

Health Law & Business

West Virginia, Center of Opioid Crisis, Cut Out of \$48 Billion Pledge (1)

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- AG's previous settlements with drug companies endanger possible recovery
 - "Ground zero" of opioid crisis would get little in proposed deal, say lawyers
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A proposed \$48 billion global settlement that would resolve litigation against drug companies blamed for the opioid crisis could have dire consequences for West Virginia, the state hit hardest by the addiction crisis, according to attorneys representing cities and counties in the state.

The reason: West Virginia Attorney General Patrick Morrisey earlier struck separate deals with three of the same opioid distributors on behalf of the state totaling \$73 million—a figure that has been criticized as far too low to address the crisis in a region widely considered ground zero of the opioid epidemic. Two of the settlements, with Cardinal Health and AmerisourceBergen, were announced in 2017. The state settled with McKesson earlier this year.

By comparison, two counties in Ohio just reached a deal with the same three companies for \$215 million. Teva Pharmaceuticals also committed an additional \$45 million in cash and addiction treatment drugs. The counties—Cuyahoga and Summit—have a combined population of nearly 1.8 million people, roughly the same as West Virginia.

The Ohio counties' settlement is separate from the \$48 billion deal announced Oct. 21 by the Tennessee, Pennsylvania, Texas, and North Carolina attorneys general. The four attorneys general are negotiating on behalf of their states in the litigation involving 2,700 counties and municipalities that sued drug companies and distributors involved in dispensing opioids. The suits were combined into large multidistrict litigation filed in a federal court in Cleveland.

The proposed global settlement is designed to allow the defendant companies to exit any remaining litigation and foreclose further liability for the crisis, but it needs buy-in from more attorneys general, and cities and counties in the multidistrict litigation are pushing for their own local government-led universal settlement.

West Virginia is in a unique situation in these talks. The state settled with the three drug distributors, but some of its own counties and cities are still pursuing cases in the multidistrict litigation. The four attorneys general have asked West Virginia to accept what amounts to 0.001335% of the total payout of the \$48 billion, said Paul Farrell Jr., co-lead for the plaintiff local governments in the national litigation and counsel of record for 700 cases, including several West Virginia plaintiffs.

Morrisey is fighting the notion that West Virginia would get a fraction of the amount that drug companies would pay because of the state's prior settlements. "There's no agreement at this time, the discussions are ongoing and fluid, and the attorney general is working very hard for West Virginia," said a person with knowledge of the discussions. The individual declined to be identified for fear of jeopardizing negotiations.

"The attorneys general are absolutely committed to treating the people of West Virginia fairly. Specifics of how best to do that have yet to be determined and will be done in consultation with everyone involved," said Laura Brewer, spokeswoman for the North Carolina attorney general's office.

'Bad Situation'

Given "the low settlements by the attorney general, if this deal is accepted, then he certainly put the cities and counties of West Virginia in a very bad situation," said Hunter Shkolnik, an attorney representing West Virginia cities and counties who is on the executive committee for the Ohio-based multidistrict litigation.

The Oct. 21 settlement, if finalized, could exclude 85% of what the state otherwise would receive, he said.

"To say we were flabbergasted is a very delicate way of putting it—that they honestly believed that the settlement as to West Virginia would be adequate," said Shkolnik.

The proposed settlement from the four attorneys general follows tensions between states and municipalities over who should control the litigation. Many attorneys general sought to block the multidistrict litigation, arguing that the states should be the ones negotiating a global settlement with various members of the opioid supply chain.

That effort failed, denied by the Sixth Circuit Court of Appeals this month.

A spokeswoman for the North Carolina attorney general's office said that prior settlements in West Virginia could "potentially" be factored into that state's share of the settlement but denied that the state's apportionment had been determined, adding that deals were still being worked out. She declined to provide further details.

Shkolnik estimates that West Virginia would wind up with roughly \$1 million distributed among all counties and cities in the state under the proposal.

That would be a devastating outcome in a state that has had the nation's highest rate of drug overdose deaths, at 49.6 per 100,000 people in 2017, according to federal data. West Virginia also had the highest concentration of opioid pills imported into the state from 2006 to 2012, at a rate of 66.5 per person per year, according to a database acquired by the Washington Post.

Cash Divided Among States

Morrissey on Oct. 18 tweeted: "If a global opioid settlement is reached, payment for each litigant should reflect the severity of the opioid problem faced by impacted entities. Payments based almost entirely on raw population—having NOTHING to do with severity—are morally bankrupt & should be a non-starter."

The \$48 billion tentative agreement includes \$22.25 billion in cash from the three largest opioid wholesalers and two drugmakers to resolve the companies' roles nationwide. The deal would also include an additional \$26 billion worth of treatment drugs and delivery services.

The cash would be divided among the states, then further divided between each state's coffers (15%), municipalities (15%), and statewide treatment and support services (70%). Strictly speaking, West Virginia cities and counties would be eligible for the 15% payout, but the state would be precluded from the other 85% allotment because of its prior settlements, according to multiple plaintiffs attorneys working on the case.

But an official speaking on behalf of the four attorneys general said West Virginia could get more than 15%, but its prior settlements must be factored into whatever the state eventually gets. The official declined to be identified because negotiations are still ongoing.

Millions of Pills

The developments are the latest in the ongoing opioid litigation to raise questions about Morrissey's prior settlements with drug wholesalers and distributors.

"In some ways the fate of the people of West Virginia has been sealed in the amounts of these settlements, in terms of the opioid crisis," said Rahul Gupta, the former commissioner for the Bureau for Public Health in West Virginia. "We've faced the biggest crisis ever in West Virginia, in terms of public health, and yet the fate has been sealed by a single individual."

Since 2016, Morrissey has reached a total of \$84 million in settlements with 13 different companies, the lion's share coming from Cardinal, AmerisourceBergen, and McKesson. From 2006 to 2012, those three companies delivered 198.7 million, 131.4 million, and 123.4 million opioid pills to West Virginia, respectively.

"If you divide up the shipment of pills by the amount of settled money, it is not even a fraction of the cost" to abate the crisis, said Gupta, who left public office in late 2018 to work for the March of Dimes.

(Updates with statement from the North Carolina attorney general's office in the 8th paragraph.)