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La. High Court Reins In State AG Medicaid Fraud Suits

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Law360, New York (February 11, 2014, 5:39 PM ET) -- On Tuesday, Jan. 28, 2014, the Louisiana Supreme Court's ruling in Caldwell ex rel. State v. Janssen Pharmaceuticals Inc., reversed a trial court judgment of granting civil penalties, attorney fees and costs and expenses, and granted judgment in favor of defendants Janssen Pharmaceutica Inc.[1] and its parent company Johnson & Johnson Inc.

This decision has significant implications for lawsuits brought by Louisiana Attorney General Buddy Caldwell asserting Medicaid fraud claims against pharmaceutical companies under Louisiana's Medical Assistance Programs Integrity Law ("MAPIL"). Additionally, it could influence how similar Medicaid fraud prevention statutes are construed in other states.

Background

In recent years, state attorney generals, often assisted by private counsel retained on a contingency fee basis, have increasingly brought claims against pharmaceutical manufacturers for marketing activities that allegedly violate the Food, Drug and Cosmetic Act under Medicaid fraud prevention and consumer protection statutes.

A number of state trial court decisions regarding Janssen and Johnson & Johnson's promotion of the second generation antipsychotic Risperdal are reaching state appellate courts. On May 16, 2012, the Commonwealth Court of Pennsylvania upheld the dismissal of claims against Janssen and Johnson & Johnson under the Pennsylvania Medicaid Fraud Control Act because a pharmaceutical manufacturer was not a "provider" from which the commonwealth could seek civil penalties.[2]

In addition to the Pennsylvania and Louisiana cases, Janssen and Johnson & Johnson are pursuing an appeal of a $327 million award of civil penalties under the South Carolina Unfair Trade Practice Act pending before the Supreme Court of South Carolina and an appeal of a verdict of $1.2 billion in civil penalties under the Arkansas Medicaid Fraud False Claims Act and Deceptive Trade Practices Act scheduled to be heard before the Supreme Court of Arkansas on Feb. 27, 2014.[3]

Procedural History of Caldwell ex rel. State v. Janssen

In Janssen, Louisiana alleged that statements made by sales representatives and contained in a letter sent by defendants to doctors regarding a class wide U.S. Food and Drug Administration warning failed to adequately characterize the risks associated with Risperdal and violated the provisions of MAPIL prohibiting false and fraudulent claims, relying largely on a 2004 warning letter from the FDA. Specifically, Louisiana alleged that the defendants violated subsections (A), (B) and (C) of La Rev. Stat. § 46:438.3 (2006), which provide:

> A. No person shall knowingly present or cause to be presented a false or fraudulent claim.
> B. No person shall knowingly engage in misrepresentation to obtain, or attempt to obtain, payment from medical assistance programs funds.

> C. No person shall conspire to defraud, or attempt to defraud, the medical assistance programs through misrepresentation or by obtaining, or attempting to obtain, payment for a false or fraudulent claim.[4]

The trial court ruled that to prove its MAPIL claims "the AG only need prove false, misleading, misrepresentative, deceitful, intent to defraud type statements, attempts to defraud type statements, that in and of itself is the causation [] needed" and allowed the case to proceed to the jury without any evidence a false or fraudulent claim was ever submitted.

On appeal, defendants argued, among other things, that the trial record was insufficient to find liability under MAPIL because the state provided no evidence that defendants presented or caused to be presented any actual false claim for payment to the Louisiana Medicaid program. The Louisiana Third Circuit Court of Appeal held "that the trial court did not abuse its discretion in interpreting the MAPIL statute" and adopted the trial court's interpretation of the statute.[5]

However, the Louisiana Supreme Court adopted the defendants' arguments and rejected the trial court's and intermediate appellate court's sweeping interpretation of MAPIL, holding that "there was insufficient evidence adduced that any defendant engaged in fraud, misrepresentation, abuse or other ill practices seeking to obtain, pursuant to a claim made against the medical assistance program funds, payments to health care providers or other persons to which the health care providers or other persons were not entitled."[6]

The Louisiana Supreme Court's Decision

The Louisiana Supreme Court addressed each of the three provisions of MAPIL at issue during the relevant time period.

