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### MDL and the Allure of Sidestepping Litigation

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# MDL AND THE ALLURE OF SIDESTEPPING LITIGATION

*Howard M. Erichson\**

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For a judge assigned to handle a mass dispute, the prospect of settlement may look more attractive than adjudication, and for good reason. Polycentric disputes do not lend themselves to adjudication, as Lon Fuller taught us long ago.<sup>1</sup> Even leaving aside the special problems of polycentrism, adjudication is sometimes difficult and nearly always time-consuming, and adjudication forces all-or-nothing frameworks onto issues better understood in probabilities than certainties. While public adjudication serves valuable functions, and the adjudication-versus-settlement debate has generated important insights in academic circles,<sup>2</sup> it is fair to say that many lawyers and judges see settlement as the generally preferred outcome, especially in complex disputes. In federal multidistrict litigation (MDL) in particular, where the transferee judge is well-positioned to push mediation but lacks the power to adjudicate all of the constituent actions by trial,<sup>3</sup> transferee judges often work hard to move the parties toward a negotiated global resolution.<sup>4</sup>

Preference for settlement, however, does not render litigation irrelevant. On the contrary, litigation may provide disputants what they need to negotiate sensibly.<sup>5</sup> Indeed, while neither litigation nor adjudication is itself necessary for settlement, the *prospect* of litigation and adjudication is essential. Disputants do not need *adjudication* to resolve their disputes, but they need a *path to*

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<sup>1</sup> See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (describing polycentric adjudications and the problems they present).

<sup>2</sup> See, e.g., Symposium, *Against Settlement: Twenty-Five Years Later*, 78 FORDHAM L. REV. 1117, 1118 (2009) (discussing “adjudication, settlement, and the relative advantages of each”).

<sup>3</sup> See 28 U.S.C. § 1407 (2012) (establishing transfer process in which transferee judges are designated to conduct “coordinated or consolidated pretrial proceedings”); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (holding that the MDL statute authorizes only pretrial proceedings, and rejecting self-transfer by MDL judges as a ploy to try cases in the transferee court).

<sup>4</sup> See MANUAL FOR COMPLEX LITIGATION § 20.132 (4th ed. 2004) (“One of the values of multidistrict proceedings is that they bring before a single judge all of the federal cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the . . . cases.”).

<sup>5</sup> See, e.g., *id.* (noting that bellwether trials can promote settlement in the remaining actions).

*adjudication* if they are to achieve settlements that reflect the merits of their claims and defenses.

This essay will use the opioids MDL to explore the allure of sidestepping litigation and the importance of providing a path to adjudication even when the judge views adjudication as a second-best outcome. The judge overseeing the opioids MDL took an unusually aggressive pro-settlement stance from the start.<sup>6</sup> The story of the first year of that litigation, told mostly in the judge's own words, is instructive.

I. "PEOPLE AREN'T INTERESTED IN DEPOSITIONS, AND DISCOVERY, AND TRIALS"<sup>7</sup>

On January 9, 2018, lawyers crowded into a packed courtroom for the initial pretrial conference in the National Prescription Opiate Litigation.<sup>8</sup> Judge Dan Polster of the Northern District of Ohio had been designated one month earlier by the Judicial Panel on Multidistrict Litigation to handle the coordinated proceedings in the burgeoning opioid litigation.<sup>9</sup> The MDL mostly consisted of claims by cities, counties, states, and Native American tribes that they had spent massive amounts of money addressing the opioid epidemic, and that various participants in the pharmaceutical industry—including manufacturers, distributors, and retailers—bear responsibility for improperly marketing and inappropriately distributing opiates.<sup>10</sup> Plaintiffs had filed lawsuits in federal and state courts around the country against various combinations of pharmaceutical defendants<sup>11</sup>, and the federal court cases were transferred to Judge Polster pursuant to the multidistrict litigation statute "for coordinated or consolidated pretrial proceedings."<sup>12</sup>

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<sup>6</sup> See Transcript of Proceedings at 6, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-02804 (N.D. Ohio Jan. 9, 2018) [hereinafter Jan. 9 Transcript] (indicating that the MDL judge would rather not try the case).

