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Judge Refuses Drugmakers' Bid to Dismiss New York Opioid Cases

A New York state court judge has refused to dismiss lawsuits against several opioid manufacturers in some of the first substantive rulings to come out of the barrage of cases brought by governments over the prescription painkillers.

By Amanda Bronstad | June 18, 2018



Bottles of Purdue Pharma L.P. OxyContin, an opioid medication. Photo: George Frey/Bloomberg

A New York state court judge has refused to dismiss lawsuits against several opioid manufacturers in some of the first substantive rulings to come out of the barrage of cases brought by governments over the prescription painkillers.

In a pair of rulings on Monday, Suffolk County Supreme Court Judge Jerry Garguilo rejected motions to dismiss brought by Purdue Pharma, Endo Health

Solutions, Teva Pharmaceuticals, Allergan, Johnson & Johnson's Janssen Pharmaceuticals Inc. and Insys Therapeutics Inc. He allowed cases brought by New York counties to go forward alleging violations of New York's consumer fraud and false advertising laws, as well as public nuisance, negligence, fraud and other claims.

"The plaintiffs allege the manufacturer defendants employed assiduously crafted, multi-pronged marketing strategies that targeted the general public through websites, print advertisements, and educational materials and publications as part of their respective campaigns to change the perception of the risks associated with prescription opioids and to de-stigmatize and normalize the long-term use of opioids for chronic nonmalignant pain," he wrote. The defendants also hired "key opinion leaders" and funded "front groups" such as the American Pain Foundation and the American Academy of Pain Medicine.

"The manufacturer defendants' argument that the plaintiffs must allege and prove a particular misstatement led a specific physician to write a particular opioid prescription for a patient is rejected," he wrote.

The defendants created a public health crisis that led counties to spend money on treatment programs for those who were addicted or overdosed. "Thus, the plaintiffs here are not simply seeking to recoup medical and drug cost incurred by their employees and Medicaid beneficiaries," he wrote.

The ruling comes as many of the same manufacturers have [moved to dismiss](https://www.law.com/nationallawjournal/2018/06/05/drugmakers-in-bid-to-extinguish-opioid-suits-say-theres-no-viable-legal-theory/) (<https://www.law.com/nationallawjournal/2018/06/05/drugmakers-in-bid-to-extinguish-opioid-suits-say-theres-no-viable-legal-theory/>) claims in the federal multidistrict litigation in Cleveland.

"This is foreshadowing of more to come, frankly, from the MDL," said Paul Napoli, of counsel at New York's Napoli Shkolnik and co-lead plaintiffs counsel in the New York cases. "There's certainly overlap in theories and arguments at both levels. This is the first court to really address all the substantive arguments in light of all the avalanche of

cases filed, and I think the judge had a well-thought-out decision covering multiple issues raised throughout not only New York but around the country.”

Janssen spokesman Andrew Wheatley wrote “[w]e will continue to defend ourselves in this litigation. Our actions in the marketing and promotion of these medicines were appropriate and responsible. The labels for our prescription opioid pain medicines provide information about their risks and benefits, and the allegations made against our company are baseless and unsubstantiated. In fact, our medications have some of the lowest rates of abuse among this class of medications.”



Paul Napoli

Endo spokeswoman Kate Wall in an email to the New York Law Journal said “Endo’s policy not to comment on current litigation. That said, we deny the allegations contained in this lawsuit and intend to vigorously defend the Company.”

Press officers for the other manufacturers in the case did not respond to requests for comment.

The rulings did not address separate motions brought by opioid distributors.

As in the federal cases, the defendants had asserted federal pre-emption of the state law claims given that the U.S. Food and Drug Administration approved opioids for chronic pain. But “the FDA’s approval of opioids for consumption by the general public does not mean that states, and specifically, the plaintiffs herein, may not seek to protect their residents from the unlawful activities of defendants concerning those drugs,” Garguilo wrote.

Garguilo also rejected manufacturers’ claim that the municipal cost recovery doctrine prohibited the counties from suing over opioids because it bars governments from obtaining tort damages for required public services like police and fire protection. The

defendants, the judge wrote, failed to cite a case that disallowed governments from suing “to remedy public harm caused by intentional, persistent course of deceptive conduct” and that doing so “would distort the doctrine beyond recognition.”

The judge also allowed public nuisance claims to go forward. Public health, he wrote, could be a right “common to the general public.”

Garguilo did grant dismissal as to Allergan based on lack of personal jurisdiction because its headquarters is in Ireland.

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