

# **Current Issues and Ethical Concerns in Affirmative Litigation on Behalf of Counties**

**Sarah Burns, Esq.**

**Thomas I. Sheridan, III, Esq.**

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# Current Issues & Ethical Concerns in Affirmative Litigation on Behalf of Counties

CAASNY Annual Conference

The Otesaga Resort

May 18-19 2026



**SIMMONS HANLY CONROY**  
A NATIONAL LAW FIRM

Sarah Burns

[sburns@simmonsfirm.com](mailto:sburns@simmonsfirm.com)

Thomas I. Sheridan, III

[tsheridan@simmonsfirm.com](mailto:tsheridan@simmonsfirm.com)

## 10,000 FOOT VIEW

- Opioid Litigation
- Insulin Price Fixing Litigation
- Up and Coming Cases
- Ethical Issues

**The opinions expressed are those of the authors and do not necessarily reflect the views of their employer or their clients. This presentation is for general information purposes and is not intended to be and should not be taken as legal advice.**

## OPIOIDS: LOOKING BACK

- First New York case filed September 1, 2016 by Suffolk County in state court. 52 counties ultimately filed.
- Suffolk County and Nassau County selected as bellwethers along with State.
- One of the first opioid cases in the country alleging public nuisance.
- Survived motions to dismiss, extensive discovery, motions for summary judgment, Frye expert challenges.

# OPIOIDS LOOKING BACK

- Liability-only trial began in summer of 2021 before the late Justice Jerry Garguilo in Suffolk County.
- Suffolk, Nassau, and New York State were plaintiffs.
- Trial began against 10 defendant families.
- Prior to verdict, all but two defendants settled.
- In December 2021, jury found Teva (and its subsidiary Anda) liable for public nuisance
- Teva settled prior to remedies trial.
- Litigation by New York counties was a driving force behind the national global settlements—and the New York premiums.



Justice Garguilo

# SETTLEMENT OVERVIEW

- Each NY County has settled with all 10 defendant families. To date, over \$2.2 billion to New York Counties.
- As of 2026, there are smaller and "remnant" defendant settlements in the works. For example, the Group of 8 settlement will pay out \$24 mm to all New York subdivisions.
- Subdivisions were recently asked to participate in the "Remnant 6" settlement.
- Brown Greer manages a portal at [www.nationalopioidofficialsettlement.com](http://www.nationalopioidofficialsettlement.com) where all global payments can be determined by county, by defendant, and by year. The incentive and NY specific settlement payments will be available at this portal in short order.
- Please be sure to submit all paperwork certifying spending on approved uses. This ensures that future abatement funds are available to your county.

The Directing Administrator of the Distributor Settlement Agreement, dated as of July 21, 2021; the Janssen Settlement Agreement, dated as of July 21, 2021; the CVS Settlement Agreement, dated as of December 9, 2022; the Walgreens Settlement Agreement dated as of December 9, 2022; the Walmart Settlement Agreement dated as of November 14, 2022; the Allergan Settlement Agreement dated as of November 22, 2022; and the Teva Settlement Agreement dated as of November 22, 2022 (together, the "Settlement Agreements") created a dashboard available to the public reflecting both current and projected allocations available to the Settling States and Participating Subdivisions pursuant to the Settlement Agreements. This public dashboard is available [here](#).

# BANKRUPTCIES AND OTHER RESOLUTIONS OVERVIEW

- Purdue, Mallinckrodt, Endo, and RiteAid each sought bankruptcy protection.
- The US Bankruptcy Court approved Purdue's Chapter 11 reorganization plan in November 2025, paving the way for approximately \$7.4 Billion in payments to counties, states and individuals. The Sacklers will contribute approximately \$6.5 Billion and Purdue approximately \$900 Million. \$850 Million will be used to compensate individuals with addiction-related claims. Purdue will transfer its assets to a new corporation Know Pharma that will develop and distribute opioid overdose reversal and addiction medications. Objections to the bankruptcy plan were resolved in early 2026 and payment is expected to begin in mid-2026. Payments will be front-loaded in the first 3 years and continue over 15 years.



