Despite Jury Win, Opioid Attys Predict ‘A Long Way To Go’

From the article:

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Law360 (November 23, 2021, 10:35 PM EST) — A jury’s landmark finding that major pharmacy chains fueled the opioid crisis in Ohio was a badly needed win for governments in nationwide opioid litigation, but experts cautioned that a gauntlet of appeals awaits — something that plaintiffs attorneys themselves immediately acknowledged. The verdict found that CVS, Walgreens and Walmart “engaged in intentional and/or illegal conduct [that] was a substantial factor in producing” the opioid crisis in the northeastern Ohio counties of Lake and Trumbull.At a news conference following the **verdict**, attorneys for Lake and Trumbull counties vowed to keep pursuing trials over the “massive public health crisis” of opioid abuse. They likened the situation to protracted litigation in recent decades over asbestos-related diseases and predicted that they’ll suffer setbacks.

“We’re going to try a lot of cases. We’re going to lose some, but we’re going to win this war,” Motley Rice LLC co-founder Joe Rice, a lead plaintiffs attorney in multidistrict opioid litigation, told reporters.

The verdict on Tuesday followed two **judgments** this month — in the only other opioid cases to have produced trials and judgments — that poked holes in the key legal theory underpinning opioid litigation: that companies created a “public nuisance” of narcotic abuse by selling opioids with scant regard for their serious safety risks.

In one of the rulings, the Oklahoma Supreme Court struck down a $465 million bench verdict against Johnson & Johnson in a case brought by the state’s attorney general. In the other, a California state judge delivered a total triumph to J&J and three other drugmakers in a case brought by four Golden State communities.

Tuesday’s verdict ended that brief losing streak, and it also gave plaintiffs attorneys an undefeated record — 1-0 — in opioid trials against pharmacies. Every other opioid trial so far has focused on manufacturers or distributors, and it had been unclear how juries might react to cases contending that some of the nation’s largest retailers have quietly been sowing the seeds of widespread opioid addiction.

“There’s some causal arguments that the pharmacies might be a little bit different than the other parts of the chain of distribution from the manufacturers to the distributors,” the University of Georgia School of Law’s Elizabeth Chamblee Burch said Tuesday. “Pharmacies are the ones that are really on the frontline. They’re the ones that are seeing the people that come in and seeing what their prescriptions are.”

Harry Nelson, managing partner of health law boutique Nelson Hardiman LLP, cautioned Tuesday that forcing pharmacies to scrutinize prescriptions more aggressively could have undesirable consequences.

“There are cases where pharmacies should be doing more to look for warning signs and red flags,” Nelson said. “But I don’t think we want to have a system where you get a prescription from a doctor, and then you go to the pharmacy, and you have to prove that the prescription medication is the one that the doctors recommended that you get.”

Nelson added, however, that the jury verdict suggests the public is angry about the opioid crisis — which has hit the Buckeye State harder than almost any other state — and eager to hold accountable any company that profited off of prescription painkillers.

Large pharmacies have notably been reluctant to strike settlement deals, in contrast to major drugmakers and distributors that have reached various settlements over the long course of the opioid litigation, including proposed

global settlements worth $26 billion with Johnson & Johnson and distributors AmerisourceBergen Corp., Cardinal Health Inc. and McKesson Corp.

Rice on Tuesday said the jury verdict "is going to be talked about in the boardroom of every corporation that's in the pharmaceutical chain that's involved in this litigation." He argued that it would be best to negotiate nationwide settlements "before we end up with a lot of jury verdicts," while also predicting that "we've got a long way to go."

All three of the pharmacy corporations swiftly vowed to appeal the liability verdict, which will be followed next year by bench proceedings to determine the financial remedy. The counties plan to seek more than $1 billion apiece, and their lawyers are cautioning that appeals courts will likely weigh in before any money that's awarded actually reaches the communities.

"I'd love to say that the money will be disbursed, and the problem will be abated, and we will see thriving communities overnight. But regrettably, that won't be the case," Mark Lanier, lead trial counsel for Lake and Trumbull, said Tuesday. "We expect that the companies will appeal these decisions — that they will appeal them all the way to the U.S. Supreme Court. And that's a process that can take years."

And there's a good chance that the companies will prevail on appeal, experts said.

Burch noted that the Sixth Circuit has already reversed U.S. District Judge Dan Aaron Polster — who presided over the trial and supervises the MDL — on key issues in the opioid litigation. Those issues **include** his certification of a novel "negotiation class" that pharmacies opposed, and his decision to let local governments belatedly supplement their allegations against pharmacies.

Nelson also pointed to Judge Polster's decision to let the trial go forward after a juror did her own research in defiance of the court's instructions and shared her findings with other members of the jury.

Both the counties and the pharmacies "initially agreed that it was such severe misconduct, that there should have been a mistrial," Nelson said. "And then, bizarrely, the judge kind of pushed [the counties] to withdraw their request for mistrial."

In the California case, the lack of specific evidence tying specific opioid prescriptions to the epidemic foiled the local governments' case, as that judge concluded that a rise in opioid prescriptions couldn't be directly tied to the opioid epidemic.

Nelson suggested Tuesday that a similar lack of specifics may prove key in the pharmacies' appeal, noting that there were no specific examples of residents in Lake and Trumbull who shouldn't have had their opioid prescriptions filled.

"The whole crisis is much more complicated than just looking at the quantities and saying [the pharmacies] should have been more suspicious," Nelson said.

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