

In New Twist, W.Va. Judges Suddenly At Odds In Opioid Suits

By Jeff Overley

Law360 (July 25, 2025, 11:47 PM EDT) -- A new ruling in West Virginia opioid crisis litigation is revealing sharp divisions among the Mountain State's federal judges regarding a pivotal legal theory, potentially boosting a Fourth Circuit appeal by beleaguered municipalities aiming to erase a landmark win for drug distributors.

Wednesday's ruling by U.S. District Judge John Preston Bailey preserved a suit accusing divisions of Cigna Healthcare and UnitedHealth Group Inc. of exacerbating rampant narcotic abuse, and it did so by breaking with U.S. District Judge David A. Faber, who in 2022 **authored a bombshell opinion** favoring drug wholesalers after the first opioid trial in federal court.

Judge Bailey's ruling on a motion to dismiss began by observing that the "defendants rely primarily" on Judge Faber's opinion. After that introduction, Judge Bailey focused on refusing to embrace his fellow jurist's rejection of the "public nuisance" theory of liability. The theory, traditionally deployed against bothersome businesses and properties, has been ubiquitous in thousands of opioid lawsuits, with mixed results.

"Limiting the doctrine of public nuisance solely to damage to public property runs contrary to the [West Virginia Supreme Court of Appeals'] prior decisions," Judge Bailey observed early in his ruling, which devoted many of its 15 pages to excerpts from other decisions critiquing Judge Faber's holding.

The case before Judge Bailey targets Cigna unit Express Scripts Inc. and UnitedHealth unit OptumRx — pharmacy benefit managers that handle drug reimbursement — and is proceeding in the Northern District of West Virginia without much fanfare. In contrast, the case before Judge Faber targeted three drug distributors — AmerisourceBergen Corp., Cardinal Health Inc. and McKesson Corp. — and proceeded in the Southern District of West Virginia under a national media spotlight.

The case in the Southern District was brought by West Virginia's Cabell County and its largest city, Huntington — the setting for an Oscar-nominated Netflix documentary, "Heroin(e)," about the opioid epidemic. After Judge Faber's decision, the local governments appealed to the Fourth Circuit, where they flagged Judge Bailey's ruling in a Thursday notice.

That ruling has several "notable features," including the fact that Judge Bailey "rejected the district court's decision in this case," Cabell County and Huntington told the Fourth Circuit. The circuit in early 2024 **sought**

the views of the West Virginia Supreme Court on the public nuisance claims, but the state's high court recently **declined to weigh in**, saying that "disputed factual findings" prevented it from tackling the legal issue.

When Fourth Circuit judges solicited the state court's input, they acknowledged that "public nuisance cases in West Virginia traditionally have addressed hazards or inconveniences affecting property." But the judges added that they would "hesitate to infer such limits ... in light of the broad language used" by the state's high court to describe public nuisance claims in past cases.

Roughly one-third of Judge Bailey's Wednesday ruling was an excerpt of the Fourth Circuit's solicitation, including portions that voiced skepticism about arguments the distributors have advanced. One such argument is that Judge Faber's opinion is buttressed by the Oklahoma Supreme Court's decision in favor of Johnson & Johnson in **another opioid case** involving public nuisance claims.

"We do not think that the authorities cited by the defendants ... control the outcome of this case," Fourth Circuit judges wrote in the excerpt.

Judge Bailey's ruling also used bold-face font when quoting from an order by U.S. District Judge Dan Aaron Polster, who has supervised multidistrict opioid litigation in Ohio and previously called Judge Faber's opinion an outlier.

"Every West Virginia state court that has addressed identical public nuisance claims against opioid defendants has come to a different conclusion than Judge Faber on the scope and contours of West Virginia public nuisance law," Judge Polster wrote in 2022, the Wednesday ruling noted.

One example of a different conclusion came from West Virginia's Mass Litigation Panel, where **jurists in 2022 wrote** that Judge Faber placed "an artificial external constraint on the common law cause of action for public nuisance," which panel members dubbed "a flexible area of the law that is adaptable to a wide variety of factual situations." Distributors have warned against excessive flexibility, saying that it could **open a Pandora's box** of public health lawsuits against sellers of "alcohol, fatty foods, lead paint, guns, cell phones" and other products.

In Wednesday's ruling, Judge Bailey also quoted from **a 2024 order** by U.S. District Judge Charles R. Breyer in opioid litigation involving McKinsey & Co., which has paid out hundreds of millions of dollars to resolve suits over its consulting for opioid manufacturers. In his order, Judge Breyer observed that the Fourth Circuit had requested feedback from the West Virginia Supreme Court, and in a reference to Judge Faber, he averred that the circuit's request "reflects doubt about the district court's narrow view of West Virginia nuisance doctrine."

Shortly after that excerpt, Judge Bailey discussed the West Virginia Supreme Court's decision not to address the public nuisance theory. That decision "is not without relevance," the judge wrote, because it described factual issues as essential to the legal issue.

"If, as defendants argue, an action against defendants for the damage caused by the opiate epidemic under the doctrine of public nuisance is categorically banned, there would be no reason to consider the underlying facts," Judge Bailey wrote at the end of his ruling. "The fact that the [West Virginia Supreme] Court felt that it needed the underlying facts is evidence that such a claim may be brought under the doctrine of public nuisance."

Optum, Express Scripts and fellow pharmacy benefit managers specialize in administering health insurance coverage and reimbursement for prescription drugs. For many years, PBMs avoided actively litigating opioid cases, but after national settlements with the primary defendants — drugmakers, distributors and large pharmacy chains — plaintiffs **turned their attention to the so-called middlemen.**

The distributors have agreed to pay more than \$20 billion to resolve opioid cases across the country. But Judge Faber's decision was still important, as Cabell County and Huntington sought more than \$2 billion to alleviate opioid abuse and related troubles.

Although public nuisance claims are the focal point at the Fourth Circuit, the appeal also presents other issues, including whether Cabell County and Huntington failed to show that the distributors actually caused a crisis of illicit narcotic use. In Thursday's notice, the local governments said the circuit "should reverse the district court's ruling rejecting Cabell/Huntington's public nuisance claims and proceed to resolve the other issues on appeal."

The Fourth Circuit is not alone in seeking a state court's help regarding public nuisance claims. The Sixth Circuit, for example, **wiped out a \$650 million verdict** against pharmacies after seeking the Ohio Supreme Court's views and being told that the Buckeye State doesn't permit opioid suits under a public nuisance theory.

Attorneys for the three distributors didn't immediately respond to requests for comment Friday.

Cabell County and Huntington have been represented by Powell & Majestro PLLC and Motley Rice LLC, respectively, and by Kellogg Hansen Todd Figel & Frederick PLLC.

AmerisourceBergen has been represented by Reed Smith LLP.

Cardinal Health has been represented by Williams & Connolly LLP.

McKesson has been represented by Covington & Burling LLP.

The cases are City of Huntington, West Virginia et al. v. AmerisourceBergen Drug Corp. et al., case number 22-1819, and Cabell County Commission v. AmerisourceBergen Drug Corp. et al., case number 22-1822, both in the U.S. Court of Appeals for the Fourth Circuit, and Ohio County Commission et al. v. Express Scripts Inc. et al., case number 5:24-cv-00142, in the U.S. District Court for the Northern District of West Virginia.

--Editing by Michael Watanabe.

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