

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 9

DANE COUNTY

STATE OF WISCONSIN,

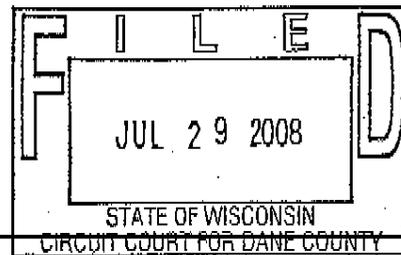
Plaintiff,

v.

Case No. 04 CV 1709

AMGEN INC., et al.

Defendants.




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**DECISION AND ORDER ON CERTAIN DEFENSE CROSS-MOTIONS FOR  
SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiff State of Wisconsin's motions for partial summary judgment on §100.18 liability against defendants Astra Zeneca, Johnson & Johnson, Novartis and Sandoz were met by cross-motions for partial summary judgment by these defendants, which were joined by all defendants. Additionally, defendants Schering-Plough and Warrick filed separate summary judgment motions which tracked a different briefing schedule. This decision addresses the former, but not the latter, which will be the subject of a subsequent decision.

SEPARATION OF POWERS/POLITICAL QUESTION ARGUMENT

In its "Decision and Order on Plaintiff's Motions for Partial Summary Judgment against Defendants Novartis, Astra Zeneca, Sandoz, and Johnson & Johnson", this court rejected the defense argument that plaintiff's §100.18 claims present a political question which separation of powers principles prohibit this court from deciding. That rejection is reiterated here, and the defense motions for partial summary judgment on that ground are denied.

ARGUMENT THAT §100.182, NOT §100.18, PROVIDES THE EXCLUSIVE  
REMEDY FOR PLAINTIFF'S FIRST TWO CLAIMS FOR RELIEF

This argument was also rejected in this court's decision on plaintiff's partial summary judgment motion, and thus provides no basis for partial summary judgment in favor of the defense.

ARGUMENT THAT §100.18 (10) (B) DOES NOT CREATE A SEPARATE CLAIM FOR RELIEF

The court agreed with this argument and dismissed plaintiff's second claim for relief, merging it into the first.

STATUTES OF LIMITATIONS ARGUMENTS

The default statute of limitations for actions by the state is §893.87, Stats., which provides:

**"893.87 General limitation of action in favor of the state.**

Any action in favor of the state, if no other limitation is prescribed in this chapter, shall be commenced within 10 years after the cause of action accrues or be barred. No cause of action in favor of the state for relief on the ground of fraud shall be deemed to have accrued until discovery on the part of the state of the facts constituting the fraud."

Defendants contend that plaintiff State of Wisconsin's third, fourth, and fifth claims for relief are governed by six-year statutes of limitations. The validity of this contention depends upon whether or not a limitation is prescribed for these claims in Chapter 893 other than the 10 years provided in §893.87. In addressing this question, we must bear in mind our supreme court's holding that the "state is not bound by general statutes of limitation, unless the legislature has clearly manifested its intention that the state be so bound." *State v. Josefsberg*, 275 w 142, 151, 81 N.W.2d 735 (1957).

The state's third claim for relief alleges violation of the Wisconsin Trust and Monopolies Act, Chapter 133, Stats. Accordingly, defendants urge the applicability of the six-year statute of limitations provided in §133.18 (2), Stats. However, nothing in that statute "clearly manifest[s]" the legislature's intention that the state be bound by its limitation. Section 893.43, Stats., suffers from the same shortcoming, and thus does not control plaintiffs fourth and fifth claims for relief alleging, respectively, medical assistance fraud and unjust enrichment.

Accordingly, plaintiff's third, fourth, and fifth claims for relief are governed by the 10 year limitations period provided in §893.87. This court's May 18, 2006 order to the contrary is amended to that extent.

Material factual issues regarding the accrual date foreclose summary judgment dismissing these three claims for relief on limitations grounds, as moved by the defense. Although defendants establish a *prima facie* showing that

plaintiff actually knew or should have known that "average wholesale price" did not represent an actual average of wholesale prices long before 10 years ago, the conclusion does not follow *ipso facto* that the state knew or should have known that defendants were involved in unfair trade practices, fraud, or unjust enrichment during that time period as well. Defendants simply have failed to make a *prima facie* case in this regard.

Moreover, under the discovery rule, which governs the accrual date for plaintiff's claims, a claim accrues when the plaintiff objectively knows, or with **reasonable exercise of care** should have known, the cause of the injury and the defendant's part in that cause. *Gumz v. Northern States Power Co.*, 295 Wis. 2d 600, 607, 721 N.W. 2d 515 (Ct. App. 2006). The "reasonableness" of conduct is rarely amenable to resolution by summary judgment, *see e.g. Lambrecht v. Kasczmarczyk*, 241 Wis. 2d 804, 808, 623 N.W. 2d 751 (2001), and the rule is no different in the limitations context, *see e.g. Hennekins v. Hoerl*, 160 Wis. 2d 144, 161 and 172, 465 N.W. 2d 812(1991).

