

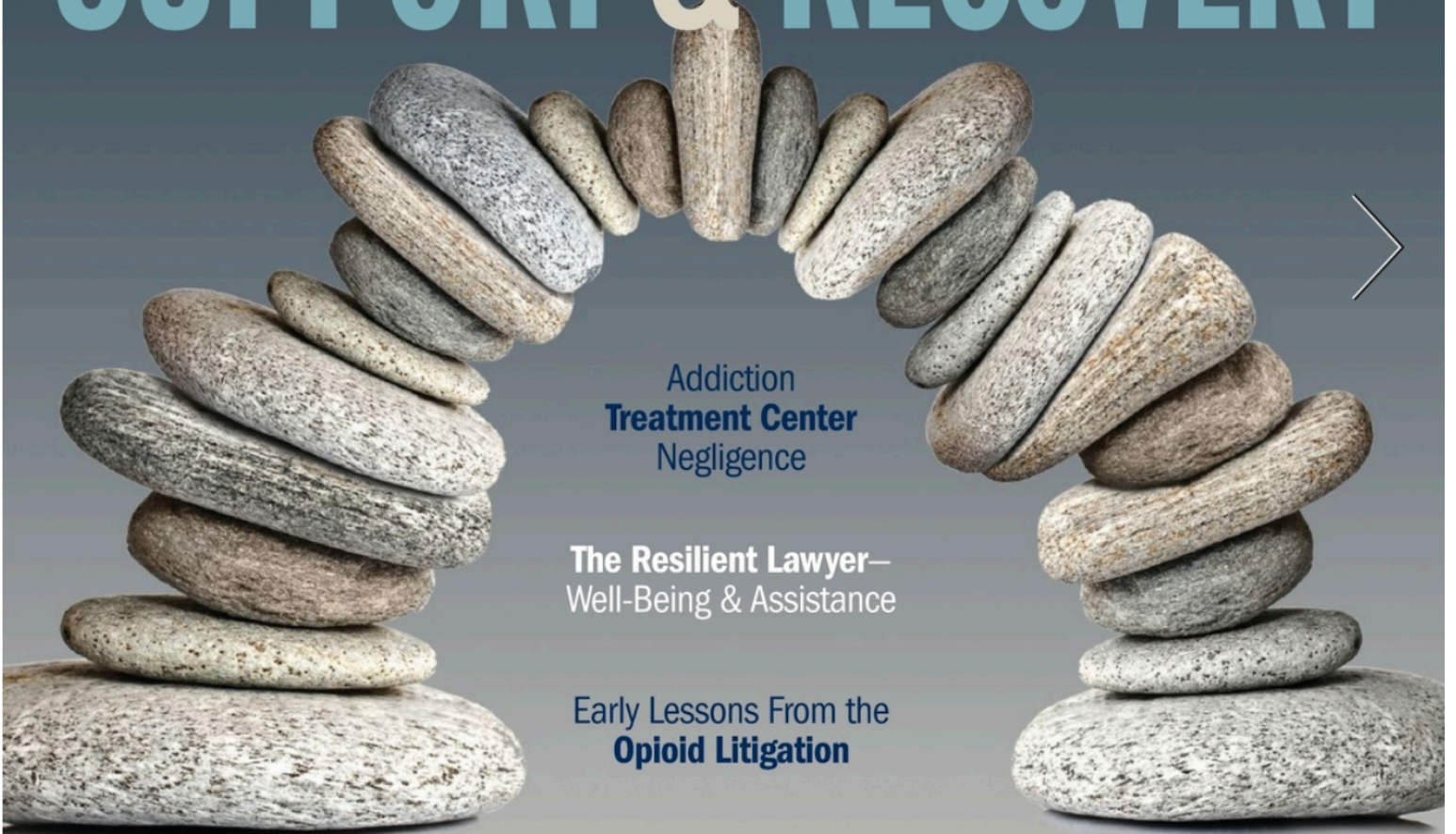
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