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MDL Hearing Signals A New Phase For Opioid Suits

By **Adam Fleischer** and **Kevin Harris** December 1, 2017, 11:58 AM EST

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On Nov. 30, 2017, the U.S. Judicial Panel on Multidistrict Litigation, through the U.S. District Court for the Eastern District of Missouri, heard argument from the parties in over 100 lawsuits filed by county and local governments seeking damages from pharmaceutical companies for the opioid epidemic. The plaintiffs who favor consolidation argued that the cases belong in Ohio, whereas the manufacturers argued for consolidation in Chicago or New York, and various distributors supported consolidation in West Virginia. Whether these cases get consolidated and, if so, in which court, may have far reaching implications toward the management and ultimate resolution of the onslaught of opioid claims.

The Parties' Arguments for MDL and Their Preferred Venue

On Sept. 25, 2017, 46 government plaintiffs filed a motion with the panel seeking coordination or consolidation of their claims and 20 "substantially similar" lawsuits pending in 11 federal districts. Among the common questions of fact that would justify MDL, plaintiffs cited:

- Whether, and to what extent, defendants promoted or allowed the use of prescription opioids for purposes other than those approved by the U.S. Food and Drug Administration.
- Defendants' knowledge of the actual or potential diversion of prescription opioids into illicit channels.
- The nature and adequacy of defendants' internal controls and procedures for identifying suspicious orders for prescription opioids and reporting them to the authorities.

Pro-MDL Plaintiffs: The above referenced government plaintiffs argued that "the potential for conflicting, disorderly, [and] chaotic" pretrial rulings is great, and recommended that Chief Judge Edmond A. Sargus, Jr. of the Southern District of Ohio, currently presiding over more than a dozen opioid claims, preside over the MDL in light of his experience with dispositive motions, "bellwether trials," and settlements in the MDL context. According to counsel, a court in Appalachia, which has been hit hardest by the opioid epidemic, deserves the opportunity to preside over any MDL the panel might establish.

Anti-MDL Plaintiffs: Several plaintiffs, including the city of Chicago and eight plaintiffs from West Virginia, opposed centralization. Those plaintiffs argued that their claims named distributors or

manufacturers, but not both, such that MDL would hinder their individual case interests, and they would not have sufficient issues of commonality to justify consolidation.

The panel rejected these arguments because, as Judge Charles Breyer of the Northern District of California noted repeatedly, the central factual issue for these claims is "what did [the manufacturers and distributors] know and what did they do [with that knowledge]?" Plaintiff-specific questions, such as how many pills were shipped into a given community, could be answered in the context of MDL without hindering any individual plaintiff's case.

Distributors: According to the "big three" distributor defendants, McKesson Corporation, Cardinal Health Inc., and AmerisourceBergen Corporation, the panel should establish MDL before Judge David A. Faber in the Southern District of West Virginia, where claims against distributors were first filed, and where Judge Faber has already heard motions to remand and motions to dismiss in those cases (Judge Faber has not ruled on the latter).

Manufacturers: The manufacturers sought transfer to the federal district in which they were first sued. For them, that is the Northern District of Illinois, where Judge Jorge Alonso is presiding over the lawsuit filed by the city of Chicago in June 2014. The manufacturers noted that more than half of the Northern District's judges have MDL experience, and touted the central location of the court and its proximity to airports as additional support. Judge Alonso's rulings on three rounds of motions to dismiss in Chicago's suit were also discussed.

As an alternative to the Northern District of Illinois, the manufacturers, many of which are based in Connecticut, Pennsylvania, New York and New Jersey, also expressed support for the U.S. District Court for the Southern District of New York, even though there is no opioid litigation pending against them there.

Criteria for Establishing MDL and Selecting a Transferee Court

The panel considers a number of common sense factors when selecting a transferee court to administer MDL, including: (1) case load; (2) geographic convenience for parties, witnesses and evidence; and (3) forums with large numbers of pending or anticipated cases subject to the MDL. In addition, the panel has previously focused on the availability of an experienced and capable judge familiar with the issues presented by the litigation. At the hearing, the Panel noted that although defendants were partial to the jurisdictions in which they were first sued, that consideration "will not be the determining factor" in the selection of a venue for MDL.

