

## Burned By MDL Judge, Takeda Finds Hope In State Courts

By **Sindhu Sundar**

*Law360, New York (June 24, 2014, 8:48 PM ET) -- Takeda Pharmaceutical Co. Ltd. has been slammed with a \$6 billion verdict and disciplined for destroying key evidence in federal litigation over its diabetes drug Actos, but the drugmaker has found success in state courts by convincing juries that it adequately warned of the drug's bladder cancer risks or by keeping its evidence spoliation out of the trials altogether.*

*Takeda's loss in its first federal bellwether trial against plaintiffs Terrence and Susan Allen appeared to cement the Japanese drugmaker's weakened position in the Actos litigation, after U.S. District Judge Rebecca F. Doherty **found in January** that the plaintiffs had shown enough proof that Takeda destroyed relevant evidence. In her June 20 opinion, she said that the evidence that plaintiffs had put forward during the trial indicated that Takeda had **acted with bad faith** in destroying those documents, and ordered Takeda to reconstruct the lost evidence at its own expense.*

*Despite these setbacks, which Takeda will still have to contend with in the federal suits that belong to the multidistrict litigation, the drugmaker has found success in five state court trials over the same issue. Takeda has won defense verdicts in three of them — two in Nevada and one in Illinois — while the other two plaintiff awards, in Maryland and California, have failed to stand. In fact, Takeda's only remaining loss is in the Allen case, which it is planning to fight, according to Takeda Pharmaceuticals USA Inc. general counsel Ken Greisman.*

*The state court wins may indicate that the science is in Takeda's favor, but attorneys say the victories may also reflect a canny legal strategy on the part of Takeda that is focused on turning the tide in its favor by tackling state court disputes that are less influenced by Judge Doherty's criticisms.*

*"if you get a bad result in an MDL, it can affect the result in all the cases in the MDL," Blackwell Burke PA partner Peter Goss said. "But to the extent that you have state court cases that are not consolidated with the MDL cases, there will be opportunities to get the results you want because the judges in those cases will not be bound by the MDL judge ruling on the evidentiary issues."*

*In the first state court verdict in Takeda's favor, the Nevada jury found in December that Takeda's warning on the drug's alleged risks were adequate. In its Illinois trial, the jury in May **cleared** Takeda without offering specifics in its verdict sheet, Greisman told Law360. The plaintiffs in that case had attempted to introduce evidence of Takeda's document destruction, but **failed** when the drugmaker persuaded the court that the plaintiffs had shown no evidence that it prejudiced them, according to Greisman.*

*Takeda **won** the second Nevada trial, which concluded in May, despite failing to keep its*

evidence spoliation out of the trial. The judge in that case also issued an adverse instruction that the jury could assume that the destroyed evidence would have been unfavorable to the defense if it had been preserved.

In Maryland, the jury awarded roughly **\$1.8 million** in damages to the plaintiffs, but the award could not stand because the jury also found that the purported Actos victim Diep An may also have contributed to his death from bladder cancer. The state's contributory negligence laws make it so that if a jury finds that a patient may have in some way contributed to his or her own death after consuming a product, the company that made the product cannot be penalized.

In California, Takeda bested the plaintiffs' \$6.5 million verdict after the judge found that their expert testimony on causation had to be disqualified, Greisman said. The issue of evidence spoliation did not surface during the Maryland or California trials, he said.

"Some of their success there is because they've managed to keep that evidence out of trial, because they have smart lawyers doing what they're supposed to do," plaintiffs attorney Bill Curtis of the Curtis Law Group said. "They've had some good fortune thus far, but in the long run they have very significant problems with spoliation, the drug itself and the injuries it's caused, especially in the federal cases."

Takeda may also have an edge in fighting allegations about a disease such as bladder cancer, which has few known direct causes, attorneys say. Where mesothelioma and lung cancer have well-established ties to asbestos and cigarette smoking, respectively, it may be harder for plaintiffs to prove that Actos caused their bladder cancer, attorneys say.

"If I had to guess why the plaintiffs lost in Nevada even with the spoliation issue come up in the trial, it would be that the causation evidence that the plaintiffs have produced was weak," Alan Klein of Duane Morris LLP said. "And if a jury finds that the warning was adequate you might not even get to the rest of the verdict slip to talk about causation. That gives Takeda a couple strings to the defense bow."

--Editing by Elizabeth Bowen and Chris Yates.

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