NAMSDL Case Law Update

February 7, 2017

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This issue of *NAMSDL Case Law Update* focuses on several ongoing cases related to the marketing, distribution, and prescribing of controlled substances. Summarized cases include: (1) a lawsuit recently filed against the maker of OxyContin by a city in Washington State; and (2) a federal appellate court decision upholding a doctor's conviction for Controlled Substances Act violations. The next issues of the *Case Law Update* will focus on cases involving drugged driving, marijuana, and novel psychoactive substances.

CASES IN THIS ISSUE

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City of Everett, Washington v. Purdue Pharma, L.P., et al., Superior Court of Washington, Snohomish County, Case No. 17-2-00469-31

United States v. Kohli, U.S. Court of Appeals for the Seventh Circuit, Case No. 15-3481, February 1, 2017, --- F.3d ----2017 WL 429259

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Cases Involving the Marketing and Distribution of Controlled Substances

City of Chicago v. Purdue Pharma L.P., et al., U.S. District Court for the Northern District of Illinois, Case No. 14-CV- 04361. Earlier issues of the *NAMSDL Case Law Update* contain a more comprehensive summary of this case. In June 2014, the City of Chicago ("Plaintiff") sued nine pharmaceutical companies ("Defendants"), alleging in a multiple count complaint that Defendants had violated Illinois and Chicago law by developing a fraudulent marketing plan to convince Chicago doctors to write, and healthcare payers to pay for, unnecessary opioid prescriptions. Plaintiff seeks restitution from Defendants for over $9.5 million in workers' compensation claims paid plus disgorgement of profits, treble damages, and punitive damages. Defendants moved to dismiss the case on various grounds that included: (1) Defendants did not misrepresent the effectiveness and riskiness of opioid treatment programs; and (2) the complaint does not link sufficiently the Defendants' alleged conduct to actual prescriptions written by doctors, filled by patients, and paid for by Plaintiff.

In May 2015, the court dismissed some causes of action, but allowed Plaintiff to amend its complaint to revive one or more of the dismissed claims. Plaintiff filed an amended complaint in August 2015. Defendants again moved to dismiss the case and, in September 2016, the court again dismissed some, but not all, causes of action. The court held that: (1) Plaintiff's factual allegations are sufficient to allow claims for deceptive practices and misrepresentation to move forward; but (2) Plaintiff fails to plead with enough particularity about injuries to consumers or how Defendants' alleged conduct caused either those injuries or the costs incurred by Plaintiff. As a result, the court dismissed Plaintiff's claims for unfair practices, conspiracy, and recovery of costs. Nevertheless, the court allowed Plaintiff one final chance to amend its complaint. Plaintiff filed another amended complaint in October 2016. Presently before the court are renewed motions to dismiss the case filed by Defendants.

People of the State of California v. Purdue Pharma L.P., et al., Superior Court of California, County of Orange, Case No. 30-2014-00725287. Earlier issues of the *NAMSDL Case Law Update* contain a more comprehensive summary of this case. In May 2014, the State of California ("Plaintiff") sued five pharmaceutical companies in a complaint alleging a fraudulent opioid marketing scheme, similar to that alleged in the *Chicago v. Purdue Pharma* case. According to the Office of County Counsel in Santa Clara County—the lawyers who filed the lawsuit—Plaintiffs "allege that the manufacturers engaged in unfair competition and deceptively marketed their prescription painkillers as safe and effective for use in treating chronic pain, leading to an epidemic of painkiller abuse and addiction." The lawsuit seeks injunctive relief preventing the manufacturers from continuing their allegedly deceptive conduct, civil penalties, restitution, and "abatement of the public nuisance created by the skyrocketing rates of abuse and addiction." The California trial court judge put a complete hold ("stay") on the case in August 2015 to allow the U.S. Food and Drug Administration to complete current research into the effectiveness and safety of opioids. In early June 2016, the Plaintiff filed two motions, one to allow an amended complaint, and the other to lift the stay. These two motions still appear to be pending before the court, along with a motion to intervene as a plaintiff filed by an individual. The next status conference in the case will be February 9, 2017.

