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

Some Public Nuisance Claims Cut In NY Opioid Suit

By **Emily Field**

Law360 (April 10, 2020, 2:56 PM EDT) -- A New York state judge on Thursday dismissed public nuisance claims against pharmacy chains in Long Island counties' suit over the opioid crisis but declined to toss public nuisance claims over Endo Pharmaceuticals Inc.'s marketing of its discontinued drug Opana ER.

Suffolk County Supreme Court Judge Jerry Garguilo said that Nassau and Suffolk counties hadn't shown that retail chain pharmacies, including CVS Pharmacy Inc, Rite Aid and Walgreen Co., are responsible for the conduct of their subsidiaries. It has long been New York law that a parent corporation is not liable for the torts of its subsidiary, the judge said.

"Accordingly, the court grants the motions of the pharmacy defendants for summary judgment on the public nuisance cause of action only, to the extent that the pharmacy defendants have been sued in their capacities as dispensers of prescription opioids," the judge said.

The judge did not grant summary judgment on public nuisance claims asserted against the pharmacies in their capacity as opioid distributors.

"We have not begun the discovery on the 'dispensing' case, and that is all that got cut out by this decision," Hunter Shkolnik of Napoli Shkolnik PLLC told Law360 on Friday. "We won and are going to trial on the gross conduct that led to multimillion dollar fines related to the 'distribution' claims. This has been our goal in New York from Day 1."

In a separate order, the judge denied Endo's request for an order barring the state of New York from basing its public nuisance claim on evidence related to their marketing of Opana ER before March 2016, when the state struck a deal with the pharmaceutical company over claims that it was falsely promoting the painkiller as crush resistant.

"The defendants do not offer proof establishing their entitlement to judgment on an issue in the upcoming trial on the causes of action for public nuisance; rather, in the nature of a motion in limine, they are seeking pretrial determinations limiting the nature of the evidence that may be introduced at that trial," the judge said. "In any event, the defendants failed to demonstrate a prima facie case that the March 2016 agreement with the attorney general extended to their marketing and supply of prescription opioids other than Opana ER."

In March 2017, Endo **bowed** to U.S. Food and Drug Administration pressure and agreed to halt sales of Opana ER, which has been linked to abuse and a spike in injection-related diseases.

In another two-page order, the judge shot down distributor Cardinal Health's request for summary judgment on public nuisance claims based on violations of the New York Controlled Substances Act before February 2009.

"The court finds that summary judgment is not an appropriate vehicle to obtain the requested relief," the judge said, saying that the issue would be ruled on at trial.

Trial in the suit was set to start March 20, but it has been put on hold indefinitely due to the **coronavirus** pandemic. A status conference is set for April 14.

The trial is expected to test allegations from New York and two Long Island counties against major drug manufacturers and distributors.

Although states and local governments have filed thousands of cases blaming drug companies for the opioid crisis, only one case has gone to trial. That trial saw Oklahoma's attorney general win a \$465 million judgment against Johnson & Johnson, which it is appealing.

Representatives for the other parties didn't immediately respond to requests for comment Friday.

The state of New York is represented by David Nachman, John Oleske, Christopher Leung, Sara Mark, Elizabeth Chesler, Carol Hunt, Diane Johnston, Michael Reisman, Jennifer Simcovitch, Paulina Stamatelos, Lawrence Reina, Conor Duffy, David Payne, Cory Nugent and Lisa Landau of the New York State Attorney General's Office.

Suffolk County is represented by Paul J. Hanly Jr., Jayne Conroy, Andrea Bierstein and Thomas I. Sheridan III of Simmons Hanly Conroy LLC.

Nassau County is represented by Hunter J. Shkolnik, Salvatore C. Badala and Joseph L. Ciaccio of Napoli Shkolnik PLLC.

Cardinal Health is represented by Williams & Connolly LLP.

Endo is represented by Arnold & Porter.

CVS is represented by Zuckerman Spaeder LLP.

Rite Aid is represented by Morgan Lewis & Bockius LLP.

Walgreen is represented by Bartlit Beck LLP.

The case is In re: Opioid Litigation, case number 400000/2017, in the Supreme Court of the State of New York, Suffolk County.

--Additional reporting by Jeff Overley. Editing by Gemma Horowitz.