

## After Pharmacy Deals, New Opioid Sellers In Legal 'Bull's-Eye'

By **Jeff Overley and Eric Heisig**

Law360 (November 2, 2022, 11:35 PM EDT) -- Multibillion-dollar settlements with top pharmacy retailers will shift a historic barrage of opioid litigation away from the last of its early targets and toward groups of pharmaceutical sellers and advisers whose business practices and legal defenses have received little attention, according to plaintiffs counsel and court records.

The **preliminary deals** covering CVS Pharmacy and Walgreens — as well as Walmart, according to a source — became public on Wednesday, nearly five years after the formation of multidistrict litigation for thousands of opioid-crisis lawsuits on behalf of local governments and Native American tribes.

It was a milestone moment that effectively closes the books on a bruising and protracted stage of briefing and trials against the primary defendants. With the three drugstore chains poised to bow out, most of the largest companies selling prescription narcotics have negotiated nationwide resolutions. A handful of others went wobbly under the weight of mountainous legal costs and either sought bankruptcy protection or, as in the case of Rite Aid Corp., brokered a **temporary truce** while trying to find their financial footing.

While Wednesday's news was still developing, lawyers for municipalities and tribes were already setting their sights on a new collection of companies. Those companies include regional pharmacy networks operated by grocery store giants, such as Albertsons Cos., The Kroger Co., Meijer Inc. and Publix Super Markets.

Hunter J. Shkolnik of Napoli Shkolnik PLLC, a high-ranking plaintiffs attorney in opioid cases, told Law360 on Wednesday that "these big chains ... have gobbled up regional supermarkets all over the United States" and are now a central focus of the litigation.

"They're in the next round — the bellwether trials — ready to go. So we are addressing them," Shkolnik said. "These defendants are now in the bull's-eye. They sat back and watched, and now it's time for them to step up and take responsibility."

The MDL also includes "second-tier" defendants, which have been on the MDL's sidelines despite facing numerous suits and aren't heading to trial anytime soon. That tier includes Abbott Laboratories, Amneal Pharmaceuticals, Hikma Pharmaceuticals, Indivior PLC, Mylan Inc., Novartis Pharmaceuticals Corp. and its Sandoz Inc. affiliate, and Assertio Therapeutics, formerly known as Depomed.

In September, after those companies filed updates on their litigation stances, Motley Rice LLC co-founder Joe Rice, one of the MDL's three lead plaintiffs lawyers, told Law360 that "**not much progress**" had occurred during several months of initial conversations. On Wednesday, Rice told Law360 that the stasis has persisted and even expanded to talks with the regional pharmacies.

"Still little progress, but it would include pharmacy defendants like Kroger [and] Albertsons," Rice said via email.

Yet another tier of companies, referred to as "non-litigating defendants," filed status reports on Tuesday and Wednesday in response to an order from the MDL's presiding judge. The order sought details on "every case in federal or state court that states claims against [the non-litigating company] involving the manufacturing, marketing, sale, distribution or dispensing of opioids."

Those companies include Collegium Pharmaceutical Inc., Winn-Dixie Stores Inc., Associated Pharmacies Inc., Sun Pharmaceutical Industries Inc., Costco Wholesale Corp., Hy-Vee Inc., Apotex Corp., Target Corp., SuperValu Inc. and Zydus Pharmaceuticals. In their reports, some companies suggested there's little reason for them to even be named in opioid cases.

As one example, Sun Pharmaceutical described itself as "a small participant in the opioid market [that] has never promoted or advertised these medications in the United States."

Andrew Pollis, a professor at Case Western Reserve University's law school in Cleveland, told Law360 on Wednesday that the departure of major defendants will start to raise questions about the MDL's return on investment for plaintiffs counsel. Discovery, briefing and trials are very expensive, and smaller businesses might not be able to pay substantial verdicts or settlements.

"My guess is they're at sort of a junction here, where the plaintiffs have to decide if it's worth expending the resources to pursue these cases against the smaller companies, and the smaller companies have to decide whether it's worth putting up a fight," Pollis said.

Another front is taking shape in a separate opioid MDL that began last year for cases accusing the consulting firm McKinsey & Co. of exacerbating the opioid crisis with its advice to OxyContin maker Purdue Pharma LP and other drug manufacturers. Although McKinsey recently **announced a tentative settlement** with some parties, its deal wouldn't cover suits on behalf of tribes, health insurance payers and infants affected by maternal opioid use.

Moreover, several new and expanded lawsuits have been filed in recent weeks in connection with the McKinsey MDL. Those suits are outlining new allegations related to drug advertising or marketing efforts by Publicis Health LLC, ZS Associates Inc. and Practice Fusion Inc.

On Wednesday, Browne Pelican PLLC managing attorney Matthew Browne, one of the first lawyers in private practice to launch opioid cases against McKinsey, noted that his co-counsel vowed last year to "continue to work to identify all responsible parties."

"Since then, despite intervening settlements, we have never ceased that work," Browne told Law360 via email. "The claims asserted against Publicis, ZS and Practice Fusion are results of that work."

The evolving landscape of opioid litigation has also become murkier in recent months because cases are becoming less centralized. That's happening partly because the Judicial Panel on Multidistrict Litigation **blocked** the transfer of new suits to the original opioid MDL, and partly because the Sixth Circuit **forced** the original MDL's head judge to rule on motions to remand opioid cases out of the MDL.

The decentralization has raised the prospect of new opioid cases advancing under the radar in courts throughout the country, in conjunction with older opioid suits remanded from the MDL. Some of those cases are likely to be waged by the small but significant number of government entities that have balked at nationwide settlements; if those entities take cases to trial and prevail, enormous verdicts are possible.

Ultimately, even if the litigation picture looks increasingly messy, one throughline is that money remains the driving force in most cases, Pollis said. He noted that some components of the overall litigation — including cases involving hospitals, infants with neonatal abstinence syndrome, and **individuals who used painkillers** — haven't been resolved and will entail tricky cost considerations for all sides.

"The general concept is, there is still some amount of money out there yet to be paid over," Pollis said.

The MDLs are In re: National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio, and In re: McKinsey & Co. Inc., National Prescription Opiate Consultant Litigation, case number 3:21-md-02996, in the U.S. District Court for the Northern District of California.

--Editing by Emily Kokoll and Jay Jackson Jr.

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