

## How A 3-Firm 'Joint Effort' Beat A \$3.6B Pharma Antitrust Suit

By **Bonnie Eslinger**

*Law360 (July 5, 2023, 7:57 PM EDT)* -- With Gilead and Teva facing trial on claims they bilked health plans and insurers out of \$3.6 billion through a "pay-for-delay" scheme over two HIV drugs, the three law firms representing the pharmaceutical giants secured a total victory last week by putting on a united front, attacking the reliability of the plaintiffs' experts and even waiving some attorney-client privilege.

Gilead Sciences Inc. and Teva Pharmaceutical Industries are market competitors and occasional courtroom rivals, but attorneys from Kirkland & Ellis LLP and Proskauer Rose LLP, representing Gilead, and Goodwin Procter LLP, representing Teva, say they took the California federal case to trial in a "great joint effort" rather than settling because their clients were on the same page and the facts were in their favor.

"That was the key from Teva's perspective all along, was to show the jury what actually happened," Teva lawyer Christopher Holding of Goodwin told Law360 during a Zoom interview this week, adding that the legal teams showed jurors that Teva's decision "had nothing to do with the 'pay-for-delay'" — a term for when a patent holder pays an alleged patent infringer to keep the rival company from competing against the patentee for an agreed-upon period of time — "and it had everything to do with managing the significant patent risk that Teva faced and getting the best they thought that they could."

### Attacking Plaintiffs' Experts Head-On

The plaintiffs' losing game plan, Holding said, was to focus the jury's attention on the opinions of their experts.

"I think the problem from our perspective all along is that those experts weren't grappling with what were actually the facts of the case," he said. "And so they didn't really address what this case was really about."

Convincing the jury to reject the reliability of the plaintiffs' experts was key to the defendants' win, said Gilead lawyer Bart Williams of Proskauer.

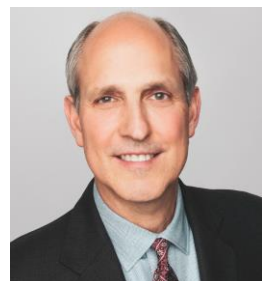
"They were the core of the plaintiffs' case, and so making the jury at least question whether that testimony was reliable was really key," Williams said during a phone



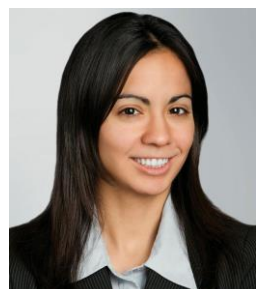
Bart Williams



Devora Allon



Christopher Holding



Susan Gutierrez

interview Monday with the other Gilead lawyers.

The case stems from an underlying patent dispute generic-drug maker Teva launched in 2008 challenging branded-drug maker Gilead's patents for its two blockbuster HIV drugs, Truvada and Atripla. Gilead responded by suing Teva, but the two companies reached an out-of-court agreement ending their claims in 2014.

During the trial, a pharmaceutical patent attorney testified for the drug purchasers that he believed Gilead's drug patents could have been invalidated by Teva, and another expert for the plaintiffs, a Harvard University professor, took that assessment and said Teva could have nabbed an earlier market entry date.

But that entry date was entirely reliant upon the patent attorney's incorrect analysis of Gilead's patents, Williams said.

"So, if you slightly changed that input — how likely Teva was to defeat the Gilead patents — it made an enormous difference with respect to [the expert's] model," Williams said, adding that the defendants' expert, Celeste Saravia, really "dug in" to discredit that model.

The defendants also made it clear to the jury that the drug purchasers' patent attorney was not giving a credible explanation for how he reached the conclusions he did, Proskauer partner Susan Gutierrez said.

"Trying to make that clear to the jury was paramount for us as well," Gutierrez said. "That was helped and assisted by our own expert, Ms. Kathleen O'Malley, a former Federal Circuit judge."

