

7th Circ. Won't Revive Payors' Depakote Suit Against Abbott

By **Diana Novak Jones**

Law360, Chicago (October 12, 2017, 6:03 PM EDT) -- The Seventh Circuit declined Thursday to revive a proposed class action filed by welfare-benefit plans that claim they were ripped off when Abbott Laboratories Inc. illegally marketed its epilepsy drug Depakote for off-label uses, saying the tie between the marketing and the payors was too tenuous.

Lead plaintiffs Sidney Hillman Health Center of Rochester and Teamsters Health Services and Insurance Plan Local 404 are not supposed to pay when the drug is prescribed unnecessarily, but there are too many other factors at play to determine if Abbott's conduct was the direct cause of unnecessary payments, the court said.

In 2012, Abbott entered a guilty plea and paid a \$1.6 billion settlement to resolve a criminal investigation and governmental civil claims over the alleged marketing of Depakote for conditions unapproved by the U.S. Food and Drug Administration. The next year, the plans sued the pharmaceutical company under the Racketeer Influenced and Corrupt Organizations Act, claiming they were the ultimate victims of the plot.

But on Thursday, the panel agreed with several other circuits that have found payors cannot recover under RICO for allegedly illegal marketing by pharmaceutical companies.

In particular, the Second Circuit held in two cases "that there are so many layers, and so many independent decisions, between promotion and payment that the causal chain is too long to satisfy the Supreme Court's requirements," wrote Circuit Judge Frank Easterbrook in the unanimous opinion.

Representatives for AbbVie Inc., which took over Depakote sales in 2013 and is also named in the suit, did not respond to a request for comment. Neither did attorneys for the proposed class.

The appeal decided Thursday was the second time the case had come before the Seventh Circuit. After finding the plans' claims were beyond the statute of limitations, U.S. District Judge Sara Ellis dismissed the suit in 2014. But in 2015, the appellate court rebooted it, saying more discovery was necessary.

Judge Ellis again granted Abbott's motion to dismiss in 2016, this time saying the plans' had not clearly established the link between their injuries and the drug company's marketing.

In oral arguments last month, attorneys for the plans argued that the fact the plans paid for the majority

of the prescriptions' cost was enough to make them the direct victim of the promotions.

But any patient who took the drug comes first in the chain of events stemming from the marketing, Judge Easterbrook wrote. The patient could be harmed by the drug itself, or if it did nothing, they could be harmed from the expense of filling their prescription.

Plus, doctors could also suffer injury as a result of the marketing, Judge Easterbrook said, because if the prescriptions they write don't help their patients, the patients could take their business elsewhere.

Sorting out who is the primary victim is compounded by problems calculating the extent of the damage, the panel said. Some patients may have been helped by the off-label Depakote they received, and some doctors might write off-label Depakote prescriptions regardless of Abbott's activities, Judge Easterbrook wrote.

"We hold that improper representations made to physicians do not support a RICO claim by payors, several levels removed in the causal sequence," the judge wrote. "Public prosecution avoids these problems, so Abbott's criminal conviction and \$1.6 billion payment were the proper remedies."

Circuit Judges Frank Easterbrook, Michael Kanne and Ann Claire Williams sat on the panel.

The plans are represented by James Pizzirusso of Hausfeld, Mary Thomas, James Sabella and Jay Eisenhofer of Grant & Eisenhofer PA and Frank Schirripa of Hach Rose Schirripa & Cheverie LLP.

Abbott and AbbVie are represented by William F. Cavanaugh Jr, Jonah M. Knobler and D. Brandon Trice of Patterson Belknap Webb & Tyler LLP.

The case is Sidney Hillman Health Center of Rochester et al v. Abbott Laboratories Inc. et al., case number 17-1483, in the Seventh Circuit Court of Appeals.

--Editing by Philip Shea.