

**Breaking Down
the July 2021 Proposed
Multi-District Litigation
Settlement Agreement:**
Implications for the Overdose Crisis



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Breaking Down the July 2021 Proposed Multi-District Litigation Settlement Agreement:

Implications for the Overdose Crisis

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Executive Summary



On July 21, 2021, a bipartisan group of seven state attorneys general announced a proposed settlement agreement with the three largest opioid distributors and the manufacturer Johnson & Johnson over the lawsuits filed against them regarding their role in the opioid epidemic. If states and local jurisdictions join the agreement, the settlement could provide them with up to \$24 billion over the next 18 years.

PRINCIPLE	SUMMARY FINDING
<i>Principle #1—Spend the Money to Save Lives.</i>	The settlement agreement permits, but does not require, states to spend all the funds to save lives from addiction and overdose.
<i>Principle #2—Use Evidence to Guide Spending.</i>	The settlement agreement provides clear examples to states and localities of evidence-based strategies to prioritize but does not require their use.
<i>Principle #3—Invest in Youth Prevention.</i>	Although the settlement agreement suggests investment in evidence-based prevention programs in schools, the agreement does not emphasize the importance of these programs nor their value in other settings.
<i>Principle #4—Focus on racial equity.</i>	Equity is not discussed at all in the settlement agreement, though money can be used on programs that may advance equity.
<i>Principle #5—Develop a fair and transparent process for deciding where to spend the funding.</i>	The settlement agreement generally leaves it up to states and localities to develop the process by which they will decide how to spend their dollars.

A critical question is whether these and other funds from opioid litigation will be used wisely. The vast majority of the money received by states as a result of the 1998 Tobacco Master Settlement Agreement was diverted to states’ general funds, and not used to help tobacco cessation or prevention efforts.

To prevent this from happening again, more than 50 organizations have endorsed five principles that outline the process that states and local jurisdictions should implement when deciding how to use the money that they will be receiving.

This analysis assesses how well the recent settlement agreement between states, Johnson & Johnson, and opioid distributors tracks these principles. Principal findings include:

Overall, the proposed settlement agreement is consistent with the general direction of the Five Principles. However, additional focus and sustained advocacy will be needed at the state and local levels in order for funds to be used wisely and with maximum impact.

Introduction

Over [500,000 people](#) have died from opioid overdoses since 1999. Unfortunately, the crisis has worsened during the COVID-19 pandemic. An [estimated](#) 93,000 people died from opioid overdoses in 2020, more than in any other year. Fortunately, states and local jurisdictions will soon have additional money to invest in evidence-based solutions as a result of litigation brought against opioid manufactures, distributors and dispensers.

In one of the most prominent and complicated lawsuits, a group of state attorneys general recently [announced](#) an agreement that could reach \$26 billion to settle with the three largest opioid distributors (Cardinal, AmeriSourceBergen and McKesson) and one of the opioid manufacturers, Johnson & Johnson.¹ \$2 billion of this would be reserved for private attorneys that have brought the legal actions; the rest of the money would go to state and local jurisdictions should they sign on. Distributors and Johnson & Johnson will pay less than \$26 billion should states and local jurisdictions not join the agreement.

States have until August 20 to decide if they will sign on the agreement; should enough states participate, then local subdivisions will be asked if they will join the agreement, then local subdivisions will be asked if they will participate. Ultimately, the distributors and Johnson & Johnson will determine if a sufficient number of states and localities have signed on for the agreement to take effect.²

Key aspects of the settlement agreement include:

- 1. Payments will last for 18 years and be front-loaded.** The first payments would happen within the next 12 months and continue annually for a total of 18 years.³ Johnson & Johnson's payments would be completed after 9 years.⁴ States and localities would receive [40%](#) of their money within the first five years.
- 2. Payments to states will vary based on state population; number of overdose deaths; number of people with a substance use disorder; and number of opioids distributed.** The potential total payments to states range from nearly 10% of the settlement to California (around \$2.3 billion) to close to 0.2% of the settlement to Wyoming (around \$45 million).⁵
- 3. States must spend between 70% and 100% of the funds on programs to address the opioid crisis.** To spend the funds, the agreement outlines the creation of "abatement account," a "subdivision account" and a "state fund" in each state. Each of these three has its own rules on what the funds can be used for.

