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Attys For Gilead, Drug Buyers Trade Barbs As $3.6B Trial Ends

By **Bonnie Eslinger**

Law360 (June 28, 2023, 9:16 PM EDT) -- Gilead's lawyer on Wednesday slammed a $3.6 billion antitrust suit alleging an illegal "pay-for-delay" deal with Teva over two HIV drugs during closing arguments, calling the plaintiffs' theory a "house of cards," while a plaintiffs' lawyer accused the drugmakers of "sleight of hand" at trial by selectively using attorney-client privilege.

The closing arguments wrapped weeks of testimony and other evidence in the antitrust case brought by health plans and insurers that claim they paid inflated prices for Gilead-brand Truvada and Atripla, as well as for Teva's generic versions of the HIV drugs.

The case stems from an underlying patent dispute Teva initiated in 2008, challenging Gilead's patents for Truvada and Atripla. Gilead responded by suing Teva, but the two companies reached an out-of-court agreement ending their claims in 2014.

On Wednesday, a lawyer for Gilead called the drug purchasers' case shaky, noting that the alleged delay is based on claims that Teva could have won the patent litigation — allowing all generic companies to enter the market — or that Teva would have secured an earlier entry date in the settlement if Gilead had not provided the generics maker with six months of market exclusivity.

"That's their theory. And I would suggest to you … that this is a house of cards," said Gilead's lawyer, Bart Williams of Proskauer Rose LLP.

Williams reminded the jury that the patents covering one of the active ingredients in Truvada and Atripla didn't expire until 2021 and that under the settlement, Teva was able to put its generic versions on the market in 2020.

"That is early entry and not delay," Gilead's lawyer told jurors.

Williams told jurors the verdict form asks whether the plaintiffs proved that the settlement agreement included a "reverse payment from Gilead to Teva so that Teva would delay its entry into the market."

There was no payment and no delay, Gilead's lawyer said.

"Even if you were to conclude there was a payment, and you should not, but if there were a payment, if that payment did not result in a delayed entry by Teva, the defense wins this case," Williams said.

The purchasers have told jurors that Teva made over $600 million during the six months that it was on the market solo with the only generic versions of Truvada and Atripla. But Williams underscored that the settlement only offered "what you might call a level of exclusivity" but that it also provided ways for other generics to get onto the market at the same time as Teva or earlier. For example, he said, another generics company could sue Gilead over the patents and win, the lawyer said.

"To ignore the other provisions is to ignore the contract," Williams told jurors.

In the end, 10 other companies entered the market in early 2021 — 180 days after Teva — after reaching their own settlements with Gilead.

"Ten different companies, independently made the decision not to continue to challenge my client's patents," Williams said. "If they had succeeded, they could have entered at the same time."

The purchasers have downplayed the possibility that another generics manufacturer would have succeeded in invalidating Gilead's patents or launched "at risk" before the patents expired.

"The plaintiffs say these are rare — but ladies and gentlemen, that is because the patents in this case that my client has are strong," Williams said. "If the patents were weak like the plaintiffs say, then all of these options would be more likely to occur."

Toward the end of his closing arguments, Williams directed jurors to look at the first question they would be asked on their verdict form: "Did the plaintiffs prove that Gilead had market power within the relevant market(s) that included Truvada and/or Atripla?"

Gilead's lawyer said the answer to that question is no — and with that finding, the plaintiffs lose their case. Williams reminded the jury that they had heard evidence from witnesses for Gilead and Teva "about the explosion of new drugs for HIV treatment ... almost every year for the last 15 years" and that one expert explained that HIV patients switch from one drug to another.

Williams also reminded jurors of instructions on the law from U.S. District Judge Edward M. Chen, who said, "You should consider whether the products are reasonably interchangeable in terms of use or whether consumers will change their consumption of one product in response to a price change in another."

During rebuttal, a lawyer for one groups of the plaintiffs — individual health plans including Kaiser and Humana — took aim at the 'house of cards' statement made by Gilead's lawyer.

"We don't think that is accurate," said Jeffrey Poston of Crowell & Moring LLP. "We think it is the defendants here who are engaging in a bit of sleight of hand."

Poston noted that Teva had waived its attorney-client privilege, saying that's why the jury has been able to see internal emails from the generics manufacturer's legal team. Gilead, however, had not, Poston told jurors.

"So we do not know what Gilead thought about the strength of its patents or the strength of its lawsuit," the lawyer for the drug purchasers said. "What's happening here is that Teva and Gilead are hiding behind a handful of Teva's emails ... [and] want you to believe that these emails are the only pieces of the puzzle."

Williams objected, calling the statements improper argument. Judge Chen sustained the objection.

Poston pressed on.

"We don't know what Gilead thought," the lawyer said. "You and I and all the experts who testified for the defendants have no idea what Gilead's beliefs were."

Williams objected again on grounds the argument was improper.

Judge Chen reminded the jury that they were "not to draw any adverse inferences" from Gilead's invocation of attorney-client privilege.

The closing arguments began on Tuesday, with a lawyer for the drug purchasers calling the settlement a "payoff deal" between Gilead and Teva to keep prices for the two HIV drugs as "expensive as possible for as long as possible" and urging jurors to return overcharges totaling $3.6 billion.

Gilead's willingness to pay off a generic suggested that Gilead knew its patents weren't strong, said Tom Sobol of Hagens Berman Sobol Shapiro LLP, who represents classes of end-payor purchasers.

Closing arguments for the defense began toward the end of Tuesday with Teva lawyer Christopher Holding of Goodwin Procter LLP. The evidence shows that Gilead's patents were strong and that it was unlikely any generics company would have been able to invalidate those patents in court, Teva's lawyer said.

"Teva was putting on the best defense it could for sure, but Teva thought it was unlikely to win," Holding said.

The trial kicked off on May 25, and just before the start it was announced that Gilead and Teva had reached out-of-court deals with some plaintiffs, including major pharmacies, and Gilead settled with direct purchasers.

Jury deliberations, which began Wednesday afternoon, will continue on Thursday.

The end-payor plaintiffs are represented by Hilliard Shadowen LLP and Hagens Berman Sobol Shapiro LLP.

United HealthCare Services Inc. is represented by Zelle LLP and Boies Schiller Flexner LLP.

Humana Inc., Blue Cross and Blue Shield of Florida Inc., Health Options Inc., Centene Corp., Triple-S Salud Inc., Blue Cross and Blue Shield of Kansas City and Kaiser Foundation Health Plan Inc. are represented by Crowell & Moring LLP and Berry Silberberg Stokes PC.

Gilead Sciences Inc., Gilead Holdings LLC, Gilead Sciences LLC and Gilead Sciences Ireland UC are represented by Kirkland & Ellis LLP and Proskauer Rose LLP.

Teva is represented by Goodwin Procter LLP.

The case is In re: HIV Antitrust Litigation, case number 3:19-cv-02573, in the U.S. District Court for the

Northern District of California.

--Additional reporting by Gina Kim, Dorothy Atkins and Bryan Koenig. Editing by Rich Mills.
