

Physician Liability for Opioid Addiction and Death: Claims and Defenses

TUESDAY, DECEMBER 17, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Benjamin J. Fenton, Partner, **Fenton Law Group**, Los Angeles

Andrew C. Hazi, Attorney, **Burns White**, Pittsburgh

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Burns White

ATTORNEYS AT LAW

Issues in Opioid Litigation

Andrew C. Hazi, Esquire



Who is Affected - Communities

- The financial and social burden of the opioid crisis affects entire communities.
- Recent lawsuits are a good example of this as individual communities are filing suit

Who is Affected - Communities

- **In Pennsylvania alone:**
 - Borough of Edwardsville, Pa. v. AmerisourceBergen Drug Corporation, et. al; 3:19 cv 2042
 - Claims for RICO violations, fraud, product liability, unfair business practices and consumer warranty.
 - It is alleged Defendant pharmaceutical manufacturers used deceptive marketing to conceal the risk for addiction, overdose and death associated with opioid painkillers.

Who is Affected - Communities

- **In Pennsylvania alone:**

- Forty Fort Borough, Pa. v. AmerisourceBergen Drug Corporation, et. al; 3:19 cv 2043
- Similar claims for RICO violations, fraud, product liability, unfair business practices and consumer warranty.
- Similar allegations Defendant pharmaceutical manufacturers used deceptive marketing to conceal the risk for addiction, overdose and death associated with opioid painkillers.

Who is Affected - Communities

- Opioid litigation class actions are drawing comparisons to the tobacco/cigarette company class actions filed in the 1990s and 2000s.
- Note, many of the opioid class actions are now being consolidated at In Re: National Prescription Opiate Litigation in the Northern District of Ohio. This case consists of nearly 3,000 individual lawsuits.
- Two counties in Ohio settled a case in October, 2019 for roughly \$260 million. It was thought this would be the bellwether trial for these actions moving forward.

Who is Affected - Patients

Obvious impacts to patients involved in opioid litigation:

- i. Loss of employment;
- ii. Loss of earning capacity;
- iii. Injuries caused by overdose, such as permanent brain injury;
- iv. Medical expenses, namely costs for drug therapy;
- v. Pain and suffering – particularly impactful with a patient who suffers severe withdrawal symptoms

Who is Affected - Patients

Case example - Koon v. Walden, 2017 WL 4782843

- City parks employee awarded damages at trial including \$15 million in punitive damages. Upheld on appeal.
- Mr. Koon was 45 and presented evidence he lost his job, his future earning capacity was impaired, and his marriage ended in divorce.

Who is Affected - Families

- Wrongful death and survival actions can certainly be asserted by families in connection with opioid-related claims
- Loss of consortium damages are likely viable – In *Koons v. Walden*, Mr. Koon's wife was awarded \$804,000 in damages

Who is Affected - Insurers

- Substantial burden is placed on insurers and communities to pay for medical costs, care and treatment, and support those who cannot work.
- Opioid-related claims are more expensive for insurers:
 - Critically severe outcomes occur in 50% of medical malpractice claims, generally
 - Critically severe outcomes occur in 70% of opioid-related claims. Of those, 8 out of 10 result in death.

Source: [Opioid Treatment: Liability Risks in the Office Setting](https://www.medpro.com/documents/10502/5086245/Opioid+Treatment+%26+Liability+Risks+in+the+Office+Setting.pdf)

MedPro Group

<https://www.medpro.com/documents/10502/5086245/Opioid+Treatment+%26+Liability+Risks+in+the+Office+Setting.pdf>

Who is Affected - Insurers

- Annual economic burden of prescription opioid misuse in the U.S. is estimated to be \$78.5 billion **per year**
- This includes costs for healthcare, lost productivity, addiction treatment, and involvement of the criminal justice system

Source: National Institute on Drug Abuse

<https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis#two>

(CITING Florence CS, Zhou C, Luo F, Xu L. The Economic Burden of Prescription Opioid Overdose, Abuse, and Dependence in the United States, 2013. Med Care. 2016;54(10):901-906.)

