

Shout-Out: Three Legal Giants Crush a Russian Drug Co's Antitrust Suit

By Jenna Greene

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In no uncertain terms, a federal judge in Manhattan dismissed with prejudice an antitrust suit by a Russian drugmaker who accused three rivals of an elaborate conspiracy to keep its biosimilar cancer drugs out of the U.S. market.

It was a thorough win for a dream team of lawyers from Latham & Watkins; Davis Polk & Wardwell and Gibson, Dunn & Crutcher, crushing potentially explosive allegations against their clients.

St. Petersburg-based Biocad, represented by Feinstein and Partners, sued F. Hoffman La Roche; its subsidiary Genentech Inc. and R-Pharm JSC, claiming that they tried to sabotage its efforts to sell biosimilar versions of Roche's blockbuster drugs Avastin, Herceptin and Rituxan.

Biocad claimed it's the "only pharmaceutical company in the world that was able to re-create biosimilars of all three of Roche's star drugs to date," and said it planned to enter the U.S. market when Roche's exclusivity period expired in 2018 and 2019.

"Knowing that generic entry would decimate its sales in the U.S., and that any delay in such entry would be highly profitable for Roche, even though very costly for consumers and cancer patients, Roche and other defendants designed and implemented a scheme to destroy plaintiff's competing business," wrote Albert Feinstein in the suit filed in U.S. District Court for the Southern District of New York last year.



Tainted-Drugs-Vial-and-Syringe Credit: Fotolia

The trio of drugs have allegedly generated \$170 billion in sales in the U.S. since their launch.

But as an antitrust complaint, it had major problems. "Utterly frivolous." "Wildly deficient." "Insurmountable failings." Those were a few descriptions offered by counsel from Latham for Genentech; Davis Polk for Roche and Gibson Dunn for Russian pharmaceutical company R-Pharm JSC.

"It is impossible to see this conduct as anything other than an abuse of U.S. legal process to attempt to extract a settlement from defendants, procure defendants confidential and proprietary information through discovery, or force the increase of pharmaceutical

prices in Russia. None is acceptable,” wrote Lawrence Buterman from Latham; Paul Spagnoletti from Davis Polk and Eric Stock from Gibson Dunn in a joint motion for Rule 11 sanctions.

They didn’t get the sanctions (at least not yet) but U.S. District Judge Richard Sullivan on Friday dismissed the case and refused to let the plaintiff refile.

Most of the conduct that Biocad complained about occurred in Russia, where the defendants allegedly sell the drugs at a loss and for dramatically less than in the U.S. (Herceptin, for example, allegedly costs \$926 in Russia and \$3,879 in the U.S.). But U.S. antitrust laws aren’t designed to cover foreign markets.

Sullivan found Biocad lacked antitrust standing to bring the suit. A basic problem: The company does not and has never participated in the U.S. market.

That’s not insurmountable, the judge noted. “However, at the very least, such a would-be competitor must demonstrate its ‘intention and preparedness’ to enter the relevant market,” Sullivan wrote.

But Biocad has taken no steps to obtain FDA approval for its drugs and revealed nothing about its plans to do so.

“In sum, Plaintiff has provided little information from which the court may assess the likelihood of approval of its biosimilars, and has thus failed to allege more than ‘a hope or expectation’ of engaging in the U.S. pharmaceutical market,” he wrote. “Plaintiff makes no allegation that any of the defendants’ anticompetitive conduct has prevented it from applying for FDA approval, and in fact provides no explanation for its failure to take any steps toward applying for FDA approval to sell its biosimilars in the United States.”

He concluded, “Plaintiff has failed to set forth facts demonstrating its intention and preparedness to engage the U.S. pharmaceutical market, and thus has failed to allege that it has suffered an antitrust injury.”

But just in case that wasn’t enough, he also found that “the foreign locus of plaintiff’s allegations would still defeat each of its causes of action.”

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