

Appeal No. 1120010

---

**IN THE SUPREME COURT OF ALABAMA**

---

**CAREMARK RX, INC.; AMERICAN INTERNATIONAL GROUP, INC.;  
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, Pa.;  
AIG TECHNICAL SERVICES, INC.; and AMERICAN INTERNATIONAL  
SPECIALTY LINES INSURANCE COMPANY.**

Defendants-Appellants-Cross Appellees,

v.

**JOHN LAURIELLO** individually and **JAMES O. FINNEY, JR., SAM  
JOHNSON,** and **CITY OF BIRMINGHAM RETIREMENT AND RELIEF  
SYSTEM,** for themselves and on behalf of a class of all  
others who are similarly situated,

Plaintiffs-Appellees-Cross Appellants.

Appeal of Order Certifying Class Action from  
the Circuit Court of Jefferson County, Alabama,  
Case No. CV 03-6630-TK

---

**APPLICATION FOR REHEARING**

---

David G. Hymer  
Joel M. Kuehnert  
**BRADLEY ARANT BOULT  
CUMMINGS LLP**  
One Federal Place  
1819 Fifth Avenue North  
Birmingham, Alabama 35203  
(205) 521-8000

*Attorneys for Appellant-  
Cross Appellee Caremark  
Rx, Inc.*

M. Christian King  
Lee M. Hollis  
**LIGHTFOOT, FRANKLIN & WHITE, LLC**  
The Clark Building  
400 North 20th Street  
Birmingham, Alabama 35203  
(205) 581-0700

*Attorneys for Appellants-Cross  
Appellees American International  
Group, Inc., National Union Fire  
Ins. Co. of Pittsburgh, Pa., AIG  
Technical Services, Inc., and  
American International Specialty  
Lines Ins. Co.*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
APPLICATION FOR REHEARING .....	1
BRIEF IN SUPPORT OF APPLICATION .....	3
Issue 1: The Scope of the Class.....	3
Issue 2: The Statute of Limitations.....	6
CONCLUSION .....	10
CERTIFICATE OF SERVICE .....	11

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<u>Novak v. Home Depot U.S.A., Inc.</u> , 259 F.R.D. 106 (D.N.J. 2009) .....	8
<u>Parsons Steel, Inc. v. Beasley</u> , 522 So.2d 253, 256 (Ala. 1988) .....	7
<u>Thorn v. Jefferson-Pilot Life Ins. Co.</u> , 2004 WL 5745993 (D.S.C. 2004), <u>aff'd</u> , 445 F.3d 311 (4th Cir. 2006) .....	8
<b>Statutes</b>	
Ala. Code §6-2-3 .....	7
<b>Other Authorities</b>	
Rule 40, Ala. R. App. P. ....	1

## APPLICATION FOR REHEARING

Pursuant to Rule 40, Ala. R. App. P., Defendants Caremark Rx, Inc.; American International Group, Inc.; National Union Fire Insurance Company of Pittsburgh, Pa.; AIG Technical Services, Inc.; and American International Specialty Lines Insurance Company ("Defendants") petition this Court to rehear its Decision released September 12, 2014 ("Decision"). Defendants request rehearing on two issues:

(1) The scope of the class. The Decision appropriately recognizes that those who were not "actual participants in the prior settlement" cannot be included in the proposed class here. (Decision at 42). Nevertheless, the Decision rejected Defendants' contention that the class as certified by the trial court is impermissibly broad because it does not expressly exclude those who did not submit claims in connection with the settlement. The Court appears to have concluded that the exclusion of those "who opted out of the 1999 Class Settlement" (Decision at 16) addresses Defendants' position in this regard. Because this exclusion of "opt outs" does not cover non-claimants, a fact that the Decision appears to overlook, Defendants' position has not been resolved. Defendants seek rehearing to clarify that

the class does not include persons who did not submit claims in the 1998 litigation.

(2) The statute of limitations. The Decision appears to overlook Defendants' position that individualized issues associated with the statute of limitations preclude class certification. These individualized determinations are alone enough to require that the trial court's order be overturned since the Defendants have a recognized due process right to litigate these issues as to each class member. Defendants seek rehearing and request that the Court hold that class certification must be denied because individual issues as to the statute of limitations predominate over common issues.

In further support of this application, Defendants submit the incorporated brief. Defendants request that upon rehearing, the Court modify or clarify its Decision as described below.

## **BRIEF IN SUPPORT OF APPLICATION**

Defendants acknowledge the Court's holding that to the extent the alleged fraud and/or suppression in this case was perpetrated, it was perpetrated on the Class in the 1998 litigation. This Application is not addressed to that holding. Rather, it appears the Court overlooked operative facts and arguments involving two other issues critical to the resolution of Plaintiffs' class certification motion -- concerning the scope of the class and the statute of limitations -- and this Application seeks correction of those oversights and clarification of the Decision.

