

1 Pharmaceutical and Medical Device Litigation § 3:10

Pharmaceutical and Medical Device Litigation | November 2023 Update
Charles S. Zimmerman

Chapter 3. Drug and Device Advertising

§ 3:10. Opioid Litigation

References

Hundreds of cases have been brought against **opioid** manufacturers, distributors, retailers, and prescribers, essentially arguing that the drugs were aggressively marketed, with benefits maximized and addiction risks downplayed, and improperly distributed with no regard to the risks.¹ There are a number of theories of recovery asserted against **opioid** manufacturers, distributors, and retailers, from negligence to public nuisance, RICO, unjust enrichment, conspiracy, fraud, and deceptive trade practices. In addition to consumers and individuals, numerous states, counties, cities, municipalities, Indian tribes, hospitals, and third party payors who allegedly incurred expenses because of **opioid** addiction have also brought suit.² A bipartisan coalition of State Attorney Generals have also been collaborating in investigating and litigating cases against **opioid** manufacturers, distributors and retailers. Some of the cases brought on behalf of government entities have been outsourced and are being handled by tort lawyers on a contingency basis. Criminal charges have also been brought in some cases.

In 2017, the Judicial Panel for Multi-District Litigation consolidated a number of **opioid** actions in MDL 2804 in the Northern District of Ohio under **Judge** Dan Aaron **Polster** for actions sharing factual questions regarding the allegedly improper marketing and distribution of various prescription opiate medications.³ Defendants include drug manufacturers, wholesalers, pharmacy chains, and many small companies. Judge Posner denied the defendants motion for summary judgement on public nuisance claims.⁴ The Sixth Circuit rejected a proposed negotiation class set up by **Judge Polster** in MDL 2804 in an effort to obtain a global settlement, finding that such a class was not contemplated under Rule 23.⁵ In April 8, 2022, the Judicial Panel for Multi-District Litigation, when discussing whether to enjoin two new cases in MDL 2804 issued an order stating that no additional plaintiffs should be added to MDL 2804, which currently has over 3000 cases in it.⁶

In re National Prescription Opiate Litigation, 440 F. Supp. 3d 773 (N.D. Ohio 2020), motion to certify appeal denied, 2020 WL 2128450 (N.D. Ohio 2020) and motion to certify appeal denied, 2020 WL 2128462 (N.D. Ohio 2020), the court held that state law claims by private third-party payors for costs of prescription **opioids** and for medical treatment associated with **opioid** misuse, addiction, and overdose against drug manufacturers and wholesale distributors, including for public nuisance, negligence, fraud, unjust enrichment, and civil conspiracy, were not preempted by FDCA, since claims were not premised upon any inappropriate labeling or fraud on the Food and Drug Administration (FDA), rather they were premised on fraudulent and misleading marketing in promotion and sale of their **opioids** and on duty not to sell their **opioids** due to diversion concerns.

The Judicial Panel for Multi-District Litigation has also consolidated a number of actions involving the role of McKinsey & Co., Inc., in providing advice to **opioid** manufacturers in the sale of prescription **opioid** drugs in MDL 2996 in the Northern District of California.⁷ Plaintiffs in this case are cities, counties, tribal governments, and other entities alleging various claims against McKinsey, including public nuisance, negligence, fraud, unjust enrichment, violation of consumer protection statutes, and federal RICO claims.

In 2021, the Oklahoma Supreme Court rejected a public nuisance claim in an appeal from a \$465 million dollar judgement,

finding that Oklahoma’s public nuisance law did not apply to J&J’s conduct in manufacturing, marketing and selling prescription **opioids**.⁸ The court held that the state’s public-nuisance claims, if allowed, could hold manufacturers perpetually liable for their products, and damages that the state sought were not for a communal injury but were instead more in line with a private tort action for individual injuries sustained from use of a lawful product and in providing medical treatment or preventive treatment to certain, though numerous, individuals.

