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Expert Analysis

How Opioid 'Negotiating Class' Would Affect Civil Claims

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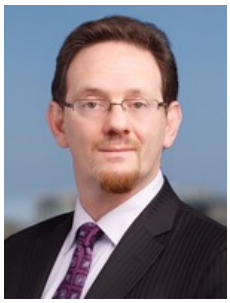
July 1, 2019, 2:43 PM EDT


Adam Fleischer

The country's federal opioid multidistrict litigation is now faced with the question of whether to create the first ever Rule 23 negotiating class, in order to allow representative cities and counties to negotiate an opioid settlement for all American cities and counties, while circumventing the judicial system's requirements of causation, damages and fundamental proof.

The prospect of such a "negotiating class" may move the national litigation closer to dispensing the "junk justice" warned against by one state court, and bringing the crushing weight of societal economic burdens to tort defendants and their insurers in unprecedented fashion.

The Proposed "Negotiating Class"

On June 25, 2019, 39 cities and counties in the opioid multidistrict litigation pending in the U.S. District Court for the Northern District of Ohio brought before the court a "Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class."

Significantly, the multidistrict litigation is not a class action suit, but instead consists of approximately 2,000 similar national lawsuits, the majority of which are brought by states, cities or counties seeking to recoup their past and future expenses for governmental services necessitated by the nation's opioid crisis. The suits generally seek to recoup such governmental expenses from the companies that, from approximately 2006 to 2018, manufactured and distributed prescription opioids and the retail pharmacies that sold them.

Of course, each suit presents unique issues and challenges for a governmental plaintiff to prove, such as what portion of a sheriff department's opioid-related expenditures (for example) were caused by the conduct of which defendants, relative to what pills, sold to whom, at what place and at what time.

The federal class action rules have never before been used to create a negotiating class involving thousands of plaintiffs which are in fact not part of a class action. The movants seek to create a proposed class "of all United States Cities and Counties ... for the *sole purpose* of negotiating and potentially settling with defendants conducting nationwide opioids manufacturing, sales or distribution." (Emphasis added).

The proposed negotiating class, however, would not include other plaintiffs whose claims are pending in the MDL, including states, hospitals and labor unions. The motion suggests that a national "city/county" settlement could be negotiated and approved, "if more than 75% of voting class members approve the proposed settlement, based on 75% supermajorities of litigating and non-litigating cities and counties, 75% of the populations, and 75% of the allocations to the cities and counties."

The stated purpose of such a proposal is to obtain better settlement returns through coordinated negotiation, in an effort "to generate funds and establish programs to help abate the opioids epidemic." The motion argues that only such a negotiating class can accomplish a global peace.

Significantly, the motion not only seeks a negotiating class, but suggests the fashion by which settlement funds would be allocated to class members. Settlement funds would be distributed based on three metrics: (1) the number of morphine milligram equivalents in the opioid prescriptions filled within each class county; (2) the number of total overdose deaths in the county; and (3) the number of opioid use disorder cases in the county.

The counties and cities would then either reach agreement on how to share the funds or, if they do not reach an agreement, a special master would divide the funds between them. The total amount of settlement funds set aside for things such as "special needs" and private counsels' fees are also proposed in the motion.

Introducing Notions of "Junk Justice"

The manner in which the proposed negotiating class circumvents causation in order to distribute the funds calls into question the very credibility of using the federal class action template of Rule 23 to achieve a settlement for disparate claims of social harm that may not fit within the civil tort framework in the first instance.

For example: (1) dividing "damages dollars" based on the number of morphine milligram equivalents distributed in a location ignores that prescription opioids are legal and oftentimes properly prescribed and used. So, the measure of opioid dosages in a particular location does not by itself indicate either negligence, damage or causation; (2) the number of overdoses within a geographical location may not be an appropriate factor for dividing settlement funds because it does not account for the many overdose deaths caused by illegal heroin or deadly synthetic opioids that have been flooding American streets from the Mexican and Chinese drug cartels, and not necessarily from the negligence of the defendants in the MDL; and (3) the number of "opioid use disorder" cases within a settling city or county has no automatic evidentiary connection with the actions or inactions of any particular manufacturer, distributor, retailer, pharmacy, doctor, user, sheriff's department, child welfare department or any other plaintiff or defendants at issue in the complex web of claims in the MDL.

The issues above hint at the impossibility of justly solving deeply rooted societal harm through civil litigation. Consider that a true social crisis, such as the opioid epidemic, has innumerable intertwined and engrained social, political, criminal and interpersonal contributing causes, all differing on a case by case basis.

The judicial system has historically not functioned to circumvent, ignore or blur those differing causes, but instead has served to employ stringent tests of duty, breach and causation to prevent the social convenience of foisting the financial burden of social harm onto deep-pocketed corporations, irrespective of proof. In part, these stringent legal tests of liability have been relied upon in allowing corporations and their insurers to properly innovate, operate, compensate and manage risk.

