousand Dollars ($100,000.00).

(2) Each agency shall prepare a written report providing an economic impact statement for the adoption of a rule or significant amendment to an existing rule imposing a duty, responsibility or requirement on any person, except as provided in subsection (7) of this section. The economic impact statement shall include the following:

(a) A description of the need for and the benefits which will likely accrue as the result of the proposed action;

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[8] This statute is copied in full for the court's convenience in Appellees' Record Excerpts Tab I.

(b) An estimate of the cost to the agency, and to any other state or local government entities, of implementing and enforcing the proposed action, including the estimated amount of paperwork, and any anticipated effect on state or local revenues;
(c) An estimate of the cost or economic benefit to all persons directly affected by the proposed action;
(d) An analysis of the impact of the proposed rule on small business;
(e) A comparison of the costs and benefits of the proposed rule to the probable costs and benefits of not adopting the proposed rule or significantly amending an existing rule;
(f) A determination of whether less costly methods or less intrusive methods exist for achieving the purpose of the proposed rule where reasonable alternative methods exist which are not precluded by law;
(g) A description of reasonable alternative methods, where applicable, for achieving the purpose of the proposed action which were considered by the agency and a statement of reasons for rejecting those alternatives in favor of the proposed rule; and
(h) A detailed statement of the data and methodology used in making estimates required by this subsection.

This provision of the Mississippi Administrative Procedures Act (MIPA) requires an administrative agency, including DOM[9], provide a written report of the agency's analysis of the economic impact of a "significant rule amendment" to the citizens of Mississippi. The statute is very specific as to what the study and the report must include. The one page statement submitted by DOM (R. Vol. 5, p. 8 or Appellees' Record Excerpts Tab C) is so lacking in complying with this statute, it demonstrates in and of itself DOM's arbitrary and capricious conduct by its total disregard for the effect of the rule change on the citizens of this state, including pharmacists and Medicaid beneficiaries. It does not include an estimate of the costs to governmental entities of implementing the rule as required by subsection (b). The costs of hiring Meyers & Stauffer, the out-of-state accounting firm, is not disclosed, but is estimated to be as high as $500,000. It does not include an estimate of the impact of the proposed rule on small business as required in subsection (d), nor the costs of record keeping on 838 categories of generic drugs as required by subsection (b). Needless to say the rule will have a devastating effect on pharmacies of this state. The one page statement does not compare the costs and benefits; whether there are less costly methods or alternative methods available; and the reasons for rejecting the alternatives as

[9] Miss. Code Ann § 43-13-137 (1972, as amended) specifically states that DOM "... is an agency as defined by [MIPA] and, therefore, must comply in all respects with Administrative Procedures Law...."

required by subsections (e) through (g). Nor is there a detailed statement of the data and methodology used in making the estimates required by the statute.

Soon after the Mississippi Administrative Procedures Act (MAPA) was implemented the Mississippi Secretary of State published Model Rules[10] for all agencies, including a form to be used as a "Concise Summary of Economic Impact Statement" SOS Form APA 004, Effective Date 07/29/2005, Appellees' Record Excerpts Tab J. Not only did DOM not utilize the suggested form, it failed to provide the essential information required by MAPA in any form. [11]

Miss. Code Ann § 25-43-3.111 (1972, as amended) provides that a rule is invalid unless it is adopted in "substantial compliance" with MAPA. In order for a rule to be challenged as invalid because of an agency's failure to substantially comply with the Act, including a failure to conduct an economic impact study and file the necessary concise summary, the issue must be raised in the agency proceedings. 1 MS Prac. Encyclopedia MS Law § 2:24. Pharmacists raised the issue of DOM's failure to conduct an economic impact study and provide a summary of its findings in meetings, correspondence, legal memoranda, and at the oral proceeding. There is no question that DOM knew of plaintiffs' concerns and ignored them.

