

Challenge To Test Strip Injunction Falls Flat In 2nd Circ.

By **Pete Brush**

Law360, New York (October 27, 2016, 6:32 PM EDT) -- H&H Wholesale Services Inc.'s bid to dissolve an injunction in Abbott Laboratories' crackdown on "gray market" diabetes test strips sold in the U.S. with foreign packaging encountered sharp pushback Thursday from the Second Circuit, with one judge saying the supplier was "barking up the wrong tree."

Circuit Judge Richard Welsey wasn't having it when H&H counsel John J. Shaeffer of Fox Rothschild LLP asserted that a November 2015 preliminary injunction by U.S. District Judge Carol Bagley Amon blocking the sale of FreeStyle glucose test strips with foreign packaging improperly imposed Lanham Act liability on his client.

Abbott's October 2015 complaint says a large number of defendants have been buying the strips at low prices abroad and illegally importing them to sell in the U.S. at higher prices. That conduct has left U.S. patients confused about how to use the strips, Abbott says.

But H&H argues among other things that "no court has held a wholesaler directly liable for the conduct of its retailer customers."

"They're not confused," Shaeffer said of H&H customers. "H&H disclosed to all of its customers that the product being purchased was a product other than that intended by Abbott to be sold in the retail market."

"Your customer doesn't use the test strip," Judge Wesley said. "That's what the Lanham Act is about: consumer confusion — not customer confusion. I think you're barking up the wrong tree here."

Judge Wesley was joined in skepticism by Circuit Judge Robert A. Katzmann.

"If the importation of the goods itself causes confusion, why does it matter for our analysis whether the confusion occurs at the direct customer level or at the end-user level?" Judge Katzmann asked.

Shaeffer noted that his client claims Abbott has intentionally put identical strips in different packaging to force suppliers to buy more product.

A second appellant, Matrix Distributors, also encountered pushback from the two judges on the assertion that Abbott waited so long to bring suit that the injunction was improper.

"I believe the delay here is outrageous," said Matrix counsel Martin I. Saperstein of Goodman & Saperstein, who asserted Abbott waited at least seven months to file suit after learning of the U.S. sales.

Judge Katzmann pointed out that Abbott was told by federal authorities "not to contact Matrix" initially, and was in Brooklyn federal court within four months after getting clearance to sue.

"Why did it take four months?" Judge Katzmann later asked Abbott counsel Geoffrey Potter of Patterson Belknap Webb & Tyler LLP.

"Remember Abbott sells 600 million test strips a year in the United States," Potter said. "We had to find the product, we had to buy from them, we had to conduct an investigation. That took a little bit more than 90 days. It seems completely reasonable."

Also hearing the appeal Thursday was Second Circuit Judge Ralph K. Winter.

At the district court level, Abbott has rolled up settlements in which distributors have agreed not to sell strips in the U.S. with foreign packaging. On Oct. 18, Harrico-Galler became the latest to settle out with a \$10,000 payment.

H&H Wholesalers is represented before the Second Circuit by John J. Shaeffer of Fox Rothschild LLP.

Matrix Distributors is represented by Martin I. Saperstein of Goodman & Saperstein.

Abbott is represented by Geoffrey Potter of Patterson Belknap Webb & Tyler LLP.

The appeal is Abbott v. Adelpia Supply USA et al., case number 15-3785, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Emily Kokoll.