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Girardi Keese Can't Avoid Recovery Sharing In Avandia Suits

By **Martin Bricketto**

Law360, New York (July 2, 2015, 7:51 PM EDT) -- The Third Circuit on Thursday upheld an order forcing The Girardi Keese Law Firm to kick in its purported share to a common benefit fund in centralized suits against GlaxoSmithKline LLC over the diabetes drug Avandia, finding that a district court had the power to decide the cross-country dispute.

The case centered on an attorney participation agreement among plaintiffs' lawyers in multidistrict litigation in Pennsylvania federal court and a related court order cementing the benefit fund. Girardi Keese and other participants agreed to kick in 7 percent of recoveries for mutual resources, but the firm argued that the deal didn't extend to the settlement of numerous Avandia cases it handled in California state court.

The issue arose after Girardi Keese and GSK in 2012 settled all of the firm's Avandia cases — Girardi Keese represented clients in about 25 cases in the MDL but thousands of California cases — and the drugmaker said it would hold back 7 percent of the settlement based on the attorney participation agreement. While the firm contested the assessment as to the California cases, the district court last year ruled that all of the settled cases fell under the assessment and ordered GSK to withhold the funds.

The district court would have overstepped its authority if it ordered Girardi Keese to contribute to the common benefit fund despite being a stranger to the MDL, but that wasn't what happened, the panel said Thursday.

"The proper question we must ask is did the district court properly exercise jurisdiction to enforce the contract Girardi Keese made with the plaintiffs' steering committee," the panel said. "We conclude that it did."

When it signed the agreement with the MDL plaintiffs' steering committee, Girardi Keese committed a share of recoveries on claims that Avandia increases heart failure risks in exchange for use of the committee's litigation work product, the panel noted. The promised share included 4 percent from attorneys' fees and 3 percent from what clients won.

The district court's subsequent order establishing a fund to compensate the steering committee for common work incorporated that agreement, according to the panel. Generally, district courts overseeing MDLs are expected to help organize a leadership structure among plaintiffs for case management purposes and craft a means to compensate attorneys for work that benefits the cases as a whole, the panel added.

"This is not, as Girardi Keese argues, finding subject-matter jurisdiction by agreement of the parties," the panel said. "The agreement itself is not the source of the district court's

authority. Rather, the district court's authority over this dispute arose from its responsibilities to appoint and supervise a coordinating committee of counsel. The agreement was simply incorporated into an order the district court was empowered to issue."

Girardi Keese also argued on appeal that the court should have compensated the firm for the common benefit work that it produced, but the panel said it didn't offer evidence of work that served a common benefit versus work that solely aided its own clients.

"We cannot say the district court abused its discretion in failing to consider or grant a credit for the common benefit Girardi Keese provided when no evidence exists in the record that Girardi Keese actually provided a common benefit," the panel said. "If Girardi Keese believes it has provided a common benefit to all plaintiffs litigating over Avandia, it may and should apply to the district court for such an award."

Representing the plaintiffs' committee, Dianne M. Nast of NastLaw said the underlying decision from U.S. District Judge Cynthia M. Rufe was "solid and sound."

"We are of course pleased that Judge Rufe's opinion has been upheld — it was obvious that she weighed the issues with care and it appears that the Third Circuit agrees, in an also thoughtful opinion," Nast said.

An attorney for Girardi Keese did not immediately return a request for comment late Thursday.

Circuit Judges Patty Shwartz, D. Michael Fisher and Kent A. Jordan sat on the panel for the Third Circuit.

The plaintiffs' committee is represented by Dianne M. Nast of NastLaw.

Girardi Keese is represented by David S. Senoff and William R. Caroselli of Caroselli Beachler McTiernan & Conboy LLC.

The case is In re: Avandia Marketing, Sales Practices and Products Liability Litigation, case number 14-2980, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Mark Lebetkin.

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