

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
FIFTH DIVISION

STATE OF ARKANSAS

PLAINTIFF

v.

CASE NO. CV04-634

DEY, INC.; WARRICK  
PHARMACEUTICALS CORPORATION;  
SCHERING-PLOUGH CORPORATION;  
and SCHERING CORPORATION,

DEFENDANTS

**DEFENDANTS' JOINT REPLY MEMORANDUM IN SUPPORT OF THEIR  
MOTION FOR JUDGMENT ON THE PLEADINGS**

Defendants Dey, Inc., Warrick Pharmaceuticals Corporation, Schering-Plough Corporation, and Schering Corporation ("Defendants") submit this reply memorandum of law in support of their motion for judgment on the Complaint brought by the Attorney General on behalf of the State of Arkansas ("Plaintiff" or "State").

**I. The State Has Failed to Plead a Claim for Common Law Fraud.**

The heart of the State's case is that it paid too much for prescription drugs because the "average wholesale price" or "AWP" that the State gleaned from third-party publications did not reflect discounts commonly given in the marketplace and thus was not "the actual average of the wholesale price." Compl. ¶ 35. The facts alleged in the Complaint – regardless of whether Defendants have admitted or denied them – can state a claim *only if* the State reasonably believed that the published AWP's were "the actual average of the wholesale price" and the State was harmed as a result of its reasonable reliance. The State has not pled either proposition because it cannot. It is a matter of clear public record that Arkansas has known for well over a decade that published AWP's are not "the actual average of the wholesale price"

and judgment should enter for defendants as a matter of law. *See Wiseman v. Batchelor*, 315 Ark. 85, 88-89, 864 S.W.2d 248, 250 (1993) (dismissing complaint with prejudice where plaintiff failed to make "any allegation of justifiable reliance").

The State's attempt to obscure its own well-documented knowledge by reference to other plaintiffs in other actions should be rejected summarily. Whatever any other state or private plaintiff may or may not have known, it is abundantly clear that Arkansas legislators and regulators have focused on this precise issue since at least 1991 and crafted Arkansas's reimbursement scheme accordingly. In 1991, the United States Department of Health and Human Services heard evidence and concluded that Arkansas "was aware that pharmacists generally paid less than" AWP. *In re Arkansas Dep't of Human Servs.*, DAB No. 1273, 1991 WL 634857 (HHS Dept. App. Bd. Aug. 22, 1991). During the course of that hearing, Arkansas officials admitted that they were aware of federal government reports concluding that AWP was not "an adequate estimate of the prices providers are generally paying for their drugs" and warning states to "abandon the AWP reimbursement methodology." *Id.* at 5.<sup>1</sup> In 1997, Arkansas conducted independent audits to determine typical discounts off of AWP, and those reports confirmed that pharmacies generally paid only 82.7% of AWP for brand name drugs. *See Wal-Mart Stores Inc. v. Knickrehm*, 101 F. Supp. 2d 749, 756 (E.D. Ark. 2000). Indeed, Arkansas's own Medicaid reimbursement formula has required significant discounts off of AWP since at least 1995. *See* Compl. ¶ 13.

The State makes a half-hearted attempt to distinguish its extensive knowledge of AWP

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<sup>1</sup> Arkansas officials admitted that they were aware of, among others, the following reports: Office of Inspector General, *Use of Average Wholesale Prices in Reimbursing Pharmacies Participating in Medicaid and the Medicare Prescription Drug Program* (Oct. 1989): Medicare Action Transmittal No. 84-12, *reprinted in* Medicare & Medicaid Guide (CCH) 34, 157 at 10,191 – 10,206 (1984).

