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Calif. High Court Takes Up Cipro Pay-For-Delay Suit

By Roxanne Palmer

Law360, New York (February 15, 2012, 10:21 PM ET) -- The California Supreme Court agreed Wednesday to review a lower court's decision that Bayer AG hadn't violated state antitrust law by paying Barr Pharmaceuticals Inc. nearly \$400 million to delay entry of its generic version of the antibiotic Cipro, after a class of indirect purchasers appealed.

The plaintiffs, including consumers and union health funds, claim the California state appeals court erred in October when it affirmed a trial court's 2009 decision to toss the suit claiming Bayer's reverse payment settlement of a patent dispute was illegal.

"We are grateful that the California Supreme Court will review this case and look forward to arguing that these collusive agreements violate California's antitrust laws," Joseph R. Saveri of Lieff Cabraser Heimann & Bernstein LLP, who represents the plaintiffs, said in a statement Wednesday.

In their appeal, the plaintiffs claim reverse payment settlements, in which brand-name drug companies pay other companies to not make a generic version of a drug, run afoul of California's antitrust law, the Cartwright Act.

The settlement in question dates to 1997, when Barr agreed to refrain from marketing a generic version of Cipro until after Bayer's patents expired, settling a patent lawsuit initiated by Bayer. In return, Bayer agreed to pay Barr a certain percentage of the revenues earned from the drug, which totaled \$398 million.

The trial court and the appeals court ruled the settlement did not violate the Cartwright Act because it did not restrain competition beyond the scope of the patent-in-suit.

In their December brief to the state Supreme Court, the plaintiffs claim Bayer's payment to Barr caused consumers to pay more for Cipro and should be found per se illegal under the Cartwright Act.

"Bayer made the payment to avoid trial on Barr's invalidity counterclaim, and the resulting patent invalidation that would have taken away its monopoly profits. That is wrong," the brief said.

Representatives for the defendants could not immediately be reached for comment

Wednesday.

The patent-in-suit is U.S. Patent Number 4,670,444.

Judges Kathryn M. Werdegar, Ming W. Chin, Carol A. Corrigan and Goodwin Liu sat on the panel for the state Supreme Court.

The plaintiffs are represented by Joseph R. Saveri, Eric B. Fastiff, Brendan Glackin, Jordan S. Elias and Dean M. Harvey of Lieff Cabraser Heimann & Bernstein LLP, Ralph B. Kalfayan of Krause Kalfayan Benink & Slavens LLP, and Dan Drachler of Zwerling Schachter & Zwerling LLP.

Bayer is represented by Christopher J. Healey of Luce Forward Hamilton & Scripps LLP, Kevin McDonald of Jones Day and Peter Bensinger Jr. of Bartlit Beck Herman Plenchar & Scott LLP. Barr is represented Joann F. Rezzo of Edleson & Rezzo, Edwin J. U, Gregory L. Skidmore and Karen N. Walker of Kirkland & Ellis LLP, and Kathryn E. Karcher.

The case is In re: Cipro Cases I & II, case number S198616, in the Supreme Court of the State of California.

--Additional reporting by Ryan Davis. Editing by Elizabeth Bowen.