

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 7

DANE COUNTY

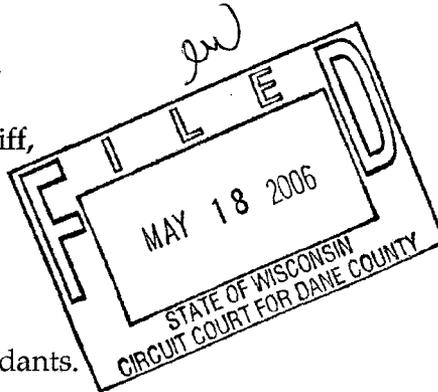
STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN INC., et. al.,

Defendants.



Case No. 04-CV-1709

**REMAINDER OF THE DECISION AND ORDER
ON DEFENDANTS' MOTIONS TO DISMISS**

This document is a continuation of the Partial Decision that issued in this case on April 3, 2006. Without repetition, it adopts and incorporates the contents of that earlier decision.

III. ATTORNEY GENERAL'S AUTHORITY

Defendants challenge the ability of the Wisconsin Attorney General to bring certain claims. They claim that there is no statutory authority permitting the Attorney General to represent Wisconsin citizens or to recover damages for Wisconsin citizens for the causes of action set forth in Counts I-IV in the Amended Complaint. Further, Defendants maintain that the Attorney General has no power whatsoever to sue for unjust enrichment (Count V in the Amended Complaint.) Plaintiff counters that there is ample statutory authority allowing the Attorney General to raise each of the challenged claims. The State directs

attention, in particular, to Wis. Stat. §§ 100.18(11)(d) and 100.264(2) for Counts I and II and to Wis. Stat. §§ 133.16, § 14.11(1) and § 165.25(1), apparently for Counts III-V.

“[I]t is well established by case law that according to the plain meaning of Wis. Const. Art. VI, § 3, the attorney general’s powers are prescribed only by statutory law.” State v. City of Oak Creek, 232 Wis.2d 612, 628, 605 N.W.2d 526, 533 (2000). Counts I and II are clearly authorized by the plain language of Wis. Stat. § 100.18(11)(d).¹ Counts III-V seem to be just as clearly authorized by the extensive grant of authority in Wis. Stat. § 165.25(1)², which allows the attorney general to “if requested by the governor ... prosecute ... in any court ... any cause or matter, civil or criminal, in which the state or the people of this state may be interested,” particularly when combined with the extensive grant of authority to the governor in Wis. Stat. § 14.11(1).³ The Amended Complaint does

¹ “The department or the department of justice, after consulting with the department, or any district attorney, upon informing the department, may commence an action in circuit court in the name of the state to restrain by temporary or permanent injunction any violation of this section. The court may in its discretion, prior to entry of final judgment, make such orders or judgments as may be necessary to restore to any person any pecuniary loss suffered because of the acts or practices involved in the action, provided proof thereof is submitted to the satisfaction of the court. The department and the department of justice may subpoena persons and require the production of books and other documents, and the department of justice may request the department to exercise its authority under par. (c) to aid in the investigation of alleged violations of this section.”

² “Except as provided in s. 978.05(5), appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party; and, if requested by the governor or either house of the legislature, appear for and represent the state, any state department, agency, official, employee or agent, whether required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested. The public service commission may request under s. 196.497(7) that the attorney general intervene in federal proceedings. All expenses of the proceedings shall be paid from the appropriation under s. 20.455(1)(d).

³ The governor, whenever in the governor's opinion the rights, interests or property of the state have been or are liable to be injuriously affected, may require the attorney general to institute and prosecute any proper action or proceeding for the redress or prevention thereof; and whenever the governor receives notice of

set forth facts indicating that the State and the people of the State have an interest in this matter, e.g. it is clearly alleged that the State has overpaid for prescription drugs because of Defendants' alleged misstatements. Although at p. 47 of its brief, Plaintiff represents that the Governor has requested the Attorney General to bring these claims, that fact has not been established. On the other hand, no authority has been presented which requires the State to plead or for that matter, provide evidence of, the Governor's request. If there is a legitimate issue regarding the existence of a request from the Governor, this would better be addressed in a summary judgment motion

In actuality appears that Defendants are really taking issue with some of Plaintiff's damage demands. But they have presented no authority, nor have they provided a compelling reason for the Court to determine at this time whether particular items of damage are appropriate. Since it appears that the Attorney General does have authority to bring the causes of action contained in the Amended Complaint, and since matters related to the appropriateness of damages may be more properly dealt with at a later stage in the proceedings, dismissal of the Amended Complaint or any of the claims set forth within it for the lack of A.G. authority is not required.⁴

any action or proceeding between other parties by which the rights, interests or property of the state are liable to be injuriously affected, the governor shall inform the attorney general thereof and require the attorney general to take such steps as may be necessary to protect such rights, interests, or property."

