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Trump's opioid announcement may be enough to bring increased litigation

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After months of mixed signals from the administration, on Oct. 26, President Donald Trump announced that he would declare a "national health emergency" — rather than a "national emergency" under the Stafford Act — to address the nation's opioid epidemic.

Shortly thereafter, the president's Commission on Combating Drug Addiction and the Opioid Crisis issued its final report outlining its suggestions for fighting the opioid crisis.

Both the president's announcement and the commission's recommendations are consistent with earlier statements from Trump suggesting he does not intend to target the pharmaceutical industry in his efforts to curb opioid addiction.

However, certain statements and recommendations foreshadow the potential for increased litigation involving manufacturers of opioids. Further, the attention these actions direct toward the opioid crisis may residually result in an increase in the filing of lawsuits and potentially influence jury pools.

In March, Trump issued an executive order establishing a blue-ribbon commission charged with identifying existing federal funds used to combat the opioid crisis, examining possible treatment services, reporting on best practices for addiction prevention and evaluating existing federal programs addressing drug addiction.

Four months later, the commission recommended that the president declare a national emergency, an act that would free additional federal resources to address the problem.

In response to that recommendation, then-Health and Human Services Secretary Tom Price initially suggested on Aug. 8 that "the resources that we need, or the focus that we need to bring to bear to the opioid crisis can be addressed without the declaration of an emergency."

A mere two days later, Trump announced that his intention was to formally declare a national emergency with a White House news release adding that the president had "instructed his administration to use all appropriate emergency and other authorities to respond to the crisis caused by the opioid epidemic."

Less than a week after the president's announcement, the blue-ribbon commission released a draft of its final report. Consistent with the president's comments, the recommendations in the panel's report focused primarily on three fronts: (1) preventing addiction, (2) providing treatment for those already addicted and (3) developing new non-addictive medications.

While the report discusses increased funding for the prosecution of drug trafficking and money-laundering organizations, it does not address any of the ongoing civil litigation filed by both municipalities and individuals against manufacturers for allegedly failing to curb incidents of opioid abuse.

In light of the conflicting messages coming from the administration, the president's recent decision to again change course and declare not a full national emergency but rather a national health emergency, while somewhat unexpected, is hardly shocking.

[T]he attention that Trump's declaration is bringing to the opioid crisis may further impact the perception of the pharmaceutical industry in jury pools in cases of all types.

The tone of his address was consistent with prior statements, focusing on treatment as the main vehicle for addressing the opioid crisis. Certain recommendations also invoked the Reagan-era War on Drugs, with Trump threatening to go after foreign manufacturers of illicit opioid drugs as well as target and break up gangs who distribute them.

At the same time, the president proposed the introduction of "really tough advertising" and an educational campaign intended to warn children of the dangers of opioids and teach them "not to start taking drugs."

With respect to the pharmaceutical industry, much of the president's address spoke of working with manufacturers, rather than against them. Trump praised the National Institute of Health for a public/private partnership intended to develop non-addictive painkillers.

Similarly, the blue-ribbon commission specifically urged the National Institute on Drug Abuse to "continue research in concert with the pharmaceutical industry to develop and test innovative medications" for treating those addicted to opioids.

However, in his address the president also warned that his administration would "be bringing some very major lawsuits against people and against companies that are hurting our people." He further indicated that one unspecified "truly evil" opioid would be "taken off the market immediately." No such actions have been announced to date.

Several states have already sought to recover damages from major pharmaceutical manufacturers associated with what they believe were fraudulent marketing practices. In lawsuits filed by attorneys general, states have alleged that manufacturers have suggested use of opioids and failed to take appropriate steps to curb incidents of opioid abuse.

Indeed, within the past year, more than two dozen states, cities and counties have filed these types of civil lawsuits against pharmaceutical manufacturers, including here in Illinois.

The good news for the pharmaceutical industry is that the

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declaration of a public healthcare emergency does not itself seem intended to encourage lawsuits from public entities or attorneys general. While the Public Health Service Act lifts certain restrictions in the event of a public health emergency, it does not provide significant government funds in the same manner that a national emergency under the Stafford Act would.

As such, it appears that there will be no access to additional funding and resources to, among other things, pursue litigation against pharmaceutical companies.

That said, it remains possible that Trump could still direct the Justice Department to shift focus — and available funds — toward such litigation. The Justice Department itself could also unilaterally choose to do so. Indeed, the same day that the president made his recent statement, the Justice Department announced that it had indicted a pharmaceutical CEO for allegedly bribing doctors and pharmacists to prescribe a highly addictive opioid.

Additionally, Attorney General Jeff Sessions created an Opioid Fraud and Abuse Detection Unit this past August, and while it claims to be focused on "pill mill schemes and pharmacies," it is possible that the unit could redirect its attention to manufacturers.

Perhaps more significantly, the attention that Trump's declaration is bringing to the opioid crisis may further impact the perception of the pharmaceutical industry in jury pools in cases of all types. There is little doubt that an American president can influence public opinion and that presidential communications — from executive orders to tweets — may directly or indirectly influence outcomes.

In his Oct. 26 announcement, the president has now declared this to be an "emergency," referenced a "truly evil" pharmaceutical and referenced "people and companies that are hurting people." Such statements cannot be considered helpful in the context of pretrial publicity in any cases involving pharmaceuticals and pharmaceutical manufacturers.

Whether the administration's actions or the president's own statements serve to encourage additional opioid lawsuits remains to be seen.

In the context of an overall impact of these actions and statements, the possibility of increased litigation and the effect upon the outcomes of that litigation for manufacturers of pain medications is certainly a legitimate concern.

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