First, the court analyzed Louisiana's claim under La. Rev. Stat. § 46:438.3(A), which provides: "[n]o person shall present or cause to be presented a false or fraudulent claim." The court held that there is no evidence that defendants "ever presented a claim for payment from the medical assistance funds."[7] Thus, the court assessed whether defendants "caused" a false or fraudulent claim to be submitted. Relying on the statutory definition of a "false or fraudulent claim," La. Rev. Stat. § 46:437.3(8),[8] the court held that Louisiana had not adduced evidence that the alleged misrepresentations "caused any health care provider or his billing agent to knowingly present a claim for payment that is false, fictitious, untrue or misleading in regard to any material information."[9]

Rejecting Louisiana's argument that a pattern or practice of violating FDA rules constitutes a false claim, the court held that a person must have "knowingly caused a health care provider or its billing agent to present a claim for payment the health care provider or its billing agent knew to be false or misleading," even under the portion of the statute making a claim false if it was "part of a pattern in violation of applicable federal or state law or rule."[10] In this case, the court held that no evidence supported a finding that defendants' improper marketing statements caused any provider or billing agent to "submit a claim for payment the provider or his agent knew was false or misleading or that violated a federal or state law or rule."[11]

Second, the court rejected Louisiana's claim under La. Rev. Stat. § 46:438.3(B), which provides: "[n]o person shall knowingly engage in misrepresentation to obtain, or attempt to obtain, payment from medical assistance programs." The court held that section 46.438.3(B) required a person to attempt to

receive payment “directly from medical assistance program funds pursuant to a claim.”[12] Because there was “no showing that the defendants attempted to obtain payment to a health care provider directly from medical assistance program funds pursuant to a claim,” this provision did not apply.[13]

The court rejected Attorney General Caldwell's broad interpretation of the definition of “misrepresentation” in La. Rev. Stat. § 46:437.3(15)[14] to include within its scope the failure to disclose information required by any state or federal requirement. Rather, because MAPIL was intended to “protect the fiscal and programmatic integrity of the medical assistance programs,” the court limited the definition of “misrepresentation” under the statute to: “(1) the knowing failure to truthfully or fully disclose any information required on a claim or provider agreement; (2) the concealment of any and all information required on a claim or provider agreement; or (3) the making of a false or misleading statement to the department relative to the medical assistance programs.”[15]

The court found that there was no showing that defendants failed to disclose or concealed information on a claim or made any of the allegedly false statements to the Louisiana Department of Health & Hospitals “relative to the medical assistance programs in an attempt to obtain payment on a claim made against the medical assistance programs.”[16]

Finally, the court held defendants did not violate La. Rev. Stat. § 46:438.3(C), which provides “[n]o person shall conspire to defraud, or attempt to defraud, the medical assistance programs through misrepresentation or by obtaining, or attempting to obtain, payment for a false or fraudulent claim.”

Relying on its earlier construction of “misrepresentation,” the court held that subsection (C) was not violated because there was no evidence defendants “failed to truthfully or fully disclose or concealed any information required on a claim for payment made against the medical assistance programs, or that these statements were made to the department relative to the medical assistance programs.”[17] Additionally, the court held that “there must be a causal link between the misleading marketing statement and a false or fraudulent claim for payment to a health care provider or other person to establish liability under MAPIL.”[18]

Potential Impact

Louisiana's attorney general has been particularly aggressive in bringing Medicaid fraud claims against pharmaceutical companies for their promotional and marketing activities, and the Janssen decision considerably limits the his state's ability to bring these claims under MAPIL.

The attorney general currently has cases alleging marketing violations and asserting claims under MAPIL pending against numerous pharmaceutical companies. The Janssen decision requires Louisiana to prove a causal connection between marketing or promotional statements and the submission of a knowingly false claim by a health care provider. If the state is unsuccessful bringing claims under MAPIL, Louisiana's attorney general may have difficulty engaging private counsel in other enforcement actions against pharmaceutical companies.

