

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 7

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN INC., et al.,

Defendants.

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Case No. 04-CV-1709  
Unclassified – Civil:30703

**PLAINTIFF STATE OF WISCONSIN'S MOTION TO  
FILE SUPPLEMENTAL AUTHORITY**

Plaintiff moves the Court for leave to file the attached supplemental authority for the reasons that follow.

1. The attached opinion is the decision of the Circuit Court of Alabama denying defendants' motion to dismiss in Alabama's drug pricing case. That case (which includes most, if not all, of the same defendants named in this case plus some others) rejected the very arguments the defendants rely on here in support of their motion to dismiss. The Alabama decision is consistent with the many other decisions denying similar motions which we reported in Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss at page 16, fn.6.

2. As part of the Alabama decision the court directed Alabama to identify all drugs Alabama currently believes are involved in defendants' fraudulent scheme. As the Court here knows from Wisconsin's status report, Wisconsin, although it alleges and expects to prove that the prices of all of defendants' drugs have been artificially inflated as a matter of course, has voluntarily provided the defendants with a significantly narrowed list of drugs for which it will be seeking damages. This list is based on the volume of purchases made by Wisconsin and/or its

citizens participating in the Medicare Part B program.

Dated this 15<sup>th</sup> day of November, 2005.

Respectfully submitted,



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One of Plaintiff's Attorneys

PEGGY A. LAUTENSCHLAGER  
Attorney General  
State Bar #1002188

MICHAEL R. BAUER  
Assistant Attorney General  
State Bar #1003627

CYNTHIA R. HIRSCH  
Assistant Attorney General  
State Bar #1012870

FRANK D. REMINGTON  
Assistant Attorney General  
State Bar #1001131

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-0332 (MRB)  
(608) 266-3861 (CRH)  
(608) 266-3542 (FDR)

CHARLES BARNHILL  
State Bar #1015932

WILLIAM P. DIXON  
State Bar #1012532

ELIZABETH J. EBERLE  
State Bar #1037016

Miner, Barnhill & Galland, P.C.  
44 East Mifflin Street, Suite 803  
Madison, WI 53703  
(608) 255-5200

Attorneys for Plaintiff,  
State of Wisconsin



Pursuant to Rule 12(b)(6), Ala. R. Civ. P., a motion to dismiss for failure to state a claim should seldom be granted and is properly granted only when it appears beyond a doubt that the plaintiff can prove no set of facts entitling him to relief. *Winn Dixie Montgomery, Inc. v. Henderson*, 371 So. 2d 899, 901 (Ala. 1979). Put another way, this Court must ask “if the facts alleged in the Complaint can be proved, would the State be entitled to relief under any cognizable theory of law?” *Childs v. Mississippi Valley Title Insurance Company*, 359 So. 2d 1146 (Ala. 1978). The Court finds that the First Amended Complaint, liberally construed in the light most favorable to the Plaintiff, states causes of action upon which relief can be granted. As to the statute of limitations argument, this Court recognizes the doctrine of *nullum tempus occurrit reipublicae*, which provides that the statute of limitations does not apply against the sovereign. Furthermore, the standard for granting a motion to dismiss based on the statute of limitations is whether the existence of an affirmative defense appears clearly on the face of the complaint. Where there is a factual issue as to when the statute of limitations began to run, the question is to be decided by the jury. *Jones v. Alfa Mutual Ins. Co.*, 879 So. 2d 1179, 1193 (Ala. 2003); *Alabama Farm Bureau Mutual Casual Ins. Co. v. Griffin*, 493 So. 2d 1379, 1382 (Ala. 1986).

The Defendants also argue that the State’s case should be dismissed because “pharmacists, physicians and, perhaps, others,” are indispensable parties to this action. Under Alabama law, an absent party is needed for adjudication and is indispensable if (1) in that person’s absence complete relief cannot be accorded among those already parties, or (2) that party has a legally protected interest relating to the subject matter of the action, not merely a financial interest or interest of convenience, which would be impaired in its

absence as a party. *Neal v. Neal*, 856 So. 2d 766, 780 (Ala. 2002); *Russ v. Luton*, 456 So. 2d 259, 256 (Ala. 1984). The party seeking to show that a party is indispensable has the burden of proof. *Walters v. Stewart*, 838 So. 2d 1047, 1052 (Ala. Civ. App. 2002). After examining the briefs and considering the oral arguments, the Court finds that the Defendants have failed to carry their burden of proof on this issue.

