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Restasis Buyers Win Cert. Battle In Allergan Monopoly Case

By **Anne Cullen**

Law360 (May 6, 2020, 4:52 PM EDT) -- Health care plans, welfare funds and other buyers of Allergan's extremely successful dry eye treatment Restasis have won class certification in the sweeping litigation accusing the drugmaker of illegally keeping generic rivals on the sidelines, with three firms tapped to head up their legal team.

In a lengthy decision out of New York federal court Tuesday, U.S. District Judge Nina Gershon certified **a class of end-payors** — which is estimated to cover up to 40,000 benefit plans as well as more than 1 million insured and uninsured consumers — over objections from Allergan **that the group included too many uninjured buyers**.

"There is, in short, no support for defendant's contention that the mere existence of uninjured class members in this putative class compels denial of [end-payor plaintiffs'] motion," Judge Gershon said.

She also cemented Girard Sharp LLP, Lieff Cabraser Heimann & Bernstein LLP and the Joseph Saveri Law Firm's positions as co-lead counsel and tapped Zwerling Schachter & Zwerling LLP for the liaison counsel spot. All four firms had held the same positions on an interim basis for the past two years.

"I carefully reviewed the qualifications, experience, and resources of these attorneys when I appointed them to their interim roles, and the attorneys' work since then, including on this motion, serves as further assurance that they are extremely qualified and able to represent the certified class," the judge said.

The lawsuit, which is part of multidistrict litigation that was combined before Judge Gershon in early 2018, centers on claims that Allergan deployed a multifaceted campaign to keep generic Restasis off the market for years after the patent for its branded treatment had expired.

Buyers at every link in the Restasis distribution chain — drug wholesalers, retailers, benefit plans and consumers — say the strategy allowed Allergan to keep demanding premium prices for the widely used treatment. Restasis pulls in more \$1.5 billion in sales for the pharmaceutical giant each year, according to case filings.

The end-payors moved for class certification a year ago, which Allergan vehemently opposed, prompting months of extensive briefings and daylong hearings in September and October.

Central to the certification battle were figures put forth by both sides' experts estimating how many drug purchasers would've stuck with Restasis even if a cheaper drug was available. The end-payors' expert clocked the figure at less than 6%, though Allergan pegged that estimate as "unreasonably low."

Judge Gershon took the buyers' side Tuesday, noting that she "readily accept[s]" the class expert's theory. She also highlighted that dry eye is a chronic condition, so even if a buyer opted for the generic option just one time, they still would've been harmed by the purported conspiracy.

The fact that end-payors were bringing claims under dozens of state laws proved to be another sticking point, as Allergan said the distinctions in these varying statutes will make a unified class

action unmanageable.

Judge Gershon initially found that a trial plan set out by the buyers was insufficient to show that a multistate class action was the right way forward, but she said Tuesday that the buyers' reworked strategy fared better. The class's new plan grouped state laws based on varying requirements and drafted questionnaires for the jury that would address those differences.

"EPPs have met their burden of demonstrating, through an extensive analysis of state law variations, that class certification does not present insuperable obstacles," she said.

The end-payors were also able to cull some of Allergan's expert evidence Tuesday, as Judge Gershon threw out opinions from three of Allergan's experts in a separate order, finding they were impartial, irrelevant and untrustworthy.

The experts had testified that many doctors would've still prescribed brand Restasis even if a generic was available due to concerns about the efficacy of the cheaper option. The theory would've upped the percentage of buyers estimated to be uninjured within the end-payor class.

One of Allergan's experts, Canada-based optometrist Kyriakos Mandadakis, had worked for the company as a paid consultant up until 2018, and Judge Gershon found "his partiality was apparent at the hearing as well as in his report." She added that Mandadakis was "entirely unqualified" to render some of the opinions he offered the court.

Massachusetts ophthalmologist Kathryn Masselam Hatch's opinions also drew the judge's skepticism, as Judge Gershon pointed out that Hatch's testimony leaned heavily on quotes and citations from doctors that had been paid by Allergan. An opinion from Allergan's third expert that relied on the testimony of Mandadakis and Hatch was also culled from evidence.

Judge Gershon said even if she'd left these opinions in play, her decision to certify the end-payors would've been unchanged. "I would have afforded these experts' opinions little weight," she said.

An attorney for the end-payors, Dena C. Sharp of Girard Sharp LLP, said they "are pleased that the class, including individual drug consumers, has been certified and Allergan's experts have been excluded."

"We look forward to further preparing the case for trial," Sharp added.

Counsel and representatives for the other parties did not respond to requests for comment Wednesday.

Outside of the end-payors, a group of drug wholesalers and other direct buyers settled with the pharmaceutical company **in a deal worth \$51 million** earlier this year. The retailers, including CVS, Rite Aid and Walgreens, also cut a deal with the company according to a notice posted to the court in February, though the amount wasn't specified.

The end-payors are represented by Girard Sharp LLP, Lieff Cabraser Heimann & Bernstein, LLP, Joseph Saveri Law Firm and Zwerling Schachter & Zwerling LLP.

The direct buyers are represented by Hagens Berman Sobol Shapiro LLP, Capshaw Derieux LLP, Sperling & Slater PC, Nussbaum Law Group OC, Radice Law Firm PC, Kaplan Fox & Kilsheimer LLP, Berger Montague, Faruqi & Faruqi LLP, Taus Cebulash & Landau LLP, Roberts Law Firm PA and NastLaw LLC.

The retailers are represented by Kenny Nachwalter PA and Hangley Aronchick Segal Pudlin & Schiller.

Allergan is represented by Gibson Dunn & Crutcher LLP and Kirkland & Ellis LLP.

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

--Additional reporting by Kevin Stawicki, Nadia Dreid and Christopher Cole. Editing by Abbie Sarfo.

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