

## Contaminated steroids class-action suit settles for \$10.5M

### Multidistrict suits, bankruptcy among obstacles faced in 'complicated' case

By: Douglas Levy in News Stories April 11, 2016

Nearly four years after more than 300 patients in Michigan were infected with fungal meningitis — 19 of whom died — a \$10.5 million class-action settlement has been reached with a Michigan defendant.

This is in addition to a \$210 million national tort trust for all national class members, including Michigan's, approved by a bankruptcy court in Boston.



But the road to getting a Livingston County Circuit Court judge to sign off on the Michigan settlement was fraught with as many bumps, turns and scrapes as a motocross competition.

"It was a very complicated process," said Southfield attorney Marc E. Lipton, who led the three-attorney steering committee for Michigan.

#### At Ground Zero

The U.S. Food and Drug Administration and Centers for Disease Control traced the 2012 outbreak to contaminated steroid compounds that came from Massachusetts-based New England Compounding Center.

Lipton said NECC was only licensed to prepare individual steroid prescriptions but instead compounded bulk quantities of them. He said that as NECC's business scaled up, it disregarded precautions for keeping the drugs safe. Mold was discovered in the room where the drugs were prepared.

"Unbridled greed combined with absolutely poor management and processes [were] in place," said Lipton, of Lipton Law. "They were acting like a manufacturer but were operating as a compounder and using that loophole to avoid safety requirements."

The outbreak affected more than 750 people in 20 states, 64 of whom died.

Lipton said that as fungal meningitis cases were being reported nationally, Michigan was deemed Ground Zero for the outbreak, with Brighton-based Michigan Pain Specialists bearing the most cases per capita.

"For whatever reason, and it could have been bad luck, [MPS] had more sick patients than any other state in the country — not any other hospital or clinic," Lipton said. "They had about 30 percent of the known cases of infected people."

NECC executives were charged with murder and racketeering. On the civil side, each court case was consolidated in Boston as part of a multidistrict litigation (MDL), with the court appointing each state a plaintiffs' steering committee.

Many of Michigan attorneys and firms supported Lipton for the head of the Michigan committee, which Lipton called "a combination of stepping up and being pushed forward." Robert B. Sickels of Sommers Schwartz PC and Marc Newman of The Miller Law Firm PC filled out the team of class counsel.

#### Potholes ahead

But before the MDL was created, NECC filed for bankruptcy.

The U.S. Attorney's Office appointed an unsecured creditors committee, made up of patients who had a stake in the matter. Lipton said even though one of his clients was named to the committee, he sat there in her place as her representative.

He said he viewed the unsecured creditors committee members as "acting like a shadow steering committee."

"The coordination problem became very difficult," Lipton said. "Because of the bankruptcy, you had a whole other

set of entities that had to be dealt with on this problem.

"You had the trustee who was appointed by the bankruptcy court, and technically he represents [NECC], but his interest was in getting as much money as he could from all the people who were potentially responsible into the hands of the patients. But he had his own methods and his lawyers, so we had to deal with him. Then the creditors committee had their lawyers, and the plaintiffs' steering committee were our lawyers."

And that was all just for the plaintiffs' side.

Besides criminal attorneys for the NECC executives, Lipton said the defense side included insurance attorneys and counsel for all of the NECC subsidiaries and related companies who were being sued.

### **'Excruciating' negotiations**

Lipton said he and Sickels filed the first Michigan suit against MPS and its physicians. He added that because other clinics and physicians across the country had general negligence and medical malpractice claims filed against them, counsel's argument that MPS shouldn't have trusted NECC was strengthened.

The federal court in Boston ordered counsel for MPS and its two insurance carriers and Lipton, on behalf of the plaintiff's steering committee, into facilitation. There, they were joined by a representative from the creditors committee and an NECC trustee.

"Those negotiations were excruciating," Lipton said. "They were very contentious. There were a lot of issues. There were issues of insurance coverage and liability. When you put 20 lawyers in a room, it's not going to run as smooth as you'd like."

