

District Court Holds Individual Issues of Fact Predominate in Unjust Enrichment Class Action

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The US District Court for the Eastern District of Pennsylvania recently denied class certification to a proposed class of third-party payors of prescription drugs. The plaintiffs brought a class action for unjust enrichment, claiming that Cephalon, Inc. improperly marketed a drug with limited approval by the US Food and Drug Administration (FDA), resulting in excessive payments for drugs that should not have been prescribed to the plaintiffs' members.

Cephalon, a pharmaceutical company, purchased drug developer Anesta Corporation in 2000. One of the drugs Anesta developed was Actiq, a pain-reliever for cancer patients. Actiq was approved by the FDA, but only under Subpart H, a special categorization for effective but risky drugs, and only for certain cancer patients not effectively treated by other drugs. Manufacturers of Subpart H drugs are required to follow a Risk Management Program (RiskMAP) designed to ensure compliance with the limited approval.

When Cephalon bought Anesta it amended the marketing plan for Actiq, which an internal audit by Cephalon determined was contrary to the RiskMAP (Cephalon later pleaded guilty to off-label promotion). The plaintiffs allege that by marketing outside what was allowed by the RiskMAP, Cephalon caused doctors to overprescribe Actiq, even though more effective and/or less expensive alternatives were available. Third-party payor plaintiffs sued Cephalon in 2007 alleging unjust enrichment.

The District Court held that the plaintiffs' class of third-party payors could not be certified because individualized issues predominate for two reasons. First, the court determined that the unjust enrichment law of each plaintiffs' home state would apply, and not all states apply the same law to unjust enrichment claims. Second, the court held that the determination of unjust enrichment is, by nature, a fact-sensitive question because, under an unjust enrichment theory, all facts and circumstances of the case must be considered.

Although the plaintiffs could allege certain elements commonly, they could not allege that each payment was unjust absent specific individualized facts. Because of differences in each physician's familiarity with Cephalon's marketing, physician judgment, patient response, and plaintiff decision-making, individual issues of fact predominated, and the plaintiffs' motion to certify the class was denied.

In re Actiq Sales and Mktg. Practices Litig., Civil Action No. 07-4492 (E.D. Pa. Mar. 23, 2015)

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