<sup>7</sup> *Id.* at 4.

<sup>8</sup> See *id.* at 3 (noting that the courtroom was not large enough for all of the participants of the MDL).

<sup>9</sup> *In re Nat'l Prescription Opiate Litig.*, MDL 2804, 290 F. Supp. 3d 1375, 1379-80 (J.P.M.L. 2017).

<sup>10</sup> See *id.* at 1 (describing the plaintiffs' claims that gave rise to the opiate MDL).

<sup>11</sup> See *id.* at A1-A4 (listing the 64 actions that were consolidated into the opiate MDL).

<sup>12</sup> 28 U.S.C. § 1407 (2012).

Judge Polster welcomed the gathered lawyers and then wasted no time in telling them exactly what he wanted them to do. He wanted them to negotiate a settlement that would reduce the problem of opioid addiction and abuse. The judge explained the severity of the crisis and made it clear that the first order of business, as far as he was concerned, was for the parties to figure out ways to abate the crisis:

What's happening in our country with the opioid crisis is present and ongoing. I did a little math. Since we're losing more than 50,000 of our citizens every year, about 150 Americans are going to die today, just today, while we're meeting.

And in my humble opinion, everyone shares some of the responsibility, and no one has done enough to abate it. That includes the manufacturers, the distributors, the pharmacies, the doctors, the federal government and state government, local governments, hospitals, third-party payors, and individuals. Just about everyone we've got on both sides of the equation in this case.

The federal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government, federal and state, have punted. So it's here.

So I don't think anyone in this country is interested in a whole lot of finger-pointing at this point, and I'm not either. People aren't interested in depositions, and discovery, and trials. People aren't interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unraveling complicated conspiracy theories.

So my objective is to do something meaningful to abate this crisis and to do it in 2018.<sup>13</sup>

One can understand the sentiment behind the judge's announcement. Judge Polster appreciated the seriousness of the national opioid crisis. He had been handed the responsibility of

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<sup>13</sup> Jan. 9 Transcript, *supra* note 6, at 4.

overseeing the nationwide federal litigation over opioids. When life hands a person an opportunity to make a difference, one can squander the opportunity or one can try to do something. By virtue of the centrality of his role as MDL transferee judge, he had gathered in his courtroom representatives of many of the major players involved in the opioid situation, including pharmaceutical manufacturers, distributors, and retailers, as well as state and local governments. As Judge Polster put it, “I mean, look around this room; an incredible amount of talent. I doubt if any judge has ever assembled this kind of talent ever.”<sup>14</sup> And so he stated forthrightly what he believed was his moral duty and the shared duty of the gathered lawyers: “I think we have an opportunity to do it, and it would be an abject abdication of our responsibility not to try it.”<sup>15</sup>

Judge Polster made it clear that when he said, “we have an opportunity to do it,” he was not talking about determining who was liable to whom. Rather, the *it* he was talking about was reducing the number of deaths from opioid overdoses: “But the resolution I’m talking about is really—what I’m interested in doing is not just moving money around, because this is an ongoing crisis. What we’ve got to do is dramatically reduce the number of pills that are out there and make sure that the pills that are out there are being used properly.”<sup>16</sup> He drove home that the first item on his agenda was to reduce the flow of opioids into the wrong hands, and that “moving money around” was decidedly a secondary priority. “So that’s what I want to accomplish. And then we’ll deal with the money . . . . Okay? We don’t need—we don’t need a lot of briefs and we don’t need trials. They’re not going to—none of them are—none of those are going to solve what we’ve got.”<sup>17</sup>

Even if the thought behind Judge Polster’s statement is understandable, it is a stunning statement from a judge, when one pauses to consider it. It is one thing for a judge to say that abatement of the crisis is an important goal, that the federal MDL has a role to play in achieving this goal, that the judge intends to manage the litigation in a way that furthers this goal wherever possible, and that ultimately a negotiated resolution may be the

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<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 9.

<sup>17</sup> *Id.*

best way to achieve this goal. It is quite another thing to forswear litigation and adjudication altogether.