by suggesting that it applies a discount off of AWP when calculating reimbursement so as not to "be the highest price payer for prescription drugs." Plaintiffs' Memorandum in Opposition to Defendants' Joint Memorandum for Judgment on the Pleadings ("Opp.") 13. Such informed discounting off of AWP in fact *defeats* the State's allegation that it was misled by Defendants into reasonably relying on AWP as an "actual average of the wholesale price." Compl. ¶ 35. The State cannot reasonably claim to have believed that providers participated in a voluntary program like Medicaid while recovering only 80% of their average costs for prescription drugs. *See* Compl. ¶ 14. In addition, the basic premise of the State's argument is mathematically flawed. The State could not have thought AWP to be both an "average of several wholesale prices" and, at the same time, the "*highest* price" in the market. Opp. 13. The State's actions show that in fact it did not believe AWP to be an "actual average of the wholesale price." Instead, the State discounted off of AWP because it knew that AWP is an undiscounted reference price.

In a final effort to shore up the weaknesses in its Complaint, the State feebly suggests that it should be permitted to ride the coattails of those few states and private plaintiffs who claim they did not know that published AWP's reflect undiscounted reference prices. The law requires much more. The State cannot proceed – and inflict the tremendous cost and burden of complex litigation – unless it can plead facts sufficient to state its own claim for relief in its own Complaint. The State cannot plead that it reasonably relied on an assumption that published AWP's represented "the actual average of the wholesale price," Compl. ¶ 35, or that it suffered any harm as a result of the publication of undiscounted AWP's. The State's admissions and the public record are clear that Arkansas set its own reimbursement formula

armed both with full knowledge that AWP represents an undiscounted reference price, and with its own auditor's assessment of what pharmacies actually pay for prescription drugs. The State's request that the Court ignore these shortcomings and permit it to proceed with its fraud claim must be denied.

## **II. The ADTPA Claim Should Be Dismissed.**

### **A. The Attorney General Has Not Alleged Receipt of a Specific Request from CMS or DHS to Implement the ADTPA.**

The Attorney General cannot bring a claim pursuant to the Arkansas Deceptive Trade Practices Act ("ADTPA") in connection with actions or transactions permitted under laws administered by state and federal regulatory bodies, unless the directors of those regulatory bodies request the Attorney General to do so. *See* Ark. Code Ann. § 4-88-101(3). All of the transactions at issue in this case fall within the scope of § 4-88-101(3). The State does not – because it cannot – dispute that the Centers for Medicare and Medicaid Services, formerly the Health Care Financing Administration, (collectively, "CMS") is a regulatory body.<sup>2</sup> Nevertheless, it seeks to evade the clear requirement of § 4-88-101(3) by arguing – bizarrely – that the Arkansas Department of Human Services ("DHS"), which administers the Arkansas Medicaid Program, is not a regulatory body. *Opp.* 14-15. This argument flatly contradicts the plain meaning of the term "regulatory body," Arkansas statutes and regulations, and actual practices.

*Black's Law Dictionary* defines a "regulatory agency" as: "A governmental body with the authority to implement and administer particular legislation." BLACK'S LAW DICTIONARY

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<sup>2</sup> "CMS is the federal regulatory authority for the Medicaid program, and is in charge of assuring that states comply with the requirements of the Medicaid Act." *Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Servs.*, Nos. 03-1015 & 03-2616, No. 03-1483, 2004 U.S. App. LEXIS 7356, at \*19 (8th Cir. Apr. 16, 2004).

49, 1032 (7th ed. 1999). The evidence is overwhelming that DHS implemented and administered the legislation establishing the Arkansas Medicaid Program, and is responsible for the reimbursement of medical providers dispensing prescription drugs under that program. The State concedes that the "Arkansas Medicaid program is administered by the Arkansas Department of Human Services [DHS]." Compl. ¶ 11. Indeed, Arkansas law provides that DHS shall "administer all forms of public assistance" and "make rules and regulations and take actions as are necessary or desirable." Ark. Code Ann. § 20-76-201(1), (13). Arkansas law also provides that the Director of DHS shall reimburse medical providers for prescription drugs dispensed to beneficiaries of the Arkansas Medicaid Program. *See* Ark. Code Ann. § 20-77-403. Additionally, the DHS, Division of Medical Services publishes a manual establishing the reimbursement methodology for reimbursement of drugs dispensed by providers through the Medicaid program. This manual, including the reimbursement methodologies contained therein, is officially implemented by DHS via its incorporation into the Code of Arkansas Rules and Regulations. *See* Ark. Rules & Regs. § 016.06.035.

