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OUTSIDE THE COURTS

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The article "America on Opioids," which ran in the August 2017 issue of *CLM Magazine*, introduced readers to the torment of 91 Americans dying every day from the opioid epidemic, the burgeoning lawsuits, and the imminent insurance coverage disputes. A little more than a year later, roughly 150 Americans are now dying from opioids each day and the courts are faced with burgeoning suits. Here, we offer another review of the epidemic, examining the problems with looking to pharmaceutical corporations or their insurers to fund a societal solution, and studying the lessons that obesity claims may have left behind to inform the opioid crisis.

LITIGATION EXPLODES AND EVOLVES

Today, more than 1,300 opioid lawsuits clog the courts, filed by governments, Native American tribes, health care providers, and labor unions seeking to recoup economic costs ranging from policing to community education. Plaintiffs attack three groups: Opioid manufacturers like Purdue Pharma, which are accused of fraudulently marketing opioids; opioid distributors, like McKesson, which allegedly failed to report suspiciously large orders; and opioid retailers like CVS and Costco, which are similarly accused of failing to prevent opioid diversion from their stores. Three main litigation battlegrounds have emerged: The Cleveland multi-district litigation, Texas, and New York.

In Cleveland, over 1,000 federal suits are combined in a multi-district litigation (MDL) in the U.S. District Court before Judge Dan Aaron Polster. From the start, Judge Polster favored resolution, commenting, "It is [not] in anyone's interests to have this dragging on for five or 10 years…. [M]y objective is to do something meaningful to abate this crisis and to do it in 2018." He added, "We don't need briefs and we don't need trials. None of those are going to solve [the crisis] we've got."

Judge Polster left no uncertainty when he commented to the litigants, "Quite 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." He also said, "I think I was picked for that reason, and that's where I am going to spend my time."

While the court's special master oversees regular settlement discussions, Judge Polster has designated three Ohio lawsuits as "trial track" cases, with a two-to-three-week trial that began

on Sept. 3, 2019. He also selected 10 suits by governments, hospitals, labor unions, and Native American tribes to engage in a motion to dismiss briefing, to be completed in September 2018.

While at press time the Cleveland MDL had just completed dispositive briefing, a state consolidated action in New York already ruled on dispositive motions, providing a hint of what to expect in the Cleveland MDL. The New York action involves 12 consolidated opioid lawsuits filed by government entities. On June 18, 2018, the court denied the manufacturers' motions to dismiss, followed by denial of the distributors' motions on July 17, 2018.

On pre-emption, the court ruled the FDA's approval of the manufacturers' products, labeling, and promotional materials does not prohibit New York counties from bringing claims against the defendants for alleged unlawful marketing. With regard to causation, the court found that, despite the intervening acts of pharmacists, doctors, and the users themselves, it was at least arguable that the defendants could anticipate or prevent the injuries, and should not be dismissed. Addressing the statute of limitations, the court found that the injury pled seems to be a "public nuisance," which is not barred by a statute of limitations, but which only allows recoverable damages for the three-year period prior to filing of any lawsuit—a powerful point.

Meanwhile, on June 13, 2018, in *In Re Texas Opioid Litigation*, lawsuits filed by government entities were combined into a state MDL. The claims trace those of the Cleveland MDL with 13 manufacturer defendants—including Purdue, Johnson & Johnson, and Actavis—as well as distributor defendants McKesson, AmerisourceBergen, and Cardinal Health. The damages delineated are similar to those damages at issue in New York and Cleveland: Governmental costs for medical care to individuals suffering from opioid-related addiction; costs for counseling, housing, and rehabilitation services; costs for treatment to infants with opioid-related conditions; and costs associated with law enforcement and public safety relating to the opioid epidemic.

THE COURT FOUND THAT, DESPITE THE INTERVENING ACTS OF PHARMACISTS, DOCTORS, AND THE USERS THEMSELVES, IT WAS AT LEAST ARGUABLE THAT THE DEFENDANTS COULD ANTICIPATE OR PREVENT THE INJURIES, AND SHOULD NOT BE DISMISSED.

DISCOVERY AND COVERAGE CONUNDRUMS

For purposes of insurance coverage, equally as important as what damages are alleged is what damages are not alleged. In the Cleveland MDL, a June 2018 special master order addressed whether plaintiffs must produce "information related to all individuals who were harmed by opioids…including medical records, insurance records, [and] pharmacy records." The government plaintiffs objected that the discovery has no relevance to the Cleveland MDL because plaintiffs "are not claiming any damages for personal harm suffered by any individual or group of individuals who were harmed by defendants' conduct."

The special master found that the discovery requests for evidence of individual injury were indeed overly broad and unnecessary at this stage in the litigation. However, how can the defendants be held liable for injury based solely on statistical evidence of harm to the "public at large," and where, in any insurance policy, is such social harm intended to be covered?

