MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)

CITY OF ST. LOUIS, et al., Plaintiffs

vs

AMERICAN TOBACCO CO., et al., Defendants

CASE NO. 22982-09652 DIVISION 6 December 30, 2010

COURT ORDER on PLAINTIFFS' MOTIONS IN LIMINE and CERTAIN DEFENDANTS' MOTION IN LIMINE TO EXCLUDE EVIDENCE AND ARGUMENTS REGARDING THE FRA ASSESSMENT PAID BY THE PLAINTIFF HOSPITALS

On October 27, 2010, various motions *in limine* filed by Plaintiffs were called, heard and submitted. The Court is mindful that rulings on motions *in limine* are interlocutory and that evidence adduced or events occurring at trial, if known prior to its rulings, may have affected same. The Court, therefore, directs the respective parties to raise hereafter out of the hearing of the jury and in a time and manner sufficient to allow a review, any alleged facts or circumstances that would alter the propriety of its rulings below. However, upon its review and in the context of the oral presentations made and the briefs submitted by the parties, the Court now rules on said motions as follows.

First argued were five (5) motions Plaintiffs related to issues Plaintiffs characterize as "collateral source", to-wit: PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT EVIDENCE REGARDING COLLATERAL SOURCE; PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE OF FEDERAL REIMBURSEMENT ALLOWANCE, DISPROPORTIONATE SHARE PAYMENTS AND FEDERAL AUDIT OF STATE OF MISSOURI; PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT EVIDENCE REGARDING HOSPITAL PROFITS; PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT EVIDENCE REGARDING PLAINTIFF HOSPITALS "BENEFITING" FROM OR "SEEKING" PATIENTS SUFFERING FROM TOBACCO-RELATED ILLNESSES; and PLAINITFF'S MOTION IN LIMINE TO PROHIBIT DEFENDANTS AND DEFENDANTS' EXPERTS FROM MAKING ARGUMENTS REGARDING ALLEGED BENEFITS RECEIVED FROM DEFENDANTS' TORTIOUS CONDUCT.

The common theme of the above motions is Plaintiffs' request to exclude from evidence

their receipt of any and all collateral source funds. In their efforts, Plaintiffs' point to well-recognized case law prohibiting same. The overriding question for this Court on the above motions, however, is whether these principles and considerations as very broadly described by Plaintiffs' herein apply to the case at bar. As Defendants point out and as is reiterated on the bottom of page 1 of the first listed motion above, Plaintiffs in this case seek to "recover the **unreimbursed** costs **associated with** treating indigent patients. . . . [emphasis added]". Debate included questions about which elements of these costs may be properly recoverable (see, for example, CERTAIN DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE ARGUMENT THAT PLAINTIFFS ARE ENTITLED TO RECOVER FIXED COSTS AS DAMAGES AND EVIDENCE OF PLAINTIFFS' COSTS THAT COMBINES FIXED AND VAIRABLE COSTS heard on October 28, 2010 and decided this date under separate cover). In their opposition to PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT EVIDENCE REGARDING COLLATERAL SOURCE, Defendants argue that except as to Plaintiffs' efforts to exclude evidence of charitable donations, the remaining subjects Plaintiffs wish to exclude (i.e. Medicare, Medicaid, Private Insurance, and Self-Pay; Federal and State Governmental Payments) are separately covered in the other related motions *in limine*. While Plaintiffs disagree, this Court will address these related issues in the order it deems most logical.

The Court does not accept Plaintiffs' **broad** definition and application of the collateral source rule. That said, it does believe and find that **some** revenues received by Plaintiff hospitals are so indirectly connected to particular patients' care as to make the collateral source analogy instructive. Consequently, with respect to revenues received by Plaintiffs as a result of charitable activities or donations or certain governmental monies received, for example, pursuant to the Hill-Burton Act, PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT EVIDENCE REGARDING COLLATERAL SOURCE is granted unless Defendants can lay a foundation sufficient for this Court to conclude that the receipt of any such revenues is directly connected to a charitable or governmental response to smoking or the acts or conduct of Defendants. Without this foundation, this Court finds that evidence related thereto will be confusing to the jury and that the prejudicial effect thereof outweighs any probative value.

