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Expert Analysis

Settlement Aspirations Enter The Opioid MDL

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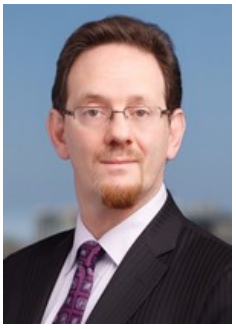
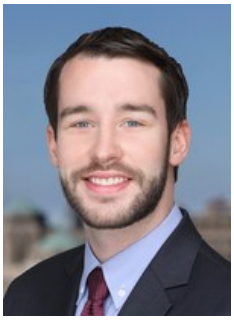

Adam Fleischer


Kevin Harris

It has been just short of a year since the worst drug crisis in American history spread from the streets and the morgues of American cities, and infected courtroom dockets, where over 150 state and local governments, hospitals and labor unions have sued pharmaceutical manufacturers and distributors to recoup hundreds of millions of dollars spent to date addressing the opioid epidemic.

As of yesterday, two freight trains driving the opioid litigation appear on a collision course. The first engine is in the form of journalistic investigations that have recently revealed a wealth of information as to what the pharmaceutical industry knew about the allegedly fraudulent marketing of prescription opioids and when they knew it. As this train picks up speed, so too does the second engine driving these lawsuits, which is the multidistrict litigation formed last month in the U.S. District Court for the Northern District of Ohio, where Judge Dan Aaron Polster made clear at a Jan. 9, 2018 hearing that he plans to push the matter as diligently as he can toward a global resolution in 2018.

What They Knew, And When They Knew It

Judge Polster left no uncertainty when he commented to the litigants last month that "[q]uite frankly, I think the best use of my time and my abilities will be to help see if there is some sort of resolution we can reach. ... I think I was picked for that reason, and that's where I am going to spend my time." Typically, such settlement aspirations are impossible to pursue without a foundation of detailed discovery. However, here the story of what was known and when may find its foundation not through discovery, but through the recently flexed investigative power of the press.

For example, a Dec. 17, 2017 report by the Washington Post revealed that two years of government investigation by the U.S. Drug Enforcement Agency was sucked down the drain just as the DEA prepared to demonstrate that the nation's largest drug distributor, McKesson Corporation, had turned a knowingly blind eye toward suspicious orders of opioids from California to Florida. According to the report, the DEA was preparing to pursue

a $1 billion fine and criminal charges against McKesson, when McKesson struck a deal with the DEA in 2017 to drop the investigation in exchange for a $150 million fine. This was on top of a $13.25 million fine related to opioid distribution that had been paid in 2008. Significantly, the facts and allegations garnered by the DEA trace the legal theories pending against the distributors in the MDL.

The DEA investigation detailed by the Washington Post may indeed provide the type of information needed to move settlement talks forward in the MDL. In fact, one of the DEA managers who helped gather the evidence against McKesson, Jim Geldhof, has retired from the DEA and is now consulting with the plaintiffs' firms suing the manufacturers and distributors, including McKesson. It was with Geldhof's involvement that the DEA concluded that McKesson filled 1.6 million opioid orders from its Aurora, Colorado, warehouse between June 2008 and May 2013, but recorded only 16 as "suspicious" — thereby watching volumes of pills flow to pharmacies in remote towns that could not possibly justify such a need. The Washington Post has even claimed to have obtained governmental evidence that McKesson warehouses in Michigan and Ohio were supplying to pharmacies that then sold the opioids to criminal drug rings. What would otherwise take many years and millions of dollars in discovery battles to uncover in the MDL may come into the public sphere early and often through the journalistic investigations.

The revelations of evidence against McKesson come on the heels of an Oct. 15, 2017 report that was the result of a six-month joint investigation by 60 Minutes and The Washington Post, concluding that "the drug industry, with the help of Congress, turned the opioid epidemic into a full blown crisis" by knowingly allowing the diversion of pain pills from the distributors to illicit users in communities across the nation. By way of example, the investigation highlights the town of Kermit, West Virginia, population 392, wherein one pharmacy allegedly received over 9 million doses of hydrocodone pills over 2 years. It is against this backdrop that Judge Polster has framed his strategy in handling the MDL.

Settlement Aspirations Discussed at Jan. 9 MDL Hearing

At a hearing last month, Judge Polster noted that, despite novel theories of liability and potential defenses to the plaintiffs' claims, "it is [not] in anyone's interests to have this dragging on for five or ten years[.]" Before a packed courtroom on Jan. 9, he continued his pointed effort toward early settlement by noting that roughly 150 Americans die every day and that "[m]y objective is to do something meaningful to abate this crisis and to do it in 2018." "We don't need briefs and we don't need trials," Judge Polster observed. "None of those are going to solve [the crisis] we've got."

Of course, settlement of this epidemic has many complicating tentacles. For example, there looms a seemingly insurmountable burden of establishing which towns, counties, or states have suffered how much in damages, due to the actions of which manufacturers or

distributors. The allocation of increased health care or police budgets to the opioid crisis is not easily demonstrated, nor is the comparative liability to be borne by illegal opioid producers, distributors and the addicts themselves. Furthermore, unlike the tobacco litigation, the rush to place blame on the pharmaceutical industry here must be balanced against the reality that the product at issue does indeed carry significant social utility when used in the proper fashion.

In addition to the uncertainty of allocation, evidence and the market share theories sure to evolve, is the reality that there are dozens of mammoth opioid suits pending in state courts, and the resolution of the MDL will need to be coordinated with the resolution of those actions in order to accomplish a truly global settlement. Judge Polster indicated a willingness to pursue just such coordination. A final complicating settlement consideration is that the courts will be forced to guard against any MDL settlement from extinguishing or impinging upon the right of individual plaintiffs to recover for the individual injuries they may claim due to their own unique circumstances.

Insurers' Role in Settlement Talks?

While Judge Polster flexed his admirable determination to push an MDL settlement up the hill in 2018, counsel for one of the manufacturers noted that one challenge will be "making sure that the right folks are at the table, and maybe many of them are not in this room." In that respect, one important class of stakeholders who may be unceremoniously invited into the MDL discussions are the insurers of the pharmaceutical industry. However, for insurers of the pharmaceutical industry, their coverage for the types of claims at issue is far from certain.

For example, the same allegations that plaintiffs have made about the pharmaceutical industry's knowingly fraudulent conduct that allegedly justifies large settlement figures, are also likely to give rise to multiple coverage defenses for insurers. In fact, liability insurers are not likely to accept the idea of funding a settlement for the reimbursement of economic harm, the disgorgement of profits, harm previously known or expected, or the cost of instituting injunctive relief, all of which are not typically insurable damages. Thus, while it is clear that Judge Polster intends to push the MDL toward settlement, the process and the pockets that this will involve are not yet identifiable.

DISCLOSURE: BatesCarey LLP represents a number of the insurance companies who have issued policies to the pharmaceutical manufacturers and distributors being sued in the cases discussed above.

Adam H. Fleischer *and* ***Kevin F. Harris*** *are members of BatesCarey LLP in Chicago and serve on the firm's opioid coverage task force in monitoring and evaluating a range of liability and insurance issues related to the opioid epidemic.*