Purdue Pharma Headquarters

## ALMOST A DECADE OF OPIOID LITIGATION AND STILL GOING STRONG!

- Currently the most active cases in the MDL involve Pharmacy Benefit Managers (PBMs) OptumRX and UnitedHealthcare
- PBMs serve as middlemen between pharmaceutical manufacturers and payors. They negotiate contracts and formulary placement on behalf of their members.
- Plaintiffs (including all NY Counties) allege that PBMs contributed to the public nuisance by:
  - Colluding with Purdue Pharma and promoting opioids.
  - Continuing to promote opioids to their members even as their own detailed data showed the harmfulness of opioids.
  - Receiving rebates and kickbacks in return for favorable placement of opioids on formularies without appropriate limits on dosage or duration.

# PBMS: THE UPHILL CLIMB

- First cases filed in 2019 into the MDL
- There were only about 80 cases filed total as compared to about 3000 filed against manufacturers & distributors.
- Cases brought by Rochester and Ogdensburg are proceeding as bellwethers in the MDL.
  - Significant offensive and defensive discovery.
  - Significant third party discovery, including of Monroe and St. Lawrence Counties.
- NY Counties sued PBMs in State Court. More on this below.



Whiteface

# PBMS: THE UPHILL CLIMB

- Judge Garguilo’s rulings on New York public nuisance law were not tested on appeal.
- See *In re Nat’l Prescription Opiate Litig.*, 82 F.4th 455, 461–62 (6th Cir. 2023) (Ohio statute abrogated all Ohio common-law public-nuisance claims arising from the sale of a product) (no such statute in New York).
- *City of Huntington, West Virginia v. AmerisourceBergen Drug Corp.*, No. 22-1819 (4<sup>th</sup> Cir. Oct. 28, 2025) (upholding public nuisance claims under West Virginia law).
- *City of Martinsville, Virginia*, No. CL8000240-00 (Va. Cir. Ct. Jan. 29, 2026). (upholding common law and statutory public nuisance claims)
- *City of Boston v. OptumRx, Inc.*, No. 25-1258 (4<sup>th</sup> Cir. Mar. 2, 2026) (dismissing based on Statute of Limitations)
- *Express Scripts, Inc. v. Anne Arundel County, Maryland*, Misc. No. 1 (Md. Sup. Ct. Mar. 23, 2026) (“the licensed dispensing of, or administration of benefit plans for, a controlled substance does not constitute an actionable public nuisance.”)



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## THE PBM UPHILL CLIMB (CONT.)

- **Motions to Amend to Add New Parties in MDL (filed in July 2024)**
  - It has become difficult to add new parties, such as PBMs in the MDL without good cause.
  - Extensive, plaintiff-specific briefing still underway
- **Federal Cases not subject to automatic transfer to MDL**
  - New cases filed in federal district court will remain in that district absent some other basis to transfer.

## THE PBM UPHILL CLIMB (CONT.)

- **Removal from State to Federal Court.**
  - All NY Counties' cases were removed to two district courts.
  - PBMs say the federal officer removal statute applies because they perform the same services for three federal agencies that they do for their other clients.
  - The same argument has been made, successfully, in the insulin price fixing cases.
  - Both district courts rejected the argument and remanded back to State court, where the cases are stayed due to Purdue bankruptcy.
  - In the meantime, an appeal of the remand orders is fully argued in the Second Circuit, but the appeal is being held in abeyance awaiting a decision from the Supreme Court in *Chevron USA Inc., et al. v. Plaquemines Parish, La., et al.* (U.S. No. 24-813) (argued 1/12/26).

## THE PBM UPHILL CLIMB (CONT.)

- Some New York counties whose cases are stayed have been dragged into MDL Bellwethers involving their County seats.
  - Monroe & Rochester
  - St. Lawrence & Ogdensburg
- Fed. R. Civ. P. 45 helps protect non-parties from undue burden and expense, but ...
  - disclosure can still be time consuming and expensive
  - the expense can be hard to quantify, since those doing the work are county employees.



Marcy

# THE PBM UPHILL CLIMB (CONT.)

## Landmines

- Authorization to sue and supervision of outside counsel
- Public Records Requests made by PBM counsel
  - Interference with A-C relationship
  - Harassment and delay tactic
- Document retention- the “mountains of documents”
  - Be aware of cybersecurity
- Attempts at “confidential” settlements



