UNITED STATES v. AN ARTICLE OF DRUG*** DISO-TATE, ET AL.

United States District Court for the Eastern Division of Louisiana.
No. 75-1790.
September 28, 1976.

In an amended complaint to a seizure action against the drug Disodium Edetate (EDTA), the Government sought to enjoin the physician-defendant from continuing to administer the drug for uses for which it was mislabeled and contraindicated. Promotional literature distributed by the physician to prospective patients advocating unapproved drug therapy, coupled with the drug's labeling, which failed to bear adequate directions for such therapy, rendered the drug misbranded under the Federal Food, Drug, and Cosmetic Act.

The Food and Drug Administration is charged with the responsibility of removing misbranded drugs from the flow of interstate commerce. While this is normally done by seizure of the misbranded drug, the court enjoined the actual administration of EDTA by the physician-defendant. The court held that this remedy did not interfere or regulate the practice of medicine since the injunction was the only practical way of removing the misbranded drug from interstate commerce.

Section 502(f)(1), Federal Food, Drug, and Cosmetic Act

MEMORANDUM AND ORDER

GORDON, J., District judge: This matter is before the Court on the motion of the United States of America for a preliminary injunction. After four days of testimony, the Court took the motion under submission.

This suit was originally instituted as a forfeiture action for the seizure and condemnation of the drug Disodium Edetate (EDTA), which is held for sale at Meadowbrook Hospital, on the ground that the drug was misbranded after shipment in interstate commerce.

By way of amended complaint, the United States sought a preliminary injunction in which it requested:

That defendants, H. Ray Evers and Meadowbrook Hospital, their officers, agents, servants, employees, representatives, and all persons in active concert or participation with them, or any of them, be ordered immediately to discontinue the administration of all disodium edetate, calcium disodium edetate and other chelating agents, to notify, all persons shown by defendants' files to have purchased the treatment or to have referred persons to Meadowbrook Hospital for purposes of receiving the treatment, that defendants have been enjoined by order of this Court and may no longer hold said drugs and other chelating agents at Meadowbrook Hospital, and that said defendants will be in

criminal contempt of this Court by delivering said treatment to any person whether directly or indirectly.

Initially, this case began as an action for the seizure of EDTA, which was allegedly misbranded. However, as the prayer for injunctive relief indicates, the Government is now not only attempting to enjoin the misbranding of EDTA, but also its administration. The issuance of the injunction will avoid the necessity of the Government making multiple, and perhaps daily, seizures of EDTA in order to prevent the misbranding of EDTA.

MISBRANDING

Initially, the Government contends that the EDTA at Meadowbrook Hos-

pital is misbranded within the meaning of 21 U.S.C. § 352(f)(1). (1) On June 12, 1975, at an evidentiary hearing on Dr. Evers' motion to dismiss the Government's suit, this Court found:

We have here an instance where a man is broadcasting to the public through other physicians a widespread use of a drug for which not only is the drug not labeled, but for which use is contraindicated. The Court finds the evidence indicates the drug is still in commerce and that under these circumstances, the actions of Dr. Evers, the claimant, have been shown to this Court's satisfaction, to constitute mislabeling or misbranding. (2)

The evidence adduced at the injunction hearing discloses that EDTA has continued to be misbranded by Dr. Evers and his associates at Meadowbrook Hospital. The evidence is undisputed that the defendants have used EDTA in the treatment of arteriosclerosis and other circulatory diseases (chelation therapy). However, the labeling of disodium edetate is as follows:

DISODIUM EDETATE WARNING (BOX)

The use of this drug in any particular patient is recommended only when the severity of the clinical condition justifies the aggressive measures associated with this type of therapy.

ACTION

Disodium edetate forms chelates with the cations of calcium and many divalent and trivalent metals. Because of its affinity for calcium, disodium edetate will produce a lowering of the serum calcium level during intravenous infusion. Slow infusion over a protracted period may cause mobilization of extracirculatory calcium stores. The chelate thus formed is excreted in the urine. Disodium edetate exerts a negative inotropic effect upon the heart...

INDICATIONS

Disodium edetate is indicated in selected patients for the emergency treatment of hypercalcemia and for the control of ventricular arrhythmias and heart block associated with digitalis toxicity...

CONTRAINDICATIONS

Disodium edetate is contraindicated in anuric patients. It is not indicated for the treatment of generalized arteriosclerosis associated with advancing age.

WARNING

See box warning above.

