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STATE HIGH COURT RULINGS INDICATIVE OF ALABAMA'S CIVIL JUSTICE TURNAROUND

by
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Alabama's tort system is winning attention again, except this time for reasons opposite twenty years ago when it earned a dangerous reputation. The distance traveled can be seen in a recent decision by the Alabama Supreme Court, *Sandoz, Inc. v. State of Alabama*, 2012 WL 2866764 (July 13, 2012), which reversed a \$78.4 million verdict against a pharmaceutical manufacturer.

The *Sandoz* decision is a victory for the rule of law, as well as another cautionary tale for states who would consider hiring outside contingency-fee lawyers to aggressively pursue "regulation by litigation." It also is a healthy sign of Alabama's turnaround, paralleled—not coincidentally—by major business growth in the state including the announcement of Airbus's recent decision to locate a U.S. manufacturing facility there.

It was almost two decades ago, in 1993, when author David Frum published an alarming column in *Forbes* magazine entitled "Unreformed," recounting how Alabama had become the "worst place in America to be a civil defendant." A similar article in *Time* labeled Alabama as "tort hell," a place "where corporate America bleeds for the public good." Such news sent businesses scrambling for the exits, inspiring a new literary genre (state tort rankings), and ushering in a tort reform movement that has become a cottage industry.

The U.S. Supreme Court soon took notice. After an avalanche of bad publicity and a powerful Supreme Court opinion rejecting Alabama's use of punitive damages (*BMW v. Gore*, 517 U.S. 559 (1996)), the public wised up. The problem, they realized, was not the law; it was the judges and their application of the law.

In 1996, voters began to elect more conscientious appellate judges, addressing a factor that helped Alabama earn its reputation as a rogue jurisdiction. That perception however, still exists in some corners, even after nearly two decades of better behavior.

Decisions like *Sandoz* are emblematic of the change. The State, with assistance from contingency-fee lawyers, sued a generic drug manufacturer and its participating pharmacies for fraud. Its role was to supply pharmacists with prescription drugs for Medicaid participants. Those pharmacists were reimbursed by the State, which in turn was reimbursed two-thirds by the federal Medicaid program. A condition of federal funding, however, was the requirement to maintain a certain level of participation among pharmacies, thus ensuring broad availability—a real challenge in a small state with low volumes. To keep pharmacists on board, state regulators set reimbursement rates at levels they deemed fair based on a balancing of policy considerations.

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Plaintiffs' lawyers convinced the elected Attorney General that the cash-strapped State was due massive refunds from the pharmaceutical industry for alleged fraudulent overcharges. Those attorneys, once deputized, brought their case to a jury of fellow taxpaying citizens—a jury of alleged victims, if you will—demanding both compensatory and punitive damages from Sandoz. The jury complied. It returned a verdict of \$28.4 million in compensatory damages and another \$50 million in punitives.

On appeal, the entire \$78.4 million verdict was thrown out. In a compelling example of judicial independence, the Alabama Supreme Court (also politically elected) issued a thorough and well-reasoned opinion surveying forty years of history on the custom and practice of Medicaid pricing. It concluded that the evidence contradicted the State's claim that Sandoz fraudulently had either misrepresented its "wholesale" prices or concealed the existence of discounts and rebates for certain customers. The Court found further that the State knew enough about Sandoz's pricing system that it was not hoodwinked. The Court noted with interest that the state agency, even after suit was filed in 2005, made no changes to its reimbursement rates.

In addressing the fraud claim, the Court cited established precedent that "plaintiffs alleging fraud cannot be said to have reasonably relied on alleged misrepresentations when they have been presented with information that would either alert them to any alleged fraud or would provoke inquiry that would uncover such alleged fraud." Alabama's reimbursement rates, it held, "were the result of the [State's] own policy-making decisions, its own research, or the directives of the federal government, all in an effort to balance costs with the policy to set reimbursements high enough to ensure the participation of pharmacies and other providers in the Medicaid program."

The *Sandoz* result is not unique. It followed a nearly identical 2009 decision overturning two verdicts totaling \$275 million against AstraZeneca and two other pharmaceutical companies in *AstraZeneca v. State of Alabama*, 41 So.2d 15 (Ala. 2009). It also came against the backdrop of major reversals in *Exxon v. Alabama*, 986 So.2d 1093 (Ala. 2007) (\$3.5 billion), and *Hunt Petroleum Corp. v. Alabama*, 901 So.2d 1 (Ala. 2004) (\$23 million), both of which involved similar disputes with the State. Today, unlike twenty years ago, one would be hard-pressed to find a lop-sided punitive award upheld in Alabama.

In the larger picture, *Sandoz* is a cautionary example of the pitfalls of "regulation by litigation" where a state's interests are not fully in alignment with outside contingency-fee attorneys. It also underscores the importance of an independent judiciary.

A national ranking is a source of great pride for football fans in Alabama. But the most important ranking in Alabama may be the one it disappeared from nearly a dozen years ago. It is the annual American Tort Reform Association "Judicial Hellholes" list whose name Alabama inspired. It seldom is "news" when one is left off a list, so it is not surprising that the media largely ignored Alabama's dropping of the list over a decade ago.

The news instead has been about an influx of new business: Airbus, Thyssenkrupp, Hyundai, Mercedes-Benz, Honda and a host of others whose site selection criteria include a sound legal system. Of course there remain issues and courthouses still needing attention, as in every state. But as *Sandoz* demonstrates, and as critics of the old regime (such as this author) must recognize, things are very different now. Alabama's civil justice system is not the imposing impediment to free enterprise that it once was.