

## Fraud Claims Allowed to Proceed in Diabetes Test Strip Price Case

BY MARK HAMBLETT

A FEDERAL judge has weeded out claims by Abbott Laboratories that hundreds of distributors and pharmacies are defrauding the pharmaceutical giant in the market for diabetes test strips.

U.S. District Judge Carol Bagley Amon of the Eastern District of New York dismissed racketeering and unjust enrichment claims against some 300 defendants accused of exploiting the difference in price between FreeStyle and FreeStyle Lite strips, depending on where they are sold. But she allowed trademark, fraud and importation claims to remain.

The key to the case of *Abbott Laboratories v. Adelpia Supply USA*, 15-cv-05826, is how much internationally distributed blood glucose strips are sold for versus the more expensive strips that are sold domestically.

When a diabetic patient purchases the domestic strips, the pharmacist scans a National Drug Code number on the box, which informs the insurance company of the sale. The insurance company then informs Abbott of the sale and the company pays a pre-negotiated rebate to the insurance company.

Because internationally-sourced strips don't have a National Drug Code number, Abbott claims, the pharmacies, when selling the international version, scan the code off of a domestic box, and thus receive a reimbursement they don't deserve.

Abbott alleged a racketeering enterprise between distributors, pharmacies, importers and online sellers.

Some of the defendants have counterclaimed in an antitrust, saying the lawsuit is really a part of Abbott's broader effort to fix prices and charge Americans more

because of the way insurance reimbursement works.

Amon issued an opinion late Wednesday that followed an oral argument in August on motions to dismiss. She called Abbott's allegation of an "association-in-fact" between the defendants conclusory and nonspecific, saying the company had alleged no facts to support the inference that "the entities were acting in any way but in their own independent interests."

The judge also noted that the distributor, "supposedly the lynchpin fraudster, is at most a facilitator."

But Amon said the same was not true of the fraud claims, where Abbott specified that the "fraud is required not merely occasionally, but in a full 95 percent of sales."

The company, she said, had alleged "that almost any sale of international test strips in the United States would bring about a fraudulent statement."

The judge went on to keep in the lawsuit aiding and abetting fraud claims against the nonpharmacy defendants as well as vicarious liability claims, including those in trademark, against individual corporate officers of the distributor defendants.

Amon already had issued preliminary injunctions in the case based on Abbott's claims that the goods are materially different and that the company "has in place legitimate quality-control measures that will be inhibited by the domestic sale of international test strips."

Some 20 individual defendants and pharmacies have reached settlements with Abbott that include injunctions.

Geoffrey Potter is leading a team at Paterson Belknap Webb & Tyler representing Abbott.



ABBOTT'S FreeStyle Lite diabetes test strips

Forty-six of the defendant distributors are represented by three firms: Gottlieb & Janey; Goodman & Saperstein; and Stern & Schurin. Derrelle Janey of Gottlieb & Janey argued before the judge in August.

"With the dismissal of the RICO and the unjust enrichment claims, this case is only about infringement and even if Abbott succeeds on liability, the likelihood of damages in this case will be proved to be nil," Janey said Thursday.

John Shaeffer of Fox Rothschild and Jason Yert of Kerr, Russell and Weber represent a distributor and other defendants in the case—and they are the attorneys pursuing the counterclaim against Abbott.

@ Mark Hamblett can be reached at Mhamblett@alm.com. Twitter: @Mark\_Hamblett