

Ohio High Court Urged To Toss \$650M Opioid Verdict

By **Emily Field**

Law360 (January 9, 2024, 9:10 PM EST) -- Walmart, CVS and Walgreens — backed by business groups — have urged the Ohio Supreme Court to toss a \$650 million jury verdict awarded to two counties in opioid litigation, saying that state product liability law bars the counties' public nuisance claims.

The pharmacies told the Buckeye State's high court Monday that the Ohio Product Liability Act was written by the General Assembly to block public nuisance claims under common law based on the marketing and distribution of a product. The law did not originally address public nuisance claims, but lawmakers specifically amended it to make it clear that those claims were barred after plaintiffs continued to file those types of lawsuits, the pharmacies said.

"This case is merely the latest attempted end-run, and the court should reject it," Walmart, CVS and Walgreens said.

At the request of the Sixth Circuit, the Ohio Supreme Court is mulling whether the opioid epidemic can be considered a public nuisance, the legal theory underpinning similar suits brought by local governments across the country.

At stake is whether Lake and Trumbull counties can keep their 2021 jury award, which was handed down after a six-week trial over the counties' accusations that the pharmacies contributed to the epidemic by filling prescriptions for opioids without enough safeguards in place to prevent the drugs from entering the black market.

"It's clear the pharmacy defendants are extremely worried they will be paying the \$650 million verdict and have lined up amici from a veritable who's who of wrongdoers to support their effort to overturn our clients' win," the counties' counsel Hunter Shkolnik of Napoli Shkolnik PLLC told Law360 on Tuesday. "Neither their briefs nor their amici get it right, because public nuisance is alive and well in Ohio."

The pharmacies have appealed the verdict, arguing that the scope of the award exceeded the breadth of the nuisance found and that the trial was tainted by a juror who reportedly researched and disseminated information on the availability of Naloxone to fellow jurors. But the pharmacies also questioned the viability of the counties' public nuisance claims, saying that the Ohio Product Liability Act bars nuisance claims arising from the marketing, distribution and sale of a product.

Also on Monday, business groups, such as the U.S. Chamber of Commerce, backed the pharmacies' argument that the counties' public nuisance claims are barred by state law.

"Over the years, whenever plaintiffs or lower courts have tried to expand the public-nuisance tort, legislatures and state supreme courts have stepped in and restored the tort to its original limited role," the Chamber said. "In Ohio, when it appeared that plaintiffs were trying to expand public-nuisance liability beyond its historical confines to impose liability for the sale of lawful, non-defective products, the Ohio General Assembly enacted a law stopping that effort in its tracks."

In **September**, when the Sixth Circuit asked the Ohio high court to weigh in on the public nuisance question, U.S. Circuit Judge Richard Allen Griffin said that issue was unresolved due to 2005 and 2007 amendments to the state law. The pharmacies argue that the revisions pulled all public nuisance claims, regardless of the remedy sought, under the umbrella of the law's provision abrogating certain product liability claims, while the counties allege that public nuisance claims

seeking an equitable remedy, such as theirs, are still allowed, Judge Griffin said.

He noted that jurists have interpreted the law differently, including an Ohio federal court that was hearing a "materially identical" opioid suit brought by a different Ohio county, Summit County. In that case, a magistrate judge recommended dismissing Summit County's public nuisance claims, only to be overruled by the district court that determined that public nuisance claims seeking "economic loss" damages can't be considered product liability claims barred by state law, according to the Sixth Circuit order.

The Ohio Supreme Court, Judge Griffin said, has interpreted the scope of the relevant OPLA provisions in at least three other cases. But the justices had interpreted the law as it existed before the 2005 and 2007 amendments, which were partly introduced by state lawmakers in response to the legal decisions, he said.

"In short, there is no controlling precedent from the Ohio Supreme Court to guide us," he said.

A representative for CVS declined to comment. Representatives for the other parties didn't immediately respond to requests for comment on Tuesday.

Trumbull County and Lake County are represented by Hunter Shkolnik of Napoli Shkolnik PLLC, and David C. Frederick and Daniel V. Dorris of Kellogg Hansen Todd Figel & Frederick PLLC.

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: National Prescription Opiate Litigation, Trumbull County, Ohio et al. v. Purdue Pharma LP, case number 2023-1155, in the Ohio Supreme Court.

--Additional reporting by Alyssa Aquino. Editing by Rich Mills.