The liability insurance policies to which the opioid claims have been tendered generally only cover damages awarded "because of bodily injury" sustained by "a person." A few legal decisions—*Cincinnati Ins. Co. v. Richie Enterprises LLC*; and *Travelers Property Cas. Co. of America v. Anda Inc.*—conclude the governments seeking economic recoupment in the opioid suits do not seek compensation "because of bodily injury" to a person, and, therefore, are not covered.

There is one case, *Cincinnati Ins. Co. v. H.D. Smith, LLC*, finding that, for purposes of the duty to defend, the opioid claims may indeed present claims for damages incurred "because of bodily injury."

There are no cases indicating whether damages awarded to entities for their economic costs to fight the public harm from opioids may fall within the more stringent duty to indemnify standard.

Nevertheless, to the extent economic harm to public entities can be deemed a covered bodily injury, the next insurance coverage question is when the defendants knew that their conduct was allegedly causing such public bodily injury. Insurance law provides multiple safeguards to protect against covering risks of which the insured had prior knowledge. These defenses include the common law known loss defense and policy provisions to prevent coverage for claims related to suits, injuries, or circumstances known by the insured prior to the policy period.

So, again, if the economic expenditures of public entities for the opioid epidemic can constitute public bodily injury, then did the defendants know of the injurious circumstances prior to 2012 when the avalanche of suits and insurance tenders began?

It is likely numerous defendants were aware many years before the suits that their conduct was an alleged contributor to the opioid epidemic, yet the conduct continued unabated. For example, in 2006, the Drug Enforcement Agency (DEA) warned opioid retailers, such as Walmart, that they may be

violating their statutory duties to prevent opioid diversion, which was allegedly harming the general welfare of Americans. In 2008, DEA investigations led to fines of $13.25 million against McKesson and $34 million against Cardinal Health for the same business practices now at the heart of the suits. Complaints in the MDL allege that retailers, such as Rite Aid, were the focus of multi-jurisdictional investigations as early as 2009, resulting in millions of dollars in fines for failing to monitor opioids and prevent diversion.

In the world of insurance coverage, the defendants' liability for society's economic losses are not likely covered damages for bodily injury, but if they are, then the questions of who knew what and when become an important and expensive debate.

IT IS NOW UP TO THE COURTS TO DETERMINE WHETHER THE OPIOID CRISIS, LIKE OBESITY, IS JUST TOO COMPLEX OF A SOCIETAL PROBLEM TO SHIFT THE ECONOMIC SOLUTIONS ANYWHERE BUT BACK ONTO SOCIETY ITSELF.

WHO PAYS FOR SOCIETAL INJURY?

A spate of obesity lawsuits may be a predictive tool for the opioid epidemic. In the early 2000s, public advocates sought to quell America's obesity epidemic by suing fast-food chains accused of masking the ill effects of their products and marketing them to a public that did not know the potent health dangers of what they were eating.

The obesity lawsuits failed in the courts, with judges finding that consumers cannot blame McDonald's if they chose to continue eating food they knew was harmful. While the court system refused to find corporate liability for the societal epidemic, the mere existence of the suits fostered societal solutions. Nutrition labels began appearing on fast-food containers. Restaurant menus started to list calories and healthier product alternatives. Consumers were zealously offered education for better individual choices.

It is now up to the courts to determine whether the opioid crisis, like obesity, is just too complex of a societal problem to shift the economic solutions anywhere but back onto society itself. In fact, the mere existence of opioid lawsuits, as with obesity, has triggered societal changes that may be the proper and only solution:

- Purdue Pharma, which made over $35 billion aggressively marketing opioids, announced that it will no longer send representatives to doctors' offices to market opioids.
- Buffalo introduced the nation's first opioid crisis court. A judge funnels non-violent opioid offenders into recovery rather than jail.
- The Everett, Wash. Police Department decided, after 57 people overdosed on opioids in one week, that it would emulate other departments by creating teams that combine officers with social workers so those in crisis can obtain services rather than enforcement.
- At the federal level, a pending bill (S. 523) named the Budgeting for Opioid Addiction Treatment Act (LifeBOAT) seeks to establish a one-cent fee on each milligram of opioid in a prescription painkiller. The proceeds of this tax would fund opioid treatment programs across all states.

The government claims to recoup social expenditures are in no way suits seeking compensation for "bodily injury" derived from a tortious act that the court system is intended to address. And the liability insurance industry is not structured, priced, or intended to serve as a funding mechanism for these types of societal injuries. If liability insurers are to be available to share in the risk of other true bodily injuries caused by negligence, then such insurance must not be twisted into a mechanism for resolving societal harm. Instead, funding for the solutions to the opioid crisis resides within manufacturer and distributor changes to business practices, medical education, crisis counseling, and legislative action—all of which have now begun. ■

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