Rapid intravenous infusion or attainment of a high serum concentration of disodium edetate may cause a precipitous drop in the serum calcium level and may result in

fatality. Toxicity appears to be dependent upon both total dosage and speed of administration. The rate of administration and dosage should not exceed that indicated in Dosage and Administration.

Renal excretory function should be assessed prior to treatment. Periodic BUN and creatinine determinations and daily urinanalysis should be performed on patients receiving this drug.

DOSAGE AND ADMINISTRATION

For adults: The recommended daily dosage is 50 milligrams per kilogram to a maximum dose of 3 grams

in 24 hours. The dose, calculated by body weight, should be dissolved in 500 ml. of 5 percent dextrose injection or sodium chloride injection. The intravenous infusion should be regulated so that 3 or more hours are required for completion and the cardiac reserve for completion is not exceeded.

A suggested regimen includes five consecutive daily doses followed by 2 days without medication, with repeated courses as necessary to a total of 15 doses.

As can clearly be seen, not only does the labeling fail to bear adequate direction for its use in the treatment of circulatory diseases, but also it is specifically contraindicated for that type of treatment. The phrase "adequate directions for use" has been construed to mean directions which ate readily intelligible to those without special training. Alberty Food Products v. United States, 194 F. 2d 463 (9th Cir. IM). Nonetheless, 21 U.S.C. § 352(f)(1) recognizes that there are some drugs which, by virtue of their characteristics, such as toxicity or other potentiality for harm, cannot bear adequate directions for lay use. However, such drugs may be marketed if if [sic] they comply with the applicable requirements of 21 C.F.R. § 201.100, including labeling which contains:

(d)(1) ... adequate information for such use, including indications, effects, dosages, routes, methods, and frequency and duration of administration, and any relevant hazards, contraindications, side effects, and precautions, under which practitioners licensed by law to administer the drug can use the drug safely and for the purposes for which it is intended, including all purposes for which it is advertised or represented...

Courts have held that the intended use of a drug is revealed by a number of factors associated with the actual use, promotion, advertising and sale of the drug. As was stated in United States v. Hohensee, 243 F. 2d 367 (3d Cir. 1957):

The intended uses of the products in the present issue [sic] as in Kordel 241 [335 U.S. 345 (1948)] were to cure, ameliorate or prevent diseases. The evidence to prove their uses included both graphic materials distributed and testimony of oral representation to users and prospective users. The latter are no less relevant on the question than the former. (243 F. 2d at 370)

Whether an article is intended to be used for a particular drug use has been determined from newspapers and magazine advertisements, store placards, and television, United States v. An Article... Sudden Change, 409 F. 2d 734 (2d Cir. 1969); from letters and oral representations, United States v. Milipax, Inc., 313 F. 2d 152 (7th Cir. 1963); from speeches delivered at a public lecture hall, Nature Food Centres, Inc. v. United States, 310 F. 2d 67 (1st Cir. 1962); from statements of an authorized distributor, V. E. Irons v. United States, 244 F. 2d 34 (1st Cir. 19157); and from a radio broadcast, United States v. Articles of Drug, Food Plus, Inc., 239 F. Supp. 465 (D. NJ., 1965).

Testimony at the injunction hearing established that Dr. Evers has held a press conference and distributed promotional literature advocating EDTA therapy for cardiovascular therapy, and that

promotional literature of a same sort was distributed at a convention of the National Health Federation. It was shown that Dr. Evers continued to distribute chelation therapy advertising to prospective patients and both he and Meadowbrook Hospital enjoy a national reputation as employing EDTA in the treatment of arteriosclerosis.

Accordingly, it is this Court's conclusion that the intended use of EDTA at Meadowbrook Hospital is in the treatment of arteriosclerosis and that the failure of the drug's label to comply with 21 C.F.R. § 200.100 causes it to be misbranded within the meaning of 21 U.S.C. § 352(f)(1).

AVAILABILITY OF INJUNCTIVE RELIEF

At the outset, the Court notes that the evidence presented as to the existence, vel non,

of irreparable injury caused by the misbranding of EDTA was mixed. Nevertheless, the Court is convinced that unless the continued misbranding of EDTA at Meadowbrook Hospital is enjoined serious and irreparable harm will occur to the individual patients at the hospital and the public generally. See, Morgan v. Fletcher, 518 F. 2d 236 (5th Cir. 1975).