### **Listening to Your Client When Selecting Expert Witnesses**

Saravia, an economist with the consultancy firm Cornerstone Research, did a great job of describing how both parties would have been motivated to settle the case with the agreed-upon market entry date for Teva of September 2020, even without the alleged payment, Williams said.

And O'Malley, who retired from the Federal Circuit bench and is now of counsel at Irell & Manella LLP, told jurors that after analyzing the patents at issue, including related proceedings before the U.S. Patent and Trademark Office, she concluded that Teva would not have been able to invalidate Gilead's patents if the generics maker had pressed forward with its litigation.

Bringing O'Malley in for the defense was Gilead's idea, said Gilead lawyer Devora Allon of Kirkland.

Gilead "knew her, just from her reputation," Allon said. "It was their idea to reach out to her."

### **Not Being Afraid to Pull Back the Curtain**

In addition, Teva's decision to waive attorney-client privilege — which allowed jurors to see company emails during the underlying patent trial expressing concerns about losing their invalidity case — was also a winning move, the company's lawyer said.

"That was key to being able to actually lay out this record," Holding said.

Teva also put one of its top lawyers on the stand. Staci Julie, the lead in-house patent lawyer for Teva,

testified for six hours over three days.

Among other things, Julie talked about an email she had sent to her boss days before the 2014 settlement that was struck in the underlying patent litigation, saying, "We felt the trial went well for us but it's difficult to give odds of greater than 50 percent" for winning their case.

Teva's intention was to try to get its products to market as early as it could against formidable patents, and Julie was able to communicate that to jurors, Holding said.

"She was clear, [and] she's articulate," Holding said. "I was very happy that the jury got a chance to see a person behind these documents and to see really just what we said was going on."

### **Demonstrating the Competitive Market for HIV Drugs**

Convincing the jury that Gilead lacked market power — the ability to control prices — in the HIV drug market also helped seal the defendants' success.

The company is just one in a crowded market, Allon said.

"We don't just face competition from the generics, but we face competition from other brand products," Allon said. "In all of these generic delay cases, market power is a threshold issue."

The Gilead lawyer credited the defendants' expert witness, Lawrence Wu, an antitrust economic consultant who used to work for the Federal Trade Commission, with convincing jurors that Gilead faced ongoing innovation from other drugmakers before its agreement with Teva.

Patients are "making decisions based on innovation," Allon said. "They want the best quality products out there, and that forces Gilead to always compete."

Gutierrez said she believed the ability of the defendants' witnesses to keep their cool under the pressure of the drug purchasers' questions also contributed to the win.

"They remained calm and confident in the face of what at least I would describe as biting, often sarcastic or with a tone of disbelieving, cross-examination," Gutierrez said. "In many instances like that, a witness can either fold, or to the jury seem like a different person. Not our witnesses here. They remained calm, collected and provided the evidence as they understood it to be, and my personal belief is that the jury saw that."

### **Reverse-Engineering the Jury's Verdict**

The weeklong trial kicked off on May 25, and on June 30 the jury found that Gilead did not have market power within the relevant markets that included Truvada and Atripla.

The case should have been over at that point, as the jurors were told that if they found against the purchasers on that question, they could skip all others. But when the verdict was announced, the court learned that the jury had gone forward and answered the second question, concluding that the drug purchaser plaintiffs had not proved that the 2014 settlement agreement between the two companies in patent litigation included a "reverse payment" from Gilead to Teva that allowed it to delay giving up some of its market share to generic competition.

Williams said unexpectedly getting both answers was gratifying.

"Yeah, we thought a lot about that. I think it would stand to reason, because the case was framed by the plaintiffs as a 'pay-for-delay' case, that the jury wouldn't be able to help themselves but to jump to that topic," Williams said. "We had speculated that during jury deliberation they may have jumped to question two just to talk about it, because that was the primary focus of the plaintiffs' case."