Overall, even though the goal of the proposed settlement agreement is for all of the funds⁶ to be used for opioid remediation⁷, the agreement allows for up to 15% of the funds to be used for alternative purposes, and an additional 15% of the funds to reimburse past expenses.

As a result, the agreement only requires 70% to be spent on programs to address substance use.

- 4. States are encouraged to take action regarding the settlement, including and reaching agreement with localities.** The agreement has a number of requirements around how money from the Abatement Fund and Subdivision Account can be allocated. But the agreement outlines three actions that states can take to gain more flexibility with the dollars.⁸ These actions are:
- a. Pass an “Allocation Statute” regarding the use of the dollars;
 - b. Set up a “Statutory Trust” to allocate money from the Abatement Fund; or
 - c. Reach a “State-Subdivision Agreement” with local governments on the use of the dollars.

For example, the agreement requires that at least 50% of the money in the Abatement Fund must be allocated and tracked at the regional level. This requirement, and a number of others, are waived though if states have passed an Allocation Statute, set up a Statutory Trust, or reached a State-Subdivision Agreement.⁹

- 5. Local governments are encouraged to drop their lawsuits.** 55% of the money allocated to a state is that state’s Base Payment; it will be paid regardless of whether lawsuits by local governments continue.¹⁰ States can receive additional Incentive Payments should states bar local jurisdictions from continuing their lawsuits or should enough local jurisdictions drop their lawsuits and join the agreement. These Incentive Payments are equal to the remaining 45% of the money allocated to each state.¹¹

In addition to this money, states and local jurisdictions will also be receiving dollars from other lawsuits. For example, the consulting firm McKinsey recently [settled](#) with states for nearly \$600 million. Additionally, the bankruptcy of Purdue Pharma--the maker of Oxycontin and other opioids--is expected to be resolved soon; this [could result](#) in an additional \$4.5 billion for states and local jurisdictions.

In preparation for these resolutions, more than fifty groups have endorsed a [set of principles](#) organized by staff and faculty at the Johns Hopkins School of Public Health. These principles provide recommendations for the process by which jurisdictions should decide how to spend the money that they will receive in order to save the most lives. The goal is to avoid a repeat of what happened with the dollars from the 1998 tobacco master settlement, where the [vast majority](#) of the money went to states’ general funds rather than being used to address tobacco use.

The five principles are:

1. *Spend the money to save lives*
2. *Use evidence to guide spending*
3. *Invest in youth prevention*
4. *Focus on racial equity*
5. *Develop a fair and transparent process for deciding where to spend the funding*

This white paper assesses how the multidistrict litigation agreement reached with the distributors and Johnson & Johnson addresses--or leaves out--key elements of these nationally recognized principles.

Principle #1—Spend the Money to Save Lives.

The settlement agreement permits, but does not require, states to spend all the funds to save lives from addiction.

This first principle calls for states and local jurisdictions to spend all of the money received from the litigation on efforts to address the ongoing substance use epidemic, otherwise known as future opioid remediation.

However, the settlement agreement only requires that at least 70% of the money be spent on future opioid remediation. As outlined above, the agreement permits states to spend 15% of the money in areas unrelated to substance use and another 15% to reimburse themselves for past opioid-related expenses.

The agreement does encourage states to set up a Statutory Trust for the settlement dollars, as called for in the principles, by giving states that have set up such a Trust more flexibility in how they can use the money. However, establishing such a fund is only one of several ways that states can gain additional flexibility in the use of the dollars.

Finally, the agreement does not prohibit supplantation--that is, a state could cut back on the amount of funding that opioid programs receive from the state's general fund and use dollars from the lawsuits to fill the funding gap.

Conclusion. The settlement permits states and localities to spend all the funds to save lives. However, states and localities can choose to divert nearly one-third of the dollars to other goals and could decide to use even more of the dollars to supplant existing funding. Advocacy is likely to be necessary to make sure states set up a dedicated fund and devote all of the money to future remediation.

