

AbbVie, Eli Lilly Beat Insurer's RICO Suit in Testosterone MDL

By **Diana Novak Jones**

Law360 (February 15, 2019, 9:38 PM EST) -- An Illinois federal judge entered judgment in favor of AbbVie and other makers of testosterone replacement drugs in a Racketeer Influenced and Corrupt Organizations Act suit brought by an insurer on Thursday, saying there was no evidence the insurer was misled by the companies.

U.S. District Judge Matthew Kennelly granted the pharmaceutical companies' motions for summary judgment in Medical Mutual of Ohio's suit after finding the insurer hadn't shown it was deceived by false information AbbVie Inc., Eli Lilly and Co., Endo Pharmaceuticals Inc., Actavis Inc. and Auxilium Pharmaceuticals Inc. disseminated about the safety and efficacy of their testosterone products.

Medical Mutual's suit claimed the companies had pushed their testosterone drugs as a fountain of youth for aging men while downplaying the accompanying increased risk of heart attacks and other dangerous side effects. As a result, the company had been scammed into paying for thousands of medically unnecessary prescriptions, their suit said.

The claims stood out among thousands of suits over the testosterone drugs' alleged hidden risks — most of them brought by individuals — that are centralized in multidistrict litigation before Judge Kennelly. But on Thursday, the judge said the insurer hadn't produced evidence to support its claim that it made payment decisions based on misrepresentations by the pharmaceutical companies.

"Even if a reasonable jury could find that defendants made false or misleading statements to [Medical Mutual] about the safety or efficacy of their [testosterone] drugs, it could not find that [Medical Mutual] relied on them to make any formulary or utilization management decision regarding the drugs," the judge wrote in his opinion.

Those problems negate Medical Mutual's RICO and negligent misrepresentation claims brought under Ohio state law, Judge Kennelly said.

The ruling follows Judge Kennelly's rejection of Medical Mutual's bid for certification of a class of third-party payors, handed down last July.

In that ruling, the judge said Medical Mutual's proposed class, which could have included more than 10,000 insurers and health care payors nationwide, had too many individualized problems to proceed as a group.

And Medical Mutual wouldn't work as a class representative, he said, because it would be open to attacks from the pharmaceutical companies about when it learned about the drugs' supposed dangers.

Medical Mutual had moved for class certification after Judge Kennelly initially allowed its RICO claims to move forward. In an August 2016 ruling, the judge said the insurer had made a plausible case to support its allegations of conspiracy under RICO.

But on summary judgment, Judge Kennelly said there wasn't enough there to put the claims before a jury.

Reviewing emails and other documents produced in the more than 4-year-old case, Judge Kennelly said there was evidence that representatives from the pharmaceutical companies had met with staff at Medical Mutual and the pharmacy benefit managers it relied on to select drugs for the list it would cover. However, there wasn't much about what misrepresentations the pharmaceutical companies made at those meetings, he said.

And there was no evidence to back Medical Mutual's claims that it or the pharmacy benefit managers actually made decisions based on these purported misrepresentations, the judge said.

For one thing, Medical Mutual says it adopted wholesale the lists of drugs, or formularies, its pharmacy benefit managers provided, Judge Kennelly said. Therefore, it couldn't have relied on the drug companies' information to select their products.

And while Judge Kennelly didn't express an opinion as to whether RICO claims could rest on alleged misrepresentations made to the pharmacy benefit managers, he said there wasn't evidence of that either. Jason Dohm, the corporate representative from pharmacy benefit manager Medco — which later became Express Scripts — said he didn't know when his company decided to put testosterone replacement therapy drugs on their formulary and couldn't say either way if his company had relied on information from the pharmaceutical companies, according to the order.

"For a jury to conclude that Medco or [Express Scripts] added defendants' [testosterone] drugs to their formularies in reliance on information provided by defendants, based only on Dohm's testimony that ESI and Medco consider such information as a general practice, would require guesswork," Judge Kennelly wrote.

Representatives for the pharmaceutical companies and for Medical Mutual did not respond to requests for comment on Friday.

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, Jonathan W. Garlough and David B. Goroff of Foley & Lardner LLP.

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

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

Medical Mutual is represented by W. Scott Simmer and Noah Rich of Baron & Budd PC, Allan Kanner, Conlee S. Whiteley and Layne C. Hilton 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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