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## MDL May Be On The Horizon In Opioid Litigation

By **Emily Field**

Law360, New York (October 6, 2017, 10:11 PM EDT) -- The recent wave of opioid litigation has yet to hit its peak, as new suits filed by counties and municipalities against drug manufacturers and other companies in the supply chain roll in on an almost daily basis, and it is increasingly likely that a number of federal cases will be consolidated, attorneys say.

Recently, the West Virginia firm of Hill Peterson Carper Bee & Deitzler PLLC asked to transfer 66 suits filed by cities and counties in 11 different federal courts, arguing the suits share common questions about the manufacture, distribution and sales of opioids by the defendants, and they mainly target the country's three largest drug distributors, though some also name drugmakers Purdue, Teva and Cephalon, among others.

While it's likely the Judicial Panel on Multidistrict Litigation would decide to consolidate these cases for efficiency's sake, a number of factors, like the number of defendants in the cases, would make such an MDL stand out, attorneys said.

Normally, MDLs have their origin in one defendant, such as Ethicon in the pelvic mesh litigation, or in claims against a bevy of defendants arising from a discrete event, like the 2010 Deepwater Horizon oil spill, said Joe Rice of Motley Rice LLC, whose firm is representing Chicago, Santa Clara and other municipalities and states in opioid suits.

"So this would be an unusual management challenge in an MDL," Rice said.

The ongoing opioid epidemic has given rise to at least 100 suits filed on behalf of local governments and a Cherokee tribe, as well as at least one proposed class action in Arkansas and a joint investigation launched this summer by 41 state attorneys general into at least half a dozen drugmakers and distributors.

The state AGs' probe initially focused on OxyContin maker Purdue Pharma and **has since widened** to include other drugmakers and distributors such as Endo, Allergan, McKesson and Teva.

According to the Centers for Disease Control and Prevention, deaths from prescription opioids have increased fourfold since 1999, roughly keeping pace with an increase in sales of opioids since 1999, even though Americans haven't reported a change in pain levels.

Suits filed over the opioid crisis generally allege the drug companies downplayed the addictive risks of the drugs in order to turn a profit; other claims include negligence and violations of the federal Racketeer Influenced and Corrupt Organizations Act and state business practices laws.

The petition for consolidation was filed by James Peterson of Hill Peterson Carper Bee & Deitzler, which represents more than **40 municipalities** suing over the opioid crisis. The firm is working with a consortium of other plaintiffs firms, which may be a sticking point for the JPML, Hunter Shkolnik of Napoli Shkolnik PLLC noted.

"They may say, wait a second, you're all the same firms, why do you need an MDL to coordinate with yourselves?" Shkolnik said. "That's my concern about their petition."

Shkolnik said that his firm is representing New York counties in a coordinated state court proceeding;

it is also representing municipalities in other states including Maine and Ohio.

The suits filed by his firm on behalf of about 60 counties around the country are aimed at not only drugmakers and distributors, but also “pill mills,” as well as doctors and pharmacists who have lost their licenses for their role in the crisis. Other plaintiffs' firms are focused either largely on manufacturers or distributors of opioids, Shkolnik said.

Shkolnik likened the types of litigation to a Venn diagram: “We all cross over at some point; we cross over everybody, and they don’t all cross over on each other.”

While the similarity of counsel in the federal cases might be enough to dissuade the JPML at this point from consolidating the cases, Shkolnik did say that the momentum of new suits might override such concerns for the panel.

“You have a situation where I think they know this is going to grow and grow, so maybe they will do an opioid MDL, just knowing it’s going happen,” Shkolnik said.

Paul Hanly of Simmons Hanly, who is co-lead counsel in the New York county cases, also represents a number of cities in Connecticut.

“My plan file is to file as many county cases as I can gather over the course of the next year or so,” Hanly said. “I have 50 or so [now], and I expect that to grow to as many as 500 or 600.”

Hanly — who was one of the lawyers involved in Purdue’s 2007 \$19.5 million multistate settlement over its opioid marketing — said that he expects to see different “pockets” of coordinated proceedings develop across the country as the litigation matures.

“I frankly would like every county join to litigation because that’s the way you get leverage over these companies, you have to have a lot of cases [that] are brought by a lot of lawyers who have a lot of firepower and a lot of money,” Hanly said.

George Talarico of Locke Lord LLP said that while he was surprised a plaintiff filed the motion for an MDL — as he’d expect plaintiffs would want to stay in their local courts — he didn’t see the motion being challenged by the defendants.

“I would think they would want the efficiency of an MDL as well,” Talarico said.

--Editing by Philip Shea and Aaron Pelc.