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Ohio Trial In Opioid MDL Will Go Forward, 6th Circ. Says

By **Emily Field**

Law360 (October 10, 2019, 12:18 PM EDT) -- The Sixth Circuit on Thursday rejected eleventh-hour bids by the Ohio attorney general and drug companies to block an upcoming bellwether trial in multidistrict litigation accusing drugmakers of fueling the opioid crisis, rejecting the state's arguments that the counties in the case are usurping its authority.



The Sixth Circuit on Thursday refused to block an upcoming bellwether trial in multidistrict litigation accusing drugmakers of fueling the opioid crisis. (AP)

In a separate ruling, the panel also rejected the drug companies' bid to disqualify the judge overseeing the trial.

The Sixth Circuit ruled that Attorney General Dave Yost hadn't shown that the state would be harmed by a trial it's not participating in or how the suits in federal court brought by Summit County and Cuyahoga County would interfere with its own suits over the crisis. In rejecting the attorney general's petition, the panel said that the state hadn't met the high bar required for obtaining a writ of mandamus.

"Despite having notice that the counties' claims would proceed to trial, Ohio made no attempt to intervene in the MDL proceeding for the limited purpose of raising the issues that it now asks us to decide by extraordinary means," the panel said.

In a separate ruling, the Sixth Circuit also shot down a bid by drug distributors and pharmacies to remove U.S. District Judge Dan Polster from overseeing the trial, rejecting arguments that his statements in support for a settlement create an appearance of impropriety.

"Read in isolation, Judge Polster's statements to the press and in court might call into question his impartiality," the panel said. "But we must take his statements in context."

The panel noted that the judge equally placed blame on all parties, acknowledged that settlement efforts might not pan out and that both sides had compelling arguments.

"He granted interviews to some papers, in which he discussed the general impact of the opioid epidemic and his desire to settle the action," the panel said. "But those articles also discussed his penchant for settlement in all cases and his refusal to discuss the particulars of this case."

The rulings clear the way for the counties' claims that drugmakers' reckless opioid sales spurred the opioid epidemic to be heard at trial starting on Oct. 21.

In an Aug. 30 petition, Yost argued that the counties' suits undermined the state's authority to protect the public welfare, pointing to a long line of U.S. Supreme Court precedent that states have standing to bring claims on behalf of their citizens, but localities do not.

The attorney general's bid to block the trial **had been opposed** by Ohio's governor, Mike DeWine, who stated that the local governments have borne a significant brunt of the opioid epidemic and that he would veto any legislation that would give the attorney general control over the counties' suit.

The bellwether trial will be the first in the sprawling opioid MDL. Cuyahoga and Summit counties are seeking several billion dollars to cope with the opioid crisis' effects on their health care systems, law enforcement and economies, a major test for the approximately 2,000 other cases in the MDL.

"Cuyahoga County is very pleased to see that both writs were denied and now we can focus our attention to the trial and holding the pharmaceutical industry responsible for the opioid epidemic," Hunter Shkolnik of Napoli Shkolnik PLLC, a top plaintiffs lawyer in the MDL, told Law360 on Thursday.

Major players on the drugmakers' side have sought an exit in recent weeks.

Purdue Pharma LP and its owners, the Sackler family, have reached a tentative deal to settle the roughly 2,000 suits in the multidistrict litigation. Under the terms of the proposed deal, Purdue on Sept. 16 filed for Chapter 11 protection and the company will be restructured as a public benefit trust from which profits of its painkiller OxyContin drug will be funneled to states and local governments.

The company's owners, the Sackler family, will pay \$3 billion of its fortune, with no admission of wrongdoing.

Other drug companies have exited the trial in the MDL, with the first being Endo Pharmaceuticals Inc., which on Aug. 20 paid \$10 million to settle claims against it.

Allergan followed on Aug. 30 with a \$5 million deal with the counties, and Mallinckrodt said on Sept. 6 it will pay \$24 million and donate up to \$6 million in generic drugs to leave the bellwether trial.

Most recently, Johnson & Johnson agreed to pay \$20.4 million to exit the bellwether trial. The pharmaceutical giant said it would pay \$10 million to Ohio's Cuyahoga and Summit counties in addition to reimbursing them for \$5 million of their legal expenses and a promise to donate an additional \$5.4 million to nonprofits focusing on the impacts of opioid addiction.

A representative for AmerisourceBergen declined to comment. Representatives for the other parties didn't immediately respond to requests for comment on Thursday.

The cases are County of Cuyahoga v. Purdue Pharma LP et al., case number 1:17-op-45004; County of Summit et al. v. Purdue Pharma LP et al., case number 1:18-op-45090; and In re: National Prescription Opiate Litigation, case number 1:17-md-02804, all in the U.S. District Court for the Northern District of Ohio. The Ohio attorney general's appellate case is In re: State of Ohio, case number 19-3827, in the U.S. Court of Appeals for the Sixth Circuit. The companies' disqualification request is in In re: AmerisourceBergen Drug Corp. et al., case number 19-3935, in the U.S. Court of Appeals for the Sixth Circuit.

--Editing by Alyssa Miller.

Update: This story has been updated with more information and with comments from Hunter Shkolnik.

