OPIOID UPDATE

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Justice Delayed

By March 2020 municipalities in the opioid war could rightfully feel some optimism. Plaintiffs were routinely defeating motions to dismiss and succeeding in discovery battles. Newly released DEA data revealed the total number of opioids distributed around the nation exceeded $100 billion, substantially greater than previously known. A series of upcoming trials presented defendants with a threatening gauntlet which might finally cascade towards an omnibus settlement and fund relief from the opioid crisis.

As with virtually other aspect of American life, COVID-19 upended that momentum. The litigation has slowed dramatically, handing defendants an unexpected gift—but it continues. Herewith is a snapshot:

Judge Polster-Persevering Against Headwinds

From the day he was appointed in December 2017 to oversee the National Prescription Opiate Litigation (17 md 2804), Aaron Polster has championed settlement and the cause of victims. This posture has been denounced by defendants as a presupposition that they lack meritorious arguments and will be forced to settle. It has even resulted in a motion, rejected at the Sixth Circuit, to have Polster removed from the MDL for bias. But he has persisted, overseeing a first settlement in October 2019 which enabled Ohio's Summit and Cuyahoga counties to receive nearly $300 million from manufacturers in the "Track 1A" bellwether case.

Remand

Polster has also fulfilled a primary purpose of the MDL--to marshal evidence, facilitate discovery, and dispose of motions such that cases can be returned to their originating federal court and proceed efficiently. Over the ever-present objections of defendants, he has remanded significant cases, including those brought by Chicago and San Francisco, each of which is being litigated by IMLA member law departments. Other remands have returned the Cherokee Nation bellwether to Oklahoma's Eastern District, and the action by Huntington and Cabell County to the Southern District of West Virginia, where they seek recourse against the distributors in "Track 2."

The Mandamus-and the Response

The settlement in late 2019 did not include pharmacies, who became defendants in a new bellwether case-"Track 1B." The counties had added the pharmacies to their complaints before the court's deadline in April 2018, but only in their capacity as "distributors" of opioids, declining to cite them as "dispensers."

In November 2019, Judge Polster allowed the counties to amend their Track 1B complaints to include dispensing claims, opening pharmacies to liability for filling suspicious "red flag" prescriptions (unusually large amounts, repeated refills, combinations of opioids/benzodiazepines/ muscle relaxers, prescriptions from unlicensed prescribers, and so on). He also granted additional discovery requests, ordering the pharmacies to collect and deliver 13 years' of nationwide prescribing data.

When Polster refused the pharmacies' motions for relief, they sought mandamus at the Sixth Circuit. While mandamus is an extraordinary measure, reserved for "exceptional circumstances" involving a "judicial usurpation of power" or a "clear abuse of discretion" the Circuit found such irregularities. On April 16, 2020, in acerbic language, it required that Judge Polster strike the dispensing claim from Track 1B: "Not a circuit court in the country, so far as we can tell, would allow a district court to amend its scheduling order under these circumstances."

Unbowed, Polster immediately ordered a new bellwether-"Track 3" to try the dispensing actions. On April 30, he ordered that Track 3 would consist of cases brought by Ohio's Lake and Trumbull counties. He further directed that the original Track 1B distribution case against the pharmacies move forward towards its scheduled November 2020 trial:

> Given that most of the discovery has been done on these claims, the Court believes that, even with the exigencies of COVID-19, the current schedule culminating in a November 2020 trial remains reasonable and realistic.

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The New York Frontrunner

While Judge Polster's MDL justifiably garners significant national interest, the case materializing before Judge Jerry Garguilo in Suffolk County, New York is arguably more consequential at this writing. Until COVID-19 required the closing of his courtroom, Garguilo's case, brought by the State of New York, Suffolk and Nassau counties against all three groups of defendants, was slated to go to trial on March 20. Since that time, pretrial activity has slowed substantially.

One significant development in the Suffolk court is Garguilo's Decision and Order, filed April 13, 2020, granting summary judgment to CVS, Walgreen, Walmart and Rite-Aid on the dispensing issue. He found that the parent enterprises could not be held liable for dispensing practices of individual stores, at least on a public nuisance claim. Given the robust interplay between various opioid courtrooms, that ruling, although grounded in New York law, seems destined to surface elsewhere. It may also have undercut a useful holding by Garguilo that pharmacies could not shift responsibility to John Doe prescribers who wrote the red flag prescriptions to begin with.

The Bankruptcy Gambit

After agreeing to pay Oklahoma $270 million in May 2019 to avoid what would have been an unpalatable televised trial prosecuted by AG Mike Hunter, Purdue filed for Chapter 11 bankruptcy in September, proposing to settle all claims against it via a $14 billion fund, including some $3 billion from Sackler family members. That proposal was initially directed at state and local government litigants, who could not reach accord as to its adequacy. The Purdue bankruptcy has recently become more complex due to an accelerating campaign soliciting personal injury claims from individuals harmed by opioids, required to be filed with the Bankruptcy Court before a June 2020 deadline.

The majority of opioid cases in the MDL and in state courts around the country name Purdue Pharma L.P. as a primary defendant. The company's bankruptcy has obviously stayed all plaintiffs from pursuing such actions, with the most recent stay order extending through October 2020. Ironically, one request was recently made for a limited exception to the stay, but not by plaintiffs. Distributors in the New York opioid case made the request, seeking to add Purdue to the verdict form for the purpose of attributing liability; the solvent defendants would ostensibly be apportioned the remaining non-Purdue share of liability. Given that public nuisance liability is joint and several under New York law, the plaintiffs have strenuously objected. On April 22, 2020, Bankruptcy Judge Robert Drain declined to rule, finding the issue premature.

While settlement discussions involving Purdue no doubt proceed apace behind the scenes, a perusal of the Bankruptcy Court docket shows scant activity—other than fee requests. These come not only from firms representing the debtors' interests, but also from counsel representing creditors' committees. The requests reveal many millions millions of dollars going to lawyers each month, significant portions of which are billed at rates nearing $1700 per hour.

Purdue will likely not be the only defendant to seek protection. Mallinckrodt, the Irish headquartered entity whose SpecGX US subsidiary is believed to have supplied upwards of 70% of all oxycodone in Florida and roughly one-third across the nation, has also announced its intent to shield further liability via bankruptcy.

The Negotiation Class

The fate of the Negotiation Class, giving a stake in an opioid settlement to more than 30,000 municipal and local government entities, remains with the Sixth Circuit. Given that fewer than 700 jurisdictions opted out, the Class, if approved, will afford defendants one large bloc of plaintiffs with which to negotiate. While that will be only one part of various tectonic shifts needed to achieve an omnibus resolution, it may well be critical.

Moving Forward

As referenced above, the opioid defendants have pressed to delay proceedings, pushing a day of reckoning ever farther into the future. Plaintiffs argue that there are now technologies to compensate for the absence of face to face proceedings, as they asserted in a March 25, 2020 MDL filing:

> While our changed circumstances no doubt present challenges, current technology is more than adequate to allow the parties to proceed with discovery, including depositions. Consistent with production determinations and directives from other courts and the Federal Rules, Plaintiffs' counsel have developed a comprehensive deposition protocol to enable the parties to take depositions remotely. The protocol includes the use of widely available videoconferencing technology that allows multiple individuals to participate in a deposition without requiring them to be physically present or proximate. The protocol will solve the logistical problems posed by COVID-19 in a workable fashion, and in a way that does not needlessly slow this important case down.

For municipalities and their constituents already reeling from the opioid crisis, COVID-19 has only heightened the need for funding. It is essential that courtrooms continue to function, forcing progress towards settlement. ML