Alternatively, the Defendants argue that the State has failed to plead fraud with particularity under Rule 9(b). Under this rule, so long as the Defendant is reasonably apprised that the claim against him is one for fraud, the State is not required to set forth each and every element of its claims for fraud with detail and particularity. *Spry Funeral Homes, Inc. v. Deaton*, 363 So. 2d 786, 789 (Ala. Civ. App. 1978); Ala. R. Civ. P. 9(b), committee comments. The purpose of Rule 9(b) is to enable a defendant to understand the fraud claim and effectively respond. The Committee Comments to Rule 9(b) say that “the courts will strive to find the details necessary for the sufficiency of such a complaint, if the pleadings give fair notice to the opposing party. . . .” A motion for more definite statement under Rule 12(e) shall be granted only when a “party cannot reasonably be required to frame a responsive pleading.” In addition, the requirements of Rule 9(b) may be relaxed where the transactions at issue are voluminous, complex and extend over a long period of time or where the defendants control information required for more detailed pleading. The Amended Complaint in this case alleges that the transactions are complex and occurred over a period in excess of 10 years. See ¶133. The Amended Complaint also alleges that Defendants’ true prices are known to and within the control of Defendants themselves, and that these prices have been concealed from the State.

The Court notes the depth and breadth of the State's Amended Complaint. The Amended Complaint alleges that the Defendants provided or caused to be provided false and inflated AWP, WAC, and/or Direct Price information for their drugs to various nationally known drug industry reporting services. The Complaint further alleges that the State relied on these fraudulently inflated prices to its detriment. The Defendants, however, contend that the State fails to put the Defendants on notice as to each and every drug involved in the fraudulent scheme. That point is well taken. Accordingly, the State is ordered to amend its Complaint within 90 days to name each and every drug, known to the State at this time, which the State contends is part of the fraudulent scheme alleged.<sup>1</sup> The Court finds that the Amended Complaint otherwise meets the standards of Rule 9(b).

In addition to the grounds set forth in Defendants' Motion to Dismiss, the "Alabama Ten" contend that they should be dismissed because they have either not been sued in other similar lawsuits filed by other states, or that they were dismissed from the cases in which they were included as a defendant. The Court is not persuaded by this argument, and, for the same reasoning set forth above, the Motion to Dismiss filed by the "Alabama Ten" is DENIED.

With regard to the motions filed by Defendants Andrx Corporation and K-V Pharmaceutical Company asserting lack of personal jurisdiction and the motions filed by the Bayer Defendants and the Astrazeneca Defendants seeking dismissal of certain claims previously released in prior settlement agreements, the parties have informed the Court that

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<sup>1</sup> Of course, this required amendment will not act to preclude the State from further amending its Complaint at a later date in accordance with Ala. R. Civ. P. 15. Any such Complaint may include the naming of additional drugs for which a claim is made.

these issues will be resolved by agreement within ten (10) days from the hearing date in this matter. If the parties fail to reach an agreement, the Court will entertain these Motions at a later date upon notice to the Court by the parties that an agreement has not been reached.

THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED that all Defendants' Motions to Dismiss are DENIED. The Defendants' Motions for a More Definite Statement are GRANTED in part as set forth above, but otherwise DENIED. The State will have ninety (90) days to amend the Complaint accordingly.

DONE this the 13 day of October, 2005.



HONORABLE CHARLES PRICE  
CIRCUIT COURT JUDGE



**Local Counsel for Abbott Laboratories, and  
Tap Pharmaceutical Products, Inc.**

Lynn M. Stathas  
Anthony J. Lucchesi  
Reinhart Boerner Van Deuren, SC  
22 East Mifflin Street  
PO Box 2018  
Madison WI 53701-2018  
(608) 229-2200  
(608) 229-2100 fax

**Local Counsel for Amgen Inc.**

William M. Conley  
Jeffrey A. Simmons  
Foley & Lardner, LLP  
150 East Gilman Street  
PO Box 1497  
Madison WI 53701  
(608) 258-4209  
(608) 258-4258 fax