Principle #2—Use Evidence to Guide Spending.

The settlement agreement provides clear examples to states and localities of evidence-based strategies to prioritize but does not require their use.

This second principle calls for states and local jurisdictions to spend money on programs that have been shown to work and to avoid funding programs that don't work. The principles are supported by [other documents](#) that describe interventions for which there is the best evidence.

The settlement agreement states that dollars must be used for “*evidence-based or evidence-informed programs or strategies*”. As guidance, the agreement lays out two categories of acceptable programs for the dollars to be spent on (though it notes that these lists are not meant to be exclusive).¹²

The first category is identified as “Core Strategies”; states and localities are encouraged, though not required, to fund programs from this list. These programs all have a strong evidence base to support their use, and states and local jurisdictions would do well to focus their efforts in these areas. The Core Strategies include programs in the following areas¹³ :

- Naloxone or other FDA-approved drugs to reverse opioid overdoses;
- Medication-assisted treatment (“MAT”) distribution and other opioid-related treatment;
- Pregnant and postpartum women;
- Expanding treatment for neonatal abstinence syndrome (“NAS”);
- Expansion of warm hand-off programs and recovery services;
- Treatment for incarcerated population;
- Prevention programs;
- Expanding syringe service programs;
- Evidence-based data collection and research analyzing the effectiveness of the abatement strategies within the state;

The settlement then lays out other “Approved Uses” for the dollars; there is less evidence supporting many of these other areas. These include, for example, employment training and education services for people in treatment, developing recovery high schools, training for medical providers around opioid prescribing, and public education regarding drug disposal. These ideas may indeed be helpful, but there is less of an evidence base to guide implementation. Communities should focus on making sure that they have built out the Core Strategies before turning to this next level of services. A recently-conducted needs assessment will help states and localities be sure they are providing resources to high-priority areas.

Conclusion. The settlement agreement encourages states and localities to spend money on evidence-based programs. However, specific decisions will be made locally, and communities have significant flexibility in determining how they will spend the dollars. Advocacy will be needed to make sure that the programs receiving funds are the top priority in the community.

Principle #3—Invest in Youth Prevention.

Although the settlement agreement suggests investment in evidence-based prevention programs in schools, the agreement does not emphasize the importance of these programs nor their value in other settings.

This third principle discusses the need for state and local jurisdictions to invest in evidence-based youth prevention programs in order to stop young people from beginning to misuse substances. [90%](#) of substance use disorders begin in the teenage years, making youth prevention efforts essential to solving the addiction crisis.

The settlement agreement lists “Prevention” as a Core Strategy that states and local jurisdictions should prioritize. Within that heading, both 1) media campaigns to prevent opioid use and 2) evidence-based programs in schools are highlighted. “Provide education to school-based and youth-focused programs that discourage or prevent misuse” is also listed under the medication-assisted treatment Core Strategy, and “Funding community anti-drug coalitions that engage in drug prevention efforts” is listed as an additional strategy that states and communities can use.

The agreement does support the use of dollars to fund evidence-based youth prevention programs. However, it misses an opportunity to encourage investments in these programs by not featuring them more prominently. It also does not mention prevention programs that are focused at the family or community levels, despite the evidence to support their use.

Conclusion. The settlement agreement mentions youth prevention, without specifying the types of prevention most supported by evidence. Advocacy will be needed to make sure that evidence-based youth prevention programs receive appropriate funding and direction from the agreement.

Principle #4—Focus on racial equity.

Equity is not discussed at all in the settlement agreement, though money can be used on programs that may advance equity.

This fourth principle states that states and local jurisdictions should use this opportunity to address racial equity by, among other strategies, directing money to communities that have been affected by decades of discriminatory policies, supporting programs that are alternatives to arrest and incarceration, and reducing stigma associated with drug use and addiction that can lead to discriminatory punitive approaches.

