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Pharmacies Must Give Patient Ages In Opioid MDL Discovery

By **Mike Curley**

Law360 (February 13, 2020, 7:14 PM EST) -- An Ohio federal judge on Thursday overruled objections from several pharmacies being asked to disclose the ages of patients in discovery in sprawling opioid multidistrict litigation, saying in light of the other data being produced, disclosing the ages does not present a risk to patient privacy.

U.S. District Judge Dan Aaron Polster backed up the findings of Special Master David R. Cohen, who in January met with counsel for the pharmacy defendants, which include Rite-Aid and Walmart, and the plaintiff counties Summit and Cuyahoga, Ohio, to determine what documentation should be disclosed in the Track One-B cases in the MDL.

The Summit and Cuyahoga county cases are part of a sprawling, nationwide MDL in which numerous municipalities are suing opioid manufacturers and distributors to hold them accountable for the opioid epidemic across the country.

The pharmacy defendants two weeks ago objected to three aspects of Cohen's findings. In addition to the ages, they objected to the amount of data they must produce for non-opioid drugs and the time frame in which they would have to produce additional information for drug distribution orders that the plaintiffs identified as "red flag" prescriptions.

While the pharmacies said producing the patients' birth years would be a breach of privacy by identifying the patients, Judge Polster said the amount of data fields about patients that must be produced has already been pared down from more than 160 fields to 34 by Cohen, and that the narrow set "strikes an appropriate balance" between the needs of the case and patient privacy.

On the non-opioid data, the judge again wrote that the special master did pare down some of what the plaintiffs were requesting be produced, rejecting their request to produce numbers on sleep aids, while requiring the pharmacies to produce information on 14 benzodiazepines and four muscle relaxers.

In his findings, Cohen had sided with plaintiffs in finding that identifying "red flag" prescriptions — ones likely to indicate abuse — includes not only looking at opioids, but also other drugs that have been identified as being commonly mixed with opioids.

The judge sided with Cohen, finding that the pharmacies have not shown that producing those records would be unduly burdensome.

Cohen had also given the plaintiffs an 18-day deadline to look over the pharmacies' initial discovery to identify the "red flag" prescriptions, followed by a 14-day deadline for the pharmacies to produce additional data on those specific prescriptions.

While the pharmacies argued the deadline was too short, and any deadline should be done on a case-by-case basis, the judge found the objection was too speculative for the court to overrule the special master's findings.

Peter H. Weinberger of Spangenberg Shibley & Liber, plaintiffs liaison counsel, told Law360 on

Thursday they are happy with the decision and hopeful to receive the information soon.

"This data is critical to our ability to analyze how these retail chain pharmacies, as the last line of defense, dispensed opioids and cocktail drugs to Summit and Cuyahoga Counties," he said.

Hunter J. Shkolnik of Napoli Shkolnik, representing Cuyahoga County, added the pharmacies did not want to produce "bad" sales records, but cannot hide them anymore.

Representatives for the pharmacy defendants could not immediately be reached for comment Thursday.

In January, Judge 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.

The plaintiffs are represented by Paul J. Hanly, Jr. of Simmons Hanly Conroy, Joseph F. Rice and Linda Singer of Motley Rice, Paul T. Farrell, Jr. of Farrell Law, W. Mark Lanier of Lanier Law Firm, Peter H. Weinberger of Spangenberg Shibley & Liber and Hunter J. Shkolnik of Napoli Shkolnik.

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

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

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

Walgreen Co. is represented by Kaspar Stoffelmayr of Bartlit Beck LLP.

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

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

The Track One-B cases are County of Summit, Ohio et al. v. Purdue Pharma L.P. et al., case number 18-op-45090 and The County of Cuyahoga, Ohio et al. v. Purdue Pharma L.P. et al., case number 17-op-45004, and the MDL is 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.

--Additional reporting by Ryan Boysen and Jeff Overley. Editing by Amy Rowe.