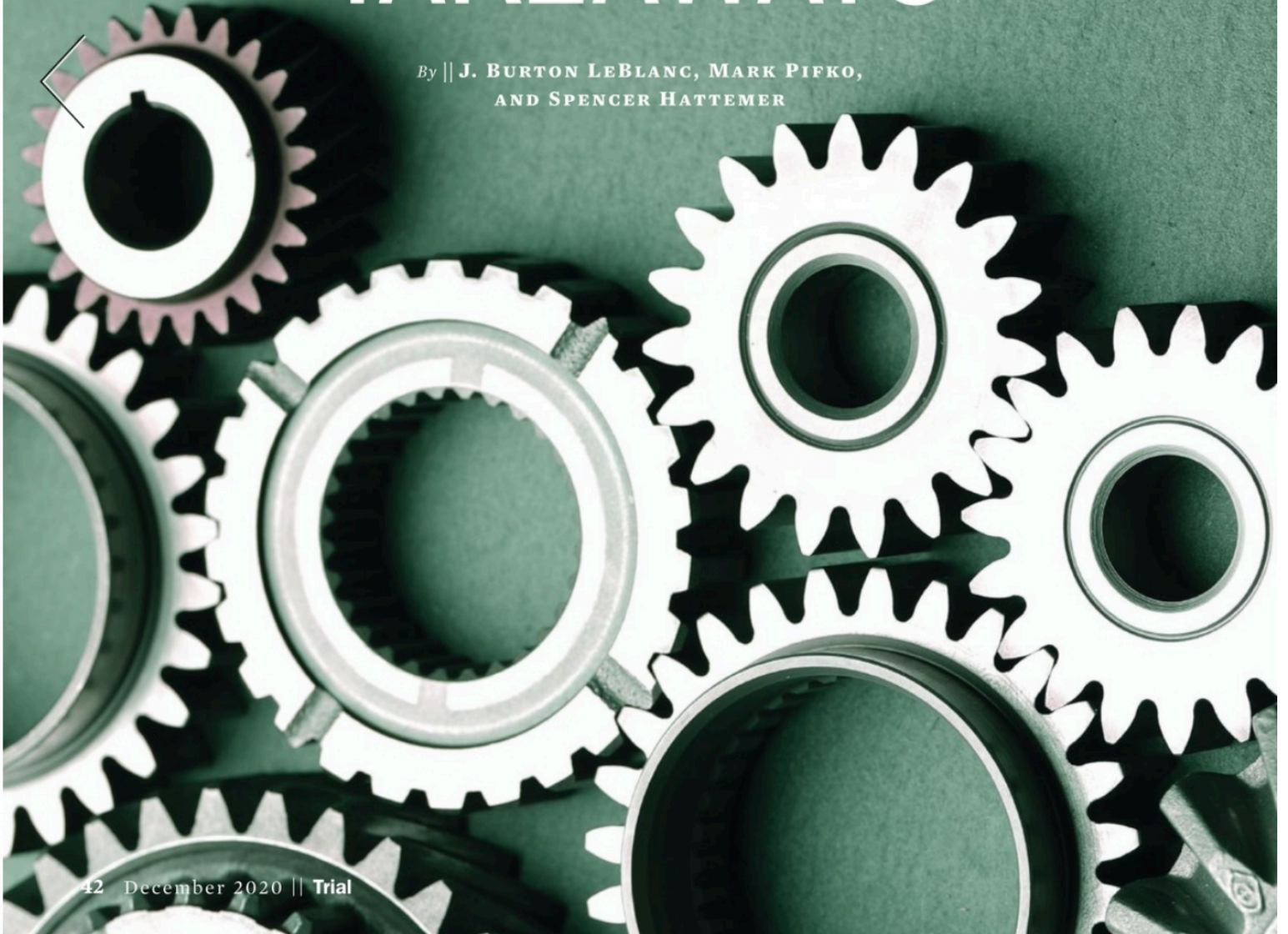
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EARLY OPIOID LITIGATION TAKEAWAYS

