# Judge Calls Drugmaker's Bid To Strike 'A Bit Disingenuous'

*By Jonathan Capriel · Listen to article*

Law360 (July 11, 2023, 8:37 PM EDT) -- Acella Pharmaceuticals can't escape a proposed class action over its recalled thyroid medication, a Georgia federal judge ruled, calling some of the company's assertions as to why the plaintiffs could never secure class certification "a bit disingenuous."

While U.S. District Judge Richard W. Story said he had some leanings to toss Acella's motion to strike class allegations as premature, as "many district courts in the Eleventh Circuit" do, he decided to address and reject the company's arguments in his 24-page order issued Monday.

He suggested some of Acella's assertions were weak, specifically its claim that the proposed class lacked typicality because one named plaintiff described the medication as "sub-potent," while the other called it "defective."

"This is, frankly, a distinction without a difference and a bit disingenuous," Judge Story said.

The order said that it does not appear "impossible" for the plaintiffs, led by Sue Faulkner, to secure certification. It denied Acella's motion to strike and its request to delay discovery as moot. It also noted that the company could bring these same arguments up again further down the road should the class seek certification.

The lawsuit, filed in May, claims that Acella failed to properly make its NP Thyroid medication and didn't conduct any post-production testing, resulting in three recalls of the drug for being "super-potent" or "sub-potent" and landing a number of consumers in the hospital.

Despite years of boasting that the drug was made with the highest-quality standards by US Pharmacopeia, the U.S. Food and Drug Administration repeatedly cited Acella for quality control issues going as far back as 2012. The agency found "significant violations of current good manufacturing practice regulations for finished pharmaceuticals" during an inspection launched in 2019, the lawsuit said.

Acella's motion to strike said the putative class action failed to meet the typicality and predominant commonality requirements for class certification. It called the suit "overbroad," and argued that the litigation would be bogged down with hyper-individualized claims of injuries "or no injury at all."

But in both instances, Judge Story said the patients satisfied the requirements. In terms of commonality, the

lawsuit's pleadings point to the company's actions in making the drug.

"The issue of 'whether the NP Thyroid tablets manufactured, distributed, and sold by Acella were adulterated or defective because they failed to meet USP requirements' can be readily proven or disproven through a review of the specifications and testing records that Acella undoubtedly possesses," the judge said. "None of these questions turn or depend on individualized proof."

As for typicality, the judge said that the lawsuit adequately pleads economic injury among all plaintiffs, and notes it seeks to recover economic damages, attorney fees and punitive damages.

"Though they acknowledge that 'every member of the class suffered a personal injury to some extent,' they make clear that they 'do not seek to recover damages for personal injuries on a class-wide basis,'" the judge said.

However, the law doesn't actually preclude them from attempting to recover from personal injuries on a class-wide basis, the judge said, pointing to the 2001 Eastern District of New York case Nicholson v. Williams.

"This court has reached the same conclusion before, as have many other federal courts across the country," Judge Story said.

Counsel for both parties declined to comment.

The patients are represented by Aaron K. Block, Max Marks and Allison Bailey of The Block Firm LLC.

Acella is represented by David F. Norden and Elizabeth P. Waldbeser of Troutman Pepper Hamilton Sanders LLP.

The case is Faulkner v. Acella Pharmaceuticals, LLC, case number 2:22-cv-00092, in the U.S. District Court for the Northern District of Georgia.

--Additional reporting by Kelcey Caulder. Editing by Alex Hubbard.



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