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Kentucky AG Fights To Remand OxyContin Claims

By **Erin Marie Daly**

Law360, New York (October 15, 2009) -- Kentucky Attorney General Jack Conway has asked a federal judge to remand to state court a suit accusing Purdue Pharma LP of failing to warn about the risks associated with controversial painkiller OxyContin, arguing that the drugmaker improperly joined the suit with unrelated patent and antitrust actions.

In a motion to remand filed Thursday in the U.S. District Court for the Southern District of New York, Conway accused Purdue of wrongly claiming federal subject matter jurisdiction when the company removed his case — originally filed in the Pike County Circuit Court in October 2007 — to the U.S. District Court for the Eastern District of Kentucky.

The case was then transferred to the Southern District of New York, where it was consolidated with a multidistrict litigation involving competition and infringement claims that has been stayed since March 2006.

According to Conway's suit, Purdue misled medical providers and consumers through misrepresentations or omissions regarding the appropriate uses, risks and safety of OxyContin in violation of state law.

The claims are "demonstrably unconnected" to the pending patent and antitrust litigation that are consolidated in the district court, and Purdue attempted to "muddy the waters" regarding the substance of his lawsuit, Thursday's motion contends.

Purdue argued that the attorney general's claims raised questions of federal law under the federal Medicaid statute because they depended on the interpretation and application of the federal statutory provisions that govern which drugs can be included in or rejected from coverage by state Medicaid programs, including Kentucky's.

In addition, Purdue maintained that federal funds constitute the majority of Kentucky's Medicaid funds, which are at issue in Conway's suit.

But Conway insists his claims "do no such thing."

"Let us be clear: this case is not about coverage of an outpatient drug under the Medicaid Act, and it is not it about the [Food Drug and Cosmetic Act]," he said. "This case is about whether state entities may recover under state law for defendant's failure to properly inform the public about certain risks associated with the outpatient drug OxyContin."

According to Conway, state law claims render Purdue's notice of removal improper under current federal removal law, and that the case should be shifted back to Pike County.

In May 2007, Purdue and three of its top executives admitted that they misbranded the blockbuster painkiller, pleading guilty to charges that they fraudulently marketed OxyContin by making claims about it that were not supported by medical research.

The company, President Michael Friedman, chief legal officer Howard Udell and former chief medical officer Paul D. Goldenheim pled guilty in the U.S. District Court for the Western District of Virginia to a misdemeanor charge of misbranding the drug and agreed to pay more than \$700 million in payments to the U.S. government.

The pleas came the same week that the Connecticut-based company, which is privately held, agreed to pay 26 states and the District of Columbia \$19.5 million to settle similar allegations.

Prosecutors said Purdue and the executives continued to push a fraudulent marketing campaign despite warnings from health care professionals, the media and members of its own sales force that OxyContin was being widely abused and causing health problems.

Among other things, prosecutors alleged that from January 1996 to June 2001, Purdue sales representatives falsely reported to health care providers that OxyContin had a less euphoric effect and less abuse potential than short-acting opioids.

The company's supervisors also allegedly told sales representatives they could inform health care providers that OxyContin was potentially less addictive than immediate-release opioids.

Purdue is represented by Covington & Burling LLP.

The case is In re: OxyContin Antitrust Litigation, case number 1:04-md-01603, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Anne Urda

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