

**DRUG & DEVICE
BULLETIN**



JANUARY 29, 2010

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**ALABAMA SUPREME COURT SIDES WITH
WYETH, DECERTIFIES NATIONWIDE CLASS
OF THIRD-PARTY PAYERS**

The Alabama Supreme Court recently reversed the certification of a nationwide class of third-party payers (TPPs) seeking reimbursement from Wyeth for the purchase price of unused Duract capsules following the medication's voluntary withdrawal from the market. *Wyeth, Inc. v. Blue Cross Blue Shield of Ala.*, 2010 WL 152123 (Ala. Jan. 15, 2010). The Court ruled 8-1 that the need to individually adjudicate each TPP's unjust enrichment claim precluded class certification.

Following reports of liver problems, Wyeth voluntarily withdrew Duract from the market in 1998 and instituted a customer-refund program for retail customers still possessing Duract capsules. The program refunded the capsules' value, plus an incentive amount for retail customers, and credited pharmacies and wholesalers for all Duract capsules they returned. Wyeth refunded about \$705,000 to approximately 18,000 retail customers during the refund period.

In 2003, Blue Cross Blue Shield of Alabama (BCBSAL) filed suit against Wyeth in the Circuit Court for Jefferson County Alabama, seeking to recover its payments for unused Duract capsules. BCBSAL alleged that Wyeth was unjustly enriched when TPPs paid for the unused capsules, and it sought to represent a nationwide class of TPPs for reimbursement of these payments. In granting BCBSAL's motion, the trial court certified a nationwide class of TPPs who paid for Duract capsules that were unused when the product was withdrawn from the market on June 22, 1998.

Wyeth filed an interlocutory appeal and argued, among other things, that individual issues would predominate over common issues of law or fact because the prosecution of an unjust-enrichment claim would require each TPP to establish that it paid for unused Duract under a mistake of fact or in reliance on a fraudulent misrepresentation.

The Alabama Supreme Court noted that its previous decisions provided "ample support" for the proposition that unjust enrichment claims are generally not appropriate for class certification. Faced with a putative nationwide class, the court also found



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that BCBSAL did not meet its burden of demonstrating that common questions of law or fact predominated over questions affecting individual class members because the theory of unjust enrichment would have to be analyzed under the law of all 50 states: “[T]he fact that legitimate questions exist as to the plaintiff’s legal theory and that there is a need to parse the laws of 50 states to see if that theory is cognizable in all or most of those states is itself inconsistent with a finding that common questions of law predominate.”

Based on these findings, the Alabama Supreme Court concluded that the trial court erred in certifying the nationwide class of TPPs. Wyeth was represented in the case by Harvey L. Kaplan of Shook, Hardy & Bacon LLP; Shana J. Long, formerly with Shook, Hardy & Bacon LLP; Richard H. Gill of Copeland, Franco, Screws & Gill, PA; and Alfred F. Smith, Jr. and Sela E. Stroud of Bainbridge, Mims, Rogers & Smith, LLP.

The favorable opinion comes on the heels of another significant ruling from the Alabama Supreme Court in a drug-pricing case. In October 2009, the Alabama Supreme Court made headlines by reversing substantial multi-million dollar verdicts against three prescription drug manufacturers in cases brought by the Alabama Attorney General concerning the reporting of prices for drugs covered under Alabama’s Medicaid program. *AstraZeneca LP v. State of Alabama*, 2009 WL 3335904 (Ala. Oct. 16, 2009). On January 22, 2010, the court declined to reconsider its decision. ■

This analysis was prepared by associate [Brigette Willauer](#).