

Untimely Dispensing Allegations Against Pharmacies Stricken in Opioid Litigation

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As the world grapples with the health crisis caused by COVID-19, litigation regarding a different health crisis—the opioid epidemic—continues to progress (see our previous posts on this topic [here](#) and [here](#)). In a major development last week for the multidistrict litigation, the Sixth Circuit concluded that key bellwether cases against twelve large pharmacy chains may not include untimely dispensing allegations.

The multidistrict litigation (“MDL”) includes claims by numerous plaintiffs arising out of the nation’s opioid crisis. Two of those plaintiffs—Cuyahoga County and Summit County of Ohio—brought claims against certain pharmacies that sold prescription opioids (in addition to their claims against other defendants like distributors and manufacturers). The Counties’ claims against the pharmacies are scheduled for trial in November 2020.

The Counties’ claims against the pharmacies originally related to the pharmacies’ capacity as “distributors” of drugs to their own retail pharmacies. The Counties expressly declined to bring any claims against the pharmacies as

“dispensers” of prescription opioids. This is an important distinction. Distributors ship pharmaceuticals wholesale; dispensers fill prescriptions.

Discovery against the pharmacies proceeded with respect to their alleged role as distributors. For all parties, discovery included more than 600 depositions and the production of tens of millions of documents.

However, nearly ten months after the close of discovery, the Counties reversed course and moved to amend their complaints to add dispensing allegations against the pharmacies. On November 19, 2019—i.e., almost 19 months after the court’s deadline



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for amendments to the Counties' complaints—the court granted the Counties' motion. The court did so based on perceived efficiencies, reasoning the dispensing claims were better considered by the district court now rather than later “in front of some other Court that does not have the expertise I have developed over the past two years.”

The court also allowed discovery on the recently-added dispensing claims. The pharmacies were ordered to produce data on every prescription that their pharmacies had filled for any opioid medication, anywhere in the United States, for a period of 13 years—including data on prescriptions outside Ohio, which the district court intended to make available for future cases, but which would be inadmissible in the Ohio-focused case in which it was to be produced.

Following the district court's order, the pharmacies petitioned the U.S. Court of Appeals for the Sixth Circuit for a writ of mandamus. The primary issue before the Sixth Circuit on the pharmacies' petition was the district court's decision to allow the Counties to amend their complaints 19 months after the court's deadline for doing so.

The Sixth Circuit granted the writ in a strongly-worded order. Stating that an “MDL court may not . . . distort or disregard the rules of law applicable” to each individual case consolidated in the MDL, the Sixth Circuit concluded there was no “good cause” for the Counties' failure to timely amend their complaints to add the dispensing allegations. In fact, the Sixth Circuit recognized that the Counties' express decision to omit those claims earlier “arguably amounts to an outright waiver of them.” According to the Sixth Circuit, “[n]ot a circuit court in the country, so far as we can tell, would allow a district court to amend its scheduling order under these circumstances.”

The Sixth Circuit's ruling once again highlights how the unprecedented scope of the opioid litigation—with more than 2,700 cases consolidated in the MDL—deeply strains ordinary structures and procedures of litigation. In the orders at issue, the district court appeared to value efficiency and the collective interests in managing the MDL as a whole over the individual rights of the parties in the specific case at hand. Stipulating that the “district judge in this case is notably conscientious and capable, and we fully recognize the complexity of his task in managing the MDL here,” the Sixth Circuit nevertheless concluded the district court had gone too far: “Respectfully, the district court's mistake was to think it had authority to disregard the Rules' requirements in the Pharmacies' cases in favor of enhancing the efficiency of the MDL as a whole.” That decision should have been based, but was not, on the record in the individual case before the court.



Even in an MDL as complex as the opioid litigation, the district court's authority to manage it is not without limit. Cases within an MDL retain their separate identities and the parties in those individual cases have rights that cannot be impinged merely to create efficiencies in the MDL generally.

Particularly with respect to issues that can be dispositive, e.g., motions for summary judgment or to amend pleadings, it remains important for district courts to articulate and apply the traditional standards governing such issues.

The Sixth Circuit's decision also means that important liability questions in the opioid litigation will remain unanswered for now. Had the dispensing claims been allowed, the trial set for November 2020 may have answered whether a pharmacy could or would be held liable for filling prescriptions issued by someone else. Because those claims are no longer part of the Counties' complaints, the full extent of potential liability large pharmacies face for the opioid epidemic is still unclear. And unlike other categories of defendants like drug manufactures and large distributors, pharmacies have largely declined to settle the claims against them.

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.