

STATE OF WISCONSIN

CIRCUIT COURT  
Branch 9

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN, INC., et al.,

Defendants.

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Case No. 04-CV-1709

Unclassified - Civil: 30703

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**THE J&J DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION  
FOR PARTIAL SUMMARY JUDGMENT ON COUNTS I, II, III, AND V**

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**INTRODUCTION**

The J&J Defendants moved for partial summary judgment on that portion of Plaintiff's claim which seeks restitution for Wisconsin citizens who made co-payments for Procrit® under Medicare. These claims were disposed of after trial by entry of judgment in favor of the J&J Defendants in the federal class action in Massachusetts. In re Pharmaceutical Indus. Average Wholesale Price Litig., No. 01-12257-PBS, 2007, U.S. Dist. LEXIS 96537 (D. Mass. Nov. 20, 2007). Class judgments are routinely accorded preclusive effect in subsequent litigation. Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984).

Plaintiff responds by denying that it is pursuing parens patriae claims on behalf of Wisconsin's citizens. It claims instead that it is pursuing restitution for Wisconsin citizens as part of its own action. This is a semantic distinction without a difference. The Attorney General's claims for restitution on behalf of Wisconsin citizens are identical to the Class 1 claims by Wisconsin citizens adjudicated in the MDL. Whatever label the Attorney General attaches to his claims on behalf of Wisconsin

citizens, he cannot recover restitution for individuals whose claims have been extinguished by a valid judgment on the merits.

### **REPLY IN SUPPORT OF PROPOSED UNDISPUTED FACTS**

As set forth below, Plaintiff does not dispute the material facts set forth in the J&J Defendants' motion.

1. A number of class actions brought against 16 pharmaceutical manufacturers were consolidated in a multi-district litigation in the United States District Court for the District of Massachusetts. The MDL case was titled In re Pharmaceutical Indus. Average Wholesale Price Litigation; MDL No. 1456; Mass. Dist. Ct. Civil Action No. 01CV12257-PBS (hereafter, "the MDL Class Action.") (See Affidavit of James W. Richgels in Support of Cross-Motion for Partial Summary Judgment on Counts I, II, III, and V, hereafter, "Richgels Aff.," ¶ 2, Ex. 1, generally and ¶ 1).

Plaintiff's Response: Not disputed.

2. The essence of the claims in the MDL Class Action was that Defendants caused various industry publications to publish fictitious "average wholesale prices" ("AWPs.") These AWP's were used as a benchmark by Medicare and third-party payers to reimburse doctors for physician-administered drugs. Plaintiffs claimed that the AWP's were fictitious, because they exceeded the true average wholesale prices, and that the Defendants unlawfully marketed the "spread" or difference between the AWP, the benchmark for reimbursement, and the actual acquisition price of the drugs paid by providers. (See Richgels Aff., ¶ 2, Ex. 1, ¶ 2).

Plaintiff's Response: Disputed. Not an evidentiary fact, but instead a disputed inference. Contrary evidence. This was not the only theory of liability advanced by plaintiffs as set forth in the Complaint.

**Reply**: No material fact dispute. Alleged "contrary evidence" is not identified. The above was one of the theories of liability advanced by Plaintiffs in the Massachusetts MDL.

3. Johnson & Johnson, Centocor, Inc., Ortho Biotech Products L.P., McNeil PPC, Inc., and Janssen Pharmaceutical Products, L.P. ("the Johnson & Johnson Group") were Defendants in the MDL Class Action. (See Richgels Aff., ¶ 3, Ex. 2, ¶ 1)

Plaintiff's Response: Not disputed.

4. A class ("Class 1") was certified in the MDL Class Action which included Wisconsin residents who incurred an obligation to make a co-payment based on the AWP for any Medicare Part B drug at issue in the MDL Class Action and manufactured by the Johnson & Johnson Group. (Richgels Aff., ¶ 3, Ex. 2, ¶ 1) (save for certain irrelevant

exclusions, Class 1 was defined as “[a]ll natural persons nationwide who made, or who incurred an obligation enforceable at the time of judgment to make, a co-payment based on AWP for a Medicare Part B covered Subject Drug that was manufactured by . . . the Johnson & Johnson Group.”)

Plaintiff’s Response: Not disputed.

5. Procrit, a drug sold by the Johnson & Johnson Group, was a “Medicare Part B covered Subject Drug” in the MDL Class Action. (Richgels Aff., ¶ 3, Ex. 2, p. 14, Table of Subject Drugs).

Plaintiff’s Response: Not disputed.

6. Class 1 was expressly certified for claims under Wis. Stat. § 100.18. (Richgels Aff., ¶ 3, Ex. 2, ¶¶ 2-4) (“[t]he Medicare Part B Co-payment Class is certified for claims under . . . Wis. Stat. § 100.18, et seq.”)