**Local Counsel for  
Astrazeneca Pharmaceuticals LLP  
Local Counsel for Astrazeneca LP**

Brian E. Butler  
Joseph P. Wright  
Barbara A. Neider  
Stafford Rosenbaum, LLP  
3 South Pinckney Street; Suite 1000  
PO Box 1784  
Madison WI 53701-1784  
(608) 256-0226  
(608) 259-2600 fax

**Local Counsel for Aventis Pharmaceuticals,  
Inc., and ZLB Behring, LLC f/k/a Aventis  
Behring, LLC**

Stephen P. Hurley  
Marie A. Stanton  
Andrew Erlandson  
Hurley Burish & Milliken, SC  
10 East Doty Street, Suite 320  
PO Box 1528  
Madison WI 53703  
(608) 257-0945  
(608) 257-5764 fax

**Local Counsel for Baxter International, Inc.**

Bruce A. Schultz  
Coyne, Niess, Schultz, Becker & Bauer, SC  
150 E. Gilman Street  
Madison WI 53703  
(608) 255-1388  
(608) 255-8592 fax

**Local Counsel for Ben Venue Laboratories, Inc.  
Boehringer Ingelheim Pharmaceuticals, Inc.,  
and Roxane Laboratories, Inc.**

Patrick J. Knight  
Gimbel, Reilly, Guerin & Brown  
Two Plaza East, Suite 1170  
330 East Kilbourn Avenue  
Milwaukee WI 53202  
(414) 271-1440  
(414) 271-7690 fax

**Local Counsel for Dey, Inc.**

John W. Markson  
John M. Moore  
Bell, Gierhart & Moore, S.C.  
44 East Mifflin Street  
PO Box 1807  
Madison WI 53701  
(608) 257-3764  
(608) 257-3757 fax

**Local Counsel for Immunex Corporation**

Michael R. Fitzpatrick  
Brennan, Steil & Basting SC  
One East Milwaukee Street  
PO Box 1148  
Janesville WI 53547-1148  
(608) 756-4141  
(608) 756-9000 fax

**Local Counsel for Ivax Corporation,  
Ivax Pharmaceuticals, Inc.**

Steven P. Means  
Michael Best & Friedrich LLP  
One South Pinckney Street, Suite 700  
Madison WI 53703  
(608) 257-3501  
(608) 283-2275 fax

**Local Counsel for Johnson & Johnson,  
Janssen Pharmaceutica Products, L.P.,  
McNeil-PPC, Inc., Ortho Biotech Products,  
L.P., and Ortho-McNeil Pharmaceuticals, Inc.**

Donald Schott  
Waltraud (Wally) A. Arts  
Quarles & Brady, LLP  
One South Pinckney Street, Suite 600  
Madison WI 53703-2808  
(608) 251-5000  
(608) 251-9166 fax

**Local Counsel for Merck & Company, Inc.**

Michael P. Crooks  
Peterson, Johnson & Murray, S.C.  
131 West Wilson Street, Suite 200  
Madison WI 53703  
(608) 256-5220  
(608) 256-5270 fax

**Local Counsel for Mylan Laboratories, Inc.  
And Mylan Pharmaceuticals, Inc.**

David J. Harth  
David E. Jones  
Heller, Ehrman, White & McAuliffe, LLP  
One East Main Street, Suite 201  
Madison WI 53703  
(608) 663-7460  
(608) 663-7499 fax

**Local Counsel for Novartis Pharmaceuticals  
Corp.**

Kim Grimmer  
Solheim, Billing & Grimmer, S.C.  
U.S. Bank Plaza, Suite 301  
One South Pinckney Street  
PO Box 1644  
Madison WI 53701-1644  
(608) 282-1200  
(608) 282-1218 fax

**Local Counsel for Pfizer Inc.  
Local Counsel for Pharmacia Corporation**

Beth Kushner  
Timothy Feeley  
Von Briesen & Roper, SC  
411 East Wisconsin Avenue, Suite 700  
Milwaukee WI 53202  
(414) 287-1373  
(414) 276-6281 fax

**Local Counsel for Sandoz, Inc.**

Shannon A. Allen  
Friebert, Finerty & St. John, SC  
Two Plaza East – Suite 1250  
330 East Kilbourn Avenue  
Milwaukee WI 53202  
(414) 271-0130  
(414) 272-8191 fax

