

BUSINESS LITIGATION

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Insurer Has Controversial Strategy to Reduce Rx Costs

BY DAVID RUBENSTEIN

LITIGATION is a poor way to settle disputes, especially when it takes place among parties who have to continue doing business with each other. Executives are distracted, profits decline, the economy suffers, the lawyers get rich and so on.

Most corporate attorneys would agree with these bromides, and if they didn't, they probably would avoid saying so on the record.

An exception to the rule has cropped up in an unlikely setting. Blue Cross & Blue Shield United of Wisconsin, the largest health insurer in the state, has embraced litigation as a way to bring healthcare costs down and affect healthcare policy in ways designed to benefit customers.

"We actively and aggressively prosecute cases," says Lawrence R. LaSusa, litigation counsel at Milwaukee-based United Wisconsin Services Inc., the publicly traded affiliate of the Wisconsin Blue Cross. "One thing we are currently doing is promoting health insurer versus pharmaceutical company lawsuits."

Many health insurance companies are taking a beating from the brand-name pharmacy companies, according to LaSusa. "The big companies have been vigilant about keeping generics off the market through anti-competitive behavior," he says. "It typically works out to be advantageous for the brand name to pay what to some people would be exorbitant amounts of money, many millions every quarter, to the generic manufacturers to keep their product off the market."

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lawsuits targeting pharmaceutical companies. Allegations include payoffs to the generic manufacturers to keep them from selling their product.

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"The funny thing is," he adds, "very few health insurers prosecute this sort of thing. It's not a popular concept, to sue your providers."

Among the Blues affiliates nationally, which represent about one in four people with health insurance, it's not a concept that has caught on. His organization is the "laboring oar" of this endeavor, according to LaSusa. He thinks it ought to be embraced more widely.

A LEGAL MILIEU

When LaSusa went to work at Wisconsin Blue Cross in 1997, he found a soul mate in Russell Streur, the head of an aggressive UWS fraud investigation unit.

"They hooked me up with Russ, and we have been collaborating on all sorts of cases since then, in the investigation phase as well as litigation." LaSusa calls Streur an old fashioned gumshoe and a first-rate investigator. Streur is not an attorney.

"It's been fun," says LaSusa. "I get to do some of the stuff I originally started out doing for the Illinois attorney general, which was fraud investigations and recoveries that helped thousands of people. In a sense, I'm doing the same thing here."

LaSusa's view is that he has helped articulate and take to the level of corporate strategy an effort that Streur was already implementing, in a corporate culture that was predisposed to accept an aggressive legal strategy. The CEO of United Wisconsin Services and Blue Cross & Blue Shield United, Thomas R. Hefty, is a former Wisconsin deputy insurance commissioner and former attorney with the Federal Trade Commission.

"This is one of the companies that promotes lawyers to business positions," LaSusa says. "Half the strategic business units here are headed by law department alumni."

This is one reason that, when the company makes strategic business plans, the attorneys are involved, according to LaSusa. "When we looked at these issues,

it wasn't just business people saying, 'Yeah, there's a problem out there, but no, we don't want to ruffle any feathers.' It was, 'There's a problem, and as lawyers, we are going to do something about it.'"

MOVING TARGET

Russell Streur, gumshoe, has been working for the organization since 1991. He began in the subrogation unit, dealing with accidents. As interest in healthcare costs and abuses waxed, his job changed.

Since 1992, Streur's unit has been involved in numerous UWS lawsuits, including cases involving false billings in the mental health and homecare industries.

Today Streur's title is supervisor of the fraud investigation unit at Meridian Resource Corp. Meridian is a subsidiary of United Wisconsin Services. Spun off early in 1999, it handles the fraud investigations for Blue Cross & Blue Shield United of Wisconsin and works on contract for other carriers.

According to Streur, we are currently in the third era of the rapid-fire history of healthcare fraud. The first, in the early part of the 1990s, was the era of inappropriate mental health treatment: committing people who didn't need to be committed and keeping them committed until their insurance benefits ran out. The second, roughly the mid-1990s, saw an upsurge in clinical billing irregularities. This was the age of "upcoding."

Now we are in the third cycle of abuse, according to Streur, and it involves pharmaceuticals. The first indicators, he says, showed up a few years ago, "when the cost of prescription drugs began to outrun not only the base rate of inflation, but the higher rate of medical cost inflation."

"The prices are spiking. Why are they spiking?" he asks. "You come to certain conclusions. A brand-name drug company pays a generic competitor not to market. Brand-name drug company pays a supplier not to supply to rivals.

"We are trying to provide an answer and create a lead," he says, "a position that other companies can follow."

THE DRUG CASES

In March 1999, UWS filed a lawsuit against Hoechst and a generic manufacturer, Andrx Pharmaceuticals Inc., Ft. Lauderdale, Fla. In May, UWS filed a suit against, among others, Mylan Pharmaceuticals Inc. In October, it filed against Abbott Laboratories. All three

lawsuits were filed as class actions.

