

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

STATE OF WISCONSIN,

ex rel. Hagens Berman
Sobol Shapiro LLP.

et al.

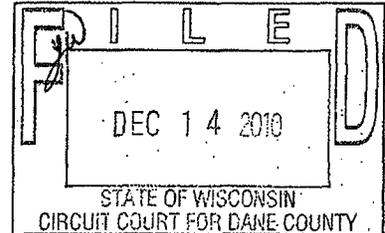
Plaintiff,

v.

Case No. 10 CV 3411

MCKESSON CORPORATION,

Defendant.



DECISION AND ORDER GRANTING MOTION TO DISMISS

STATEMENT OF THE CASE

The *qui tam* plaintiffs are law firms currently prosecuting, on behalf of various states and others, Medicaid fraud damages and civil forfeiture claims against defendant McKesson Corporation. In their Complaint filed June 28, 2010, they essentially contend that McKesson Corporation, a wholesale distributor of pharmaceutical products, conspired with publisher First Databank to artificially inflate the published average wholesale price benchmark on hundreds of generic and patented drugs in a fraudulent scheme to cause Medicaid programs, including Wisconsin's, to overpay for these drugs. They seek to recover, on behalf of the State of Wisconsin, over \$50 million in actual compensatory damages under § 20.931, the "Wisconsin False Claims for Medical Assistance" statute, trebled under § 20.931 (2), Stats. Additionally, pursuant to that statute, the *qui tam* plaintiffs seek to "recover their appropriate share of the proceeds of this action pursuant to Wis. Stat. § 20.931 *et seq.*" and "in addition to their

appropriate share, the reasonable expenses, costs and attorneys fees as provided by law". ("Complaint", Prayer for Relief, ¶¶ C. and D.)

The State of Wisconsin has moved to dismiss this action on numerous grounds, the most salient being these. First, under § 20.931(12)(b), Stats., the State asserts that this *qui tam* action is based upon allegations or transactions that are the subject of an already pending civil action to which the State is a party. Secondly, "good cause" within the meaning of § 20.931(7) (a) supports a dismissal.

The motion has been fully briefed, and oral argument was heard on November 22, 2010. Accordingly, the dismissal motion is ripe for decision. It is granted for the following reasons.

FACTUAL BACKGROUND

Since before 2004, the State of Wisconsin has been battling the pharmaceutical industry, including manufacturers, distributors, and alleged co-conspirator facilitators, in Medicaid fraud actions arising out of allegedly artificial and inflated pricing of brand-name and generic drugs. The battle has taken place in this courtroom (04 CV 1709)¹, and in federal courts both in Wisconsin and elsewhere.

Since at least January 2009, the State of Wisconsin has been participating with the United States Department of Justice and other states in a *qui tam* action against McKesson Corporation seeking damages, including treble damages, and civil penalties under the federal False Claims Act. The lawsuit, identified in McKesson Corp.'s form 10-K filed with the United States Securities and Exchange Commission, is premised upon essentially the same allegations as the *qui tam* plaintiffs assert here. See Reply Brief in Support of Motion to Dismiss, Exhibit A.

Additionally, the State of Wisconsin represents that it "is proceeding directly against McKesson separately and in conjunction with other states as part of the National Association of Medicaid Fraud Control Units." See Reply Brief in Support of Motion to Dismiss, page 2.

On February 16, 2010, the Medicaid Fraud Control Units ("MFCUS") of several states, including Wisconsin, negotiated a litigation "Tolling Agreement" with McKesson Corporation. The "Tolling Agreement" provides, as pertinent here:

TOLLING AGREEMENT

This Tolling Agreement ("Agreement") is made as of February 16, 2010, by and between the Medicaid Fraud Control Units of the several States

¹ Now on appeal as case number 10 AP 232.

and/or Commonwealths (hereinafter "MFCUs"), and McKesson Corporation ("the Company").

PREAMBLE

Whereas, the MFCUS are investigating potential civil and/or criminal claims against the Company related to the reporting to First Databank of the Company's drug pricing information coming including markup; and

Whereas, the MFCUs are considering the filing of civil and/or criminal proceedings related to the reporting to First Databank of the Company's drug pricing information, including markup; and,

Whereas, the MFCUs and the Company desire to avoid the expense and inconvenience of litigation at this time so that the parties can continue their attempts to amicably discuss their differences; and,

Whereas, the MFCUs and the Company desire to preserve the status quo as to the MFCUs' claims related to the reporting to First Databank of the Company's [McKesson's] drug pricing information can including markups, and to establish the tolling arrangement described below;

TERMS OF AGREEMENT

NOW THEREFORE, in consideration of the mutual promises contained herein, and intending to be legally bound, the parties agree as follows:

1. The MFCUs will not hereafter commence civil or criminal proceedings against the Company [McKesson] relating to the reporting to First Databank of the Company's drug pricing information, including markups, before the thirtieth (30th) business day following notice of termination of this Agreement by any party pursuant to paragraph 5 of this Agreement.