The State's argument that the sale of pharmaceuticals is not regulated in Arkansas misses the point. This lawsuit does not relate to the regulation of the sale of pharmaceuticals. Rather, this action, as the State has pled it, relates to the reimbursement methodology used by the Medicare Part B and the Arkansas Medicaid programs. These reimbursement methodologies are indisputably regulated by state and federal regulatory bodies. *See* 42 C.F.R. § 447.331; Ark. Rules & Regs. § 016.06.035 (Section 241).

Ark. Code Ann. § 4-88-101(3) therefore bars the Attorney General's from bringing this action without a prior specific request from CMS and DHS. The bare allegation that the

Attorney General is "authorized" to bring this action is too vague to satisfy the requirement.

Compl. ¶ 4. The Complaint contains no allegation that any specific request was made, and the ADTPA claim should therefore be dismissed.

**B. The ADTPA Does Not Support a Claim for Damages on Behalf of the State.**

In its Opposition, the State claims that the Attorney General may bring an action seeking restitution of "overpayments" made by the Arkansas Medicaid Program. Opp. 16. But nowhere in the Complaint does the State seek restitution on the Medicaid program's behalf. *See* Complaint, Prayer for Relief. "[I]t is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Morgan Distrib. Co., Inc. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989).

Even if it the Complaint sought such relief, the plain language of the ADTPA does not authorize the Attorney General to recover money damages on behalf of a non-purchaser like the Arkansas Medicaid Program. The statute provides solely for the "restor[ation] to any purchaser who has suffered any ascertainable loss . . . together with damages sustained." *See* Ark. Code Ann. § 4-88-113(a)(2)(A). The reference to "damages sustained" in that provision – on which the State places great weight, Opp. 16 – is merely a measure of restitution available to purchasers. *See* Ark. Code Ann. § 4-88-113(a)(2)(B) ("In determining the amount of restitution to be awarded under this section [4-88-113(a)(2)] . . .). The phrase does not confer upon the Attorney General unfettered authority to bring an action for damages on behalf of non-purchasers.

The Arkansas Medicaid program did not purchase any of Defendants' drugs. Instead, the State merely *reimbursed* medical providers for their purchases. *See* Compl. ¶¶ 12-15. The

State attempts to bypass the "purchaser" requirement by labeling the Arkansas Medicaid Program an "indirect purchaser" of Defendants' drugs. Opp. 16. The State cannot simply tack the word "indirect" on a term and thereby expand the scope of the ADTPA.<sup>3</sup> Furthermore, even if the ADTPA did cover "indirect" purchasers, it still would not cover the State. Indirect purchasers are those persons or entities which purchase goods from a manufacturer through an intermediary. *See generally Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). A person who buys Defendants' drugs from a pharmacy is an indirect purchaser. The Arkansas Medicaid Program, in contrast, did not buy any drugs from any seller.

### **III. The Complaint Should be Dismissed Under Rule 9(b).**

#### **A. The Common Law Fraud Claim is Not Alleged with Adequate Specificity.**

In addition to its inability to demonstrate that it reasonably relied to its detriment on Defendants' published AWP's, the State fails to plead its fraud-based claims with the particularity required by Ark. R. Civ. P. 9(b). The Opposition argues that the Rule requires only allegations that there was "some concealment [or] misrepresentation . . . by which another is misled, to his detriment." Opp. 10. That is merely a statement of the elements of fraud. Rule 9(b) requires pleading of *actual facts* in support of these elements:

It is not sufficient to plead fraud generally, or merely to characterize actions as fraudulent. The facts and circumstances constituting the fraud should be set forth. There should be some concealment, misrepresentation, craft, finesse, or abuse of confidence, by which another is misled, to his detriment; and these, or some of them, must be alleged and proved. Mere epithets, or adverbs characterizing conduct, which in itself, may be innocent, amount to nothing.

