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Drug Companies Preview Trial Defenses for Bellwether Opioid Trial

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In the last several years, thousands of cities and counties, as well as most states, have sued various combinations of pharmaceutical manufacturers, retailers, and distributors for damages allegedly caused by the opioid epidemic. Nearly 2,000 of those cases have been consolidated into a multi-district litigation ("MDL") in the Northern District of Ohio.

Until very recently, defendants in the MDL had not revealed how they intended to argue against the charge that they caused or contributed to the opioid crisis. But with the first trial set to begin on October 21, 2019, the defendants recently submitted their trial briefs, which provide a sneak peek at the factual and legal arguments they intend to raise at trial. Among other alleged causes, defendants have pointed to corrupt doctors, criminal cartels, and even local governments.

For example, one drugmaker stated that it "fully recognizes the opioid crisis that exists in this country" but suggested that alternative causes such as public policy failures and illicit drug use drove the opioid crisis. More specifically, the defendant stated:

[P]ervasive diversion and abuse of oxycodone and hydrocodone pills, unscrupulous doctors and internet pharmacies operating as drug-trafficking organizations, foreign criminal cartels that flooded the country with heroin and fentanyl illegally made in clandestine labs, and state and federal governments that struggled to ensure patients had access to necessary medications while addressing long-known problems of abuse, misuse, diversion, and overdose.

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(Doc. No. 2633 at 8.)

Another drugmaker alleged that rather than blaming defendants, the plaintiffs—*i.e.*, two counties in Ohio—"should be examining their own actions and inaction—which directly contributed to the opioid abuse problem in the United States." (Doc. No. 2669 at 9.) As an example, the defendant argued that "the Counties continue to reimburse for opioid prescriptions for chronic pain today, thereby influencing what gets prescribed and dispensed to patients—and confirming (against their very own foundational theory in this case) that opioid prescriptions may be appropriate for chronic pain." (*Id.*)

Similarly, an opioid distributor believes the opioid crisis was caused by "innumerable actors not before the Court, ranging all the way from well-intentioned prescribing doctors to criminal drug dealers and heroin traffickers." (Doc. No. 2643 at 4-5.)

Another distributor suggested that plaintiffs in the MDL overlook the "role of criminal drug cartels and other actors in the illegal opioid market." (Doc. No. 2659 at 4.)

Finally, yet another distributor argued that alternative causes of the opioid crisis preclude recovery in the MDL. This defendant argued that under *City of Cleveland v. Ameriquest Mortg. Secs., Inc.*, 615 F.3d 496 (6th Cir. 2010), the presence of "independent actors between the alleged misconduct and the alleged injury" compel the conclusion that plaintiffs' claims here are "too indirect to warrant recovery." *Ameriquest*, 615 F.3d at 506. The defendant attempted to distance itself from defendants occupying other roles in the chain of distribution by stating that it "does not make opioids available to patients," and instead, a "patient can obtain opioids only after a doctor makes an independent decision to write a prescription and a pharmacist makes the independent decision to fill the prescription." (Doc. No. 2667 at 8.)

All the finger-pointing between and among plaintiffs and defendants emphasizes what has been increasingly clear as the first MDL cases approach trial; it will take a Herculean effort by the courts (and juries) to sort through the medical, social, political, and economic issues that are intertwined with the opioid crisis. The breadth of the problem even raises the question of whether jury trials are the right tools to address social crises of this magnitude and complexity. Indeed, some studies place the national economic burden of the opioid crisis at $78.5 billion, with over 35,000 people dying annually for drug overdoses related to opioids.

U.S. District Judge Dan Polster, who presides over the MDL cases, bluntly emphasized these complex challenges in recent comments:

[E]veryone shares some of the responsibility, and no one has done enough to abate it. That includes the manufacturers, the distributors, the pharmacies, the doctors, the federal government and state government, local governments, hospitals, third-party payers and individuals. Just about everyone we've got on both sides of the equation in this case.

The federal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government, federal and state, have punted. So it's here.