The rule is invalid for the failure of DOM to conduct the analysis required by statute as to the new rule's economic impact on the citizens of this state. See e.g. Environmental Defense Center, Inc. v. U.S. EPA, 344 F.3d 832 (9th Cir 2003) (agency must prepare analysis of economic impact of proposed rule on small business unless agency certifies that proposed rule will not have significant economic impact on a substantial number of small entities and provides factual basis for the certification); Medical Society of State of New York, Inc. v. Levin, Superintendent of Insurance for the State of New York, et al. 185 Misc, 2d 536, 547 (Sup. Ct. N.Y. 2000) (No-fault insurance regulations were invalid because "healthcare providers who submit claims for

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[10] The Model Rules were published by the Secretary of State and copied in full for the court's convenience in Appellees' Excerpts of Record tab J.

[11] A review of the Administrative Bulletin maintained by the Mississippi Secretary of State indicates that the flawed economic impact statement was only the second ever prepared by DOM. The only other economic impact statement was prepared in connection with AP 2006-36 filed June 30, 2006 proposing an increase in the gross revenue assessments for hospitals.

payment under no-fault insurance system are small businesses to which requirements of [regulation] apply.... [The agency's] position that the new regulation would not impose reporting, record keeping or other compliance requirements upon them is intellectually misleading."); Southern Offshore Fishing Ass'n. v. Daley, 995 F. Supp 1411 (M.D. Fla. 1998) (the agency must make a reasonable good-faith effort to inform the public about potential adverse effects of a proposed rule and about less harmful alternatives that were considered and rejected.); Freemont Lumber Co. v. Energy Facility Sitting Council, 936 P.2d 968 (Or. 1997) (Rule may be invalidated if agency fails to conduct fiscal impact study.); State Dept. of Health and Rehabilitative Services v. Framat Realty, Inc. 407 So.2d 238 (Fla. App. 1st Dist. 1981) (Rule is invalid where economic impact statement was not prepared by person with demonstrated ability to make determinations required and neither methodology nor data utilized in preparing economic impact statement was explained as to attach any credibility to conclusions reached).

D. DOM's actions in implementing the new rule were arbitrary and capricious in that it did not conduct a fair and adequate oral proceeding and failed to base its decision of substantial evidence in the record.

As to the fourth assignment of error the standard of review is whether the actions of DOM were arbitrary and capricious and not based on substantial evidence. Looking at the definition of capricious, the Mississippi Supreme Court has stated: "an act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and controlling principles." Environmental Quality v. Weems, 653 So.2d 266, 274 (Miss. 1995). The Court has also held that an administrative act is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency..." Id. at 281.

The decision by DOM to implement the new rule for reimbursement to pharmacists was truly one that runs "counter to the evidence before the agency". It is submitted that DOM's decision was reached to satisfy a goal of saving thirty two (32) Million dollars, regardless of whether it was supported by the record or in compliance with the mandate of the legislature that levels of reimbursement not be changed or reduced and be reasonable. DOM "worked backwards" knowing the conclusion it wanted to reach before it considered the evidence in the

record. This is made clear by the DOM Director's own words as quoted previously and appearing in the record at R. Vol. 13, pp. 1279-1280.

1. The oral proceeding was inadequate, arbitrary and capricious and violated Pharmacists' due process rights

The entire administrative process, from DOM notifying pharmacists only 25 days before the date the rule would become effective; to not allowing its decision makers to be questioned or met with; to limiting oral presentations to five minutes; to not conducting an economic impact study and preparing a complete economic impact statement; to not providing a clear and complete written finding as to its decision, is arbitrary and capricious and violates plaintiffs' (Pharmacists') due process rights.

In McGowan v. Mississippi State Oil & Gas Board, 604 So.2d 312 (Miss. 1943) this Court vacated a ruling by the Oil & Gas Board because the agency did not provide plaintiffs basic constitutional rights of due process by not conducting the hearing appropriately and by not providing a clear and detailed summary of how it reached its decision. In Sierra Club, Inc. v. Mississippi Department of Environmental Quality, 819 So.2d 515 (Miss. 2002) this Court again reversed an agency's decision because there was a lack of a detailed explanation of its findings, beyond mere conclusory statements. The Court stated:

> In *McGowan* we vacated the orders of the Oil & Gas Board for failing to make adequate findings of fact and for failing to explain how it evaluated the competing interests before it. We clearly explained the law of this state as follows:
>
> If an agency does not disclose the reason upon which its decision is based, the courts will be usurped of their power to review over questions of law... Among those questions of law are whether board action is supported by substantial evidence. We further stated that 'it is a logical and legal prerequisite to intelligent judicial review...that the board favor us with more than mere conclusory findings on each of the issues, together with a summary of the grounds for those findings'.