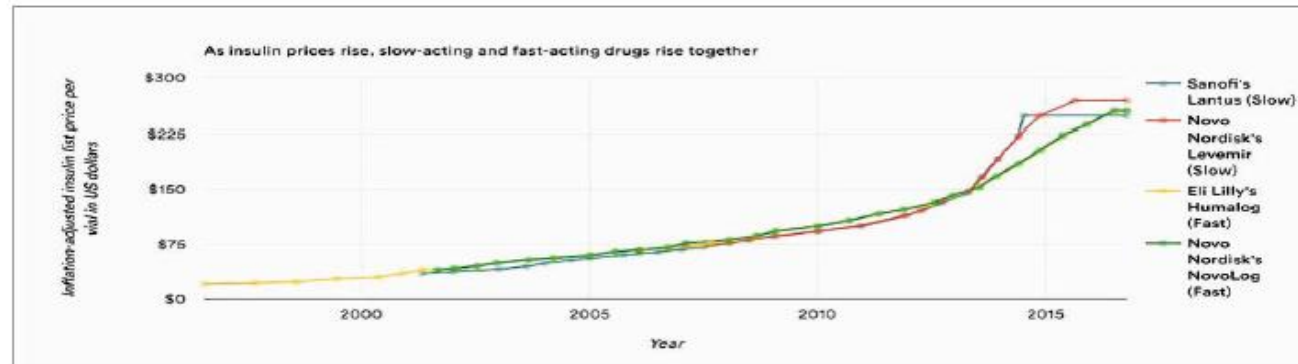
Algonquin

# INSULIN PRICE-FIXING LITIGATION QUICK FACTS

- The insulin price fixing litigation has been pending before Judge Brian Martinotti in the District of New Jersey since 2023. There have been cases addressing insulin price fixing since 2017 in various courts.
- Types of Plaintiffs: Indirect Purchaser Class, Direct Purchaser Class, Attorneys General, Payors (Government Subdivisions, Corporations, Unions, other Employers)
- Over the past twenty-five years, the list price of certain insulins has increased by more than 1000% (10x). By comparison, \$165 worth of consumer goods and services in 1997 dollars would, in 2021, have cost \$289 (1.75x).
- Sept 2025 two orders on motion to dismiss from the insulin price fixing self funded payer case in DNJ. Judge Martinotti dismissed SFP plaintiffs' RICO claims brought against the manufacturers and PBMS. In general, state law fraud, unjust enrichment, civil conspiracy survived.

# INSULIN PRICE-FIXING LITIGATION

Figures 14 and 15: Lockstep insulin price increases



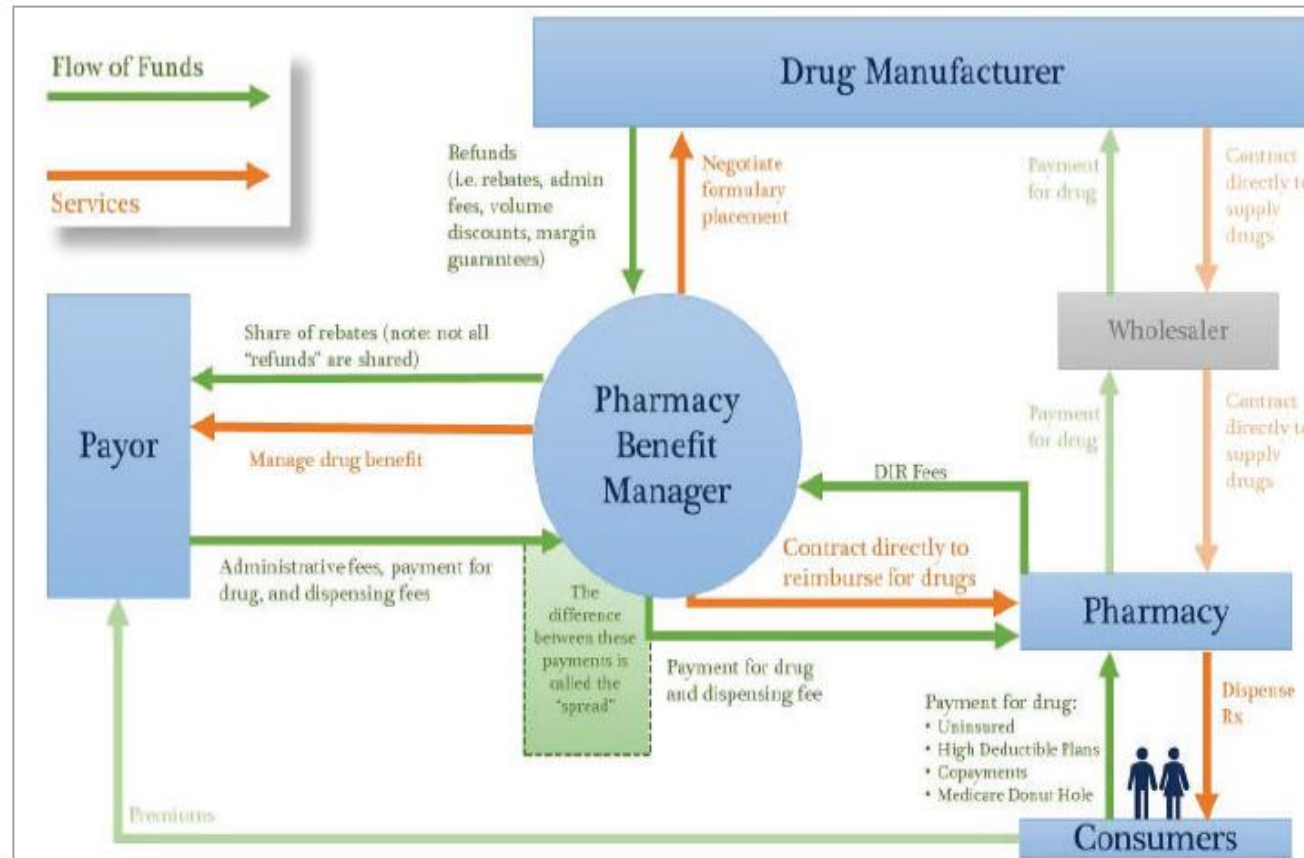
- Fraud and conspiracy claims remain alleging that three insulin manufacturers and three PBMs colluded to artificially inflate the price of insulin.
- Manufacturers are Eli Lilly, Novo Nordisk, Sanofi; PBMs are OptumRX, United Healthcare, CVS Caremark; Group Purchasing Organizations are Ascent, Emisar, Zinc

