



# VERDICT

Volume 2020-2021 - Issue 2

## Oklahoma v. Purdue Pharma: The Beginning of the End?



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“The most depraved criminals are often the dispensers of these habit-forming drugs.”<sup>1</sup> Oklahoma Attorney General, Mike Hunter, started his 134-paragraph Complaint against drug manufacturers that included Purdue Pharma, Cephalon, and Johnson & Johnson, with a century-old quote that succinctly and clearly set out what direction the lawsuit would take before even alleging a single cause of action. Filed in Cleveland County, Oklahoma, on June 30, 2017, the *OK v. Purdue Pharma, et al.* lawsuit surprised and shocked drug manufacturers, doctors, patients, and lawyers alike. The State of Oklahoma finally did what other states had only dreamed of – publicly air the misconduct and “dirty laundry” of drug manufacturers who had been pushing their highly addictive opioids for decades. But would the lawsuit fall flat on its face? Or had the opioid crisis become such a national epidemic that drug manufacturers would finally be forced to change their business practices?

Purdue Pharma (hereinafter “Purdue”) first introduced OxyContin to the market in 1996, initially intended for cancer pain and end-of-life care. However, according to the Complaint, it was not long before Purdue began pushing the drug on doctors for ailments and pain other than its original intended use. While doctors have discretion to prescribe medications beyond their approval (otherwise known as “off-label”), drugmakers, such as the defendants in the lawsuit, are much more limited and may only market their products for the specific ailments approved by regulators.<sup>2</sup> The Complaint focused on the illegal marketing of the opioids in which Purdue and its co-defendants actively engaged. Purdue allegedly implemented training that went so far as to instruct sales representatives to tell doctors OxyContin “is virtually non-addicting.”<sup>3</sup>

Purdue instituted a bonus system for its sales representatives, designed to encourage “maximum OxyContin prescriptions” and in 2001 paid out \$40 million in bonuses.<sup>4</sup> The company began targeting primary care physicians rather than pain specialists.<sup>5</sup> The Complaint alleges:

Defendant Purdue also relied on several types of branded items to promote its products including hats, toys, coffee mugs, and even a pen that had a conversion chart attached to it allowing a physician to calculate dosages to convert a patient from other opioid pain

relievers to OxyContin. In other words, Defendant Purdue treated the marketing of a Schedule II controlled substance as if it were peddling paper products.<sup>6</sup>

Co-defendant, Johnson & Johnson, which contracted with poppy farmers in Tasmania, is estimated to at one point have supplied 60% of the opiate ingredients that drug companies used for opioids.<sup>7</sup> Janssen Pharmaceuticals (hereinafter “Janssen”), a J&J subsidiary, makes its own opioids – including a pill whose rights it sold in 2015 for over \$1 billion (Nucynta) and a Fentanyl patch that it still produces.<sup>8</sup> The lawsuit honed in on the marketing of Nucynta, alleging that Janssen<sup>9</sup> made unsubstantiated representations that the medication was appropriate for broader pain conditions than indicated.<sup>10</sup>

The Complaint also chronicled how the Purdue and Janssen defendants provided false scientific support for their misrepresentations by paying doctors, which the Complaint referred to as “Key Opinion Leaders,” to publicly advocate opioids as an effective treatment for chronic pain while downplaying the risks of addiction and abuse.<sup>11</sup> “By operating through [Key Opinion Leaders], Defendants added perceived legitimacy and/or impartiality to their misrepresentations regarding opioids.”<sup>12</sup> The Complaint referred to two Key Opinion Leaders by name – Dr. Russell Portenoy, former Chairman of the Department of Pain Medicine and Palliative Care at Beth

Israel Medical Center in New York, and Dr. Lynn Webster, former Chief Medical Director of Lifetree Clinical Research, a pain clinic in Utah.<sup>13</sup> Both Drs. Portenoy and Webster have since acknowledged several of the misrepresentations they made with regard to opioids and addiction were false and unsupported.<sup>14</sup>

And of course the Complaint described the massive profits OxyContin generated for the defendants, including a significant allocation of public funds. Sales of OxyContin alone have reportedly generated more than \$35 billion in revenue for Purdue since 1996.<sup>15</sup> From 2007 to 2017, Purdue submitted over 95,000 prescriptions for reimbursement to the Oklahoma Health Care Authority, on behalf of the Oklahoma Medicaid system, for the opioids manufactured by Purdue.<sup>16</sup> The Oklahoma Health Care Authority, as of June 2017, had paid just shy of \$50 million for the Purdue opioids.<sup>17</sup>

