



Overview of the Opioid Litigation and Related Settlements and Settlement Proposals

November 25, 2019

According to the latest available data from the Centers for Disease Control and Prevention, the opioid epidemic has claimed the lives of [nearly 400,000](#) people in the United States between 1999 and 2017. As described in an earlier [Sidebar](#), the severity of the epidemic has prompted state and local governments to address the issue not only through legislation and executive actions, but also through court challenges filed around the country that seek to hold certain opioid manufacturers, distributors, or other supply chain entities legally liable for the epidemic. These challenges—which generally seek to recover the costs incurred or will be incurred by the state and local governments to address the epidemic—have generally proceeded in two settings:

- In the [opioid multidistrict litigation](#) (MDL) formed in a federal district court, where more than [2,400 cases](#) filed by local governments (and other non-governmental plaintiffs) have been coordinated;
- In various state courts, where state governments have filed their cases.

In recent months, several case [settlements](#) or settlement proposals related to these cases have been announced. [Some](#) of the settlements are more typical litigation settlements that would settle claims against a defendant in a specific case. Other settlement proposals would more broadly settle cases across both the MDL and state courts. One [global settlement proposal](#), for instance, would globally settle claims against Purdue Pharma, the maker of OxyContin. Under another proposal, [four](#) state attorneys general (from North Carolina, Pennsylvania, Tennessee, and Texas) reached a \$48 billion global settlement framework with three major drug distributors and two drug manufacturers. This proposal would resolve all state and local government opioid claims against those companies in all 50 states and the District of Columbia. Representatives of certain local governments—particularly those that have cases pending in the MDL—have, however, already voiced their [public rejection](#) of this settlement framework.

As Congress continues to analyze the opioid litigation and consider ways to address the opioid epidemic, this Sidebar provides an overview of the pending state and local government opioid litigation and the related settlements or settlement proposals.

Congressional Research Service

<https://crsreports.congress.gov>

LSB10365

Overview of the State and Local Government Opioid Litigation

The state and local government opioid cases, generally filed against various entities along the opioid prescription supply chain, seek damages resulting from the opioid epidemic. Specifically, as to the opioid manufacturers, the suits have typically alleged that these companies initiated false and misleading marketing campaigns in the 1990s to increase opioid prescriptions. These campaigns allegedly promoted certain improper pain management practices, understated the opioids' risk of addiction, and overstated their efficacy. The campaigns' success in altering prescription practices allegedly led to a significant increase in opioid prescription and usage that generated and fueled the opioid epidemic in the affected communities. Among other claims, the complaints typically allege that these marketing practices constitute a civil violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act, created a public nuisance under relevant state law, and violate state consumer protection law. Suits that have been brought against drug distributors, which supply opioids to pharmacies and health care providers, have typically alleged that these companies failed to comply with relevant federal and/or state law that required these entities to monitor for suspicious orders of opioid products to prevent their diversion to illicit markets. By allegedly failing to comply with these requirements, the complaints maintain that distributors fueled the opioid epidemic by allowing disproportionately large orders of prescription opioids to flood into comparatively small communities.

Like the cases that states filed more than two decades ago seeking to recover from tobacco manufacturers the costs incurred for treating smoking-related diseases, the opioid suits generally seek to recover from the defendants the costs the government plaintiffs allegedly expended and expect to be expended to abate the resulting public health crisis. These damages include costs for medical care (including through Medicaid spending), drug treatment, law enforcement, and other social and emergency response services. Unlike the tobacco cases, which states brought and involved relatively few local government plaintiffs, many local governments have initiated their own actions in the opioid context. In general, the state attorneys generals have filed the state government cases in the relevant state courts while the local government opioid cases have been coordinated (along with cases filed by other non-governmental plaintiffs) in the federal MDL.