*“People aren’t interested in depositions, and discovery, and trials.”*<sup>18</sup> Surely some are interested in depositions, discovery, and trial, aren’t they? Those who filed lawsuits asserting claims for relief probably fit in this category. *“People aren’t interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unraveling complicated conspiracy theories.”*<sup>19</sup> But what if the viability of the claims and defenses, on the merits, depends upon preemption or the learned intermediary doctrine or complicated conspiracy theories? If some or all of the plaintiffs are entitled to the relief they demand, won’t it require the court to be willing to address legal questions? And if some or all of the defendants are not liable under the law, contrary to the plaintiffs’ allegations, again, won’t it require the court to be willing to address legal questions? If, for example, a defendant complied with federal law and a plaintiff’s state law claim is preempted, is this merely an “interesting legal question,” or is it basic to understanding whether a particular plaintiff is entitled to relief from a particular defendant? *“We don’t need a lot of briefs and we don’t need trials.”*<sup>20</sup> Well, didn’t that remain to be seen?

Judge Polster said that he would consider it a failure if he had to move forward with litigation and adjudication:

[I]f I’ve got to do it in a traditional way . . . I’ll admit failure and I’ll say, All right . . . and in 2019, I’ll try the Ohio case myself and see what happens, after dealing with whatever motions . . . . What that will accomplish, I don’t know. But I’d rather not do that.<sup>21</sup>

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<sup>18</sup> *Id.* at 4.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Id.* at 5-6. Two days later, the court’s minute order asserted that the lawyers had reached a “consensus” at the initial conference to prioritize abatement of the crisis rather than litigation of the claims and defenses. See Minute Order, *In re Nat’l Prescription Opiate Litigation*, MDL No. 2804 (N.D. Ohio Jan. 11, 2018) [hereinafter Jan. 11 Order] (“The Court held an Initial Pretrial Conference with Counsel on January 9, 2018, at which time the Court solicited and obtained the consensus of Counsel to focus everyone’s present efforts on abatement and remediation of the opioid crisis rather than pointing fingers and litigating legal issues.”). The transcript of the January 9 conference does not so much reflect consensus

Again, it is worth pausing over the words, even as we understand the gravity of the situation and the urge to reduce harm. “*What that will accomplish, I don’t know.*”<sup>22</sup> The judge is talking about motions and trials. What motions and trials accomplish, the lawyers in his courtroom might have thought, is adjudication of disputes on the merits. Cities, counties, states, tribes, and others allege that they have spent vast sums of money dealing with the epidemic of opioid addiction, and they assert that various participants in the pharmaceutical industry breached legal duties and bear liability for these costs.<sup>23</sup> The defendants assert that they did not breach their duties and that they are not liable under the law.<sup>24</sup> Aren’t the plaintiffs entitled to demand of the courts an adjudication of their claims? And, by the same token, aren’t the defendants entitled to demand of the courts a determination of whether they are correct that they are not liable for these harms? Of course it is possible—indeed, likely—that most of the plaintiffs and defendants will resolve their disputes by negotiation rather than by adjudication. But does that mean that adjudication, or setting up a path to adjudication, would accomplish nothing?

Judge Polster, however, was focused on one thing. The court promptly launched a track intended to help the lawyers focus on settlement. The minute order following the January 9 initial conference stated that the court would schedule a day-long information session and preliminary settlement discussion: “Counsel thought it would be beneficial to select a day for an information session to educate the Court and each other on supply-chain dynamics and other issues relevant to resolving this MDL, and to further pursue settlement discussions.”<sup>25</sup> The morning would be devoted to an exchange of information, and the afternoon would be devoted to “preliminary settlement discussions.”<sup>26</sup> Again, Judge Polster left no doubt about where the lawyers should put their

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on this point as it does acquiescence by the lawyers in the judge’s clearly stated position. *See generally* Jan. 9 Transcript, *supra* note 6.

<sup>22</sup> Jan. 9 Transcript, *supra* note 6, at 6 (emphasis added).

<sup>23</sup> *See* Transfer Order, *supra* note 9, at 3 (summarizing the plaintiffs’ claims against the pharmaceutical industry).

