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## 1st Circ. Hints Insys Execs' Convictions Will Stand

By **Chris Villani**

Law360 (May 6, 2021, 5:16 PM EDT) -- Emotional patient testimony and a prosecutor's improper remark during closing arguments likely aren't enough to overturn a landmark verdict convicting five former Insys Therapeutics executives of a scheme to bribe doctors to prescribe opioids, a First Circuit panel suggested Thursday.

The panel heard nearly two hours of oral arguments in the appeals of Insys Therapeutics Inc. founder John Kapoor and former underlings Michael Gurry, Rich Simon, Joe Rowan and Sunrise Lee, as well as the government's bid to reinstate part of the racketeering conviction that was thrown out by the trial judge.

Kapoor's attorney, Martin G. Weinberg of Martin G. Weinberg PC, argued that the jury was swayed in large part by nine patients who testified to the horrors of their addiction to Insys' fentanyl spray, Subsys. The accounts were gripping, but ultimately the executives had no knowledge of these people's medical histories, rendering them irrelevant, Weinberg said.

But U.S. Circuit Judge Bruce M. Selya suggested the testimony could have some bearing on prosecutors' claims that the company brass wanted to sell as much Subsys as possible.

"As I understand the government's case, the fact of addiction is part and parcel of the alleged scheme here," Judge Selya said. "The scheme itself was designed to get patients hooked, addicted, and therefore to require higher and higher amounts of Subsys to be prescribed."

The issue, Weinberg replied, is that the government was never able to show the Insys executives told the doctors to mistreat patients or overprescribe.

"If there was no such proof, no such predicate, the evidence should not have been admitted," he said.

The executives were charged with using a speaker program to funnel cash and other perks to doctors who wrote a large number of Subsys prescriptions.

David Lieberman of the U.S. Department of Justice argued that the doctors in the case, many of whom were also charged and convicted, are co-conspirators. Therefore, he said, their words and actions are relevant and the patient testimony served to document what they said and did when it came to treating their patients.

That issue was one of many debated Thursday as the five former executives seek to upend the results of a blockbuster three-month trial in the spring of 2019.

Kapoor and the others have said they were also prejudiced by a closing argument given by now-retired Assistant U.S. Attorney Fred Wyshak, who likened their activity to **firing a gun** into a crowd. Wyshak said the defendants may not have intended to kill any specific person, but they knew someone was going to get hit.

U.S. District Judge Allison D. Burroughs offered a jury instruction, calling the remark improper,

and the First Circuit on Thursday seemed to think that was good enough.

"I am struggling with the notion of why, in a 51-day trial, why that tips the balance. We had a very explicit, timely instruction in this case," Judge Selya said. Given all the other issues presented on appeal, he wondered how "this somehow rises to the top."

Judge Selya similarly pushed back on an argument by Lee's attorney, Pete Horstmann, that Judge Burroughs was wrong to allow evidence of Lee's previous work as a stripper and a claim that she gave a lap dance to a doctor who prescribed a large amount of Subsys.

"There's certain things you can't un-hear," Horstmann said. "You can tell a jury to disregard something, but you can't un-hear it."

"Why isn't it relevant?" Judge Selya replied. "This seems to be just another way of improperly inducing a physician in this case, in this case a particular physician, with respect to the lap dance evidence, to do the conspiracy's bidding."

Horstmann argued the testimony did more harm than good, saying Lee was "part of a misogynistic pharmaceutical system that preyed on femininity and sexuality in order to sell drugs."

"They can be bribed by offering other inducements," the judge replied. "I'm struggling with the concept of arguing this was not relevant evidence. I don't even understand the argument that this was not relevant."

Lieberman also ran into resistance in seeking to reinstate a racketeering predicate, **nixed** by Judge Burroughs, that said the executives violated the Controlled Substances Act. He argued that the evidence shows Insys sales reps with **no medical training** advocated to doctors that they jack up dosages of Subsys.

But Chief U.S. Circuit Judge Jeffrey R. Howard said it's "a bit of a leap" to prove that they intended the drug to be prescribed off label.

"It has to be their specific intent to bring about that outcome," he said. The evidence suggests the company simply wanted as much Subsys written as possible, without caring who it went to and why, the judge added.

Attorneys for Rowan and Simon tried to argue they were, at worst, on the periphery of the scheme and had no idea what was going on. Simon's attorney, William Fick of Fick & Marx LLP, added that his client was also harmed by his attorneys from Weil Gotshal & Manges LLP being conflicted because they also represented Insys, which cooperated with the government, in its bankruptcy proceedings.

Fick said **this conflict** prevented the Weil Gotshal team from trying to pierce attorney-client privilege and look into an internal company investigation conducted by Skadden Arps Slate Meagher & Flom LLP.

Judge Selya noted that the other attorneys in the case were not conflicted and did not go down this road. The legal strategy could have backfired and produced information that harmed Simon even more, the judge said.

Fick countered that it didn't matter whether it would have worked, only whether Simon was denied a possible avenue of defense.

"There was certainly ample material there," Fick said. "Thirty million buys a lot, even at Skadden rates."

Circuit Judges Jeffrey R. Howard and Bruce M. Selya and U.S. District Judge Gustavo A. Gelpí Jr., sitting by designation, sat on the panel for the First Circuit.

The government is represented by Donald C. Lockhart, Mark T. Quinlivan, David G. Lazarus 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's Criminal Division.

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

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

Rowan is represented by Michael Kendall and Alexandra I. Gliga of White & Case LLP.

Simon is represented by William W. Fick and Daniel N. Marx of Fick & Marx LLP.

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

The cases are U.S. v. Kapoor, case numbers 20-1409 and 20-1382, U.S. v. Gurry, case numbers 20-1410 and 20-1457, U.S. v. Lee, case numbers 20-1411 and 20-1369, U.S. v. Simon, case numbers 20-1412 and 20-1368, U.S. v. Rowan, case numbers 20-1413 and 20-1370, in the U.S. Court of Appeals for the First Circuit.

--Editing by Adam LoBelia.