### **Issue 1: The Scope of the Class**

All agree that the Class does not and cannot include those who opted out of the 1999 Settlement. Inclusion of those individuals would, as the Court held (Decision at 42), render the Class "impermissibly broad." For the same reason, inclusion of individuals who did not formally opt out but did not submit claims in 1999 certainly would also render the class impermissibly broad. If a class member chose not to submit a claim to participate in the settlement process, that class member simply was not affected by any of the misconduct Plaintiffs allege.

The class as certified by the trial court expressly excluded "**all those members [of the settlement class] who opted out of the 1999 Class Settlement.**" (Id. at 16 (emphasis added)). This was the only articulated exclusion in the trial court's order. Thus, while the trial court excluded so-called "opt outs," Plaintiffs did not concede, and the class as certified by the trial court did not expressly exclude, non-claimants -- those who did not opt out but also failed to submit a claim in the Settlement. (Id.). Rather, the class as certified by the trial court appears to have included all those who were bound by the settlement in the 1998 litigation -- **whether they submitted a claim or not.**

Opting out of the Settlement required one to submit a formal and valid request for exclusion (S2169);<sup>1</sup> a person who did not submit an opt-out request and also submitted no claim form to collect proceeds from the Settlement was bound by the Settlement even though he or she received no payment (Id.). The trial court recognized the distinction between these two groups, concluding that approximately

---

<sup>1</sup> As in Defendants' opening brief, citations to the Supplemental Record on Appeal are of the form "Sxx," with page numbering from the Clerk's numbers at the top of each page.

80,000 individuals and entities were bound by the Settlement, even though only 18,000 "actually filed claims . . . ." (R5753).<sup>2</sup>

On appeal, Defendants argued that the class as certified by the trial court was impermissibly broad because it included individuals and entities that did not submit claims in connection with the Settlement. Defendants argued that the claims of those who actively participated in the Settlement by requesting proceeds from that Settlement are not typical of those who did not submit claims. Inclusion of persons who did not formally opt out but did not submit claims in 1999 would render the class impermissibly broad.

The Court stated (Decision at 42) that this was not a concern because the trial court "limited the class to actual participants in the prior settlement process," so that the Class as certified does not "'include[] individuals who did not submit claims in the 1998 litigation'" (id. (emphasis by the Court)). Thus, the Court appears to agree with Defendants that such non-claimants were not "actual partic-

---

<sup>2</sup> As in Defendants' opening brief, citations to the Record on Appeal are of the form "Rxx," with page numbering from the Clerk's numbers at the top of each page.

ipants in the prior settlement" and should be excluded from the current class. (Id.). But the class as certified by the trial court appears not to have excluded non-claimants (id. at 10), and the Decision affirmed the trial court's order in all respects (id. at 45). If the decretal paragraph of the Decision is not modified to conform to what Defendants believe this Court intended by the language quoted above, non-claimants apparently will be treated as class members notwithstanding this Court's determination that the class must be limited to "actual participants." (Id. at 42).

Accordingly, Defendants respectfully request that the Decision be modified to clarify that the class does not include persons who did not submit claims and thus were not "actual participants in the prior settlement process."

## **Issue 2: The Statute of Limitations**

Separate and apart from the reliance element of the fraud and suppression claims, Defendants argued that individual issues predominated because the statute of limitations required individualized determinations as to what each class member knew or should have known about the ex-

cess policy and when he or she knew or should have known it. Point I.C of Defendants' brief was headed:

**"The Predominance of Individual Issues as to the Statute of Limitations Is Indisputable and By Itself Precludes Certification"**

The Court seems to have overlooked this issue, since the Decision does not mention or discuss the statute of limitations issue.

The settlement of the 1998 litigation was finally approved on July 10, 1999. (S2148-61). The statute of limitations applicable to fraud claims in Alabama requires that these claims be asserted within two years of the time the plaintiff knew, or should have known, facts that were allegedly misrepresented or suppressed. Ala.Code §6-2-38(1). But this action was brought on October 22, 2003, well after the two-year period had expired. (R10). In these circumstances, each class member bears the burden of proving that the statute was tolled as to him or her. Parsons Steel, Inc. v. Beasley, 522 So.2d 253, 256 (Ala. 1988) ("The burden is . . . on the party bringing an action for fraud to show that he comes within the purview of [Ala. Code §6-2-3] if it otherwise appears that the statutory period has ex-

pired." ). Facts relating to this determination are highly individualized.

The Decision did not address the statute of limitations and, thus, did not determine whether common or individual issues predominate. It likewise did not address Defendants' position (Opening Brief at 58) that they have a due process right to litigate the individual issues necessarily raised by the statute of limitations.<sup>3</sup> The question before this Court is whether the individual issues as to the statute of limitations, which are distinct from the question of individual vs. class-wide reliance, precludes certification.

