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## Insys Boss Tells 1st Circ. Feds Made Him Opioid 'Scapegoat'

By Chris Villani

Law360 (September 11, 2020, 6:05 PM EDT) -- Arguing for a new trial Friday, Insys Therapeutics Inc. founder John Kapoor told the First Circuit that prosecutors unfairly made him "a scapegoat for the national opioid crisis" and sought to sway jurors with heartbreaking but irrelevant testimony by addicted patients.

As his legal team has done in past arguments in the landmark prosecution, Kapoor blasted federal prosecutors for attempting to pin the opioid epidemic on his company as they sought to prove that he and other Insys executives bribed doctors to prescribe the fentanyl spray Subsys.

Kapoor told the First Circuit the government "cherry picked" patients he and his fellow executives had never met and U.S. District Judge Allison D. Burroughs wrongly allowed them to testify over the defendants' objections "about the heart-wrenching addiction, withdrawal and other harms they experienced."

"Despite the district court's efforts to cabin the gut-wrenching testimony from nine patients, the court abused its discretion by permitting them to testify about addiction and other harms that they attributed to their use of Subsys," Kapoor's lawyers wrote in Friday's brief, which totals 246 pages including exhibits.

"This evidence was irrelevant to the charged racketeering conspiracy, and especially to the surviving predicate objects of ordinary mail and wire fraud," Kapoor's defense team argued. "It was also grossly prejudicial."

The opening salvo to the appellate panel argued that a new trial is the only way to remedy the alleged unfairness of the first proceeding, which resulted in a conviction and a 5½-year prison term for the one-time billionaire. Kapoor is set to begin serving his sentence on Nov. 30.

The brief noted that Judge Burroughs **threw out** part of the jury's verdict, a racketeering predicate that accused Kapoor and the others of violating the Controlled Substances Act by effectively acting as white collar drug dealers and seeking to get Subsys prescribed to patients who did not need it.

The government's star witnesses at trial included former Insys CEO Michael Babich and national sales vice president Alec Burlakoff. Kapoor's brief argued that neither of them had testified that the goal of the scheme was to prescribe Subsys to patients who did not need it.

"Indeed, Babich expressly disclaimed any goal to have doctors prescribe Subsys to patients who did not need it," the document stated. "He testified that his goal in bribing doctors was to cause them to switch patients who were already prescribed" competing drugs.

"The government was not content to charge John Kapoor, the founder of a pharmaceutical company and developer of a leading pain medicine, with ordinary health care fraud offenses," the brief added. "Instead, it charged him with heading a racketeering enterprise and tried him as a scapegoat for the national opioid crisis."

The argument also highlighted comments Judge Burroughs made during the 10-week trial when she described the CSA charge as "**pretty darn thin**"

out of earshot of the jury and called the wrongdoing at Insys "**garden variety insurance fraud.**"

Before the trial began, the judge said she would permit patients to take the stand but did not want "**sob stories.**" But, Kapoor's brief argued that the trial nonetheless "ended with a parade of vulnerable individuals offering unfairly prejudicial testimony — at times including the heart-wrenching 'patient sob stories' the court said it was 'seeking to avoid.'"

The brief to the First Circuit acknowledged wrongdoing at Insys, specifically that workers at an Insys call center lied to insurers to get them to pay for the pricey drug.

"Kapoor and his co-defendants maintained that they did not know about or agree to such conduct," the brief stated. "But the government chose not to charge the bribery, and to treat the insurance fraud as a secondary concern to the core allegations of medically illegitimate prescriptions and patient harm."

Kapoor's legal team also highlighted another contentious issue: the rebuttal by Assistant U.S. Attorney Fred Wyshak that likened the bribery allegations to **firing a gun** into a crowd of people while knowing that "someone is going to get hit."

The comment was out of line, the defense argued both at the time and on Friday, yet "the district court declined to grant a mistrial or to give the curative instruction proposed by defendants, offering only a watered-down instruction that did not admonish the government."

A representative for the U.S. attorney's office declined to comment on the filing. Kapoor's attorneys, Martin G. Weinberg of the Law Offices of Martin G. Weinberg PC and Kosta S. Stojilkovic of Wilkinson Walsh LLP, told Law360 Friday "we believe that John Kapoor's appeal raises strong and important issues."

Kapoor was **convicted** in May 2019 along with Michael Gurry, Sunrise Lee, Joe Rowan and Rich Simon. All five defendants are slated to report to prison on Nov. 30, after Judge Burroughs denied a motion by Gurry and Lee to delay their report dates until January due to the COVID-19 pandemic. Lee had also cited a desire to be home with her children over the holidays.

In a separate filing on Thursday evening, prosecutors ripped the request to **put off prison** for holiday time at home as "remarkably inappropriate" and "stunningly tone deaf." Lee's attorney declined to comment, while a lawyer for Gurry did not respond to a comment request.

Judge Burroughs previously denied a bid by the executives to stay out of prison until their appeal was heard, a ruling that was **upheld by the First Circuit** in July.

The government is represented by Alexandra W. Amrhein, David G. Lazarus, Donald Campbell Lockhart, Mark T. Quinlivan, Elysa Q. Wan, Fred M. Wyshak Jr. and K. Nathaniel Yeager of the U.S. Attorney's Office for the District of Massachusetts and David M. Lieberman of the U.S. Department of Justice.

Kapoor is represented by Martin G. Weinberg of the Law Office of Martin G. Weinberg PC and Beth Wilkinson, Kosta S. Stojilkovic and Chanakya A. Sethi of Wilkinson Walsh LLP.

Lee is represented by Peter C. Horstmann of the Law Offices of Peter Charles Horstmann.

Gurry is represented by Tracy A. Miner and Megan A. Siddall of Miner Orkand Siddall LLP.

The cases are U.S. v. Kapoor et al., case number 20-1409, in the U.S. Court of Appeals for the First Circuit and U.S. v. Babich et al., case number 1:16-cr-10343, in the U.S. District Court for the District of Massachusetts.

--Editing by Janice Carter Brown.

