



BIG IDEAS

MAXIMIZING THE IMPACT OF OPIOID LITIGATION TO ADDRESS THE OVERDOSE EPIDEMIC

THE U.S. IS AT A CRITICAL JUNCTURE IN THE OVERDOSE EPIDEMIC.

Overdoses are claiming more lives than ever, and proceeds from litigation against opioid manufacturers, distributors, and pharmacies are imminent. If spent properly, these funds will support essential interventions to counter the devastating public health and societal consequences of the opioid epidemic. Stakeholders, including governments, advocates, researchers, and affected populations, must act to ensure that these funds are spent on services, infrastructure, and innovations that will be effective and respond to the needs of local communities.

In September 2021, Georgetown University Law Center convened an [Opioid Litigation Summit](#). This convening brought together numerous experts to discuss the legal, administrative, and programmatic strategies needed to optimize the impact of proceeds from the opioid litigation. The themes described in this brief emerged from the Summit and can be applied to the opioid litigation as well as future mass tort litigation to address public health crises.

OPIOID LITIGATION SETTLEMENT PROCEEDS MUST ADVANCE A PUBLIC HEALTH RESPONSE.

Increasing rates of overdoses in the United States demand a systemic public health response that will remedy adverse health and societal

Georgetown University Law Professor Maria Glover, in collaboration with the O'Neill Institute for National and Global Health Law, The Pew Charitable Trusts, and the Legislative Analysis and Public Policy Association, hosted an Opioid Litigation Summit. This Summit was a first-of-its-kind convening of key experts in comprehensive, divergent, and crosscutting fields for a series of dynamic strategy sessions maximizing opioid settlement funds to save lives and respond to the overdose crisis. This report reflects themes discussed during the Summit.

OVER
1,000,000
PEOPLE
IN THE U.S. SUFFERED A
FATAL
OVERDOSE
FROM 1999 THROUGH 2021

FROM APRIL 2020 TO APRIL 2021, OVERDOSE
DEATHS ROSE 28.5%
NATIONWIDE
REACHING 100,306 DEATHS
—THE HIGHEST NUMBER OF OVERDOSE DEATHS IN ONE YEAR
IN THE U.S., AND, FOR THE FIRST TIME, OVERDOSE DEATHS
SURPASSED 100,000 IN ONE YEAR.*

*The CDC's National Center for Health Statistics Provisional Data

effects and improve the quality of life for affected individuals, families, and communities. The response should include support for: (1) evidence-based substance use disorder treatment; (2) expanded harm reduction efforts and recovery supports; (3) correlated health and social issues, such as infectious disease prevention/treatment and housing; (4) approaches that focus on “upstream” responses, including mental health, trauma, and adverse childhood experiences; and (5) efforts to reduce stigma.

Some of the responsibility for generating the funds necessary for these efforts has fallen upon the legal system through litigation. Accordingly, increasing rates of overdose deaths demand sustained and significant legal involvement and advocacy to maximize settlement and/or judicial verdict payouts for remediation efforts, to ensure equity among claimants and their constituencies in settlement design and distribution, and to efficiently and effectively manage the use of litigation proceeds for remediation of the opioid epidemic. Many of the individual and public health effects of the opioid epidemic will persist for years; funding strategies must support systems that curb overdoses and prevent the recurrence of the opioid epidemic.

STRATEGIES FOR MAXIMIZING OPIOID LITIGATION PROCEEDS MUST ENSURE:

- (1) **EQUITABLE SETTLEMENT DESIGN**
- (2) **FLEXIBLE AND EFFICIENT SYSTEMS FOR SETTLEMENT DISTRIBUTION AND**
- (3) **OVERSIGHT AND ACCOUNTABILITY**

The tobacco litigation settlements of the 1990s evince the need for a comprehensive strategy of oversight and accountability to distribute and manage opioid litigation proceeds. Despite the intent of the settling states’ Attorneys General that funds be used primarily for tobacco-related health initiatives, the lack of specificity in the settlement agreements led to less than 10% of the \$206 billion award funding tobacco-related public health strategies. Avoiding this outcome in the opioid litigation will require the development and implementation of detailed mechanisms in settlement language, memoranda

ON JULY 21, 2021, OPIOID MANUFACTURER JOHNSON & JOHNSON AND THE “BIG THREE” DISTRIBUTORS—MCKESSON, AMERISOURCEBERGEN, AND CARDINAL HEALTH—MADE A

**\$26 BILLION
“GLOBAL” OFFER**

TO SETTLE THEIR OPIOID-RELATED LIABILITIES TO 44 STATES AND THOUSANDS OF LOCALITIES ACROSS THE COUNTRY.

