

Damages Forfeited In Opioid MDL Bellwethers, Drug Cos. Say

By **Jeff Overley**

Law360 (November 2, 2018, 7:44 PM EDT) -- Local Ohio governments with bellwether cases in multidistrict litigation over the opioid crisis have "willfully defied" a court order to identify allegedly improper prescriptions and should be blocked from recovering damages at trial, drug companies have told an Ohio federal judge.

In a motion to dismiss on Thursday, drugmakers accused Ohio cities and counties of disregarding an April **case management order** requiring the disclosure of prescriptions that the governments believe were medically unnecessary or medically inappropriate.

The governments made a "strategic decision to disregard the court's order" and have thereby undermined the ability of drugmakers "to prepare their defenses and challenge plaintiffs' basic theory of liability," the motion said.

Although the governments have said they intend to rely on high-level evidence to prove their case, the drugmakers on Thursday insisted that identification of specific prescriptions is "critically important" to their defense.

To rectify matters, the court "would be justified in dismissing the [bellwether] complaints in their entirety," but the drugmakers would be content with dismissal of the local governments' claims for damages, the motion said.

That would leave intact claims for "prospective measures to address an ongoing public health crisis," the drugmakers wrote.

Thursday's motion hinted at a challenge if damages are ultimately awarded, saying that "fundamental due process rights" have been flouted. As a result, "any judgment the plaintiffs might obtain could not be enforced on post-trial motions or appeal," the drugmakers argued.

Hunter Shkolnik of Napoli Shkolnik PLLC, a top attorney for the local governments, fired back on Friday, calling the motion "a ridiculous attempt to make headlines to somehow cover up the manufacturers' outrageous actions in causing this epidemic."

"The court will see it for what it is: much to do about nothing," Shkolnik told Law360.

The drugmakers are accused of a yearslong campaign of misinformation that deceived doctors and patients about the risks and benefits of opioid painkillers. The ensuing addiction crisis has strained municipal budgets by creating huge costs related to health care and law enforcement, the governments allege.

Thursday's motion adds to a flurry of recent court filings over the extent to which specific prescriptions should be identified. After a special master recently **required disclosure of certain prescriptions**, the governments objected, and U.S. District Judge Dan Aaron Polster **issued a compromise ruling** that allowed them to instead give up their reliance on such prescriptions at a trial set for September 2019.

The compromise ruling then prompted several additional filings: a response from the local governments, a motion in which drugmakers accused the governments of trying to avoid identifying prescriptions without sacrificing their reliance on such prescriptions, and another filing in which the governments accused the drugmakers of misconstruing their response.

Separately Friday, drug manufacturers, distributors and pharmacies all filed objections to a magistrate judge's recent recommendation that motions to dismiss bellwether allegations **should mostly be rejected**. Local governments also filed an objection to the magistrate judge's recommendation that their public nuisance claims should be dismissed.

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 Jack Karp.