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Opioid MDL Needs New Pharmacy Bellwether, Judge Says

By **Adam Lidgett**

Law360 (April 17, 2020, 5:44 PM EDT) -- The Ohio federal judge overseeing the vast multidistrict opioid litigation told local governments and pharmacy giants to quickly select a new bellwether case to test allegations of improper painkiller dispensing or he will do it himself.

In an order late Thursday, U.S. District Judge Dan Aaron Polster directed attorneys for cities and counties to choose a case by April 23 and then confer with the pharmacy defendants. Both sides have until April 28 to let the court know if they have agreed on a case, the judge wrote, adding that he'll select a case unilaterally if the parties can't come to a meeting of the minds.

The judge's order came just one day after the Sixth Circuit **ruled** that an upcoming bellwether trial against the pharmacies — including CVS, Walgreens, Walmart and Rite-Aid — can't examine dispensing allegations because those claims were added too late. As a result, the trial in November will only look at wholesale distribution activities.

Top attorneys for the MDL plaintiffs — Paul Farrell Jr. of Farrell Law, Paul Hanly Jr. of Simmons Hanly Conroy and Joe Rice of Motley Rice LLC — said in a Friday statement they were "encouraged by Judge Polster's decision to start a third case track to address the merits of our dispensing claims against the pharmacy defendants."

"We are confident the evidence against the pharmacy chains will clearly demonstrate their role — as a distributor and dispenser — in creating a public nuisance and fueling the opioid epidemic," they said.

The question of whether improper dispensing and distribution by pharmacies created a public nuisance in the form of the opioid crisis will be the sole legal claim decided at the bellwether trial covered by Thursday's order. It's not clear how soon Judge Polster intends to schedule the trial.

The order stems from the Sixth Circuit's unanimous decision granting a writ of mandamus that pharmacy chains petitioned for in January. The appeals court found that Judge Polster improperly allowed two Ohio counties to amend their complaints with retail dispensing allegations even though they had "expressly disavowed" them at one point long ago.

"The chain pharmacies got what they asked for in the writ, but maybe next time they should consider the ramifications," Hunter Shkolnik of Napoli Shkolnik PLLC, another top attorney for the MDL plaintiffs, said in a statement to Law360. "They will now have to face two trials back to back rather than one. In the end, this was a bad decision they made."

Representatives for the pharmacies either declined to comment or couldn't immediately be reached Friday.

Other bellwether cases in the opioid MDL are revving up around the country, but not all of them involve pharmacy defendants, much less allegations that pharmacies are legally responsible for addiction-related harms to communities caused by opioid prescriptions that shouldn't have been written.

Pharmacies have been conspicuously absent from most of the publicly reported settlement offers in the opioid MDL, which involves nearly 3,000 cases. That's a contrast with drug manufacturers and the largest distributors, which have expressed openness to paying billions to state and local governments to resolve their alleged roles in fueling the opioid crisis.

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. Editing by Alyssa Miller.

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