⁴ Defendants, in their joint reply brief, confuse the issue of the Attorney General's authority to bring a lawsuit with the issue of standing. They do not support this contention with any argument or authority. Defendants, in fact, appear not to realize that they invented this conflation in their reply brief since they state, without further explanation, that "plaintiff concedes that it lacks standing to bring a claim for monetary relief under the Trusts and Monopolies Act. (See Pl. Opp. At 47.)." Nothing on page 47 of the Plaintiff's Brief indicates that the State concedes that it has no standing to bring a suit under Wis. Stat. § 133.16. Indeed, nothing on page 47 of Plaintiff's Brief appears to make any use whatsoever of the word "standing." Defendants conflation of the concepts of Attorney General authority and standing does not appear accidental and does not advance their cause. Greater care should be taken by Defendants not to

IV. REQUIRED ELEMENTS

Defendants find defects in all the causes of action in the Amended Complaint. As regards the Wis. Stat. §§ 100.18(1) and (10)(b) claims, Defendants argue that Plaintiff has failed to allege reliance or causation as to any consumer or insurer. There is, however, no indication that the Amended Complaint was 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 or insurer is required for an action filed pursuant to Wis. Stat. § 100.18(11)(d). Moreover, it is obvious that the Amended Complaint does allege facts indicating causation and clear claims of reliance or facts from which reliance can be reasonably inferred. For example, one of the very paragraphs cited by Defendants asserts that Medicare Part B participants are required to make co-payments based on AWP. See Amended Complaint, ¶ 66, see also, e.g., id., ¶¶ 33-44 (prices denominated Average Wholesale Price do not reflect average wholesale price), ¶58 (State payments based on AWP) ¶¶73-74 (Defendants and PBMs agree to secret discounts based on percentages of AWP), ¶¶79 & 83 (flatly alleging causation).⁵

Addressing the Wis. Stat. § 133.05 claim, Defendants assert that Plaintiff has not sufficiently alleged (1) injury to competition and (2) secret and unearned

mislead their readers (See e.g., Joint Brief, p. 18, fn.) and to avoid raising issues with no intent to provide sufficient argument. (See e.g., Joint Brief, pp. 18-25).

⁵ Defendants also argue that a failure to disclose material facts is not actionable under Wis. Stat. § 100.18(1). They may well be correct. Based on Plaintiff's concession in its brief and based on a reasonable reading of the Amended Complaint, it does not appear that Plaintiff is bringing any such claim.

discounts. This assertion is, however, plainly inaccurate. The Amended Complaint clearly alleges injury to competition and secret discounts and gives rise to a strong inference that secret discounts were unearned. See Amended Complaint, ¶¶ 33-44, 51, 56, 85-88. Furthermore, nothing in Jauquet Lumber Co. v. Kolbe & Kolbe Millwork Co. supports Defendants' contention that "the statute applies only where discounts are provided to one purchaser and are kept secret from other purchasers." See 164 Wis.2d 689, 699, 476 N.W.2d 305, (1991). Given the lack of legal bases for these contentions, this writer has not searched the Amended Complaint for allegations meeting these newly minted "requirements."

The adequacy of the pleading of the unjust enrichment claim is also questioned. Defendants claim that Plaintiff has failed to allege any of the three required elements, i.e. (1) benefit conferred upon defendant by plaintiff, (2) knowledge by defendant of benefit and (3) inequity of allowing defendant to retain the benefit. See Tri-State Mechanical, Inc. v. Northland College, 273 Wis.2d 471, 479, 681 N.W.2d 302, 306 (Ct. App. 2004). Defendants assert but cite no authority for the proposition that to state a claim for unjust enrichment Plaintiff must allege that it conferred a benefit directly upon Defendants. It is apparent that the Amended Complaint sufficiently alleges a cause of action for unjust enrichment, i.e. conferral of a benefit by Plaintiff on Defendants (¶¶ 56, 94), knowledge by Defendants of such benefit (¶ 95) and inequity of allowing Defendants to retain the benefit (¶ 97).

