



OFFICE OF THE WINONA COUNTY ATTORNEY

KARIN L. SONNEMAN – COUNTY ATTORNEY

December 2, 2017

To: Winona County Board
Ken Fritz- County Administrator
Maureen Holte- Assistant County Administrator
Ron Ganrude- Winona County Sheriff

From: Karin L. Sonneman

Re: Opioid Litigation

I. INTRODUCTION

In response to questions some of you have raised to me about the opioid litigation that some Minnesota counties have undertaken and are currently considering, I have prepared this memorandum to answer some of those questions, and to recommend that Winona County commence civil litigation against opioid drug manufacturers and/or wholesale distributors. Also, I am sure you will hear about the opioid litigation at the Association of Minnesota Counties (AMC) conference next week, so I wanted you to have some background about the litigation if you attend the AMC conference.

More than 60 similar lawsuits have been filed by states, counties, and cities around the United States. Several Minnesota counties, including Hennepin, Ramsey, Dakota, and St. Louis, recently announced at a press conference on November 30, 2017, that they are going forward with this litigation. This litigation has important similarities to the tobacco litigation by state attorneys general in the mid-1990s, in that it seeks to hold manufacturers responsible for their misconduct related to opioid marketing and to hold distributors responsible for their misconduct related to improperly oversupplying portions of the market. Unlike the tobacco litigation, any relief obtained would directly serve Winona County and its residents. No lawsuit has been filed to date by any governmental entity in Minnesota, although several Minnesota counties and cities are currently considering such action and those counties I named above, have taken significant steps toward filing lawsuits by engaging outside counsel to represent their respective counties.

II. FACTUAL BACKGROUND

As you know, state and local governments around the United States have been grappling with the opioid epidemic for several years, as the rates of heroin and opioid addiction, overdoses, and deaths have steadily increased. In 2016, there were 153 accidental opiate-related deaths in Minnesota, compared with 97 in 2015. Many different government agencies within Winona County, across Minnesota, and across the United States have implemented different strategies to address opioid use and misuse. These strategies range from emergency responses by local law enforcement, such as distributing naloxone, to intervention and treatment programs, to prevention and public health efforts, such as the recent work of Medical Examiner's offices in identifying carfentanil, a powerful opioid, as the cause of multiple overdose deaths.

In addition to these traditional government responses, numerous cities, counties, and states around the country have sued the companies who were responsible for either manufacturing prescription opioids or distributing those opioids to pharmacies, as another strategy for tackling this epidemic. In general, the

lawsuits allege that the manufacturers (such as Purdue Pharma, the maker of OxyContin) used deceptive marketing tactics to convince physicians that opioid painkillers could be prescribed for chronic pain without any risk of addiction or abuse. The lawsuits allege that these misrepresentations vastly expanded the use of opioids in the United States. Several lawsuits also allege that the wholesale distributors (such as McKesson Corporation) breached their duties to monitor, detect, and report suspicious orders of prescription opioids, which allegedly resulted in an oversupply. In fact, both Purdue Pharma and McKesson reached settlement agreements with the U.S. Department of Justice in recent years, paying hundreds of millions of dollars in fines to resolve either criminal charges (Purdue) or civil claims (McKesson). The role of these manufacturers and distributors in fueling the opioid crisis has received intense media attention in recent months. In late October, the U.S. Department of Health and Human Services declared the opioid epidemic to be a public health emergency. President Donald Trump made the same declaration in a presidential memorandum on October 26, 2017 and announced “new steps to combat what he described as the worst drug crisis in U.S. history. President Trump's declaration, which will be effective for 90 days and can be renewed, will allow the government to redirect resources in various ways and to expand access to medical services in rural areas. But it won't bring new dollars to fight a scourge that kills nearly 100 people a day.” *Quote from the Chicago Tribune, October 27, 2017.*

III. POTENTIAL CLAIMS AND RELIEF

Several Minnesota counties and cities are now considering whether to commence similar litigation against the opioid drug manufacturers and/or distributors. Under Minnesota law, the potential claims by counties and cities could include statutory claims under the Minnesota Prevention of Consumer Fraud Act (Minn. Stat. § 325F.68 et seq.), the Minnesota Unlawful Trade Practices Act (Minn. Stat. § 325D.09 et seq.), the Minnesota Deceptive Trade Practices Act (Minn. Stat. § 325D.43 et seq.), the Minnesota False Statement in Advertising Act (Minn. Stat. § 325F.67), and/or the Minnesota False Claims Act (Minn. Stat. Ch. 15C). The potential claims could also include common law claims for fraud or misrepresentation, negligent misrepresentation, or negligent failure to warn, as well as public nuisance and unjust enrichment. The relative strengths or weaknesses of each claim would depend to some extent on each city or county's particular factual circumstances. Self-insured cities or counties could also consider claims relating to the costs of prescriptions, treatment, and emergency care relating to employee and retiree health benefits.