The settlement agreement does not explicitly address racial equity. The agreement does highlight alternatives to arrest and incarceration as an area in which there are a number of evidence-based programs. For example, acceptable uses of the funds include “Support [established] pre-arrest or pre-arraignment diversion and deflection strategies for persons with OUD and any co-occurring SUD/MH conditions”, “Support pre-trial services that connect individuals with ODU and any co-occurring SUD/MH conditions to evidence-informed treatment”, and “Support treatment and recovery courts that provide evidence-based options”.

This principle also calls for involving members of communities of color in identifying solutions for their communities through advisory councils and other mechanisms; this is not mentioned in the agreement.

Conclusion. The settlement agreement permits using the funds to address racial equity, but there is no mechanism to ensure that this occurs. Advocacy will be needed at the state and local levels to be sure this challenge is adequately addressed.

Principle #5—Develop a fair and transparent process for deciding where to spend the funding.

The settlement agreement generally leaves it up to states and localities to develop the process by which they will decide how to spend their dollars.

This fifth and final principle calls for states and local jurisdictions to implement a process that is guided by public health leaders with opportunities for input from many others affected by the opioid crisis, in particular people with lived experience and their families.

The agreement is generally silent on the process that states and local jurisdictions should use to determine how to spend the money. States without an Allocation Statute, Statutory Trust or State-Subdivision Agreement must establish an advisory committee to help with the process, though the agreement does not get into detail on the expertise needed for members of the committee.¹⁴ The agreement also does not mention other key process steps from the principles, including: assessing areas of need when allocating dollars; receiving input from the public; and ensuring that members of communities of color are involved in the process.

Conclusion. State and local advocates will need to work with their elected and appointed officials to set up an inclusive process that meets the goal of this principle. The process should include input from public health experts, people with lived experience and their families, groups with firsthand experience working with youth and people who use drugs, and the public.

Conclusion

Over 50 organizations endorsed five principles to spend funds from the opioid settlements wisely. Many parts of the settlement agreement are generally consistent with these principles. However, considerable discretion in state and local implementation leaves a major role for advocacy. The best use of billions of dollars to address addiction and overdose are at stake.

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Comments & Questions

For comments and questions, please email opioidlitigationprinciples@gmail.com.

Endnotes

- ¹ Note that there are actually two separate settlement agreements--one with the three distributors and one with Johnson & Johnson. The distributor agreement contains a total of \$21 billion; the Johnson & Johnson agreement has \$5 billion. Because the agreements are identical in most respects, they are referred to here as an agreement. We will flag areas in which the Johnson & Johnson agreement differs from the other. The agreement with the distributors can be found [here](#); the Johnson & Johnson agreement is [here](#).
- ² Exhibit H appears to indicate that at least 44 states and 90% of subdivisions would need to join the agreement in order for the distributors and Johnson & Johnson to decide to proceed.
- ³ Distributor [Settlement Agreement](#), p.14
- ⁴ Johnson & Johnson [Settlement Agreement](#), p. 19
- ⁵ Distributor [Settlement Agreement](#), Section F-1
- ⁶ The agreement states that, “*It is the intent of the Parties that the payments disbursed from the Settlement Fund to Settling States and Participating Subdivisions be for Opioid Remediation...*”. Distributor [Settlement Agreement](#), p. 28
- ⁷ Opioid remediation is defined in the agreement as, “Care, treatment, and other programs and expenditures... designed to (1) address the misuse and abuse of opioid products, (2) treat or mitigate opioid use or related disorders, or (3) mitigate other alleged effects of, including on those injured as a result of, the opioid epidemic.” Distributor [Settlement Agreement](#), p. 6
- ⁸ Distributor [Settlement Agreement](#), p. 32
- ⁹ Distributor [Settlement Agreement](#), p. 32
- ¹⁰ Distributor [Settlement Agreement](#), p. 17
- ¹¹ In the Johnson & Johnson agreement, 46% of the money is a Base Payment; the rest are Incentive Payments. Johnson & Johnson [Settlement Agreement](#), Section V-D
- ¹² Distributor [Settlement Agreement](#), Section E-4
- ¹³ Distributor [Settlement Agreement](#), Section E-1
- ¹⁴ Distributor [Settlement Agreement](#), p. 33