By || J. BURTON LEBLANC, MARK PIFKO,
AND SPENCER HATTEMER



Here are some quick tips to help untangle a complex litigation with many moving parts.

The opioid multidistrict litigation (MDL) has been called the “most complex in American legal history.”¹ The MDL plaintiffs include approximately 2,500 cities, counties, tribes, labor unions, and other entities—and that’s just in federal court. State attorneys general and other entities, such as hospitals, are pursuing claims in state courts. The defendants in these cases include opioid distributors, manufacturers, dispensers, and prescribers (and some fall into more than one category).² Many of these defendants are massive corporations—the distributor defendants alone include three of the Fortune 500’s top 16 companies.³

The theories of liability are complex and vary from defendant to defendant and jurisdiction to jurisdiction—ranging from creating a public nuisance to false advertising to violations of federal and state controlled substance laws.⁴ Some claims, such as allegations of racketeering, seek joint and several liability against defendants who serve different roles in the chain of distribution. Jurisdictional issues are equally complex and varied. Some plaintiffs are in federal court based on diversity alone, while others are there because their claims raise federal questions, such as Racketeer Influenced and Corrupt Organizations Act violations. As the cases have moved through discovery and toward bellwether trials, the complexity has only increased, with cases splintering out back to their transferor courts.

The opioid epidemic is still raging and the importance of pursuing justice for the plaintiffs has never been greater. In 2018 and 2019, for instance, more than 130 Americans died from opioid-related drug overdoses every day.⁵ The White House Council of Economic Advisers estimated that the cost of the opioid epidemic exceeded \$2.5 trillion dollars just for the four-year period of 2015 to 2018.⁶

Now, the pandemic is exacerbating the opioid epidemic. Treatment centers have shut down or moved to telemedicine, and social isolation has increased during quarantine. There has been an 18% spike in suspected overdoses since stay-at-home orders were implemented in mid-March.⁷ At the same time, COVID-19 has further strained state and local government resources, shrinking tax bases and overloading health departments, hospitals, and emergency responders.

Our experience in the litigation so far has garnered some takeaways for other complex MDLs and mass torts in pharmaceutical, environmental, and other practice areas.

Harness special masters. MDL Judge Dan Polster has maintained an urgency to move these cases forward given what is at stake for the people and communities impacted by the opioid crisis—he requires tight briefing deadlines and releases rulings sometimes just days after an issue is briefed. Special masters for each of the bellwether trials hold regular discovery conferences and are ready to step in to resolve disputes quickly.

During the peak of the discovery period in the MDL, weekly meetings were held with the special masters, and disputes were promptly resolved. These weekly meetings and prompt resolutions allowed both sides to move through issues so that litigants did not get stuck. For example, if, as a result of a ruling from the special master, you knew you were not going to get additional documents you thought you were entitled to, you could promptly proceed with depositions, rather than wait for a traditional motion to compel process to run its course, which could take a month or more. Using a special master or establishing a procedure to hold regular meetings with a magistrate judge or discovery referee indisputably moves cases along. However, it is costly, and in smaller cases, you may not have a sufficient number of issues arise to justify weekly or biweekly meetings.

Avoid silos. Notwithstanding some COVID-related delays, MDL bellwether trials are approaching over the coming months in California, Illinois, Ohio, Oklahoma, and West Virginia, as are state court trials in New York, Washington, and West Virginia. The trials have differing claims, defendants, state laws, and discovery time lines. The West Virginia MDL bellwether trial is limited to a nuisance claim brought by Cabell County and the City of Huntington against the three distributors.⁸ The Ohio MDL bellwether case covers claims related to dispensing and distribution.⁹

However, even as claims are severed and cases remanded, it is critical to work in close coordination. For example, while the West Virginia trial will not include a racketeering claim, many of the same facts apply to joint liability under state law. This affects discovery because documents from each defendant can impact the cases against all of the defendants, so it is important that teams communicate regularly.

Similarly, because the defendants include companies at each level of the opioid supply chain, documents in each production may be relevant to claims against more than one group of defendants. For example, an email between defendants A and B may be produced by defendant B only but would be relevant to the liability case against both defendants. It is critical that the teams working up the cases against defendants A and B discuss their findings. Discovery and depositions will be ongoing in some cases even as others go to trial. Close coordination ensures strong processes for gathering and distilling facts and sharing findings.

Additionally, close coordination can ensure defendants produce thorough and complete discovery. As discussed above, relevant documents include communications, orders, or other interactions between defendants up and down the opioid supply chain or with third parties such as the Drug Enforcement Administration. Each of these documents should be in multiple parties' productions. Also, you may find references to reports or documents about one defendant in another defendant's production. Using all of the available information, you can identify deficiencies. If items have not been produced, it could be grounds for sanctions or, at least, provide specific proof that a party's production needs to be supplemented.

Form strong client partnerships. In litigation with so many different types of plaintiffs, the parties and their counsel need to be full partners with respect to discovering the facts and forming strategic and tactical decisions. The clients in these cases bring their expertise as elected officials, local leaders, and lawmakers. City mayors and county commissioners oversee solicitors' offices, law enforcement agencies, and health departments. Many attorney general clients have significant institutional knowledge and experience from the tobacco litigation



Close coordination among plaintiff counsel can ensure defendants produce thorough and complete discovery.

and other MDLs. If new county commissioners, mayors, and attorneys general are elected during the litigation, ensuring the partnership remains strong and being ready to adapt the strategy to align with new priorities are key.

