How Purdue Opioid Win Could Bolster J&J In Okla. Trial

By **Cameron Turner**

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Purdue Pharma LP, the manufacturer of OxyContin, currently embroiled in opioid litigation around the country, scored a major victory recently, as District Judge James Hill in Burleigh County, North Dakota, dismissed that state's action against the opioid defendant. North Dakota's complaint against Purdue Pharma alleged consumer fraud and public nuisance.

Purdue Pharma argued that North Dakota's claims were preempted by the Federal Food, Drug and Cosmetic Act, and the approval process outlined by the act for Purdue Pharma's packaging and labeling of its opioid products. Judge Hill agreed, concluding that "the marketing practices of Purdue that the State claims are improper … were consistent with the FDA-approved product labeling."[1]

The court went on to find that there was "'clear evidence' that the FDA would not have approved changes to Purdue's labels to comport with the State's claims."[2] As to the consumer fraud claims, the court held that North Dakota was obligated to plead causation that the damages it sought based on the alleged consumer fraud were caused directly by Purdue Pharma's advertising practices.[3] Instead, the court held that the state's claims amounted to a "fraud-on-the market" theory that was attenuated at best, given the number of intervening causes and the availability of other lawful and unlawful opioids.[4]

Finally, the court refused to extend North Dakota's public nuisance statute to cases involving the sale of goods under the facts presented by the state.[5] Purdue Pharma's motion to dismiss was treated as a motion for summary judgment because of the evidence submitted by the parties in their briefs.[6] The state has indicated it will appeal the court's decision.

The impact of this decision of course remains to be seen, but it provides a framework — and now some precedent, albeit nonbinding — for Purdue Pharma and other defendants named in opioid cases to challenge consumer fraud and public nuisance allegations in these cases at the motion to dismiss and motion for summary judgment stages.

The likelihood of success on these motions in the trial courts will hinge on the venue, and the overseeing judge's willingness to make a bold decision like Hill's. At the very least, though, the North Dakota ruling provides opioid defendants some leverage in settlement negotiations, as even if they proceed to trial and take an adverse verdict, they now have a potentially dispositive appellate argument that has been accepted by at least one judge.

The North Dakota decision may thus prove timely for Johnson & Johnson, who began the first opioid litigation trial recently in Cleveland County, Oklahoma. The case, filed by the Oklahoma attorney general, is a bench trial, and while some view it as an important bellwether of the evidence that will be presented and the likelihood of success of opioid

trials, the scope of the case is significantly narrower than its originally filed version.

Purdue Pharma settled the case in March for a reported $270 million, after which all counts (including, notably, the fraud count) except one alleging public nuisance were dropped against the remaining defendants, Teva Pharmaceutical Industries and Johnson & Johnson. Two days before trial was set to begin, Teva announced that it had reached an $85 million settlement with the Oklahoma attorney general, leaving Johnson & Johnson as the lone remaining defendant. Many of those monitoring the case believe that a large verdict will lead to a flood of settlements around the country in many other cases, though inevitably, a long appeal will also follow.

While the Oklahoma trial will undoubtedly shed some light on the evidence and arguments that both sides will present in future trials, the fact it is a bench trial limits its utility in predicting how opioid trials in front of juries will play out. Were the case a jury trial, the jury selection process alone would likely take several days, maybe even weeks, as the parties attempted to find jurors who have not been directly or indirectly impacted by opioid addiction in states and venues where addiction is rampant.

Beyond that, of course, finding jurors that will be able to sit for long, drawn-out trials will prove challenging. One can safely assume that multiple jurors will be stricken for cause due to biases or hardship, if and when these opioid cases proceed before a jury.

Further, the approach of the attorneys, particularly on the plaintiff's side, will likely be more reserved in the Oklahoma trial than they would be if the trial were proceeding before a jury. A case such as this, where the plaintiff wants to portray a corporate giant as a threat to the community who puts profits over the safety and well-being of consumers, lends itself perfectly to a "reptile theory" approach by plaintiffs attorneys in a jury trial.

That approach is an attempt by plaintiffs attorneys to appeal to the instincts of the average juror to protect themselves, their families and their communities from perceived threats posed by defendants portrayed as careless or indifferent corporate giants. The public nuisance theory that is a common allegation against the defendants involved in the opioid cases is a broad-based, global threat type of claim that fits squarely into the reptile theory approach in jury trials.

Before a judge, however, this approach would likely be less effective, and probably not as tolerated. Thus, while there may be instances where the plaintiffs' attorneys follow the reptile model in the evidence and arguments presented before the judge in Oklahoma, one can expect the case overall to be presented in a more straightforward, less embellished manner than it would be before a jury.

Additionally, by proceeding before a judge rather than a jury, the likelihood that the plaintiffs will score a runaway verdict probably decreases, and Johnson & Johnson likely has a better chance of scoring a defense, or at a minimum less shocking, verdict.

Of course, this is just one of what could be many opioid trials in the coming months and years. In the Northern District of Ohio, where the federal opioid cases are consolidated on a multidistrict litigation docket, the first two test trials have been set for October. Many believe those cases will likely settle before they see a trial date.

Yet the wave of opioid cases being filed around the country continues, with more cases being filed weekly. Just recently, several additional state attorneys general filed cases against Purdue Pharma, bringing the total now to 48 of the 50 states that have filed

lawsuits. The new lawsuits were filed in Idaho, California, Maine, Hawaii, New Jersey, Iowa, Kansas, Maryland, West Virginia and Wisconsin.

Michigan is rumored to be searching for a plaintiff firm to represent it in such a suit. Nebraska has not yet opted to file a case. Most of the new filings name Richard Sackler individually, as the former Purdue Pharma president and a member of the family that owns the company. Some lawsuits additionally name other drug manufacturers or distributors of opioids.

Lawsuits are also being filed by county and municipal plaintiffs, including recent cases filed by Sussex County (New Jersey), Louisa and Madison Counties (Virginia), the city of Rochester (Minnesota), three towns in Cecil County (Maryland), the city of Canton (North Carolina) and Richland County (South Carolina).

Opioid litigation appears to be here to stay, for a while to come. In the approaching weeks and months, those filing, defending and monitoring these cases will have a much better sense of how the evidence and arguments are received, the appellate issues presented by these cases, the verdicts to be expected and how all of these factors impact the settlement values of these complex cases.

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[1] State of North Dakota v. Purdue Pharma LP et al., Case No. 08-2018-CV-01300, Burleigh County, ND, Order Granting Defendants' Motion to Dismiss, p. 9.

[2] Id. at 10.

[3] Id. at 18.

[4] Id. at 19.

[5] Id. at 27.

[6] Id. at 4.