<sup>24</sup> *See, e.g.,* County of Summit v. Purdue Pharma L.P., No. 18-op-45090 (N.D. Ohio Dec. 19, 2018) (addressing various motions to dismiss).

<sup>25</sup> Jan. 11 Order, *supra* note 21, at 1.

<sup>26</sup> *Id.*

energies: “As Counsel are to focus their efforts on resolution, the Court hereby continues the moratorium on all substantive filings.”<sup>27</sup>

Several weeks later, the court appointed negotiating teams—seven lawyers to represent the plaintiffs, seven to represent the manufacturer defendants, four to represent the distributor defendants, and two to represent the state attorneys general, with the expectation of appointing others later to represent the insurers.<sup>28</sup> The court ordered the teams to “work with the Special Masters and the Court to identify possible resolutions of economic and noneconomic issues in this litigation.”<sup>29</sup>

The lawyers seem to have gotten the message loud and clear that they were to frame all of their requests and arguments in terms of advancing the settlement agenda. In the early months of the MDL, the biggest dispute concerned discovery of a database maintained by the federal Drug Enforcement Administration (DEA).<sup>30</sup> The DEA’s Automation of Reports and Consolidated Orders System (ARCOS) database contained detailed information tracking the flow of opioids from manufacture to sale. The plaintiffs urged the court to order that the information be provided, as the database could be useful for identifying suspicious sales and distribution patterns, as well as for determining market share of various manufacturers and distributors.<sup>31</sup> But the lawyers seemed to bend over backwards to avoid framing their arguments in terms of anything that might be useful for litigating the claims.

At a hearing on February 26, plaintiffs’ lawyer Paul Farrell explained the need for market-share data this way: “So when we say market share, it’s not merely identifying those that should sit at the table, but to have meaningful settlement discussions, also for an allocation of responsibility for the settlement proceeds based upon the conduct.”<sup>32</sup> As to discovery of data regarding distribution of opioids, he argued, “with the distributors, what we are also

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<sup>27</sup> *Id.* at 2 (emphasis omitted).

<sup>28</sup> Order Regarding Settlement Negotiating Teams, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Feb. 7, 2018).

<sup>29</sup> *Id.*

<sup>30</sup> See Julie A. Steinberg, *Opioid Plaintiffs Seek Data DEA Says Could Hurt Investigation*, Bloomberg (Feb. 8, 2018), <https://www.bna.com/opioid-plaintiffs-seek-n57982088581/>.

<sup>31</sup> *Id.*

<sup>32</sup> Transcript of Proceedings at 7, *In re Nat’l Prescription Opiate Litig.*, Doc. No. 155 [hereinafter Feb. 26 Transcript].

interested in is looking to see which distributors delivered which volume of pills to which jurisdiction. And again, for purposes of settlement, it allows us to understand for market conduct purposes which of the defendants are likely to be most culpable for purposes of discussing settlement.”<sup>33</sup>

At the same hearing, attorney Alvin Emch, representing distributor AmerisourceBergen, argued that discovery of the ARCOS database (that is, discovery of detailed information on his client’s distribution of opioids) was unnecessary, and instead encouraged the court simply to invite any relevant distributors to participate in settlement negotiations.<sup>34</sup> When Judge Polster suggested that the plaintiffs need to know about the distributors, Mr. Emch responded, “Well, respectfully, your Honor, that’s a litigation goal that the plaintiffs have. That’s a discovery goal.”<sup>35</sup>

Implicit in Mr. Emch’s argument was that the parties were not permitted to seek discovery for litigation purposes – at least not yet. Just as Mr. Farrell understood that he had to frame his request for the data in terms of what was needed “to have meaningful settlement discussions,” so did Mr. Emch understand that his most effective argument would be one that accused the plaintiffs of trying to move forward with actually litigating their claims. Mr. Emch used “litigation goal” and “discovery goal” as if those were dirty words.

