

Opioid Jurors Detail Talks As Pharmacy Trial Gets Feisty Start

By **Jeff Overley**

Law360, Cleveland (May 11, 2022, 12:02 AM EDT) -- An opioid trial to determine remedies after a jury verdict against CVS, Walgreens and Walmart commenced colorfully and combatively Tuesday as plaintiffs counsel floated metaphors involving spaghetti and cake, pharmacies encountered judicial pushback when challenging a key expert, and former jurors took Law360 behind the scenes of their deliberations.

The **bellwether bench trial** in Cleveland federal court comes on the heels of a jury trial that ended last year with **a liability verdict** in favor of the northeastern Ohio counties of Lake and Trumbull. The counties, which brought the test case against the pharmacy giants in multidistrict litigation, are now seeking roughly \$875 million for treatment and prevention over five years, and depending on the success, they may seek more funds in the ensuing decade.



The 18th floor of the Cleveland federal courthouse, left, is hosting a bench trial to determine remedies after an opioid verdict against CVS, Walgreens and Walmart. (Jeff Overley | Law360)

November's verdict was the first involving pharmacies in opioid litigation either inside or outside the MDL, and the ensuing bench trial that kicked off Tuesday is one of the first examples of an opioid trial focused on remedies. Two jurors who helped to reach the liability verdict attended Tuesday's kickoff and spoke with Law360 about the inner workings of last year's deliberations, which included plastering walls with reams of paper notes.

U.S. District Judge Dan Aaron Polster, presiding judge for the trial and the entire MDL, took stock of the situation right away on Tuesday morning. The judge told an almost fully occupied courtroom that he'll be "listening carefully" to testimony and evidence as he contemplates the contours, cost and duration of a so-called abatement plan that the pharmacies must bankroll.

"I've been tasked with ... something no other judge in our country has ever been required to do," Judge Polster said Tuesday before opening statements.

As planned, those opening statements were highly abbreviated, and the rest of the trial will also follow a streamlined format, with expert testimony being submitted in writing so that the litigants can quickly move to cross-examinations.

W. Mark Lanier, lead trial counsel for Lake and Trumbull, designed his introductory remarks around the sort of offbeat analogies that often appear in his courtroom commentary. As he described the opioid epidemic's complexity — and defended the need for a wide-ranging remedial plan that the pharmacies call overreach — Lanier compared the crisis to a confection that must be seen as the sum of its parts.

If a person has baking powder, eggs, oil and sugar, "you can mix it all together, and you get a cake," Lanier said. "It's impossible to parse out the baking powder; it's impossible to parse out the sugar. ... You've just got a cake."

The culinary comparisons continued when Lanier suggested that a "bowl of spaghetti" would be another apt illustration of the drug abuse epidemic's intertwined features and fixes.

"We can't determine where one noodle starts and one noodle stops. ... It's much too complicated," the trial lawyer said, seemingly drawing a chuckle from Judge Polster.

Later Tuesday, the judge indicated that he was striving to strike the correct balance on abatement, simultaneously fretting about doing too little or too much.

"We can't partially abate the nuisance. You either abate it or you don't," Judge Polster said before adding that it's crucial "to tailor the abatement to the nuisance that the jury found."

The Ohio counties and the three pharmacy chains have sharply disputed the meaning of the jury's verdict, which found that "oversupply of legal prescription opioids, and diversion of those opioids into the illicit market outside appropriate medical channels, is a public nuisance" in Lake and Trumbull. The counties see that as a recognition of a massive problem implicating societal upheaval and numerous narcotics, including heroin, while the pharmacies see a problem confined to prescription pills.

The counties' abatement plan "goes far beyond the nuisance the jury found here and includes overly inflated costs," as well as provisions that "can only be described as indirectly or tangentially related to this nuisance," Bartlit Beck LLP partner Kat Hacker, counsel for Walgreens, said Tuesday.

The pharmacies also insisted that any financial award should be divvied up among them based on various criteria, including market share, as opposed to making them jointly and severally responsible for the full award.

"It is 100% divisible," Eric R. Delinsky of Zuckerman Spaeder LLP, counsel for CVS Pharmacy, told Judge Polster.

