

**National Association of County Association Executives (NCCAE)
Opioid Litigation FAQ – January, 2018**

Q: What is the opioid litigation?

A: Hundreds of states, counties and cities across the country have brought litigation against the manufacturers and distributors of opioid pain medications. Briefly, this litigation brings claims against these parties for their role in creating the current state of the opioid epidemic, including deceptive marketing to physicians and distributing opioids in violation of state and federal law.

Q: Which firm should counties hire?

A: NCCAE is not recommending law firms counties should hire. There are many qualified firms handling this litigation in the states. It is suggested that firms interviewed should have relevant experience in pharmaceutical litigation. In addition, the Federal MDL Judge has appointed a representative executive committee of law firms to assist the Federal Court. That list is attached.

Q: What is the mindset of the MDL Judge who is charged with hearing all the Federal Lawsuits?:¹

A: **Responsibility:** In my humble opinion, everyone shares some of the responsibility, and no one has done enough to abate it. That includes the manufacturers, the distributors, the pharmacies, the doctors, the federal government and state government, local governments, hospitals, third-party payers and individuals. Just about everyone we've got on both sides of the equation in this case. The federal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government, federal and state, have punted. So it's here.

Timing: I read recently that we've managed in the last two years, because of the opioid problem, to do what our country has not done in 50 years, which is to -- for two consecutive years, reduce, lower the average life expectancy of Americans. And if we don't do something in 2018, we'll have accomplished it for three years in a row, which we haven't done since the flu epidemic 100 years ago wiped out 10 percent of our population. And this is 100 percent manmade. Now, I'm pretty ashamed that this has occurred while I've been around. So I think we all should be.

¹ Bolded intro phrase provided by authors here; remainder of paragraph, taken from the verbatim transcript on January 9, 2018 of Judge Polster's comments, as he addressed the lawyers of record in the consolidated federal proceeding.

Resolution requires more than money: The resolution I'm talking about is really -- what I'm interested in doing is not just moving money around, because this is an ongoing crisis. What we've got to do is dramatically reduce the number of the pills that are out there and make sure that the pills that are out there are being used properly. Because we all know that a whole lot of them have gone walking and with devastating results. And that's happening right now. So that's what I want to accomplish. And then we'll deal with the money. We can deal with the money also and the treatment. I mean, that's what -- you know, we need a whole lot -- some new systems in place, and we need some treatment.

What the people think: I don't think anyone in the country is interested in a whole lot of finger-pointing at this point, and I'm not either. People aren't interested in depositions, and discovery, and trials. People aren't interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unravelling complicated conspiracy theories.

Settlement: I'll turn the plaintiffs loose on the defendants; I'll turn the defendants loose on the plaintiffs. You'll, you know, tear each other up way down ... for discovery. You can go after the federal government, full discovery there, too. You know, FDA, DEA, have at it, and in 2019, I'll try the Ohio case myself and see what happens, after dealing with whatever motions, and I'm sure some of the claims and theories are going to be knocked out and some will survive...

Q: What is the general theory of damages?

A: This litigation brings claims against certain parties for their role in creating the current state of the opioid epidemic, including deceptive marketing to physicians and distributing opioids in violation of state and federal law.

Q: Who are the parties to this action?

A: Suits against Manufacturers:

These tend to focus on the alleged deceptive manner in which opioids were marketed to doctors. Generally, the manufacturer defendants all alleged to have deceived doctors, and their patients, by overstating the benefits of opioid treatment and understating, or falsely presented, the risks.

A: Suits against Distributors:

These tend to focus on alleged negligence in carrying out their duties to report and to otherwise act to curtail suspicious opioid ordering volumes.

Q: Is there a cost to the taxpayers to file this litigation?

A: Due to the complexity of this litigation, it is not advised that individual county attorneys use in-house lawyers to represent the county and that outside counsel should be used. These outside counsel firms generally offer a contingency based retainer agreement under which the firm is only paid if there is a recovery for the county. These retainer agreements should be carefully reviewed to address expenses associated with the litigation, percentage of retainer gross vs. net of recovery (to date 25% seems to be the best offered).

Q: What are the damages sought by the local government entities?

A: Local governments, particularly county governments, across the country have spent and continue to spend taxpayer dollars on employee costs, including overtime; criminal justice services including: increased county Medical Examiner staffing costs, storage of bodies, toxicology laboratory costs, county policing services and corrections costs, including drug rehabilitation programs, Narcan/naloxone injection purchasing/training; mental health/hygiene substance abuse clinics/coordination; fire; paramedic; opioid addiction and abuse treatment; human services including children's services (foster care), family and child services increased staffing, public assistance for child care; health insurance and workers compensation insurance and other employee benefits; hospitals; indigent care funding; and burial, specialized courts: juvenile, surrogate, drug, DUI, drug treatment, juvenile, probate, costs of public defender offices, prosecution, probation and many other costs. These are expenditures tied to the alleged manufacturer and distributor practices that could have been used for other public purposes.

Q: What are the federal causes of action?

A: Federal Claims (partial list)

- Violations of RICO (based on multiple layers of allegations of fraud along with the other elements that make up a RICO claim)

Q: What are the state causes of action?

A: State Claims (partial list)

- Public Nuisance claims based on state statutory schemes
- Public Nuisance claims based on state common law
- Violations of state Consumer Protection laws
- Violations of state Unfair or Deceptive Trade Practices laws
- Violations of state civil conspiracy laws

- Fraud
- Unjust enrichment
- Negligence

Q: If a county filed in federal court in its home state where is the case heard?

A: All cases filed in federal court throughout the country are being consolidated in the United States District Court, Northern District of Ohio, Eastern Division. This Multi District Litigation (MDL) is coordinating all federal lawsuits in the opioid litigation. The MDL is before Judge Dan A. Polster United States District Judge. The MDL is in its infancy, but the Judge has currently put on hold all litigation in an effort to see if a resolution can be reached. [See, *In RE: National Prescription Opiate Litigation*, MDL No. 2804 Case No. 1:17-CV-2804].

Q: Are all cases filed in federal court?

A: No. While most law firms have chosen to file these cases in federal court, some prefer state jurisdiction and have filed in state court. For example, dozens of counties in New York have filed and are currently proceeding in litigation in state court. Recently, the New York judge handling these cases has ordered that discovery proceed at this stage. Other states such as Florida also have state claims filed. The ability of these state court claims to remain in state court and to not be consolidated into the MDL is a state-by-state judicial determination.

Q: What are the states doing?

A: In June of 2017, a bipartisan group of 41 State Attorneys General issued investigative subpoenas and document requests to manufactures and distributors of opioid drugs. This state coalition is seeking this information to determine how these companies marketed and distributed the products

Q: If our state's Attorney General has already filed an action in our state, can a county still file a separate action?

A: Yes, counties are not barred from filing a separate lawsuit. Each county should consult with its county attorney and state attorney general office for further advice and analysis of the potential advantages and disadvantages.