PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2233

MAYOR AND CITY COUNCIL OF BALTIMORE; GOVERNMENT EMPLOYEES HEALTH ASSOCIATION, on behalf of itself and all others similarly situated,

Plaintiffs - Appellants,

v.

ACTELION PHARMACEUTICALS LTD.; ACTELION PHARMACEUTICALS US, INC.; JANSSEN RESEARCH & DEVELOPMENT, LLC,

Defendants - Appellees,

and

ACTELION CLINICAL RESEARCH, INC.,

Defendant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. George L. Russell, III, District Judge. (1:18-cv-03560-GLR)

Submitted: January 29, 2021 Decided: April 13, 2021

Before NIEMEYER, WYNN and FLOYD, Circuit Judges.

Vacated and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Wynn and Judge Floyd joined.

Sharon K. Robertson, David O. Fisher, COHEN MILSTEIN SELLERS & TOLL, New York, New York, for Appellants. Gregory T. Lawrence, LAWRENCE LAW, LLC, Baltimore, Maryland; Katherine B. Forrest, Damaris Hernández, CRAVATH, SWAINE & MOORE LLP, New York, New York, for Appellees.

NIEMEYER, Circuit Judge:

The plaintiffs[1] commenced this antitrust class action against Actelion,[2] alleging that Actelion extended its patent monopoly for its branded drug Tracleer — a drug to treat pulmonary artery hypertension — beyond the patent's expiration date. They alleged that Actelion did so "through illegitimate means" with the intent of precluding competition from generic drug manufacturers and charging supracompetitive prices for Tracleer, in violation of federal and state antitrust laws. They claim that as a result of Actelion's illegal monopolization, they were injured by having to pay supracompetitive prices for Tracleer for some three years after Actelion's patent for Tracleer expired.

On Actelion's motion, the district court dismissed the plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6), ruling that all but four of the plaintiffs' claims were barred by the applicable four-year statutes of limitations because the action was commenced on November 19, 2018, more than four years after "Actelion's last overt anticompetitive act" in February 2014. The court identified that act as the consummation of settlement agreements between Actelion and several generic manufacturers, resulting in the dismissal of the manufacturers' antitrust actions against Actelion. With respect to the four claims that it held were not barred by limitations — claims made under the laws of Maine, Minnesota, Vermont, and Wisconsin — the court ruled that the plaintiffs lacked

[1] Mayor and City Council of Baltimore and Government Employees Health Association.

[2] Actelion Pharmaceuticals Ltd.; Actelion Clinical Research, Inc.; Actelion Pharmaceuticals US, Inc.; and Janssen Research & Development, LLC, collectively, "Actelion."

standing to assert them because the plaintiffs made no purchases of Tracleer in those States and thus suffered no harm that implicated their laws.

On appeal, we vacate and remand, concluding that the plaintiffs' antitrust claims did not accrue until the plaintiffs were injured by paying supracompetitive prices for Tracleer after the patent expired in November 2015. Therefore, their action commenced in November 2018 was timely. Moreover, even if the February 2014 date, when Actelion entered into agreements settling the generic manufacturers' antitrust claims, marked the last anticompetitive act, damages could not then have been recovered by plaintiffs because their claims would not have been ripe for judicial resolution in view of the speculative nature of future conduct that might have thereafter occurred. Therefore, limitations would not begin to run until the claims became ripe. And in any event, because the plaintiffs alleged that Actelion continued with anticompetitive acts after November 2015 in selling Tracleer at supracompetitive prices, new limitations periods began to run from each sale that caused the plaintiffs damages. Accordingly, we vacate the district court's limitations ruling.

As to the district court's standing ruling, we largely agree with the district court. But while the plaintiffs cannot for that reason seek relief under the laws of States in which they made no purchases of Tracleer — i.e., Maine, Minnesota, Vermont, and Wisconsin, as well as others — they nonetheless might, if a class is certified under Rule 23(c), be able to advance claims under those laws on behalf of class members who purchased Tracleer in those States. Accordingly, we conclude that the allegations asserting violations of the laws in States where plaintiffs did not purchase Tracleer may yet be considered when

determining whether the plaintiffs can, based on a Rule 23 analysis, represent class members who purchased Tracleer in those States, and if they can, then whether the plaintiffs can include those claims.

I

The facts alleged in the complaint are, for purposes of this appeal, taken as true, as the district court's dismissal order was based on Federal Rule of Civil Procedure 12(b)(6).

The complaint alleges that Actelion is a pharmaceutical company that obtained an exclusive license under a patent for Tracleer — U.S. Patent No. 5,292,740 (Patent '740) — which was issued in 1994 to Hoffman-LaRoche, Inc. Tracleer, which contains the compound bosentan, is the only oral treatment for pulmonary arterial hypertension, and Actelion made billions of dollars in profits from sales of the drug. Patent '740 expired on November 20, 2015.

For some three years after Patent '740 expired, no competitor brought a generic version of Tracleer to market, and Actelion was thus able to continue to charge the same supracompetitive prices for Tracleer that it had charged before the patent expired. In their complaint, the plaintiffs alleged that this absence of competition was attributable to a multi-year scheme by Actelion to block at least four generic manufacturers from filing applications for approval of a generic version of Tracleer with the intent to maintain its patent monopoly power beyond the expiration date, in violation of the antitrust laws. As alleged, the generic drug manufacturers sought to obtain from Actelion, beginning in 2009, samples of Tracleer to enable them to develop a generic drug. This was necessary because

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