

Special Counsel Contract – Opioid Litigation – Keller Rohrback

General Description

The firm will provide professional legal services in pursuing claims for damages and injunctive relief against pharmaceutical companies and/or pharmaceutical distributors who manufacture, market and sell prescription opioids, and engage in activities including, but not limited to allegations of false, deceptive and unfair marketing practices and failing to monitor and report suspicious opioid prescription orders.

Term

August 15, 2018 – conclusion of all assigned litigation or August 15, 2020, whichever occurs later.

Special Counsel RFQ Timeline

May 7, 2018: Request for qualifications issued

May 18, 2018: Deadline to submit qualifications statement

May 29, 2018: Call with coalition to choose top 4 firms to interview

June 1, 2018: Notification of invitation to interview

June 15, 2018: Outside counsel interviews with selection committee

June 25, 2018: Call with coalition to choose selected firm – Keller Rohrback

Payment Mechanism

Payment to Keller Rohrback is based on a flat rate contingency fee. 15% net of sums recovered up to \$500 million, and 10% for recovery in excess of \$500 million. Costs and expenses will be deducted from sums recovered before the fee is calculated.

Scope of Problem

An estimated 90 Americans per day die due to opioid overdoses and the number of opioid prescriptions written in the United States is roughly equal to the number of adults in the population.¹ The Centers for Disease Control and Prevention estimated that the total economic burden—including healthcare costs, loss of productivity, cost of addiction treatment, and costs of criminal justice—of prescription opioid misuse in the United States is \$78.5 billion per year, and that we are experiencing a “public health epidemic”.²

The opioid epidemic did not suddenly arise. Arguably, the opioid epidemic started in the 1990s when manufacturing companies reassured the medical community that patients would not become addicted to prescription opioid pain relievers. In response, healthcare providers prescribed opioids at greater rates, which led to the wide misuse and abuse of the medications, leading to a rise in rates of addiction,

¹ Opioid Crisis, NIH, National Institute on Drug Abuse (available at <https://www.drugabuse.gov/drugsabuse/opioids/opioid-crisis>, last visited Sept. 19, 2017) (“Opioid Crisis, NIH”) (citing at note 1 Rudd RA, Seth P, David F, Scholl L, Increases in Drug and Opioid-Involved Overdose Deaths — United States, 2010–2015, *MMWR MORB MORTAL WKLY REP.* 2016;65, doi:10.15585/mmwr.mm655051e1); see also Dan Keating & Samuel Granados, *See How Deadly Street Opioids Like ‘Elephant Tranquilizer’ Have Become*, *WASH. POST* (Oct. 25, 2017), https://www.washingtonpost.com/graphics/2017/health/opioids-scale/?utm_term=.8456d8b568f2; Robert M. Califf et al., *A Proactive Response to Prescription Opioid Abuse*, 374 *N. ENG. J. MED.* 1480 (2016).

² Florence CS, et al., *THE ECONOMIC BURDEN OF PRESCRIPTION OPIOID OVERDOSE, ABUSE, AND DEPENDENCE IN THE UNITED STATES*, 2013. *Med Care.* (2016), <https://www.ncbi.nlm.nih.gov/pubmed/27623005>.

overdoses, deaths, as well as increase in illicit substance use – such as heroin.³ Many local governments argue responsibility for the opioid crisis lies with the manufacturers and distributors of these drugs.

Denver's experience includes the following:

- Loss of life;
- Increased hospital costs;
- Increased criminal activity and drug related offenses;
- Increased methadone, naloxone and related treatment/interventions distribution;
- Increased costs to behavioral and substance (mis)use programs, including syringe access programs; and
- Increased utilization of resources in emergency medical response system.

Litigation as an Option

In the fall of 2017, the Mayor's Opioid Epidemic Work Group was formed to address the epidemic through a citywide multi-agency effort, and includes a variety of professions – medical, public health, law enforcement, social work, and behavioral health. The Work Group was charged with analyzing the current state of programs and initiatives in Denver, as well as making recommendations for how the city should currently address the epidemic, and best meet the needs of the city and its residents in the future.

