

Merck, Others Beat Eye Drop Dosage Suit For 2nd Time

By **Bonnie Eslinger**

Law360, Los Angeles (March 24, 2016, 8:23 PM ET) -- A New Jersey federal judge Thursday dismissed an amended putative class action accusing Merck and other drug companies of boosting eye drop sales through bottles that dispensed higher-than-necessary doses, saying the plaintiffs still hadn't established they were harmed by the drops they claimed were wasted.

In granting the motion to dismiss filed by Alcon Laboratories Inc., Allergan Inc., Merck & Co. Inc. and other pharmaceutical companies, U.S. District Judge Freda Wolfson said the plaintiffs' bolstered claims still failed to show they were promised a specific number of doses from their eye drops and they failed to receive those amounts.

"Because the court finds that plaintiffs' amendments fare no better than their original allegations ... plaintiffs' amended complaint is dismissed for want of standing," Judge Wolfson wrote.

The suit from the 24 named plaintiffs contended that smaller bottle tips would avoid wasting drops and produce a cost savings. The eye drop users claim the drug companies deliberately designed the tips of the bottles to dispense the medicated drops in larger than necessary doses, forcing buyers "to pay for much more medication than the users of those medications needed," the complaint says.

The amended complaint included scientific literature asserting that smaller drop volumes provides an improved therapeutic result and lead to cost savings. Plaintiffs also included charts breaking down the costs per drop and the alleged wasted drops.

In her opinion, Judge Wolfson said the seminal standing question is whether a plaintiff has alleged a personal stake in the outcome of the stated controversy, including an injury and a causal connection with the conduct at issue.

"It bears repeating that the complained-of injury must not be abstract or subjective," the judge wrote.

The assertion that smaller tips would result in cost savings was speculative, the judge said, because the plaintiffs still couldn't show that smaller-tipped bottles wouldn't be priced differently.

The amended complaint didn't established that the consumers were economically harmed and entitled to receive a reimbursement for the wasted drops, the judge said.

"Rather, plaintiffs' reimbursement theory rests on their disagreement with how defendants designed

their bottles — a design that has been specifically approved by the FDA in a medical context,” the judge wrote. “And their insistence that they should be reimbursed for drops that were wasted as a result of the design, although plaintiffs were never promised a certain number of doses. This is not sufficient.”

The eye drop users did not contend they were forced to purchase additional prescriptions because the medications were depleted prematurely or that the eye medications failed to perform as intended, the judge noted.

“And importantly, there are no allegations that any plaintiffs would have purchased comparable cheaper products that dispense smaller drops in lieu of defendants’ products,” the judge wrote.

The suit, which lists 25 causes of action, was brought in September 2014. In June, Judge Wolfson dismissed it, saying the consumers had not sufficiently alleged the specific economic loss they suffered and calling the injury-related allegations “nothing more than conjecture.”

The amended complaint was filed in July.

Attorneys for the parties were not immediately available for comment.

The consumers are represented by Jeffrey W. Herrman of Cohn Lifland Pearlman Herrmann & Knopf LLP.

Allergan, Bausch & Lomb and Valeant are represented by Jim Muehlberger and Lori McGroder of Shook Hardy & Bacon and Robert J. McGuirl of the Law Offices of Robert J. McGuirl LLC. Merck is represented by Charles Blaine Casper of Montgomery McCracken Walker & Rhoads LLP. Pfizer Inc. is represented by Liza M. Walsh, Trisha B. O’Reilly and Christopher J. Borschert of Connell Foley LLP. Falcon Pharmaceuticals Ltd. and Sandoz Inc. is represented by Gregory E. Ostfeld, Roger B. Kaplan and Lori G. Cohen of Greenberg Traurig LLP. Prasco LLC is represented by Charles B. Casper of Montgomery McCracken Walker & Rhoads LLP and Stephen G. Strauss and Randy J. Soriano of Bryan Cave LLP. Akorn Inc. is represented by Walter H. Swayze III, Kyle G. Everly and Megan E. Grossman of Segal McCambridge Singer & Mahoney Ltd. and John M. Kilroy Jr. and J. Stanton Hill of Polsinelli PC.

The case is *Cottrell v. Alcon Laboratories Inc. et al.*, case number 3:14-cv-05859, in the U.S. District Court for the District of New Jersey.

--Editing by Brian Baresch.

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