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CVS, Walmart Look To Shift Blame To Doctors In Opioid MDL

By **Mike Curley**

Law360 (January 7, 2020, 4:12 PM EST) -- A group of pharmacies led by CVS Pharmacy Inc., Walgreen Co. and Walmart Inc. are taking aim at droves of unnamed doctors, saying the Ohio counties suing as part of the sprawling opioid multidistrict litigation are unfairly blaming pharmacies instead of going after physicians for overprescribing the drugs.

In a third-party complaint filed Monday, the pharmacies claim Cuyahoga County and other counties and municipalities targeted the pharmacies "in a misguided hunt for deep pockets," saying their pharmacists only fill prescriptions written by Ohio physicians, so if there is a problem with too many opioids being distributed, the fault lies with the people writing those prescriptions, not the people filling them.

"No amount of artful pleading by plaintiff can mask the obvious fact that when plaintiff alleges that pharmacists working for the Cuyahoga County pharmacy chains supposedly filled prescriptions for an 'excessive volume' of opioid medications, somebody else must have written those prescriptions — i.e., the prescriber defendants," the pharmacies told the court.

According to the complaint, CVS and the other pharmacies don't believe they or the physicians are at fault, but they told the court the counties' refusal to name a single prescription that was wrongly written or filled makes the complaint necessary.

"The premise of plaintiff's complaint is nothing more than unsupported speculation that local pharmacists working for the Cuyahoga County pharmacy chains filled prescriptions for opioid medications that they should not have filled," the pharmacies told the court. "Plaintiff makes these allegations despite its inability to support its claims with even one instance of an improperly filled prescription."

The physicians' responsibility to ensure the prescriptions they write are proper trumps any responsibility pharmacies have to customers, the pharmacies argued, adding that while their pharmacists are good at their jobs, they aren't trained as physicians and don't examine or diagnose patients, therefore they can't judge whether a prescription is proper.

The pharmacists are bound by law to accept the prescribing physician's judgment in most cases, so placing the blame on the pharmacists while leaving the physicians alone is unfair, the pharmacies argued.

If the counties identify any prescriptions they say were wrongly written or filled out, the pharmacies said they will amend the complaint to name only the physicians that wrote them.

Paul J. Geller of Robbins Geller Rudman & Dowd LLP, representing the counties, called the complaint "a bit of a head-scratcher."

"The pharmacies were legally obligated to guard against suspicious scrips — but they kept their eyes closed and their profit center wide open — as they dispensed massive amounts of these highly addictive drugs into the county," he told Law360 Tuesday. "But hey, its not our fault — its the fault of the imaginary doctor team of Jane and John Doe.' I guess it goes to show that being a litigator and a

creative writer are not mutually exclusive."

A spokesperson for Walgreen Co. said the company strongly believes most of prescriptions were properly prescribed and the complaint is needed to respond to unsubstantiated allegations by the counties that the pharmacists should not have filled them.

The spokesperson added that the counties chose to target pharmacies but not pill mills, pain doctors and independent and internet pharmacies that fueled the opioid crisis.

A spokesperson for CVS declined to comment.

"As we have said from day one, there are many parties that have contributed to the opioid epidemic," Paul J. Hanly Jr. of Simmons Hanly Conroy; Paul T. Farrell Jr. of Greene Ketchum, Farrell, Bailey & Tweel, LLP; and Joe Rice of Motley Rice LLC, representing the county plaintiffs, said in a statement Tuesday. "However, we have demonstrated and will continue to show that the origins of the opioid crisis and the fuel that spread the epidemic can be traced back to the behavior and practices of corporations in the drug supply chain. Without widespread wrongdoing by the opioid industry—including pharmacies—we would not be in the place we are today."

The complaint is part of a sprawling MDL in Ohio federal court, in which numerous municipalities are suing opioid manufacturers and distributors to hold them accountable for the opioid epidemic across the country.

Last week, U.S. District Judge Dan Aaron Polster ordered pharmaceutical companies to **turn over 14 years' worth** of nationwide opioid prescription records to the cities and counties suing them over their role in the opioid epidemic.

The Ohio counties are scheduled to conduct the first trial in the MDL in October against the pharmacies. An earlier trial against drug manufacturers scheduled for October 2019 was scuttled after those defendants **settled with the counties** for \$260 million.

Representatives for the other pharmaceutical companies and the unnamed doctors could not immediately be reached for comment Tuesday.

Cuyahoga County and the other municipalities are represented by Aelish M. Baig, Paul J. Geller, Mark J. Dearman and Dorothy P. Antullis of Robbins Geller Rudman & Dowd LLP, Paul J. Hanly Jr. of Simmons Hanly Conroy, Joseph F. Rice and Linda Singer of Motley Rice LLC, Paul T. Farrell Jr. of Greene Ketchum LLP, Peter H. Weinberger of Spangenberg Shibley & Liber and Hunter J. Shkolnik of Napoli Shkolnik.

CVS is represented by Eric R. Delinsky and Alexandra W. Miller of Zuckerman Spaeder LLP.

Walgreens is represented by Kaspar J. Stoffelmayer and Katherine M. Swift of Bartlit Beck LLP.

Rite Aid of Ohio Inc. is represented by Kelly A. Moore and Elisa P. McEnroe of Morgan Lewis & Bockius LLP.

Discount Drug Mart Inc. is represented by Timothy D. Johnson and Gregory E. O'Brien of Cavitch Familo & Durkin Co. LPA.

Giant Eagle Inc. and HBC Service Co. are represented by Robert M. Barnes, Scott D. Livingston and Joshua A. Kobrin of Marcus & Shapira LLP.

Walmart is represented by Tina M. Tabacchi and Tara A. Fumerton of Jones Day.

Counsel information for the prescriber defendants was not available.

The case is County of Cuyahoga v. Purdue Pharma LP et al, case number 1:17-op-45004, in the U.S. District Court for the Northern District of Ohio. 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 Ryan Boysen and Jeff Overley. Editing by Amy Rowe.

Update: This story has been updated with comment from attorneys representing the county plaintiffs.

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