

# Opioid Litigation: Something Old or Something New?

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At this point, virtually everyone – whether in the legal profession or not – has heard about the “opioid crisis.” While litigation surrounding prescription opioid medication has been ongoing for many years, the Judicial Panel on Multidistrict Litigation (JPML) centralized a torrent of lawsuits, filed by state and local governments, against opioid manufacturers in the Northern District of Ohio in December 2017. *In re: National Prescription Opiate Litigation*, 1:17-md-02804, U.S. District Court for the Northern District of Ohio.<sup>[1]</sup> At that time, 115 lawsuits were centralized before Judge Dan A. Polster, though the number now exceeds 400. The JPML cited the large number of opioid overdoses in Ohio as one reason for the selection of that forum, as well as the experience of Judge Polster in managing large, centralized litigation.

One of the co-lead counsel for the plaintiffs, Paul J. Hanly, Jr. of Simmons Hanly Conroy LLC, has mused that the case could become the “largest MDL in history” and that damages could extend into the “hundreds of billions” of dollars. The scope and gravity of the litigation has drawn comparisons to the tobacco litigation of the late 1990s. While similarities exist, there are also key differences that will be worth following as the litigation proceeds.

The similarities begin with the fact that both pieces of mass-tort litigation are situated amid a climate of unusually intense media scrutiny. The media focus in the tobacco litigation was prompted in part by leaked internal documents from the tobacco manufacturers suggesting that the companies were aware of the addictive nature of their products, and it is certainly anticipated that plaintiffs will make similar arguments in the opioid litigation. This intense media focus impacts the parties, potential jurors, and in this case, perhaps even the judge to an extent. Judge Polster has commented publically, “The stakes, in this case, are incredibly high . . . [a]ny thinking person should feel terrible about the situation we’re in.” And headlines in the press have repeatedly cited the figure of 42,000 opioid overdoses in 2016 alone.

Also like the tobacco litigation, it is anticipated that a final resolution for the opioid litigation will include injunctive relief and/or monetary payouts devoted to what are traditionally considered public-health issues, as opposed to the norm of monetary damages in products-liability litigation. Such relief could include limiting the strength and dosage of opioids, as well as funding addiction treatment and public education. Remedies in tobacco litigation involved public education funds, health care and treatment funds, and transparency requirements.

But despite these similarities, the opioid litigation is different insofar as it involves prescription medicines, as opposed to consumer products, like cigarettes. Unlike tobacco, opioids require the prescription from a trained physician, who presumably determined that the medicine was appropriate for a particular patient at some point in time. Rather than theories of liability being premised upon alleged misrepresentations to the consumer, the opioid litigation must focus upon alleged misrepresentations to physicians that resulted in prescriptions to patients that might not otherwise have been written. This additional gloss of arguments and evidence was not necessary in the tobacco suits. How this gloss impacts the specific claims and defenses remains to be seen but will be worth following as the litigation progresses.

Also interesting will be Judge Polster's approach to managing the litigation, given the sense of urgency that he has described during the proceedings. At the first status conference this January, Judge Polster stated, "About 150 Americans are going to die today, just today, while we're meeting."<sup>[2]</sup> He has also informed counsel that he does not intend to spend many years "unraveling complicated conspiracy theories" and desires meaningful solutions to a national crisis, that would not "just mov[e] money around," by the end of 2018.<sup>[3]</sup> All of this will make the ongoing opioid litigation the most heavily followed mass-tort litigation for pharmaceutical and medical-device litigators for the foreseeable future.

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[1] Defendants include manufacturers Purdue Pharma LP, Teva Pharmaceuticals USA Inc., Johnson & Johnson, Endo Pharmaceuticals Inc., Allergan Inc. and Mallinckrodt LLC. Distributors targeted in the case include Cardinal Health Inc., AmerisourceBergen Corp. and McKesson Corp., as well as units of CVS Health Corp. and Wal-Mart Stores Inc.

[2] Hoffman, Jan. "Can this Judge Solve the Opioid Crisis?" The New York Times [New York, NY], March 5, 2018 (last accessed 3/30/18 at: <https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html>).

[3] *Id.*