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STATE OF WISCONSIN

CIRCUIT COURT
Branch 9

DANE COUNTY

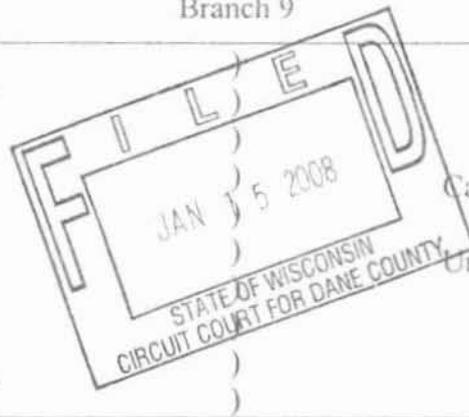
STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN, INC., et al.,

Defendants.



Case No. 04-CV-1709

Unclassified - Civil: 30703

**THE JOHNSON & JOHNSON DEFENDANTS' CROSS-MOTION AND
SUPPORTING MEMORANDUM OF LAW FOR PARTIAL SUMMARY
JUDGMENT ON COUNTS I, II, III, AND V**

INTRODUCTION TO CROSS-MOTION

Defendants Johnson & Johnson, Janssen L.P., McNeil-PPC, Ortho Biotech Products L.P. and Ortho McNeil Pharmaceutical (collectively, the "J&J Defendants") respectfully cross-move for partial summary judgment on Plaintiff's Counts I, II, III, and V because claim preclusion bars portions of each of these counts. Each of the above counts includes claims based on the drug Procrit and brought by Plaintiff parens patriae on behalf of Wisconsin participants in the Medicare Part B program. However, Wisconsin Part B participants' Procrit-based claims against the J&J Defendants have already been litigated. Those claims were part of a class action in the United States District Court for the District of Massachusetts. The Court determined that the claims lacked merit, and entered judgment in the J&J Defendants' favor. Because Wisconsin Part B participants' Procrit-based claims have already been litigated, claim preclusion bars Plaintiff from bringing those claims in this action.

CLAIMS AT ISSUE IN CROSS-MOTION

The J&J Defendants seek partial summary judgment on Counts I, II, III, and V of Plaintiff's Second Amended Complaint, dismissing that portion of each of those Counts that is based on the drug Procrit, and brought on behalf of Wisconsin participants in the Medicare Part B program (i.e., claims the Plaintiff brings parens patriae).

ELEMENTS OF DEFENSE AT ISSUE IN CROSS-MOTION

The J&J Defendants' cross-motion for partial summary judgment is based on the defense of claim preclusion. The elements of claim preclusion are:

1. "[I]dentity between the parties or their privies in the prior and present suits;
2. prior litigation [which resulted] in a final judgment on the merits by a court with jurisdiction; and
3. identity of the causes of action in the two suits."

Kruckenberg v. Harvey, 2005 WI 43, ¶ 21, 279 Wis. 2d 520, 531, 694 N.W.2d 879, 885, quoting Sopha v. Owens-Corning Fiberglass Corp., 230 Wis. 2d 212, 233-34, 601 N.W.2d 627 (Wis. 1999).

PROPOSED UNDISPUTED FACTS

The Massachusetts MDL AWP Litigation

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).

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 AWPs were used as a benchmark by Medicare and third-party payers to reimburse doctors for physician-administered drugs. Plaintiffs claimed that the AWPs 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).

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

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.")

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).

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.")

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).

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.")

The Wisconsin AWP Litigation

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).

10. Johnson & Johnson, Janssen Pharmaceutical 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).

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).

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's 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.")

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's defendants caused to be published. (Second Amended Complaint, ¶¶ 80, 82, 84, 86 and WHEREFORE clauses following ¶¶ 82 and 86).

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).

CROSS-MOTION ARGUMENT

Claim preclusion entitles the J&J Defendants to partial summary judgment dismissing those portions of Plaintiff's claims that are brought on behalf of Wisconsin Part B participants and relate to Procrit's AWP (i.e., portions of Counts I, II, III, and V). The J&J Defendants' alleged publication of a false and inflated AWP for Procrit was at issue in the MDL Class Action. Both Wisconsin Part B participants (as part of Class 1) and the J&J Defendants participated in the MDL Class Action and the case proceeded to a judgment on the merits. Claim preclusion therefore bars Plaintiff from relitigating the same claims against the J&J Defendants based on the facts at issue in the MDL Class Action.

