Class Action Watch

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Mississippi Supreme Court to Rule on Constitutionality of Non-Economic Damage Caps

by Karen R. Harned & Jeff A. Hall

The Mississippi Supreme Court will soon issue its ruling in the case of *Double Quick, Inc. v. Ronnie Lee Lymas*. The court is expected to rule on the constitutionality of Mississippi's non-economic damage cap. The cap limits recovery of non-economic damages (awards for pain, suffering, loss of companionship, and other similar losses) to $1,000,000 in civil suits.

"Judicial Hellhole"

When the American Tort Reform Association (ATRA) published its first "Judicial Hellholes" report in 2002, Mississippi's 22nd Judicial Circuit was one of the worst offenders.[1] It had a reputation for being friendly to large, mass action lawsuits and for awarding unusually large verdicts. This status made the 22nd Judicial Circuit a "magnet court" that attracted plaintiff's lawyers from around the country. Tiny Jefferson County, a county in the 22nd Judicial Circuit with just 10,000 full-time residents, saw more than 21,000 plaintiffs file suit there between 1995 and 2000.[2]

The ATRA report concluded that abuse of Mississippi's court system had unfortunate effects on the state's economy. When the 22nd Judicial District appeared in ATRA's Judicial Hellholes report again in 2003, the report noted that seventy-one insurance companies had stopped doing business in the state.[3] It also reported that medical malpractice rates were skyrocketing, high-risk doctors (like obstetricians) were becoming hard to find, and Mississippi was losing jobs as businesses were fleeing the abusive tort system.[4]

Reform Efforts

Shortly after ATRA labeled the counties in Mississippi's 22nd Judicial Circuit as Judicial Hellholes a second time, state legislators took action to reform the state's tort system. In three separate bills enacted from 2002 to 2004, Mississippi's legislature reformed its venue requirements, capped non-economic damages in medical malpractice claims at $500,000, and capped damages in all other civil suits at $1,000,000.[5] The Mississippi Supreme Court also acted during this time to reform the state's rules for joining multiple parties in a single suit.[6]

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Alabama High Court Issues Landmark Drug Pricing Decision

by Mark Behrens

Late in 2009, the Alabama Supreme Court issued one of the year's most significant state court rulings, reversing verdicts against three prescription drug makers totaling over a quarter billion dollars. The decision, *AstraZeneca LP v. State*,[1] is "exemplary of litigation currently pending in state and federal courts" involving allegations that the nationwide pricing policies of pharmaceutical manufacturers caused states to overpay for Medicaid recipients' prescription drugs. The actions originated in 2005 when Alabama's Attorney General partnered

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with outside contingency fee counsel to sue over seventy pharmaceutical manufacturers, including defendants AstraZeneca, Novartis, and GlaxoSmithKline. In an 8-1 ruling, the Alabama Supreme Court held that the defendants did not defraud the state.

In recent years, contingency fee lawyers representing states such as Alabama sued virtually the entire pharmaceutical industry alleging fraud in the reporting of prices for drugs covered under Medicaid programs. State Medicaid agencies reimburse providers (e.g., treating physicians and retail pharmacies) for the costs of prescription drugs disbursed to individuals who cannot afford medical care. Medicaid reimbursements may be made on the basis of an estimated cost, such as the "average wholesale price" ("AWP") or "wholesale acquisition cost" ("WAC"), which is supplied by manufacturers to an independent price reporting service. The Alabama litigation and cases like it around the country involve allegations that the states were unaware that pharmaceutical manufacturers reported "list prices," which did not include rebates, discounts, or other price cuts. The lawsuits further allege that providers were over-reimbursed because the states unwittingly used the reported list prices in their Medicaid reimbursement formulas.

The Alabama Supreme Court held that state regulators could not have reasonably relied on the manufacturers' published prices for prescription drugs. Numerous government publications and other public reports made clear that Medicaid regulators understood that both AWP and WAC were undiscounted "list prices"—like a window sticker on a new car. The court concluded:

> [T]he State's argument that it believed the published AWPs to represent actual AWPs is simply untenable. On the contrary, it is clear beyond cavil that the reimbursement methodology adopted by the [Alabama Medicaid Agency] is the product of a conscious and deliberate policy decision, which seeks to "balance (i) the amount [it] reimburse[s] pharmacies that dispense drugs to Medicaid patients, and (ii) the requirement—established by federal law—to set reimbursement sufficiently high to ensure participation in the Medicaid program by retail pharmacies."

Notwithstanding the fact that the state's lawsuits were filed several years ago, Alabama has not changed its Medicaid reimbursement methodology and has continued to rely on the same reported prices it has been claiming to be fraudulent.

The Alabama Supreme Court stated that the AWP litigation is "essentially an 'attempt to use tort law to re-define [state] Medicaid reimbursement obligations.'" The court said, "Such regulation through litigation raises, of course, serious questions of federal preemption and supremacy" because it challenges business conduct allowed by legislators and regulators. Fairness concerns also come into play, as recently noted by U.S. District Court Judge Jack Weinstein in *In re Zyprexa Products Liability Litigation*.[2]

The Alabama Supreme Court's decision in *AstraZeneca* creates a significant barrier for the state in related cases, such as a nearly $80 million judgment being appealed by generic drug manufacturer Sandoz, Inc. The court's reasoning also suggests that other states will have significant proof problems in their cases, particularly with respect to proving reasonable reliance.

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Endnotes

1 2009 WL 3335904 (Ala. Oct. 16, 2009).

2 2009 WL 4260857, *66 (E.D.N.Y. Dec. 1, 2009) ("[T]his slash-and-burn-style of litigation would arguably constitute an abuse of the legal process.").