But in trying to argue that discovery was unnecessary because the court could simply invite potentially responsible parties to the table, he apparently reached too far, and his exchange with the court is instructive. Mr. Emch reminded Judge Polster that the judge had urged everyone to focus on settlement rather than litigation. Mr. Emch said, “Well, a big part of what I’m saying to Your Honor is we don’t want to invite all of these other parties into the litigation. Litigation is about blame and fault and liability and pointing fingers. Your Honor saw that from the very beginning.”<sup>36</sup> Therefore, he argued, the court should simply extend invitations to

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<sup>33</sup> *Id.* at 7-8. During the same hearing, manufacturers’ liaison counsel Carole Rendon encouraged an approach that would answer questions “without increasing the risk of interlocutory litigation.” *Id.* at 65.

<sup>34</sup> *Id.* at 31.

<sup>35</sup> *Id.* at 32.

<sup>36</sup> *Id.* at 33.

all of the identified distributors: “If we want to just have people to come to the table who can talk about their responsibilities and how better to meet those responsibilities, what the Court needs is the names of those parties that might be invited to come to the table.”<sup>37</sup>

Judge Polster’s reply goes to the crux of the matter, and ultimately explains why Judge Polster’s exclusive focus on settlement was bound for failure. Judge Polster said, “they’re not likely to come, Mr. Emch, if they’re not named as defendants. Okay? I don’t think your client, in all fairness, would have just accepted someone’s voluntary invitation to come and be part of this.”<sup>38</sup>

## II. “THEY BELIEVE SETTLEMENT WILL BE MADE MORE LIKELY IF THE COURT ALSO CREATES A LITIGATION TRACK”

Perhaps the hearing on discoverability of the ARCOS data was a turning point. Or perhaps the lawyers, in other ways, made it clear that litigation could not be avoided. At some point, Judge Polster apparently came to realize that he could not generate a negotiated resolution merely by the force of his own will, and that some litigation—and perhaps even adjudication—was going to be necessary.

On March 6, after meeting with the negotiating teams, Judge Polster agreed to create a litigation track:

On March 6, 2018, the Court met with the parties’ negotiating teams, liaison counsel and representatives of numerous State Attorneys General to discuss the status of settlement negotiations in this case. The parties reported important and substantial progress on several fronts, but also identified various barriers to a global resolution. To varying degrees, the parties agreed that the quickest way to surmount at least some of these barriers is to put into place a limited litigation track, including discovery, motion practice, and bellwether trials.

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<sup>37</sup> *Id.* at 34.

<sup>38</sup> *Id.* Even as he acknowledged that productive negotiations may require discovery and actually naming distributors as defendants, Judge Polster still insisted that trial would be a failure. In the context of addressing whether information from the database would become public, he said not unless there was a trial, and “Hopefully there will be no trials.” *Id.* at 42.

Accordingly, the Court directs the parties to submit . . . their suggestions regarding the appropriate scope and timing of a litigation track and the contents of a case management order, including identification of test cases, sequencing of discovery, timing of motion practice (including issues related to remand), and any other relevant matters.<sup>39</sup>

Still, the judge left no doubt that his goal was for the parties to reach a negotiated resolution.<sup>40</sup> Importantly, however, he acknowledged for the first time in the opioid MDL that litigation may be necessary to move the parties toward such a resolution. Or, at least, he acknowledged that litigation may be “the quickest way” to do so.<sup>41</sup> Thus began the actual litigation of claims in the opioid MDL, and it would include a schedule for discovery, motions, and trial in the Northern District of Ohio cases.

On April 11, nearly four months after the Initial Transfer Order that assigned the opioid MDL to Judge Polster, the court finally issued Case Management Order 1 (CMO 1).<sup>42</sup> CMO 1 still framed the need for litigation exclusively in terms of the goal of settlement, but even so, it established a framework for moving forward so the parties could begin to litigate the claims and defenses:

The parties in this case have been pursuing, and are continuing to pursue, settlement discussions, and they have made good progress. The parties have indicated, however, they believe settlement will be made more likely if, in addition to the ‘settlement track’ they are currently pursuing, the Court also creates a ‘litigation

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<sup>39</sup> Minute Order, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Mar. 7, 2018).