Injunctive relief is also available with respect to many of the potential claims. Examples of injunctive relief could include funding for addiction treatment or to supply antidotes (such as naloxone) or to host drug collection events or for prevention efforts like prescriber and patient education. Injunctive relief could also require manufacturers to stop any deceptive marketing practices or to conduct research on alternative treatments, etc.

If the Winona County Board decides to authorize litigation, then prior to filing suit, additional legal research and factual investigation will be required to determine which claims would be most appropriate, and which defendants to name. Depending on which claims are asserted, Winona County could also pursue monetary damages for “proprietary costs,” such as costs incurred for payment of prescriptions or treatment of employees, retirees, and dependents, or worker's compensation benefits. Winona County could potentially seek compensation for “government costs,” meaning the increased costs of first responders, law enforcement, emergency medical personnel, child protection and foster care, etc., related to the opioid epidemic. Winona County could also pursue restitution or disgorgement of profits. Some of the statutory claims could also support treble damages, punitive damages, civil penalties, and recovery of litigation costs.

Depending on which claims are asserted and which defendants are named, any litigation is likely to proceed in federal court – although the claims primarily arise from state law, the potential defendants are

all likely to be out-of-state, which will result in diversity jurisdiction in the federal courts system. In federal court, any litigation by Winona County is likely to become part of “multi-district litigation,” in which all of the federal cases asserting similar claims against similar defendants would be consolidated before a single judge, for management of the pre-trial process (motion practice and discovery). It is likely that the federal multi-district litigation will be venued in either Ohio or Illinois.

IV. OUTSIDE COUNSEL

The Winona County Attorney’s Office has been approached by several law firms who are interested in representing Minnesota cities and counties in opioid litigation. Each firm has proposed to represent Winona County (and the other cities and counties) in the opioid litigation on a contingency basis. Under this arrangement, the private firms would front all out-of-pocket litigation expenses (e.g., document processing, travel, depositions, expert fees, etc.). If Winona County obtained any monetary relief, the firm would be reimbursed for these out-of-pocket expenses from that monetary relief, and then take an attorney fee percentage from the remaining amount. If any injunctive relief resulted in creation of a monetary fund (for education, treatment, etc.), the firm would likely seek its attorney fee percentage from that fund as well. If the injunctive relief did not have any objective monetary value, then no fee percentage would apply to that relief. If the litigation is not successful – meaning that Winona County does not obtain any monetary or injunctive relief – then the firm would not receive any reimbursement for out-of-pocket expenses, nor any compensation for attorney fees.

On October 30, 2017, the Hennepin County Attorney’s Office coordinated a meeting with the Minneapolis City Attorney, the St. Paul City Attorney, and the County Attorneys from Anoka, Carver, Dakota, Isanti, Mower, Olmsted, Otter Tail, Ramsey, St. Louis, and Steele Counties, and heard presentations from four legal teams:

- (1) Briol & Benson PLLC and Motley Rice LLC;
- (2) Lockridge Grindal Nauen PLLP, Gustafson Gluek PLLC, and J.F. Henderson Law PLLC;
- (3) Robins Kaplan LLP; and
- (4) Gray Plant Mooty.

Hennepin County has decided to go with #1 above; Ramsey County with # 2. I am not sure of the status of the other counties which attended the October 30th meeting. Several of the county attorneys who attended the October 30th meeting also attended the November 30, 2017 news conference to announce that their respective counties were going ahead with a lawsuit. The story was written up in the following newspaper article: <http://www.twincities.com/2017/11/30/minnesota-county-attorneys-plan-lawsuits-over-opioid-crisis/>

As a Director on the Board of the Minnesota County Attorney’s Association (MCAA), I will be attending the Annual Meeting of MCAA starting December 6th. I plan to talk with my colleagues from other counties, including those who have gone ahead with the lawsuits, to get more information on the opioid litigation. Winona County still has time to join the group of counties going ahead with lawsuits.

I will prepare an agenda request for the Board’s December 26th meeting for you to consider my recommendation that Winona County join the other Minnesota counties in the opioid litigation.