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Atty Fees Capped At 15% In \$26B Opioid MDL Settlement

By Mike Curley

Law360 (August 9, 2021, 1:27 PM EDT) -- An Ohio federal judge has capped contingent attorney fees in a \$26 billion settlement in the sprawling opioid multidistrict litigation at 15%, saying the cap is necessary to ensure more money goes to the plaintiffs for addressing the harm opioids have done and to keep fees from being unreasonable.

In an order filed Friday, U.S. District Judge Dan Aaron Polster capped the fees for individually retained plaintiff's attorneys, or IRPAs, in the suit, including both those whose cases are already in the MDL and those who opt-in to the settlement without having participated up to now.

According to the order, the \$26 billion settlement reached in July already sets aside \$2.3 billion, or about 8.8%, of its fund for attorney fees, and all the attorneys in the plaintiffs executive committee have agreed to waive their contingency contracts to take their fees from that fee fund.

In addition, the deal stipulates that in no event must less than 85% of the funds be spent on opioid remediation, the judge wrote, so the hard cap is already built into the settlement. In order to collect from the attorney fee fund, IRPAs must submit an application and waive the right to enforce their own contingent fee contracts, the judge wrote.

And even if they forgo payment from the attorney fee fund, the amount they can collect on their contingent contracts is still capped at 15%, the judge wrote.

The deal with J&J, AmerisourceBergen Corp., Cardinal Health Inc. and McKesson Corp. ends the bulk of the suits levied over the opioid crisis. Up to \$5 billion will come from J&J over the next nine years and \$21 billion from the distributors over the next 18 years, with up to \$23.5 billion of the total going toward easing the opioid epidemic, according to the deal.

Under the terms of the deal, J&J agreed to stop its opioid sales, according to a statement from the New York Attorney General's Office. The drug distributors also agreed to share data about opioid shipments with an independent monitor.

New York was joined by the state attorneys general for California, Colorado, Connecticut, Delaware, Florida, Georgia, Louisiana, Massachusetts, North Carolina, Ohio, Pennsylvania, Tennessee and Texas in negotiating the deal.

The 15% cap represents a consensus following significant deliberation and negotiations among the

parties, Judge Polster wrote Friday, and the fact that attorneys must waive their contingent contracts to collect from the fee fund will prevent the plaintiff entities from having to effectively pay their attorneys twice, and keep the amount each attorney receives fair and equitable.

Given the scale of the settlement, which Judge Polster said was among the largest in the nation's history, the lower percentage will keep the fees from growing beyond what is reasonable, adding that a disproportionately large fee could erode faith in the legal system.

Finally, the judge noted that some attorneys may well have performed extraordinary work on behalf of their clients far beyond the norm in the opioid MDL, and in those rare cases, the court will allow an IRPA who forgoes the fee fund to enforce a fee contract at higher than 15%, provided they present evidence of the exceptional work and extraordinary risk they went through in the case.

"We understand the court was faced with a difficult situation here and reached a Solomonian decision to ensure fairness for all the government clients," Hunter Shkolnik of Napoli Shkolnik PLLC, representing plaintiffs in the MDL, told Law360 on Monday.

Paul Geller of Robbins Geller Rudman & Dowd LLP, also representing plaintiffs in the MDL, said those who worked the hardest on the case are the ones that are going to be alright with the cap.

"If there ever were a case where a lawyer should agree with a well-reasoned fee cap, it's this one," he said. "There are literally hundreds of lawyers involved in opioid litigation ranging from altruistic to avaricious, and everything in between; one's reaction will largely depend on where you fall on that continuum."

Geller added that the litigation to him has always "had a higher purpose" of addressing the public health crisis.

"The judge's order is consistent with my view that the vast majority of this money has to go towards abatement programs," he said. "Frankly, the lawyers who did good work and contributed to the settlements will get paid from a separately negotiated fee fund. It is only those who didn't do the work but were just lying in wait to grab a chunk of their clients share of abatement money who are probably upset at the order."

The plaintiffs executive committee, made up of Jayne Conroy of Simmons Hanly Conroy LLC, Paul T. Farrell Jr. of Farrell & Fuller LLC and Joseph F. Rice of Motley Rice LLC, and the committee's negotiating team of Elizabeth Cabraser of Lieff Cabraser, Peter Mougey of Levin Papantonio Rafferty, Paul Geller of Robbins Geller, Jennifer Scullion of Seeger Weiss, and Chris Seeger of Seeger Weiss, said in a statement Monday that they agree that the bulk of the funds should go toward the plaintiffs' efforts to address the impact of the opioid epidemic.

"The opioid epidemic is an ongoing societal tragedy that demands a reckoning," the committee said in the statement. "We are in complete agreement with the court that the overwhelming majority of funds generated by this litigation should be used for the urgent abatement needs of communities around the nation. The court's order formalizes what plaintiff attorneys across the country have already agreed to do. Namely, to make significant reductions in fee agreements to ensure settlement proceeds go toward fighting the opioid epidemic. The plaintiffs' leadership team is grateful for Judge Polster and his particular efforts to manage this litigation in an equitable, fair manner on behalf of all parties involved."

Representatives for the settling defendants and the New York Attorney General's office, which led the state-based plaintiffs in the settlement negotiations, could not immediately be reached for comment Monday.

The case is In Re: National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Jeff Overley and Emily Field. Editing by Alyssa Miller.

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