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## Pharmacies Can't Dodge Ohio Opioid MDL's 2021 Bellwether

By **Emily Field**

Law360 (August 6, 2020, 6:15 PM EDT) -- The Ohio federal judge overseeing opioid multidistrict litigation has refused to toss two Ohio counties' bellwether cases against pharmacies, allowing their public nuisance claims over the dispensing and distribution of opioids to move forward.

U.S. District Judge Dan Polster rejected the pharmacies' arguments that state laws and regulations precluded Lake and Trumbull counties' claims that they turned a blind eye to red flags they were fueling the opioid epidemic. The companies ignore the fact that Ohio courts for decades have recognized a common law claim for absolute public nuisance based on a defendant's illegal conduct, the judge said.

The judge also rejected the pharmacies' contention that only their pharmacist employees have a duty under the Controlled Substances Act to prevent opioids from being diverted due to illegitimate prescriptions, which he called "deeply troubling."

"In other words, the pharmacy defendants now ask the court to conclude that the CSA, as a matter of law, does not impose any obligation on a pharmacy-registrant, itself, to identify or investigate dubious prescriptions prior to filling them," Judge Polster said. "The court declines to do so, as this strained interpretation of the CSA would turn the fundamental purpose of the act on its head."

The CSA makes it clear that anyone, including a pharmacy itself, who knowingly filled an illegitimate prescription violated the law, the judge said.

Additionally, given that a pharmacy must collect the data required to spot a pattern of illegitimate prescriptions, it is in the best position to spot red flags, not pharmacists, the judge said.

"Identifying prescriptions presented over time for the same drugs or combinations of drugs, in the same quantities, issued by the same doctor (and possibly presented to different pharmacists in different stores owned by the same pharmacy), would test the limits of human memory; this red flag would be nearly impossible for any individual pharmacist to discern absent some global mechanism for reference to other prescriptions," the judge said.

The pharmacies' argument that they cannot be responsible for identifying red flags because they don't have the specialized knowledge and skill that pharmacists have did not fare better with the judge.

"But the pharmacy defendants do have an obligation under the CSA to employ someone who does have and can exercise appropriate professional knowledge, judgment, and skill on their behalf," the judge said. "In sum, the court concludes the pharmacy defendants have failed to meet their burden of demonstrating there is no corporate-level obligation to design and implement systems, policies, or procedures to identify red flag prescriptions."

The counties claim that the pharmacies created a public nuisance by failing to monitor suspicious orders of opioids and only belatedly put in systems to detect those orders.

Trumbull County and Lake County in May said that the chains, which include CVS and Rite Aid, had

extensive data on the opioids they distributed and could have taken action to prevent filling suspicious opioid prescriptions, but instead fueled a **black market** for opioids.

They also contend that the pharmacies failed to train pharmacists and technicians on how to spot suspicious orders and what to do if a prescription is possibly illegitimate.

Judge Polster selected the counties' bellwethers in April, which is set for May 24, 2021.

"We were confident in the strength of the case against the national chain pharmacies like CVS, Rite Aid, Walmart, Walgreens and others, and Judge Polster correctly denied these motions," Hunter Shkolnik of Napoli Shkolnik PLLC, who represents the counties, told Law360 on Thursday. "We look forward to trial."

Representatives for the pharmacies did not immediately respond to a request for comment Thursday.

The cases are County of Lake, Ohio v. Purdue Pharma LP et al., case number 1:18-op-45032, and County of Trumbull, Ohio v. Purdue Pharma LP et al., case number 1:18-op-45079, in the U.S. District Court for the Northern District of Ohio.

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.

--Editing by Adam LoBelia.

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