

## 'Red Flag' Expert's Opinion Limited In Opioid MDL

By **Mike Curley**

Law360 (September 14, 2021, 5:35 PM EDT) -- An Ohio federal judge will limit the scope of an expert's testimony about how pharmacies failed to heed "red flags" meant to curb the diversion of opioids, saying he can opine that the alleged failure likely led to the drugs getting out on the streets, but he cannot establish a direct causal link.

In an order filed Monday, U.S. District Judge Dan Aaron Polster granted in part a motion from big-name pharmacies like Rite-Aid, CVS and Walgreens seeking to exclude testimony from Carmen Catizone, who has undergraduate and masters' degrees in pharmacy and served as the executive director of the National Association of Boards of Pharmacy for decades.

Catizone is set to testify in an upcoming bellwether trial in October concerning claims by Ohio's Trumbull and Lake Counties alleging the pharmacies did not do enough to prevent diversion of opioids or filling of illegitimate prescriptions.

Rite-Aid announced **in August** that it and the two counties had reached a settlement, freeing the pharmacy from the upcoming bellwether. The remaining defendants include regional supermarket chain Giant Eagle and the country's three biggest pharmacy corporations: CVS Health, Walgreen Co. and Walmart Inc.

Catizone's expert testimony concerns a set of "red flag" warning signals that pharmacies can use to identify potentially illegitimate prescriptions, such as combinations of particular types of drugs being filled all at once or customers going to a pharmacy more than 25 miles from their home.

While the pharmacies argued that Catizone's methods were untested and unreliable, Judge Polster pointed to his decades of experience in the practice and regulation of pharmacies and noted that Catizone is going to testify that his guidelines are recommendations rather than hard-line mandates.

It would be helpful for fact-finders, such as the jury, to hear how many suspicious prescriptions Catizone's methods would have flagged, the judge wrote.

Catizone cannot, however, draw a point directly from his system to actual illegal distribution, Judge Polster said, noting that he is neither a statistician nor an epidemiologist.

"While Catizone's methodology reliably supports his opinions that 'red-flagged' prescriptions were potentially illegitimate, Catizone may not opine that the mere presence of a red flag, without more, in fact means a prescription is illegitimate," the judge wrote.

Also on Monday, Judge Polster denied bids from the pharmacies to exclude three other experts who were offered in the same bellwether. The judge found that data expert Craig McCann's methods, which use Catizone's "red flag" criteria, are reliable and reasonable in one order.

In two other orders, the judge allowed testimony from Dr. Caleb Alexander, a practicing physician and professor of epidemiology and medicine at Johns Hopkins Bloomberg School of Public Health, and Dr. Katherine Keyes, an associate professor of epidemiology at Columbia University, who are set to testify about the increased number of opioids prescribed in recent years and the harms associated with the drugs.

"The rulings show the judge is carefully applying the law," W. Mark Lanier of The Lanier Law Firm, representing plaintiffs in the MDL, told Law360 on Tuesday. "We believe the door is open for the jury

to hear important facts and opinions."

Representatives for the defendant companies could not immediately be reached for comment Tuesday.

The plaintiffs are represented by Simmons Hanly Conroy LLC, Motley Rice LLC, Farrell & Fuller LLC, The Lanier Law Firm, Spangenberg Shibley & Liber, Plevin & Gallucci Co. LPA, and Napoli Shkolnik PLLC.

Rite Aid is represented by Kelly A. Moore and Elisa P. McEnroe of Morgan Lewis & Bockius LLP.

CVS is represented by Alexandra W. Miller and Eric R. Delinsky of Zuckerman Spaeder LLP.

Walmart is represented by Tara A. Fumerton and Tina M. Tabacchi of Jones Day.

Giant Eagle and HBC are represented by Robert M. Barnes, Scott D. Livingston and Joshua A. Kobrin of Marcus & Shapira LLP.

Walgreens is represented by Kaspar J. Stoffelmayr, Brian C. Swanson, Katherine M. Swift, Sharon Desh, Sten A. Jernudd and Alex J. Harris of Bartlit Beck LLP.

The MDL is In re: National Prescription Opiate Litigation, case number 1:17-md-02804, all in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Jeff Overley. Editing by Dave Trumbore.