
Wisconsin Legislative Council



Anne Sappenfield
Director

TO: MEMBERS, JOINT COMMITTEE ON FINANCE

FROM: Steve McCarthy, Senior Staff Attorney, and Tom Koss, Staff Attorney

RE: Department of Justice Settlements for Approval

DATE: November 30, 2021

This memorandum summarizes two proposed settlement agreements that resolve legal claims against an opioid manufacturer and three pharmaceutical distributors. The Department of Justice (DOJ) submitted the proposed agreements to the Joint Committee on Finance (JCF) for approval pursuant to s. 165.12 (2), Stats., which is a statutory requirement created in 2021 Wisconsin Act 57,¹ in a letter dated November 23, 2021.

This memorandum also provides background information on 2021 Wisconsin Act 57, which governs the distribution of proceeds under the settlement of federal opioid litigation titled *In re: National Prescription Opiate Litigation*, Case No. MDL 2804, and any proceeding filed in Wisconsin circuit court that contains allegations and seeks relief substantially similar to those in Case No. MDL 2804.

2021 WISCONSIN ACT 57

Cooperation by Attorney General

Act 57 requires the Attorney General to cooperate with local governments by entering into a joint settlement agreement for the legal or equitable claims of the state and the claims of local governments that are parties in the opiate litigation, if all of the following conditions are met:

- JCF approves the proposed settlement agreement using the procedure for approval of DOJ settlement proposals under s. 165.08 (1), Stats.
- The settlement agreement or any document that effectuates the settlement identifies 30 percent of the settlement proceeds as payable to the state.
- The settlement agreement or any document that effectuates the settlement identifies 70 percent of the settlement proceeds as payable to local Wisconsin governments that are parties in the opiate litigation.

[s. 165.12 (2), Stats.]

¹ 2021 Wisconsin Act 57 was passed by the Legislature this legislative session, and went into effect on July 2, 2021.

Expenditure of Settlement Proceeds

The act also requires that the state and local governments spend their settlement proceeds according to certain requirements, as described below.

Expenditure by the State

The state's settlement proceeds must be allocated to the Department of Health Services (DHS) and may be spent for any purpose that complies with a settlement agreement or order of the court. In order to spend the settlement proceeds, DHS must submit a proposal of expenditure to JCF by April 1 of each year, for the next fiscal year.

After receiving DHS's proposal of expenditure, JCF has 14 working days to schedule a meeting for the purpose of reviewing the proposal. If JCF schedules a meeting for the purpose of reviewing the proposal, DHS may spend the funds only upon gaining JCF approval. If JCF does not schedule a meeting within 14 days, DHS may spend the funds as described in its proposal. Additionally, if DHS seeks to deviate from its proposal, it must submit a proposal for the deviation to JCF, and the proposed deviation is then subject to the same review provisions as the original proposal for expenditure.

Expenditure by Local Governments

The settlement proceeds for local governments may be paid directly only to local governments that are parties in the opiate litigation. A local government that receives settlement proceeds must deposit the funds in a segregated account that is subject to several requirements, including limitations on how the funds may be spent, budgeted, or reallocated to another political subdivision.

A local government that receives settlement proceeds must submit a report to DOJ and JCF by May 1 of each year. The report must include the amount of money in the segregated account as of December 31 of the previous year and an accounting of the receipts and disbursements from the segregated account in the previous year.

The act also allows a local government to use part of its settlement proceeds to pay for attorney fees if a separate fund created in a settlement agreement for opiate litigation is insufficient to pay the entire amount of attorney fees and expenses.

Claims by Nonparties to Opiate Litigation

The act prohibits a political subdivision of the state (or an officer or agent of a political subdivision of the state) that was not a party to the opiate litigation as of June 1, 2021, from doing any of the following:

- Maintaining a claim to proceeds of any settlement agreement described above.
- Maintaining or commencing any claim related to opioids against a defendant in the opiate litigation that would be released in a settlement agreement described above, if the party bringing the claim were party to the settlement agreement.

The act specifies that a local government with a lawsuit or claim pending as of June 1, 2021, may maintain that lawsuit or claim.