<sup>40</sup> Lest there be any doubt that Judge Polster continued to push the parties toward settlement, the Court on March 27, 2018 noted, “Pursuant to its case management and settlement facilitation role under Rule 16(a) of the Federal Rules of Civil Procedure, the Court has periodically met with the parties in this litigation to discuss various matters, such as a resolution of this litigation through settlement and the terms of a settlement proposal that would satisfy both the parties and the Court.” Order Regarding Settlement Discussions, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Mar. 27, 2018).

<sup>41</sup> Minute Order, *supra* note 41.

<sup>42</sup> Case Management Order No. 1, *Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Apr. 11, 2018).

track.’ Accordingly, the Court hereby enters this Case Management Plan, which directs the parties to engage in motion practice, discovery, and trial preparation for certain cases in this MDL.<sup>43</sup>

The court declared itself open to consider motions to dismiss and other legal matters by stating, “The parties and Court agree that it will be efficient and informative to proceed with briefing on threshold legal issues on common claims.”<sup>44</sup>

The judge designated as Track One the three Northern District of Ohio actions, over which he had power to try the claims, in contrast to actions that had been transferred to him by the Judicial Panel on Multidistrict Litigation.<sup>45</sup> CMO 1 established deadlines for Track One written discovery, depositions, expert reports, and trial: “The Court intends to begin the trial at 9:00 a.m. Eastern Time on Monday, March 18, 2019, to last for a period of three weeks.”<sup>46</sup>

The court emphasized the firmness of the trial date, even as it acknowledged some flexibility on discovery: “Please note that the granting of an extension of any discovery deadline shall not change the trial date, and the Court does not intend to move the trial date of the Track One case(s).”<sup>47</sup> The lawyers, judge, and magistrate judges proceeded with the litigation,<sup>48</sup> even as Judge Polster continued to insist that the litigation track is “not a substitute or

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (emphasis in original). Plaintiffs’ lawyers approved of the short trial deadline. See Jeff Overley & Emily Field, *Opioid MDL Judge Sets Litigation Plan, Bashes DEA*, Law360 (April 11, 2018, 10:00 PM), <https://www.law360.com/articles/1009123/opioid-mdl-judge-sets-litigation-plan-bashes-dea> (quoting co-lead plaintiffs’ attorney Paul J. Hanly, Jr. saying, “We’re very pleased because trial dates tend to force settlement — that’s a truism in our world.”).

<sup>48</sup> See generally Order Establishing Deposition Protocol, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio June 20, 2018) (establishing protocol for depositions); Case Management Order No. 4, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio May 22, 2018) (establishing a detailed schedule for motions to dismiss); Case Management Order No. 3 Regarding Document and Electronically Stored Information Production Protocol, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio May 15, 2018) (establishing protocol for production of documents and electronically stored information).

replacement in any way” for a negotiated resolution that includes steps to reduce the opioids problem.<sup>49</sup>

Notwithstanding the statement in CMO 1 that the court did not intend to move the Track One trial date, the judge subsequently pushed the date back twice: first by about six months,<sup>50</sup> and then by another seven weeks.<sup>51</sup> Perhaps the longer path to trial was inevitable in light of the complexity of both the factual discovery and the legal issues in the case.<sup>52</sup>

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<sup>49</sup> Transcript of Public Hearing, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio May 10, 2018); see also Emily Field, *Opioid MDL Judge Says Litigation Track Is a Settlement Aid*, Law360 (May 10, 2018, 8:33 PM), <https://www.law360.com/articles/1038711/opioid-mdl-judge-says-litigation-track-is-a-settlement-aid> (“It’s necessary to do [the litigation track], and we’re doing it, but it’s not a substitute or replacement in any way,” the judge said Thursday. “I still am resolved to be the catalyst to take some steps this year to turn the trajectory of this epidemic down and rather than up, up, up.”)

<sup>50</sup> See Case Management Order No. 7 Setting New Deadlines for Track One Cases at 1, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Aug. 13, 2018) (setting a new Track One trial date of September 3, 2019 because “[t]he parties unanimously requested extension of those deadlines and submitted various proposed schedules.”); see also Jeff Overley, *Opioid MDL Bellwether Trial Postponed 6 Months*, Law360 (Aug. 13, 2018, 8:26 PM), <https://www.law360.com/articles/1072924/opioid-mdl-bellwether-trial-postponed-6-months> (calling it “the latest sign that dreams of quickly resolving the epic legal battle may not be realized.”).