Finally, defendants concede that the statute of limitations argument, if successful, does not result in a complete defense against the third, fourth and fifth claims for relief, since these claims clearly target at least *some* defense conduct that allegedly occurred within the limitations period. Thus, a portion of plaintiff's lawsuit, as pleaded, is timely under either view of the appropriate limitations period, be it six years or ten. The jury will sort out those portions of plaintiff's claims that are time-barred from those which are not, upon appropriate instruction from the court in conjunction with focused special verdict questions.

#### "REASONABLE RELIANCE"/CAUSATION ARGUMENTS

Until very recently, the plaintiff State of Wisconsin has expressly eschewed any damages remedy under §100.18 (11) (b) 2, Stats.<sup>1</sup> For example, "PLAINTIFF STATE OF WISCONSIN'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT", page 9, unequivocally states:

"In short, Judge Krueger was right when she held that ' the Amended Complaint was [not] filed pursuant to Wis. Stat. §100.18 (11) (b) (2), and no argument or authority is offered to support the proposition that causation or reliance by a consumer is required for an action filed pursuant to §100.18 (11) (d).' "

<sup>1</sup> An apparent change of heart emerged in the July 3, 2008 "THE STATE OF WISCONSIN'S BRIEF IN SUPPORT OF ITS CLAIM TO A TRIAL BY JURY", page 3. However, following the court's finding that no "reasonable view of the pleading Second Amended Complaint on the first two claims for relief fairly implicates a damages remedy..." (Transcript, July 9, 2008 Status Conference, page 4)—a point apparently conceded by the State in the above brief at page 3, n. 3— the current posture of this action involves no damages claim under §100.18 (11) (b) 2., pending further order of the court.

The fact that plaintiff's Deceptive Trade Practices Act claim for relief is limited to an enforcement remedy under §100.18 (11) (d), Stats., renders inapposite defendants' argument that plaintiff's §100.18 claim must be dismissed for failure to show causation, i.e. reliance, reasonable or otherwise. "Reasonable reliance"/causation arguments are not a defense to enforcement actions under §100.18 (11)(d). Indeed, the whole purpose for an enforcement action is to forestall *any* harm caused by the targeted conduct. Accordingly, defense summary judgment motions on this ground are denied.

### JOHNSON & JOHNSON'S ARGUMENT ON CLAIM PRECLUSION

Johnson & Johnson's motion for partial summary judgment dismissing plaintiff's claims I, II, III, and IV, based on the argument that Judge Saris' November 20, 2007 decision<sup>2</sup> triggers claim preclusion, is fundamentally flawed and therefore denied. That decision, in paragraph 13, stated:

"As to the J&J Defendants, the Court ruled, among other things, that although J&J's conduct was troubling, it did not violate Mass. Gen. Laws ch. 93A, in part because the spreads on the J & J Defendants' subject drugs (Procrit and Remicade) never substantially exceeded the range of spreads generally expected by the industry and government. 491F. Supp. 2d at 104."

Consequently, all claims in the MDL Class Action were dismissed against the J&J defendants, in a judgment Judge Saris characterized as having "the requisite degree of finality." *Id.* at ¶ 15

The prerequisites for the application of claim preclusion doctrine are identity between the parties or their privies in the two suits, a final judgment on the merits in the prior suit by a court with jurisdiction, and an identity of the causes of action in the two suits. *DePratt v. West Bend Mutual Ins. Co.*, 113 Wis 2d 306, 311 (1983). Here, while the J&J defendants' motion apparently satisfies the second prerequisite (final judgment in the prior litigation), it falls fatally short on the other two, i.e. identity of parties or causes of action.

Again, the State of Wisconsin is suing on its own behalf in an enforcement action under the Wisconsin Deceptive Trade Practices Act (claim for relief under §100.18(1), Stats.). It was not— and probably could not have been— a party in the MDL Class Action, which proceeded against the J&J defendants applying Massachusetts substantive law. The State is not proceeding *in parens patriae* on this claim for relief, at least not yet, and is apparently partly seeking damages relief on behalf of other injured parties only in its third claim for relief under

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<sup>2</sup> "Findings and Order on Motion of Track-1 Defendants for the Entry of Judgment Pursuant to Federal Rule of Civil Procedure 54(b)", *In Re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, Civil Action No. 01-12257-PBS (Mass. Dist. Ct.) (hereinafter "MDL Class Action").

Wisconsin antitrust law (Second Amended Complaint, ¶ 88 and 91). Judge Saris' decision did not address Wisconsin antitrust law. Thus, under *DePratt*, while issue preclusion/collateral estoppel considerations may be implicated by her decision, claim preclusion/*res judicata* doctrine is not.

CONCLUSION

The defense cross-motions for partial and full summary judgment addressed in this decision are DENIED, except to the extent previously granted in the court's decision on plaintiff's motion for partial summary judgment on liability.

Dated this 29 day of July, 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)

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FCS