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## Zyprexa suit brings in \$45M State's decision to go it alone nets tenfold increase

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A display of determination to take pharmaceutical giant Eli Lilly and Co. to trial helped South Carolina negotiate a \$45 million settlement over its claims that the company engaged in fraudulent prescription marketing of the anti-psychotic drug Zyprexa.

The settlement, which Attorney General Henry McMaster announced Oct. 23, was the state's second biggest ever. Only its settlement in the 1998 Tobacco Master Settlement Agreement was bigger, McMaster's office said.

The settlement was the highest for any of the 45 states that have brought actions against Eli Lilly in connection with Zyprexa.

The next largest was Connecticut's \$30 million agreement, followed by \$22.5 million for West Virginia, said Trey Walker, a spokesman for McMaster's office.

But it wasn't just South Carolina's decision to opt out of a 32-state class action that pushed its settlement to the top. Also important was the fact that South Carolina sued for damages that the multi-state action didn't seek, Walker told South Carolina Lawyers Weekly.

"That, and the fact that we were very adamant about going to trial unless we thought that the taxpayers were reimbursed what they were owed," he said. "We believe it was a fair settlement and it was a good recovery for the taxpayers."

Had South Carolina joined the class action, its take would have been a mere \$4.5 million, Walker said. That's because



Photo provided by Eli Lilly

the class-action states sued and recovered only for Medicaid damages.

In contrast, South Carolina sued for damages to the S.C. Department of Mental Health, the S.C. State Employees Health Plan and the state Medicaid program as "injured purchasers and/or reimbursers of prescription drugs," according to a complaint filed in a Spartanburg circuit court in 2007.

"These multi-states do not recover for your state health plan," Walker said. "That's one of the reasons why, when we

look at multi-state agreements, we take into account whether, one, they are recovering for the state health plan and, two, if their damage assessment is correct on what the actual damages are.

"If we believe that it's in South Carolina's best interests to join that multi-state, we will."

The state sought "tens of millions of dollars" it claimed to have spent on buying Zyprexa and treating side effects resulting from off-label use of the drug.

The state claimed that Eli Lilly failed

to properly warn of side effects such as diabetes, neurological problems, weight gain, pancreatitis, hyperglycemia and cardiovascular problems. It accused the company of “aggressive marketing,” “overstating the drug’s use” and failing to “warn South Carolina physicians treating Medicaid, SCDMH and SHP participants of [the] risks.”

It sued for submission of false and fraudulent claims under the Medicaid program; recovery of the cost of treatment for injuries caused by Zyprexa as parens patriae or, alternatively, under S.C. Code Ann. § 43-7-420; violation of the S.C. Unfair Trade Practices Act; negligence; breach of warranty; fraud and misrepres-

sentation; and unjust enrichment.

The company denied the claims.

Marni Lemons, an Eli Lilly spokeswoman, declined to comment on specifics of the case. “We feel it’s in the best interest of all the consumers ... to put this case behind us,” Lemons said.

A few months after the company removed the case for a brief sojourn in the U.S. District Court of South Carolina, U.S. District Judge Henry M. Herlong Jr. remanded it to state court in August 2007.

A trial set for Oct. 5 in Spartanburg County Circuit Court got as far as jury selection, Walker said.

About 84 percent of the settlement

funds, or almost \$38 million, will go to the state. The remainder goes to special counsel and the Attorney General’s Office.

The special counsel — John Belton White Jr. of Spartanburg, John S. Simmons of Columbia and Kenneth Bailey Jr. of Houston — will receive about \$5.8 million in attorney fees, or 12.94 percent of the settlement, under a retention agreement which McMaster’s office said provided the lowest fee rate in the nation.

McMaster’s office said it will receive about \$647,000 allowed under state law for “statewide criminal prosecution efforts.”