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<sup>3</sup> The ADTPA is a penal statute that must be strictly construed in favor of the accused, with all doubts resolved in favor of the defendant, and nothing taken as intended which is not clearly expressed. *See, e.g., Cooper Realty Investments, Inc. v. Ark. Contractors Licensing Board*, 2003 WL 22861576, \*3 (Ark. 2003); *State ex rel. Sargent v. Lewis*, 335 Ark. 188, 190-191, 979 S.W.2d 894, 896 (1998).

*Beam v. Monsanto Co., Inc.*, 259 Ark. 253, 263, 532 S.W.2d 175, 180 (Ark. 1976) (quoting *McIlroy v. Buckner*, 35 Ark. 555 (1880)). The State has failed to plead with particularity anything beyond Defendants' reporting of a handful of AWP's – an innocent activity in which every drug manufacturer engages. See Compl. ¶ 28 & Exh. A. Simply attaching the epithet of "fraud" to a list of published AWP's does not satisfy Rule 9(b).<sup>4</sup>

As an initial matter, the Opposition does not even try to salvage the State's vacuous pleading of the purported claim on behalf of Arkansas consumers not covered by Medicaid or Medicare. The State ignores Defendants' challenge to provide some legal basis for its allegation that it is "illegal to charge consumers less than Medicaid." Compl. ¶ 52. Worse, the State does not even posit a factual scenario – much less allege one with specificity in the Complaint – where an allegedly inflated AWP led to an inflated charge to a consumer outside of Medicaid or Medicare. Without alleging, at the very least, that a single specific provider inflated its prices based on an allegedly inflated AWP of a Defendant's drug, and that a single specific consumer paid that inflated price, the claim must fail under Rule 9(b).

The Opposition argues that the State has pled with specificity that "Defendants failed to report accurate pricing information for their drugs and made the conscious decision to report inflated prices." Opp. 10. Yet the Complaint does not include a single "accurate price" for a Defendant's drug, a single price that the Medicaid program, any Medicare beneficiary, or any

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<sup>4</sup> Nor can the Opposition's reference to cases pending against other defendants in other courts make up for the Complaint's pleading deficiencies. Defendants' knowledge about the allegations pled by plaintiffs in cases *outside of Arkansas* – cases that involve different drugs, plaintiffs, and reimbursement systems – does not mean that the conclusory allegations pled here are sufficient to put Defendants on notice of the specific fraudulent conduct the State claims Defendants committed *in Arkansas*. Defendants are, as a matter of law, entitled to understand the particulars – the "who, what, when, where and how" – of the alleged conduct engaged in by Defendants that the State alleges caused injury in Arkansas. *United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003).

consumer paid for a Defendant's drug, or *even identify which drugs and which time period the claims cover*. Nor does the Complaint "clearly state[] the circumstances by which [the State] was misled to its detriment, by the Defendants' misrepresentations of AWP." Opp. 10. The Complaint offers nothing at all that could explain how Defendants' mere reporting of AWP misrepresented the meaning of AWP to the State. Arkansas has long known that AWP is an undiscounted reference price, and, in light of the numerous federal government reports that Arkansas received and admitted to reading in 1991, Defendants could reasonably assume that the State understood it as such. The Complaint contains no allegations to the contrary.

