

LABATON SUCHAROW FIGHTS FOR FAIR COMPETITION IN PRICING OF AIDS/HIV DRUGS

By Michael Stocker

Few markets are more vulnerable to the effects of anticompetitive schemes than the market for HIV medications. Because the HIV virus responsible for AIDS reproduces billions of times in a single day, the virus has the ability to mutate very rapidly. These mutations permit the virus to develop resistance to new medications nearly as fast as the drugs enter the market. Unless research produces a constant stream of new AIDS drugs, the virus in patients becomes resistant to all available treatments, and the patient dies. Three years ago, Abbott Laboratories brought innovation in this critical area to a virtual standstill.

In the summer of 2003, Abbott Laboratories knew it had a problem. Its blockbuster AIDS drug Kaletra, one of the company's top three primary care medications, was facing the entry of new, safer competitors which were sure to weaken Abbott's stranglehold on the market. However, these new competitors needed to be "boosted" by another Abbott drug, called Norvir, to work effectively. In an effort to shore up the sagging market share of Kaletra, Abbott raised the price of Norvir, needed by Abbott's market competitors, by four hundred percent. Overnight, Abbott made its competitors' medications much more expensive to use, stanching Kaletra's decline. It also raised a significant barrier to attempts by researchers to keep new life-saving AIDS drugs coming to the market.

The looming human disaster posed by Abbott's anticompetitive acts did not go unnoticed. The Federal Trade Commission and the Attorneys General of California, New York, and Illinois all launched investigations of the Norvir price increase. Hundreds of HIV physicians organized a boycott of Abbott products, refusing even to let Abbott representatives into their offices in protest of Abbott's actions. The *New York Times*, the *Chicago Sun Times*, and the *San Jose Mercury News* all pointed to Abbott as a poster child for drug company greed at the expense of consumers' health.

In the wake of governmental investigations and the physician boycott, Labaton Sucharow, together with co-counsel, brought a suit against Abbott on behalf of the Service Employees International Union Health and Welfare fund. On behalf of the S.E.I.U., Labaton Sucharow alleged that Abbott had violated Section 2 of the Sherman Act by leveraging its monopoly power in the market for AIDS drug boosters in an effort to maintain Kaletra's market share, and sought damages and injunctive relief.

After unsuccessfully moving to dismiss the case, Abbott brought a summary judgment motion arguing that it owned a patent on the method of using Norvir to boost other AIDS drugs, and that it could legally exclude competitors from selling drugs for this purpose as a means of policing its patent rights. On July 6, 2006, the Court denied Abbott's motion, ruling that Abbott's patents give it no immunity from antitrust liability, and that the case should proceed to trial.

The Court's positive ruling for Labaton Sucharow's client represents both a key decision on the intersection of intellectual property and antitrust law as well as a milestone in the battle to preserve competition in the market for drugs critical to the survival of people living with AIDS.