<sup>51</sup> See Case Management Order No. 8 Setting New Deadlines for Track One Cases at 2, *In re Nat'l Prescription Opiate Litig.*, No. MDL 2804 (N.D. Ohio Jan. 29, 2019) (setting a new Track One trial date of October 21, 2019). In addition, on December 31, 2018, Judge Polster created a Track Two of litigation to expand the range of cases moving toward trial. See Emily Field, *2nd Bellwether Track Set in Opioid MDL*, Law360 (Jan. 2, 2019, 5:13 PM), <https://www.law360.com/articles/1114551/2nd-bellwether-track-set-in-opioid-mdl> (reporting on Judge Polster’s selection of two cases for a second bellwether track).

<sup>52</sup> See Overley, *supra* note 50 (“In a preview of Monday’s order, Judge Polster last week revealed that the local governments and opioid manufacturers had requested more time ‘so that the parties can complete the discovery necessary to present an intelligible trial.’”); Mike Curley, *Bellwether Trial in Opioid MDL Delayed Another 7 Weeks*, Law360 (Jan. 29, 2019, 7:54 PM), <https://www.law360.com/articles/1123419/bellwether-trial-in-opioid-mdl-delayed-another-7-weeks> (“The governments and the defendants asked for the delay in a joint motion on Friday, saying the ‘modest extension’ would balance the need to get to trial with the interest in addressing discovery issues, which have been the subject of other delays in the pre-trial process, according to court documents.”).

III. “WHETHER PLAINTIFFS CAN PROVE ANY OF THESE ALLEGATIONS REMAINS TO BE SEEN, BUT THIS COURT HOLDS THAT THEY WILL HAVE THAT OPPORTUNITY”

On December 19, the court ruled on motions to dismiss in the Track One cases. With the exception of two aspects of the statutory public nuisance claims, Judge Polster determined that the plaintiffs could move forward with their claims.<sup>53</sup> At the end of his opinion, the judge took the opportunity to express, in a rather personal way, the seriousness of the crisis:

It is accurate to describe the opioid epidemic as a man-made plague, twenty years in the making. The pain, death, and heartache it has wrought cannot be overstated. As this Court has previously stated, it is hard to find anyone in Ohio who does not have a family member, a friend, a parent of a friend, or a child of a friend who has not been affected.

Plaintiffs have made very serious accusations, alleging that each of the defendant Manufacturers, Distributors, and Pharmacies bear part of the responsibility for this plague because of their action and inaction in manufacturing and distributing prescription opioids. Plaintiffs allege that Defendants have contributed to the addiction of millions of Americans to these prescription opioids and to the foreseeable result that many of those addicted would turn to street drugs.

While these allegations do not fit neatly into the legal theories chosen by Plaintiffs, they fit nevertheless. Whether Plaintiffs can prove any of these allegations remains to be seen, but this Court holds that they will have that opportunity.<sup>54</sup>

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<sup>53</sup> See *County of Summit v. Purdue Pharma L.P.*, No. 18-op-45090, slip op. at 38 (N.D. Ohio Dec. 19, 2018) (determining which claims could proceed and which could not).

<sup>54</sup> *Id.* at 38-39.

To reach this conclusion, the judge ruled on numerous legal issues including the statute of limitations, civil RICO, civil conspiracy, public nuisance, and preemption.<sup>55</sup>

Recall that one year earlier, Judge Polster had declared confidently that “[p]eople aren’t interested in figuring out the answer to interesting legal questions like preemption . . . or unraveling complicated conspiracy theories.”<sup>56</sup> And here he was ruling on preemption and complicated conspiracy theories.<sup>57</sup> Perhaps people *are* interested in such legal questions after all. Judged against the goal stated by the judge at the initial pretrial conference, ruling on “interesting legal questions” may look like failure. But perhaps adjudicating such legal questions is precisely what must be done, in a complex dispute like this one, to move parties toward a realistic prospect of negotiating a resolution that reflects the merits of the claims and defenses.

