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# Consumer Orgs Ask 1st Circ. To Ax Momenta Antitrust Shield

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Law360, Fort Wayne (January 11, 2017, 3:59 PM EST) -- Public interest groups urged the First Circuit on Tuesday to overturn a lower court's ruling that the Noerr-Pennington doctrine protects drugmaker Momenta from claims that it plotted with Sandoz to keep rival Amphastar from selling a generic version of the anticoagulant Lovenox, saying the court interpreted the doctrine too broadly.

The district court inappropriately expanded the application of Noerr-Pennington when it held in July that [Momenta Pharmaceuticals Inc.](#) was [immune from the antitrust action](#) by Amphastar Pharmaceuticals Inc., the amicus brief by [Consumer Action](#), the [National Health Law Program](#) and the U.S. Public Interest Research Group said.

“The Noerr-Pennington doctrine is a narrowly applied immunity that protects First Amendment covered conduct such as petitioning the government through litigation or lobbying, or speech such as publicity campaigns,” the groups said. “This conduct is protected even if the intended consequence of the conduct is to decrease competition. For this reason, the Noerr-Pennington doctrine, like all antitrust immunities, should be narrowly construed and not expanded beyond its established scope.”

They said Momenta was trying to suppress generic competition for Lovenox by manipulating the [U.S. Pharmacopeial Convention](#)'s standard-setting process used to ensure the safety of medication. Expanding the Noerr-Pennington immunity shield to such behavior would harm competition and increase costs for consumers, they said.

Amphastar is appealing a ruling by U.S. District Judge Nathaniel M. Gorton dismissing the action. [Amphastar has said](#) Judge Gorton erroneously applied the doctrine because Amphastar's injury stems from Momenta's misconduct before the USP.

In the case, Amphastar alleges that after Momenta deliberately concealed that it held a pending patent

application related to the proposed standard for enoxaparin — the generic name for Lovenox — the Pharmacopeial Convention unknowingly adopted a standard for the drug that reflected the pending patent.

When Amphastar later sought [FDA](#) approval for its version of the drug, Momenta sued, claiming that its patent would be infringed, according to court documents.

Amphastar and its subsidiary International Medication Systems Ltd. sued Momenta and Sandoz in September 2015, alleging violations of the Sherman Act and California antitrust law and unfair business practice law.

The [Federal Trade Commission](#) has also [urged the First Circuit](#) to reverse the district court's ruling, saying that whatever the merits of Amphastar's underlying claims, the judge had misapplied the doctrine.

Momenta, meanwhile, has [argued the district court judge ruled correctly](#). The First Circuit, following the [U.S. Supreme Court](#), has confirmed in previous decisions that there can be no antitrust liability when the only alleged injury resulted from government action, Momenta said.

Consumer Action, the National Health Law Program and the U.S. Public Interest Research Group are represented by David A. Balto, Bradley A. Wasser and Matthew C. Lane of the Law Offices of David A. Balto.

Amphastar and International Medication Systems are represented by Alan D. Rose Sr., Meredith W. Doty and Michael L. Chinitz of [Rose Chinitz & Rose](#) and Jonathan M. Jacobson, Chul Pak, Jeffrey C. Bank, Daniel P. Weick, Seth C. Silber and Elyse Dorsey of [Wilson Sonsini Goodrich & Rosati PC](#).

Momenta is represented by Julia Jill Bredrup and Michael J. Proctor of [Caldwell Leslie & Proctor PC](#) and Daniel C. Winston, Diane Seol, Irene Oberman Khagi, Robert M. Buchanan Jr., John C. Calhoun, Greta Ann Falls, Robert S. Frank Jr., and Sophie F. Wang of [Choate Hall & Stewart LLP](#).

Sandoz is represented by D. Andrew Hatchett, Kimberly Kisabeth Chemerinsky, Matthew D. Kent, Michael P. Kenny and Teresa T. Bonder of [Alston & Bird LLP](#) and Melissa Nott Davis and Thomas P. Steindler of [McDermott Will & Emery LLP](#).

The case is Amphastar Pharmaceuticals Inc. et al. v. Momenta Pharmaceuticals Inc. et al., case number [16-2113](#), in the U.S. Court of Appeals for the First Circuit.

--Editing by Brian Baresch.

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