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### How Lilly's Covington lawyers defeated Amylin injunction

Alison Frankel

It's no small thing to persuade a federal district court judge to change her mind, especially a mere two weeks after she's delivered a paralyzing karate chop to your client. So kudos to Michael Imbroscio and Thomas Barnett of Covington & Burling, who on Wednesday won a ruling from San Diego U.S. district court judge Janis Sammartino that dissolves a temporary restraining order barring Covington's client, Eli Lilly, from deploying sales reps to market a new diabetes drug Lilly developed in a partnership with Boehringer Ingelheim.

Judge Sammartino also denied a preliminary injunction request by Amylin, which had claimed that Lilly's sale of the new Boehringer drug was a breach of Lilly's agreement to market a rival diabetes drug previously developed by Amylin. The judge concluded that if Lilly markets the Boehringer drug, Amylin won't suffer irreparable harm—either through the misuse of confidential information or the loss of prospective customers and goodwill. That's quite a turnaround from her May 25 TRO decision, in which Judge Sammartino memorably compared Amylin to a jilted lover. Here's Reuters' story on the preliminary injunction decision, which includes official statements from both Lilly and Amylin.

But OTC wanted to know how Covington brought Judge Sammartino around to Lilly's view of the case. Happily, we got hold of a transcript of the June 2 preliminary injunction hearing, which answers a lot of questions about this otherwise sealed litigation.

To begin with, Lilly's lawyers (including Stephen Swinton of Latham & Watkins) made it clear to Judge Sammartino how important the Amylin case was to the company. Senior executives from Lilly's diabetes division came to court for the hearing, and Lilly's counsel took care to introduce them to the judge. (And how important is the case? Lilly's lawyers didn't drop any numbers, but Amylin's counsel from Skadden, Arps, Slate, Meagher & Flom said at one point in the hearing that Lilly lost \$13.5 million in sales of the new diabetes drug in the first week of the TRO, and had claimed "hundreds of millions of dollars" in other TRO-related losses.)

The Covington tag team of Imbroscio and Barnett did a good job of offering evidence that Lilly's deal with Amylin anticipated the introduction of other drugs to Lilly's portfolio of diabetes treatments. The Lilly lawyers resisted Skadden's assertion that the Boehringer drug is intended to replace the Amylin drug, insisting that Lilly regards the two treatments as complementary, not competing. That's how Lilly trained its sales reps to present information to doctors, the Covington lawyers asserted, and that's why Lilly has continued to support the Amylin drug.

"We're in this for the long run [with Amylin]," Imbroscio said. "We committed to the product, committed to the benefits it can bring patients. The suggestion that we want to just kick them to the curb is just wrong."

Skadden partners Maura Grinalds and Clifford Aronson, arguing for Amylin, attempted to hammer at the confidential information issue that concerned Judge Sammartino at the temporary injunction stage. "The loss of control of confidential information, putting it in the hands of sales representatives whose mission it is to promote a directly competing product," Grinalds said, "that loss is irretrievable and the case law demonstrates that. It also muddles our message forever."

Added Aronson: "What they've done is, they've taken the people that we have trained year after year to understand what our story is and they've taken them and they assigned them to [Boehringer's] product. How is that not injury? I mean, now those people know what our answers are. They know what our weaknesses are. They know what our strengths are."

But this time around, Covington had an answer to the judge's concerns about Lilly reps using confidential Amylin knowledge. On rebuttal, Imbroscio informed Judge Sammartino that federal regulations prohibit Lilly sales representatives from drawing comparisons between the Amylin and Boehringer drugs, let alone disparaging the Amylin product. Moreover, he said, Amylin's arguments didn't hold water at the preliminary injunction stage, when the standard is irreparable harm.

"We're not talking about the formula for Coca-Cola here," he said. "In the end, it's a case about money. They think that our reps are going to do something wrong with information that they have and it's going to hurt their sales. Even if you accept all that, as hard as it is for me to even give that hypothetical, it's a dispute about money."

Those arguments apparently won over Judge Sammartino. "Amylin has offered no concrete evidence that Lilly's sales representatives would risk FDA sanctions," she wrote, explaining her conclusion that Amylin hadn't shown it would suffer irreparable harm if Lilly reps sold the Boehringer drug. "Amylin has failed to show that money damages would not suffice to remedy any potential harm."

Both Skadden and Covington declined requests for comment. OTC will be watching to see whether the preliminary injunction hearing is the last time the firms will face off in this case; Judge Sammartino, citing the continuing business relationship between Lilly and Amylin, encouraged both sides to resolve the dispute outside of the courtroom.

### ---- Index References ----

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