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What DOJ Investigation Means For Generic Drug Plaintiffs

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More than 80 named plaintiffs whose antitrust claims have been consolidated in Philadelphia recently learned that discovery in their cases will be stayed until August pending further developments in the U.S. Department of Justice investigation into the generic pharmaceutical industry. Observers to these closely watched cases are left to consider whether: (1) the government investigation will confirm or undermine the wide-ranging allegations of price-fixing among the more than 30 defendants named in the lawsuits; (2) a related action brought by 40 state attorneys general against the industry will be folded into the proceedings in Philadelphia or be permitted by the Judicial Panel on Multidistrict Litigation to proceed in Connecticut, where that case was filed; and (3) how the private plaintiffs might productively use the next several months to strengthen their cases without the benefit of discovery from defendants.

Background

On May 22, 2017, U.S. District Judge Cynthia Rufe entered an order staying all discovery in the private plaintiff litigation consolidated before her by the Multidistrict Litigation (MDL) panel.[1] These cases allege that generic drug manufacturers unlawfully conspired to fix prices on various medications since approximately 2013. According to the complaints, the conspiracy involved more than 30 generic drug manufacturers, including such heavyweights as Teva, Mylan and Actavis.

The plaintiffs claim that the defendants fixed the prices of and illegally allocated markets for some 18 different generic drugs, ranging from dermatological treatments to medicines for epilepsy, heart conditions and depression. The plaintiffs include retail pharmacies, drug resellers, health insurers, labor unions and consumers who are proceeding as representatives of putative classes of similarly situated parties. The complaints cite an ongoing investigation into the industry, which includes guilty pleas for price-fixing by the former CEO and the president of generic manufacturer Heritage Pharmaceuticals Inc. and a resulting cooperation agreement between the former Heritage executives and federal and state regulators.

The Current Stay in Litigation

Judge Rufe's May 22 stay order resulted from a stipulated agreement between the Antitrust Division and the named plaintiffs to hold off on discovery in the consolidated case so as not to interfere with the government's ongoing investigation into the generic drug industry. Plaintiffs are prohibited under the order from serving discovery requests on the defendants until Sept. 15, 2017.

Beyond the guilty pleas of the two Heritage executives, little is known about the results of the government's investigation, which began three years ago and has resulted in the issuance of investigative subpoenas to various players in the industry. Under the division's amnesty program, targets of such investigations are incentivized to come forward and cooperate with the government by providing evidence of their own and others' involvement in the alleged conspiracy, so it is likely that one or more of the defendants in the litigation are effectively turning state's evidence on their fellow generic drug manufacturers. In light of this cooperation, the federal government's investigation undoubtedly will shed more light on the scope of the actual price-fixing conspiracy: which drugs and which manufacturers were involved, as well as the length of the conspiracy and how it functioned. The state attorneys general who filed the Connecticut action may already have a deeper understanding of these issues and the available evidence of collusion, as suggested by the redaction of substantial portions of the allegations in their complaint, the complete version of which the district court allowed the states to file under seal. All of this may ultimately benefit the private plaintiffs in their opposition to defendants' expected challenge to their complaints as factually deficient and their conspiracy theory as implausible given the number of drugs allegedly subject to collusive activity.

The 40-State Connecticut Action: To Consolidate or Not to Consolidate

Meanwhile, the state attorneys general are resisting efforts to have their case transferred to Judge Rufe. The states claim that consolidation of their case with that of the private plaintiffs would be improper because they initiated the investigation years ago and are entitled to their choice of forum both because their case is different in important respects from the private plaintiffs' litigation and because transfer will only result in delay. The MDL panel will hear argument on the transfer issue on July 27, 2017.

Even if transfer is ordered, the states' case will be consolidated solely for pretrial purposes, namely discovery and dispositive motion practice. Like the other cases in the MDL that were filed outside of Philadelphia but later transferred to Judge Rufe, the states' action would be tried in the jurisdiction where the case was first filed, Connecticut. The defendants named in the cases may prefer to deal with a single consolidated proceeding involving the private plaintiff cases and the state attorneys general, but such an order might foster greater cooperation between the parties aligned against the generic drug manufacturers and, in turn, a greater chance of being found liable and subject to crushing damage awards.

Activity During the Stay

Private plaintiffs in the MDL, and the large population of potentially injured companies who are closely watching the case, undoubtedly will be following developments in the Antitrust Division's investigation and the state attorneys general case over the next several months. Even though discovery has been stayed in the MDL cases, there is much for these parties to do between now and mid-September.

First, Judge Rufe has ordered that the plaintiffs file consolidated, amended complaints for each of the drugs at issue and by each of the subclasses of claimants: direct purchasers, indirect resellers and end-payer plaintiffs. Second, each private plaintiff and potential claimant should be taking steps to make

sure they preserve their purchase data and using this time to carefully review that data for the 18 generic drugs at issue in the MDL to determine on what drugs and against which defendants they may have viable claims. Third, these putative direct action plaintiffs should have the prices they paid on those drugs analyzed. Publicly available information indicates that many of the drugs experienced a pricing pattern consistent with a price-fixing conspiracy: sharp, unexplainable spikes in price followed by sustained high pricing for a period of time and ultimately steep declines back to pre-2013 prices after the commencement of the government's investigation of the industry. Fourth, companies that purchased large quantities of generic drugs should be reviewing their contracts with their suppliers to determine whether they "own" the claims and whether those claims are as direct or indirect purchasers. Answers to these questions will dictate the best way forward for these companies to remedy the injuries they have allegedly suffered.

Only time will tell how the various antitrust cases against the generic drug industry will fare. Developments over the next several months, however, will play a significant role in the outcome of these cases despite the fact that discovery in the MDL has been stayed.

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[1] See MDL No. 2724.