Litigation against the manufacturers and distributors of opioids was one of the many options the Work Group reviewed to address the crisis, and in early 2018 recommended moving the decision forward to the Mayor as part of a multi-pronged opioid strategy approach.

The goal is to drive industry reform through injunctive relief and enhance city resources. Potential recovery will help offset some of the programmatic costs increases and can be reinvested in the community to help address and alleviate the multi-faceted issues related to addiction.

Litigation Claims

Working with other governmental jurisdictions in Colorado provides additional leverage against the manufacturers and distributors and is intended to be a collaborative Colorado effort to resolve to the crisis. The current jurisdictions working with Denver are as follows:

- Adams County
- Arapahoe County
- Boulder County
- City and County of Broomfield
- City of Aurora
- City of Black Hawk
- City of Commerce City
- City of Northglenn
- Jefferson County
- Larimer County
- Teller County
- Town of Hudson

³ *Opioid Overdose Crisis*, NATIONAL INSTITUTE ON DRUG ABUSE (Last updated June 2017), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis#two>.

Below is a general overview of the claims that may be brought. There may be additional claims based on the unique circumstances of Denver and Colorado law.

Claims Against Manufacturers: Manufacturers of opioids marketed the drugs using false, deceptive, and unfair practices. Manufacturers, during the 1990s, began marketing schemes designed to persuade doctors and patients that opioids can and should be used to treat chronic pain. Marketing tactics included talks by sales representatives, industry-funded front groups, and advertising directly to the consumer; many of these ideas were used by the tobacco industry. Many manufacturer claims are either blatantly false or not backed up by evidence, such as the assertion that opioids are not addictive.

The marketing strategies falsely led consumers and doctors to believe opioids do not cause adverse effect over long-term use. This false advertising led to a rise in prescriptions which, over time, led to the rise of opioid addiction and higher opioid doses to sustain pain relief, heroin addiction, and eventually overdoses and death. Municipalities have used large amounts of resources to help those struggling with addiction, respond to overdoses, help families affected by addiction, and balance the loss of economic benefits from a productive work force.

In addition to false, deceptive, and unfair practice claims, local governments also assert claims of fraud due to misleading advertising and concealing conduct; public nuisance because of the devastating effect on public health, safety, and welfare; negligence claims; and unjust enrichment claims. Some jurisdictions also claim that the manufacturers and distributors colluded together to maximize profits, thereby violating the Racketeer Influenced and Corrupt Organizations Act (“RICO”).⁴

Manufacturer defendants are similar in the various opioid lawsuits and include Purdue Pharma, Purdue Fredrick Company, Teva Pharmaceuticals, Cephalon, Johnson & Johnson, Janssen Pharmaceuticals, Endo Health Solutions, and more.

Claims Against Distributors: Distributors breached their affirmative duty under federal law⁵ to monitor, detect, investigate, refuse to fill, and report suspicious orders of prescription opioids originating from any locality as well as those orders which the distributor defendants knew or should have known were likely to be diverted into that locality.⁶ This breach is claimed to be the direct and proximate cause of the widespread diversion of prescription opioids for nonmedical purposes, causing an immediate hazard to public health and safety. The foreseeable harm resulting from a breach of these duties is the diversion of prescription opioids for nonmedical purposes and subsequent plague of opioid addiction. Distributor defendants did not investigate and/or report the suspicious orders because the defendants desired monetary gain. In addition, these defendants misrepresented compliance with legal duties to mislead regulators and the public.

Local governments are currently bringing suits against the “big three” distributors: McKesson Corporation, Cardinal Health, and AmerisourceBergen Drug Corporation. These three companies are the three largest distributors of opioids in the country.

⁴ 18 U.S.C. 1961 et seq.

⁵ 21 U.S.C. § 823; 21 C.F.R. 1301.74.

⁶ Note, most states have a similar law.