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Meet the lawyer trying to pry drug pricing secrets out of Big Pharma

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April 20, 2017

He has a private jet, a pedigree of winning billion-dollar settlements, and the (sometimes grudging) respect of his adversaries. Now, he wants to become pharma's latest headache.

Class-action attorney Steve Berman is coming after a drug industry he says is "gouging" the American consumer. And his suits have the potential to crack the lid on the black box of drug pricing, shedding light on a secretive process that has sparked an escalating blame game between drug makers and the many middlemen in the US health care system.

Berman sees the drug pricing system as a Rube Goldberg machine for extracting money from patients: Pharma sets a high price for a given medication, and then promises a big, undisclosed rebate to the pharmacy benefit managers who control which drugs get covered by insurers. As prices go up, so too do the secret rebates. Berman's conclusion: The big guys get richer, and the patients pay the price.

So he's suing. One of his recent cases, against Mylan, argues that the company ran a racket with its infamous EpiPen, doling out kickbacks to PBMs to ensure its epinephrine primacy. Another, against the three biggest makers of insulin, accuses them of mounting an "arms race" of lockstep price increases to compensate for escalating rebates.

"The theme in all the cases is that the consumer is powerless, and the drug companies know that," Berman said in an interview. "It's completely opaque, so the drug companies will take advantage of that any time they can."

Mylan did not respond to requests for comment. The insulin makers — Eli Lilly, Sanofi, and Novo Nordisk — have all said they reject the allegations and intend to defend themselves accordingly.

In the past, the drug industry has defended itself by pointing the finger at PBMs, claiming that the middlemen have used the threat of yanking insurance coverage to force pharma into offering larger and larger rebates. And that, in turn, forces pharma to raise its list prices simply to stay solvent, the industry argues.

But because the contracts between drug makers and PBMs are protected as trade secrets, outsiders have found it impossible to adjudicate the dispute. That makes Berman's work, which could surface some of those details, particularly fascinating. And, for drug makers, potentially nerve-wracking.

“In an area as dark and opaque as this, any time you learn anything, it’s valuable,” said Dr. Walid Gellad, an associate professor of medicine and the co-director of the Center for Pharmaceutical Policy and Prescribing at the University of Pittsburgh.

“The players involved know what the truth is,” said Gellad, who called Berman’s lawsuit against Mylan the best he’d ever read. “They know how much money is changing hands; they know what’s happening. But it’s in no one’s best interest to reveal that.”

Berman, who has built a reputation among defense attorneys as a formidable opponent, is confident he can force the industry’s hand.

A self-appointed lawyer for David, against Goliath

Berman’s list of adversaries reads like a corporate rogues gallery, starring Enron, Bernie Madoff, Bear Stearns, and Exxon Valdez. Neatly framed news clippings of his wins against the biggest wheels of industry dot his Seattle office like claimed pelts.

His firm, Hagens Berman Sobol Shapiro, has an origin story befitting its cofounder’s persona. In 1993, he wanted to go after Jack in the Box over a spate of hamburger-borne E. coli infections. His law firm didn’t want to take it on, so Berman struck out on his own. Within two years, he’d won a \$12 million settlement from the parent company of Jack in the Box, thus beginning an ascendant career in class-action law.

In the decades since, Berman has triumphed over Big Tobacco, major automakers, and multinational oil companies, securing billions of dollars in settlements and transforming his firm from a punchy upstart into a household name among corporate attorneys. In his retelling, he’s always attorney to David, taking on corporate Goliaths with “squadrons of lawyers.”

Along the way, Berman rose to prominence as a camera-friendly, quick-with-quote advocate for consumers. He’s represented iPod owners upset about earphone volume, SeaWorld patrons concerned with the well-being of orcas, and candy eaters worried their Butterfinger bars have ties to child labor. And he rarely misses an opportunity to explain the precise extent of their plight to the media.

Berman, 62, is quiet and somewhat aloof in person, fellow attorneys said. An avid cyclist, he spends his weekends refereeing youth soccer matches and competing in races on the pricey bike often parked in his office.

But when an audience is to be reached, Berman’s reserved nature gives way to showmanship. His corporate adversaries are trying to “pass the buck,” using “smoke and mirrors” to hide “the disturbing truth” from customers who are “practically imprisoned.”

“You will search with some difficulty for people who successfully do what he does and do not have a big personality,” said Walter Olson, a senior fellow at the Cato Institute’s Center for Constitutional Studies. “As is the case with birds, it helps both to deter competitors and intimidate enemies when you have a large feather display.”