MEMORANDUM OF UNDERSTANDING

In addition to the settlement agreement subject to JCF approval, DOJ has provided the committee with a copy of a memorandum of understanding (MOU) between the State of Wisconsin and certain Wisconsin local governments involved in opiate litigation.

As required by Act 57, the MOU is created to effectuate the terms of the settlement agreements, and includes statutorily required provisions that identify 30 percent of the settlement proceeds² as payable to the state, and 70 percent of the settlement proceeds as payable to local governments in the state that are parties in the opiate litigation.

SETTLEMENT AGREEMENTS

Below is a brief summary of some key aspects of the settlement agreements, including financial terms, injunctive terms, and approved opioid abatement purposes.

Financial Terms

According to DOJ,³ the settlement agreements provide for maximum nationwide payments of up to \$26 billion, approximately \$23.9 billion available to fund opioid abatement uses. The funds are to be distributed according to the allocation agreement reached between the states. Wisconsin's share of the funds is 1.7582560561 percent of the total amounts.

Injunctive Terms

The settlement agreements include injunctive relief relating to the parties' roles in manufacturing or distributing opioids.

Regarding the settlement with Janssen, very generally, Janssen is prohibited from certain activities such as selling, manufacturing, and promoting opioids or opioid products; providing financial support to any third party that primarily engages in conduct that promotes opioids; and lobbying regarding certain opioid-related regulations.

Regarding the settlement agreement with the distributors, each distributor must establish a "Controlled Substance Monitoring Program" to implement the injunctive relief terms and assist in identifying certain "red flags," such as an excessive ordering growth of controlled substances and analyzing the volume of prescriptions to out-of-area patients. Distributors also must establish thresholds to identify potentially suspicious orders of controlled substances and report suspicious orders to states and must

² The MOU defines "Opioid Settlement Proceeds" as "all funds allocated by a Settlement Agreement to the State or Local Governments for purposes of opioid remediation activities, as well as any repayment of those funds and any interest or investment earnings that may accrue as those funds are temporarily held before being expended on opioid remediation strategies." The MOU provides that "Opioid Settlement Proceeds" do **not** include the "additional restitution," reimbursement of the United States Government, or separate funds identified in the Settlement Agreements as payment of the Parties' litigation fees, expenses, and/or costs." However, the MOU also provides that 100 percent of additional restitution amounts must be paid to the state and deposited with DHS, and may be utilized only for purposes identified as approved uses for abatement in the settlement agreements.

³ See letter from Charlotte Gibson, Administrator, and Corey F. Finkelmeyer, Deputy Administrator, Division of Legal Services, DOJ, to JCF, dated November 23, 2021.

select a “monitor” to conduct certain reviews and facilitate a resolution between the parties in the event of a dispute.

Approved Opioid Abatement Uses

Under Act 57, DHS and the local governments may only use settlement funds for purposes identified as approved uses for opioid abatement in the settlement agreements. The settlements identify certain “core strategies” that must be prioritized in the use of opioid abatement funds, such as the following:

- Expanding training for first responders, schools, community support groups, and families regarding Naloxone or other approved drugs to reverse overdoses.
- Treating persons with opioid use disorder who are in and transitioning out of the criminal justice system.
- Funding opioid use prevention programs, such as funding for media campaigns to prevent opioid use and funding for education and outreach for medical providers regarding best prescribing practices.

Funds may also be used for other approved purposes, such as the following:

- Certain programs or strategies to treat opioid use disorder, such as supporting evidence-based withdrawal management services, expanding the availability of treatment for opioid use disorder, and improving oversight of opioid treatment programs.
- Supporting individuals in recovery from opioid use disorders, such as through strategies that provide comprehensive services to individuals with opioid use disorder, including housing, transportation, education, job training and placement, and childcare.
- Preventing the misuse of opioids, such as through strategies that fund media campaigns to prevent opioid misuse and engaging nonprofits and faith-based communities as systems to support prevention.
- Reducing harms associated with opioids, such as through strategies that increase the availability and distribution of Naloxone and other drugs that treat overdoses and developing data tracking software for overdoses.

Please let us know if we can provide any further assistance.

SM:TK:jal