As was described in the Partial Decision, the standard of review on a motion to dismiss claims that are not grounded in fraud is not very exacting. Just as those non-fraud causes of action have been found to give enough notice, so it is that they are also found to contain the requisite reference to the elements of the claims. They are sufficient to survive this motion to dismiss.

V. FILED RATES

According to Defendants, the “filed rate” doctrine bars each of Plaintiff’s claims. In their view, the fact that the state and federal governments’ reimbursement rates are based on Defendants’ AWP’s, challenges to these listings would require the Court to engage in a prohibited reexamination of governmentally set rates. Plaintiff responds that the “filed rate” doctrine does not apply here because (1) Defendants are not regulated entities and their AWP’s and WAC’s are not filed, (2) legal rights of Defendants and their customers are not measured solely by the filed rate and (3) the “filed rate” doctrine does not apply to the State.

Other Courts that have considered this very same issue in closely similar context, and their holdings are persuasive. See In re: Pharmaceutical Industry Average Wholesale Price Litigation, 263 F.Supp.2d 172, 192 (D.Mass. 2003), In re: Lupron Marketing and Sales Practices Litigation, 295 F.Supp.2d 148, 163, fn. 16 (D.Mass. 2003). Nothing has been presented indicating that Defendants are regulated entities or that AWP’s or WAC’s are “filed” within the meaning of the “filed rate” doctrine. Defendants attempt to argue away these crucial differences

by asserting that the only important fact is that the government has set a reimbursement formula using AWP's and/or WAC's. It is this statutory or regulatory action, the mere setting of a "rate," that makes a rate "filed," according to Defendants. No authority has so held. Even the authorities cited by Defendants involve, in each and every case, a regulated entity and a rate or substantial equivalent that has been submitted to, set by, authorized by or approved by a regulatory body. See, e.g., Servais v. Kraft Foods, Inc., 246 Wis.2d 920, 631 N.W.2d 629 (Ct. App. 2001) (action involving prices set by USDA milk orders), Daleure v. Commonwealth of Kentucky, 119 F.Supp.2d 683 (W.D.Ky. 2000) (action involving collect phone call rates approved by Kentucky Public Service Commission and the FCC), County of Stanislaus v. Pacific Gas & Electric Co., 1995 WL 819150 (action involving rates and contracts approved by Canadian, federal and state regulatory bodies).

Defendants are not regulated entities subject to significant price setting oversight. In addition, the AWP's and WAC's here are not required to be submitted to any regulatory authority and are not subject to any sort of governmental approval. Rather, AWP's and WAC's are allegedly set at and subject to amendment solely at Defendants' discretion. There has been no showing that any authority has applied the "filed rate" doctrine to a similar situation, nor has there been presented a compelling reason to break such new ground. The "file rate" doctrine has no applicability to this lawsuit.

VI. STATUTES OF LIMITATION⁶

This case was filed on June 16, 2004. The Wis. Stat. § 100.18 claims are governed by the three year statute of repose in Wis. Stat. § 100.18(11)(b)3. Defendants argue that the violations of Wis. Stat. § 100.18 described in the Amended Complaint predate the commencement of this lawsuit by more than three years. The balance of the claims are governed by the six year statute of limitations for contractual matters in Wis. Stat. § 893.43 or the default statute of limitations in Wis. Stat. § 893.93. Defendants claim that the State was aware of the facts giving rise to these claims more than six years prior to the commencement of this action. In the alternative, Defendants request that the Amended Complaint be dismissed as to any non-Chapter 100 claims arising before June 16, 1998.

