

## Ala. AG Loses Bid To Revive \$275M AWP Cases

By Nick Malinowski

*Law360, New York (January 22, 2010)* -- The Alabama Supreme Court has refused to reconsider its reversal of two jury decisions that had awarded the state nearly \$275 million from Novartis Pharmaceuticals Corp., GlaxoSmithKline and AstraZeneca LP, putting to rest the bellwether prescription drug price-fixing case.

In an 8-1 judgment without opinion, the high court on Friday denied Alabama Attorney General Troy King's application for rehearing and reconsideration — a ruling that could pave the way for the dismissal of 70 similar actions in state courts.

Although at trial, King had prevailed on his claims that the pharmaceutical companies fraudulently inflated the prices of their drugs to the detriment of the state's Medicaid program, in October the state Supreme Court overturned these decisions, finding that Alabama could not claim that it was misled by the drugmakers' pricing policies because for at least 30 years it knew that the average wholesale prices did not accurately reflect the actual costs pharmacists paid for the medications.

Nationwide this was the first AWP-based fraud claim to reach any state's high appellate body.

"As I understand it, the case is effectively over as a matter of substance, and the only thing left is for us to file a bill of costs," Novartis attorney Saul Morgenstern said Friday.

"I think the order, certainly within Alabama, has significant implications," he added. "I think [the attorney general] should take a look at these rulings and understand that these are cases that never should have been brought."

Outside of Alabama other states will try to distinguish their claims from these cases, but whether or not they will be successful in that remains to be seen, Morgenstern said.

Kevin Newsom, who represented GlaxoSmithKline in the case, said the ruling sets a powerful precedent for AWP cases pending around the country.

"The Supreme Court's order refusing to reconsider its earlier 8-1 decision confirms, yet again, that GSK reported clear and accurate prices, that GSK's pricing practices were consistent with established industry standards, and that the state understood full well the pricing benchmarks that GSK reported," Newsom said in an e-mail Friday.

In its opposition to the state's motion for rehearing, Novartis suggested that the state was motivated to have a "media event" in the courtroom and that the application was an improper rehashing of arguments that had already been heard by the court.

King was not available for comment Friday.

In January 2005 the Alabama attorney general's office sued 73 pharmaceutical companies, including these three, alleging they knowingly provided fraudulent information to drug databases that the state relies on to make reimbursements through its Medicaid program.

The state Supreme Court severed the suits, and the AstraZeneca trial began Feb. 11, 2008, while the Novartis and GSK cases were reconsolidated and presented at trial that June.

All three drugmakers filed motions for judgment as a matter of law insisting that the state had not sufficiently proved reliance to make its fraudulent-misrepresentation and fraudulent-suppression claims, but these motions were denied, and eventually juries in both trials returned verdicts in favor of the state.

AstraZeneca was hit with \$210 million in damages, later reduced to \$160 million, while GSK and Novartis were ordered to pay \$113 million collectively.

All three appealed and were consolidated because they raised the same issue of reliance.

On appeal Novartis contended that "the state knew for decades that WAC and AWP did not represent actual, discounted transaction prices," yet Alabama did not change its reimbursement method after learning of the alleged fraud.

"Accordingly, there was no reasonable reliance and no fraud," it said, and the court agreed.

Justice Tom Parker was the lone dissenter in both decisions.

Representatives for AstraZeneca did not immediately respond to requests for comment Friday.

AstraZeneca is represented by Davis Polk & Wardwell, Christian & Small LLP and Sidley Austin LLP.

GSK is represented by Bradley Arant Boult Cummings LLP.

Novartis is represented by Kaye Scholer LLP, Lightfoot Franklin & White LLC and Capell & Howard PC.

The cases are AstraZeneca LP et al. v. State, case numbers 1071439 and 1071440; SmithKline Beecham Corp. d/b/a GlaxoSmithKline v. State, case number 1071704; and Novartis Pharmaceuticals Corp. v. State, case number 1071759, all in the Alabama Supreme Court.

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