Think broadly about remedies. Remedies vary by jurisdiction and claim—with some allowing punitive and total damages and others only abatement. However, devising a plan for abating the opioid epidemic may be even more difficult than calculating its harm. The nature of addiction means that even if defendants never sold another opioid pill, the problem will not go away. Without treatment, even more of those suffering from addiction might feel compelled to seek out illegal alternatives such as fentanyl or heroin—perhaps leading to an increase in deadly overdoses. Children of parents


who overdosed would still need foster care and support. Law enforcement and emergency responders would still be overextended. Any abatement plan will need to be long-term, comprehensive, and multi-pronged to have a chance at slowing the opioid epidemic's ongoing harm. Equally important is nonmonetary relief that will ensure responsible practices for prescribing and distributing opioids in the future.

Resolution will affect multiple plaintiffs. Even if clients and defendants can agree on a resolution, procedural barriers to settlement exist. Thousands of cities and counties have cases consolidated through the MDL, but thousands more have been harmed by the opioid epidemic. Determining allocation requires resolving tough questions. How much more should the hardest hit areas receive? How should population size factor into the equation? State, city, and county clients cover the same geographic areas—who should have control over the funds? These types of questions may apply in other complex litigation with diverse groups of plaintiffs, so considering these issues early and finding agreement are crucial.

And to ensure that an MDL settlement has sufficient finality, states may need to settle their claims with the defendants at the same time as the MDL plaintiffs. To reach a combined settlement, states and localities will need to agree on allocation and control of funds, which raises concerns over home rule, efficiency, and fairness.

Every day, the opioid litigation continues to evolve and change. In the midst of writing this article, bellwether trial dates in state and federal courts were continued. As part of a deal to resolve opioid cases, generic manufacturer Mallinckrodt filed for bankruptcy in October, making it the third company involved in the litigation to do so.¹⁰ And litigation against the pharmacy

defendants is intensifying as discovery of the dispensing issues heats up.

With so many interested parties, nothing in these cases happens quickly or easily, but, hopefully, by working together the lawyers and clients involved can obtain a meaningful resolution. COVID-19 has only exacerbated the opioid crisis, and resources are needed now, more than ever. 



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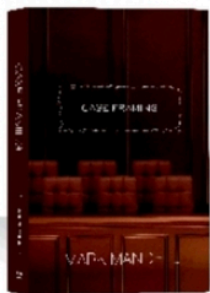
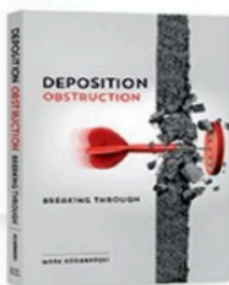
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NOTES

1. Jan Hoffman, *What to Know About the Landmark Opioid Trial Starting Monday*, N.Y. Times, Oct. 20, 2019, <https://www.nytimes.com/2019/10/20/health/opioids-trial-cleveland.html>.
2. *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804, MDL No. 2804 (N.D. Ohio transferred Dec. 12, 2017).
3. Fortune, *Fortune 500*, <https://fortune.com/fortune500/2020/search/> (McKesson, AmerisourceBergen, and Cardinal Health).
4. See *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804, MDL No. 2804.
5. U.S. Dep't Health & Human Servs., *What Is the U.S. Opioid Epidemic?*, <https://www.hhs.gov/opioids/about-the-epidemic/index.html>.
6. Council of Econ. Advisers, *The Full Cost of the Opioid Crisis: \$2.5 Trillion Over Four Years*, Oct. 28, 2019, <https://www.whitehouse.gov/articles/full-cost-opioid-crisis-2-5-trillion-four-years/>; see also Council of Econ. Advisers, *The Underestimated Cost of the Opioid Crisis*, Nov. 2017, <https://tinyurl.com/yd2bcrag>.
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8. "Track Two" cases: *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 3:17-cv-01362, MDL No. 2804 (S.D. W. Va.); *Cabell Cty. Comm'n v. AmerisourceBergen Drug Corp.*, No. 3:17-cv-01665, MDL No. 2804 (S.D. W. Va.).
9. "Track One-B" cases: *Cty. of Summit v. Purdue Pharma L.P.*, No. 18-op-45090, MDL No. 2804 (N.D. Ohio); *Cty. of Cuyahoga v. Purdue Pharma L.P.*, No. 17-op-45004, MDL No. 2804 (N.D. Ohio); see also "Track Three" cases: *Cty. of Lake v. Purdue Pharma, L.P.*, No. 1:18-op-45032, MDL No. 2804 (N.D. Ohio); *Cty. of Trumbull v. Purdue Pharma, L.P.*, No. 1:18-op-45079, MDL No. 2804 (N.D. Ohio).
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