

Opioid Update: MDL Defendants Return to the Sixth Circuit

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After a lull in appellate proceedings, one of the nation's most closely watched cases (non-impeachment category) has returned to the Sixth Circuit, at least temporarily.

Several chain drug stores that filled opioid prescriptions have filed a mandamus petition challenging Judge Polster's order to produce "transactional dispensing data for the entire United States" from 2006 forward. That order, the pharmacies complain, treats MDL proceedings as exempt from the normal application of the Federal Rules of Civil Procedure. This is particularly problematic here, the petition implores, given the privacy interests implicated by prescription-drug patterns.

A strange set of bedfellows agree: the ACLU and the U.S. Chamber of Commerce both filed amicus briefs in support of the drug stores' petition. The Chamber (joined by the National Association of Chain Drug Stores), underscored the applicability of Federal Rule 26(b)(1)'s proportionality rule, which (they say) commands the trial judge to account for the costs and risks of producing nationwide prescription data.

Meanwhile, the ACLU highlighted the "serious privacy concerns raised by the district court's discovery order requiring production of the prescription records of many millions of Americans from across the nation."

"Because the prescription records at issue—which appear to include both opioids and a host of other commonly prescribed medications, such as Xanax, Adderall, and buprenorphine—can reveal highly sensitive information about patients' underlying medical conditions, their disclosure implicates patients' rights under the Due Process Clause and the Fourth Amendment." — ACLU brief

One question for the Sixth Circuit (already answered by Judge Polster on a reconsideration motion) is whether it's appropriate to produce nationwide information now, when the parties are preparing for bellwether trials involving only Ohio's Cuyahoga and Summit Counties.

Relatedly, Judge Polster recently moved the bellwether trial date back from Oct. 12 to Nov. 9, 2020.

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