

2nd Circ. Backs Ban On 'Gray Market' Sale Of Abbott Test Strip

By Dani Kass

Law360, New York (November 3, 2016, 2:17 PM EDT) -- The Second Circuit on Thursday stood by a New York federal judge's injunction blocking the sale of "gray market" diabetes test strips sold in the U.S. with foreign packaging, concluding the lower court's order in favor of Abbott Laboratories was "thorough and well-reasoned."

A three-judge panel released its nonprecedential summary order a week after hearing arguments. At the hearing, the judges had seemed skeptical of H&H Wholesale Services Inc.'s argument that the preliminary injunction against selling FreeStyle glucose test strips with foreign packaging improperly imposes Lanham Act liability on the wholesaler.

"We find no abuse of discretion in the district court's thorough and well-reasoned order," the order said. "We have considered all of the defendants-appellants' arguments on this appeal and we find in them no basis for reversal."

Abbott's October 2015 complaint claims an array 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.

Although the U.S. and international strips are identical, Abbott has said it sells the test strips outside the U.S. at markedly lower list prices. It maintains the defendants capitalized on these pricing differences and received undeserved reimbursement from insurance companies, costing it millions of dollars.

U.S. District Judge Carol Bagley Amon said in November 2015 that Abbott had shown it was likely to succeed on its claim that the scheme caused market confusion and harmed its reputation.

H&H and Matrix Distributors appealed. H&H's arguments included that "no court has held a wholesaler directly liable for the conduct of its retailer customers."



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"They're not confused," H&H's attorney said of its 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."

U.S. Circuit Judge Richard C. Wesley shot back that "your customer doesn't use the test strip. That's what the Lanham Act is about: consumer confusion — not customer confusion."

Matrix's attorney had argued that Abbott waited too long to bring the suit, but U.S. Circuit Judge Robert A. Katzmann pointed out that Abbott was told by federal authorities "not to contact Matrix" initially, and was in Brooklyn federal court within four months of getting clearance to sue.

Geoffrey Potter of Patterson Belknap Webb & Tyler LLP, who represented Abbott before the appeals court, said Thursday he wasn't surprised at the decision.

"The many differences between FreeStyle brand test strips sold domestically and the gray-market international test strips are highly confusing. In fact, the differences are so profound that the defendants moved to stay the civil case on Fifth Amendment grounds, arguing that they are likely to be criminally indicted for selling a misbranded medical device," Potter said in a statement. "Now more than 300 defendants are enjoined from selling gray market FreeStyle test strips. This broad injunction provides important protection to both patients that test with FreeStyle and Abbott's trademarks."

An Abbott spokeswoman added that "upholding the integrity of our products for the patients and customers we serve is our highest priority. Abbott invests considerable time and resources to combat operators who are illegitimately importing and selling foreign versions of our products not approved for use in the United States."

An attorney for Matrix declined to comment. Counsel for H&H didn't immediately respond to request for comment.

H&H Wholesalers is represented by John J. Shaeffer and William Rudy of Fox Rothschild LLP and Jason Yert of Kerr Russell & Weber PLC.

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

Abbott is represented by Geoffrey Potter, Aron Fischer and Timothy A. Water 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.

--Additional reporting by Pete Brush. Editing by Brian Baresch.