



Hedge Fund's AIA Attack Should Have Biotech Cos. Wary

By Ryan Davis

Law360, New York (March 09, 2015, 2:16 PM ET) -- A hedge fund's attempt to invalidate [Acorda Therapeutics Inc.](#) drug patents under the America Invents Act as an investment strategy to lower the company's stock price should have biotechnology companies on alert for similar challenges, attorneys say, although the tactic makes financial sense only in rare cases.

An organization affiliated with Hayman Capital Management LP filed [inter partes review](#) petitions on Feb. 10 and Feb. 27 challenging the validity of two patents on Acorda's multiple sclerosis drug Ampyra, which accounts for 93 percent of the company's revenue.

The fund has reportedly taken a short position on Acorda's stock and stands to gain if the stock price drops. The price of Acorda's stock fell 10 percent after the first petition was filed before recovering part of that loss, then dropped 5 percent more after the second petition.

The filings came after a January speech by Hayman manager Kyle Bass in which he announced plans to challenge what he called weak pharmaceutical patents as a way of reducing drug prices for consumers and growing his fund. The entity that filed the inter partes review petitions is called the Coalition for Affordable Drugs, a wholly owned subsidiary of Bass's fund.

Since the America Invents Act allows just about any member of the public to file an inter partes review petition, the door is open to other such challenges by investors, attorneys say, and biotechnology and drug companies whose business is closely tied to a few key patents would be the most viable targets.

"I wouldn't be surprised at all to see copycat filings, but it doesn't seem to be easy money," said Alex Chachkes of [Orrick Herrington & Sutcliffe LLP](#).

Seeking to invalidate patents in order to impact a company's stock price only works if the loss of a few patents would have a material impact on the business. That is the case mostly with biotechnology and drug companies like Acorda that rely heavily on their patents and would be harmed if their patents were invalidated, allowing competing generic products to enter the market.

"For most companies, if you found their most valuable patent and tear it up, the stock wouldn't budge," Chachkes said. "This is a very unique situation."

Since anyone can file an inter partes review petition, "it's a commercial tool like any other," and hedge funds and other investors are likely to try to use them in this way, said Robert Brunelli of [Sheridan Ross PC](#).

This type of strategy is "really about finding a weakness in a company and finding out if you can exploit it," he said.

AIA reviews have been an effective tool for invalidating bad patents, and if they can also be used for this type of investment strategy, "it's just one of the bad things that comes with the good of these new procedures," said Ronald Abrams of [Ezra Brutzkus Gubner LLP](#).

Acorda, which has retained Gerald Flattmann of [Paul Hastings LLP](#) to represent it in the inter partes reviews, has said that "we'll vigorously defend ourselves" in the case. The company noted that it has five patents on Ampyra and that all of them would have to be invalidated before competing generic drugs could launch.

Bass's petitions have provoked a heated response from the biotechnology sector. In a statement the day after Bass filed his first petition, the [Biotechnology Industry Organization](#) said that he had "opened a new door to abuse of the U.S. patent system" by challenging patents "as part of his cynical short-selling strategy."

The group said that the AIA was never intended to be used in such a way and urged Congress to quickly enact legislation to prevent similar actions in the future. It said such challenges will not only hurt the value of the companies developing new drugs, but also the patients who need them.

While biotechnology companies could be subject to future AIA reviews as an investment strategy, any hedge funds seeking to follow Bass's lead face a daunting task. Preparing an inter partes review petition is a highly complex and technical process that requires a thorough analysis alleging the patent is invalid.

The heavy lifting involved means that an investor mounting a challenge must take on significant legal expenses and expect that the potential gain from invalidating the patent will outweigh that cost.

"You can't just throw some prior art at the patent office. It's much more work than that," said Cyrus Morton of [Robins Kaplan LLP](#).

Once the petition is filed, the Patent Trial and Appeal Board still needs to decide to review the petition and then ultimately find it invalid, which takes about 18 months. The filing fee alone for inter partes reviews is \$23,000, and the total cost of prosecuting one to completion can be in the hundreds of thousands dollars.

"It's not an insignificant amount of money, but for a major hedge fund with a huge position, it's probably not that much money," Morton said. "It's all how you look at it."

Bass and other hedge funds that want to use inter partes reviews to influence stock prices are unlikely to face any legal consequences for doing so, said Jeffrey Alberts, head of the white collar defense practice at [Pryor Cashman LLP](#).

Manipulating stock prices can be actionable under securities law if someone makes false

statements designed to artificially influence the price, he said. If Bass legitimately believes that the patents he is challenging are invalid, that is likely a legal defense to any claim he is illegally manipulating the price, even if he concedes he challenged them specifically to make money.

"It would be really difficult to prove he didn't have a valid intent" for filing the petitions, Alberts said. "It's almost always possible to come up with a reason."

Given the wide latitude the AIA gives anyone who wants to challenge a patent's validity, Morton said he has been expecting some petitioners to find ways to use the proceedings to make money.

"If this gambit is successful, we'll certainly see other people trying to apply it, not just in this technology area, but beyond," he said.

Bass's strategy has caught the eye of at least one member of Congress who has introduced a bill he said is partly aimed at preventing other investors from doing the same thing.

Sen. Chris Coons, D-Del., recently introduced the [**STRONG Patents Act**](#), which, among many other provisions aimed at making it more difficult to invalidate patents in AIA reviews, would impose a standing requirement allowing only parties accused of infringement to bring an AIA challenge.

In a speech on Wednesday, Coons said he included that provision to prevent misuse of the AIA proceedings, and referred specifically to the Acorda challenges.

Coons' bill is expected to have little support in Congress, and attorneys say that the proposed standing requirement would shut the door to many legitimate inter partes review petitions filed by companies that believe they are at risk of being sued for infringement.

Creating a standing requirement to address what is now a very narrow problem is "throwing the baby out with the bathwater," said James Klaiber of Pryor Cashman LLP, but members of Congress could come up with a more specifically tailored way to prevent challenges by hedge funds.

Given the cost involved in using inter partes reviews to influence stock prices and the difficulty of finding the right company to target, "this does seem like a pretty risky strategy," Klaiber said.

"But if there's money to be made doing this, people are going to do it," he said.

--Editing by Katherine Rautenberg and Philip Shea.