With respect to the "[m]any **other** patients' treatment costs [that] are covered by Medicare, Medicaid, Private Insurance, or through Self Payment [emphasis added]", the Court does believe, as will be further spelled out hereafter, that it is relevant in a critique of Plaintiffs' damages' model that these monies were **paid** (supporting the argument that Plaintiffs were, therefore, not damaged) but that it is **not** relevant **who** paid them. In other words, to the extent that Plaintiffs' motion seeks to prohibit Defendants from eliciting testimony indicating that Medicare paid a certain amount to Plaintiffs, that Medicaid paid a certain amount to Plaintiffs, etc., Plaintiffs' motion is sustained. To the extent, however, that Plaintiffs seek to prohibit evidence that they were paid "x" dollars for the treatment of patients for whom they seek any recovery, their motion is denied.

While there may be a relationship between Plaintiff hospitals' bad debt and charity care costs and Disproportionate Share payments (DSH) as referenced in PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE OF FEDERAL REIMBURSEMENT ALLOWANCE,

DISPROPORTIONATE SHARE PAYMENTS AND FEDERAL AUDIT OF STATE OF MISSOURI, this Court finds that these receipts are not related to any recovery of Plaintiffs' losses connected with Defendants' conduct and so are similarly attenuated and indirect such as to make them only marginally probative despite their potential for undue prejudice and jury confusion. Additionally, with respect to the "DSH" audit referenced in the motion, to the extent that it (not necessarily any actions taken by Plaintiffs in response to it) may be marginally relevant, said relevance is clearly outweighed by its prejudicial effect. Therefore, Plaintiff's motion to delete any reference to this Federal action is sustained.

Closely related to the issues raised above is CERTAIN DEFENDANTS' MOTION IN LIMINE TO EXCLUDE EVIDENCE AND ARGUMENTS REGARDING THE FRA ASSESSMENT PAID BY THE PLAINTIFF HOSPITALS which was similarly heard and submitted. Although Plaintiffs may have a reasonable argument that these payments are a "cost of doing business", their close relationship with Plaintiffs' DSH receipts is, also, confusing to such a degree that any marginal relevance is clearly outweighed by their prejudicial effect. For these reasons, this motion is, also, sustained.

The third of the above five (5) "collateral source" motions (regarding hospital profits) truly sets the stage for the Court's review of the last two (2). In short, Plaintiffs seek to prevent Defendants from adducing the potentially entertaining and arguably "politically incorrect" evidence (expert and otherwise) that they derived profits and benefits by treating those "paying" Pathway 1 and 2 patients for whom the hospitals do not seek to recover their costs of treatment. While Plaintiffs have offered a "but for" analysis to explain the causal connection between Defendants' conduct and their injuries/damages, they claim that this does not make their treatment of those patients with tobacco-related illnesses and/or costs of care for whom they do **not** seek recovery – the **paying** patients – relevant to those of the nonpaying.

The pertinent question throughout this discussion, in view of Plaintiffs' theory of loss, is whether Defendants can adduce evidence and argue that Plaintiffs **made** money rather than lost it as a result of Defendants' conduct. By its very damages model, Plaintiffs have unavoidably put into evidence questions of payments/revenues in relation to costs. What else are profits or losses if not this? In this business tort case where the measure of damages is solely pecuniary, Plaintiff hospitals do not stand in the shoes of one personally injured (Plaintiffs' patients). They are not suing in subrogation of each injured patient (nor as Defendants have aptly pointed out – do they want to in light of the defenses that could be thereby addressed). That Plaintiffs' claims are not derivative (in the sense that they derive from another's) as this is the arguably fatal flaw in Plaintiffs' "99 ladder" example raised in oral argument (where the merchant would presumably sue the manufacturer in some form of indemnity action – also derivative). The applicability of the principles and arguments Plaintiffs make here depend on who is doing the suing, who is sued and what theory of recovery is at issue. Because Plaintiffs here are not in the shoes of the individual patient/smoker, the question for the jury is what causal effects did Defendants' conduct have on Plaintiffs' financial condition – what Plaintiffs' financial condition would have been "but-for" the allegedly wrongful conduct of Defendants?

