

'Egregious' Opioid Sales Support \$650M Verdict, 6th Circ. Told

By **Emily Field**

Law360 (February 15, 2023, 7:02 PM EST) -- The Ohio counties of Lake and Trumbull late Tuesday defended their milestone \$650 million opioid trial win over pharmacy giants CVS, Walgreens and Walmart, telling the Sixth Circuit that their claims that the pharmacies created a public nuisance by "egregious" opioid dispensing aren't barred by federal law.

The counties said in a 449-page **brief** that the Controlled Substances Act does not preempt their state law claims that the pharmacies created a public nuisance by failing to implement adequate policies to prevent the diversion of opioids for illicit purposes. Courts that have contemplated such arguments in government opioid cases have rejected them, the counties said.

The CSA preserves state law, and the pharmacies cite no authority that holds that the CSA bars state law public nuisance claims over the distributing and dispensing of opioids, the counties said.

The pharmacies also misconstrued the counties' argument as seeking the dispensing of fewer opioids, Lake and Trumbull counties said.

"Rather, the counties proved that appellants engaged in culpable intentional conduct by dispensing excessive volumes of opioids without adequate policies and systems to prevent diversion and by discouraging pharmacists from taking the time to resolve red flags before dispensing suspicious prescriptions, despite knowing that doing so would lead to more diversion," the counties said. "Imposing liability based on such conduct does not conflict with anything in the CSA."

During the trial, the jury was shown evidence that the pharmacies failed to put in place procedures to spot red flags in dispensing opioids, causing the counties to be flooded with an "unconscionable" number of pain pills, about 100 million between 2006 and 2019, the counties said.

For example, the pharmacies continued to fill prescriptions written by doctors who had signs of being "pill mills," such as writing prescriptions for cash and prescriptions for very high volumes of pills, the pharmacies said.

CVS, Walgreens and Walmart are appealing a \$650 million judgment issued by U.S. District Judge Dan Polster in a bench ruling following a jury's verdict in **November 2021** that the chains were liable for contributing to the opioid crisis in the counties.

The pharmacy chains **in December** told the Sixth Circuit that the judge went far beyond his authority when he imposed an award requiring the pharmacies to fund a "sweeping and aspirational" slate of public initiatives to alleviate the opioid crisis.

The pharmacies also said the Ohio counties' argument relies on a faulty theory of public nuisance and should not have made it to trial because the Ohio Product Liability Act bars public nuisance claims based on the marketing, distribution and sale of a product.

In response, the counties argued that the OPLA doesn't bar their public nuisance claims since they are seeking equitable relief from the harms of the opioid epidemic, not damages, and are thus not covered by the law.

CVS, Walgreens and Walmart also contend that there should be a retrial because of juror misconduct.

During the trial, a juror reportedly researched the availability of naloxone in response to testimony from one of the trial witnesses and passed out fliers to other jurors on the subject. The juror was dismissed, but the trial was allowed to proceed.

"Appellants did not suffer actual prejudice, and the district court cured any potential prejudice by dismissing the juror and giving a limiting instruction," the counties said.

The trial in November 2021 marked the first pharmacy-focused verdict in a bellwether trial selected to lead the way for pharmacies implicated in the national multidistrict litigation over the opioid crisis.

This past November, following the August 2022 **award in that case**, CVS, Walmart and Walgreens each announced settlements in the billions of dollars to put an end to the many pending cases over the prescription painkillers.

The pharmacies made a failed bid in October to use the Sixth Circuit appeal as a reason to pause preparations for a trial in Montgomery County, Ohio, that targets Meijer Inc. and Kroger in addition to CVS, Walgreens and Walmart.

"Lake and Trumbull counties believe the jury and the court got this right," Hunter Shkolnik of Napoli Shkolnik PLLC, one of the top plaintiffs attorneys in the litigation, told Law360 on Wednesday. "The chain pharmacy defendants are reaching for straws with this appeal."

Representatives for the pharmacies didn't immediately respond to requests for comment Wednesday.

Trumbull County and Lake County are represented by Kellogg Hansen Todd Figel & Frederick PLLC, The Lanier Law Firm, Napoli Shkolnik PLLC, Spangenberg Shibley & Liber and Plevin & Gallucci Co.

Walmart Inc. is represented by Jones Day.

Walgreens is represented by Sullivan & Cromwell LLP and Bartlit Beck LLP.

CVS is represented by Munger Tolles & Olson LLP and Zuckerman Spaeder LLP.

The case is In re: Trumbull County, Ohio, et al. v. Purdue Pharma LP et al., case numbers 22-3750, 22-3751, 22-2753, 22-3841, 22-3843 and 22-3844, in the U.S. Court of Appeals for the Sixth Circuit. The MDL is In Re National Prescription Opiate Litigation, case number 1:17-md-2804, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Jeff Overley, Cara Salvatore and Carolyn Muyskens. Editing by Linda Voorhis.