\$10 BILLION

OF THIS PAYOUT IS CONTINGENT ON LOCAL GOVERNMENTS AGREEING TO FORGO ONGOING AND FUTURE LITIGATION AGAINST JOHNSON & JOHNSON AND THE MAJOR OPIOID DISTRIBUTORS.

TEVA PHARMACEUTICALS HAS SETTLED ITS LIABILITIES OUTSIDE OF THE “GLOBAL” SETTLEMENT,

**\$250 MILLION
IN CASH AND MEDICATIONS IT VALUES AT
\$23 BILLION.**

PURDUE PHARMA AND MALLINCKRODT BANKRUPTCY COURT SETTLEMENTS ARE ANTICIPATED TO RESOLVE THOUSANDS OF OPIOID-RELATED CLAIMS AGAINST THE MANUFACTURERS.

SETTLEMENTS WITH OTHER COMPANIES ARE ALSO IN PROCESS, INCLUDING LAWSUITS BROUGHT UNDER STATE LAWS.

**SYSTEMS OF OVERSIGHT AND
ACCOUNTABILITY CAN ENSURE THAT OPIOID
SETTLEMENT FUNDS ARE USED TO ADVANCE
PUBLIC HEALTH STRATEGIES.**

of agreement and understanding, and legislation to separate out opioid litigation proceeds to abate harms from the opioid epidemic. In doing so, input should be sought of relevant government entities, local communities, and public health experts. For example, Johns Hopkins Bloomberg School of Public Health, in collaboration with public health leaders and others, has developed a set of [guiding principles](#) for use of opioid litigation proceeds.

SETTLEMENT LANGUAGE

Judges should ensure settlement language achieves **equity** among stakeholders in the settlement terms, as well as the plans and systems for distribution of the litigation proceeds. Settlement agreements can, for instance, include a requirement to create councils that represent affected communities, as well as representatives from government agencies and nonprofit organizations. Additionally, attorneys, judges, and judge-appointed extra-judicial officers can ensure community input in settlement design by obtaining data from local communities, including health-service providers, first responders, community leaders and elected officials, individuals in recovery, among others.

Settlement agreements can secure judicial oversight of settlement distribution by including language providing for **retained jurisdiction** for any later-needed updates and adjustments.

Systems of oversight should facilitate, not obstruct, settlement fund distribution to remediate the opioid epidemic. For instance, drafters of settlements can consider provisions for expedited fund-application processes, consolidation of appeals, and deferential standards of review for distribution awards by judge-appointed masters, among others.

LEGISLATION

State and federal legislation, when coupled with carefully crafted settlement agreements, can create guardrails for the use of opioid litigation proceeds. Such carefully crafted agreements can also ensure long-term accountability, allow for oversight over the expenditure of funds, and ensure that litigation proceeds abate and prevent wide-ranging harms caused by the opioid epidemic. The [Model Opioid Litigation Proceeds Act](#) is a model state law that provides a comprehensive framework for the legal, administrative, and programmatic strategies necessary to ensure that opioid litigation proceeds abate the damages that resulted from the practices of defendants in opioid litigation cases.

The Model Opioid Litigation Proceeds Act was developed by the O'Neill Institute for National and Global Health Law, the Legislative Analysis and Public Policy Association, the Center for U.S. Policy, and Brown & Weinraub, PLLC with support by the White House Office of National Drug Control Policy. This Act will guide state legislatures in ensuring that opioid litigation settlement funds are directed to addressing addiction and the overdose epidemic in impacted communities and with public accountability.

MEMORANDA OF UNDERSTANDING / MEMORANDA OF AGREEMENT

Memoranda of Understanding (MOUs) and Memoranda of Agreement (MOAs) between states and localities are a way to formalize how opioid litigation proceeds are spent by establishing a general understanding or conditional agreement among parties. In the context of the global settlement, MOUs and MOAs between state and local governments are a way to create consensus in the terms for distribution and use of the proceeds prior to distribution, in addition to the terms of the settlement agreement itself. For example, [North Carolina's MOA](#) facilitates compliance between the state and local governments with the terms of an anticipated settlement agreement and any other settlements reached by the state of North Carolina related to the opioid epidemic.