**Local Counsel for Schering-Plough Corporation,  
And Warrick Pharmaceuticals Corporation**

Earl H. Munson  
Boardman, Suhr, Curry & Field, LLP  
One South Pinckney Street  
Fourth Floor, PO Box 927  
Madison WI 53701-0927  
(608) 283-1796  
(608) 283-1709 fax

**Local Counsel for Sior, Inc.  
f/k/a Gensia Sior Pharmaceuticals, Inc.  
and Teva Pharmaceuticals USA, Inc.**

Lester A. Pines  
Cullen, Weston, Pines & Bach  
122 W. Washington Avenue, #900  
Madison WI 53703-2718  
(608) 251-0101  
(608) 251-2883 fax

**Local Counsel for Smithkline Beecham Corp.,  
d/b/a Glaxosmithkline**

Daniel W. Hildebrand  
Dewitt Ross & Stevens, SC  
2 East Mifflin Street, Suite 600  
Madison WI 53703  
(608) 255-8891  
(608) 252-9243 fax

**Local Counsel for Watson Pharma Inc.  
f/k/a Schein Pharmaceuticals, Inc., Watson  
Pharmaceuticals, Inc.**

Ralph Weber  
Gass Weber Mullins, LLC  
309 North Water Street  
Milwaukee WI 53202  
(414) 223-3300  
(414) 224-6116 fax

**Local Counsel for Bristol-Myers Squibb Co.**

Roberta F. Howell  
Michael D. Leffel  
Foley & Lardner, LLP  
150 East Gilman Street  
PO Box 1497  
Madison WI 53701  
(608) 258-4209  
(608) 258-4258 fax

**MINER, BARNHILL & GALLAND, P.C.**

ATTORNEYS AND COUNSELORS

LISA T. ALEXANDER  
CHARLES BARNHILL, JR. \*  
JEFFREY I. CUMMINGS  
WILLIAM P. DIXON\*\*  
ELIZABETH FBERLE\*\*\*  
GEORGE F. GALLAND, JR.  
ROBERT S. LIBMAN+++  
NANCY L. MALDONADO  
WILLIAM A. MICELI  
JUDSON H. MINER  
REBECCA D. ONIE  
SARAH E. SISKIND++  
PAUL STRAUSS+++  
LAURA E. TILLY

SUITE 803  
44 EAST MIFFLIN STREET  
MADISON, WISCONSIN 53703  
(608) 255-5200  
TELECOPIER (608) 255-5380  
www.lawmbg.com

WRITER'S EMAIL:  
cbarnhill@lawmbg.com

**CHICAGO OFFICE**  
14 WEST ERIE STREET  
CHICAGO, ILLINOIS 60610  
(312) 751-1170  
TELECOPIER (312) 751-0438

\*ADMITTED IN WISCONSIN AND ILLINOIS  
\*\*ADMITTED IN WISCONSIN AND  
DISTRICT OF COLUMBIA  
\*\*\*ADMITTED IN WISCONSIN AND CALIFORNIA  
†ADMITTED IN ILLINOIS AND NEW YORK  
††ADMITTED IN WISCONSIN AND NEW YORK  
†††ADMITTED IN ILLINOIS AND CALIFORNIA  
††††ADMITTED IN CALIFORNIA,  
DISTRICT OF COLUMBIA and ILLINOIS  
ALL OTHERS ADMITTED IN ILLINOIS ONLY

OF COUNSEL:

THOMAS F. ASCH  
SHARON K. LEGENZA  
BRADLEY SCOTT WEISS

November 1, 2005

Judith A. Coleman  
Clerk of Circuit Court  
City County Building, Room GR10  
210 Martin Luther King Jr. Blvd.  
Madison WI 53703

Re: *State of Wisconsin v. Amgen Inc., et al.*  
Case Number 04-CV-1709

Dear Ms. Coleman:

Enclosed please find the State of Wisconsin's Motion To File Supplemental Authority, along with a certificate of service in the above-captioned matter.

Please file the originals of these documents and return a file stamped copy to my office.

By copy of this letter these documents are being served on Daniel W. Hildebrand via hand delivery and to local Wisconsin counsel via U.S. Mail.

Thank you in advance for your assistance.

Sincerely,



Charles Barnhill

CB:jlz

Cc: Hon. Moria Krueger  
Local Wisconsin Counsel  
[dwh@dewittross.com](mailto:dwh@dewittross.com)