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Insys Founder Says 'Spillover Prejudice' Warrants New Trial

By **Cara Salvatore**

Law360 (March 2, 2021, 7:12 PM EST) -- The founder of opioid maker Insys Therapeutics insisted Tuesday he deserves a new trial on his landmark racketeering conviction, telling a federal appeals court the outcome was adulterated by "spillover prejudice" from emotional testimony on counts that were gutted only after the verdict.

Founder John Kapoor told the First Circuit that the jury was able to hear highly emotional testimony from opioid patients related to Racketeer Influenced and Corrupt Organizations Act conspiracy predicates that were dismissed after the verdict. This testimony was unrelated to the RICO conspiracy mail and wire fraud predicates that remained standing, and it irreparably biased the jury, Kapoor said.

Without the predicates that were later tossed, "the government would not have tarred defendants with the spillover prejudice from those allegations," Kapoor said.

Prosecutors "would not have been able to ask those patients how Subsys purportedly ruined their lives — about crippling addiction, severe hallucinations, and other harms that are known and disclosed risks of every drug in Subsys's class," he said.

In November 2019, U.S. District Judge Allison Burroughs **struck down** part of the **May 2019 verdict**, which had been the first successful prosecution against a drugmaker tied to the opioid crisis.

The struck-down predicates were under the Controlled Substances Act and honest-services fraud. A jury had found that Kapoor and others violated the CSA by intending that doctors would prescribe powerful opioids without a legitimate medical purpose.

Other predicates remained, but if the trial had been limited to only those now-remaining ones, it would have been "a 'garden variety' insurance fraud case," Kapoor's lawyers said. Other defendants also filed briefs Tuesday, arguing that the remaining convictions were not fair and didn't rest on sufficient evidence as to them individually.

Kapoor claimed prosecutors acknowledged both in closing arguments and to the media that the **emotional testimony** of victims made a big difference to the jury.

"As part of their post-verdict press tour, the prosecutors touted the patient testimony to '60 Minutes' as 'very compelling' because it showed the jury that patients 'became addicted' to Subsys and that the drug 'ruined their lives,'" Kapoor said.

Kapoor also fought back Tuesday against **prosecutors' own cross-appeal** argument to the First Circuit, which is that the predicates done away with by Judge Burroughs should actually be reinstated.

Another executive, former Insys CEO Michael Babich, pled guilty on the eve of trial and testified

against his old colleagues.

The government is represented by Donald Lockhart, Mark Quinlivan, Fred Wyshak Jr., David Lazarus and K. Nathaniel Yeager of the U.S. Attorney's Office for the District of Massachusetts and David Lieberman of the U.S. Department of Justice.

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

The case is U.S. v. Kapoor et al., case number 20-1382, in the U.S. Court of Appeals for the First Circuit.

--Additional reporting by Reenat Sinay and Chris Villani. Editing by Bruce Goldman.

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