Tired of seeing the havoc and toll the opioid epidemic had wreaked on his state, AG Hunter filed the lawsuit in June 2017, and promptly sent drug manufacturers into a frenzy and seized the national public discourse. Included in the Complaint were causes of action for Medicaid False Claims, Medicaid Program Integrity, Consumer Protection, Public Nuisance, Fraud (Actual and Constructive) and Deceit, and Unjust Enrichment. Counts A and B accused the defendants of submitting false claims to the state Medicaid program. Count C, brought under the Oklahoma Consumer Protection Act, alleged the defendants engaged in deceptive trade practices and made misrepresentations and omissions in marketing their opioids that deceived or could reasonably be expected to deceive or mislead consumers.<sup>18</sup> In that regard, the defendants were accused of knowingly making false or misleading representations as to the characteristics, ingredients, uses, and benefits of their respective

opioids by downplaying the risks of addiction and abuse, overstating the efficacy, and misrepresenting the medical necessity of the opioids.<sup>19</sup>

Count D, Public Nuisance, alleged the opioid epidemic, created by the defendants, constituted a public nuisance in that it affected entire communities, neighborhoods, and people.<sup>20</sup> Fraud (Actual and Constructive) and Deceit, Count E, indicated the defendants made false representations to healthcare providers working for Oklahoma and/or omitted material facts regarding the risks, efficacy, and medical necessity of the opioids, which assertions defendants knew were false, were made recklessly without knowledge of the truth, and/or had no reasonable ground for believing such assertions.<sup>21</sup> Lastly, Count F, Unjust Enrichment, alleged:

For years, Defendants have peddled their opioids on the basis of false claims regarding the drugs' addictiveness and effectiveness and, in doing so, have siphoned millions of dollars from the State's coffers into their corporate bank accounts. While many Oklahomans' lives are ravaged by opioid abuse and addiction, Defendants have lined their pockets with State monies paid for opioid prescriptions that, but for Defendants' deceptive marketing scheme described herein, would never have been prescribed.<sup>22</sup>

The "Prayer for Relief" included requests for actual damages, penalties, injunctions, punitive damages, attorney's fees, and a "disgorgement of defendants' ill-gotten gains," among other things.<sup>23</sup>

The defendants predictably filed a Motion to Dismiss based on preemption, arguing there could be no liability as a matter of law for alleged past misrepresentations in marketing because those statements

were consistent with FDA-approved labeling and labeling decisions. Judge Thad Balkman denied the Motion and found the State had sufficiently stated its claims except for the cause of action under the Oklahoma Consumer Protection Act, which he dismissed with prejudice.<sup>24</sup> Thereafter, the parties entered into a Stipulation extending the defendants' Answer date, and limiting the defendants' ability to remove the case to Federal Court.<sup>25</sup> Despite the Stipulation, Purdue removed the action, arguing that federal question jurisdiction existed because the State's answer to an Interrogatory revealed that the lawsuit involved state law claims inextricably tied to substantial disputed federal questions.<sup>26</sup> The State filed a Motion to Remand, arguing the Court had already ruled the claims did not implicate federal issues when it denied the Motion to Dismiss.<sup>27</sup> U.S. District Judge Vicki Miles-LaGrange remanded the action, noting the case did not satisfy the *Grable*<sup>28</sup> principles for federal question jurisdiction and agreeing with the State that the claims did not "necessarily raise" a federal issue.<sup>29</sup>

Back in Oklahoma State Court, the case marched on, with a trial date slated for May 2019. Then in late March 2019, the unthinkable happened. Purdue agreed to settle the claims against it for \$270 million. The settlement came just one day after the Oklahoma Supreme Court denied Purdue's emergency appeal for a delay of the trial date.<sup>30</sup> The monster settlement faced backlash and criticism from Oklahoma legislators who argued the money should have been deposited into the state's treasury where lawmakers would have then determined how it was spent. Instead, AG Hunter and Purdue agreed that \$200 million of the settlement would go directly towards establishing a National Center for Addiction Studies and Treatment at Oklahoma State University. The remaining \$70

million was distributed to local governments and covered legal fees.

Days before the May 2019 trial was set to begin, Teva Pharmaceuticals settled its claims with the State as well for \$85 million.<sup>31</sup> As such, the case proceeded against Johnson & Johnson, and in August 2019, following a two-month bench trial, Judge Thad Balkman ordered J&J to pay \$572 million.