Recent Notable Developments in the Federal MDL

Pursuant to a special federal procedure designed to streamline the handling of certain complex civil litigation, the federal opioid MDL was formed in the Northern District of Ohio before Judge Dan Polster. The MDL procedures generally permit the Judicial Panel on Multidistrict Litigation (JPML) to transfer civil actions separately filed in different federal districts to a single federal district court for coordinated pretrial proceedings, if the JPML determines that the actions involve one or more common questions of fact. The rules generally require the cases to be remanded back to the transferor court for trial at the conclusion of the pretrial proceedings. In practice, however, most MDL cases are resolved through aggregate settlements in the transferee courts or are finally resolved in other ways there without ever returning to the transferor court.

The JPML formed the opioid MDL in December 2017 after over 60 cities and counties around the country filed, based on the legal theories described above, opioid suits in (or had their suits removed to) various federal district courts. As noted above, the MDL now includes over 2,400 cases that are coordinated before Judge Polster for pretrial proceedings. The MDL proceedings have so far focused on the local government cases because Judge Polster designated two sets of such actions as the first bellwether cases to go to trial. Bellwether cases in an MDL are typically selected because they address legal and/or factual

issues that are shared among the rest of the MDL cases, and, as such, the process of litigating these cases can help litigants understand the strengths and weaknesses of their case and help encourage settlement. In the opioid MDL, the claims of Summit and Cuyahoga counties in Ohio against certain opioid manufacturers and distributors are the first set of bellwether cases and thus have been the focus of the MDL litigation and settlement discussions to date. A [second set](#) of bellwether cases involve the claims made against various drug distributors by Cabell County, West Virginia and the City of Huntington in that county.

Even though the MDL court has jurisdiction over only the MDL cases, Judge Polster acknowledged that he has been “very active” in [encouraging](#) all sides to consider a broader, global settlement as a means of resolving the opioid cases filed in both the MDL and state courts. He has publicly [stated](#) his general view that, given the extent of the opioid crisis, multiple parties, including the MDL defendants, plaintiffs, the federal government, the medical professions, and individual opioid users bear responsibility for the crisis. Thus, in his [view](#), a global settlement that would provide funds to address the epidemic while also implementing additional controls on the flow and proper use of prescription opioids would be the most desirable outcome. In furtherance of this stated goal (which drew objections from certain MDL defendants in the form of a recusal motion that was ultimately [rejected](#) by the Sixth Circuit), Judge Polster has sought to [coordinate](#) settlement-related discussions not only among the MDL litigants, but also with the state attorneys generals and the Drug Enforcement Administration (DEA). In September 2019, he also certified a novel “negotiation class” comprised of “all cities and counties in the United States” (which would encompass over 33,000 local governments) for the purpose of “creating a unified body to enter into further negotiations” with the MDL defendants. The certification order—novel in part because the local governments generally did not file their cases as class actions—is currently subject to two separate appeals, one by certain [distributor defendants](#) in the MDL, and another by certain [city plaintiffs](#) in the MDL.

Judge Polster’s settlement efforts to date have resulted in settlements with most defendants in the Ohio bellwether cases, including all manufacturer defendants as well as the three major drug distributor defendants. These settlements leave only a number of pharmacy chains that have been sued in their capacity as drug distributors (including Walgreens, Rite Aid, CVS, and Walmart) as the remaining defendants in the Ohio bellwether cases. In addition, Judge Polster stated that the discussions have also helped to [precipitate](#) a tentative, broader agreement to settle the claims against Purdue Pharma brought by the local government MDL plaintiffs as well as roughly half of the state attorneys general. Because Purdue Pharma filed for [bankruptcy](#) as part of that agreement, the settlement proposal is now subject to approval through the bankruptcy proceedings; as part of the proceedings, the bankruptcy judge has temporarily stayed the roughly 2,600 opioid suits against Purdue. As to the remaining MDL proceedings, Judge Polster has set an October 2020 [trial date](#) for the remaining defendants in the Ohio bellwether cases. He has also [recommended](#), given the scope of the opioid MDL, that the JPML strategically remand three cases back to their transferor courts for trial while he continues to preside over the remaining cases and also pursue global settlement discussions.

