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What is the Role of the Judiciary in Tackling the Opioid Epidemic?

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As waves of opioid lawsuits have mounted in the federal courts, one district court was chosen to shepherd all the cases, and one judge is motivated to step up to stem the tide of the epidemic.

In the Northern District of Ohio, Judge Dan A. Polster was chosen by the Judicial Panel on Multidistrict Litigation, which centralized hundreds of suits, and created the Opioid MDL.

"The federal court is probably the least likely branch of government to try and tackle [the opioid epidemic], but candidly, the other branches of government, federal and state, have punted," said Judge Polster during the first hearing of the MDL in January. "My objective is to do something meaningful to abate this crisis and to do it in 2018."

Government entities, hospitals, Native American tribes, and individuals are bringing suits against key contributors to the opioid epidemic, including Purdue Pharma, and the "Big Three" distributors (Cardinal Health, AmerisourceBergen, and McKesson).

As of May 2018, over 700 opioid lawsuits have been consolidated before Judge Polster in the Opioid MDL. Every week, new lawsuits are being filed. Ever since the first hearing in January 2018, it has been clear that the Opioid MDL is not, and will not, operate like a typical MDL.

According to Judge Polster, this MDL is unique and requires acceleration because the subject matter does not involve a past problem; it involves a crisis that is "present and ongoing."

Novel Legal Issues Amid Pressure Towards Accelerated Resolution

Although the Opioid MDL is unique, it also possesses typical characteristics of an MDL by having designated bellwethers, or "test cases," to address several substantive legal issues. On June 8, 2018, briefing on these issues commenced when the drug companies filed their first round of motions to dismiss. The plaintiffs are expected to respond in the coming months.

Most of the government plaintiffs have brought public nuisance claims, also referred to as *parens patriae* actions. These theories allege that the government entities should recover the huge expenses incurred when treating and responding to the opioid epidemic.

Although public nuisance traces back centuries, the road to recovery remains broad and ill-defined. Several recent motions to dismiss filed in the Opioid MDL argue that plaintiffs are attempting to improperly expand the scope of public nuisance. Another unanswered question is whether individual overdose victims have standing to bring public nuisance claims when their physical injuries are "different in kind" from the economic injuries suffered by the general public.

Further, questions remain over the applicability of the "learned intermediary doctrine," an exception to the general rule that manufacturers must provide warnings directly to ultimate consumers. Under this doctrine, a prescription drug manufacturer only has a duty to warn and instruct the learned intermediary (i.e., the prescribing or treating physician) about the potential risks or dangers associated with the drug.

Product misuse is also a well-recognized defense in products liability. In these opioid cases, defendants suggest that overdoses are quintessential examples of product misuse. However, manufacturers still have a duty to warn when there are common or foreseeable misuses of their products.

For example, evidence suggests that Purdue knew that Oxycontin was being misused but concealed this information and continued to represent a low-risk of addiction to the medical community. A similar nuanced question is whether the defense of product misuse applies when the defective nature of the product (both in design and warning) contributes to misuse, such as increased addiction and overdose.

The many open questions surrounding the opioid cases invite great legal debate, not to mention law review topics. However, if Polster achieves his stated objective, many of these questions may go unanswered.

By the time another law review submission season has passed, the only disputes remaining may relate to settlements. Although these issues are intriguing, Judge Polster has made clear that they must give way to the immediate need to abate the public health crisis.

“People aren’t interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unraveling complicated conspiracy theories,” Polster said in court in January. “What we’ve got to do is dramatically reduce the number of the pills that are out there and make sure that the pills that are out there are being used properly…We don’t need a lot of briefs and we don’t need trials.”

In a recent Bill of Health post, author Stephen P. Wood described the opioid epidemic as a “humanitarian crisis” which requires “humanitarian care” in both “policy and practice to combat it.”

Judge Polster’s open statements suggest that the Opioid MDL is taking a similar humanitarian approach. The changing view towards people with substance use disorders could affect many of the legal questions detailed above, especially the “product misuse” defense. Even so, the MDL judge is speaking openly about immediate action to reduce access to opioids, ensure proper use, and create additional treatment facilities.

Although the country desperately needs this type of immediate action, the question remains: is this the role of the judiciary?

The Least Likely Branch

Many commentators have criticized Judge Polster’s handling of the Opioid MDL, dubbing the historic MDL as “regulation by litigation” and suggesting the merits are “predetermined.”

Others praise Judge Polster for his unconventional, yet necessary, tactics to diminish this national health crisis. No matter your views on “judicial restraint” or “judicial activism,” it is important to note that MDLs operate under different rules than other forms of aggregate litigation.

As Professors Elizabeth Chamblee Burch and Margaret Williams recently explained in *Repeat Players in Multidistrict Litigation: The Social Network*, published in *Cornell Law Review*, multidistrict litigation “provides a forum with the same high-stakes [as class actions], but without the overt judicial monitoring and error-correction built into Rule 23.” This allows MDL judges greater flexibility in making key decisions, which are often based on considerations of what has proved successful in prior MDL proceedings.

The Opioid MDL, in its current state, gives the impression of policy-making through a litigation process. As other MDLs continue to develop, it will be interesting to see whether this accelerated policy-making approach will be reserved only for dire situations, such as another national health crisis, or whether it will become a new paradigm in multidistrict litigation.

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