

applicable in Wisconsin and made by the Defendants in this case. They also raised an indispensable party argument, which was not made by the Defendants here. In contrast, the Defendants here have made almost twice as many arguments, arguments that were never raised by the Alabama defendants and, thus, never considered by the Alabama court. For example, Defendants have raised the arguments that Wisconsin lacks *parens patriae* authority, that Wisconsin failed to establish a causal link between the alleged misconduct and any injury suffered, and that the alleged claims are barred by the “filed rate doctrine.”

Third, the Alabama court erred in directing the state of Alabama merely to list the drugs that were allegedly part of the fraudulent scheme in repleading its complaint. Many other courts considering complaints involving allegations of AWP-related fraud have required plaintiffs to plead their factual allegations of fraud with considerably more particularity than was present in the Alabama complaint and than is present in the complaint in this case. *See, e.g., TAP Pharm. Prods., Inc.*, 868 A.2d 624, 636 (Pa. Commw. Ct. 2005) (dismissing without prejudice the Commonwealth’s complaint because its listing of drugs did not satisfy the requirement that fraud be plead with particularity, and directing the Commonwealth to describe “the precise acts the Defendants took with regard to their specific products”);¹ *In re Pharm. Indus. Average Wholesale Price Litig.*, 263 F. Supp.2d 172, 194 (D. Mass 2004) (requiring private putative class action plaintiffs to replead to identify the specific plaintiffs who purchased drugs, the specific drugs that were purchased and the allegedly fraudulent AWP for each drug); *In re Pharm. Indus. Average Wholesale Price Litig.*, MDL No. 1456, Memorandum and Opinion, at 1 (D. Mass., Apr. 8, 2005) (requiring New York County plaintiff to do more than simply list a particular AWP for a particular named drug, holding that it must “provide its basis for

¹ In a subsequent decision, the Pennsylvania court found the Commonwealth’s allegations sufficient to satisfy that State’s particularity requirements.

calculating a spread between the published AWP and the actual average price at which the drug is sold by wholesalers”); *Massachusetts v. Mylan Lab.*, 2005 U.S. Dist. LEXIS 2158 at 2 (Apr. 5, 2005) (finding that the Commonwealth’s AWP complaint would not satisfy fraud pleading standards unless it stated “drug by drug, the allegedly false representations”); *Connecticut v. Glaxo SmithKline*, No. CV-03-0083298-S(X07), Order of February 11, 2004 (Ct. Super. Ct.) (requiring Connecticut Attorney General to revise its AWP complaint to provide more specificity).

These decisions are consistent with Wisconsin court rulings that allegations of fraud must be plead with particularity, requiring the “who, what, when, where and how” of the false representation. *Friends of Kenwood v. Green*, 2000 WI App 217, 14, 239 Wis. 2d 78, 619 N.W.2d 271 (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)). This standard is markedly different from the one applied by the Alabama court.

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