Recent Notable Developments in the State Litigation

In addition to the federal MDL cases, many state attorneys general have also filed suits in state courts against similar defendants based on comparable claims and allegations as in the MDL cases. By one available tally, 48 states (plus Puerto Rico and the District of Columbia) have [filed](#) 89 opioid suits in various state courts as of November 2019. To date, the state attorney general actions have resulted in two key, very different outcomes. First, in an action the North Dakota Attorney General filed against Purdue Pharma that asserted various state law claims based on Purdue’s alleged fraudulent and deceptive marketing campaigns to increase the sales of its opioid products, the court dismissed the state’s claims on a motion to dismiss. In particular, the court [concluded](#) that the federal Food, Drug, and Cosmetic Act

[preempted](#) the state’s claims because the marketing campaigns were consistent with FDA-approved indication and labeling for the drugs. The North Dakota Attorney General has [appealed](#) the lower court’s decision to the state supreme court.

Second, the Oklahoma Attorney General initiated a similar action against a number of opioid manufacturers, including Purdue, Teva Pharmaceuticals, and Johnson & Johnson. While Purdue and Teva Pharmaceuticals each settled the claims against them in May 2019, the claims against Johnson & Johnson proceeded to a bench trial—the first trial in any state or federal opioid litigation—on a claim of public nuisance. Following a 33-day bench trial, the court [concluded](#) that Johnson & Johnson had “engaged in false and misleading marketing of both their drugs and opioids generally” that “caused exponentially increasing rates of addiction, overdose deaths, and Neonatal Abstinence Syndrome,” amounting to a public nuisance under Oklahoma law. The court further concluded that the underlying nuisance could be abated under the state’s [abatement plan](#), which includes:

- providing a number of opioid treatment programs;
- incorporating universal screening programs at all primary care practices and emergency departments;
- providing a pain management benefit program;
- expanding naloxone distribution and overdose prevention education, providing medical treatment for infants with Neonatal Abstinence Syndrome; and
- providing funding for certain state law enforcement and regulatory agencies.

While the court [noted](#) that the state had offered witnesses who testified that the plan “will take at least 20 years” to work, the court concluded that the state did not present “sufficient evidence of the amount of time and costs necessary, beyond year one, to abate the Opioid Crisis.” Accordingly, the court awarded the state abatement proceeds in the sum of approximately [\\$465 million](#), the estimated amount to carry out the abatement plan in the first year. Johnson & Johnson has [appealed](#) the court’s judgment to the Oklahoma Supreme Court.

As the state attorneys general litigate the states’ opioid cases in state courts, they have taken different stances on the federal MDL cases brought by local governments. Available [reports](#) show that many have participated, in varying degrees, in settlement discussions in the federal MDL. Some, however, have expressed the view that the local government suits should be dismissed because they infringe upon the states’ authority to assert claims for harms to their citizens’ health and welfare. In the weeks leading up to the first bellwether trial in the federal MDL, the Ohio Attorney General, supported by [thirteen](#) other state attorneys general, [petitioned](#) the Sixth Circuit to block or delay the trial on that basis. The Sixth Circuit [denied](#) the petition.

As an additional indication of the tension between state and local governments, four state attorneys general, announced a global settlement framework to which certain local government representatives have already voiced public objections. The [proposal](#) would require the settling companies (including drug manufacturers Johnson & Johnson and Teva Pharmaceuticals, and drug distributors AmerisourceBergen, Cardinal Health, and McKesson) to pay \$22 billion in cash and an additional \$26 billion in (1) [medication](#) to treat opiate addiction, (2) product distribution costs for those treatment products, and (3) data-tracking measures. The \$22 billion cash settlement would be divided among the states and the local governments based on a formula to be determined and would be used to abate the opioid crisis. Additionally, Johnson & Johnson and Teva would also agree not to market any opioid products while the distributors would agree to implement additional internal processes to monitor and flag suspicious orders of opioids. It remains to be seen whether, and to what extent, other states and local governments would join this global settlement framework.

The sprawling nature of the state and local government opioid litigation suggests that any global settlements across the two litigation tracks may be of significant magnitude, and the terms of the settlements may affect how the opioid epidemic is addressed nationally. Thus, as Congress continues to consider ways to address the epidemic, including ways to coordinate its efforts with state and local governments, the ongoing settlement discussions in the opioid litigation may be something for Congress to watch.

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