

## Utah Court Dismisses State's Complaint in Average Wholesale Price Litigation

March 4, 2010

On February 26, a Utah state court dismissed, with prejudice, a complaint brought by the Utah Attorney General (AG) against pharmaceutical companies alleging fraud in the setting of Average Wholesale Price (AWP). The Utah court is the first to dismiss such a suit at the pleadings stage.

In 2001, private plaintiffs' attorneys began teaming up with states' AGs in a series of cases relating to the pharmaceutical industry's pricing practices for prescription drugs. In a series of lawsuits brought in more than 20 states, prescription drug manufacturers were alleged to have falsely inflated drug prices, causing state Medicaid programs to over-reimburse pharmacists for drugs dispensed to Medicaid patients. Although pharmaceutical companies never received the alleged overpayments, the states contended that the companies benefited from increased market share from the sales of their drugs.

In three separate actions brought against more than 30 pharmaceutical companies, the Utah AG alleged violations of the Utah False Claims Act and fraudulent misrepresentation. In the first case to go forward, *Utah v. Apotex Corporation, et al.*, No. 080907678, the District Court of the Third Judicial District for Salt Lake County initially dismissed Utah's complaint for failure to satisfy Utah Rule 9(b)'s particularity requirements for pleading fraud. The court granted the state leave to replead, which it did in March 2009.

As the result of a motion to dismiss the amended complaint, the court has now dismissed the suit with prejudice under both Rules 9(b) and 12(b)(6). First, with regards to Rule 9(b), the court found that instead of identifying "each defendant's allegedly fraudulent misrepresentations and False Claims Act violations with particularity," the amended complaint "merely offers broad conjecture with respect to statements and/or claims . . . made by the defendants as a group." The court was not persuaded that the list of drugs the state attached to the amended complaint provided the specificity required under Rule 9(b).. The court said that the list failed to identify "the allegedly false publication of each specific pharmaceutical's pricing, to whom that publication was made and when."

With regards to the state's claim under the Utah False Claims Act, the court ruled that the state "failed to allege specific facts indicating that the defendants communicated directly with the State, let alone submitted a claim to the State." Equally significant, according to the court, were the lack of allegations concerning what benefit the pharmaceutical companies received directly from the state.

The court held that the state's amended complaint was also subject to dismissal under Rule 12(b)(6) for failure to allege "fundamental elements" of fraud and Utah False Claims Act violations. "Most notable," according to the court, was the state's failure to plead that Utah Medicaid relied on any pricing information provided by drug companies in determining reimbursement rates. The court reasoned that the state's "inability to plead reasonable reliance" was due to the state's knowledge that AWP "does not in fact reflect market prices."

Thus, the Utah court joins the Alabama Supreme Court, which in October 2009 vacated three jury verdicts against pharmaceutical companies based on similar allegations. Both courts recognized that state Medicaid agencies, like all other players in the pharmaceutical industry, have understood for years the nature of the prices now alleged to be false.

Lawsuits against pharmaceutical companies have become a very prevalent practice among state attorneys general. The Utah decision is another in a more recent line of decisions limiting the states' ability to use state false claims and unfair trade practices statutes to regulate pharmaceutical pricing and promotional practices.

The Utah briefing was handled on behalf of all defendants by a team of Morgan Lewis attorneys. Morgan Lewis represents a number of pharmaceutical companies in such actions.

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

#### **Philadelphia**

John C. Dodds	215.963.4952	<a href="mailto:jdodds@morganlewis.com">jdodds@morganlewis.com</a>
Erica Smith-Klocek	215.963.5364	<a href="mailto:esklocek@morganlewis.com">esklocek@morganlewis.com</a>
Susannah Henderson	215.963.5577	<a href="mailto:shenderson@morganlewis.com">shenderson@morganlewis.com</a>

#### **Washington, D.C.**

J. Clayton Everett	202.739.5860	<a href="mailto:jeverett@morganlewis.com">jeverett@morganlewis.com</a>
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