A Primer on Opioid-Epidemic Litigation

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Date : March 7, 2019

Abbe R. Gluck, Ashley Hall, & Gregory Curfman, *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46(2) **Journal of Law, Medicine & Ethics** 351–366 (2018), available on SSRN.

Susan Sontag documented how illness becomes metaphor, wrapped in “punitive or sentimental fantasies.” The bubonic plague is no longer a mere disease but an instrument of wrath and moral judgment on the failings of a community. A popular mythology morphed tuberculosis into a romanticized episode afflicting the reckless, poor, sensual consumed by their repressed passions. Cancer turns into the disease of the capitalistic affluent; AIDS becomes a social category to punishing deviance. In these cultural myths disease expresses and causes character and thus contains moral judgment. Disease becomes shameful, a stigma to hide and wrap in guilt. Sontag argued that such myths can survive irrefutable human experience and medical knowledge. Treating illness as metaphor is obviously dangerous and misguided. Sontag calls on us to de-mystify illness and become resistant to metaphoric thinking.

The illness of our time is the opioid epidemic. We are in the process of characterizing and metaphorizing it. Litigation plays an important role in this process. As the debate about (oh what to call it?) non-party/national/universal/cosmic/high-volume/prospective-repetition injunctions has reminded us, to give something a name is to classify it and with that classification comes conceptual and normative baggage. Opioid litigation similarly continues to be part of a definitional battle. Is this about an epidemic, crisis, loss of moral fiber, white middle-class decline, crime-wave, plague, or something else? Litigation and procedural vehicles lean on these different conceptions and, in turn, shape how we view that thing out there in the world.

I was reminded of the problem of categorization and Sontag’s account when reading *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*. The article is an excellent primer on the role of courts in “impos[ing] blame–and with it, enduring responsibility” for the harm caused by the opioid epidemic.

There is no quick way to describe the despair and destruction brought upon communities by the opioid epidemic, but let me offer three crude reference points: Overdose deaths are higher than deaths from H.I.V., car crashes, or gun violence at their peaks. Hundreds of thousands suffer from opioid dependence and impairment. Many states and counties warn that they are absurdly inundated with opioids. For example, multiple Indiana counties claim that they have more opioid prescriptions than residents. Ohio claims that in 2012 (long before the peak of the opioid epidemic), pharmaceutical companies shipped to Ohio enough opioid doses to supply every last man, woman, and child in the state with 68 pills each.

Gluck et al.’s article is a useful starting point for scholars interested in one of the most shocking public health crises of our time, one that is being litigated in courts across the country. The opioid epidemic is massive, diffuse, and multifaceted, at once nearby and often hidden and remote. Litigation related to the opioid epidemic is complex and constantly evolving. It involves hundreds of cases from around the country, spanning multiple decades, using different procedural vehicles, and raising thorny substantive and procedural questions.

For people not familiar with the twists and turns of this litigation, Gluck et al.’s article offers a valuable guide. Beyond shining a spotlight on this important and perhaps overlooked topic, it makes numerous additional contributions.

First, it provides an overview of the cast of players. The article highlights a changing and expanding cast of plaintiffs and defendants. The illegal purchase of a single OxyContin pill in the hallways of a high school is the endpoint of a long

chain linking pharmaceutical companies, distributors, doctors, pharmacies, and patients to federal regulators, state agencies, local law enforcement, and local harm. Gluck et al. identify the actors in the opioid litigation as well as their substantive claims, defenses, and litigation strategies. The article also provides a useful primer on the numerous difficulties of proving causation and implementing relief.

Second, it provides an account of the history of civil opioid litigation. In a first wave of lawsuits, pharmaceutical companies largely avoided liability, public disclosures, and admissions of wrongdoing by shifting blame to users and prescribing doctors. As the authors point out, "stigma against addiction . . . played a key part in the success of drug manufacturers in defending themselves in these suits." They detail how the first wave of opioid litigation ended when Purdue Pharma agreed to pay $600 million in criminal and civil fines to the federal government and nearly $20 million to 26 states and the District of Columbia; three executives pleaded guilty to criminal charges; and Purdue admitted to misbranding by falsely advertising. This settlement, though big, pales compared to the colossal cost of opioid abuse. A second wave of litigation is under way, predominantly driven by state and local governments with a broader cast of defendants and novel legal claims.

Third, the article provides a helpful and perhaps inevitable comparison between opioid litigation and tobacco litigation. The authors are skeptical whether the former can use the latter as a strategic blueprint, repeat its successes ($250 billion recovered), and avoid its failures (use of settlement funds to compensate for general state budget shortfalls). Tobacco litigation involved fewer defendants, a clearer causal account, and no FDA approval. And in contrast to some opioid use, tobacco, in contrast to some provides no medical benefits.

Fourth, the article is attuned to the pivotal role of procedure. It highlights how class actions in the first wave failed because courts focused on the unique medical history of each user and varying medical providers, thus defeating commonality claims. In contrast, the current wave is dominated by the decision to consolidate hundreds of opioid cases in federal multidistrict litigation under a single judge.

This article is not without flaws, but it accomplishes its goals efficiently and elegantly. It provides a timely and balanced account that is mindful of the practical costs and opportunities of the opioid litigation. Most importantly, the article reminds us about all the work that remains to be done. A rich menu of pressing procedural questions awaits exploration. I hope that Gluck et al.'s article will spark a new generation of procedural scholarship on opioid litigation that will help to de-mystify the underlying epidemic and inoculate us against punitive metaphors and stigma.

Cite as: Roger M. Michalski, *A Primer on Opioid-Epidemic Litigation*, JOTWELL (March 7, 2019) (reviewing Abbe R. Gluck, Ashley Hall, & Gregory Curfman, *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46(2) **Journal of Law, Medicine & Ethics** 351–366 (2018), available on SSRN), https://courtslaw.jotwell.com/a-primer-on-opioid-epidemic-litigation/.