Plaintiff’s Response: Not disputed.

7. Following a bench trial in November, 2006, the Massachusetts District Court ruled that Class 1 members’ claims against the Johnson & Johnson Group should be dismissed because the spreads on the Johnson & Johnson Group’s subject drugs (including Procrit) never substantially exceeded the range of spreads generally expected by the industry and government. (Richgels Aff., ¶ 2, Ex. 1, ¶¶ 8, 13).

Plaintiff’s Response: Disputed. Not based on admissible evidence. Not an evidentiary fact, but instead a disputed inference. Contrary evidence. The Court found: “While Johnson & Johnson’s conduct was at times troubling, it did not rise to the level of egregious conduct actionable under the Massachusetts Chapter 93A...” *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 491 F. Supp.2d 20, 31 (D. Mass. 2007). Furthermore, counsel for the plaintiff class advanced a theory of liability that required a showing that defendants intended to defraud the plaintiff class. They did so because in the briefing on class certification, defendants had argued that a nationwide class under the consumer protection statutes of the 50 states was inappropriate because of variations in the statutes with respect to numerous issues including, among other things, whether intent to deceive was required, thereby defeating the required showing that common issues “predominate” under Fed. R. Civ. P. 23. To overcome this hurdle, plaintiffs’ counsel voluntarily assumed the highest burden of proof required of any state consumer protection statute, *i.e.*, that defendants intended to deceive the plaintiffs, the theory being that if plaintiffs prevailed under this heightened standard, they would be entitled to judgment in states with less onerous burdens of proof. In granting plaintiffs’ motion for class certification, Judge Saris adopted plaintiffs’ position:

For the remaining states, defendants flag differences in requirements for establishing reliance, proximate cause, scienter, damages, and statutes of limitations, but in the context of the claims of consumer-patients under Medicare Part B, these variations in legal standards are unlikely to be material.

Significantly, plaintiffs have wisely noted that they are pressing only the theory that defendants intentionally made fraudulent misrepresentations of AWP. Therefore, different standards governing scienter do not present individual issues.

*See In re Pharmaceutical Industry Average Wholesale Price Litigation*, 230 F.R.D. 61, 85 (D.Mass.2005) (emphasis added).

**Reply:** No material fact dispute. Alleged “contrary evidence” is not identified. The claims against the J&J Defendants under Wis. Stat. § 100.18 were dismissed on the merits; plaintiff’s analysis of the MDL decision is incorrect. *See The Johnson & Johnson Defendants’ Sur-Reply Memorandum of Law In Opposition to the State of Wisconsin’s Amended Motion for Partial Summary Judgment on Liability With Respect to Counts I and II of Wisconsin’s Complaint.*<sup>1</sup>

8. Accordingly, on November 20, 2007, the Massachusetts District Court entered judgment in favor of Johnson & Johnson, Centocor, Inc., and Ortho Biotech Products, L.P. and against Class 1. (Richgels Aff., ¶ 2, Ex. 1, Appendix D, “Judgment.”)

**Plaintiff’s Response:** Disputed. Not based on admissible evidence. Not an evidentiary fact, but instead a disputed inference. Contrary evidence. *See* Plaintiff’s Response to PUF 7, *supra*.

**Reply:** No material fact dispute. Alleged “contrary evidence” is not identified. *See* reply in support of PUF 7, *supra*.

9. The essence of Plaintiff’s claims in this suit is that defendants wrongfully profit by causing the publication of “phony average wholesale prices” for their drugs. The phony prices then become the basis for calculating the rate at which “providers” (physicians, clinics, and pharmacies who provide the drugs to patients) are reimbursed by Wisconsin. Defendants in turn attempt to profit from their scheme by using the lure of windfall profits (based in large part on the “spread” between what the provider pays for the drug and the amount the provider is reimbursed for that drug) competitively to encourage providers to buy more of their drugs. (*See* Second Amended Complaint, ¶¶ 1, 26-30).

**Plaintiff’s Response:** Not disputed.

10. Johnson & Johnson, Janssen Pharmaceutica Products, L.P., Ortho-McNeil Pharmaceutical, Inc., Ortho Biotech Products, L.P., and McNeil-PPC, Inc. are defendants in this action and Janssen Pharmaceutical Products, L.P., Ortho-McNeil Pharmaceutical, Inc., Ortho Biotech Products, L.P., and McNeil-PPC, Inc. are subsidiaries of Johnson & Johnson. (*See* Second Amended Complaint, ¶ 12; Answer of the J&J Defendants to the Second Amended Complaint, ¶ 12).

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<sup>1</sup> Plaintiff’s inclusion of legal argument in its response to PUF Nos. 7 and 12 is inappropriate. *See Standing Order Regarding Contents of Motions for Summary Judgment, Responses to Motions for Summary Judgment, and Replies to Responses.*

Plaintiff's Response: Not disputed.