Dr. Kenneth G. Schneider, who is a medical consultant at the Dallas Regional Office of the Public Health Service, testified in detail about three deaths he concluded were directly caused by the administration of EDTA at Meadowbrook Hospital. Dr. Schneider, who was qualified as an expert in preventive and public health medicine, further testified that five other patients died either from renal failure or congestive heart failure following administration of the drug. Dr. John David Spence, a qualified expert in internal medicine, clinical pharmacology and neurology, testified concerning his review of the medical histories of twenty-one Meadowbrook Hospital patients, fourteen of which he concluded died from EDTA therapy. Causes of death ranged from insulin shock, congestive heart failure caused by administration of a high saline solution carrying EDTA, and renal failure.

Finally, Dr. George L. Bailey, Clinical Professor of Medicine at Tulane University Medical School, and an expert in toxicology and nephrology, testified that EDTA should be employed solely for the treatment of lead poisoning (and even then at great risk). One woman patient retained nearly forty pounds of edematous fluid because Meadowbrook Hospital maintained her on a highly saline solution containing EDTA, which fluid Dr. Bailey removed by means of dialysis.

Admittedly, several doctors and a number of individuals testified on Dr. Evers' behalf as to the beneficial effects of EDTA chelation therapy. The Court in balancing the value of this testimony is satisfied that the possible benefits of the EDTA therapy employed at Meadowbrook is far outweighed by the serious actual and potential damage caused by the drug in such therapy. Unrebutted evidence has established that EDTA chelation therapy has been indiscriminately applied to patients at Meadowbrook Hospital and that a number of them have died as a result. This Court is not in a position to condone the haphazard application of a drug for treatment of conditions for which its use is contraindicated. To do so would be to authorize the deaths of many in the faint hope of saving a few.

As a general proposition, the Food and Drug Administration is charged with the responsibility of removing misbranded drugs, from the market. Normally, this is done by seizure of the article in question. 21 U.S.C. § 334. However, in the case at bar, the Government wishes to go one step further by enjoining the actual administration of EDTA by Dr. Evers and his employees at Meadowbrook Hospital. Initially, the Court expressed concern over the possibility that such an injunction would constitute an unwarranted interference with the practice of medicine. However, a closer analysis of the jurisprudence and the particular facts of this case reveal that the injunctive relief as requested by the Government is not only lawful but also compelled.

In United States v. Hoxsey Cancer Clinic, 198 F. 2d 273 (5th Cir. 1952), the Court authorized the issuance of an injunction against a cancer clinic staffed by licensed physicians from misbranding

drugs dispensed to patients and physicians in interstate commerce. In sanctioning injunctive relief against the physicians employed at the clinic, the Court noted that it was its "duty to adjudge the merits of the case in the light of the provisions of the Federal Food, Drug and Cosmetic Act, supra, which close the channels of interstate commerce against drugs which are misbranded." See also, Reich v. United States, 239 F. 2d 134 (5th Cir. 1956).

In the case at bar, the Court feels that the requested injunction is justified as the only possible means of removing the misbranded drugs from interstate commerce. The evidence has established

that Dr. Evers and his employees at Meadowbrook Hospital have continued to obtain quantities of EDTA and applied it to uses for which it is mislabeled and contraindicated. By enjoining the administration of EDTA at Meadowbrook the Government, will not have to resort to multiple, and perhaps daily, seizures of the drug. Furthermore, mere seizure of the drug, in this case, would be a particularly inefficient means of preventing the misbranding of EDTA. In view of Dr. Evers' demonstrated proclivity for administering the drug for treatment for which its use is contraindicated, irreparable harm may occur to patients before the drug could be seized.

The Court is of the further opinion that such an injunction will not interfere with or regulate the practice of medicine in any degree greater than it is already regulated under the Food, Drug and Cosmetic Act. As noted above, the Food and Drug Administration is charged with responsibility of removing misbranded drugs from the flow of interstate commerce. The injunction as prayed for by the Government is the only practical and equitable means of carrying out that responsibility in the case at bar. (3)

Accordingly, IT IS ORDERED that the motion of the United States of America for a preliminary injunction as prayed for in its amended complaint be, and hereby is, GRANTED.

Footnotes

- 1. 21 U.S.C. § 352(f)(1) provides that "A drug or device shall be deemed misbranded ... (f) unless its labeling bears (1) adequate directions for use;..."
- 2. Transcript of motion to dismiss, p. 146.
- 3. This is not to say that a licensed physician cannot utilize a drug for experimental or investigational uses, which would otherwise cause the drug to be misbranded. To use a drug in such a way, the physician is obligated to follow the procedure set forth at 21 U.S.C. § 355(f) and the complementing regulations found at 21 C.F. R. 8 312. 1. Suffice it to say that such procedures were not followed in this case.