Even if Defendants are not entitled to an "offset" as it has traditionally been defined, they are certainly entitled to challenge the basic premises of Plaintiffs' damages model. These last three "collateral source" motions are denied and to the extent that the fourth listed motion touches on advertising, that issue will be handled below in the motion *in limine* related to the topic.

In PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT EVIDENCE REGARDING TENET HOSPITALS' PRICE INCREASES AND THE MEDICARE OUTLIER ISSUE, Plaintiffs seek to prohibit Defendants from introducing evidence or making reference to (1) price increases by the affected Plaintiff hospitals through August 7, 2003, (2) the pricing strategy of Tenet through the above date, (3) the Medicare Outlier issue, and (4) any investigation, lawsuit and/or settlement relating to the Medicare Outlier issue. This motion is denied in part and granted in part. Any increase in prices at rates not reflective of the actual costs associated with these increases so as to affect the receipts by Tenet of government revenues are, in this Court's view, relevant to a legitimate attack by Defendants on Plaintiffs' damages model. Evidence of federal investigation, however, is not in and of itself evidence of wrongdoing or bad character. And, that a lawsuit or investigation may be "settled" implies something/issues still in dispute which by its very nature has marginal probative value and is subject to confusion – testimony/ evidence of same is ambiguous at best and utterly confusing and devastatingly prejudicial at worst. Defendants' inquiry and criticisms of any alleged Coller deficiencies in this regard can be conducted without testimony as to the existence or resolution of any Federal investigation. It can be done by positing an assertion that the relevant numbers should not include x,y,z but, in fact, her "efforts" to remove them were insufficient. In other words – that changes in computations were made is relevant – whether those changes are accurate or appropriate is relevant – but that they may have resulted from Federal pressures is not!

In PLAINTITTS' MOTION IN LIMINE TO PROHIBIT EVIDENCE REGARDING PLAINTIFFS' ADVERTISEMENTS, Plaintiffs seek to preclude Defendants from eliciting evidence related to Plaintiffs' advertising and marketing "related to treatment for smoking related diseases and illness" for the relevant time frame and in cross-examination of Plaintiffs' expert, Dr. Otis Brawley, relating to his assessment of certain Plaintiff advertising as unethical. At first blush, this issue seems (like a great many questions presented to this Court herein) related to the various Defendants' motions related to advertising/marketing activities. But the relevance of each is different. For Plaintiffs' advertising to be relevant it must be tied to Plaintiffs' responses to conduct of Defendants and for Defendants' advertising to be relevant it must be tied to Plaintiffs' theory of recovery.

What the legal significance of any party's "unethical" conduct is remains lost on this Court. It is not illegal nor is it actionable. This part of this motion (and the closely tied issue raised in CERTAIN DEFENDANTS' MOTION IN LIMINE TO EXCLUDE TESTIMONY CONCERNING CORPORATE ETHICS OR DEFENDANTS' PURPORTED ETHICAL OBLIGATIONS heard on October 28, 2010 and decided this date under separate cover) is sustained.

Defendants argue that Plaintiffs targeted certain populations with their advertising and marketing activities and **that** may be why certain patients (like the ones covered here) went to those particular hospitals and **that**, not Defendants' conduct, may be why Plaintiffs suffered damages. Unless Defendants can establish a sufficient foundation that will allow this Court to conclude that any specific piece of Plaintiffs' advertising or marketing specifically targeted people affected by Defendants' allegedly wrongful conduct, the connection between that conduct and Plaintiffs' specific advertising scheme appears too attenuated and indirect and any marginal probative value said evidence may have is easily outweighed by its prejudicial effect and is likely to cause a jury to speculate as to the significance thereof. Defendants' argument that Plaintiffs' inclusion of the various categories of hospital advertising/marketing expenditures as part of the hospitals' costs in Dr. Coller's damages model, however, is persuasive and to the extent that Defendants wish and are able to adduce testimony of the amounts any Plaintiff hospital spent on such activities, Plaintiffs' motion is denied.

In PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT EVIDENCE REGARDING COMMUNICATIONS BETWEEN CGI, PLAINTIFFS AND PLAINTIFFS' COUNSEL, Defendants argue the relevance of CGI/Orion's role in encouraging Plaintiffs to file/enter the instant action, their contingency fee arrangement, their role in arriving at Plaintiffs' damages model, and that their fees (at least for 18 Plaintiffs) are included as hospital expenses in Plaintiffs' damages model. This Court finds that CGI/Orion is not a party nor an expected witness and, for the most part, they are collateral to this action. Their role, if any, in encouraging this suit or any contingent fee from any recovery from this suit (by definition, not yet an expense to Plaintiffs) are just not relevant to any of the real the issues in the case. Any assistance CGI may have provided Plaintiffs in pursuit of Plaintiffs' claims is not totally unlike some of the various resources Defendants have utilized in their defense (and which are the "gist" of CERTAIN DEFENDANTS' MOTION IN LIMINE AND INCORPORATED SUGGESTIONS IN SUPPORT TO EXCLUDE ALL EVIDENCE OF, OR ANY REFERENCES TO, DEFENDANTS' LITIGATION RESOURCES USED IN THE DEFENSE OF THIS CASE AND THEIR NON-RESIDENT STATUS which is sustained this date under separate cover). Such deficiencies that may exist in the damages model can be more than adequately addressed through cross-examination or expert testimony on that model's merits. That portion of CGI's fees, however, **that are attributable to this suit** would be relevant on an attack to Plaintiffs' damages model to the same extent as the above decision on advertising.

A number of Plaintiffs' filed motions were **withdrawn**, to-wit: PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT EVIDENCE REGARDING MEDICAID FORMULA TO DETERMINE COSTS; PLAINTIFFS' MOTION IN LIMINE TO PROHBIT EVIDENCE REGARDING LOST OR DESTROYED DOCUMENTS; PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT EVIDENCE REGARDING FRAUD, WASTE AND ABUSE; PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT EVIDENCE REGARDING COMPLIANCE COMMITTEE MEETING MINUTES AND COMPLIANCE LOGS; PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT EVIDENCE REGARDING INTERNAL AND EXTERNAL AUDITS AND CONSULTANT REPORTS; PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT EVIDENCE REGARDING FOCUS GROUP STUDIES, PATIENT

SATISFACTION SURVEYS AND QUALITY OF CARE REPORTS; PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF DEPOSITION TESTIMONY AND RELIANCE DOCUMENTS OF FORMER PLAINTIFFS' EXPERTS; and PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT EVIDENCE COMPARING FINANCIAL RECORDS OF OTHER PLAINTIFF HOSPITALS.

PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF DEPOSITION TESTIMONY OF FORMER PLAINTIFFS is denied as **moot** as Defendants have agreed therewith.

Although this Court is inclined to agree with Defendants' assertions that PLAINTIFFS' MOTION IN LIMINE TO PROHBIT EVIDENCE REGARDING COMMUNICATIONS BETWEEN PLAINTIFFS AND LASHLEY & BAER, P.C., PRIOR TO FILING OF LAWSUIT AND CONTINGENCY FEE is overly broad and vague so as to make a meaningful order difficult if not impossible, the Court directs the parties to address the introduction of any evidence that can even remotely touch on these topics with the Court outside of the presence of the jury and in a sufficient time and manner that the sensitive principles touched thereby can be reviewed.

Lastly submitted with the waiver of oral argument of December 8, 2010, were two motions related to the above, to-wit: PLAINTIFFS' MOTION IN LIMINE TO PROHIBIT DEFENDANTS AND DEFENDANTS' EXPERTS FROM MAKING ARGUMENTS REGARDING ALLEGED BENEFITS RECEIVED FROM DEFENDANTS' TORTIOUS CONDUCT and PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE DEFENDANTS' EXPERTS FROM OFFERING TESTIMONY AND OPINIONS REGARDING WHETHER TENET PLAINTIFFS ACTED IN AN ETHICAL OR MORAL MANNER AND THE UNDERLYING FACTS REGARDING THE TENET OUTLIER ISSUE, INVESTIGATION AND SETTLEMENT. For reasons stated above the first of these two (2) motions is denied and the second (to the extent that it needs to be ruled on in view of Defendants' representations in their opposition) is sustained.

SO ORDERED:

Michael P. David,
Judge

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