The temptation of casting aside proof in favor of social welfare funding, particularly in the opioid context, was addressed in the recent ruling by a Connecticut state court in City of New Haven v. Purdue Pharma. In that January 2019 decision, Connecticut state court Judge Thomas Moukawsher dismissed the claims of Connecticut cities against 25 drug companies because the plaintiffs will never be able to prove which defendant(s) actually caused the governments' expenditures toward the opioid crisis.

Judge Moukawsher contrasted the civil claims before him with the criminal law enforcement actions that have the luxury of presenting claims that are "the righteous manifestations of government vindicating the public interest." By contrast, the court explained that the civil arena is one in which plaintiffs seek not to "vindicate the public good" but instead to "gain money solely for themselves," so strict civil rules apply about who can sue who for what.

In this respect, Judge Moukawsher noted that, while all of society has surely suffered from the opioid crisis, we cannot all simply line up for our personal share of tax recoupment, declining property values, rising crime rates and personal anguish. If we are to safeguard a rational legal system, the judge explained, courts cannot endorse a "wildly complex and ultimately bogus system that pretends to measure the indirect cause of harm to each individual (municipality) and fakes that it can mete out proportional money awards for it."

In the context of the opioid crisis, the New Haven decision explained that it would be impossible to distinguish the different harms caused by the activities of each of the many defendants upon each of the many different cities, as distinguished from each other. The court noted further that, to create true civil liability, the court system would also then have to account for the impact on each plaintiff municipality of "other drug abuse, alcohol abuse, guns, the economy, government waste, cuts in state and federal aid" and so forth.

In dismissing the cities' claims, Judge Moukawsher concluded that to establish civil liability for a social crisis "would inevitably require determining causation by conjecture. It would be junk justice."

Insurance Implications and Beyond

The proposed negotiating class for the opioid cities and counties, and the accompanying damages allocation proposal, seek to circumvent those issues of proof and causation that Judge Moukawsher warned could likely never be satisfied where plaintiffs seek to fund social change through the mechanism of civil litigation. The movants' proposal that Rule 23 be expanded to create an unprecedented negotiating class to be used to hold individual defendants liable for a social crisis lays the foundation for "causation by conjecture" and enters his referenced realm of "junk justice."

The problem of funding solutions to social harm through such creative civil litigation is that it undermines the judicial system and brings unanticipated, inexplicable and economically devastating consequences to both defendants and their insurers. Many of the companies caught in the crosshairs of the opioid litigation may be tempted to "stop the litigation bleeding" through a negotiating class settlement.

However, such a defendant will inevitably end up paying for damages it did not in fact cause. For example, the settlement allocation to Massachusetts municipal claimants will likely not set off the specific harm caused by Insys, an opioid manufacturer who earlier this month agreed to pay $195 million to settle False Claims Act suits and also paid $30 million in criminal fines and forfeitures after a Massachusetts jury found its executives guilty of racketeering in connection with Insys' opioid marketing.

Similarly, there is no indication that a settlement allocated to Chicago-area plaintiffs would set off the harm arising from the players in last month's criminal sentencing of a pain clinic operator who conspired with a physician to meet with 70 patients a day and prescribe opioids without a valid medical reason. Or that an allocation to Ohio municipalities would account for at least 49 deaths over the last three weeks that law enforcement believes were linked to mixtures of cocaine and fentanyl coming from Mexico and China.

A defendant that pays a "junk justice" settlement based on "causation by conjecture" may also struggle to explain how that settlement fits within the contours of its liability insurance coverage. Such insurance is intended to indemnify damages the policyholder pays to compensate a victim for actual bodily injury suffered by an identifiable claimant in a given policy period caused directly by the policyholder's negligence.

The settlement mechanism now before the MDL court would create social welfare funding that could not be compensated by liability insurance because: (1) the damages being paid are to fund municipal expenses and not to compensate bodily injury or property damage; (2) the settlement dollars are contributions to a social welfare fund and are untethered to any specific causal conduct of the policyholder as required by insurance; and (3) the settlement dollars are unconnected to any particular injury taking place in one period versus any other period, which is a required element of proof for liability insurance recovery.

Conclusion

The pending motion for certification of a negotiation class in the opioid MDL will be the subject of intense briefing throughout July, with a hearing scheduled for Aug. 6. The framework of the proposed negotiating class highlights numerous issues with using the civil litigation framework to create funding for a true social crisis without regard to the fundamental legal tenets of duty, breach and causation.

Should a mechanism be created allowing resolution of the opioid claims through what the New Haven court called "junk justice" or "causation by conjecture," defendants may breathe easier with an escape route from existential litigation, but such a route would be riddled with insurance coverage potholes. Such a mechanism may also create an ominous forecast regarding the use of future civil claims as a means of funding social change, without the protective elements of civil proof.

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