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CLIENT ADVISORY

Sixth Circuit Affirms Dismissal of Antitrust Class Action Involving Pharmaceutical Rebates

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On May 10, 2007, a unanimous panel of the U.S. Court of Appeals for the Sixth Circuit affirmed the summary judgment dismissal of a class action brought against Wyeth, *J.B.D.L. Corp., et al. v. Wyeth-Ayerst Laboratories, Inc.*, Nos. 05-3860/3988 *("J.B.D.L.")*, on the ground that plaintiffs had failed to produce sufficient evidence to establish that they had actually been injured by the challenged conduct. The class of direct purchasers of Wyeth's estrogen therapy product, Premarin, had alleged that Wyeth had violated Sections 1 and 2 of the Sherman Act by entering into restrictive rebate contracts with pharmacy benefit managers (PBMs) and other managed care organizations, allegedly leading to higher prices to direct purchasers. The *J.B.D.L.* case consolidated a class action and another lawsuit brought under Section 2 of the Sherman Act by two opt-outs, CVS Meridian, Inc. and Rite Aid Corporation, that were pending before Judge Beckwith in the Southern District of Ohio (Cincinnati).

BACKGROUND

In *J.B.D.L.*, the direct purchaser plaintiffs (*i.e.*, various pharmacies and wholesalers) challenged Wyeth's use of rebate contracts to promote Premarin to PBMs as unlawful "exclusive dealing" and monopolization under Sections 1 and 2 of the Sherman Act. *J.B.D.L. Corp. v. Wyeth-Ayerst Laboratories, Inc.*, No. 1:01-cv-704, 2005 WL 1396940, at *5 (S.D. Ohio June 13, 2005). Plaintiffs challenged two aspects of Wyeth's rebate contracts with PBMs. First, they alleged that some of these contracts contained a clause in which the PBM agreed that Premarin would be the "sole conjugated estrogen" on the PBM's formulary. *Id.* at *2-4. Second, they alleged that the contracts offered rebates to PBMs that were based upon Premarin's market share at such PBMs, as compared to the market share of competing estrogen therapy products or hormone therapy products at such PBMs. *Id.* Plaintiffs argued that Wyeth unlawfully restricted competition because these "exclusive" and "*de facto* exclusive" contracts gave Premarin favored positioning on PBM formularies

and/or awarded rebates based on the share of reimbursement that the PBMs made for Premarin products. *Id.* at *2-5. Plaintiffs contended that, by limiting the competitive threat posed by competing products, such contracts allowed Wyeth to charge supracompetitive prices for Premarin. *Id.* at *4.

On June 13, 2005, the district court granted summary judgment for Wyeth and dismissed both consolidated suits in their entirety, ruling that plaintiffs' claims were legally insufficient on two alternative grounds. First, the court ruled that there was insufficient evidence in the record to support any claim that Wyeth's contracts with PBMs had either restrained trade in or monopolized the relevant market. *Id.* at *8-17. With respect to plaintiffs' claim under Section 1, the district court found that Wyeth's PBM formulary arrangements did not substantially foreclose competition in the relevant market for oral estrogen therapy products. *Id.* The court agreed with Wyeth that its "favorable or exclusive formulary placement for Premarin in many PBMs" does not constitute "actionable market foreclosure." *Id.* at *10. Numerous competing estrogen products were able to achieve formulary status, and, in any event, obtaining formulary listings was just one method of competition. *Id.*

The court also rejected plaintiffs' claim under Section 2 of the Sherman Act, finding that Wyeth's contracts were a "practice that is widespread throughout the larger and unique pharmaceutical market," and that plaintiffs had failed to put forth sufficient evidence that Wyeth's conduct adversely affected overall competition in the relevant market. *Id.* at *17. Recognizing that "the antitrust laws are intended to protect competition, not a competitor" (*id.* at *12 (citing *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 823 (6th Cir. 1982)), the court found that plaintiffs developed evidence relating solely to a single competitor (Cenestin) and engaged in "little, if any, analysis of the effects of the challenged conduct on overall competition" in the market. *Id.*

Second, the court ruled—as an alternative ground for summary judgment—that plaintiffs could not establish that they had suffered "antitrust injury," because plaintiffs "have not established a 'but for' causative link between Wyeth's PBM contracts and Wyeth's price increases." *Id.* at *21. (The court used "antitrust injury" to mean "injury in fact," not in its standing sense to distinguish injury that is not "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).)

The plaintiffs appealed the district court's summary judgment decision with respect to plaintiffs' claim under Section 2 of the Sherman Act, but abandoned the Section 1 claim on appeal.

THE SIXTH CIRCUIT'S DECISION

The Sixth Circuit affirmed the judgment below based on the district court's finding that the plaintiffs failed to come forward with evidence to establish a genuine issue of fact on the issue of whether Wyeth's conduct actually injured the plaintiffs. *J.B.D.L. Corp., et al. v. Wyeth-Ayerst Laboratories, Inc.*, Nos. 05-3860/3988 (6th Cir. May 10, 2007) (slip opinion).

The Sixth Circuit noted that plaintiffs had presented "four pieces of evidence" to support their theory of causation, including Wyeth's internal documents, plaintiffs' own experts' testimony, a government study, and Wyeth's expert witnesses. *Id.* at 7. In rejecting plaintiffs' theory of causation, the Sixth Circuit ruled that plaintiffs had "overread[]" certain documents, "relie[d] on serious distortions of the

experts' analyses," and presented experts' opinions that "do not provide a sound evidentiary basis" for their theory of causation. *Id.* at 7-8.

Because the Sixth Circuit found "an absence of evidence of causation" and affirmed the district court's decision on that ground, the Sixth Circuit did not address the district court's other ground for granting summary judgment (*i.e.*, that the challenged contracts were not anticompetitive). *Id.* at 6 n.7. Thus, the Sixth Circuit left open the issue concerning the use of above-cost rebates in the pharmaceutical context. *See, e.g., Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (holding that selling at a low price cannot be an act of monopolization, or predatory pricing, unless the price is below an appropriate measure of cost and the evidence shows that there is a dangerous probability that the firm engaged in predation can recoup its investment in below-cost pricing); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000) (upholding above-cost market share rebates when "such a practice was a normal competitive tool within the stern drive manufacturing industry"); *cf. LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (concluding that the *Brooke Group* opinion could not be read to set out a general rule that all discounting practices resulting in above-cost pricing were *per se* legal).

IMPLICATIONS

The Sixth Circuit's decision in *J.B.D.L.* underscores the importance of factual development in an antitrust case. As is clear from the decision, legal theories must be supported by evidence in the record. A party cannot withstand summary adjudication by simply cobbling together disparate pieces of information in the record without demonstrating that relevant inferences reasonably can be drawn from such information. Ultimately, speculation or assumptions about causation will not suffice; where a defendant is able to convince a court that documents, expert analyses, and other materials in the record do not reasonably support a finding of causation, the defendant should prevail.

Arnold & Porter served as counsel of record to Wyeth in this matter. If you would like additional information, please contact your Arnold & Porter attorney or:

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