The Complaint obviously asserts claims that have arisen within what Plaintiff concedes are the relevant statutes of limitation or repose. See Amended complaint, ¶ 33 (implying ongoing conduct). It also seems likely that some of Plaintiff's claims, or at least claims one can only guess are being pursued based on the allegations in the Amended Complaint, will ultimately be time-barred. See id., ¶ 33 (alleges misconduct dating to 1992). Plaintiff concedes that the Wis. Stat. § 100.18 claims are governed by Wis. Stat. § 100.18(11)(b)3., that such statute is a statute of repose and that "[e]ach time any defendant caused a false and

⁶ It is hoped that some of the uncertainties reflected in this decision will be eliminated by the repleading ordered in the Partial Decision.

misleading figure to be published about 'average wholesale prices' or 'wholesale acquisition costs,' that act caused a DTPA claim to accrue against that defendant for purposes of this statute." See, Plaintiff's Brief, p. 34. Despite these concessions, Plaintiff seems to be attempting to make an argument combining the discovery rule and the "continuous tort" doctrine and reaching the ultimate conclusion that Wis. Stat. § 100.18 claims predating June 16, 2001 are not necessarily barred. The argument, however, is unclear, unsupported and not demonstrably relevant to what is concededly a statute of repose. In light of Plaintiff's underlying concessions, it is determined that any Wis. Stat. § 100.18 claims accruing prior to June 16, 2001 are barred.

Insofar as any other statute of limitation is concerned, Defendants have not identified sufficient facts in the pleadings to demonstrate that any other claim is barred. Defendants do not explain how the Amended Complaint demonstrates that the various causes of action **accrued** at least six years prior to the initiation of this action. See Wis. Stat. §§ 893.43, 893.93. It cannot be simply assumed that since the origins of this action date back to 1992 that some claims had accrued by June 16, 1998. And finally, as explained in the Partial Decision, matters outside the pleadings are not being considered in resolving this motion to dismiss.

VII. SPECIFIC DEFENDANT ARGUMENTS

Thirteen additional briefs have been filed purportedly setting forth grounds for dismissal specific to certain Defendants. However, almost all of the

briefs are simple reiterations of the failure to plead with particularity argument that was resolved in the previous portion of this decision. In these additional submissions, most of the Defendants also attempt to contradict or supplement the factual assertions of the Amended Complaint. Again, no supplemental materials will be considered.⁷

Two briefs raise issues different from the Joint Motion.⁸ Defendants AstraZeneca Pharmaceutical and AstraZeneca LP contend that they have reached a settlement agreement with the State as to claims involving the drug Zoladex. Similarly, Defendant TAP Pharmaceuticals argues that it has settled with the State regarding claims involving the drug Lupron. The State agrees that such settlements have occurred and will bar at least some claims. These settlements should be acted on, with appropriate drafts of Orders submitted for the Court's signature. No defendant should remain a party to this lawsuit and longer than is absolutely necessary, but it does seem that the settlements apply only to certain drugs, rather than to parties.

Defendant TAP Pharmaceutical also draws the Court's attention to the stay order in currently pending federal class action litigation involving Lupron. Since the federal Lupron litigation does not currently appear to require the

⁷ Also for this reason, the Court **DENIES** Defendant Smithkline Beecham Corp.'s Motion for Leave to File Six Pages of Exhibits.

⁸ Defendant Baxter International Inc. also filed a motion to dismiss based on alleged lack of personal jurisdiction. This motion was obviated by a stipulation that replaced Baxter International Inc. with Baxter Healthcare Corp. in this lawsuit.

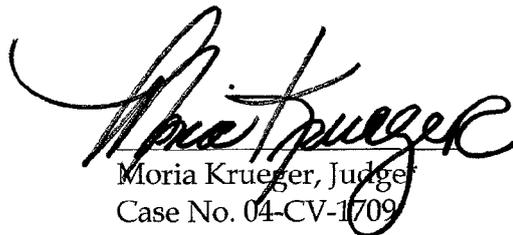
dismissal of any of Plaintiff's claims, no specific action will be taken, but the stay Order will, of course, be respected.

ORDER

For the reasons stated above, Defendants Joint Motion to Dismiss is **GRANTED** as to Plaintiff's Wis. Stat. § 100.18 claims which accrued prior to June 16, 2001. Defendants' joint and specific motions to dismiss are otherwise **DENIED** except as previously determined in the Partial Decision.

Dated this 18th day of May 2006 at Madison, Wisconsin

BY THE COURT:



Moria Krueger, Judge
Case No. 04-CV-1709

*Recognition is given to Staff
Attorney Eric Mueller for his
extensive work on this decision.

cc: *(To be distributed electronically by each attorney to the other lawyers on the same side)*

Atty. Brian E. Butler
AAG Cynthia R. Hirsch