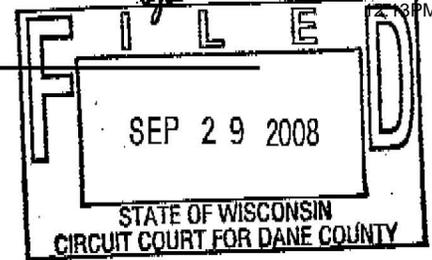




STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY



Sep 29 2008
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STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04 CV 1709

ABBOTT LABORATORIES, et al.

Defendants.

**DECISION AND ORDER ON THE STATE OF WISCONSIN'S MOTION FOR
LEAVE TO FILE ITS THIRD AMENDED COMPLAINT (PART 1)**

INTRODUCTION

Plaintiff State of Wisconsin moves under § 802.09(1); Stats., for leave to file a Third Amended Complaint to (1) assert damages remedies for its §100.18, Stats., deceptive trade practices claim and its unjust enrichment claim, (2) add to its list of targeted drugs at issue in its claims under §100.18 and the Medicaid fraud statute, §49.49 (4m) (a) (2), Stats., and (3) "make minor changes to some of the factual allegations and stipulated name changes for several defendants." Defendants oppose. To expedite the process as much as possible, the decision on plaintiff's motion will be issued in stages, with this decision (Part 1) addressing the request for addition of damages remedies and "minor changes". A subsequent decision (Part 2) will tackle the more fact-intensive, defendant-specific inquiry spawned by plaintiff's request to expand the list of targeted drugs, which will take awhile.

The motion is directed to the sound discretion of the court under §802.09 (1), which provides that "leave shall be freely given at any stage of the action when justice so requires", notwithstanding the fact that it is mind-boggling that over four years into this lawsuit, the parties still don't know what they're really fighting about, at least insofar as the pleadings are concerned.

DAMAGES REMEDIES UNDER §100.18 AND UNJUST ENRICHMENT

The motion to amend to seek damages under §100.18 and unjust enrichment theories is granted.

Under the Second Amended Complaint filed June 28, 2006, plaintiff has been seeking restitution to restore pecuniary loss for itself and its citizens under §100.18 (11) (d), Stats. (p. 31), and disgorgement of profits under its unjust enrichment claim (p. 36). Discovery into these remedies has been ongoing for the past two years, or could have been.

Damages remedies add little to what has accordingly already been at issue in this case for at least two years. Indeed, it is difficult to see much difference between restitution to restore pecuniary loss and damages to compensate pecuniary loss. Nor is there any merit to the contention that the State of Wisconsin lacks authority under §100.18 (11) (b) 2, Stats., to sue for damages it allegedly sustained as a result of wrongful conduct under section 100.18 (1), Stats. While it is true that §100.18 (11) (d) specifically authorizes the Department of Justice to enforce §100.18 where the state itself has not suffered any damage or injury and, as ancillary to that enforcement action, obtain remedial restitution for those victimized by violations of the statute, nothing in the statute prohibits the state itself, through the Department of Justice, from seeking damages under §100.18 (11) (b) 2, where it has, in fact, been the victim of the wrongful conduct. On this point, see Judge Krueger's May 18, 2006 "Remainder of Decision and Order on Defendants' Motions to Dismiss", p. 2-3, and plaintiff's discussion in part one of its bifurcated reply memorandum at pages 7 -- 10.

As for unjust enrichment damages, these are clearly allowed under Wisconsin law, and are "measured by the benefit conferred upon the defendant, not the plaintiff's loss." *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 188, 557 N.W.2d 67 (1996). This is precisely the same measure for equitable disgorgement, see e.g. *Ludyjan v. Continental Casualty Co.*, 303 Wis. 2d 398, 404, et seq., 747 N.W.2d 745 (Ct.App. 2008), which plaintiff has been seeking in its unjust enrichment claim since at least the Second Amended Complaint was filed in 2006.

Accordingly, denying plaintiff's motion to amend to assert damages remedies would likely constitute an erroneous exercise of this court's discretion, and the motion is thus granted to that extent. This strengthens plaintiff's right to a jury trial on its §100.18 claims, and provides a right to a jury trial on its unjust enrichment claim. See e.g. *Lawlis v. Thompson*, 137 Wis. 2d 490, 499, 405 N.W.2d 317 (1987) and *Dahlke v. Dahlke*, 258 Wis. 2d 764, 776, 654 N.W.2d 73 (Ct.App. 2002) ("... an unjust enrichment action can be tried to a jury..."). The court abrogates its recent "Decision and Order on Plaintiff's Right to Jury Trial" where it denies a jury trial right on plaintiff's unjust enrichment claim. This result

is further supported by plaintiff's dismissal of its prayer for an injunction under Count V, which is granted below.

Defendants raise several challenges going to the merits of plaintiff's claims for damages, e.g. those addressing causation, unreasonable reliance, equitable estoppel and general "futility". These are beyond the purview of this decision, which evaluates plaintiff's motion only under the liberal amendment rules accorded parties by §802.09(1). Subsequent opportunities to pursue these substantive challenges will be provided at the summary judgment stage. The procedural manner in which those motions may be made will be addressed at the next status conference on the record, which will be scheduled forthwith, and no such motions may be filed pending further order of the court.

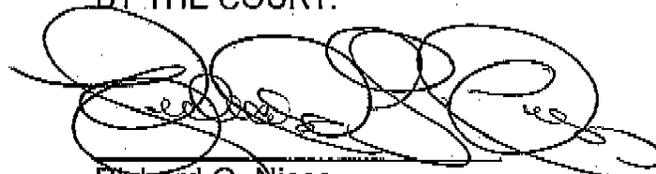
Pharmacia is the first defendant up for trial, now scheduled for February, 2008, just four months hence. Nothing in the filed materials suggests that this tardy amendment adding damages remedies to plaintiff's Second Amended Complaint prejudices its trial preparation. In fact, plaintiff avers that discovery into the damages case against Pharmacia has been proceeding already. However, because amendments to the pleadings under §802.09 (1) are to be granted only as "justice so requires", if Pharmacia can demonstrate prejudice from this belated amendment to the pleadings, the court will entertain a motion to adjourn the February trial date. All other defendants have sufficient time before their respective trials to discover plaintiff's damages case, and garner whatever evidence there may be to adequately defend it.

"MINOR CHANGES" TO THE SECOND AMENDED COMPLAINT

Plaintiff's proposed "minor" amendments appear to be unopposed, and are accordingly granted.

Dated this 29th day of September, 2008.

BY THE COURT:



Richard G. Niess
Circuit Judge

CC: Attorney William M. Conley
(for immediate service on all parties per
usual practice in this case)