Finally, the Opposition argues that the Complaint alleges with particularity how the State "justifiably relied upon the Defendants' reported AWP when reimbursing providers[,] since the State uses AWP as a method of reimbursement." Opp. 11. Of course it was reasonable for the State to reimburse according to its own regulations. But the Complaint must contain particularized allegations from which it may be inferred that the State's reliance on the alleged *misrepresentation* was reasonable. In light of the State's knowledge that AWP is an undiscounted reference price, the Complaint fails entirely to allege facts that could explain how reliance on AWP as "the actual average of the wholesale price" was reasonable. The fraud claim fails to comply with Rule 9(b), and judgment should enter for Defendants on the pleadings.

**B. The ADTPA Claim Also Fails to Satisfy Rule 9(b).**

Rule 9(b) should apply to the State's claim under the ADTPA. In the absence of controlling Arkansas authority, this Court should side with the bulk of jurisdictions who recognize that "although the language of Rule 9(b) confines its [pleading] requirements to claims of . . . fraud, the requirements of the rule apply to all cases where the gravamen of the claim is fraud." *Frith v. Guardian Life Ins. Co. of America*, 9 F. Supp. 2d 734, 742 (S.D. Tex. 1998) (citation omitted) (alteration in original); see also *Tuttle v. Lorillard Tobacco Co.*, 118 F. Supp. 2d 954, 963 (D. Minn. 2000) (same); *Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313, 1322 (M.D. Fla. 2002) (same); *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 251-52 (D. Md. 2000) (same); *Smith v. Central Soya of Athens, Inc.*, 604 F. Supp. 518, 528-30 (E.D.N.C. 1985) (same); *Toner v. Allstate Ins. Co.*, 821 F. Supp. 276, 283-84 (D. Del. 1993) (recognizing numerous courts' application of Rule 9(b)'s heightened pleading standard to fraud-based statutory claims).

Undeniably, the gravamen of the State's ADTPA claim is fraud. Indeed, the Opposition makes no attempt to distinguish the substance of the ADTPA claims from the fraud claims. Instead, the State entwines the two by parroting the same generalized allegations that appear in the Complaint *ad nauseum* (e.g., Defendants reported "false and inflated" or "fraudulent" AWP) and offers no explanation of how the two claims differ, other than in name. In these circumstances, Rule 9(b) should apply to the ADTPA claims.<sup>5</sup>

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<sup>5</sup> The cases cited by the State do not suggest a contrary result. *Delaware v. Publishers Clearing House*, 787 A.2d 111 (Del. Ch. 2001), is predicated on the notion that Delaware's version of Rule 9(b) is "an exception to the liberal 'notice pleading' standard applicable to most pleadings under the [Delaware's] Rule 8." *Publishers*, 787 A.2d at 115. But the Arkansas rules call for a "statement . . . of facts," not mere "notice pleading." Ark. R. Civ. P. 8(a). The State also cites an Oregon case, *Oregon v. Discount Fabrics, Inc.*, 615 P.2d 1034

Under the heightened pleading standard of Rule 9(b) – indeed, even under the fact-pleading requirements of Rule 8(a) – the ADTPA claims fail. The State alleges in completely conclusory fashion that Defendants' reporting of allegedly "false and inflated prices to the reporting services" constitutes "unconscionable, false, or deceptive act(s) or practices in business, or trade" in violation of Ark. Code Ann. § 4-88-107(10). Compl. ¶¶ 57, 59. But nowhere does the Complaint allege any specific facts to support the claim. The State relies in its Opposition exclusively on the facts alleged in support of its common law fraud claims, Opp. 12, but for the reasons articulated in the previous section, the pleading of those allegations is patently inadequate under the Arkansas Rules of Civil Procedure.