The sole cause of action against Johnson & Johnson stemmed from a public nuisance law – typically applied in cases where something interferes with a right common to the general public, such as roads, waterways, or other public areas. Oklahoma’s public nuisance statute was considered broad, and the state argued J&J substantially interfered with public health in its role in the opioid epidemic.<sup>32</sup> Judge Balkman concluded that Oklahoma’s nuisance law extended beyond the regulation of real property, and encompassed the corporate misconduct of the Johnson & Johnson defendants.<sup>33</sup> Specifically, he noted that the State had “sufficiently shown that [Johnson & Johnson] pervasively, systemically and substantially used real and personal property, private and public, including the public roads, buildings and land of the State of Oklahoma, to create this nuisance,” including through a cadre of sales representatives, speakers, and direct marketing ploys spreading deceptive messages throughout the state.<sup>34</sup>

Judge Balkman further concluded that the First Amendment did not protect Johnson & Johnson’s misleading messages as they were commercial in nature and thus not protected speech.<sup>35</sup> The original award was ultimately reduced to \$465 million after defense attorneys pointed out math errors in the Judge’s original award.<sup>36</sup> The award has been appealed, with attorneys for Oklahoma arguing that Judge

Balkman should maintain jurisdiction over the case and annually review whether the public nuisance has been resolved, and Johnson & Johnson arguing that the specific opioids manufactured by the company could not have single-handedly caused Oklahoma’s high rates of addiction and deaths from overdose.<sup>37</sup>

The *OK v. Purdue Pharma, et al.* lawsuit was in the nation’s spotlight for a number of reasons: it was novel, the stakes were huge, and it was personal. In 2020, it would be difficult to find a single person who has not been touched by the opioid crisis in some way or another. Nearly 400,000 people in the United States died of opioid overdoses between 1999 and 2017.<sup>38</sup> While Purdue and Johnson & Johnson were forced to pay into addiction treatment and research as part of the landmark award, the lawsuit’s lasting effects on the opioid crisis remains to be seen. Doctors, patients, and the public know the highly addictive qualities of OxyContin and other opioids, and sales representatives would be foolish to suggest otherwise. AG Hunter paved the way and provided a blueprint for other jurisdictions to follow in combating the opioid epidemic. More than 1,600 lawsuits have been consolidated in a federal court in Northern Ohio, and claims against the billionaire Sackler family (owners of Purdue) have been filed in Massachusetts. The fight is surely not over, but has only just begun. ♦

1 Editorial Comment, *American Medicine*, 1915, 21 (O.S.), 10 (N.D.) (November 1915): 799-800 (discussing spread of narcotic drug addiction).

2 Feeley, Jef, “Purdue Pharma Reaches Deal to Settle Oklahoma Opioid Case,” *Bloomberg*, (March 25, 2019). \

3 See Complaint, ¶53. 4 *Id.* at ¶55.

5 *Id.*

6 *Id.*

7 Hoffman, Jan, “Johnson & Johnson Ordered to Pay \$572 Million in Landmark Opioid Trial,” *The New York Times* (August 26, 2019).

8 *Id.*

9 The Complaint referred to Janssen Pharmaceuticals and Johnson & Johnson collectively as “Janssen Pharmaceuticals.”

10 See Complaint, ¶53.

11 *Id.* at ¶58-59.

12 *Id.* at ¶59.

13 *Id.* at ¶60-61.

14 *Id.* at ¶62.

15 *Id.* at ¶21.

16 *Id.* at ¶35.

17 *Id.*

18 *Id.* at ¶105.

19 *Id.* at ¶107.

20 *Id.* at ¶118.

21 *Id.* at ¶122.

22 *Id.* at ¶131.

23 See Complaint.

24 Judge Thad Balkman Order (12/06/17).

25 U.S. District Judge Vicki Miles Order (08/06/18).

26 *Id.* at 3.

27 *Id.* at 4.

28 *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 US 308 (2005).

29 U.S. District Judge Vicki Miles Order (08/06/18), page 9.

30 Bebinger, Martha, “Purdue Pharma Agrees to \$270 Million Opioid Settlement With Oklahoma,” NPR (March 26, 2019).

31 Fortier, Jackie, “Here’s What Happened to \$829 Million Oklahoma Was Awarded To Treat Opioid Addiction,” *KGOU* (January 16, 2020).

32 Hoffman, Jan, “Johnson & Johnson Ordered to Pay \$572 Million in Landmark Opioid Trial,” *The New York Times* (August 26, 2019).

33 Judge Thad Balkman Order (11/21/19), pages 22-23.

34 *Id.* at 23.

35 *Id.* at 28.

36 Fortier, Jackie, “Here’s What Happened to \$829 Million Oklahoma Was Awarded To Treat Opioid Addiction,” *KGOU* (January 16, 2020).

37 *Id.*

38 Bernstein, Lenny & Katie Zezima, “Purdue Pharma, state of Oklahoma reach settlement in landmark opioid lawsuit,” *The Washington Post* (March 26, 2019).

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