819 So.2d at 523, citations omitted.

The same is true here. DOM conducted an abbreviated, limited and inadequate proceeding and then did not favor Pharmacists, nor this Court, with adequate findings of fact as to its decision. This is a violation of Pharmacists' basic constitutional due process rights. As

stated by this Court in the McGowan case cited above, "This Court has held that due process always stands as a constitutionally grounded procedural safety net in administrative hearings." 604 So.2d at 318.This Court has also stated that "an administrative [agency] must afford minimum procedural due process under the Fourteenth Amendment to the United States Constitution and under Art. 3, §14 of the Mississippi Constitution consisting of (1) notice and (2) opportunity to be heard." Booth v. Mississippi Employment Sec. Comm'n, 588 So.2d 422, 428 (Miss.1991) (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

The manner in which the oral proceeding was conducted demonstrates arbitrary and capricious decision making. DOM grudgingly delayed the implementation of the rule from April 1 until May 1 in order to provide Pharmacists the oral proceeding they requested and to which they were entitled.[12] Much of the written evidence offered by Pharmacists, including letters from pharmacists, letters from members of the Medical Care Advisory Committee and Pharmacists' expert report were not made a part of the record until Pharmacists provided an additional copy for DOM to correct the record. It is questionable whether DOM even considered this evidence offered by Pharmacists. The five minute limitation imposed by DOM at the oral proceeding demonstrates DOM was not interested in gathering all evidence available on a 32 Million dollar question of what is reasonable reimbursement to pharmacists. Such a limitation is unprecedented in other rule making bodies in Mississippi such as the Oil & Gas Board (Miss. Code Ann. § 53-1-17 et. seq. (1972)), Department of Environmental Quality (Miss. Code Ann. § 49-2-1 et. seq. (1972)) or the Public Service Commission (Miss. Code Ann. § 77-3-21 et. seq. (1972)). In these agencies due process rights of sworn testimony, cross-examination, subpoena power, discovery, and representation by counsel are assured when rules are made that affect citizens. DOM could have utilized such procedures in the instant case, but it did not. It even had a guideline to follow

[12] A review of the Administrative Bulletin maintained by the Mississippi Secretary of State indicates that this was only the third oral proceeding noticed by DOM. The other two being: AP2007-22 filed May 30, 2007dealing with identification of individuals for placement in long-term care facilities; and AP 2006-36 filed June 30, 2006 proposing an increase in the gross revenue assessments for hospitals

in Miss. Code Ann. § 43-13-116 (1972) which provides detailed procedures for hearings and appeals within Medicaid in determining Medicaid eligibility for benefits. It states in part:

> (vi) The claimant or his representative has the following rights in connection with a local or state hearing:
> (A) The right to examine at a reasonable time before the date of the hearing and during the hearing the content of the claimant's case record;
> (B) The right to have legal representation at the hearing and to bring witnesses;
> (C) The right to produce documentary evidence and to establish all facts and circumstances concerning eligibility, services or benefits;
> (D) The right to present argument without undue interference;
> (E) The right to question or refute any testimony or evidence including an opportunity to confront and cross-examine adverse witnesses.