In North Carolina, a Memorandum of Agreement between the state and its localities prioritizes collaborative strategic planning, evidence-based addiction treatment, recovery support services, recovery housing support, employment-related services, early intervention, naloxone distribution, post-overdose responses, syringe service programs, criminal justice diversion programs, addiction treatment for incarcerated persons, and reentry programs.

NEEDS ASSESSMENT

An additional strategy is a comprehensive needs assessment. The assessment will inform decision makers on current efforts to address substance use disorders and identify gaps which require new interventions. Affected communities can collect survey data and conduct a gap analysis to determine how litigation proceeds would best serve their jurisdictions and provide this information to lead attorneys, judicial and extra-judicial officers, and other parties involved in settlement design and distribution.

The Colorado Attorney General received feedback from local government leaders which prompted the Attorney General to change its initial proposal of direct allocation to regions and localities from 15% to 80%. This change was finalized as part of Colorado's Settlement MOU signed in August, 2021.

OVERSIGHT BODY

Jurisdictions may also consider establishing an oversight body or council to guide and oversee opioid litigation expenditures. Such councils can coordinate, manage, and/or provide guidance for distribution decisions. These councils can set funding priorities based on a community's needs and emerging best practices. The oversight body or council provides a feedback mechanism, so expenditures adapt to changing circumstances. The council can keep stakeholders and advocates informed on the key components of the multidistrict litigation process, how to analyze and use relevant data, and provide opportunities to participate in determining how litigation proceeds are spent. **Ryan White HIV/AIDS Planning Councils** may serve as a model for these councils. The councils can also engage a diverse range of stakeholders and monitor the distribution of proceeds. Membership on the council will vary by jurisdiction, and must also include representation of traditionally marginalized communities such as people who use drugs; Black, Indigenous, and persons of color; the LGBTQ+ community; immigrant populations; incarcerated persons; rural populations; and people who are unhoused.

A ROADMAP FOR THE FUTURE

At the **Opioid Litigation Summit**, the following themes emerged to guide efforts related to the opioid litigation. These themes can also be applied to future mass tort litigation that seeks to address a public health crisis.

- **Intentional collaboration leading to actionable policy:** Policymakers, public health experts, and advocates should collaborate with litigators and, when relevant, judicial officers, throughout the settlement design and distribution processes. This requires meaningful involvement of representatives from various affected sectors in both the initial development of settlement terms and the continued oversight of the use of litigation proceeds.
- **Reflecting community needs in the distribution of proceeds:** A culture of collaboration and inclusion is essential. A formal framework for substantive community engagement can determine areas of need.
- **Supplementing, not supplanting, existing opioid-related funding:** Opioid litigation proceeds should be used to expand existing strategies and programs that have been effective in abating the opioid epidemic, as well as for new and one-time investments in infrastructure, technology, workforce and systems improvement that reflect promising practices that address the medical and social needs of those affected by the epidemic. This can include widespread implementation of evidence-based and evidence-informed interventions to manage adverse opioid-related health outcomes.

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- **Sustaining oversight:** State, local, and Tribal governments should establish clear accountability mechanisms that include regular public updates on the use of litigation proceeds. The shortcomings of the tobacco litigation settlements provide the clearest evidence of the need for continued oversight to ensure the proceeds of the opioid litigation abate the harms caused by past actions, as well as adapt to changing circumstances.
- **Maximizing and coordinating other sources of funding to create a comprehensive plan to address substance use disorders:** Other sources of funding, such as government grants, private funding, and Medicare and Medicaid funding, should complement the plans for litigation proceed expenditures. Jurisdictions should develop mechanisms, or add to existing coordination mechanisms, to facilitate communications and coordination across the government. State, local, and tribal governments should evaluate promising practices to align substance use disorders spending across funding streams, to include opioid litigation proceeds. Further, the federal government could support technical assistance for implementation of such an alignment effort.

Proceeds from the opioid litigation present an unparalleled opportunity for government leaders to remedy many of the catastrophic public health and societal harms caused by the opioid epidemic. The strategies created to ensure accountability and oversight of these funds can provide a blueprint for future public health litigation. Policymakers must take the necessary steps to safeguard these funds and optimize the possible benefits by supporting a system that ensures access to evidence-based, evidence-informed, and community-centered programs.