

MASS TORTS UPDATE

Expert Analysis

Developments in Opioid, Sexual Abuse And Other Notable Litigations

Over 90,000 people alleging sexual abuse while involved with the Boy Scouts of America. More than 100,000 individuals claiming injuries from Purdue Pharma LP due to the opioid epidemic. A total of 246,831 Allergan BIOCELL breast implants recalled in the United States. See also Order at 6, *In re: Allergan BIOCELL Textured Breast Implant Prod. Liab. Litig.*, 2:19-md-2921 (D.N.J. March 19, 2021) (hereinafter “Preemption Order”). Over 4.4 million customers without power across Texas during a cold weather storm. An \$11 billion settlement for 100,000 individuals attributing their non-Hodgkins lymphoma diagnoses to the herbicide RoundUp. When a large corporation or other entities engage in courses of action (or inaction) that harm hundreds or thousands of individuals, “mass tort” litigation inevitably results. FJC, *Manual for Complex Litig.* (4th ed. 2004) at 342-44 (a mass tort emerges “when an event or series of related events injure a large number of people or damage their property”). This column provides a quarterly update on some of the latest developments in these massive, complex cases. This edition discusses the mass tort litigations involving Elmiron, Allergan,

EDWARD E. NEIGER is a co-managing partner at ASK LLP. TROY TATTING is the managing partner of the firm’s mass tort and complex litigation practice. They currently represent thousands of victims of Boy Scout sexual abuse and over 60,000 victims of Purdue Pharma’s opioid products.



By
Edward E.
Neiger



And
Troy
Tatting

Boy Scouts, Purdue and the February 2021 Texas power outages.

The Elmiron Eye Injury Litigation Is Heating Up. An up-and-coming mass tort backed by particularly strong science involves Elmiron (pentosan polysulfate sodium), the only FDA approved oral medication for the

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treatment of chronic bladder pain, known as interstitial cystitis, and the drug’s connection to vision injuries. Wang et al., *Pentosan-Associated Maculopathy: Prevalence, Screening Guidelines, and Spectrum of Findings Based on Prospective Multimodal Analysis*, 55(2) *Can. J. Ophthalmol.* 116, 116 (January 2020). In 2018, researchers from Emory University and the Baylor College of Medicine reported “a previously undescribed and possibly preventable maculopathy related to chronic exposure to [Elmiron].” Pearce

et al., *Pigmentary Maculopathy Associated with Chronic Exposure to Pentosan Polysulfate Sodium*, 125(11) *Ophthalmol.* 1793, 1801 (November 2018). The researchers warned that clinicians should be aware of the visual issues associated with Elmiron use because these conditions “can be mistaken for other well-known macular disorders” *Id.* Subsequent studies have supported the link between Elmiron use and visual harm, resulting in lawsuits which have been consolidated into multi-district litigation before U.S. District Judge Brian Martinotti for the District of New Jersey. *In re Elmiron (Pentosan Polysulfate Sodium) Prods. Liab. Litig.*, 2:20-md-02973 (D.N.J.)

Judge Martinotti is a veteran judicial officer with significant mass tort experience having shepherded major litigations to resolution in both New Jersey federal and state courts. The Elmiron litigation is relatively new and smaller than most mass torts having only 226 filed cases in the MDL as of April 2021. Even so, the court has already set a bellwether trial date for January 2023 and recently allowed for the direct filing of lawsuits into the District of New Jersey MDL No. 2973, which often results in a significant increase in filed cases.

Plaintiffs Survive Critical Motions To Dismiss in the Allergan Breast Implant MDL. Judge Martinotti is also handling high-profile litigation involving the recall of hundreds of thousands of Allergan BIOCELL textured breast implants. According to the FDA, the recall was the result of the “risk of breast

implant-associated anaplastic large cell lymphomas (BIA-ALCL),” a cancer of the immune system. The FDA’s own analysis found an approximately 600% increased risk of BIA-ALCL with textured implants and that “distribution of Allergan’s BIOCELL textured breast implants would likely cause serious, adverse health consequences, including death, from BIA-ALCL.”

