

Calif.'s Broad Nuisance Law Key To Walgreens Opioid Liability

By **Bonnie Eslinger**

Law360 (August 11, 2022, 11:32 PM EDT) -- A California federal judge's decision Wednesday holding Walgreens liable for substantially contributing to the opioid crisis in San Francisco was bolstered by the Golden State's broad public nuisance law, but whether other states similarly apply the legal doctrine remains to be seen, lawyers told Law360.

The ruling from U.S. District Judge Charles R. Breyer following a bellwether bench trial found that the pharmacy giant dispensed hundreds of thousands of suspicious prescriptions for the powerful painkillers in San Francisco without proper screening. Walgreens said it would appeal the ruling.

The judge also noted that California's public nuisance statute is broad in its scope, defined as "anything which is injurious to health ... or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any ... public park, square, street, or highway."

One of the lawyers who represented San Francisco at trial, Aelish Baig of Robbins Geller Rudman & Dowd LLP, agreed that California has an "expansive public nuisance law." Other states, she said, have been more restrictive in their interpretation of their respective statutes.

Those states include West Virginia, where a county's public nuisance claims against drug distributors failed, and Oklahoma, where an appellate court held in 2021 that public nuisance law doesn't provide a remedy for the harms the state's citizens have suffered because of opioids.

But the Golden State is not alone, she said.

"I think the expansive public nuisance law in California was intentional, and it's not just in California," Baig said. "You see broader interpretations of public nuisance law in places like New York as well and other places."

In New York, a jury found in December that Teva Pharmaceuticals **contributed to a crisis** of opioid abuse in the Empire State, creating a public nuisance in Suffolk and Nassau counties.

History Informs the Application of Public Nuisance Law

Courts that have declined to apply public nuisance laws to opioid-related claims have cited the history of

the legal doctrine, which has traditionally been applied only to conduct that misuses or interferes with public property or resources.

"Extension of the law of nuisance to cover the marketing and sale of opioids is inconsistent with the history and traditional notions of nuisance," said U.S. District Judge David Faber in his July ruling in the West Virginia case, adding that the "original legal character of nuisance was a wrongful disturbance of the enjoyment of real property or of its appurtenances falling short of a forcible trespass or ouster."

Unlike other states, California's nuisance law doesn't require there be some form of injury to property, Judge Breyer pointed out in his Wednesday ruling.

Instead, California's broad nuisance law encompasses injuries to health as well as obstructions to the "comfortable enjoyment of life," among other harms, the San Francisco federal judge said.

Some Lawyers Warn of Dangers in Expanding the Doctrine

Brandon Winchester, a lawyer with the boutique Texas litigation law firm Schiffer Hicks Johnson PLLC, said opening up the theory of public nuisance to eliminate the requirement of an injury to land or property is a move in the wrong direction.

"There is a fear that courts administering this novel theory of public nuisance law may create judge-made regulations that usurp the role of legislative bodies in determining what activities a state wants to encourage or discourage," Winchester told Law360 in an email.

There are also concerns, he said, that public nuisance claims will be stretched even further, beyond opioid cases.

"We have already seen climate change lawsuits brought against large oil & gas and other energy-related companies that, at least in part, are based on public nuisance theory," Winchester said.

The expansion of the tort of public nuisance is problematic and contributes to the costs of defending and resolving claims, according to Scott Seaman, co-chair of Hinshaw & Culbertson LLP's global insurance services practice group.

California's ConAgra Case Was a Watershed Decision

Public nuisance tort theories got traction with a 2017 decision by the California Court of Appeal in *People v. ConAgra Grocery Products Co.*, a case filed to hold sellers of lead-based paint liable for the health harms caused by the product. There had been other cases that attempted to pursue a case under a public nuisance theory, but the California suit succeeded in part because of the state's broad definition of public nuisance, which the appellate court said included a common right for homeowners to be free of harmful lead paint.

Since then, Seaman said, the law of public nuisance seems to be evolving, with the elements varying from state to state.

"The plaintiff's bar is making a concerted effort to liberalize public nuisance law wherever it perceives an opportunity to do so and the defense bar has to fight those efforts," Seaman said. "Right now, California is perceived by many as a welcoming jurisdiction."

In 2019, Sherwin-Williams, ConAgra and a third paint maker agreed to pay \$305 million to settle the long-running litigation brought by 10 counties and cities blaming the companies for the negative impacts of the widespread use of lead paint in the state. Both the U.S. Supreme Court and Golden State's high court declined to review the case.

In response to Wednesday's opioid case ruling, Samir Parikh, a professor at Lewis & Clark Law School, called California's public nuisance law "somewhat unique," adding it "certainly provided plaintiffs avenues for recovery that may not exist in other jurisdictions."

Walgreens Could Influence Public Nuisance Litigation Outside California

However, going forward, it is possible that other states could expand the scope of their public nuisance laws, Parikh said.

"I have argued that today there is a greater sense of corporate and personal accountability, which will fuel more mass tort cases in the upcoming years," Parikh said.

In his Wednesday ruling, Judge Breyer underscored that the case before him won't open "floodgates" of litigation against a company that sells any product with a known risk of harm, as some have claimed.

"Walgreens' conduct in dispensing opioids — not the opioids themselves — is the fundamental cause of the harm here," the judge said.

The judge also distinguished the case before his court from a December decision in Southern California litigation against opioid manufacturers, in which a judge found that even if any of the companies' marketing did include false or misleading messages, "any adverse downstream consequences" wouldn't constitute a public nuisance because "the social utility of medically appropriate prescriptions outweighs the gravity of the harm inflicted by them."

Walgreens was not a party to that case, which didn't involve any pharmacy defendant that dispensed opioids, Judge Breyer underscored.

Monty Cooper of Crowell & Moring LLP expressed doubts that Judge Breyer's ruling will encourage a similar decision from other courts in public nuisance cases outside California.

"I think in terms of a trend across the country, we haven't seen enough of courts following California's lead this way," Cooper said.

--Additional reporting by Craig Clough, Jeff Overley and Emily Field. Editing by Emily Kokoll and Michael Watanabe.