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Discovery War Breaks Out In Opioid MDL Bellwethers

By **Jeff Overley**

Law360 (July 25, 2018, 7:01 PM EDT) -- A simmering discovery dispute in multidistrict litigation over the opioid crisis has boiled over, according to court filings late Tuesday that show drugmakers and pharmacies going public with heated objections over the "unprecedented breadth" and "massive scope" of document disclosures.

The filings relate to **a high-stakes fight** over document production in three bellwether cases filed by local governments in Ohio. Drug companies until now have mainly voiced criticisms behind the scenes, but Tuesday, they went over the head of a special master and sought relief from U.S. District Judge Dan Aaron Polster.

The objections were strongly worded, with drugmakers decrying the "unprecedented breadth of the discovery" and pharmacies bemoaning the "massive scope of discovery." Plaintiffs lawyers promptly fired back Wednesday, telling Law360 that the drugmakers and pharmacies are maneuvering to drag out the litigation.

Special master David Cohen last week **reduced the volume** of customer-specific information that drugmakers must divulge. But the drugmakers remain deeply displeased, arguing that Cohen's discovery rulings still cover too many years and too many products, especially in light of an Aug. 31 discovery deadline.

"The rulings broaden discovery to products, time periods and prior productions such that it is nearly limitless and would be impossible to comply with by Aug. 31 or even within many months," the drugmakers said Tuesday.

The companies are taking issue with requirements to produce certain data stretching back to 1996, records related to any schedule II opioids and documents produced previously in any litigation involving the marketing or distribution of opioids.

The difficulties are compounded by the fact that depositions are getting started, according to the drugmakers, which said that requiring witness interviews before documents can be reviewed "violates due process."

The drugmakers include Allergan Inc., Mallinckrodt LLC, Johnson & Johnson, Endo Pharmaceuticals Inc., Teva Pharmaceutical Industries Ltd. and Purdue Pharma LP. In Tuesday's filing, the manufacturers made highly detailed, company-specific requests for how discovery should be tailored.

Pharmacy retailers — including CVS Health Corp., Rite Aid Corp., Walgreen Co. and Walmart Stores Inc. — also filed objections Tuesday. The pharmacies argued that they are subject to a statute of limitations of two years and that there is no basis for making them produce more than two decades of data.

"It is unheard of to measure the temporal scope of discovery without any reference to the applicable limitations periods, as the rulings have done," the pharmacies wrote.

Local governments have argued that historical data will help them show how prescription opioid sales evolved over time. But the pharmacies on Tuesday called that argument "nonsensical," asserting that it's well known that opioid sales have increased, and that the important comparison is opioid orders

by similar pharmacies during the same time period.

The pharmacies asked Judge Polster to dial back their discovery obligation so that it covers schedule II opioids from April 2015 to April 2018 in the two Ohio counties covered by the bellwether cases.

Peter Mougey of Levin Papantonio Thomas Mitchell Rafferty Proctor PA, a top plaintiffs attorney in the MDL, told Law360 on Wednesday that the companies are "doing everything they can to slow down the process" and that their objections "are another example of foot-dragging."

Hunter Shkolnik of Napoli Shkolnik PLLC, another top plaintiffs attorney in the MDL, echoed that point, telling Law360 that the parties "must move on and accept these decisions and not delay this trial, something the defendants wish to do."

The bellwether cases are set for trial in early 2019. When Judge Polster in April set the trial date, plaintiffs lawyers predicted that the short timeline would help them broker a settlement and avoid protracted litigation.

"This is a defendant's worst nightmare, having a short trial date," Shkolnik **said in April**. "They bask in delayed discovery that goes on for years."

The case 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.

--Editing by Dipti Coorg.

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