Plaintiffs scored a significant win on March 19, 2021, surviving Allergan’s motions to dismiss their claims, largely on preemption grounds. Preemption of state causes of action is often a significant hurdle for injured individuals suing medical device manufacturers. Manufacturers often argue that plaintiffs’ state law causes of action are preempted by federal law, for example, the Medical Device Amendments, which provide rules for the approval of safe and effective devices. Preemption Order at 13-15. The 121-page opinion scrutinized plaintiffs’ claims ultimately finding that the majority survive preemption and defendants’ motions to dismiss. With this significant ruling, we expect a number of additional plaintiffs to step forward and that the number of filed cases will grow in the near future. As of April 2021, there were 603 actions pending in the MDL.

Bankruptcy Mass Torts Involving Purdue’s Opioids and Boy Scout Sexual Abuse Moving in Different Directions. Occasionally mass tort matters end up in bankruptcy proceedings. This has been the case in two highly publicized matters—allegations of sexual abuse within the Boys Scouts and claims of individuals harmed by the opioid epidemic by Purdue Pharma. In these matters, the tort claimants become unsecured creditors of the estate attempting to emerge from bankruptcy. In order for the company to emerge successfully, the tort claimants must be compensated in order to extinguish their claims. Sometimes, companies facing massive tort liabilities have no choice but to claim bankruptcy. Other times, companies may do so strategically. In most situations, tort claimants may not receive the full compensation they would have had their cases not been within bankruptcy proceedings.

Creditor demands, for example, often surpass the value of the distressed, bankrupt company. Nevertheless, significant compensation may be available for tort claimants when a bankrupt company has significant assets or insurance coverage.

In the Purdue bankruptcy, a number of parties have engaged in hard-fought negotiations to develop an acceptable Chapter 11 plan. Individual personal injury plaintiffs, states, municipalities, hospitals, and others impacted by the opioid epidemic have all sought compensation from Purdue and the billionaire Sackler family—the company’s current owners. Court filings suggest the reorganization plan may be worth more than \$10 billion, with at least \$700 million currently earmarked for individual personal injury victims.

In the Boy Scout bankruptcy proceedings, the parties continue to engage in mediation for the compensation of approximately 90,000 victims alleging sexual abuse. Recent media reports have outlined certain proposed settlements with insurers and planned compensation distributions for abuse survivors. Victim advocates, survivors, and their attorneys, including the authors of this article, have widely panned these proposals as woefully inadequate. These proposals would provide paltry compensation for a sexual abuse survivor of only a few thousand dollars when in reality a sexual abuse settlement or verdict may result in millions of dollars in compensation to a survivor. Absent significant developments in the near future, the parties may engage in significant litigation or estimation proceedings over the next year.

Don’t Mess With Texas? The Power Outage Claims Explosion. Finally, and perhaps unfortunately, the saying may be true, at least in the mass tort world, that “everything is bigger in Texas.” With 4.4 million Texans without power due to an unseasonably cold winter storm, litigation has exploded in the Lone Star State. The Texas power system operates on its own power grid, separate from the rest of the United States, making back up power unavailable

in emergencies—which is exactly what happened to millions of Texans the week of Feb. 13, 2021. The resulting economic loss, property loss, human suffering, and even death has been projected to amount to losses of \$197 billion to \$295 billion. U.S. Multi-Regional Impact Assessment Systems, The Perryman Group (“preliminary estimates of the economic impact of the February 2021 Texas freeze”).

Predictably, a number of lawsuits have been filed against the Electric Reliability Council of Texas (ERCOT) alleging the non-profit failed to plan for cold weather despite multiple warnings, leading to the collapse of its power grid, resulting in widespread blackouts, price gouging for alternative sources of energy, broken pipes, business interruption, and even hypothermia and loss of life. See Morgan Winsor, “ERCOT faces class-action lawsuit, resignations in wake of Texas power outages,” ABC News (Feb. 24, 2021); see also Ryan Miller, “Texas woman whose electric bill soared over \$9,000 files class-action lawsuit seeking \$1 billion from Griddy,” USA Today (Feb. 25, 2021). Despite all the damage done, redress via lawsuits might prove difficult as ERCOT is attempting to hide behind governmental immunity to protect it from the dozens of lawsuits it faces. ERCOT, overseen by the Texas Public Utility Commission, is arguing it is an arm of the State government, making it immune from suit. These Texas power outage cases are a recent, fast-developing area of complex litigation. We expect a number of twists and turns as case law and the underlying facts continue to develop.