Who is Responsible - Physicians

Individual physicians are on the front lines of the liability battlefield

- Family medicine providers are most often found liable as the responsible clinical service
- Allegations most frequently implicate direct care providers
 - Improper management of medications, rather than orders for medication or questions with administration, makes up 80% of the allegations and 90% of the total dollars spent in opioid-related claims

Physician Liability for Opioid Addiction and Death: Claims and Defenses

- **Benjamin Fenton, Healthcare attorney,
Fenton Law Group**

Benjamin J. Fenton, Esq.
FENTON LAW GROUP, LLP
Los Angeles, California 90025
Tel: (310) 444-5244
Fax: (310) 444-5280
Email: bfenton@fentonlawgroup.com

Physician Liability for Opioid Addiction and Death: Claims and Defenses

- Who is responsible

- Pharmacies
- Manufacturer

**Johnson & Johnson, Purdue, McKesson, CVS, Walgreens,
Cardinal Health, Amerisource Bergen, Rite Aid**

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– Who are the Plaintiffs? Providers of Health and Welfare

- Counties, cities, Indian tribes, hospital systems, clinics, emergency services

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Los Angeles, California 90025
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E-mail: bfenton@fentonlawgroup.com

– National Multidistrict Litigation

Benjamin J. Fenton, Esq.
FENTON LAW GROUP, LLP
Los Angeles, California 90025
Tel: (310) 444-5244
Fax: (310) 444-5280
E-mail: bfenton@fentonlawgroup.com

Physician Liability for Opioid Addiction and Death: Claims and Defenses

- **Over 2700 lawsuits involved**
 - **Overlapping Defendants.**
 - **State Attorney General Suits**

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– **In re: National Prescription Opiate Litigation, MDL 2804, Case No. 1:17-md-2804: Hon Dan Aaron Polster, Judge ; Northern District of Ohio.**

- **Various actions involve common questions of law and fact.**
- **Centralization to ND of Ohio for convenience of all parties.**
- **Will be remanded ultimately.**

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- **What is MDL? 28 U.S.C.A § 1407.
Multidistrict litigation**

Benjamin J. Fenton, Esq.
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Los Angeles, California 90025
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-What are the causes of action and allegations?

- **Cause of Actions: Rico, Nuisance, Controlled Substances Act.**
- **Allegations:**
 - **Family of operations.**
 - **Manufacturing of API Active Pharmaceutical Ingredients.**
 - **Overly aggressive and dishonest marketing.**
 - **Low risk, low abuse.**
 - **No reporting of excessive orders.**
 - **Focused on pain and family medicine physicians**
 - **Pressured doctors by telling them they were underprescribing and that patients have the right to pain meds.**
- **Damages**

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- **Prior Civil Penalties**

- **McKesson. 150 million civil penalty for violation of the Controlled Substances Act (2017)**
- **Costco. Nearly 12 million penalty (2017)**
- **Cardinal Health. 44 million penalty (2016)**

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- Status of MDL lawsuits

- **Judge Dan Polster**
- **Moratorium on all substantive filings at the outset of litigation**
- **Representative Counsel**
- **Track one bell weather cases.**
- **Close coordination with state cases.**
- **Track one cases settled on Oct 31, 2019 (eve of trial).**

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– Settlements

- **Purdue Pharm. Filed for Chapter 11 BK (SDNY) (September 16, 2019)**
 - **Proposed 10-12 billion settlement. Sackler family to pay 3 billion of that amount, contribute company, and give up all future profit.**
- **Track one cases involving two Ohio counties settled on eve of trial.**
 - **Defendants are McKesson Corp, Cardinal Health, Amerisource, Teva. Settled for over 300 million.**

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- **State of Oklahoma v. Purdue Pharm L.P. (Johnson & Johnson)**
 - Court found Johnson & Johnson operated a “pain management franchise”
 - J & J owned an Australian company for purposes of poppy production and a company to extract the Active Pharmaceutical Ingredient.
 - J & J launched efforts in 1997 after seeing success of Oxycontin.
 - J & J had an aggressive and dishonest marketing practice.
 - Emphasized low risk and low likelihood of abuse.
 - The “pain management franchise” became a big part of the J & J business model.
 - Judgment awarded against J & J: \$465 million.

