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# Pharmacies Accuse Drug Maker of Anticompetitive Contracting to Restrict Biosimilar Market

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Walgreens and Kroger have filed an antitrust action in the United States District Court for the Eastern District of Pennsylvania accusing Johnson & Johnson (J&J) of engaging in anticompetitive conduct designed to stymie the growth of biosimilar alternatives to J&J's Remicade, a biologic drug used to treat certain chronic immune disorders (*Walgreen Co. v. Johnson & Johnson*, Case No. 2:18-cv-02357-JCJ, Eastern District of Pennsylvania). The action is only the latest in a string of suits filed against J&J challenging its sales practices relating to Remicade. Pfizer, the maker of Inflectra, a biosimilar alternative to Remicade, previously filed an action against J&J making similar claims, as did a number of union benefits funds. Several of these previously-filed actions have already been consolidated in the Eastern District of Pennsylvania as the *In re Remicade Antitrust Litigation,* Case No. 2:17-cv-4326, JCJ, before Judge J. Curtis Joyner. In all likelihood, the *Walgreens* case will be referred to Judge Joyner and become part of the consolidated action as well.

In the *Walgreens* case, the plaintiffs allege that Remicade is J&J's best-selling drug (and among the best-selling drugs in the world), providing J&J with $5 billion a year in revenue. So, according to plaintiffs, when J&J began to face competition for Remicade in 2016 – from Pfizer's Inflectra and Merck's Renflexis – J&J instituted a plan designed to

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protect its Remicade sales, which it dubbed its "Biosimilar Readiness Plan." According to plaintiffs, J&J's plan included the use of anticompetitive means to restrict the sale of Remicade alternatives, in violation of Sections 1 and 2 of the Sherman Antitrust Act.

Specifically, plaintiffs allege that J&J entered into contracts with many of the largest commercial health insurers in the country whereby the insurers agreed that they would not reimburse patients and/or providers for the use of the Pfizer and Merck biosimilar products unless a doctor first certified that treatment with Remicade had been unsuccessful (characterized as a "fail first" provision by plaintiffs in their complaint). As a result of this provision, patients desiring to use the Pfizer and Merck drugs rather than Remicade faced significantly greater out-of-pocket expenses, even though the price charged by Pfizer and Merck for their drug was well below that charged by J&J for Remicade. In addition, plaintiffs further contend that J&J threatened hospitals and other large provider purchasers with the loss of rebates if they failed to continue to purchase Remicade at their prior levels, another tactic that plaintiffs allege made it very difficult, if not impossible, for the providers to switch to the less-expensive biosimilar alternatives. As a consequence of these practices, according to the complaint, J&J's Remicade drug continues to enjoy a market share in excess of 95%, notwithstanding the introduction of biosimilar competition, and J&J has even been able to increase the price of Remicade since the introduction of Pfizer's and Merck's competing products (unlike what typically occurs when a generic alternative to a branded drug is introduced – where a loss of share and a decrease in the price of the branded drug is the more common result).

In the earlier filed cases, J&J denied all claims that it has violated the antitrust laws, and has contended that the continued success of its Remicade product is the result of consumer preference and the

product's superior quality, and not any anticompetitive conduct. Presumably, J&J will mount a similar defense in response to the *Walgreen* case as well. Stay tuned.

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