

Report on Patient Privacy Volume 18, Number 8. August 31, 2018 Patient Privacy Court Case

By Ellie Chapman

This monthly column is written by Ellie F. Chapman of Morgan, Lewis & Bockius LLP in San Francisco. It is designed to provide RPP readers with a sampling of the types of patient privacy cases that courts are now hearing. It is not intended to be a comprehensive monthly survey of all patient privacy court actions. Contact Ellie at ellie.chapman@morganlewis.com.

◆ Media are barred from opioid database. On July 26, 2018, U.S. District Judge Dan Aaron Polster blocked media access to voluminous drug company data disclosed in multidistrict litigation (MDL) over the opioid crisis, reasoning that publicity would undermine the discovery process in a high-stakes case in the U.S. District Court for the Northern District of Ohio. The opinion rejected public records requests filed by *The Washington Post* and two West Virginia newspapers (*The Herald-Dispatch* and the *Charleston Gazette-Mail*) seeking data provided to several local governments that have filed bellwether cases in the MDL. Data in the Automation of Reports and Consolidated Orders System (ARCOS) is sent to the U.S. Drug Enforcement Administration (DEA) by drug manufacturers, distributors and pharmacies. It is a powerful device that has permitted local governments to see when and where opioid transactions took place. Polster found, however, that providing such data to journalists would be a disservice to the MDL. “Allowing the ARCOS data to be disclosed to the media...[would] contradict the bedrock principle that discovery is a private process, the sole purpose of which is to assist trial preparation and, in this case, global settlement discussions,” Polster wrote. “ARCOS data does not transmogrify into a public record merely because it has been disclosed privately to the parties in this civil litigation.” Hundreds of local governments are involved in the MDL, and Polster’s ruling precludes any of them from divulging the ARCOS data for the time being. He noted that a bellwether trial scheduled for March “will be open to the public, and the evidence presented will become a matter of public record.” Drug companies vehemently opposed disclosure, expressing their concern regarding potential competitive harm if their specific transactions were made public. Polster noted their viewpoint in his opinion, but appeared more convinced by the DEA’s opposition, which focused on risks to law enforcement investigations. That “is a subject this court takes very seriously,” the judge stated in his opinion. (*National Prescription, Opiate Litigation*, Case. No. 1:17-md-02804)

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