Currently, and likely due to the above Tolling Agreement, there are no outside counsel retained on behalf of the State of Wisconsin in its claims against McKesson Corporation. However, in the State's other pharmaceutical litigation, particularly 04 CV 1709, several private firms have been retained. One of these is the Miner Barnhill firm, which is also involved in representing several states, including Hawaii, in Medicaid fraud AWP pricing cases directly against McKesson Corporation. So far, Miner Barnhill has achieved excellent results on behalf of the State of Wisconsin in its AWP litigation against pharmaceutical manufacturers, including one judgment exceeding \$13 million and numerous settlements. Of particular pertinence to the case at hand, this court has already observed the following concerning the fee agreement between the State and the Miner Barnhill firm, which agreement would likely be duplicated in any case the State files against McKesson, should outside counsel be retained:

The State of Wisconsin negotiated a phenomenal deal with outside counsel in which it bore no responsibility for attorneys fees, win or lose, and which

provided for a contingent fee to outside counsel which in no way reduces the State's net recovery. As in the above cases, this fee agreement furthers the public policy bases underlying fee shifting statutes such as those involved in our case..."

(State of Wisconsin v. Pharmacia Corporation, Dane County Circuit Court Case No. 04 CV 1709, "Decision and Order on Attorneys Fees and Related Motions", p. 2).

DECISION AND ORDER

It is clear from the offers of proof from both the State of Wisconsin and the *qui tam* plaintiffs that the allegations and transactions that are the subject of this action are substantially similar to those already pursued by the State of Wisconsin in the federal *qui tam* action pending against McKesson Corporation, in coordinated efforts with other state MFCUs, and in current negotiations with the McKesson Corporation. But for the "Tolling Agreement", additional litigation would undoubtedly have been filed in Wisconsin to protect any state claims not already at issue in the federal action. In short, the *qui tam* plaintiffs here are barred from pursuing this action under § 20.931 (12) (b).

Even if this were not the case, "good cause" supports dismissal of the *qui tam* Complaint under § 20.931(7) (a) for the following additional reasons, in no particular order.

First, by allowing the plaintiffs to pursue this action, the State's deliberate, years-long litigation strategy against the pharmaceutical industry is essentially hijacked, at least insofar as McKesson Corporation, a major player, is concerned.

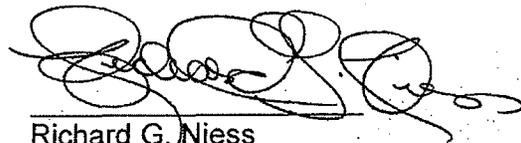
Secondly, if the dual purposes of the false claims "whistleblower" provisions are to (1) encourage those with information to come forward where the government watchdog lacks knowledge, and (2) spur the government to take action to protect the public, neither purpose is served by plaintiffs' *qui tam* action here. Although the *qui tam* plaintiffs were undoubtedly instrumental in developing the claims and evidence against McKesson Corporation beginning years ago, the State of Wisconsin has also been involved in the Medicaid fraud inquiry against McKesson for years. Accordingly, while the State may not have the identical chapter-and-verse documentation and evidence possessed by the *qui tam* plaintiffs, they know about, and have access to, the pertinent evidence by virtue of the litigation they are already pursuing, and the public records from the actions that have already concluded. In short, the State has "been all over" these Medicaid fraud claims against McKesson for a number of years, and accordingly is a far cry from the "unknowing government watchdog". Additionally, this action is not needed to propel the State forward in its claims against McKesson, because these claims are already being pursued by the State. Accordingly, the *qui tam* plaintiffs, accomplished attorneys though they certainly are, bring no real meat to the Wisconsin table.

But, thirdly, they surely intend to eat more than their fair share from that table. By allowing them to proceed, the *qui tam* plaintiffs essentially walk away with no less than 25% of the recovery, before factoring in attorneys fees under § 20.931 (11), Stats. Given plaintiffs' estimate that the actual damages in this case total \$50 million, and are subject to trebling, allowing this action to proceed would essentially throw away \$37,500,000 of state taxpayer money. While this might be an investment worth making if the *qui tam* plaintiffs actually had alerted the State to claims about which it was previously unaware or if their representation offered \$37,500,000 more value to the State than Miner Barnhill's, neither of those circumstances exists. The former point has already been addressed. As to the latter, Miner Barnhill, which is pursuing precisely the same type of litigation for other states, would be the likely attorneys for the State of Wisconsin if litigation proves necessary against McKesson Corporation (i.e. should settlement negotiations fail), and has proven to be expert in the field. Unlike the *qui tam* plaintiffs, who seek a portion of the recovery plus a recovery under the fee shifting statutes, Miner Barnhill would take nothing from the State's recovery against McKesson itself.

In short, "good cause" exists to dismiss the Complaint because, charitably viewed, the *qui tam* plaintiffs simply duplicate and attempt to piggy-back the State's own pending efforts against McKesson Corporation. On the other hand, it would not take a hardened cynic to see the Complaint as simply a parasitic, opportunistic attempt at self-aggrandizement by the law firm plaintiffs to the severe detriment of the citizens and taxpayers of the State of Wisconsin.

Dated this 14th day of December, 2010.

BY THE COURT:



Richard G. Niess
Circuit Judge

CC: Attorney Daniel Kotchen
Assistant Attorney General Frank Remington