Significance of MDL to the Opioid Epidemic

Transferee courts often make crucial pretrial decisions regarding case management, the scope of discovery and class action certification. Moreover, while those cases the panel consolidates into MDL "shall be remanded," to its original district following pretrial proceedings, remand is unnecessary if a case "shall have been previously terminated." According to statistics produced by the panel, in 2016, transferee courts only remanded 12.1 percent of cases (399 of 3,289) that were consolidated into MDL. Instead, the transferee court commonly rules on dispositive motions before remand or presides over settlement.

For example, Judge John Lee, in the Northern District of Illinois, has used his role in presiding over an MDL for the NCAA college football concussion claims to help navigate and create coordination between disparate groups of plaintiffs' counsel, and to test the limits of the proper valuation of a

settlement of these claims, as well as the parameters of what groups of plaintiffs will and will not be included in the settlement, and how the settlement may be paid out. The opioid claims have this far suffered from the lack of such coordination and guidance, and establishing an MDL is an important step in this direction.

The opioid claims in particular, as contrasted with concussion or other MDLs, present a few unique challenges. First and foremost, the opioid claims are not brought by the injured individuals themselves. Instead, these claims are brought by government entities that allege they are out money for having treated or responded to the epidemic.

As Judge Vance noted throughout the hearing, "there are serious threshold issues" with the government entities' standing to bring their claims that do not apply to other categories of plaintiff, such as individuals claiming wrongful death, which could lead to an inefficient MDL for nongovernment plaintiffs. Therefore, the manner in which government entities can prove their damages will be a challenging topic for any MDL court, as will the consideration of how a settlement may be structured such that it does not impinge on the rights of recovery for the actual individuals who may later claim personal harm from opioids.

An additional consideration for any MDL court is how to address the differing exposure and roles of the defendants who may be part of the MDL and any proposed settlement. Pharmaceutical manufacturers have been the primary target of opioid litigation, as these entities are alleged to have been involved in stoking the fires of the epidemic from the earliest days. Many of these companies have very large self-insured retentions, which could give them increased autonomy to craft settlements through an MDL.

By contrast, the distributor defendants in the MDL may face very different exposure, a resolution of which may involve insurance interests. The defendants in these claims are also beginning to include pharmacies, doctors and pain management clinics, all of which have settlement interests and exposures that differ from the others, and which would have to be reconciled through MDL management.

As opioid claims mount, reports have surfaced indicating that Purdue Pharma and other pharmaceutical defendants are eyeing settlement, at least at the state level. Therefore, the existence of an MDL in the immediate future, while having its work cut out for it, may be the key development toward moving these cases toward resolution in a coordinated fashion on the federal level.

Indications from the Court

The panel clearly believed that what the pharmaceutical defendants knew about their drugs and sales practices, and what they did with that knowledge, were factual issues shared across claims. The panel's concern was about efficiency, and about how to structure an MDL to elucidate common facts without impinging on the claims of various plaintiffs. Nearly every attorney who spoke was asked to opine on the ideal scope for the MDL: Should the MDL include government entities only, or should it include hospitals, labor unions and individual plaintiffs as well? Quite understandably, no counsel had a comprehensive answer.
One way to solve this problem, which was first posited by Judge Breyer, is to assign all of the claims to MDL and allow the transferee court to create different "tracks" based on plaintiff category, spin off new MDLs as appropriate, or remand cases that have ceased to benefit from MDL.

Some variation of this procedure received support from prominent parties, including the manufacturer defendants and the "big three" distributors. This approach would also assuage various parties who expressed concern about being lumped into a "one-size-fits-all" MDL, such as smaller, localized

wholesale distributors who are only sued in a handful of the roughly 150 opioid lawsuits currently pending nationally.

Conclusion

The most prominent parties agree that the opioid litigation proliferating across the country would benefit from MDL coordination or consolidation. The panel seems convinced that common questions of fact exist in the opioid litigation at issue.

Assuming an MDL is established, the pace of opioid litigation should accelerate and new, "tag along" claims will likely be filed as plaintiffs seek to share costs within the MDL and share in any potential global settlement. Evidentiary and dispositive rulings may also influence how many additional plaintiffs file new claims and push the parties towards settlement. With the prospect of an MDL looming, prescription opioid litigation is entering a new phase that will have a significant impact on those interested in these claims.

***DISCLOSURE**: BatesCarey LLP represents a number of the insurance companies who have issued policies to the pharmaceutical manufacturers and distributors being sued in the cases discussed above.*

Adam H. Fleischer and Kevin F. Harris are members of BatesCarey LLP in Chicago and serve on the firm's opioid coverage task force in monitoring and evaluating a range of liability and insurance issues related to the opioid epidemic.