Recently, Judge Polster signaled that there will be no more trial delays. Ruling on a defense request to extend the deposition process, the judge stuck to his deadlines and ordered each side to designate ten priority expert witnesses.<sup>58</sup> Significantly, he framed his ruling in terms of the integrity of the trial schedule:

The Court has, on more than one occasion, moved the dates for the Track One trial back at the behest of the parties and declines to do so now or at any point in the future. The deadlines agreed to by the parties and ordered by the Court in CMO-8 will remain in place.<sup>59</sup>

The transformation was complete. The judge who had insisted “we don’t need trials”<sup>60</sup> had become a judge who insisted that trial would not be postponed for any reason.

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<sup>55</sup> See *id.* at \*3-38 (discussing each legal issue).

<sup>56</sup> Jan. 9 Transcript, *supra* note 6 at 4.

<sup>57</sup> See *County of Summit*, slip op. at 2 (adopting the magistrate judge’s recommendations with regard to preemption); *id.* at 22 (“[T]he R&R concluded, and this Court agrees, that Plaintiffs adequately pled that Defendants shared a general conspiratorial objective of expanding the opioid market.”).

<sup>58</sup> Order Re Expert Depositions, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Apr. 10, 2019).

<sup>59</sup> *Id.* at 2.

<sup>60</sup> Jan. 9 Transcript, *supra* note 6, at 9.

## IV. SETTLEMENT, LITIGATION, AND ADJUDICATION

Judge Polster's bold statement at the initial pretrial conference treated *settlement* and *litigation-adjudication* as opposites. He wanted the parties to negotiate a settlement; therefore, he did not want the lawyers to waste time litigating the claims and defenses, and he did not want the court to waste time adjudicating the claims and defenses.

But settlement is not the opposite of litigation-adjudication. It is the product of it. Or, more accurately, settlement is the product of the possibility of adjudication, and the path to adjudication is litigation. For parties to reach a settlement, neither litigation nor adjudication is necessary, but a *path to adjudication* is necessary.<sup>61</sup> Litigation and adjudication matter to settlement in at least three ways: as information, as a guide for lawyers, and as risk that it gets resolved in settlement. It is thus the only thing that provides leverage in line with the merits.

First, litigation and adjudication provide information to the parties and lawyers that enables them to think more clearly about settlement. This includes legal rulings such as Judge Polster's decision on the motions to dismiss. It includes factual discovery such as the ARCOS database of opioid distribution and sales. And it includes trial verdicts as data points for parties to consider when negotiating a global settlement of the remaining claims, which explains Judge Polster's conceptualization of Track One and Track Two actions as bellwether cases and also explains his stated desire that these cases be representative of the broader litigation.

Second, a path to adjudication tends to align lawyers' interests with clients' interests in settlement.<sup>62</sup> Agency risks are greatest when deals are negotiated by lawyers whose franchise existence or scope depends upon whether they succeed in striking a deal.

Third, and most importantly, the very thing that is being negotiated is a resolution of the claims that the disputants are entitled to demand adjudicated. Without a threat that defendants

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<sup>61</sup> See Howard M. Erichson, *Settlement in the Absence of Anticipated Adjudication*, 85 *FORDHAM L. REV.* 2017 (2017) (explaining the importance of a path to adjudication as a foundation for settlement).

<sup>62</sup> See *id.* at 2023 (discussing how the "path to adjudication sets the basis for achieving fair value in settlement" and also "reduces the problems of lawyer-client conflicts of interest in settlement negotiation").

will be held liable, there is nothing to negotiate (leaving aside nuisance value). Without a threat that plaintiffs will lose, there is likewise nothing to negotiate (leaving aside transaction costs). The path to adjudication is the very thing that drives settlement. Significantly, this is not a binary proposition. Parties bargain in the shadow of litigation-adjudication. If a settlement is to reflect the merits of the claims and defenses, there must be a realistic path by which parties could—if negotiation fails—obtain an adjudication on the merits.<sup>63</sup>

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<sup>63</sup> See *id.* at 2023-24; Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. REV. 399, 401 (2011).