Moreover, a similar statute provides for procedures for DOM hearings regarding the recovery of an improper payment to a recipient or provider. Miss. Code Ann. § 43-13-121 (4) (1972, as amended) gives the division and its hearing officers in contested cases power to issue subpoenas, to administer oaths, to compel attendance and testimony of witnesses or production of documents. Section 121(4) specifically deals with contested cases within Medicaid. The Administrative Rules issued by the Mississippi Secretary of State defines a "contested case" as "... **[A]n adjudication or other proceeding, including but not restricted to rate-making,** price- fixing, and licensing in which the legal rights, duties, or privileges of a party are required to be determined by an agency after an opportunity for a hearing ...." 01.1.02 MISS ADMIN CODE 216, Appellees' Record Excerpts Tab J. DOM has the responsibility by statute of "providing fair and impartial hearings". Miss. Code Ann. § 43-13-121(1)(a)(iv). In this very important contested proceeding changing and reducing rates of reimbursement by over thirty-two Million dollars per year DOM failed to provide a fair and impartial hearing.

DOM did not even follow the Model Rules regarding an oral proceeding proposed by the Mississippi Secretary of State which provides in section 107.02 (Appellees' Record Excerpts Tab J):

> The presiding officer where time permits and to facilitate the exchange of information, may open the floor to questions or general discussions. The presiding officer may question participants and permit the questioning of participants by other participants about any matter relating to that rulemaking proceeding; but no participant shall be required to answer any question.

Although many agencies specifically adopted the proposed Model Rules, DOM did not.[13]

The lack of an adequate and reasonable administrative process violates Section 43-13-121 (1) and demonstrates the arbitrary and capricious conduct of DOM in implementing the new rule.

2. The decision of DOM was arbitrary and capricious and not based on substantial evidence in the record

The Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any state deprive any person of life liberty or property without due process of law**; nor deny to any person within its jurisdiction the equal protection of the law. [emphasis added]

In the same way, Article 3, Section 14 of the Mississippi Constitution of 1890 provides:

> No person shall be deprived of life, liberty, or property except by due process of law.

These constitutional provisions prevent the government from taking private property without due process. Morley v. Jackson Redevelopment Auth., 632 So.2d 1284, 1296 (Miss. 1994) (holding that restrictive covenants are property interests for which due compensation must be paid by the government). There is no question that filling Medicaid prescriptions makes up a substantial portion of the business of many pharmacies in small communities throughout Mississippi. When DOM drastically reduces their reimbursement it takes money out of their pockets and risks their very livelihood. An analogous situation was discussed by Justice Reuben

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[13] A review of the administrative bulletin maintained by the Mississippi Secretary of State indicates that many state agencies adopted the Model Rules proposed by the Secretary of State, including the section allowing questions of presenters. These agencies include: Secretary of State (as to its own rulemaking and other administrative activities)filed 5/26/05; Board of Pharmacy 8/6/07; Department of Health 6/30/06; Department of Mental Health 11/25/07; Gaming Commission 5/16/07; Soil and Water Conservation Commission 6/8/06; Land, Water and Timber Resources Board 4/12/07; State Board of Public Accountancy 12/18/06; State Board of Contractors 10/12/05; State Board of Cosmetology 6/29/06; State Board of Optometry 6/26/06; Board of Psychology 9/11/06; Board of Optometry 6/26/06; State Board of Medical Licensure 7/12/07; State Board of Examiners for licensed Professional Counselors 10/30/08; Industries for the Blind 11/9/06; Fair Commission 3/30/07; Board of Examiners for Social Workers & Family Therapists 10/2/06; Commission of the Status of Women 9/29/06 and State Board of Nursing Home Administrators 7/20/06.

Anderson in his dissenting opinion in Pruett v. State, 574 So.2d 1342, 1356 (Miss. 1990) wherein he reasoned that lawyers' services were property, which should not be taken for public use without just compensation. He stated: "As a matter of federal law, from this it follows that an attorney from whom services are demanded and by whom they are given has a property right in his fee for those services which ... should be based on their just and reasonable value". Justice Anderson, in arguing that attorneys required to work on death penalty cases should receive adequate compensation, also cited Cunningham v. Superior Corp., 177 Cal. App. 3d 336, 351 (1986): "an attorney who is appointed to represent an indigent without adequate compensation is required effectively to give away a portion of his property—his livelihood. Other professionals, merchants, artisans, and state licensees are not simply required to donate services and goods to the poor." Likewise, pharmacists should not be required to fill Medicaid prescriptions at a loss. It violates specific statutory law [the "intent paragraph of 43-13-117 (9) (b)] as well as the U.S. and State Constitutions.

