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By Jack James*

History of The Crisis

It is no secret that the United States is in the midst of an Opioid Crisis (the "Crisis"). What may surprise some, however, is that the Crisis has actually been going on for decades. The problem originated in the late 1990s when pharmaceutical companies reassured the medical community that their opioid pain relievers were not addictive, which led physicians to prescribe them at greater rates.¹ Widespread misuse and diversion² of these medications followed as a result, all before it became clear that they could, in fact, be highly addictive.³ These harmful practices continued over the next twenty years with heroin and synthetic opioids, such as fentanyl, contributing to the devastation.⁴ Today, the Crisis has shown no signs of slowing down, with over 130 Americans dying every twenty-four hours from opioid overdoses.⁵

In addition to the immeasurable amount of heartache the Crisis has brought families and communities, it has also come with a significant economic cost. According to a study conducted by the Centers for Disease Control and Prevention, the total economic burden of prescription opioid misuse alone in the United States is \$78.5 billion annually.⁶ The public sector bears approximately one quarter of this cost in the form of health care, substance abuse treatment, and criminal justice costs.⁷ The question persists: will the

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¹ *Opioid Overdose Crisis*, National Institute on Drug Abuse, (Revised January, 2019), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis>.

² The term "*diversion*," refers to the transfer of opioids from the individual for whom they were prescribed, to others, which is illegal.

³ *Id.*

⁴ *History of the Opioid Epidemic – How Did We Get Here?*, Poison Control, (February 12, 2018), <https://www.poison.org/articles/opioid-epidemic-history-and-prescribing-patterns-182>.

⁵ National Institute on Drug Abuse, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

government be forced to pick up the tab for battling the Crisis? Perhaps not. Thousands of state and local governments have filed complaints against prescription opioid manufacturers, suppliers, and distributors demanding compensation for the costs of responding to the Crisis.⁸ Although the timelines for these lawsuits vary, the first cases are set to be heard in courtrooms as early as this year.⁹

The “Test” Case in Ohio

One of the largest opioid cases is set to take place in federal court this October in Cleveland, Ohio.¹⁰ The case, which is being called one of the most complicated legal battles in history, consists of hundreds of lawsuits filed by cities and counties from around the country.¹¹ Rather than naming one type of industry defendant, this litigation lists several, each playing a different role – not only drug makers but also distributors and retailers.¹² The plaintiffs claim that: manufacturers like Purdue Pharma and Johnson & Johnson aggressively marketed the pills for years despite knowing about the addictive properties; distributors like McKesson and Cardinal Health shipped alarming quantities without reporting to the authorities; and pharmacy chains like Walgreens and CVS Health looked away while selling flag-raising amounts of these medications to individuals.¹³ The legal theories under which the plaintiffs are suing include public nuisance, fraud, racketeering and corruption, as well as violations of federal and state laws covering controlled substances.¹⁴

⁸ Brian Mann, *Opioid-Makers Face Wave of Lawsuits in 2019*, NPR (December 31, 2008, 7:00 AM), <https://www.npr.org/2018/12/31/680741170/opioid-makers-face-wave-of-lawsuits-in-2019>.

⁹ *Id.*

¹⁰ Jan Hoffman, *Opioid Lawsuits are Headed to Trial. Here’s Why the Stakes are Getting Uglier*, *The New York Times*, (January 30, 2019), <https://www.nytimes.com/2019/01/30/health/opioid-lawsuits-settlement-trial.html>.

¹¹ To organize this litigation, these lawsuits were consolidated into one case by the Judicial Panel on Multidistrict Litigation (“JPML”). Jeremy Nobile, *Cleveland court is Big Pharma’s battleground for opioid liability*, *Crain’s Cleveland Business* (December 8, 2018, 4:00 AM), <https://www.crainscleveland.com/legal/cleveland-court-big-pharmas-battleground-opioid-liability>.

¹² Jan Hoffman, *Can This Judge Solve The Opioid Crisis?*, *The New York Times* (March 5, 2018), <https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html>.

