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Celgene Can't Delay Cancer Drug Antitrust Case, Court Told

By **Bryan Koenig**

Law360 (March 4, 2022, 7:03 PM EST) -- Drug payors pressed a New Jersey federal judge Thursday not to let Celgene Corp. and parent Bristol-Myers Squibb Co. "delay justice and perpetuate the illegal conduct" preventing generic competition for two blockbuster cancer drugs, arguing that the drugmakers cannot use separate, "significantly different" litigation to justify a pause.

Celgene has asked U.S. District Judge Esther Salas to extend all deadlines until after she rules on a long-pending motion to dismiss in another case similarly accusing the drugmaker of a litany of anti-competitive conduct to protect Thalomid and Revlimid. But assignees of organizations that provide health care to Medicare enrollees said Thursday that the other case, from insurer Humana, is too different to pump the breaks here, even though it has warranted a pause in four other lawsuits from insurers such as Cigna and United HealthCare.

The other lawsuits, according to MSP Recovery Claims, Series LLC and related entities, don't include as defendants the Chronic Disease Fund and Patient Access Network Foundation — added here in **an amended complaint** filed last month accusing the nonprofits of funneling money for Celgene to circumvent congressionally mandated co-pays intended to create market-price sensitivity among patients and discourage medically unnecessary drug treatments. Nor do those lawsuits seek class certification, according to **Thursday's letter brief**.

A ruling in the Humana suit will not "narrow this case," according to the filing, which argued that Celgene is just trying to avoid discovery into its "grossly anti-competitive and fraudulent conduct."

"The other actions filed against Celgene do not include the disclosures and findings from the congressional reports that resulted from a multi-year investigation of the pharmaceutical industry and a review of over 1.5 million pages of documents and which identified key findings relating to Celgene's anti-competitive and fraudulent conduct at issue in this case," the assignees said.

The reports in question were issued by the U.S. House of Representatives' Committee on Oversight and Reform. Their findings of massive price increases and anti-competitive conduct serve as key backstops for the lawsuit filed in December and amended last month by the latest plaintiffs, who **opted out** of **a previously settled class action**.

"These allegations set the MSP plaintiffs' case apart from that of Humana," an attorney for the plaintiffs, Robert Strongarone of MSP Recovery Law Firm, told Law360 in an email.

Importantly for the assignees, according to Thursday's letter, the reports "resolve issues concerning the statute of limitations pending before the court in Humana" because the reports show that Celgene's alleged conduct remains ongoing and that "through abuses of the patent system and other misconduct," it will be able to maintain its drug monopoly at least until 2026.

"MSP continues to pay for Celgene's drugs, Thalomid and Revlimid, and therefore continue[s] to be injured by Celgene's anti-competitive conduct," the letter states. "These findings render a substantial portion of Celgene's motion to dismiss in Humana irrelevant to this case because there is a different and more developed factual record, different legal issues and different parties in this case as opposed to the cases awaiting the Humana decision."

Thalomid dates to the 1950s as an anti-nausea drug, originally marketed as Thalidomide, that led to

catastrophic birth defects such as fetal deformation, according to the amended complaint. The drug later received U.S. Food and Drug Administration approval to be marketed as a treatment for leprosy complications, the amended complaint said.

Celgene developed Revlimid as a Thalidomide analog in 2005 and ultimately garnered FDA approval for its treatment for certain multiple myeloma and mantle cell lymphoma patients, according to the complaint. But according to the plaintiffs, Celgene wanted more, so it launched "an illegal, multi-prong, anti-competitive scheme" that entailed interfering with generic pharmaceutical companies' ability to obtain FDA approval for their own versions.

The scheme entailed preventing pharmacies and suppliers from providing drug samples to the would-be competitors, fraudulently obtaining patents for the drugs and their associated safety distribution protocols, and launching sham patent infringement litigation and filing "baseless" citizen petitions designed to delay FDA approvals, the complaint said.

In instances where the conduct failed to prevent generics from prosecuting abbreviated new drug applications, the complaint said, Celgene struck confidential settlements — known as "pay-for-delay" deals — with its competitors.

Thalomid cost about $6 per capsule when it first entered the market, and by 2014 had reached $357 per capsule, while the cost of Revlimid has spiked from $215 per pill in 2005 to $719 per pill as of 2020, the complaint said.

Celgene's regulatory filings show that Thalomid and Revlimid respectively generated $3.2 billion and $35.3 billion in sales for Celgene between 2007 and 2016, according to the complaint.

Counsel for Celgene did not immediately reply to press inquiries Friday.

Celgene has spent weeks trying to pump the brakes on this case. In late January, it sought an extension until the judge issues a ruling in the Humana case, arguing Judge Salas has already extended response deadlines in "all other nearly identical complaints" until first-filed Humana can be addressed.

After the assignees amended their complaint last month, and with no word from the court, Celgene filed a letter brief March 1 seeking expedited consideration of its pause bid "to avoid burdening the court with duplicative briefing." In the letter, which prompted the plaintiffs' response Thursday, Celgene noted that it has until March 21 to respond to the amended complaint but argued that its dismissal motion "would largely repeat arguments already before the court in Celgene's pending motion to dismiss the Humana case."

The plaintiffs are represented by Anthony J. Davis and Brian E. Moffitt of Santomassimo Davis LLP, Robert Strongarone, John W. Cleary and Aida M. Landa of MSP Recovery Law Firm, Shereef H. Akeel, Adam Akeel and Daniel W. Cermak of Akeel & Valentine PLC and Eduardo Bertran of Armas Bertran Zincone.

Celgene and BMS are represented by Daniel R. Guadalupe of Pashman Stein Walder Hayden PC and John E. Schmidtlein, David Kurtzer-Ellenbogen and Benjamin M. Greenblum of Williams & Connolly LLP.

The case is MSP Recovery Claims, Series LLC et al. v. Celgene Corp. et al., case number 2:21-cv-20451, in U.S. District Court for the District of New Jersey.

--Additional reporting by Jeannie O'Sullivan. Editing by Rich Mills.