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## RESPONSE

# RESPONSE TO: “PAY-TO-PLAY: THE IMPACT OF GROUP PURCHASING ORGANIZATIONS ON DRUG SHORTAGES”

CURTIS ROONEY\*

The Note authored by Christian DeRoo in Vol. 3.1 of the American University Business Law Review<sup>1</sup> fails to cite important and persuasive legal precedent related to the subject matter. For example, the U.S. 8th Circuit Court of Appeals in *Southeast Missouri Hospital v. C.R. Bard, Inc.* summarily dismissed the argument that GPO compensation through vendor payments gives incentive to hospitals and GPOs to overpay for medical devices to the detriment of Medicare and Medicaid, forcing competitors out of the market.<sup>2</sup> In fact, in the previous hearing by the 8th Circuit, the court described one of the expert reports in this case (authored by the same experts that DeRoo cites) as “fatally flawed”.<sup>3</sup> A similar report by two of the same authors was also rejected as “unbelievable” by practitioners in the field, including the Mayo Clinic, New York-Presbyterian, BJC Healthcare, Memorial Hermann, and other large hospitals.<sup>4</sup>

Mr. DeRoo argues that “many of the agreements entered into between GPOs and pharmaceutical manufacturers amount to exclusionary

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1. Christian DeRoo, *Pay-to-Play: The Impact of Group Purchasing Organizations on Drug Shortages*, 3 Am. U. Bus. L. Rev. 227 (2014).

2. *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 616-17 (8th Cir. 2011).

3. *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 616 F.3d 888, 893 (8th Cir. 2010), *vacated, reh'g granted*, 642 F.3d 608 (2011).

4. Letter from fourteen of the nation’s largest hospitals (including Mayo Clinic, New York-Presbyterian Hosp., Mem’l Hermann, et al.) to Eamonn P. Hobbs, Chairman of the Board, Med. Device Mfr. Ass’n (Dec. 13, 2010) (on file with author).

agreements, either explicitly through contractual arrangements, or implicitly through arrangements between the GPO and member hospitals.”<sup>5</sup> Unfortunately, he fails to mention that the United States District Court for the District of New Jersey recently rejected this argument when an antitrust plaintiff challenged “loyalty-discount” contracts.<sup>6</sup> The Court held that such contracts are not anticompetitive, as a matter of law, as long as the prices they offer are above-cost.<sup>7</sup>

Eisai and its expert witnesses (Einer Elhauge and Nicholas Economides) argued, *inter alia*, that Sanofi’s contracts prevented customers from buying less expensive rival products, raised rivals’ costs, and imposed “disloyalty penalties” on customers who failed to satisfy Sanofi’s purchase requirements.<sup>8</sup> The court rejected these arguments.<sup>9</sup> Contrary to Eisai’s allegations, the evidence showed that customers can and did buy from Sanofi’s rivals, and nothing in Sanofi’s contracts prevented them from doing so, other than a low price.<sup>10</sup> The contention that Sanofi’s practices raised rivals’ costs was, the court found, nothing more than another observation about the effects of Sanofi’s pricing.<sup>11</sup> The court noted that Eisai’s argument that Sanofi’s prices were not really discounts, but rather “disloyalty penalties,” was “a matter of semantics.”<sup>12</sup> (Op. at 65.)

The argument put forward here is that GPOs “create decreased pharmaceutical manufacturer diversity and a fragile supply chain” and therefore, a drug shortage.<sup>13</sup> Aside from the fact that GPOs existed long before the current drug shortage, these identical arguments have already been put forward by Phillip Zweig, Executive Director, Physicians Against Drug Shortages, a long-time paid consultant for the medical device industry.<sup>14</sup> Mr. Zweig has argued that GPOs inflate the cost of medical prices and used reports by Robert Litan and Hal Singer to support his

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5. DeRoo, *supra* note 1, at 232-33.

6. *See* Eisai, Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168 (MLC), 2014 WL 1343254 (D.N.J. Mar. 28, 2014).

7. *Id.* at \*30.

8. *Id.* at \*26.

9. *Id.* at \*29.

10. *Id.* at \*26.

11. *Id.* at \*27-28.

12. *Id.* at \*28.

13. DeRoo, *supra* note 1, at 227.

14. Patricia Earl & Phillip L. Zweig, *Connecting the Dots: How Anticompetitive Contracting Practices, Kickbacks, and Self-dealing by Hospital Group Purchasing Organizations (GPOs) Caused the U.S. Drug Shortage*, PHYSICIANS AGAINST DRUG SHORTAGES 2-4 (Jan. 4, 2012), available at <http://www.http://nebula.wsimg.com/c10f39efefbebd4f6475c3c890e98b8b?AccessKeyId=62BC662C928C06F7384C&disposition=0&alloworigin=1>.

statements.<sup>15</sup> Unfortunately, for both Mr. Zweig and Mr. DeRoo, it is impossible to argue that GPOs drive out competition in the generic pharmaceutical market while citing reports that say GPOs inflate health care costs in the medical device market. One must choose a side and stick with it. Fortunately, the General Accountability Office (GAO) and the Food and Drug Administration (FDA) recently reaffirmed that the root causes of drug shortages are manufacturing problems, quality issues and barriers to getting new suppliers on line when supply is disrupted.<sup>16</sup> Drug shortages are a complex challenge with no overnight fix. In summary, the courts are likely to continue to summarily dismiss specious arguments like the one's Mr. DeRoo promotes.<sup>17</sup> In the meantime, GPOs will continue their commitment to being a part of the solution.

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15. *Id.* at 3.

16. United States Government Accountability Office, *Drug Shortages: Public Health Threat Continues, Despite Efforts to Help Ensure Product Availability*, GAO.gov 21-24 (Feb. 2014), available at <http://www.gao.gov/assets/670/660785.pdf>.

17. See generally DeRoo, *supra* note 1.