

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04 CV 1709

ABBOTT LABORATORIES, et al.

Defendants..

F	I L E	D
SEP 28 2007		
STATE OF WISCONSIN CIRCUIT COURT FOR DANE COUNTY		

DECISION AND ORDER DENYING DEFENDANTS' JOINT MOTION TO SEVER AND PROVISIONALLY GRANTING DEFENDANTS' JOINT MOTION FOR SEPARATE TRIALS

Defendants move jointly to sever the plaintiff's claims against each defendant from those against every other defendant, contending that the State has failed to satisfy the grounds for permissive joinder under §803.04(1), Stats. Alternatively, defendants seek separate trials for the claims against each defendant under §805.05(2), Stats. The motions have been fully briefed and supported with evidentiary materials, and no party has requested oral argument. Accordingly, the motions are ripe for decision.

For the following reasons, the joint motion to sever is denied, but the alternative joint motion for separate trials is granted, at least for the time being, with leave to the parties to revisit the issue on appropriate motion following decisions on summary judgment motions.

MOTION TO SEVER

Section 803.04(1), Stats., permits the State to join all defendants together in this action by asserting

"against them... severally... any right to relief... arising out of the same... series of transactions or occurrences..."¹

Fairly read, the State's Second Amended Complaint satisfies this requirement. That pleading essentially alleges that defendants have hugely and illegally profited, at the expense of the State and its citizens, by concocting and participating in an unlawful scheme to cause the publication of phony drug "average wholesale prices" which have "completely corrupted the market for prescription drugs." (SAC, ¶ 60) While defendants argue that the Second Amended Complaint claims that each company acted independently, individually, and separately from each other, I do not believe the allegations can be read that narrowly, although admittedly they do not appear to expressly allege concerted action or conspiracy. Certainly paragraphs 40-41, 43, 49, and 53 of the Second Amended Complaint, cited by defendants in support of their argument, do not assert that the defendants acted independently and separately from each other. At best, these paragraphs are ambiguous on that point.

But even conceding defendants' premise, i.e. that plaintiff only seeks relief against each defendant for its independent and separate contribution to the overall damage to the pharmaceutical marketplace, joinder appears proper under current Wisconsin law, particularly *Kluth v. General Casualty Co. of Wisconsin*, 178 Wis. 2d 808, 505 N.W. 2d 442 (Ct. App. 1993). *Kluth* involved joinder of defendants from two entirely separate automobile accidents over a year apart, where plaintiff alleged that the second accident aggravated and augmented the injuries and damages from the first accident. The Court of Appeals affirmed the trial court's denial of the defense motions for separate trials upon a finding that the allegations of "commonality of an injury and aggravation of that injury by the tortfeasors", at least at the pleadings stage, satisfied §803.04(1)'s requirement that the actions against the two defendants arise out of "the same transaction, occurrence, or series of transactions or occurrences".

Similarly, the State asserts here that the confluence of defendant's actions-- whether they be completely separate and independent, or otherwise-- has debased the marketplace for prescription drugs as a whole, resulting in massive overpayments by the State and its citizens. The undeniably expansive criterion for permissive joinder specifically adopted by *Kluth's* "commonality of an injury" test is satisfied here by the State's assertion that defendant's actions have combined, in the final analysis, to completely corrupt the pharmaceutical marketplace, resulting in direct and continuing injury to the State and its citizens.

¹ While permissive joinder also requires that some "question of law or fact common to all defendants ... arise in the action", *id.*, defendants do not premise their motion to sever upon the contention that the State's case fails to satisfy this element under the statute which, accordingly, will be addressed no further.

MOTION FOR SEPARATE TRIALS

Both §803.04(4) and §805.05(2), Stats., grant this Court broad discretion to separate trials and fashion trial formats to further the interests of justice, the convenience of the parties and witnesses, the speedy resolution of the action, and the parties' and court's interests in cost-effective litigation.

Just considering logistics, given the sheer number of parties, there is no way that this case can proceed to a single trial against all defendants. At last count, 176 lawyers have appeared in this action. Short of constructing a new facility, Dane County has no suitable assembly hall that would accommodate a trial with all of these lawyers (or even just one lawyer for each of the 37 parties)², together with court personnel, jury venire panel, and client representatives.

For this Court, consideration of fairness to all parties in the presentation of their respective cases is the paramount concern, trumping all others including convenience, speed, and expense. See also *Kluth, supra*, at 818. At this early juncture in the substantive litigation, it is not at all apparent, to the court at least, that any defendant could have its case fairly considered by the jury, if not in a separate trial. Defendants present a compelling argument for insurmountable jury confusion with their proof on differing corporate practices among the defendants, multiple claims against each defendant each consisting of multiple elements and each portending multiple verdict questions both on these claims and defendants' affirmative defenses. Judge Saris' words, quoted by the defense, serve as ominous harbingers in highlighting the real potential for havoc even a trial to the court with a limited number of defendants can wreak, let alone a jury trial which indisputably adds another layer of complexity, both qualitative and quantitative.

On the other hand, both *Kluth*, 178 Wis. 2d at 821-22, and plaintiff argue convincingly that a final decision on this issue can be and should be deferred until after the case ripens through discovery and dispositive motion practice.

Accordingly, the Court renders the following provisional and limited order on defendants' motion for separate trials. First, as stated above, a single trial against all defendants will not occur. Secondly, pending further order of the court, each defendant will be accorded a separate trial on plaintiff's claims against it. In all other respects, the claims against defendants remain consolidated.

The effect of this order is to reverse the presumption under §803.04 and §805.05, Stats., if there is one, from a single trial against all defendants to separate trials against each defendant. The court will revisit the issue of joining some defendants in a single trial upon motion by any party after dispositive motions have been decided, or sooner if the factual record upon which the

² And when was the last time a case of this nature was ever tried with just one lawyer per party, not to mention paralegals and other clerical support?

factors to be weighed by the court on such a motion has sufficiently matured such that the court can apply the appropriate case law and statutory considerations in a reasonable exercise of its discretion. Such motion must be specific as to the identities of those defendants proposed for grouping into joint trials, with explanation of how the proposal protects all parties' rights to a fair trial. Absent such a motion, the case will be tried against each defendant in separate jury trials.

Dated this 28 day of September, 2007.

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)

Faxed on 9-28-07 @ 8:10 am
cf