

Opioid Update: Court Denies Pharmacies' Motion for Certification of An Interlocutory Appeal

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Earlier this week in the Opioid MDL, Judge Polster [denied](#) the defendant pharmacies' motion for certification of an interlocutory appeal. The defendants asked him to certify three issues for appeal: (1) whether the Ohio Product Liability Act abrogated the public nuisance claim, (2) whether the Court properly handled a juror's misconduct during the trial, and (3) whether the Controlled Substances Act imposes anti-diversion duties on corporate pharmacies. Judge Polster's opinion reasoned that he'd already addressed these issues, that the motion was untimely, and that an appeal would "unnecessarily extend the litigation because a final judgment is near." His principal concern was that an interlocutory appeal did not make sense when an appeal of the final judgment could be taken so soon. The opinion also focuses on "redundancy" and "timing" issues. Two of the issues had already been subject to a 28 U.S.C. § 1292(b) motion. And the defendants argued that circumstances had changed based on discovery, but Judge Polster dismissed that by stating that discovery had ended years ago.

Though he discusses each of the statutory factors under § 1292(b), practical issues predominated Judge Polster's opinion, an analysis that is [becoming increasingly](#) common in the Sixth Circuit. Judge Polster focused on the third statutory factor, which requires that the interlocutory appeal materially advance the litigation. He held that even if the public nuisance claim were abrogated, the other claims would still proceed; that reversing the juror-misconduct issue will still require a new trial' and that plaintiffs' claims could proceed regardless of the Controlled Substances Act. All of this is to say that Judge Polster believed that an immediate appeal would only extend, and not shorten, the litigation (which defendants at times appeared to admit in their briefing).

Litigants hoping to secure an interlocutory appeal should keep these practical considerations, including those not expressly included in the § 1292(b) requirements, top of mind when briefing these issues. Without a § 1292(b) certification from the district court, a litigants cannot file an appeal with the court of appeals, and so effective briefing before the district court is imperative.

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