**IV. The Complaint Does Not State a Claim With Respect to Drugs That Are Reimbursed Without Reference to AWP.**

In order to state a claim under either count of the Complaint, the State must plead that it suffered damage as a result of the alleged deception. According to the Complaint, the alleged fraud is Defendants' "provid[ing] false and inflated AWP and other pricing information . . . to various nationally known pharmaceutical price reporting services . . . which the State of Arkansas relies upon in setting its reimbursement rates." Compl. ¶ 28. But, as the Complaint and applicable regulations make clear, the State's reimbursement of Defendants' drugs may never be based on any particular Defendant's published AWP at all. The State's reimbursement formula requires it to pay the *lowest* of: (1) EAC, where EAC is defined as a discount off of AWP; (2) the pharmacy's usual and customary charge to the general public, which is not defined by reference to AWP; or (3) the GUL, which is also not defined by

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(Or. 1980), and an Eighth Circuit case, *Benrus Watch Co. v. FTC*, 352 F.2d 313 (8th Cir. 1965), concerning the standard of proof for DTPA claims, but those cases have nothing to do with pleading requirements and are therefore inapposite.

reference to AWP. The State has not pled for a single drug manufactured by any Defendant that it actually paid a reimbursement rate based on that Defendant's allegedly "false and inflated AWP," as opposed to another price under the regulation.<sup>6</sup> The State cannot be permitted to proceed without having articulated a *single* example of the claims for which it purports to seek millions of dollars of damages. Both the amount the State paid for each drug and the formula used to calculate that payment are uniquely within the State's knowledge, and it is required to plead those facts to state a claim. It has not, and judgment should enter for Defendants on both counts of the Complaint.

**V. A Statute of Limitations Applies to and Limits All of the State's Claims.**

Plaintiff invokes the archaic doctrine of *nullum tempus occurrit regi* in an attempt to avoid the statutory three-year limitation on its fraud claims and five-year limitation on its ADTPA claims. Opp. 17. Plaintiff's reliance on this doctrine is misplaced. The doctrine applies only where the State is suing on behalf of "rights belonging to the public and pertaining purely to governmental affairs." *Ark. Dep't of Environmental Quality v. Brighton Corp.*, 352 Ark. 396, 412, 102 S.W.3d 458, 469 (2003) (quoting *Alcorn v. Ark. State Hosp.*, 236 Ark. 665, 670-71, 367 S.W.2d 737, 740-41 (1967)). Where the State "seeks[s] to enforce . . . some right belonging to it in a proprietary sense, [it] may be defeated by the statute of limitations." *Id.* Here, Plaintiff is seeking recovery on behalf of the Arkansas Medicaid Program, in which the State of Arkansas purports to have a proprietary and pecuniary interest. As such, the three-year statute of limitations applies and the Court should enter judgment for

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<sup>6</sup> The State's argument that "had [Defendants] reported accurate AWPs, the State would have reimbursed less if the accurate AWP resulted in an amount less than either the usual and customary charge or the state/federal upper limit," Opp. 17, is entirely speculative and, more importantly, absent from the Complaint.

Defendants on all fraud claims arising before January 20, 2001.

Plaintiff's ADTPA claims are expressly limited by Ark. Code § 4-88-115, which imposes a five-year limitations period on ADTPA claims. Significantly, this five-year limitations period was adopted under Act 910 of 1993 – some six years before the enactment of Act 990 of 1999, which engrafted the private right-of-action provision found at § 4-88-113(f). Thus the legislature plainly intended the statute of limitations to apply to actions brought by the Attorney General; otherwise, there would have been no reason to incorporate such a provision. Accordingly, the State cannot recover under the ADTPA for any alleged conduct occurring before January 20, 1999 (five years from the date of the Complaint).

The State's assertion that its blanket allegations of concealment suffice to toll the ADTPA statute of limitations is without merit. To toll a statute of limitations under Arkansas law, the State must plead facts constituting Defendants' alleged fraudulent concealment *with the same particularity required by Rule 9(b)*. See *F.D.I.C. v. Deloitte & Touche*, 834 F. Supp. 1129, 1151 (E.D. Ark. 1992) . The court in *F.D.I.C.* further stated that:

[t]o toll the statute [of limitations], the plaintiff must allege in the complaint that: (1) the defendant concealed the conduct that constitutes the cause of action; (2) defendant's concealment prevented the plaintiff from discovering the cause of action within the limitations period; and (3) until discovery plaintiff exercised due diligence in trying to find out about the cause of action.

