

How to Approach Mass-Tort Liability:

Takeaways from the Opioid Litigation and Settlement

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A New Challenge: “Subdivision” Plaintiffs

- The opioid litigation marked the advent of a new strategy from the plaintiffs’ bar
- Suits by so-called “political subdivisions”
- More than 3,500 cities, counties and other “public entities” brought suit against opioid manufacturers, distributors and pharmacies and held themselves out as a separate constituency from the State AGs
- Rivalries with State AGs goaded each group to bring more litigation and make more demands
- Gave rise to new, major challenges in litigation and in fashioning a resolution providing closure for the defendants

What are “Subdivisions”

- Any public entity below the State level
- Large cities and counties, but much broader than that:
 - Municipalities within counties
 - Towns or Boroughs within municipalities
 - Villages and “gores”
 - School Districts
 - “Health” or “Hospital” Districts
 - Other special districts – library, irrigation – can seem absurd
 - Public Drinking Water Utilities (now frequent plaintiffs against chemical industry defendants)
- Tens of thousands of potential plaintiffs
- Each making aggregate—and overlapping—claims

The Plaintiffs' Bar's New Business Model

- Easier to get hired than representing State AGs
 - *Many* more potential clients
 - Many State AGs won't or are reluctant to hire outside law firms
 - Not so activist local politicians
 - Most cities/counties need outside help to litigate
- No fee caps
 - Most States now cap contingency fees, either by statute or practice
 - Subdivisions generally do not
 - Opioids: Standard 25%-33% contingency fee contracts, without scales or caps
- More control over litigation and settlement
- Many of the same advantages of representing States
 - Aggregated claim
 - Public nuisance theory
 - Local jury prejudice

Challenges for Litigation and Resolution

- Litigation challenges:
 - In many senses, like litigating against States, only with a nearly inexhaustible supply of plaintiffs
 - Same type of legal theories
 - Nuisance
 - Consumer protection and similar statutes (in most States)
 - No individual defenses as in private cases, e.g., reliance, contributory fault
 - Aggregated claim presents the threat of a huge verdict in individual trials
 - Problems of awaiting or getting appellate review
 - MDL process in federal court may make it worse, not better
- Resolution challenges:
 - How to get closure: corralling current litigants and barring new plaintiffs
 - Opt-outs more dangerous than in private litigation
 - So many plaintiffs that individual subdivision recoveries have to be small
 - Overlapping or duplicative State AG claims/liabilities
 - Unclear (at best) in most States whether a State release is binding on subdivisions

Opioid Settlement: Background

- Thousands of subdivision suits. More filed each week.
- Active claims by most State AGs
- Each State seeking tens of billions. Each subdivision seeking billions.
- Rivalries between States and subdivision plaintiffs
 - Resolution with a State alone fueled subdivision claims in that State
 - Talk of resolution with subdivisions fueled State AG litigation
- Involvement of all major plaintiff firms
 - Rivalries and different goals (federal vs state court, national vs local resolution)
- Federal MDL judge intent on forcing a settlement with subdivisions
 - Publicly announced at the outset, including in a NYT interview, that he was interested in a major settlement, not legal defenses
 - Ruled against the defendants' legal motions on every issue
 - Stated that States would “waste” settlement money

Opioid Settlement: Key Objectives

- Resolve States and subdivisions under one umbrella
 - Necessary for closure in the face of duplicative or overlapping claims
 - Avoid expensive settlement with one group that leaves the other outstanding
 - Avoid a Balkanized approach where the sum of the parts exceeds the whole
- Payment structure that allows focus on the total amount rather than the far-smaller amount that each of the thousands of plaintiffs get
- Make the States responsible for corralling their subdivisions and barring further subdivision claims
- Include conditions and protections in the event of any continued subdivision litigation

Opioid Settlement Structure

- Settlement with the States, conditioned on States obtaining resolution of subdivision cases through release or statutory bar
 - “Critical mass” of subdivision resolution in the defendants’ discretion
- Incentives for States to obtain full subdivision resolution
 - Nearly half of payments tied to high levels of subdivision participation
 - Suspension or cancellation of portion of remaining payments if new subdivisions sue
 - States faced the prospect of losing most of the settlement value unless they controlled their subdivisions
- Incentives for subdivisions to cooperate
 - Threat that States would enact legislation or AGs would release their claims to ensure maximum payments to the State
 - “Peer pressure” – all subdivisions get more if resolution levels in a state go up
- Payments made to States
 - Forces States and subdivisions to work out allocation

Opioid Settlement: Plaintiffs Bar

- Fee payment structure also incentivizes full subdivision resolution
- Fees to a firm tied to level and manner of subdivision resolution: only paid if the firm secures a subdivision client participation
- A firm's fee is tied to the level of resolution of all its subdivision clients.
 - "Common detriment" — a firm's fees for resolution of one client's case is reduced if other clients still sue
- Firm must agree that it would be a conflict to take on new subdivision cases to sue settling defendants
 - This is possible because of the settlement structure where payments are suspended or canceled if new subdivisions sue

Opioid Settlement: Current Status

- 46 States, DC, Puerto Rico and all Territories
- 99% of litigating subdivisions (approx.)
- 99% of non-litigating subdivisions (approx.)
 - with greater than 10K population
- >10 States have enacted statutory bars on subdivision claims against settling defendants

Takeaways

- The opioid settlement provides a template for resolution if subdivision and State litigation becomes unmanageable
- But the broader takeaway is the advisability of assessing resolution options earlier, before the litigation gets to the point where something like this becomes necessary
- Options that may exist early on can disappear once too many claims are filed and the litigation gets full political and financial impetus.
 - Settlements that center on forward-looking conduct reforms but release monetary claims
 - Settlements with individual States that contain protection against potential subdivision claims.
 - Settlements with individual law firms
 - Others

Takeaways

- Of course, the filing of some subdivision lawsuits does not mean that settlement is advisable, much less imperative.
- But it is prudent to assess how the litigation is likely to develop, rather than be carried along by events until options dwindle.
- Early warning signs:
 - Is there no truly dispositive legal issue that would terminate the litigation entirely (e.g., preemption)
 - How many of the major plaintiff firms have invested in the litigation
 - Attitudes of key judges
 - The opioid situation was extreme, but most MDL judges push settlement
 - Do not assume any prospect of appellate intervention before initial trials
 - Can we withstand an adverse verdict in a subdivision lawsuit
 - Aggregated claim means could be very large (unlike individual claims)
 - Bonding requirement
 - Market reaction
 - Adverse findings