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State of West Virginia vs. McKesson Corporation, Circuit Court of West Virginia, Boone County, Case No. 16-C-1. Earlier issues of the *NAMSDL Case Law Update* contain a more comprehensive summary of this case. In January 2016, the State of West Virginia ("Plaintiff") filed suit against McKesson Corporation ("Defendant"), a large pharmaceutical distributor. In the suit, Plaintiff alleges that the Defendant: (1) violated the West Virginia Consumer Credit Protection Act; (2) was required, but failed, to design and operate a system to identify and report suspicious orders of controlled substances; (3) contributed to the epidemic of prescription drug abuse in the state and failed to meet industry, state, and federal standards; (4) contributed to the dispensing of controlled substances for non-legitimate medical purposes, which fueled prescription drug abuse in the state; (5) created a public nuisance through its distribution of millions of doses of controlled substances in the state; (6) acted negligently in failing to monitor and guard the controlled substances against third party diversion; and (7) became unjustly enriched, making substantial profits by its widespread distribution of controlled substances in West Virginia. Plaintiff seeks civil damages and injunctive relief from the continuing supply of significant quantities of controlled substances in the state until Defendant develops a system to identify and report suspicious orders.

In March 2016, Defendant sought to remove the case to federal court on grounds that Plaintiff's claims arise under federal law. Plaintiff objected to the removal. In January 2017, the West Virginia federal court granted Plaintiff's motion to remand the case back to state court, concluding that the case involves substantial questions of state law. While the case was in federal court, Defendant moved to dismiss the case for failure to state a legally allowable claim. Although Defendant's motion is no longer pending, it provides information about Defendant's likely arguments in state court. The crux of Defendant's argument appears to be that all of Plaintiff's claims arise from an alleged duty it owed to the Plaintiff that actually does not exist under either state or federal law—the duty to refuse to fill suspicious controlled substance orders. In doing so, Defendant asserts that Plaintiff seeks to extend improperly an individual pharmacist's duty to fill only legal prescriptions to a pharmaceutical distributor.

State of West Virginia v. Cardinal Health, Inc., Circuit Court of West Virginia, Boone County, Case No. 12-C-140; *State of West Virginia v. Amerisource Bergen*, Circuit Court of West Virginia, Boone County, Case No. 12-C-141. In 2012, the State of West Virginia ("Plaintiff") sued two large drug wholesalers ("Defendants") in separate state court actions alleging that each "substantially contribut[ed] to and . . . substantially, illicitly and tortiously benefitted financially from the prescription drug abuse problem in West Virginia." In each action, the Defendant sought to remove the case to federal court, but both cases were remanded back to state court. In January 2017, the parties reported that both cases reached settlement. Although Defendants did not admit wrongdoing, the two wholesalers agreed to pay a combined $36 million to Plaintiff in exchange for a release from all pending claims.

City of Everett, Washington v. Purdue Pharma, L.P., et al., Superior Court of Washington, Snohomish County, Case No. 17-2-00469-31. In January 2017, the City of Everett, Washington ("Plaintiff") sued the pharmaceutical manufacturer Purdue Pharma and several of its executives (collectively, "Defendants") in Washington state court. Plaintiff alleges that from at least 2008 to 2010, Defendants "knowingly, recklessly, and/or negligently" marketed and supplied OxyContin "to obviously suspicious physicians and pharmacies in Everett (and other areas within the State of Washington)" without reporting such suspicious orders. This supply of drugs allegedly enabled "the illegal diversion of OxyContin into the black market, including to drug rings, pill mills and other dealers for dispersal of the

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highly addictive pills in Everett," which led directly to the city's prescription drug, and now heroin, abuse problems. Plaintiff's causes of action include: (1) gross negligence; (2) negligence: (3) public nuisance; (4) violations of the state's consumer protection act; and (5) unjust enrichment. Plaintiff seeks injunctive relief, compensatory damages, and punitive damages. Although numerous jurisdictions (both state and local) have sued Defendants in recent years regarding their alleged role in the marketing and supply of opioids, news reports indicate that this is the first lawsuit that focuses on what Defendants knew about the illegal distribution of their products at the time the company filled orders.