# INSULIN PRICE-FIXING LIABILITY

- **Fraud**
  - Manufacturers, PBMs, and Group Purchasing Organizations made material misrepresentations or omissions about the value and benefits of their products and services. Self-funded payors relied on those misrepresentations and omissions and paid artificially inflated prices as a result.
- **Civil Conspiracy**
  - Manufacturers, PBMs, and Group Purchasing Organizations conspired to artificially inflate prices based on false pretenses, causing a net increase to clients.

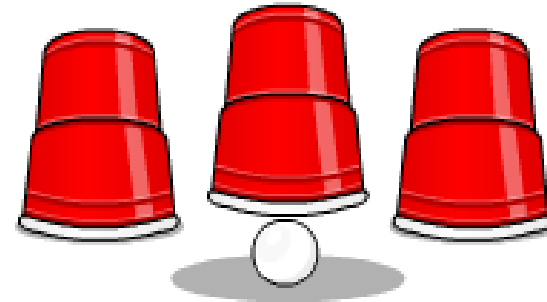
# INSULIN PRICE-FIXING DISTRIBUTION AND PAYMENT CHAIN

Figure 22: Insulin distribution and payment chain



# INSULIN PRICE-FIXING LITIGATION

- How have the defendants been able to profit so handsomely?
  - Rebates, Administrative Fees
  - GPOs – Group Purchasing Organizations
- *Dewberry Group, Inc. v. Dewberry Engineers Inc.*, 604 U.S. \_\_\_\_\_ (2025). Supreme Court rules that lower courts were wrong to treat plaintiff and its affiliates as a single entity in calculating the “defendant’s profits.”
- PBMs, in particular, hold numerous corporate affiliates and strictly interpret those corporate divides.



# INSULIN PRICE FIXING - GPOS/"REBATE AGREGATORS"

- Between 2019-2021, "big three" PBMs formed GPOs
- Why?
  - Proposed PBM transparency legislation
  - Safe Harbor provisions in the Federal Anti-Kickback Statute
- Impact?
  - Less Transparency
  - Reduces Rebate Pass Through
- PBMs have **doubled** their revenue from fees from \$3.8 billion in 2018 (before GPOs were created) to \$7.6 billion in 2022.

PBM	Aggregator
Express Scripts	Ascent
CVS/Caremark	Zinc
Optum	Emisar

# INSULIN UPHILL CLIMB

- Daunting Plaintiff Fact Sheet Process
- Senate Finance Committee Report dated January 2019 serves as the constructive notice date, triggering statutes of limitations
- CMO #23
  - 24 Plaintiff Bellwethers
  - Staged Discovery
  - Only 50 hours of deposition testimony per Defendant



Kaaterskill High Peak

## ON THE HORIZON

- Bunker gear replacement suits
  - See Int'l Assoc. of Firefighters v. Nat'l Fire Protection Assoc., 2384CV02517-BLS2 (Suffolk Cty Mass.) (finding that the IAFF survived motion to dismiss against industry partner/organization on unfair and deceptive conduct in mandating PFAS bunker gear)
  - PFAS-free bunker gear will likely become the industry standard.