11. Procrit, which is sold by Ortho Biotech Products, L.P., is one of the drugs at issue in Plaintiff's claims against the J&J Defendants in this action. (See Second Amended Complaint, ¶ 46, Ex. C).

Plaintiff's Response: Not disputed.

12. Counts I, II, and V of Plaintiff's suit include claims brought by the State of Wisconsin on behalf of its citizens who participated in the Medicare Part B program and who allegedly paid more for the drugs manufactured by the defendant due to the allegedly "phony" AWP defendants caused to be published. (See Second Amended Complaint, ¶¶ 1, 78, 80, 82, 86, 97 and WHEREFORE clauses following ¶¶ 80, 82, 86, 97) ("Wisconsin and its citizens participating in the Medicare Part B program have been harmed by defendants' deceptive conduct . . . in that they have paid far more for the drugs manufactured by defendants than they would have paid had the defendants truthfully reported the average wholesale price of their drugs.")

Plaintiff's Response: Disputed. Not an evidentiary fact, but instead a disputed inference. Contrary evidence. J&J characterizes Wisconsin's action here as a parens patriae action, *i.e.*, an action on behalf of its citizens, and that the citizens are the real party in interest. J&J is wrong. Wisconsin is not suing in the shoes of its citizens. It is bringing its own action. Wisconsin is proceeding under Wis. Stat. §100.18(11)(d), which permits the State, and only the State, to bring an enforcement action to obtain civil penalties, injunctive relief, and, at the court's discretion, restitution for persons who have been harmed by defendants' actions. The State, not its citizens, is the real party in interest. Private individuals must proceed under a separate statutory provision, section 100.18(11)(b)(2).

**Reply:** No material fact dispute. Alleged "contrary evidence" is not identified. Moreover, as discussed in the legal argument below, even if Plaintiff disclaims the parens patriae label for the claims it seeks to bring on behalf of injured private citizens, it cannot seek restitution for consumers whose claims have already been adjudicated.

13. Counts I and II of Plaintiff's suit are based on Wis. Stat. § 100.18 and include claims brought by the State of Wisconsin on behalf of its citizens who participated in the Medicare Part B program and who allegedly paid more for the drugs manufactured by the defendant due to the allegedly "phony" AWP defendants caused to be published. (Second Amended Complaint, ¶¶ 80, 82, 84, 86 and WHEREFORE clauses following ¶¶ 82 and 86).

Plaintiff's Response: Disputed. Not an evidentiary fact, but instead a disputed inference. Contrary evidence. See Plaintiff's Response to PUF 12.

**Reply:** No material fact dispute. Alleged "contrary evidence" is not identified. See reply in support of PUF 12.

14. Count V of Plaintiff's suit includes claims brought by the State of Wisconsin on behalf of its citizens and implicitly includes citizens who are Medicare Part B participants who made payments under that program. (See Second Amended Complaint, ¶¶ 88, 91, and WHEREFORE clause following ¶ 91) (as a result of Defendants' unlawful activities, the prices "Wisconsin and its citizens have paid for defendants' drugs increased beyond that which would have existed absent" Defendants' wrongful conduct) (emphasis added).

Plaintiff's Response: Disputed. Not an evidentiary fact, but instead a disputed inference. Contrary evidence. See Plaintiff's Response to PUF 12.

**Reply**: No material fact dispute. Alleged "contrary evidence" is not identified. See reply in support of PUF 12.

### **REPLY ARGUMENT**

The J&J Defendants' motion for partial summary judgment distinguishes between two separate and distinct sets of claims: 1) claims arising from any Procrit-related injury allegedly suffered by the State by reason of payments it made to Medicaid providers (which claims are not barred by claim preclusion), and 2) claims arising from any Procrit-related injury allegedly suffered by individual Wisconsin consumers by reason of payments they made to Medicare providers (which claims are barred by claim preclusion). Seizing on the J&J Defendants' characterization of Plaintiff's second set of claims as "parens patriae" claims, Plaintiff responds that it is not pursuing recovery under a parens patriae theory. Rather, it emphasizes that it is bringing its "own lawsuit, independent of any lawsuit filed by its citizens." (Plaintiff's Response, p. 77).

Notwithstanding this response, the J&J Defendants are entitled to partial summary judgment. Whatever label the Attorney General applies to his claims on behalf of Wisconsin consumers in Class 1, those claims were adjudicated in the J&J Defendants' favor in the MDL. (See PUF 6-8; see also Plaintiff's Response, p. 75). Wisconsin may not seek restitution on behalf of these same consumers in a second trial.

The State argues that the claims it seeks to pursue on behalf of individual consumers are in some undefined sense different from the claims that those same consumers litigated in the MDL as members of Class 1. Plaintiff's argument is incorrect, except as a matter of form. As a matter of substance, the State's claims on behalf of Wisconsin citizens are identical to the claims by Wisconsin citizens in Class 1.

