

Endo Sales Reps Win Conditional Cert. For OT Suit

By Abigail Rubenstein

Law360, New York (June 1, 2011, 5:35 PM ET) -- A Massachusetts federal judge on Wednesday conditionally certified a class of [Endo Pharmaceuticals](#) sales representatives to bring claims that the company misclassified them as exempt from overtime pay. U.S. District Judge Nancy Gertner said the plaintiffs met the lenient standard for conditional certification by alleging sales representatives across the country were subject to the same national policies, and that Endo had therefore misclassified them all as exempt from the Fair Labor Standards Act's overtime pay requirements.

The case is one of a spate of recent lawsuits claiming that drug sales representatives — who are legally prohibited from closing sales, and whom the pharmaceutical industry has considered exempt from overtime pay requirements for 70 years — are entitled to overtime compensation. Circuits are split on whether the outside sales exemption applies to them.

“Normally sales representatives are exempt, but pharmaceutical sales representatives don't actually sell anything because obviously only doctors can prescribe drugs ... so we say the exemption doesn't apply,” Harold L. Lichten of [Lichten & Liss-Riordan PC](#), who represents the plaintiffs, said. “It's a hotly contested issue right now all over the country.”

Former Endo sales representatives Susan Quinn and Frederick Immar claim that although they and their colleagues were labeled as sales representatives, the position did not actually involve any sales. Rather, they allege they conducted routine marketing activities by making calls to doctors' offices promoting Endo's products using predetermined scripts.

There are more than 500 sales representatives eligible to participate in the class, the plaintiffs claim.

Judge Gertner rejected Endo's arguments that the plaintiffs had not produced sufficient evidence to show that they were similarly situated to sales representatives in other states and that they had not demonstrated that other employees were interested in joining the class.

She ruled that the drug company's assertion that sales representatives covered various districts and reported to local managers was not enough to defeat a nationwide class. But the judge said Endo could later move to decertify the class and present evidence suggesting that the regions operated so differently as to preclude a class action.

As for a showing that additional plaintiffs wished to opt into the suit, Judge Gertner said that the purpose of conditional certification was to provide potential class members with notification of the lawsuit — so to find that plaintiffs who had not yet been notified wanted to

be a part of the suit “is to put the cart before the horse.”

An attorney for Endo did not respond to a request for comment Wednesday.

In February, the Ninth Circuit broke with the Second Circuit and the [U.S. Department of Labor](#) when it ruled that [GlaxoSmithKline PLC](#) rightly considered its pharmaceutical sales representatives as outside sales employees exempted from the FLSA's overtime requirements.

The Second Circuit had found in July that the outside sales exemption did not apply to drug sales representatives from [Novartis Pharmaceuticals Corp.](#) and Schering-Plough Corp.

The [U.S. Supreme Court](#) rejected petitions from Novartis and Schering-Plough urging it to review the Second Circuit's decision, but many attorneys expect the issue of drug sales representatives' status will ultimately be resolved by the high court.

The plaintiffs in the immediate suit are represented by Harold L. Lichten, Shannon Liss-Riordan and Stephen S. Churchill of Lichten & Liss-Riordan PC.

Endo is represented by Richard L. Alfred, Krista Green Pratt, C.J. Eaton and Jessica M. Schauer of [Seyfarth Shaw LLP](#).

The case is Quinn v. Endo Pharmaceuticals, case number [1:10-cv-11230](#), in the U.S. District Court for the District of Massachusetts.

--Editing by Eydie Cubarrubia.