In another nuisance case brought against Walmart, CVS, and Walgreens for not properly monitoring **opioid** prescriptions, a jury found the defendants liable and the federal District Court for the Northern District of Ohio held that evidence of whether pharmacies knowingly failed to take adequate measures to guard against diversion of prescription **opioid** medications presented question for jury.⁹

In a nuisance claim brought against wholesale distributors of pain drugs, a federal district court denied plaintiff’s claims, stating that “[t]o apply the law of public nuisance to the sale, marketing and distribution of products would invite litigation against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product.”¹⁰

In a claim against drug store and friend of decedent for negligence, wrongful-death, and survival after drug store allowed friend to pick up fentanyl prescription intended for friend’s mother, decedent and friend ingested prescription, and decedent died, the Pennsylvania Supreme Court held that at as a matter of first impression, defense of in pari delicto or “wrongful acts doctrine: applied to bar estate administrator’s action.”¹¹

Many **opioid** cases have settled, with some settling on the eve of bellwether trials.¹² Other **opioid** bellwether trials and state cases are slated to go to trial in 2022 and 2023. Also complicating matters, a number of defendants in **opioid** cases have declared bankruptcy.¹³ There have also been cases related to insurance coverage in **opioid** cases.¹⁴

In a criminal case involving a “pill mill,” the Supreme Court vacated a couple of convictions of alleged pill mill doctors, holding that a prosecution under the Comprehensive Drug Abuse Prevention and Control Act for “knowingly or intentionally” distributing a controlled substance “except as authorized,” once a defendant meets the burden of producing evidence that his or her conduct was “authorized,” the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner.¹⁵

Westlaw. © 2023 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

Footnotes

¹ “In the late 1990s, pharmaceutical companies reassured the medical community that patients would not become addicted to **opioid** pain relievers and healthcare providers began to prescribe them at greater rates. Increased prescription of **opioid** medications led to widespread misuse of both prescription and non-prescription **opioids** before it became clear that these medications could indeed be highly addictive.” What is the **Opioid** Epidemic?, U.S. Department of Health and Human Services (Sept. 19, 2018), available at <https://www.hhs.gov/opioids/about-the-epidemic/index.html>.

² See e.g., *City of New Castle v. Purdue Pharma L.P.*, 2018 WL 3438841 (E.D. Pa. 2018).

³ See *In re National Prescription Opiate Litigation*, 290 F. Supp. 3d 1375 (U.S.J.P.M.L. 2017) (consolidating cases in MDL 2804. Plaintiffs alleged that the manufacturers of prescription **opioids** grossly misrepresented the risks of long-term use of those drugs for persons with chronic pain, and distributors failed to properly monitor suspicious orders of those prescription drugs—all of which contributed to the current **opioid**


epidemic).

4 In re National Prescription Opiate Litigation, 976 F.3d 664, R.I.C.O. Bus. Disp. Guide (CCH) P 13407 (6th Cir. 2020).

5 <https://www.jpml.uscourts.gov/sites/jpml/files/MDL-2804-Order-Denying-Reconsideration-5-22.pdf>.

6 <https://cand.uscourts.gov/judges/breyer-charles-r-crb/in-re-mckinsey-company-inc-national-prescription-opiate-consultant-litigation-mdl-no-2996/>.

7 In re National Prescription Opiate Litigation, 406 F. Supp. 3d 672 (N.D. Ohio 2019).

8  State ex rel. Hunter v. Johnson & Johnson, 2021 OK 54, 499 P.3d 719, Prod. Liab. Rep. (CCH) P 21300 (Okla. 2021) (“Oklahoma public nuisance law does not extend to the manufacturing, marketing, and selling of prescription **opioids**”; a public nuisance involves the violation of a “public right,” and “a public right is more than an aggregate of private rights by a large number of injured people.”).

9 In re National Prescription Opiate Litigation, 2022 WL 671219 (N.D. Ohio 2022).

10  City of Huntington v. AmerisourceBergen Drug Corporation, 2022 WL 2399876 (S.D. W. Va. 2022).

11 Albert v. Sheeley’s Drug Store, Inc., 265 A.3d 442 (Pa. 2021).

12 See <https://www.opioidsettlementtracker.com/>.

13 See Molton, D., Rheingold, P., Litigating Mass Torts § 12:66 (Thomson Reuters 2022).

14 St. Jeanos, C.J., Fitzmaurice, J., Curtis, D. Insurance coverage issues arising in connection with the **opioid** crises, 63 NO. 5 DRI For Def. 56.

15  Ruan v. United States, 142 S. Ct. 2370 (2022).

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.