Shortly before the verdict was announced, the jury sent a note to U.S. District Judge Edward Chen that asked if the market power question could be "skipped if we have an answer for question two" — the question about whether the purchasers had proven that the settlement included a reverse payment.

After being told by the court that they had to tackle the first question, the jury reached its verdict less than 20 minutes later: no market power, no pay-for-delay, a win for Gilead and Teva.

"It seems from the notes that the jury may have had a discussion of market power that was ongoing, but that they reached a decision on the second question, which had to do with was there a payment from Gilead to Teva, and then the court had to tell them that you have to answer question one first," Williams said.

### **Rivals in the Market, Collaborators in the Courtroom**

At trial, the two drug companies also had to tackle a question the plaintiffs put into the jury's mind about the nature of the relationship of the rivals-turned-co-defendants. During closing arguments, a lawyer for the purchasers pointed out that in the underlying patent case, Teva told the judge that Gilead "will say whatever it takes to preserve their monopoly," but the generics-maker was now fighting alongside Gilead.

Allon said the move didn't surprise her.

"We are and remain competitors, and that was really important for the jury to know," Allon said.

Nonetheless, Allon said Gilead's lawyers felt "lucky that in the context of this litigation, we had as a co-defendant Teva, and co-counsel Goodwin, who we were able to work very, very well with, really just as a team in the common defense."

Holding also touted the work the two companies and three law firms did to beat the case, calling it a "great joint effort."

Another obstacle that Gilead had to overcome was the fact that Gilead and Teva are both considered Big Pharma — which can get a bad rap in the public's mind — and that the case was about claims the defendants had overcharged for their products.

"We saw during jury selection that lots of jurors have an instinctive negative reaction to Big Pharma," Allon said. "I think that that's a very challenging dynamic."

That also could lead to a possible perception that the plaintiffs — health plans and health insurance companies — were fighting against Big Pharma for everyday people like the jurors, Allon said.

"Our innovation has literally saved ... countless lives and has essentially transformed what was once a death sentence into ... a condition that can really be managed for people who live with HIV," Allon said. "I think we were able to successfully explain to jurors that [the plaintiffs' portrayal of Big Pharma] just wasn't accurate. ... Gilead is on the side of progress and innovation and access."

In the wake of the U.S. Supreme Court's landmark ruling in 2013's *Federal Trade Commission v. Actavis* — which held that large payments by branded-drug makers to potential generic entrants to settle patent disputes could be anti-competitive — many defendants in these kinds of "pay-for-delay" cases have settled regardless of the merits, Allon said.

"The reality is they just settle because the stakes are so high," the Gilead lawyer said. "And we were really lucky here to have a client who had the courage of its convictions and was willing to take it to verdict."

The end-payor plaintiffs are represented by Hilliard Shadowen LLP and Hagens Berman Sobol Shapiro LLP.

United HealthCare Services Inc. is represented by Zelle LLP and Boies Schiller Flexner LLP.

Humana Inc., Blue Cross and Blue Shield of Florida Inc., Health Options Inc., Centene Corp., Triple-S Salud Inc., Blue Cross and Blue Shield of Kansas City and Kaiser Foundation Health Plan Inc. are represented by Crowell & Moring LLP and Berry Silberberg Stokes PC.

Gilead is represented by Bart Williams, Susan Gutierrez, Will Dalsen, Om Alladi, Christina Assi, Margaret Ukwu and Genesis Sanchez Tavarez of Proskauer Rose LLP and Jay Lefkowitz, Devora W. Allon, James F. Hurst, Kevin T. Van Wart, Kevin M. Jonke, Molly Kelley and Michael J. Shipley of Kirkland & Ellis LLP.

Teva is represented by Christopher Holding, Daryl Wiesen, Molly Grammel, Tucker DeVoe and Joseph Rockers of Goodwin Procter LLP.

The case is *In re: HIV Antitrust Litigation*, case number 3:19-cv-02573, in the U.S. District Court for the Northern District of California.

--Editing by Alanna Weissman and Jill Coffey.