When Tuesday's proceedings moved to testimony, the only witness was Katherine Keyes, a Columbia University epidemiologist who has attempted to quantify the number of people in Lake and Trumbull who will need drug treatment.

Bartlit Beck partner Jeffrey A. Hall led off the cross-examination by asking whether the opioid crisis would even exist if "manufacturers of opioids acted more responsibly," and he later shifted blame further by citing narcotics "trafficked into the U.S. from China and Mexico."

Subsequent scrutiny came from Paul B. Hynes Jr. of Zuckerman Spaeder, who probed Keyes about her thoroughness when endeavoring to estimate the number of county residents in need of care for opioid use disorder.

"You didn't conduct any surveys in the counties?" Hynes asked. "You can't name a single person in the counties who has [opioid use disorder], can you?"

Hynes, however, at times, himself came under scrutiny. At one point, Judge Polster interjected to complain that the defense lawyer was misguidedly using metrics about fatal overdoses to cast doubt on metrics about opioid use disorder.

"I don't see the relevance of this at all," the judge said.

Keyes echoed that observation a minute or two later, deriding an "apples to oranges" comparison dependent on "totally different methodologies."

Judge Polster also expressed skepticism when pharmacy counsel floated the idea of a post-trial challenge to Keyes' credibility; he observed that no defense experts specialize in epidemiology, and seemed wary of deciding the case without input from such a scholar.

"You don't have any epidemiologists. She's the one," Judge Polster told a defense lawyer. "You've got to give me something."

Judge Polster nonetheless gave the pharmacies some encouraging words on Tuesday, including comments he shared with Zuckerman Spaeder's Delinsky, who assailed the idea of a monitor to oversee the pharmacies' operations in the coming years.

The pharmacies "oppose in the strongest terms possible the imposition of a monitor," Delinsky said, arguing that it would interfere with the regulatory scheme governing controlled substances.

Judge Polster responded that he was "not eager" to impose a monitor, explaining that "it's not my job at all to regulate the business of the pharmacies."

Watching from the back of Judge Polster's 18th floor courtroom were two individuals who spent nearly two months in the same space last year while serving on the jury. The duo, who requested that their last names not be used in this article, got an acknowledgement at one point from Judge Polster, who said from the bench that he was aware of their presence and that "I appreciate their interest."

One of the individuals told Law360 that his first name is Jeff and identified himself as Juror 7, a retired engineer and a resident of Lake County. The other individual told Law360 that her name is Nicole and identified herself as Juror 6, a retail worker and also a resident of Lake County.

Asked why they were in attendance, both cited "curiosity" in the wake of their deliberations, which they described as workmanlike and cordial.

"It was a lot of work ... for 12 people to go through six weeks' worth of information, and really come up with what we thought was the right decision," Jeff said. "We had 12 fantastic people. I don't think we could have done that without the group that we had."

"We all had disagreements," but also a shared mindset of arriving at a just outcome, he added. "It was a week-and-a-half of, 'Let's do this right.' We weren't going to jump to a rushed conclusion," Jeff said. "We weren't going to do it in two days; it was way too much information."

That information ended up hanging all over the room to help make sense of everything, the two jurors said Tuesday.

"We had paper lining the entire wall," Nicole said.

"If you could have seen the amount of information that was hanging on that wall by the time we were done," Jeff added.

Voting with anonymity helped the jury reach unanimity, Nicole said. She recalled an initial vote where "no one knew who gave what answer, to kind of see where we are as a group," after which the jurors "dove into all the information."

As they shared notes from the trial, the jurors observed that they had often homed in on the same things, and they spent multiple days talking about just two or three subjects, before announcing the verdict just before Thanksgiving.

"It wasn't easy. This case was huge," Jeff said. "And it's still huge."

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

CVS is represented by Zuckerman Spaeder LLP.

Walgreens is represented by Bartlit Beck LLP.

Walmart is represented by Jones Day.

The cases are County of Lake v. Purdue Pharma LP et al., case number 1:18-op-45032, County of Trumbull v. Purdue Pharma LP et al., case number 1:18-op-45079, In re: National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio, and In re: National Prescription Opiate Litigation, case number 2804, before the U.S. Judicial Panel on Multidistrict Litigation.

For more news and analysis, visit Law360's guide to the latest developments in **opioid litigation** and trials.

--Editing by Michael Watanabe.