

Shannon P. Duffy
The Legal Intelligencer
March 28, 2011



Judge Rules GSK's 'Nerve Center' in Phila. for Paxil Suits *Calls Delaware Office No More Than 'Closet'*

Lawyers for GlaxoSmithKline were enjoying something of a winning streak in their efforts to remove drug products liability lawsuits to federal court — and keep them there — by arguing that it has converted to a limited liability company that is based in Delaware.

But that streak may now be over.

U.S. District Judge Timothy J. Savage has ruled that GSK cannot claim Delaware citizenship for purposes of federal diversity jurisdiction because its true "nerve center" is in Philadelphia and its Delaware office is nothing more than a "closet" that measures 10'-by-10' and is almost never used.

While other judges had accepted affidavits from GSK executives that described its presence in Delaware, Savage ordered extensive discovery, including the deposition of GSK's CFO in London, to explore more deeply whether Delaware is truly where the corporation's officers "direct, control and coordinate" the corporation's activities.

GSK argued that, as an LLC, Savage should look to the citizenship of the LLC's members, and that GlaxoSmithKline Holdings (Americas) Inc., which is headquartered in Wilmington, Del., is the only member of GlaxoSmithKline LLC.

But Savage said the evidence showed that the holding company "does no more in Wilmington than is necessary to preserve its corporate status as a Delaware corporation under Delaware law."

The holding company's board meetings "are mere formalities to ratify decisions made elsewhere," Savage found, and its Delaware office "is the size of a closet and not used to conduct any business."

As a result, Savage remanded eight lawsuits to the Philadelphia Common Pleas Court brought by women who claim they took the drug Paxil while pregnant and that their babies now suffer from birth defects.

The impact of Savage's opinion in *Brewer v. GlaxoSmithKline* could be broad, potentially making it impossible for GSK ever to successfully remove lawsuits to the federal courts in Pennsylvania if other judges adopt Savage's reasoning.

GSK could now face the prospect of a Philadelphia state court jury in defending a growing wave of lawsuits over drugs such as Avandia, a diabetes treatment, and Lamictal, an anti-seizure drug. Many of the plaintiffs in those cases hail from other states, but choose to sue on GSK's home turf in order to avoid removal to federal courts in their home states.

The ruling's impact could go much further, too, because Savage lays out a roadmap for plaintiffs lawyers to prove, whenever a corporation is claiming Delaware citizenship, that the company's Delaware presence is minimal and doesn't satisfy the U.S. Supreme Court's new "nerve center" test.

GSK's lawyer, Joseph E. O'Neil of Lavin O'Neil Ricci Cedrone & DiSipio, said the company is disappointed by Savage's ruling and that "we continue to believe the facts and law support GSK's right to remove these cases to federal court."

Although Savage's ruling is not appealable, O'Neil said GSK "will continue to pursue its procedural options in other cases."

Attorney Rosemary Pinto of Feldman & Pinto, who argued the remand motion for the plaintiffs, said Savage had recognized the import of the U.S. Supreme Court's 2010 decision in *Hertz Corp. v. Friend*, which specifically said a corporation's citizenship cannot be based on nothing more than a "mail drop box."

Pinto said that if Savage had accepted GSK's arguments, "then any corporation could establish diversity jurisdiction by simply creating a holding company."

Attorney Charles Becker of Kline & Specter said Savage's decision has "long-term significance" and illustrates "the importance of jurisdictional discovery in a nerve center analysis."

Becker is not involved in the Paxil cases, but represented a plaintiff suing GSK over the drug Lamictal and lost his bid to have the case remanded to the state courts.

In Becker's case, *White v. GSK*, U.S. District Judge Mary A. McLaughlin found there was "ample evidence" that the GSK holding company's nerve center was in Delaware based on declarations from GSK executives who said that high-level officers direct, control and coordinate the corporation's activities in Delaware board meetings.

But Savage found that the extensive discovery in the Paxil cases showed that the board meetings are very brief and that board members from Philadelphia often participate by phone.

The bulk of Savage's opinion focuses on describing the complex corporate structure of GSK and the nature and activities of the holding company.

GlaxoSmithKline plc is a British company that is at the top of the GlaxoSmithKline global group of companies, Savage found, and GlaxoSmithKline LLC is the entity through which the British parent conducts its pharmaceutical and consumer health care business in the United States.

Until October 2009, the parent company had conducted its United States business through SmithKlineBeecham, a firm headquartered in Philadelphia.

But for tax purposes, SKB was converted to a Delaware LLC as part of a joint venture with Pfizer.

Savage accepted GSK's explanation that Delaware was chosen because, unlike Pennsylvania, it allows a corporation to convert to a limited liability company without liquidating or dissolving the corporation.

Savage found that his task, in applying the nerve center test, was to determine where the LLC's principal place of business is, and that the justices instructed courts to look for the "brain" of the corporation.

Although GSK urged Savage to find that the holding company, as the only member of the LLC, conducted its business from Delaware, Savage concluded that the evidence proved otherwise.

"In short, the operational and business decisions affecting LLC are not made by [the holding company] or its board of directors, but are made and directed by the officers and directors of LLC," Savage wrote.

In *Hertz*, Savage said, the justices made a distinction "between the place where the operational goals are set and where the operations are carried out."

The focus, Savage said, is on the operational decision-making process.

"A holding company, unlike an operating company, does not typically make decisions directly affecting business operations of its constituent companies. Those decisions are usually made by each of the companies under its umbrella. That is the situation here," Savage wrote.

Under Delaware law, Savage said, the holding company is not a "member-managed" company, but rather a "manager-managed" company.

As a result, Savage found that the holding company "has delegated the operational decision-making authority and power of LLC to LLC's officers and directors. Put another way, [the holding company] has determined that the directors and officers of LLC are to be LLC's 'managers.'"

That fact proved fatal to GSK's arguments because Savage concluded that the holding company "has factually and legally delegated the vast majority of its decision-making to LLC's officers and directors — the 'managers' of LLC — who operate from Philadelphia."

Savage emphasized that he was "not focusing on the business activities taking place in Philadelphia," but instead was focused only on "the place from where those operations are directed, controlled and coordinated."

"That place is Philadelphia, where the top-level officers to whom [the holding company] delegated the decision-making authority are headquartered," Savage wrote.

"Having delegated the direction, control and coordination of LLC to managers who operate from Philadelphia," Savage said, the holding company "has effectively transplanted the vast majority of its 'brain' or 'nerve center' to its managers in Philadelphia, leaving only a small part of its 'brain' in Delaware."