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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Restasis Payors Defend Class Cert. Bid In Allergan Suit

By **Christopher Cole**

Law360 (October 11, 2019, 6:26 PM EDT) -- A group of Restasis buyers on Friday defended class certification in their New York federal suit accusing Allergan of boosting profits by delaying a cheaper generic version of the dry-eye medication, saying they share numerous, common antitrust injuries.

Allergan filed papers the day before asking the court to turn down the certification bid, saying it's not justified because many brand-loyal customers wouldn't have dropped Restasis anyway, even with a generic on the market.

Generally, the multidistrict litigation claims Allergan used tactics such as fraudulently obtaining secondary patents and trying to get tribal immunity to stave off generic competition for the popular and highly profitable drug, at buyers' expense.

"Allergan concedes that issues common to the class include all of Allergan's numerous bad acts: Allergan's fraud on the Patent and Trademark Office, its baseless litigation and citizen petitions and its attempt to rent sovereign immunity from a Native American tribe," the end payors said. "This common proof alone warrants class certification."

The plaintiffs' group said despite such predominance of common issues, Allergan said antitrust injury for all class members "cannot be adequately demonstrated by common proof, relying largely on one out-of-circuit decision."

"Courts in this circuit have consistently held that a showing of widespread impact across the class satisfies predominance" they said, but added that Allergan had made arguments against certification that disregard the case law.

The suits claim Allergan took extraordinary actions to protect Restasis, which earned \$1.4 billion in 2017 and still lacks generic competition.

Allegations include that the drugmaker misused citizen petitions to delay generics, fraudulently obtained secondary patents, wrongly submitted those patents to the U.S. Food and Drug Administration to block generic approvals, filed flimsy patent infringement suits and improperly transferred its weak patents to a Native American tribe in an effort to prevent their invalidation.

On Thursday, the drugmaker fought efforts to certify a class of end payors, saying the number of unharmed and unidentifiable potential class members weighs against it.

Allergan cited the First Circuit's recent decision in *In re: Asacol Antitrust Litigation*, and what it said was applicable Second Circuit authorities. In *Asacol*, the First Circuit denied certification to end payors asserting pharmaceutical antitrust claims on the grounds that a substantial number of putative class members — about 10% — were unharmed and could not be identified without individualized analysis, Allergan said.

The case for denying class certification is even stronger with the Restasis case, Allergan said, because the number of unharmed and unidentifiable class members is "significantly higher, probably in the range of 14-25%, if not more," and Second Circuit case law "is even stricter than First Circuit

law in requiring putative classes to have no unharmed members."

Several unique aspects of the case guarantee that numerous consumers and third-party payors that would not have been harmed by alleged delays in generic entry are "impermissibly part of the putative class and make it impossible to identify and exclude such class members absent a highly individualized inquiry," Allergan said.

The end payors said Friday, however, that the drugmaker's argument "turns on Allergan's experts' unfounded and debunked speculation about the presence of uninjured class members. Allergan ignores long-standing economic literature, record evidence and the track record of similar drugs when it argues that the market share captured by a generic version of Restasis will be lower than in analogous circumstances."

Counsel for Allergan and the end payor plaintiffs didn't immediately respond to requests for comment Friday.

The end payor plaintiffs are represented by Dena C. Sharp, Scott Grzenczyk and Tom L. Watts of Girard Sharp LLP, Eric B. Fastiff, David T. Rudolph, Adam Gitlin and Kathleen M. Konopka of Lieff Cabraser Heimann & Bernstein LLP, Joseph R. Saveri and V Chai Oliver Prentice of Joseph Saveri Law Firm Inc., and Dan Drachler, Robert S. Schachter and Sona R. Shah of Zwering Schachter & Zwering LLP.

Allergan is represented by M. Sean Royall, Jason C. McKenney, Eric J. Stock, Adam J. Jantzi and Clifford S. Hwang of Gibson Dunn & Crutcher LLP.

The case is *In re: Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, case number 1:18-md-02819, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Dani Kass and Jeff Overley. Editing by Stephen Berg.

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