

Health Cos. Want Antitrust Cases Consolidated In Kan.

By **Dan Packel**

Law360, Philadelphia (July 18, 2013, 5:36 PM ET) -- An attorney for Owens & Minor Inc. asked a Pennsylvania federal judge on Thursday to kick a putative class action against the company and Cardinal Health Inc. to federal court in Kansas, arguing that it duplicates a related antitrust suit pending in the same district.

John Gibson of Crowell & Moring LLP emphasized that the suit – in which a Pennsylvania hospital operator accused the companies of engaging in a monopolistic scheme to get small hospitals to purchase sutures, thereby driving up costs for purchasers – mirrored a \$200 million antitrust suit filed by Sutures Express in Kansas federal court. Cardinal Health joined Owens & Minor in the motion.

Gibson said that both cases are ripe for consolidation in one court and that, because of the “first-filed” rule, the court should be in Kansas.

“His case was filed as a copycat of the first-filed District of Kansas case. He told a reporter that he looked at the Kansas case and that's how he framed this case,” Gibson told U.S. District Judge Juan Sanchez, referring to earlier comments that the hospital's attorney made to Law360.

Schuylkill Health System — the nonprofit owner of two acute care hospitals in Pottsville, Pa. — accused the companies of pushing exclusionary contracts on hospitals that penalize them from purchasing the products from their rivals in a complaint filed in December 2012.

The suit argued that the two companies, which together control more than 70 percent of the market for distribution of so-called medical-surgical supplies, unfairly bundled the sale of sutures and related products to their other wares.

The suit came on the heels of a \$200 million antitrust suit filed by Sutures Express in Kansas federal court earlier that month, in which the Kansas-based company alleged that the two companies were engaging in predatory pricing.

Gibson argued Thursday that a range of common issues – including whether the defendants conspired, whether they had sufficient market share to qualify their actions as anti-competitive, and whether their agreements included unlawful terms – served to unite the two cases.

But Kendall Zylstra of Faruqi & Faruqi LLP, representing Schuylkill Health System, told Judge Sanchez that the first-filed rule does not apply to this case, as the hospital and its proposed class are not the same plaintiffs as in the Kansas action.

He also rejected Judge Sanchez's contention that the cases are "mirror images," arguing that the procedures for class certification, determination of damages, and discovery are substantially different in the two. As a consequence, he said that the Schuylkill suit should remain in Pennsylvania because it will unfold on a significantly different schedule than the Kansas case.

Zylstra also added that the decision in the Kansas case will not determine the outcome in the Schuylkill suit. He said that even if Sutures Express wins its suit, there is no guarantee his client will win, and that even if Sutures Express loses, his client could still win by showing that there are other competitors in the marketplace who were harmed by Owens & Minor and Cardinal's conduct.

Judge Sanchez noted that, short of transferring the case to Kansas, he could stay it until the Kansas suit was resolved, noting that it is currently subject to a motion to dismiss.

But Gibson argued against this strategy, saying that if the Kansas suit were dismissed, the Schuylkill suit would have to stay in Pennsylvania, as there would no longer be a first-filed suit elsewhere. He called this outcome duplicative, noting that all the court's efforts in Kansas would have to be redone.

He added that if the motion for dismissal in Kansas were denied, and Judge Sanchez then opted to transfer the Schuylkill case, this would delay the consolidated action from moving forward.

Judge Sanchez said that he would take both attorneys' arguments under advisement and then issue a ruling.

Schuylkill Health System is represented by Kendall Zylstra and Gary Smith of Faruqi & Faruqi LLP.

Owens & Minor Inc. is represented by John Gibson and Elisa Kantor of Crowell & Moring LLP and Aimee Kumer and Mary Kohart of Elliott Greenleaf & Siedzikowski PC.

Cardinal Health is represented by Michael Sennett, Michelle Fischer, Paula Render and John Iole of Jones Day LLP.

The case is Schuylkill Health System v. Cardinal Health Inc. et al, case number 2:12-cv-07065, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Philip Shea.

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