## ETHICAL CONCERNS CONTINGENT FEES

**Defendants have argued that Counties may not engage outside litigation on a contingent fee basis.**

- Mass tort cases against major companies are very expensive to litigate. Contingent fee counsel level the playing field.
- Engagement of outside contingent fee counsel does not violate due process or public policy at least when the County Attorney maintains supervision and the County has ultimate decision-making authority. See *In re Opioid Litigation*, Index No. 400000/2017, 2018 WL 4827863, at \*6 (N.Y. Sup. Ct., Suffolk Cnty. May 15, 2018).
- Other courts are uniformly in accord. E.g., *State v. Actavis Pharma, Inc.*, 167 A.3d 1277, 170 N.H. 211 (2017); *City of Chicago v. Purdue Pharma L.P.*, No. 14-CV- 4361, 2015 WL 920719, at \*4-\*5 (N.D. Ill. Mar. 2, 2015).

# ETHICAL CONCERNS COUNSEL OF RECORD

Defendants have argued that outside counsel lacks authority or are not adequately supervised.

County Law § 501:

"*The county attorney shall prosecute* and defend all civil actions and proceedings brought by or against the county ...."

"Within the limits of the appropriation, the county attorney may *employ counsel to assist* in any civil action or proceeding brought by or against the county or any county officer in his official capacity."

To avoid arguments that outside counsel is not (i) authorized or (ii) supervised and controlled, the County Attorney should *appear as counsel of record along with outside counsel*.

# ETHICAL CONCERNS OPEN RECORDS

- To Be Supplied

## ETHICAL CONCERNS DEATH RECORDS, 911 RECORDS, DRUG TREATMENT RECORDS

- Death Records. N.Y. County Law § 677
- 911 Records. New York County Law § 308
- Drug Treatment Records. 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2 (stricter than HIPAA) and New York Mental Hygiene Law § 33.13.
- Solution: Produce anonymized data pursuant to a Protective Order.
- Depending on the statute, may need to be done with a “So Ordered” Stipulation.

# ETHICAL CONCERNS LAW ENFORCEMENT INFORMATION

**Sheriffs' Records are always sought in Opioid litigation**

- **New York Public Officers Law § 87(2)(e)**
  - interfere with an investigation or judicial proceeding
  - deprive a person of a fair trial
  - identify a confidential source
  - disclose confidential information relating to a criminal investigation
  - reveal non-routine investigative techniques or procedures
- **New York Public Officers Law § 87(2)(b)**
  - Privacy of victims, witnesses, suspects

# ETHICAL CONCERNS LAW ENFORCEMENT (CONT.)

- **New York Public Officers Law § 87(2)(f)**
  - endanger life or safety
- **New York Public Officers Law § 87(2)(a)**
  - Incorporates other confidentiality statutes (e.g., juvenile records, sealed cases)
- **Criminal Procedure Law § 160.50 / 160.55**
  - **Sealed records** (dismissals, violations)
- **Family Court Act § 381.3**
  - Juvenile delinquency records

## ETHICAL CONCERNS CRIME-FRAUD EXCEPTION TO ATTORNEY CLIENT PRIVILEGE

- **District of Columbia v. Meta Platforms, Inc., 2003 CAB 006550 (Sup. Ct. Dist. of Columbia, Oct. 23, 2005):**

“Meta’s counsel explicitly advised Meta researchers to ‘remove,’ ‘block,’ ‘button[] up,’ ‘limit,’ and ‘update’ their research. ... Meta’s counsel offered such legal advice to specifically limit Meta’s potential liability, while Meta was already the subject of a related multidistrict litigation. ... Following the initiation of the related multidistrict litigation, Meta’s counsel informed Meta’s researchers to amend their research to limit Meta’s potential liability.”

Crime-fraud exception found.

# THANK YOU AND QUESTIONS



**SIMMONS HANLY CONROY**  
A NATIONAL LAW FIRM

Sarah Burns – [sburns@simmonsfirm.com](mailto:sburns@simmonsfirm.com)  
Thomas I. Sheridan, III – [tsheridan@simmonsfirm.com](mailto:tsheridan@simmonsfirm.com)