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6th Circ. Is Told Opioid MDL Judge Flouting Court Rules

By **Emily Field**

Law360 (January 17, 2020, 8:09 PM EST) -- Pharmacies launched another attack on the judge overseeing opioid multidistrict litigation, telling the Sixth Circuit on Friday that he has "repeatedly disregarded" federal court rules and should be ordered to follow them.

Walgreen Co., CVS Health Corp., Rite Aid Corp and others are seeking to stay a **recent order** compelling pharmacies, including some of the nation's largest chains, to produce 14 years' worth of nationwide opioid prescription records. The pharmacies told the Sixth Circuit in a mandamus petition that U.S. District Judge Dan Polster made this decision of his own accord, with little regard for the significant privacy risks that producing these records would involve.

And instead of justifying the discovery as relevant to the claims in the bellwether cases in Cuyahoga and Summit counties in Ohio, the judge assumed that the nationwide data might be relevant to other unspecified cases in the MDL, the pharmacies said.

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

The pharmacies said in the petition that Judge Polster's "recurring disregard" for the Federal Rules of Civil Procedure follows his announcement at the beginning of the case that his only goal in managing the litigation is to do "something meaningful" about the opioid crisis and not to figure out the answer to legal questions.

"This court's intervention is required because the district court is wrong to conclude that the Federal Rules of Civil Procedure do not apply to this MDL," the pharmacies said.

The pharmacies argued that a stay of the order would prevent them from ringing up unnecessary litigation expenses, as producing years of records of every single prescription filled for a number of medications would be time-consuming and expensive.

"The chain pharmacies are copying the distributors' and manufacturers' plan to delay, delay, delay. That failed for them," Hunter Shkolnik of Napoli Shkolnik PLLC, a top plaintiffs lawyer in the MDL, told Law360 on Friday. "This approach is like a broken record. At some point the Sixth Circuit is going to tire of these baseless whining writs of mandamus against Judge Polster. Simply put, there is no reason to grant this."

Judge Polster's short Dec. 30 order requires the pharmacies to produce records showing how many customers obtained opioids from them and what safeguards were in place to ensure those prescriptions were legitimate, medically necessary and complied with the Controlled Substances Act, among other things.

"Together with the data of the other defendants, the order needlessly requires the production of data for tens of millions of patients who have nothing to do with the two Ohio counties that are plaintiffs in this case, and which the court has acknowledged are not necessary for the case," a Walgreens spokesman told Law360 on Friday. "We have offered to make dispensing data available, but narrowly tailored to balance the needs of the case with the important privacy interests of our patients."

Judge Polster told the pharmacies to first turn over records for Cuyahoga and Summit counties.

Those counties 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.

The pharmacies are represented by Tina M. Tabacchi and Tara A. Fumerton of Jones Day, Eric R. Delinsky and Alexandra W. Miller of Zuckerman Spaeder LLP, Kelly A. Moore and Elisa P. McEnroe of Morgan Lewis & Bockius LLP, Kaspar Stoffelmayer of Bartlit Beck LLP, Timothy D. Johnson Gregory E. O'Brien of Cavitch Familo & Durkin Co. LPA and Robert M. Barnes, Scott D. Livingston and Joshua A. Kobrin of Marcus & Shapira LLP.

The plaintiffs 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.

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 Michael Watanabe.

Correction: A previous version of this story attributed a statement from Walgreens to a Rite Aid spokesman. The error has been corrected.

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