The Abbott suit was filed in the Circuit Court of Cook County, Chancery Division, under the Illinois Fraud and Deceptive Practices Act. It alleges that at least five companies could have manufactured a generic equivalent for Abbott's best-selling drug Hytrin. But they were stymied, accord-



PHOTO BY LYNDEN STEELE

Russell Streur

ing to the complaint, "by the unfair and deceptive trade practices of Abbott."

The suit alleges that Abbott first filed irrelevant or invalid patents; then paid two generic manufacturers (both also defendants in the lawsuit) tens of millions of dollars not to market the generic.

The Abbott suit is filed in the name of United Wisconsin Services Inc., Blue Cross & Blue Shield United of Wisconsin, and other UWS affiliates and subsidiaries, and a class consisting of insurers who paid for Hytrin prescriptions since 1995. The complaint estimates that in 1998 alone, U.S. sales of Hytrin were more than \$540 million, most of it paid for by insurers.

The Hoechst suit (*United Wisconsin Services Inc. et al v. Hoechst Aktiengesellschaft, Hoechst Marion Roussel Inc. and Andrx Pharmaceuticals Inc.*), was filed in State of Wisconsin Circuit Court, Milwaukee County.

This suit, brought under Wisconsin antitrust laws, accuses the Hoechst companies of a two-stage effort to monopolize the \$900 million annual market for the prescription heart drug diltiazem hydrochloride, which Hoechst markets as Cardizem CD. According to the complaint, starting in 1992, Hoechst engaged in a variety of anti-competitive practices, including filing frivolous patent infringement actions. Then in 1997, realizing that its efforts were not sufficient, it conspired with Andrx to divide the market, under an agreement that involved Hoechst paying Andrx millions of dollars a year not to market its generic version of Cardizem and to block other generic manufacturers from the market.

The Mylan suit, *United Wisconsin Services Inc., et al v. Mylan Laboratories et al*, was filed in U.S. District Court, District of Columbia. It seeks damages for alleged violations of state antitrust and consumer protection laws, and disgorgement for defendants' "unjust enrichment." According



“A lot of these in-house counsel have been ignoring the impact of pharmaceutical expenditures on their plans, and why it is happening,” says Richard W. Cohen, partner at Lowey Dannenberg Bemporad & Selinger. “Larry has been on the soap box, exhorting them to get active.”

state attorneys general and consumer plaintiffs have filed. UWS was the first traditional third-party payer to file, according to Cohen.

A key tactic of the brand-name pharmaceuticals is something that Cohen characterizes as evergreening: They wait until the patent on “the molecule” is about to expire, lard on some new and invariably off-the-wall patent applications that allegedly pertain to the product and then litigate against the generic that is coming on the market. Under provisions of the Hatch-Waxman Act, that automatically gives them another 30 months of protection, in addition to the 17 years, plus extensions in some cases, that they have already

to the complaint, the defendants’ actions allowed them raise the price for the generic drugs lorazepam and clorazepate by as much as 4,000 percent beginning in 1998.

The suit against Mylan is also brought in the name of a class of third party payers. It alleges that Mylan and the other defendants have arranged to keep generic manufacturers other than Mylan from obtaining necessary ingredients to manufacture the drugs named.

“As evidence of the success of Mylan’s monopolization scheme, its market shares of generic Lorazepam and generic Chlorazepate *increased* when Mylan raised prices more than tenfold,” according to the complaint [“FTC Pushes Boundaries With Disgorgement Case, January 1999, p. 74].

A spokesperson for PhRMA, the Pharmaceutical Research and Manufacturers of America (formerly the Pharmaceutical Manufacturer’s Association), says that Hoechst and Abbott are members, but as a matter of policy, the organization would not comment on the

lawsuits, nor would it comment more generally on the issues raised by LaSusa or the lawsuits.

A spokesperson for Abbott says it is policy not to comment on pending litigation. Calls to the legal department at Hoechst Marion Roussel and to the general counsel’s office at Mylan were not returned.

Although UWS has been notably active in this area, it is far from the only party that has been involved. The Federal Trade Commission has indicated it is looking at the Hoechst and the Hoechst-Andrx relationship. Aetna has sued Hoechst over allegations relating to Cardizem CD, and there are now about 30 pending lawsuits relating to Cardizem, according to Richard W. Cohen, partner at Lowey Dannenberg Bemporad & Selinger in White Plains, N.Y.

Cohen, in fact, has filed several of them, including the case for Aetna, as well as for UWS. Cohen is representing UWS in all three of its 1999 pharmaceutical company litigations.

In the Mylan case, the FTC, numerous

enjoyed.

\$100 BILLION IN DRUGS

The managed care industry has been caught flat-footed, in Cohen’s view. Its response, now that criticism has reached critical mass, is to pour resources into lobbying while failing to confront economic facts that are making their business untenable. Last year, according to Cohen, about \$100 billion was expended on prescription drugs in the United States, about 70 percent of it through managed care companies.

“What percent of that is affected by the acrobatics done to keep generics off the market?” he asks. “Ten billion? Fifteen? It’s a lot of money.

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