The administrative record before this court does not support DOM's decision to reduce reimbursement to pharmacists by $32 Million dollars. Pharmacists will not repeat the previous discussion of the evidence in the record on the costs of filling and dispensing Medicaid prescriptions. The record does not contain ANY evidence to support DOM's decision. As to the cost of drug component of reimbursement, the uncontradicted evidence is that the actual acquisition cost figures provided by Meyers & Stauffer do not include a profit. It is axiomatic that any average figure would include pharmacists that purchased the drug below the average and some above. The multiplier is not to provide a profit, but to assure that a majority of pharmacists could purchase the drug for the average figure. As to the cost of dispensing component of reimbursement the evidence is uncontradicted that the actual cost of dispensing in Mississippi is over $10.00. This evidence is provided by a proper reading of the Mississippi Pharmacy School Study, the testimony and letters of Mississippi pharmacists, Pharmacists' expert report, the Grant Thornton study and the various other studies discussed by Pharmacists at the oral proceeding. DOM's distorted interpretation of the Mississippi Pharmacy School study as supporting a $5.50 dispensing fee is "without reason, whimsical, implying either a lack of understanding of or a disregard for the surrounding facts and controlling principles." This is of course the very definition of arbitrary and capricious conduct.

As this Court stated in Public Employees retirement System v. Marquez, 774 So.2d 421, 427 (Miss. 2000) (affirming Hinds County Circuit Court's reversal of administrative agency decision): "While the Circuit Court performs limited appellate review, it is not relegated to wearing blinders." Likewise, this court is not relegated to "wearing blinders" to the actual facts in the record as to the actual cost of filling and dispensing generic drugs in Mississippi.

VI. CONCLUSION

As taxpaying, law abiding, citizens of Mississippi—and the providers of the very services that DOM and Medicaid beneficiaries depend, Pharmacists are outraged at the treatment they have received from this agency. DOM has disregarded the limitations on its authority, it has disregarded the requirement of an economic impact study, it has trampled on plaintiffs' Constitutional rights to due process by conducting a superficial and inadequate rule making process and finally, it has totally disregarded the evidence in its own administrative record. Pharmacists respectfully request that this court: (a) Affirm the Chancellor's decision that the new rule of reimbursement is invalid and (b) Lift the stay of judgment pending appeal and order DOM to reimburse Pharmacists for the period the illegal rule was in effect[14].

Respectfully Submitted,

Mississippi Independent Pharmacies Association and Mississippi Pharmacy Association

By: Lowry M. Lomax
Lowry M. Lomax

By: J. Price Coleman
J. Price Coleman

[14] DOM used the invalid rule to calculate reimbursement from May 1, 2008 until July 11, 2008. The difference in reimbursement between the former rule and new invalid rule is approximately $6.3 Million.

Lowry M. Lomax [redacted]
LOMAX LAW FIRM, P.A.
1100 Tyler Avenue, Suite 102
Oxford, MS 38655
662-234-0943

J. Price Coleman [redacted]
COLEMAN LAW FIRM
1100 Tyler Avenue, Suite 101
Oxford, MS 38655
662-236-0047

CERTIFICATE OF SERVICE

This is to certify that I, J. Price Coleman, one of the attorneys of record for Appellees Mississippi Independent Pharmacies Association Inc., and Mississippi Pharmacists Association, have caused to be mailed this date, first-class postage prepaid, a true and correct copy of the foregoing Brief of Appellees Mississippi Pharmacies Association and Mississippi Pharmacists Association to the following:

Barry K. Cockrell, Esq.
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.
Post Office Box 14167
Jackson, MS 39236

Harold E. Pizzetta, III
Special Assistant Attorney General
450 High Street
Post Office Box 220
Jackson, MS 39205

Honorable William H. Singletary
Hinds County Chancery Court Judge
Post Office Box 686
Jackson, MS 39205-0686

This the 22nd day of May, 2009.

J. Price Coleman