Of course, whether and when each class member knew, or should have known, of the excess insurance policy and its potential impact on the Settlement of the 1998 litigation requires discovery into and consideration of each class member's awareness of the various public disclosures of the

---

<sup>3</sup> E.g., Thorn v. Jefferson-Pilot Life Ins. Co., 2004 WL 5745993, at \*3 (D.S.C. 2004), aff'd, 445 F.3d 311 (4th Cir. 2006); Novak v. Home Depot U.S.A., Inc., 259 F.R.D. 106, 116 n.7 (D.N.J. 2009)

Defendants understand the reference to "defenses" at pages 33-34 of the Decision to refer only to "pre-settlement differences among class members" (Decision at 33), not to the statute of limitations.

excess insurance policy. These public disclosures were available to potential class members and their lawyers because they were contained in (1) a press release issued in December 1998, almost six months before the Settlement of the 1998 litigation was first considered by any court (S1800); (2) a December 1998 news release issued by the *Birmingham Business Journal* (S2214); (3) a January 15, 1999 SEC filing describing the excess insurance policy and disclosing that MedPartners provided that policy to its lenders (S1826-27); (4) a February 10, 1999 press release (S1870-74); and (5) MedPartners' 1998 Annual Report, filed with the Securities and Exchange Commission ("SEC") on April 15, 1999 and mailed to all MedPartners shareholders at that time (S3929-30). Each class member's exposure to and knowledge of these disclosures must be evaluated to determine whether any claim is time-barred.

Rehearing should be granted and the Court should hold that class certification should have been denied because individual issues as to the statute of limitations predominate over common issues. In the alternative, the Court should clarify that the trial court must address how to litigate these individual issues and that the class must be

decertified if a process cannot be structured that accommodates and protects Defendants' due process rights.

**CONCLUSION**

Defendants respectfully request that the Application for Rehearing be granted, and that the Court modify and/or clarify its Decision as set forth herein.

BRADLEY ARANT BOULT CUMMINGS  
LLP

LIGHTFOOT, FRANKLIN & WHITE, LLC

      /s/ David G. Hymer  
David G. Hymer (HYM001)  
Joel M. Kuehnert (KUE001)  
One Federal Place  
1819 Fifth Avenue North  
Birmingham, Alabama 35203  
(205) 521-8000

      /s/ M. Christian King  
M. Christian King (KIN017)  
Lee M. Hollis (HOL075)  
The Clark Building  
400 20th Street North  
Birmingham, Alabama 35203  
(205) 581-0700

-and-

-and-

M. Robert Thornton  
Philip E. Holladay, Jr.  
Jonathan R. Chally  
KING & SPALDING LLP  
1180 Peachtree Street, N.E.  
Atlanta, GA 30309  
(404) 572-4600

Edward P. Krugman  
Joel Kurtzberg  
CAHILL GORDON & REINDEL LLP  
80 Pine Street  
New York, New York 10005  
(212) 701-3000

*Attorneys for Appellant-Cross  
Appellee Caremark Rx, Inc.*

*Attorneys for Appellants-Cross  
Appellees American International  
Group, Inc., National Union Fire  
Insurance Company of Pittsburgh,  
Pa., AIG Technical Services,  
Inc., and American International  
Specialty Lines Insurance Co.*

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 26th day of September, 2014, a true and correct copy of the foregoing was served on counsel of record electronically as indicated below.

John W. Haley, Esq. ([Haley@hwnn.com](mailto:Haley@hwnn.com))  
Ralph D. Cook, Esq. ([Ralph@hwnn.com](mailto:Ralph@hwnn.com))  
Scott A. Powell, Esq. ([Scott@hwnn.com](mailto:Scott@hwnn.com))  
James R. Pratt, III, Esq. ([Jim@hwnn.com](mailto:Jim@hwnn.com))  
Bruce J. McKee, Esq. ([Bruce@hwnn.com](mailto:Bruce@hwnn.com))  
HARE, WYNN, NEWELL & NEWTON, LLP  
2025 Third Avenue North, Suite 800  
Birmingham, Alabama 35203

John Q. Somerville, Esq. ([jqs@somervillellc.com](mailto:jqs@somervillellc.com))  
SOMERVILLE, LLC  
420 N. 20th St., Suite 2550  
Birmingham, Alabama 35203

J. Timothy Francis, Esq. ([francis@bham.rr.com](mailto:francis@bham.rr.com))  
JAMES L. NORTH & ASSOCIATES  
300 21st Street North, Suite 700  
Birmingham, Alabama 35203

Lanny S. Vines, Esq. ([lvines@lannyvines.com](mailto:lvines@lannyvines.com))  
LANNY VINES & ASSOCIATES, LLC  
2142 Highland Avenue South  
Birmingham, Alabama 35205

/s/ Joel M. Kuehnert

**OF COUNSEL**