

Individualized Claims Thwart Testosterone RICO MDL

By **Diana Novak Jones**

Law360 (July 27, 2018, 9:11 PM EDT) -- An Illinois federal judge rejected a bid to certify a class of third-party payors bringing Racketeer Influenced and Corrupt Organizations Act claims against AbbVie Inc., Eli Lilly & Co. and other makers of testosterone replacement therapy products on Thursday, saying the allegations are too individualized to proceed as a whole.

U.S. District Judge Matthew Kennelly rejected Medical Mutual of Ohio's bid for certification of a class of insurance companies, health care benefit plans and other groups in a suit accusing the pharmaceutical companies of orchestrating a many-layered scheme to get paid for medically unnecessary testosterone prescriptions.

But the alleged scheme would have likely impacted different insurers and health care payors in different ways, the judge said, making it difficult to certify a class that could include 10,000 or more third-party payors.

"Individualized issues are not just present in this case, but rather loom large," he wrote.

Separately, Judge Kennelly also said Medical Mutual would not work as a class representative.

There is some evidence the insurer did not move to limit testosterone replacement prescriptions until years after it learned of the pharmaceutical companies' alleged misrepresentations, Judge Kennelly said. That, combined with questions about Medical Mutual's methods for evaluating drugs for its formulary, makes the Ohio-based insurer vulnerable to several individualized defenses from the drug companies, he said.

"The court concludes that the evidence of MMO's unconventional pharmacy management practices could hinder its ability to prove crucial elements of its case such as receipt of and reliance on defendants' alleged misrepresentations," the judge wrote.

Judge Kennelly is overseeing the multidistrict litigation targeting a variety of pharmaceutical companies over claims they downplayed the risks associated with testosterone replacement therapy while aggressively marketing it to men and doctors as a sort of fountain of youth.

The vast majority of the MDL's nearly 6,000 cases are brought by individual plaintiffs who say they suffered a heart attack or other injuries while using the testosterone products.

Medical Mutual of Ohio's case, filed in November 2014, stands out as a unique take on the same alleged scheme. In addition to conning consumers and doctors, Medical Mutual claims the pharmaceutical companies targeted third-party payors and the people they trusted to choose drugs for their formularies with false marketing about the drugs' safety and efficacy.

The company sought to represent a nationwide class of third-party payors who covered the cost of a testosterone replacement therapy product and included one on their formularies between Jan. 1, 2000, and Jan. 31, 2014. It also requested certification of a subclass of Ohio-based third-party payors.

After an initial ruling trimming some of their claims, Medical Mutual moved for certification on violations of the RICO Act, conspiracy to violate the act, and negligent misrepresentation under Ohio common law. The claims are brought against AbbVie, Actavis PLC, Endo Pharmaceuticals Inc. and Eli Lilly, as well as their subsidiaries and affiliated companies.

But in Friday's order, Judge Kennelly said there were problems with Medical Mutual's case.

Many aspects of proving the RICO claims on a class basis would require showing all of the class members received the same misrepresentations about the drugs, and then based their decisions to cover the drugs on those misrepresentations, the judge said. That likely can't be answered with common evidence, he said.

And there are also problems with Medical Mutual serving as the class' representative, the judge said.

First, the company doesn't appear to have implemented a prior authorization requirement to monitor reimbursements for topical testosterone products until about four years after Medical Mutual claims it first learned of the alleged fraud.

It approved that requirement in 2016, but apparently didn't implement it until late 2017 when discovery from the lawsuit revealed the company wasn't actually adhering to it, the judge said.

Plus, additional evidence that the company's methods for evaluating the drugs on its formularies — including testimony from Medical Mutual's vice president of pharmacy — were not in line with industry standards would make it hard for it to convince a jury that it relied on the pharmaceutical companies' false claims, Judge Kennelly said.

Counsel for the proposed class declined to comment Friday. Representatives for the pharmaceutical companies did not respond to requests for comment.

AbbVie is represented by William F. Cavanaugh Jr. and Jonah M. Knobler of Patterson Belknap Webb & Tyler LLP.

Actavis is represented by James W. Matthews, Katy E. Koski, Redi Kasollja and David B. Goroff of Foley & Lardner LLP.

Endo is represented by Ingo W. Sprie Jr., Andrew K. Solow and Robert Grass of Arnold & Porter.

Eli Lilly is represented by David E. Stanley and Janet H. Kwuon of Reed Smith LLP.

Medical Mutual of Ohio is represented by W. Scott Simmer and Thomas J. Poulin of Baron & Budd PC, Allan Kanner, Conlee S. Whiteley, Layne C. Hilton and Marshall L. Perkins of Kanner & Whiteley LLC, and Ruben Honik and David J. Stanoch of Golomb & Honik PC.

The case is Medical Mutual of Ohio v. AbbVie Inc. et al., case number 1:14-cv-08857, in the U.S. District Court for the Northern District of Illinois.

--Editing by Adam LoBelia.

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