

Pharma Dispute Expands Constitutional Rights For Gays

It is not often that constitutional issues arise in business litigation cases. This is because business disputes arise from the private arrangements parties have with each other, such as in various contractual relations, and generally do not involve exercises of state power. However, a new decision from the Ninth Circuit involving two pharmaceutical companies might greatly expand the constitutional protections afforded to the LGBT community.

In *SmithKline Beecham Corp. v. Abbott Labs.*, Case Number 11-17357, (9th Cir. 2014) (opinion filed January 21, 2014), SmithKline Beecham (GSK) sued Abbott Laboratories in a lawsuit involving antitrust, contract, unfair competition, and unfair trade practices claims. The underlying dispute stemmed from a licensing agreement and the pricing of HIV medication. GSK claimed that Abbott violated the implied covenant of good faith and fair dealing, antitrust laws and North Carolina's Unfair Trade Practices Act when it licensed to GSK the right to market a HIV drug manufactured by Abbott in conjunction with one of its own, then quadrupled the price of the drug in order to drive business to Abbott's own combination drug.

The issue of the availability of HIV medication and pricing is of course a subject of widespread controversy in the gay community. This controversy made its way into the litigation during jury selection. Abbott used its first peremptory strike against the only self-identified gay member of the pool of potential jurors. GSK thereafter challenged the strike arguing that there was a discriminatory motive behind the strike that was prohibited under *Batson v. Kentucky*, 476 U.S. 79 (1986). That case held that potential jurors could not be excluded from serving on a jury because of their race. GSK argued that the juror was improperly excluded from serving because he was gay. The trial court judge denied the challenge and the jury came back with a verdict that awarded \$3,486,240 in damages to GSK for its contract claim but held for Abbott on the antitrust and unfair trade practices claims. Both parties appealed.

On appeal, GSK argued that excluding the juror because of his sexual orientation violated the holding in *Batson* and a new trial was warranted. The Ninth Circuit agreed - http://www.ca9.uscourts.gov/content/view.php?pk_id=000000692 holding that *Batson* applies to jurors who are excluded from serving because of their sexual orientation, and remanded the case for a new trial. In doing so, the Ninth Circuit expanded the protections afforded by *Batson* to jurors who identify themselves as homosexual. The most noteworthy aspect of the decision is that the Ninth Circuit also held that heightened scrutiny--not rational basis review--applies to classifications based on sexual orientation.

This is may not be the Court's final say on the issue, as Abbott's attorneys have filed a motion for a 30-day extension of time to file a petition for rehearing and rehearing en banc in order to evaluate whether to seek additional review. Given its holding regarding the constitutional standard of review, and its conclusion that heightened scrutiny is appropriate, this case may wind its way to the United States Supreme Court.

If you have any questions or comments, I would be delighted to hear from you.

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