

## **Gilead Says Aetna Must Litigate Its HIV Drug Suit In Fed Court**

By **Bonnie Eslinger**

*Law360 (April 7, 2022, 10:30 PM EDT)* -- Gilead urged a California federal judge Thursday to reject Aetna's bid to send to state court its second lawsuit accusing Gilead and others of illegally driving up HIV drug prices by blocking generic versions, saying Aetna already dropped a similar suit and shouldn't be allowed to pursue this litigation "tactic."

During oral arguments before U.S. District Judge Edward M. Chen, counsel for Gilead Sciences Inc. argued that Aetna Inc.'s decision to dismiss a prior state court case that was removed to federal court and then refile against Gilead again in state court was an improper attempt to subvert the federal court's removal jurisdiction.

"We have not seen this tactic done, where the plaintiff files in state court, it gets removed to federal court and then there's a voluntary dismissal and a quick refiling of the same action, in the state court," said Christopher Curran of White & Case LLP. "The same counsel same parties, same everything."

Despite Aetna's attempt to recast its claims as a state-law complaint, the allegations remain unchanged and thus still turn on substantial and disputed federal questions, including matters related to federal patent, and antitrust laws, Curran told the court.

Further, Aetna had informed the court on more than one occasion that it had planned to petition to have the earlier-filed lawsuit remanded back to state court, Curran said. Gilead relied on those representations and didn't file an answer to the suit or a motion for summary judgment — which would have blocked the insurer from doing what it did, voluntarily dismissing the earlier action.

"So we were in a sense lulled into a situation where Aetna was able to do a voluntary dismissal," Curran said. "There were representations, there was reliance and there was a breach of the prior representations, to us that sounds like fraud or misrepresentation."

Tiffanie McDowell of Crowell & Moring LLP, a lawyer for Aetna, shot back that tossing the first suit was permissible under the law.

"We changed our litigation strategy," McDowell said.

She denied that her client made any representation to Gilead that the insurer would not dismiss the earlier suit.

Judge Chen reminded McDowell that Aetna had made statements to the court that it was going to move to remand.

"Do you feel that's not the sort of statement which constitutes a promise on which the other side can rely," he said.

McDowell said Aetna had intended to file the motion to remand.

"It's not like this was some sort of monthlong plot that we had cooked up," McDowell said. "We decided at some point that the better litigation strategy was to dismiss that action. The Ninth Circuit case law is clear that plaintiffs have an unfettered right to file a voluntary dismissal under Rule 41."

When the court turned to the second basis to retain jurisdiction, whether there's sort of federal question of law that needed to be addressed in the state actions, Curran said there were three "buckets of questions, all of which are substantial here."

The case involves the federal Hatch-Waxman Act, which relates to the process for approving generic drugs, along with patent law and antitrust law, he noted.

"Congress has recognized that the patent laws and the federal antitrust laws require a federal forum," Curran added.

Aetna's lawyer countered that under the claims filed in state court, the insurer doesn't need to show that Gilead's patents are invalid. Additionally, Aetna's monopolization claim invokes state statutes, including the Cartwright Act and California's Unfair Competition Law.

Both of Aetna's suits were filed in the Superior Court of the State of California, County of San Mateo, only for Gilead to yank them into federal court.

Judge Chen has already refused to let Gilead forcibly revive the earlier Aetna lawsuit, filed in state court in December 2021. In a March 29 decision, the judge said that to grant Gilead's motion to vacate Aetna's voluntary dismissal of its first lawsuit requires "special circumstances" to justify "judicial interference into a plaintiff's otherwise unfettered right to voluntarily dismiss."

On Jan. 18, according to the decision, Aetna moved to remand the lawsuit, dubbed Aetna I, and then, on Jan. 31, it filed a new state court complaint, dubbed Aetna II, which Judge Chen said "seems to be substantially the same." Aetna filed a voluntary dismissal of Aetna I the next day.

On Feb. 3, Gilead removed the second suit, and then, four days later, the drugmaker sought to vacate the voluntary dismissal of the Aetna I federal suit, according to the court's March 29 ruling.

While Aetna has sought to get that suit remanded to state court, Gilead has also sought a permanent injunction in the Aetna cases that would block the insurer from pursuing its claims in state court.

Aetna's allegations are separate from, but parallel to, federal cases from different buyers — including end-payors and retailers such as CVS and Walgreens — with roots in a class action filed in 2019 claiming that Gilead, Janssen and Bristol-Myers Squibb Co. blocked generics from being used in certain medical cocktails to treat HIV.

The suits, which have also roped in Teva Pharmaceutical Industries Ltd., allege that the scheme allowed Gilead to earn \$59 billion on HIV drugs in the U.S. between 2004 and 2017, despite developing only a single new drug compound during that time. They include claims for violation of federal antitrust law and state antitrust and consumer protection laws.

The drugmakers are additionally fighting to dismiss claims from a variety of individual health plan plaintiffs — who, like Aetna, are represented by Crowell & Moring LLP — that include several Blue Cross Blue Shield units and Centene.

Aetna is represented by Daniel Sasse and Tiffanie McDowell of Crowell & Moring LLP.

Gilead is represented by Heather Burke and Christopher Curran of White & Case LLP.

Janssen is represented by Paul Riehle and Joanne Lewers of Faegre Drinker Biddle & Reath LLP.

The cases are Staley et al. v. Gilead Sciences Inc. et al., case number 3:19-cv-02573, and Aetna Inc. v. Gilead Sciences Inc. et al., case number 3:22-cv-00740, both in the Northern District of California.

--Additional reporting by Bryan Koenig. Editing by Jay Jackson Jr.

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