GCR NEWS
GLOBAL COMPETITION REVIEW

Litigators of the Week: Counsel to the AndroGel defendants

Ben Remaly
20 July 2018

Eric Grannon and Paul Eckles

Court dockets show little success for drugmakers in blocking direct purchasers from obtaining class certification in pay-for-delay cases. So defence counsel had particular reason to celebrate this week when a judge rejected class status for the pharmaceutical wholesalers seeking damages from reverse-payment settlements for Androgel.

Judge Thomas Thrash of the US District Court for the Northern District of Georgia ruled on Monday that the direct purchasers had not proven the formation of a class was necessary.

White & Case partner Eric Grannon said, "This appears to be only the second time that direct-purchaser plaintiffs have been denied class certification in a reverse payment case in the 20 or so years these cases have been litigated."

The plaintiffs accuse the defendants – Solvay, Actavis, Par and Paddock – of trying to keep a generic version of Androgel off the market. Solvay, which is now part of AbbVie, allegedly paid the generic drugmakers to delay market entry of competing versions of the testosterone gel.

But Judge Thrash said the plaintiffs did not meet the first prerequisite for class certification – numerosity – because they had "failed to show that joinder would be impracticable" for the few dozen drug wholesalers in the US. The "ease of identification" and individual size among the direct purchasers meant a joinder would suffice, he ruled.

As counsel to Par Pharmaceutical, Grannon said, "It's gratifying that the court evidently found our brief and appendix that provided detailed background on each of the putative class members useful in reaching the decision to deny class certification."

First published on the *Global Competition Review* website, 20 July 2018
www.globalcompetitionreview.com

The "drudgery" and "grunt work" of accumulating data on the potential putative class members into an appendix may have had the biggest impact in the result, Grannon said.

Defence counsel provided the judge with a single-sheet chart describing the direct purchasers, including information such as the damages sought, the purchasers' annual revenue, whether the companies had previously litigated antitrust cases in federal court, and whether they had litigated in Georgia.

Underlying the chart were more than 50 footnotes substantiating the materials.

Judge Thrash cited the appendix multiple times in his ruling on Monday. The chart indicated the notable size and resources of plaintiffs such as McKesson and Cardinal Health that sport revenues in the billion-dollar ranges.

"The vast majority of the proposed class members seem to have revenue of at least tens of millions of dollars per year, including at least ten members that have revenue in the billions," the judge wrote.

Both Grannon and counsel to Actavis, Paul Eckles of Skadden Arps Slate Meagher & Flom, said they had help from the US Court of Appeals for the Third Circuit, in the form of the appeals court's 2016 *Modafinil* ruling.

In July 2016, the Third Circuit reversed class certification for direct purchasers alleging a pay-for-delay agreement. It told the lower court that it should place more emphasis on judicial economy and the claimants' ability and motivation to litigate as joined plaintiffs.

Judge Thrash wrote that "the only factor potentially weighing in favor of certification is the geographic dispersion of the class," as the drug wholesalers are spread from San Francisco to Vermont.

Previous class certification rulings have viewed geographic dispersion arguments favourably for plaintiffs. For example, in *Wellbutrin XL*, the US District Court for the Eastern District of Pennsylvania found "the class members' geographic dispersion would cause substantial difficulty for the parties to conduct discovery efficiently and to coordinate the litigation."

The US District Court for the Northern District of California granted class certification in *Lidoderm*, noting "wide geographic dispersion of the DPPs also weighs against joinder."

Lidoderm acknowledged, as Thrash noted of the *Androgel* putative class, that several plaintiffs were plenty large enough to be able to litigate through joinder.

But the California federal court ultimately determined that three of the direct purchaser plaintiffs had made a majority of the disputed purchases, and concluded that "these smaller DPPs also may not have the market-power security to challenge defendants when they need to negotiate to purchase drugs from these same entities in the future."

In contrast, Judge Thrash did not give much weight to that argument – that plaintiffs without a class action may feel intimidated about challenging drugmakers – in his ruling.

"In a joint action, especially one with so many large plaintiffs, the smaller plaintiffs would have little more involvement than they would under a class action. And although a class action would shield smaller plaintiffs from discovery, it is not as if it would shield their identity," he wrote.

First published on the *Global Competition Review* website, 20 July 2018
www.globalcompetitionreview.com

GCR NEWS
GLOBAL COMPETITION REVIEW

Given the relative paucity of district court rulings denying class certification for direct purchaser plaintiffs alleging reverse-payment settlements – Judge Thrash noted only one in his judgment – fending off the bid for class status by the Androgel plaintiffs makes the drugmakers' defence counsel our Litigators of the Week.

Counsel to Actavis

Skadden Arps Slate Meagher & Flom

Steven Sunshine, Paul Eckles, Julia York, and Timothy Grayson in Washington, DC

Morris Manning & Martin

Benjamin Warlick in Atlanta

Counsel to Par Pharmaceutical and Paddock

White & Case

Eric Grannon and Adam Acosta in Washington, DC

Greenberg Traurig

Michael King in Atlanta, GA

Counsel to AbbVie

Munger Tolles & Olson

Rohit Singla, Jeffrey Weinberger, Adam Lawtori, Joshua Meltzer, and Justin Raphael in Los Angeles

Alston & Bird

Teresa Bonder and Matthew Kent in Atlanta, Georgia

Counsel to Louisiana Drug Company

Garwin Gerstein & Fisher

Bruce E Gerstein, Joseph Opper, and Elena K Chan, in New York, NY

Smith Segura & Raphael

David P Smith and Susan Segura in Alexandria, LA

Odom & Des Roches

John Gregory Odom, Stuart Des Roches, Andrew Kelly and Dan Chiorean in New Orleans, LA

Heim Payne & Chorush

First published on the *Global Competition Review* website, 20 July 2018
www.globalcompetitionreview.com

GCR NEWS
GLOBAL COMPETITION REVIEW

Russell A Chorush and Miranda Jones in Houston, TX

Liaison Counsel for Direct Purchaser Class Plaintiffs

Berger & Montague

David F Sorensen, Ellen Noteware, and Nicholas Urban in Philadelphia, PPA

Kenneth S Canfield in Atlanta, GA

Doffermyre Shields Canfield & Knowles

Kenneth S Canfield in Atlanta, GA

Counsel for Rochester Drug Co-operative

Faruqi & Faruqi

Peter Kohn in Jenkintown, PA

Counsel for Meijer Inc

Vanek Vickers & Masini

Joseph M Vanek and David P Germaine in Chicago, IL

First published on the *Global Competition Review* website, 20 July 2018
www.globalcompetitionreview.com