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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Pharmacies Can't Slip Opioid Nuisance Claims, Counties Say

By **Kevin Stawicki**

Law360 (July 6, 2020, 3:24 PM EDT) -- Two Ohio counties urged a federal judge to shut down requests by pharmacy chains to toss claims that they created a public nuisance by failing to monitor suspicious opioid orders that helped fuel an epidemic of painkiller addiction, saying the state's public nuisance law fits their claims.

Ohio's Trumbull County and Lake County said in a brief Thursday that the pharmacies, which include Walmart Inc., HBC Service Co., Walgreen Co., CVS Pharmacy Inc. and Rite Aid, inappropriately **argued in June** that the counties' claim for public nuisance against them permits only injunctive relief and can't be pursued under the common law claims.

"There is nothing inconsistent between, on the one hand, a statute that grants authority to certain governmental entities to enjoin violations (even technical ones) of the controlled drug laws, and, on the other hand, equitable and common law public nuisance actions that allow for abatement and recovery of economic damages if violations of the controlled drug laws create a significant and unreasonable interference with a public right," the counties wrote in the brief.

The counties also argued the companies erroneously attempted to separate the distribution and dispensing of controlled substances by maintaining that distributors only have corporate-level obligations to maintain systems and procedures to detect "suspicious orders."

While the companies argued the duty to guard against invalid prescriptions rests with individual pharmacists, the counties said Thursday the U.S. Department of Drug Enforcement Administration and various courts have made it clear that pharmacies and their parent companies are responsible for pharmacists' dispensing practices.

"Pharmacy defendants offer no explanation — nor, logically, could they — for how a physician's decision to write a prescription, which necessarily precedes the pharmacy's actions in filling it, could possibly break the causal link between the pharmacies' conduct and the harm to the counties," the counties said.

Thursday's brief comes shortly after the counties filed complaints **against the pharmacies**, alleging they had extensive data on the opioids they distributed and could have taken action to prevent filling suspicious opioid prescriptions, but instead fueled a black market for the drugs.

The suits are **set to go to trial** in May 2021 as bellwethers for a sprawling multidistrict litigation in which dozens of towns, cities, counties and Native American tribes have accused pharmaceutical companies, pharmacies and other distributors of downplaying the risks of addiction inherent to prescription opioids. The plaintiffs seek to hold the companies responsible for the opioid addiction epidemic that has taken hold across the nation.

Public nuisance claims have been a bone of contention in the MDL as a theory pushed by plaintiffs to hold pharmacy defendants liable for the opioid epidemic. U.S. District Judge Dan Aaron Polster has previously **upheld public nuisance claims** in the MDL brought under Oklahoma, Ohio, Michigan and Florida laws, according to court documents.

Representatives for the parties could not immediately be reached for comment Monday.

The counties are represented by Frank Gallucci of Plevin & Gallucci Co. LPA, Paul J. Hanly Jr. of Simmons Hanly Conroy, Joseph F. Rice of Motley Rice LLC, Paul T. Farrell Jr. of Farrell Law, Peter H. Weinberger of Spangenberg Shibley & Liber, Hunter Shkolnik, Joseph L. Ciaccio and Salvatore C. Badala of Napoli Shkolnik PLLC, Leo M. Spellacy Jr. of Thrasher Dismore & Dolan LPA and Scott Elliot Smith of Scott Elliot Smith LPA.

Lake County is also represented by James A. Marniella of Demer & Marniella LLC.

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

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

Rite-Aid is represented by Kelly A. Moore and John P. Lavelle Jr. of Morgan Lewis & Bockius LLP.

Walgreens is represented by Kaspar Stoffelmayr and Katherine M. Swift of Bartlit Beck LLP.

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

The counties' cases are The County of Trumbull v. CVS Health Corp. et al., case number 1:18-op-45079, and The County of Lake v. CVS Health Corp. et al., case number 1:18-op-45032, and 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 Mike Curley, Emily Field and Adam Lidgett. Editing by Marygrace Murphy.

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