I. A FINAL JUDGMENT ON THE MERITS IN ONE ACTION BARS THE RE-LITIGATION OF CLAIMS ARISING FROM THE SAME RELEVANT FACTS.

Once a final judgment on the merits has been rendered in one action, claim preclusion bars the parties from re-litigating any claim that arises out of the same relevant facts, transactions, or occurrences, including preventing the litigation of matters which could have been litigated in the former proceeding. Kruckenberg v. Harvey, 2005 WI 43, ¶ 21, 279 Wis. 2d 520, 531, 694 N.W.2d 879, 885. Wisconsin state courts also give

preclusive effect to prior federal court actions (see Moore v. LIRC, 175 Wis. 2d 561, 565, 499 N.W.2d 288, 290 (Ct. App. 1993)) and there is "no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984).

II. ALL THREE ELEMENTS OF CLAIM PRECLUSION ARE SATISFIED, BARRING PLAINTIFFS FROM LITIGATING WISCONSIN MEDICARE PART B PARTICIPANTS' CLAIMS RELATED TO THE J&J DEFENDANTS' ALLEGED PUBLICATION OF A FALSE AWP FOR PROCRI.

A. There Is Identity Between The Parties In This Action And The Parties In The MDL Class Action.

The J&J Defendants and the parens patriae Plaintiffs are virtually identical to the parties in the MDL Class Action. Johnson & Johnson and Ortho Biotech Products, L.P. were Defendants in the MDL Class Action, both are Defendants in this action, and all the J&J Defendants in this action are subsidiaries of Johnson & Johnson. (Proposed Undisputed Facts, hereafter, "PUF," ¶¶ 3, 10). Similarly, the certified class in the MDL Class Action expressly included Wisconsin Medicare Part B participants who made or incurred an obligation to make a payment based on the J&J Defendants' allegedly inflated AWP for Procrit. (Id. at ¶¶ 2-5). Plaintiff's counts I, II, and V expressly bring claims on behalf of those very same individuals -- Wisconsin Medicare Part B participants who paid more for the J&J Defendants' drugs, including Procrit, because of the allegedly inflated AWPs the J&J Defendants caused to be published. (Id. at ¶¶ 11-12). Count III also brings claims on behalf of any Wisconsin citizen who was damaged by the J&J Defendants, implicitly including Wisconsin Medicare Part B participants. (Id. at ¶ 14).

Thus, there is an identity of parties between the J&J Defendants, the parens patriae Plaintiffs in this action, and the parties in the MDL Class Action.

B. The MDL Class Action Resulted In A Final Judgment On The Merits.

The MDL Class Action proceeded to a bench trial, after which the District Court entered judgment in favor of Johnson & Johnson, Centocor, Inc., and Ortho Biotech Products, L.P. and against Class 1. (Id. at ¶¶ 7-8). This is a final judgment on the merits which now has preclusive effect. See Barksdale v. Litscher, 2004 WI App 130, ¶ 20, 275 Wis. 2d 493, 507, 685 N.W.2d 801, 808 (entry by Court of written order dismissing action on grounds plaintiff not entitled to relief sought satisfies element of final judgment on merits for claim preclusion purposes); see also Omernick v. LaRocque, 406 F. Supp. 1156, 1160 (W.D. Wis. 1976) (applying Wisconsin law), citing Knuth v. Lepp, 180 Wis. 529, 536, 193 N.W. 519 (1923) (the pendency of an appeal does not deprive a judgment of its preclusive effect unless and until it is reversed).

C. There Is Identity Between The Causes Of Action In The MDL Class Action And Plaintiff's *Parens Patriae* Claims In This Suit.