In Louisiana, the attorney general cannot retain private counsel pursuant to a contingency fee agreement unless such a contract is authorized or approved by the legislature.[19] Because of this, private counsel retained by the attorney general have primarily relied upon the fee shifting provision of MAPIL, La. Rev. Stat. § 46:438.6(D), for compensation.[20] The Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. § 51:1401 et seq., the other statutory cause of action commonly

asserted against pharmaceutical companies, does not authorize the recovery of attorneys fees in enforcement actions.[21]

Additionally, the Louisiana Supreme Court's decision in Janssen may persuade other state courts to interpret their Medicaid fraud statutes, many of which also require demonstration that misrepresentations caused false or fraudulent claims or unauthorized benefits or payments to be made, in a similar fashion.[22] The court's decision did not involve claims under the state's consumer protection statute which are also commonly asserted in attorney general enforcement actions against pharmaceutical manufacturers.

[1] Janssen Pharmaceutica Inc. has changed names multiple times since the litigation in Louisiana commenced. For simplicity, this article refers to the company as Janssen.
[2] Commonwealth ex rel. Ortho-McNeil-Janssen Pharm., No. 802 C.D. 2011, at 9 (Pa. Commw. Ct. May 16, 2012) (unreported).
[3] State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., No. 2007-CP-42-1438 (S.C. argued March 21, 2013); Ortho-McNeil-Janssen Pharmaceuticals, Inc. v. State ex rel. McDaniel, Nos. 12-1058, 13-468 (Ark.). Janssen and Johnson & Johnson also had a trial court decision regarding Risperdal under the West Virginia Consumer Credit Protection overturned because the trial court improperly gave Food & Drug Administration warning letters preclusive effect. See State ex rel. McGraw v. Johnson & Johnson, 226 W. Va. 677, 704 S.E.2d 677 (W. Va. 2010).
[4] Janssen involved a version of MAPIL effective from July, 15, 1997 to June 17, 2007. The statute, including section 46:438.3(B), was subsequently amended on June 18, 2007, August 14, 2009 and August 15, 2011. See La. Acts 2007, No. 14, § 1, eff. June 18, 2007; La. Acts 2009, No. 426, § 1; La. Acts 2011, No. 185, § 1. These amendments do not appear to alter the requirement that a misrepresentation cause or be material to a false claim that was central to the Louisiana Supreme Court's decision.
[5] Caldwell ex rel. State v. Janssen Pharm., Inc., 2011-1184 (La. App. 3 Cir. 8/31/12), 100 So. 3d 865, 876.
[6] Janssen, 2012-C-2447, 2012-C-2466 at 21.
[7] Id. at 13.
[8] Section 46:437.3(8) provided:
"False or fraudulent claim" means a claim which the health care provider or his billing agent submits knowing the claim to be false, fictitious, untrue, or misleading in regard to any material information. "False or fraudulent claim" shall include a claim which is part of a pattern of incorrect submissions in regard to material information or which is otherwise part of a pattern in violation of applicable federal or state law or rule.
The current definition is identical but numbered subsection (7).
[9] Janssen, 2012-C-2447, 2012-C-2466 at 14 (emphasis removed).
[10] Id. at 15-16.
[11] Id. at 16.
[12] Id. at 16.
[13] Id. at 16-17.
[14] La. Rev. Stat. § 46:437.3(15) provides:
[15] Janssen, 2012-C-2447, 2012-C-2466t *18.
[16] Id.
[17] Id. at 19-20.
[18] Id. at 20.
[19] Meredith v. Ieyoub, 96-1110 (La. 9/9/97), 700 So. 2d 478, 481.
[20] See .e.g., Janssen Pharm., 100 So. 3d at 884 (affirming the trial court's 70 million dollar attorney fee award under La. Rev. Stat. § 46:438.6(D)).
[21] See La. Rev. Stat. §§ 51:1407-1408. In contrast the private right of action under this statute explicitly authorizes recovery of fees and costs. See id. § 51:1409.
[22] See, e.g., Ark. Code Ann. § 20-77-902; Miss. Code Ann. § 43-13-213; Or. Rev. Stat. Ann. § 180.755; Tex. Hum Res. Code § 36.002; W. Va. Code § 9-7-6.

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Arnold & Porter attorneys — including some of the authors of this article — represent defendants in some of the pending enforcement actions brought by Louisiana Attorney General Buddy Caldwell under Louisiana's Medical Assistance Programs Integrity Law. Attorneys Jeffrey Handwerker, Rob Weiner and Stanton Jones wrote an amicus brief supporting Janssen and Johnson & Johnson's appeal.