Cases Involving the Prescribing of Controlled Substances

United States v. Kohli, U.S. Court of Appeals for the Seventh Circuit, Case No. 15-3481, February 1, 2017, --- F.3d ---- 2017 WL 429259. In 2014, a federal grand jury indicted an Illinois doctor ("Defendant") who operated a neurology and sleep center, with three counts of healthcare fraud, two counts of money laundering, and ten counts of illegal dispensation of a controlled substance. After a lengthy trial, a jury, in January 2015, convicted Defendant of seven counts of illegally dispensing oxycodone and hydrocodone to patients suffering from drug addition, in violation of the Controlled Substances Act ("CSA"). The court sentenced Plaintiff to 24 months in prison. Plaintiff appealed to the U.S. Court of Appeals for the Seventh Circuit, arguing, among other things, that he did not intentionally violate the law and made the challenged prescriptions in a good-faith and medically appropriate effort to manage his patients' chronic pain. Plaintiff asserted that the jury erred because the CSA does not "categorically criminalize[] prescribing narcotics to patients who happen to suffer from addiction disorder in addition to chronic pain." On appeal, the Seventh Circuit upheld the conviction. Although the court agreed with Defendant that prescribing narcotics to persons addicted to drugs does not necessarily constitute a CSA violation, the court likewise noted that physicians are not "automatically immune from liability whenever a patient who is obviously misusing their prescription happens to suffer from chronic pain." In the court's view, based upon the evidence proven at trial, the jury reasonably concluded that Defendant "intentionally prescribed narcotics to patients that he knew were misusing the prescriptions rather than legitimately using them to treat pain."

United States vs. Mirilishvili, U.S. Court of Appeals for the Second Circuit, Case Nos. 16-2575 and 16-3379. Earlier issues of the *NAMSDL Case Law Update* contain a more comprehensive summary of this case. In 2014, federal prosecutors charged the Defendant, a doctor, and ten alleged co-conspirators with the illegal distribution of oxycodone from his pain management clinic. Prior to trial, the ten co-conspirators plead guilty. In March 2016, a jury found Defendant guilty of three counts: two counts of unlawful distribution of oxycodone and one count of conspiracy to distribute oxycodone. In September 2016, the court sentenced Defendant to more than 13 years in prison and ordered him to turn over more than $2 million in fees collected from his patients. Defendant appealed the decision and sentence to the U.S. Court of Appeals for the Second Circuit. To date, the parties have not filed any appellate briefs. Defendant must file his initial brief on appeal by April 18, 2017.

State of California vs. Lisa Tseng, California Court of Appeals, 2nd Appellate District, Case No. B270877. Earlier issues of the *NAMSDL Case Law Update* contain a more comprehensive summary of this case. Plaintiff, a California doctor, was arrested in 2012 on charges of, among other things, second-degree murder for the overdose deaths of

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three of her patients. Prosecutors alleged that as part of her practice, Plaintiff would hand out prescriptions for pain medication to patients in as little as three minutes with no physical exam and despite evidence of addiction. In addition, prosecutors alleged that she continued to prescribe pain medication excessively even after she was notified more than a dozen times that patients of hers had overdosed. In October 2015, a jury found her guilty of 23 of the 24 charges levied against her, including three counts of second-degree murder (the first time a physician was found guilty of murder for overprescribing) and multiple counts of illegally writing prescriptions. The court sentenced Plaintiff to 30 years to life in prison. Plaintiff appealed both the conviction and sentence in March 2016. To date, no party has filed any appellate briefs. Plaintiff's initial appellate brief currently is due by February 24, 2017.

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