*Id.* at 1152 (citing numerous cases). The court noted that Arkansas law "establishes a similar pleading requirement." *Id.* at 1152 n.39; see *Williams v. Hartje*, 827 F.2d 1203, 1206 (8th Cir. 1987) ("concealment of facts . . . has no effect on the running of the statute of limitations if the plaintiffs could have discovered the fraud . . . through a reasonable effort on their part").

The State has failed to allege particularized facts demonstrating "some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that conceals itself." *Shelton v. Fiser*, 340 Ark. 89, 96, 8 S.W.3d 557, 562 (2000) (citations omitted). The most the State can muster on this score is the bald allegation that Defendants "intentionally concealed . . . true and accurate pricing information from the Arkansas Medicaid Program." Compl. ¶ 34. The State does not allege that Defendants' purported concealment prevented it from discovering the cause of action within the statute of limitations period. Nor does it allege that it exercised due diligence in trying to discover the cause of action by, for example, asking Defendants for any type of information regarding the pricing of their products, or asking health care providers to submit information regarding the price they paid for the drugs, which it readily could have done. The State's tolling argument therefore fails, and judgment should enter for Defendants on all ADTPA claims arising before January 20, 1999 and all fraud claims arising before January 20, 2001. *See Williams*, 827 F.2d at 1206.

**VI. Defendants Meet the Burden Required for a Judgment on the Pleadings Under Rule 12(c), and Timely Filed Their Motion.**

The State asserts that Defendants' Answers denying its conclusory, unsubstantiated and factually devoid fraud claims "clearly establish" that the Complaint should not be dismissed. The State argues that Defendants are, by virtue of such denials, unable to establish clearly that no material issue of fact remains and that Defendants are entitled to judgment as a matter of law. Opp. 6-7. Defendants' denials of the State's fraud claims do not establish contested material issues of fact because the State has failed to allege any facts to substantiate – much

less describe with particularity – the basis of such claims. Defendants find themselves sparring with a shadow. This Court, when considering Defendants' motion for judgment on the pleadings, is obligated to consider the "facts" of the Complaint as true, not the unsubstantiated conclusions. That Defendants deny these conclusions does not elevate them to the status of properly pleaded facts that could form the basis for a disputed material issue.

The State also contends that Defendants' claim that the Complaint is insufficient under Rule 8(a) is untimely and should have been raised through a motion for more definite statement under Rule 12(e) before answering the Complaint. *White v. Welsh*, cited by the State, does not support this contention.<sup>7</sup> Rule 12(e) permits a litigant to file such a motion before responding to the complaint. But failure to do so does not foreclose assertion of the defense of failure to state facts upon which relief may be granted under Rule 12(b)(6), which Defendants have done here, in a pleading responsive to a complaint. The State's interpretation of *White v. Welsh* would effectively eliminate Rule 12(h)(2), which states, "[a] defense of failure to state facts upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." Ark. R. Civ. P. 12(h)(2).

### CONCLUSION

WHEREFORE, for the foregoing reasons and the reason set forth in Defendants' Joint Memorandum in Support of Their Motion for Judgment on the Pleadings, Defendants respectfully request that the Court enter judgment in favor of Defendants on the pleadings.

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<sup>7</sup> In *White*, the defendants did not raise any arguments about the conclusory nature of the plaintiff's complaint until after they had lost at trial and appealed their case to the Supreme Court of Arkansas. See *White v. Welsh*, 939 S.W.2d 299, 300-301 (Ark. 1997).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by hand delivery this 12<sup>th</sup> day  
of May, 2004, on:

Teresa Marks  
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