Wis. Stat. § 100.18(11)(d) permits the Attorney General to bring an enforcement action seeking civil penalties, injunctive relief, and restitution for persons harmed by violations of the statute. Separately, § 100.18(11)(b)(2) provides those same persons with a private cause of action. See Wis. Stat. § 100.18(11). But in the context of this case, there is no meaningful distinction between the State's claims on behalf of injured consumers, and the consumers' own claims. Regardless of which statutory provision the Attorney General invokes, he cannot seek recovery on behalf of persons whose claims have already been adjudicated. Were that the case, the judgment won by the J&J Defendants against consumers in Class 1 would be meaningless. Indeed, under Plaintiff's construction of § 100.18, a class member could recover damages from a defendant for his or her injuries in one case, and the State could subsequently recover restitution on behalf of the same person for the same injury in a different case.

Not surprisingly, Plaintiff does not cite a single case – and the J&J Defendants have not found any – that permits a State to re-litigate claims on behalf of its citizens where those claims have already been extinguished in another action. Moreover, the one case the State does cite – Illinois v. Lann, 225 Ill. App.3d 236, 587 N.E.2d 521 (1992) – implicitly rejects the State's position.

The issue in Lann was whether consumers should be considered “party plaintiffs for purposes of discovery” in actions for restitution brought by the Illinois

Attorney General. The Appellate Court of Illinois held that consumers “may not be considered party-plaintiffs for purposes of discovery only.” Lann, 225 Ill. App.3d at 240, 587 N.E.2d at 523. It therefore reversed the trial court’s ruling that the Attorney General had to produce individual consumers for deposition, answer interrogatories on their behalf, and generally comply with the rules of discovery as if personally appearing on behalf of consumers. Id., 225 Ill. App.3d at 240, 587 N.E.2d at 523.

Lann does not help Plaintiff here, because it does not even address the issue of claim preclusion. In particular, nothing in the decision remotely suggests that the Illinois Attorney General could recover restitution on behalf of Illinois citizens whose private claims had already been extinguished in a prior action. To the contrary, because individual consumers were not party plaintiffs and could sue separately on their own behalf, the court encouraged the trial judge to “fashion an order diminishing the likelihood of” a double recovery caused by potentially duplicative private and State suits seeking recovery for the same injury. Id. at 244, 587 N.E.2d at 526. See also c.f., Satsky v. Paramount Communications, Inc., 7 F.3d 1464, 1469 (10th Cir. 1993) (prior parens patriae action by State did not preclude citizens from recovering for harm to citizens’ private interests where statutory scheme did not permit State to assert those private claims in any action brought by it).

Here, of course, there is no danger of a double recovery, because the Wisconsin litigants in Class 1 were unsuccessful. Nevertheless, the policy considerations that underlie claim preclusion and prohibit double recovery should also prevent the Attorney General from seeking restitution on behalf of class members whose claims have already been adjudicated. If Wisconsin’s citizens in Class 1 had recovered damages from the J&J Defendants in the Massachusetts MDL, the Attorney General could not pursue a

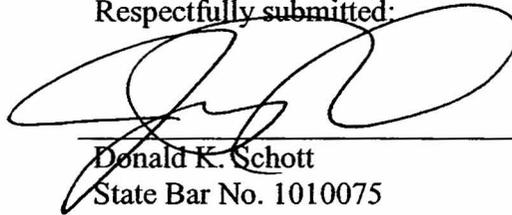
second recovery for the same injury on their behalf. The converse is also true. The Attorney General may not revive claims that have been adjudicated against Wisconsin's citizens by combining them with his own claims.

Plaintiff complains that it would be "intolerable" if "the State's prerogatives and remedies under its own statutes" were to be taken away by the private litigants in the Massachusetts MDL. (Plaintiff's Response, pp. 78-79). This is red herring. The J&J Defendants' motion for partial summary judgment does not implicate the State's right to seek recovery for its own alleged injuries. Rather, the motion seeks claim preclusion only as to claims actually litigated by Wisconsin consumers in Class 1. Each such class member elected to participate in the class and is bound by any judgment against the class. Applying claim preclusion to claims actually litigated does not undermine the State's prerogatives and remedies under Wisconsin law.

**RELIEF SOUGHT**

For the foregoing reasons, as well as the reasons set forth in its initial memorandum in support of their cross-motion, the J&J Defendants respectfully request that the Court grant their motion for partial summary judgment and issue an Order dismissing those portions of Plaintiff's Counts I, II, III, and V which are based on Procrit's AWP and which are brought on behalf of Wisconsin's citizens in Class 1.

Respectfully submitted:



Dated: April 28, 2008

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