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Enough Already With Opioid Bellwethers, Pharmacies Say

By **Adam Lidgett**

Law360 (April 28, 2020, 9:37 PM EDT) -- Big pharmacy chains on Tuesday objected to plans in the multidistrict opioid litigation to select a new bellwether case to test allegations of improper painkiller dispensing, saying another case in Northern Ohio federal court would be overkill.

In a three-page court filing, the pharmacies — including CVS, Walgreens, Walmart and Rite-Aid — targeted U.S. District Judge Dan Aaron Polster's recent directive for the companies and attorneys for local governments to find a new bellwether case after the Sixth Circuit struck dispensing allegations from an upcoming bellwether trial.

According to Tuesday's filing, Judge Polster's plans for another trial in Northern Ohio are flawed because there has already been "extensive bellwether litigation" in the district, and other bellwethers are pending.

"Three federal bellwethers already are proceeding against one or more of the pharmacy defendants ... and no more are appropriate at this time, especially given the additional state cases proceeding against several pharmacy defendants amidst the exigencies of COVID-19," the pharmacies wrote.

If another case is nonetheless selected, "it should be a case from a different jurisdiction where claims can be tested against different facts and a different state's law," the pharmacies added.

The pharmacies also said that even though the plaintiffs' executive committee was instructed to pick from a slew of possible cases that would serve as painkilling dispensing bellwethers, it only came up with two and insisted that no other viable cases exist. As a result, there was "no room to agree or disagree with the PEC's selection of cases," Tuesday's filing said.

The judge's April 16 **order** came just a day after the Sixth Circuit ruled that an upcoming bellwether trial against the pharmacies **can't examine dispensing allegations** because they were added too late. That means the trial in November will only look at the wholesale distribution activities of pharmacies.

Hunter Shkolnik of Napoli Shkolnik PLLC, a top attorney for the MDL plaintiffs, told Law360 on Tuesday that "the chain pharmacy defendants were given the option to participate in the selection of the next bellwethers that could be tried within the Northern District of Ohio, given the restrictions that the Supreme Court's Lexecon decision requires, [but] rather than participate in the process, they are again seeking to derail a trial."

Shkolnik was referring to the high court's 1998 decision in **Lexecon v. Milberg Weiss**, which held "that an MDL court can only try cases from within its district unless parties stipulate to one from outside." He said that there was no waiver under that doctrine, so the case has to come about in northern Ohio federal court.

"It is obvious [the pharmacy defendants] will do or say anything to avoid judgment day," Shkolnik said. "However, it will be coming soon enough."

Judge Polster has said that he'll select a case unilaterally if the parties can't come to a meeting of the

minds.

Representatives for the pharmacies didn't immediately respond to requests for comment on Tuesday.

The MDL is In re: National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Jeff Overley. Editing by Adam LoBelia.

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