

Opioid Seller Seeks To Lead Antitrust Class Despite Charges

By Aaron Leibowitz

Law360, Boston (July 26, 2019, 7:39 PM EDT) -- Pharmaceutical distributor Rochester Drug CO- Operative, which admitted to unlawful opioid sales earlier this year, argued in Boston federal court Friday that it is reformed and can dutifully serve as a class representative in an antitrust pay-for-delay suit over the sales of ADHD medication Intuniv.

Peter Kohn of Efltfi & Farugi LLP, representing RDC, told US. District Judge Allison D. Burroughs the company is under new management and said its motives for leading the proposed class action which alleges an illegal reverse payment from Shire LLC to Actavis LLC to delay generic competition for IntuniV — are pure. Kohn quoted from a deposition of RDC Chief Operating Officer Christopher Masseth, in which Masseth purportedly said the antitrust case was about "doing what's right for the industry."

"RDC is reformed," Kohn said, noting that the company has brought in former officials from the U.S. Drug Enforcement Administration and the US. Attorney's Office for the Southern District of New York to assist in compliance efforts.

The comments came during a hearing on class certification in a case that is slated for trial next year. A group of firms, including Hagens Berman Sobol Shapiro LLP is looking to lead parallel classes of direct and indirect purchasers of Intuniv. RDC is one of two companies hoping to be a class representative for the direct purchasers.

In April, RDC became the first drug distributor to face criminal charges for selling prescription opioids to pharmacies, admitting it did so in massive quantities despite clear evidence the drugs were being diverted for illicit use. The New York—based company entered into a deferred prosecution agreement, and its former CEO and operations manager were criminally charged.

An attorney for Actavis, Christopher Holding of Goodwin Procter LLP, said Friday that RDC shouldn't be placed in a position of fiduciary responsibility, given its "culture of dishonesty and disrespect for the law" while the alleged anticompetitive events took place.

"Can you put this company in a position of trust for the rest of the class?" Holding said. "Fraud does matter, and they've admitted to fraud."

Holding raised different concerns about the other proposed class representative for the direct purchasers, FWK Holdings LLC, saying the company had been set up for the specific purpose of purchasing claims in the bankruptcy of drug wholesaler Frank W. Kerr and then filing antitrust suits. He suggested that an attorney for FWK Holdings, Joseph Vanek of Sgerling & Slater PC, had too cozy a relationship with FWK's principal.

"Class counsel said, 'Let's find some claims, create a corporation, find our buddy, and we'll use that to go out and bring class action lawsuits,'" Holding said. "It's unprecedented for obvious reasons."

But Thomas Sobol of Hagens Berman Sobol Shapiro, representing FWK, fired back, saying there was "nothing wrong" with the arrangement.

"That's what people do," Sobol said of companies purchasing claims in bankruptcy proceedings and then using them to file litigation. He added that drug wholesalers are generally "extraordinarily reluctant" to sue their suppliers, and that FWK was doing so "in exactly the right way."

In the underlying antitrust case, Intuniv buyers say they were forced to pay extra for the drug because Shire paid off Actavis to delay the launch of its less—expensive generic competitor to Shire's brand—name drug. Even though Actavis gained permission from the U.S. Food and Drug Administration to launch its generic in October 2012, it didn't come to market until December 2014 due to the deal with Shire, leaving buyers without a generic option, the buyers allege.

Under the terms of a patent dispute settlement, Shire agreed not to launch an authorized generic during the 180-day exclusivity period to which Actavis was entitled. In exchange, Actavis agreed to delay its launch until Dec. 1, 2014, and remit to Shire a 25% portion of gross profits during the exclusivity period — constituting an unlawful reverse payment, according to the suit.

Sobol noted Friday that courts have consistently certified direct purchaser classes in antitrust suits, and he said this case should be no different. The proposed class includes about four dozen wholesalers who allegedly would have bought Intuniv at a lower price if the generic hit the market sooner.

The indirect purchasers, which include consumers who bought Intuniv from a pharmacy, could face greater challenges in winning class certification. Actavis and Shire argued that, because thousands of proposed class members suffered no apparent injury from the generic delay either because they were loyal to the brand—name drug or because they had a coupon to buy the branded version at a discount — class certification should be denied.

Class members who don't have an individual claim "do not magically get one by becoming part of a class," said Fred Kelly Jr. of Haug Partners LLP, representing Shire. [Ruben Honik of Golomb & Honik PC](#), representing the indirect purchasers, countered that point, saying that a relatively small percentage of class members being uninjured shouldn't doom the entire class. "The logical extension of their argument is that no case would get certified in this arena," Honik said. The plaintiffs and defendants offered widely different estimates calculated by their respective experts about what percentage of the class went uninjured. Attorneys for the indirect purchasers said it was below 3%, while Actavis and Shire said it was over 12%. Attorneys for the parties told Judge Burroughs they expect the case to go to trial. A date was set for July 13,

2020. Representatives for the parties did not immediately respond to requests for comment after the hearing Friday.

The indirect purchasers are represented by Allan Kanner & Associates, Kanner & Whiteley LLC, Ademi & O'Reilly LLP, Winston Law Firm and [Golomb & Honik PC](#).

The case is In re Intuniv antitrust litigation, case number 1:16-Cv—12653, in the U.S. District Court for the District of Massachusetts.