Wisconsin has adopted the "transactional approach" to determine whether there is an identity of claims between two suits. Kruckenberg, 2005 WI 43, ¶ 25, 279 Wis. 2d at 532-33, 694 N.W.2d at 886, citing Restatement (Second) of Judgments, § 24(1) (1982). Under the transactional approach, all rights to any remedies against a defendant "with respect to all or any part of the transaction, or series of connected transactions, out of which the [original action] arose" are extinguished. Id., citing Restatement (Second) of Judgments, § 24(1) (1982). Factors to be considered in determining what factual grouping constitutes a transaction include whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit,

and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. Id., citing Restatement (Second) of Judgments, § 24(2), cmt. b (1982). "The concept of a transaction connotes a common nucleus of operative fact." Id., citing Restatement (Second) of Judgments, § 24(2), cmt. b (1982).

Plaintiff's Procrit-based parens patriae claims incorporated into Counts I and II are identical to the claims already litigated in the MDL Class Action. The MDL Class Action expressly included Wisconsin's Part B participants' Wis. Stat. § 100.18 claims against the J&J Defendants based on Procrit's AWP. (PUF, ¶¶ 4-6). Plaintiff's Counts I and II in this action include those same claims -- like the claims in the MDL Class Action, Counts I and II include Wisconsin's Part B participants' Wis. Stat. § 100.18 claims against the J&J Defendants based on Procrit's allegedly inflated AWP. (Id. at ¶¶ 9-11, 13).

Furthermore, although Plaintiff's Procrit-based parens patriae claims in Counts III and V are not strictly identical to the claims adjudicated in the MDL Class Action (because the legal theory is different), each arises from "a common nucleus of operative fact." When determining if there is an identity between the causes of action in two suits, the legal theory and relief sought is not controlling. Kruckenberg, 2005 WI 43, ¶ 26, 279 Wis. 2d at 533, 694 N.W.2d at 886. Rather, claims are evaluated in factual terms and, "regardless of the claimant's substantive theories or forms of relief," a second claim may still be barred even if "the legal theories, remedies sought, and evidence used" are different between the first and second actions. Id.

Based on the above rule, there is identity between the Procrit-based parens patriae claims in Counts III and V and the claims in the MDL Class Action. Both Count

III and Count V and the MDL Class Action are based on exactly the same conduct by the J&J Defendants, namely, that the J&J Defendants allegedly published phony or inflated AWP's which they then unlawfully profited from by exploiting and marketing the "spread" between the published AWP's and the actual acquisition price paid for the drugs by providers. (See PUF, ¶¶ 2, 9). Thus, although the MDL Class Action Plaintiffs did not assert claims for violation of the Wisconsin Trust and Monopolies Act (Count III) or for unjust enrichment (Count V), both counts arise out of the same "nucleus of operative fact" as the claims in the MDL Class Action.

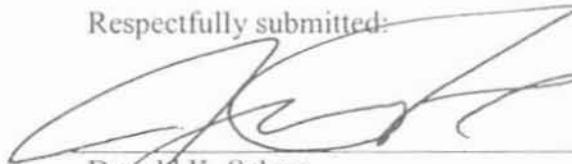
In addition, consideration of claim preclusion's purpose further illustrates that Counts III and V of the MDL Class Action claims arise out of the same nucleus of operative fact. The goals of the doctrine of claim preclusion include providing "an effective and useful means to establish and fix the rights of individuals, to relieve parties of the cost and vexation of multiple lawsuits, to conserve judicial resources, to prevent inconsistent decisions, and to encourage reliance on adjudications." Kruckenberg, 2005 WI 43, ¶ 20, 279 Wis. 2d at 530, 694 N.W.2d at 884. Wisconsin Part B participants, the J&J Defendants, and the Massachusetts District Court have already expended resources adjudicating through to trial the J&J Defendants' actions related to Procrit's AWP. (See PUF, ¶¶ 7-8). Following that trial, the Massachusetts District Court determined that the Wisconsin Part B participants' claims had no merit. (See id.). Allowing Counts III and V to go forward on behalf of Wisconsin Part B participants would force them, the J&J Defendants, and this Court to needlessly expend resources re-litigating issues that have already been determined and raise the possibility of a judgment in this Court

contradicting the Massachusetts District Court's decision. Thus, the application of claim preclusion here would be consistent with its overall purpose.

RELIEF SOUGHT

For the foregoing reasons, the J&J Defendants respectfully request that the Court grant their motion for partial summary judgment and issue and 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 participants in the Medicare Part B program.

Respectfully submitted:



Dated: January 14, 2008

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