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Pharmacies Can't Escape Public Nuisance In Opioid MDL

By **Emily Field**

Law360 (January 27, 2020, 5:37 PM EST) -- An Ohio federal judge on Monday refused attempts by Rite Aid, Walmart and others to dismiss claims alleging that their failure to stop opioids from being diverted for illicit purposes created a public nuisance, saying that counties had shown evidence to back the allegations.

U.S. District Judge Dan Polster issued separate orders denying the pharmacies' bids for summary judgment on public nuisance and civil conspiracy claims, finding that the local governments in the multidistrict litigation had presented evidence that their opioid monitoring systems were not reliable.

The counties had shown evidence that CVS Health Corp.'s system for suspicious orders was "makeshift, haphazard and ineffectual," the judge said.

As an example, CVS between 2006 and 2009 had no formal written procedures to identify suspicious opioid orders, instead relying on employees' "gut feelings" to identify orders that were too large, the judge said.

Similarly, Walmart Inc. had no written procedures for monitoring suspicious orders until 2011, the judge said.

And while Rite Aid Corp. had a list of suspicious prescribers, it took no steps to determine whether orders from those prescribers were suspicious, the judge said.

In September, the judge ruled that Walgreen Co. **must face claims** that it failed to maintain effective controls against diversion, similarly finding that the counties had produced evidence that a jury could reasonably conclude the pharmacy chain did fail to maintain those controls and those failures were a substantial factor in the opioid crisis.

Cuyahoga and Summit Counties in Ohio are scheduled to conduct the first trial in the MDL in October, against the pharmacy defendants. An earlier trial against drug manufacturers that had been scheduled for October 2019 was scuttled after those defendants **settled with the counties for \$260 million**.

"These decisions were of no surprise," Hunter Shkolnik of Napoli Shkolnik PLLC, a top plaintiffs lawyer in the MDL, told Law360 on Monday. "Walgreens lost the same motions, and these were on hold since the Cuyahoga trial. Judge Polster cleaned house, and now [the pharmacies] are sitting alongside Walgreens at our next trial."

A spokesman for Rite Aid declined to comment.

In late December, the judge **ordered the pharmacies** to turn over 14 years' worth of nationwide opioid prescription records to the cities and counties in the litigation.

In response, the pharmacies filed a mandamus petition on Jan. 17 with the Sixth Circuit, telling the panel that Judge Polster has "repeatedly disregarded" federal court rules and should be ordered to follow them.

The pharmacies said the judge made this decision of his own accord, with little regard for the significant privacy risks that producing these records would involve.

The pharmacies previously made an unsuccessful bid to remove Judge Polster from the MDL and have also complained that he makes decisions before allowing them to weigh in.

Representatives for the other parties did not immediately respond to requests for comment Monday.

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, Ryan Boysen and Hailey Konnath. Editing by Peter Rozovsky.

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