

Actos Ruling Sets Up Appellate Clash Over Punitives Ceiling

By **Sindhu Sundar**

Law360, New York (October 28, 2014, 8:24 PM ET) -- A Louisiana federal judge's ruling slashing a \$9 billion Actos bladder cancer award to \$37 million highlights an ambiguity on upper limits for punitive damages that attorneys say will spur the Fifth Circuit — and maybe even the U.S. Supreme Court — to address the issue more directly.

U.S. District Judge Rebecca Doherty's nuanced review of appeals courts precedents on punitive damage awards was written with appeals courts judges in mind, attorneys say, pointing to the near-certainty that her ruling will wind up before the Fifth Circuit. Plaintiffs Terrence and Susan Allen may challenge her conclusions that spared drugmakers Takeda Pharmaceutical Co. Ltd. and Eli Lilly & Co. from forking out billions of dollars to them, while the defendants are expected to argue that the 25-to-1 punitive damages to compensatory damages ratio she ultimately adopted is still too large.

But attorneys say the judge's ruling also sets up appeals courts to respond to a quandary she highlighted in her detailed review — the lack of appeals court guidance, especially in personal injury cases, on whether there is a clear line to gauge when a punitive damages award is excessive, despite a number of rulings that have touched on the issue.

"She is writing this for an audience of appellate judges, not just the lawyers in the case," said Bill Curtis of The Curtis Law Group. "She emphasizes that punitive damages are designed to punish corporate conduct and that how you change that conduct is by kicking them right in the checkbook."

Over the past decade, lower court judges have generally leaned on the high court's finding in *State Farm v. Campbell*, a case in which the court adopted a roughly 10-to-1 ratio for punitive damages to compensatory damages. But Judge Doherty on Monday referred to that guidance as merely "dicta," noting that the high court had itself shied away from making so-called bright-line rulings on such ratios in general.

She appeared to criticize other courts' reliance on the *State Farm* ratio, attorneys say, as she urged them to resist "the seductive lure of the siren of simplicity" in adopting such a ratio regardless of the specific facts of their cases.

"It's where her opinion really pivots, where she says it is overly simplistic to assume that *State Farm* establishes a 10-to-1 cap for punitive damages," James W. Huston of Morrison & Foerster LLP said. "She says that the Supreme Court has said that it doesn't make a bright-line rule about this and that what that does is leave a judge at sea, to some degree, on deciding what are reasonable punitive damages."

Despite her rigorous analysis, some attorneys also say her arguments have potentially weak spots that an appeals court could pick apart. Judge Doherty's review focuses, for instance, on the size of Takeda's and Eli Lilly's profits and overall wealth, and weighs that in proportion to the size of any punitive damages awards against them.

She observed that Takeda's net worth in fiscal 2013 was nearly \$24 billion while Eli Lilly's was roughly \$17 billion, and reasoned that a punitive damages award that did not take that wealth into consideration could end up being too small to have a deterrent effect on such multibillion-dollar companies.

Some attorneys say this analysis could be read as calling for the equitable disgorgement of profits, based on the notion that Takeda and Eli Lilly should not retain profits from sales that would arguably have not been made had they issued a proper warning about the potential bladder cancer risks of Actos.

"What struck me more than anything else was the fact that Judge Doherty seemed to want to exercise some power to take back sales of Actos that allegedly would not have occurred but for the lack of a proper warning," said Peter Goss of Blackwell Burke PA. "But that really isn't supposed to be part of a punitive damages review."

Another issue that Judge Doherty addressed Monday that is ripe for appellate scrutiny is the question of whether the jury's \$9 billion shows an inherent prejudice. Judge Doherty found that it did not, stressing that the jury was instructed to consider Takeda's and Eli Lilly's wanton and reckless behavior about Actos warnings. Takeda had not adopted the warning about the drug's bladder cancer risks until 2011, after "many years" of run-ins with regulators about the warnings, she stressed.

Judge Doherty's finding that the size of the punitive damages verdict did not show "passion or prejudice" formed her basis for denying the defendants' request for a new trial in the case. But it leaves room for an appeals court to consider also whether there could be an upper limit for when an award is inherently prejudiced, attorneys say.

"Ultimately, this case is going to be at the vanguard of the continuing discussion over the size and proportionality of punitive damages and the role they're supposed to play in our civil justice system," Goss said.

The plaintiffs are represented by W. Mark Lanier of The Lanier Law Firm, Paul J. Pennock of Weitz & Luxenberg PC and Richard J. Arsenault of Neblett Beard & Arsenault.

Takeda and Eli Lilly are represented by Sara J. Gourley and Sherry A. Knutson of Sidley Austin LLP, John E. McElligott Jr. of Davidson Meaux Sonnier McElligott Fontenot Gideon & Edwards and Bruce R. Parker of Venable LLP.

The case is Allen et al. v. Takeda Pharmaceutical Co. Ltd. et al., case number 6:12-cv-00064, and the MDL is In re: Actos (Pioglitazone) Products Liability Litigation, case number 6:11-md-02299, both in the U.S. District Court for the Western District of Louisiana.

--Editing by Katherine Rautenberg and Christine Chun. All Content © 2003-2014, Portfolio Media, Inc.