Corporations know that getting hit with a Berman lawsuit “means you’re in for a fight,” said Mark Mester, a partner at the firm Latham and Watkins.

“But you know it’s going to be a fair fight,” said Mester, who represented the NCAA against Berman’s firm in a class action over athletes’ head injuries. “They’re not going to resort to games or tricks that are beyond the pale.”

At least, not most of the time.

In 2015, Berman’s firm made claims that gave “new meaning to ‘frivolous,’” US District Judge Paul Diamond memorably declared.

The case was a bit of a stretch to begin with: Berman brought suit against the German drug maker Grünenthal on behalf of patients born with birth defects because their mothers took thalidomide while pregnant. The catch: Their births took place some 50 years before the suit was filed, putting the claims well beyond the statute of limitations. Still, Berman argued that he had a valid case because the plaintiffs hadn’t known until recently that thalidomide caused their birth defects — even though the drug’s tragic side effects have been well-known for decades.

The judge didn’t happen to agree. He imposed sanctions on the firm in an embarrassing ruling.

Berman hasn’t gotten over it. “I consulted with the best scientists in the world on that,” he said, “and I still think I’m right.”

Treating pharma like the mob

In his latest lawsuits against drug companies, Berman is taking a cue from cases against the Gambino, Lucchese, and Genovese crime families.

The Racketeer Influenced and Corrupt Organizations Act — or RICO — was designed as a legal cudgel to dismantle the mob, holding bosses liable for the crimes they delegate to middlemen. It has since been widely applied to mob-like activity elsewhere. To Berman, pharma fits the bill.

His insulin case paints a picture of each drug company sitting at the head of a table like a crime boss, with the three major PBMs — Express Scripts, CVS Caremark, and OptumRx — gathered to carry out its bidding. None of the PBMs is charged in the suit, but under RICO, they don’t need to be. Berman portrays them as actors in the drug companies’ protection racket.

The companies and PBMs “functioned as a continuing unit for the purposes of implementing the [insulin] pricing scheme and, when issues arise during the scheme, each agreed to take actions to hide the scheme and continue its existence,” according to the suit.

Sanofi, Lilly, and Novo Nordisk raised the prices of their insulins by more than 160 percent over five years, leaving some patients paying nearly \$900 a month, the suit claims. Higher prices allowed for bigger rebates, enriching PBMs and skewering patients, Berman argues.

Berman’s Mylan suit takes the same RICO approach, lumping the company and its associated PBMs into a crime family dubbed “the EpiPen Pricing Enterprise.”

The cost of an EpiPen auto-injector, which can be lifesaving for patients suffering an allergic reaction, rose by 500 percent over the last decade. Mylan CEO Heather Bresch, echoing many in the industry, said the demands of PBMs forced her company's hand. But "Mylan is no victim," according to Berman. Instead, the company used its list-price increases to convince PBMs to pick EpiPen over competitors, helping Mylan build a commercial juggernaut at consumers' expense.

"These companies are messing up people's lives," Berman said. "Whether it's an EpiPen or an insulin shot, you're talking about medicines that were invented decades ago. There's something seriously wrong when this happens."

It's early days yet for both suits, which were filed earlier this year. Berman's firm is still recruiting patients to join as plaintiffs, and each case is awaiting judicial certification as a class action. That will begin what is commonly a drawn-out process, legal experts said, dappled with motions to dismiss, mediation, and other judicial horse trading.

The best-case scenario for transparency — a pair of public trials — is unlikely, said Michael Carrier, a Rutgers University law professor who studies antitrust matters. The class-action game is slow but often predictable: The sides poke and pry at one another until they come to a settlement, Carrier said.

But along the way, Berman could shake loose some telling details that even Congress has failed to unearth. The contracts and contacts between drug makers and PBMs, for example, would help outsiders figure out just who's getting richest on rising drug prices.

"There are so many different actors at each point in the process that are taking out money," Carrier said. "That's one of the things that might come to light: What's going on with a lot of these actors?"

And if Berman has his way, there will be plenty more opportunities to press for disclosure. His firm is working on "five or six" new cases tied to drug pricing, he said. Berman declined to disclose details but said the theme is consistent: multinational drug companies conspiring to get one over on the little guy.

"I don't think these people will ever stop," Berman said. "There's so much money involved that there's just incentive to try to game the system."