The negotiations started November 2013, 14 months after the outbreaks occurred and six months after the first MPS suit was filed.

Though the facilitation deadline was January 2014, the parties didn't agree on anything until May 2014 — and, Lipton said, what they did agree on was only for a portion of the issues.

"We came very, very close, but we just couldn't get over that hurdle," he said. "Yet, even though the negotiations 'fell apart,' we kept talking."

### **Sorry, no deal**

But when an agreement finally materialized, the NECC trustee refused to sign off on it.

"He said he didn't want [MPS] to be treated any differently than the other clinics having their cases resolved," Lipton said. "He refused to recognize the specifics in Michigan law and why Michigan is different than Virginia and New Jersey, and how that affected the ability of the plaintiffs to ultimately prevail if we go forward in a lawsuit."

Lipton added that going forward with a lawsuit would have been impossible anyway, because even if the first few trials were successful, the jury verdicts would "wipe out the pot."

"The only way this was going to settle in a way that was fair to the patients was to settle it at one time," he said. "You couldn't go forward on a lawsuit on a class-wide basis, because it was likely the class itself would not have been approved unless it was settled."

In the meantime, the Bankruptcy Court in Boston approved a \$210 million national tort trust for all national class members, including Michigan's. In addition, four non-Michigan clinics settled at the Bankruptcy Court.

"And that's what our plan was," Lipton said. "But they refused to let us into that process. So we had to come up with another solution."

That solution, Lipton said, was to file another lawsuit in Michigan against MPS.

The clinic's insurers made an offer of settlement in July 2014, but in order for that to happen, Lipton and his team had to get buy-in from all the Michigan lawyers whose clients were part of the MPS suit.

They were successful.

"Even though I was negotiating for the steering committee at the time, I didn't want to settle the case and cram it down the throat of lawyers who have disagreed with us," he said.

down the trial of lawyers who have disagreed with us," he said.

"I knew this would be little money on a pro rata basis for terrible injuries, but I didn't want to have a ton of lawyers fighting over this case, making it harder on the clients and raising the costs."

### 'Nobody opted out'

Lipton said it took a full year to craft releases and terms of the \$10.5 million settlement.

"We gave notice to everyone," he said. "Nobody opted out. Nobody objected to the settlement, and 311 people out of 313 — 40 or 50 of which were not represented by attorneys — signed the release. In a class action, that's unheard of. That speaks to the work done by all sides on all parts."

Livingston Circuit Court Judge David J. Reader approved the settlement March 25, 2016. Plaintiff's counsel could not speak about specifics of the deal. Randy J. Hackney, who represented MPS, could not be reached for comment.

Lipton said the funds are tied up for the time being because of Medicare and private health insurers' liens. He added that the steering committee tried working with U.S. Sens. Gary Peters and Debbie Stabenow and other legislators to try to get Medicare to waive their liens. Medicare refused, he said, so the committee is working with the insurers such as Blue Cross for lien reductions.

Once they're able to do that on a global basis, Lipton said they'll "hopefully" make distributions before year's end.

Lipton said in retrospect, the case has been "an enlightening experience" from a professional standpoint.

"It's been educational," he added. "It's all the things you look for as an attorney. You want to strive to do more, and when you can help a lot of people, that's a bonus."

If you would like to comment on this story, email Douglas Levy at [douglas.levy@mi.lawyersweekly.com](mailto:douglas.levy@mi.lawyersweekly.com).

Tagged with: [BANKRUPTCY LAW](#) [JUDGE DAVID J. READER](#) [LIVINGSTON COUNTY CIRCUIT COURT](#)



MICHIGAN LAWYERS WEEKLY **Special \$19 Intro Offer** LEARN  MORE

Copyright © 2016 Michigan Lawyers Weekly

400 Renaissance Center Drive, Suite 2600,

Detroit, MI 48243

(800) 678-5297 fax: (248) 865-3117