¹³ *Id.*

¹⁴ *Id.*

The defendants have pushed back in response to the allegations, claiming that the Crisis was caused by a number of factors.¹⁵ The defendant companies challenge state liability for actions concerning the use of prescription opioids marketed and overseen by the Food and Drug Administration (the “FDA”), the governing body “specifically authorizing” such actions.¹⁶ The defendants have also argued that much of the misuse of prescription and illicit opioids is attributable to downstream actors who are far outside of the companies’ control.¹⁷ Finally, manufacturers such as Purdue Pharma have changed their marketing strategies by ceasing the practice of promoting opioid medications to prescribers.¹⁸ Purdue Pharma has even started allocating funds to support prescription drug education around the country and has run full-page ads in national publications outlining these efforts.¹⁹ Yet, this has done little to silence the critics. In an interview earlier this year, Mike Dewine, the Ohio Attorney General, voiced his unenthusiastic impression of these efforts in saying, “They can put as many ads as they want out there, but that’s not dealing with the problem.”²⁰

While on paper it may appear that these parties are on a collision course to meet at trial, the matter will likely never make it there. During the first hearing for the case, U.S. District Judge Dan Polster informed lawyers on both sides that he intended to dispense with legal norms such as discovery and would not preside over years of “unraveling complicated conspiracy theories.”²¹ He then ordered each side to prepare for settlement discussions immediately.²² In the past, drug makers and distributors have refuted demands of the plaintiffs in the hopes of either narrowing or defeating the

¹⁵ Mann, *supra* note 8.

¹⁶ Paul Schott, *Opioid crisis fuels massive litigation against Purdue Pharma*, Stamford Advocate (November 2, 2018 4:52 PM), <https://www.stamfordadvocate.com/business/article/Opioid-crisis-fuels-massive-litigation-against-13358809.php>.

¹⁷ See *id.*

¹⁸ Mann, *supra* note 8.

¹⁹ Schott, *supra* note 16.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

lawsuits in order to mitigate any settlement costs.²³ Aware of this, Judge Polster reminded the defendants that if they choose to resist a swift settlement in favor of litigation, they could be setting themselves up for an unpredictable jury trial.²⁴

Potential Impact

With this being one of the first cases of its kind, the implications could be significant. Other opioid lawsuits around the country are vastly similar, and the outcome of this case will likely serve as a bellwether for how future cases could play out.²⁵ If the parties settle as expected, the combined amount agreed upon between this case and the lawsuits to follow could reach an unprecedented height. Public officials hope for an outcome similar to the massive tobacco settlement of 1998 worth nearly \$250 billion.²⁶ However, to cover the costs of the Crisis, such a settlement could amount to several times that.²⁷ In Judge Polster's words, not a settlement that would "just be moving money around," but one that "would provide meaningful solutions to a national crisis."²⁸ Local and state officials have echoed his sentiment, saying that they desperately need that kind of cash settlement to solve the crisis.²⁹ A settlement worth hundreds of billions of dollars could revolutionize the national response, supporting more drug rehab programs, detox beds, and training for first responders.³⁰

Unfortunately, such a settlement does not appear imminent.³¹ Even if the parties were to enter into any major agreements, Purdue Pharma and other defendants are expected to demand that they would not be liable for any actions predating the settlement.³² This provision is crucial to the companies

²³ Alex Keown, *A Test for Opioid Lawsuits, Ohio Case is Pushed Forward by Magistrate*, BioSpace, October 8, 2018), <https://www.biospace.com/article/a-test-for-opioid-lawsuits-ohio-case-is-pushed-forward-by-magistrate/>.

²⁴ Hoffman, *supra* note 12.

²⁵ Nobile, *supra* note 11.

²⁶ Schott, *supra* note 16.

²⁷ *Id.*

²⁸ Hoffman, *supra* note 12.

²⁹ Mann, *supra* note 8.

³⁰ *Id.*

³¹ Schott, *supra* note 16.

³² *Id.*

because if there is an “escape hatch” in the agreement, the companies are presumably paying billions of dollars to be sued again later on.³³ Still, with the exception of the defendants, most people are hopeful that settlements come sooner rather than later.³⁴ Dr. Jeff Gordon, a former president of the Connecticut State Medical Society, affirmed this notion in a recent interview: “The reality is these lawsuits take years, and years is not something we have. We need to deal with this problem now.”³⁵

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*