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- **Future: Negotiation Class**

- **FRCP 23.**
- **The class only applies to counties and cities.**
- **49 representatives.**
- **Deadline of Nov. 19 to opt out.**
- **A 75 percent vote ratifies a settlement.**
- **Settlement proposal pending at \$48 billion. Likely too low.**

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Physician Liability for Opioid Addiction and Death: Claims and Defenses

- Sackler family

- Started Purdue Pharm. in 1952.
- Raymond and Mortimer Sackler. Both physicians.
- Introduced Oxycontin in 1995.
- Family net worth: 13 billion

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Physician Liability for Opioid Addiction and Death: Claims and Defenses

- **Switching gears**

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Physician Liability for Opioid Addiction and Death: Claims and Defenses

- The medical malpractice case

- Excessive prescribing

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Physician Liability for Opioid Addiction and Death: Claims and Defenses

- Morphine Equivalent Dosage (MED)

- Morphine Equivalent Dosage
- Used to convert from one opioid to another. MBC lists 100 as excessive

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Physician Liability for Opioid Addiction and Death: Claims and Defenses

- **Medical Board of California, Death Certificate Project.**
 - **Contract between MBC and CDPH**
 - **CURES searches**
 - **Lewis**

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Physician Liability for Opioid Addiction and Death: Claims and Defenses

- **Elements of a Defense**
 - **Documentation**
 - **Consult with Pain Management Specialist**

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Fax: (310) 444-5280
E-mail: bfenton@fentonlawgroup.com

Physician Liability for Opioid Addiction and Death: Claims and Defenses

- Neonatal Abstinence Syndrome

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Los Angeles, California 90025
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Fax: (310) 444-5280
E-mail: bfenton@fentonlawgroup.com

Physician Liability for Opioid Addiction and Death: Claims and Defenses

- Insurance Issues

Benjamin J. Fenton, Esq.
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Fax: (310) 444-5280
E-mail: bfenton@fentonlawgroup.com

Insurance Issues

Coverage issues have not been extensively litigated, however:

- The Southern District of Florida and the District of Kentucky have held that certain insurers did **not** owe a duty to defend pharmaceutical distributors.

Cincinnati Insurance Company v. Richie Enterprises LLC, 2014 WL 3513211

Travelers Prop. & Cas. Co. of Am. v. Anda, Inc., 90 F. Supp. 3d 1308 (S.D. Fla. 2015), aff'd by 2016 U.S. App. LEXIS 15760 (11th Cir. Aug. 26, 2016)

HOWEVER...

Insurance Issues

- Decisions were in declaratory actions stemming from the same suit brought by state of West Virginia seeking reimbursement for public expenditures
- Holdings were based on argument that West Virginia suit did not assert damages for bodily injury and thus were not covered by CGL policies
- Eleventh Circuit upheld Travelers on appeal, but did not reach question of whether the West Virginia suit sought damages because of bodily injury.

Insurance Issues

Many other potential issues with insurance are not clearly defined through case law:

- a) Coverage for claimed damages such as punitive damages
- b) Issues with known loss and late notice
- c) Allocation of damages over multiple policy periods
- d) Coordination of coverage for damages between multiple policies

Source:

General Liability Insurance and the Opioid Epidemic – Another Look, by Terri A. Sutton

INSIGHTS: A Professional Journal by the CPCU Society, Fall 2019 issue

Thank You

Andrew C. Hazi

achazi@burnswhite.com