

Firm Tells 3rd Circ. It Doesn't Owe Avandia MDL Fee

Share us on: By [Dan Packel](#)

Law360, Philadelphia (June 13, 2016, 9:19 PM EDT) -- A law firm that settled a batch of Illinois state court product liability suits over [GlaxoSmithKline PLC's](#) diabetes drug Avandia asked the Third Circuit on Monday to overturn a ruling obligating it to put 7 percent of the proceeds into a common benefit fund.

Mathieu Shapiro of [Obermayer Rebmann Maxwell & Hippel LLP](#), representing the Law Offices of Steven M. Johnson, told a three-judge panel that the federal courts lacked jurisdiction over his client. Shapiro said that his client was not bound by a pretrial order in the federal multidistrict litigation over Avandia, which asserted that 7 percent of all settlements must go into the fund.

“PTO 70 is quite clear,” he said, referring to the order. “You need to be a member of the plaintiffs' steering committee or to have signed an agreement.”

The federal and state cases both revolve around claims that Avandia increases the risks of heart attacks, liver failure and other injuries.

U.S. District Judge Cynthia Rufe **ruled in July 2015** that because the Johnson firm, which represented a group of plaintiffs suing GSK in state court over alleged Avandia injuries, hired outside counsel for assistance as the Illinois case neared trial and knew they were using work product from the federal litigation, that not only does she have jurisdiction, the firm owes the 7 percent requisite material access fee to the federal plaintiffs' committee.

The judge said that although it is unclear whether an attorney from the Johnson firm signed an express agreement to pay a fee for use of the material, the firm was wholly aware that the attorneys it sought to bring in as outside counsel from [Baum Hedlund Aristel & Goldman PC](#) and Rosemond Law Group PC would be using the MDL materials — referred to as a “trial in a box” — to advance its case.

Circuit Judge Kent Jordan pointed to these hires to suggest that the Johnson firm had tacitly acknowledged the terms of the agreement.

“To find otherwise is to sanction or to countenance free riding,” he said. “You sit there, you listen, you take the materials, you hire people ... What you're telling me is ‘because I walked out the door without signing, you can't touch me.’”

Shapiro responded that regardless of whether his client dodged the agreement, the court lacked jurisdiction because the firm had never been attached to the federal litigation.

“You can't be dragged before the court without some proper form of service,” Shapiro said.

He added that the matter should ultimately be decided in Illinois state court, an argument that scored points with Circuit Judge Thomas Ambro.

“I don't think your argument is strong on subject-matter jurisdiction,” he said. “I think he has a good argument on personal jurisdiction.”

Sean Connelly of Zonies Law LLC, representing the steering committee, rejected the idea that the case belonged in Illinois state court, contending that the money in question — \$735,000 — was being held in Philadelphia in a trust for GSK by its attorneys at [Pepper Hamilton LLP](#) until courts decide where to send it.

“This is a quintessentially federal question,” he said. “If Illinois state court handles this ... this would turn federalism on its head.”

The steering committee is represented by Sean Connelly of Zonies Law LLC.

The Law Offices of Steven Johnson are represented by Mathieu Shapiro and Louis Kupperman of Obermayer Rebmann Maxwell & Hoppel LLP.

The case is In re: Avandia Marketing, case number [15-2990](#), in the U.S. Court of Appeals for the Third Circuit.