Regular Agenda

JEFFERSON COUNTY
BOARD OF COUNTY COMMISSIONERS

AGENDA REQUEST

TO: **Board of County Commissioners**
Mark McCauley, County Administrator

FROM: **Philip C. Hunsucker, Chief Civil Deputy Prosecuting Attorney**

DATE: **April 18, 2024**

RE: **Opioid Litigation—Washington State Settlement with Johnson & Johnson More Money Coming to Jefferson County**

STATEMENT OF ISSUE:

This agenda request concerns whether the Board of County Commissioners (BoCC) should approve Jefferson County's participation in the State's settlement with Johnson & Johnson. Counsel for Jefferson County and the Prosecuting Attorney's Office recommend participation in the settlement.

BACKGROUND:

The Opioid Litigation

In 2018, Jefferson County engaged the Keller Rohrback (KR) law firm to pursue affirmative claims against Opioid manufacturers and distributors. National pharmacy chains that distributed opioids were added to these lawsuits later. Jefferson County is one of several Washington municipalities (counties and cities) represented by KR. Other Washington municipalities in the Opioid litigation are represented by another law firm.

Jefferson County's claims against Johnson & Johnson are being litigated in the national opioid multi-district litigation in the National Prescription Opiate Litigation, United States District Court for the Northern District of Ohio, Case No. 1:17-md-02804-DAP.

The One Washington Memorandum of Understanding (MOU)

Purpose

The represented Washington municipalities negotiated the MOU for the purpose of making possible an allocation agreement with the State for allocation of opioid settlements negotiated by the State.

Approved by the BoCC

The MOU was approved by the BoCC on April 4, 2022.

Controls How Municipalities Will Allocate Settlements

The MOU controls how funds recovered by the Washington municipalities will allocate settlements among themselves.

The MOU applies to "Settlements," defined as:

> "Settlement" shall mean ***the future negotiated resolution of legal or equitable claims against a*** Pharmaceutical Supply Chain Participant when that resolution has been ***jointly entered into by the Participating Local Governments***. "Settlement" expressly does not include a plan of reorganization confirmed under Title 11 of the United States Code, irrespective of the extent to which Participating Local Governments vote in favor of or otherwise support such plan of reorganization.

(Emphasis added.) "'Pharmaceutical Supply Chain Participant" shall mean any entity that engages in or has engaged in the manufacture, marketing, promotion, distribution, ***and/or dispensing of a prescription opioid***, including any entity that has assisted in any of the above." (Emphasis added.) Accordingly, the MOU applies to the settlement with the five pharmacies.

The MOU does ***not*** apply to entities that filed for bankruptcy, including Purdue Pharma.

Distribution by Regions Required

The MOU requires distributions by regions. The MOU says:

> Prior to any distribution of Opioid Funds within the Allocation Region, the Participating Local Governments must establish an Opioid Abatement Council (OAC) to oversee Opioid Fund allocation, distribution, expenditures and dispute resolution. The OAC may be a preexisting regional body or may be a new body created for purposes of executing the obligations of this MOU.

In an interlocal agreement discussed below, Clallam, Kitsap and Jefferson Counties approved having the Salish Behavioral Health Administrative Services Organization (SBH-ASO) serve as the regional coordinator for the distribution of funds under the MOU.

The 2022 Distributor Settlement

In June 2022, the State settled with the three major distributors of opioids, McKesson Corporation, Cardinal Health, Inc. and AmerisourceBergen Corporation. A final Allocation Agreement was reached between the represented Washington municipalities and the State on August 8, 2022.

Under the Allocation Agreement, the Washington municipalities received 50 percent of the net settlement amount and local governments received 50 percent. All the funds allocated to Jefferson County in the Allocation Agreement must be used for Opioid abatement. And, per the MOU, all the funds allocated for Clallam, Jefferson, Kitsap Counties are being distributed through the Salish Behavioral Health Administrative Services Organization (SBH-ASO).

Interlocal Agreement Between Clallam County, Jefferson County, Kitsap County and the Salish Behavioral Health Administrative Services Organization (SBH-ASO)

In December 2022, Clallam County, Jefferson County, Kitsap County and the Salish Behavioral Health Administrative Services Organization (SBH-ASO) (formerly the Salish Behavior Health Organization (SBHO)) entered into an Interlocal Agreement (ILA) "for the purpose administering monetary amounts allocated to the counties of Clallam, Jefferson, and Kitsap resulting from settlements with and/or litigation against opioid pharmaceutical supply chain participants." The ILA also says:

> 2. Clallam, Jefferson, and Kitsap counties hereby designate SBH-ASO as the Olympic Opioid Abatement Council pursuant to Section C.4.h of the One WA MOU[1] and pursuant to Section 15 of the Allocation Agreement[2] to oversee allocation, distribution, expenditures, and dispute resolution of Opioid Funds allocated to Clallam, Jefferson, and Kitsap counties consistent with the Approved Purposes set forth in the One WA MOU and Allocation Agreement and consistent with the purposes set forth in Section 8 of the Allocation Agreement[3] (collectively "Approved Purposes").
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> 3. Clallam, Jefferson, and Kitsap counties shall pay over to SBH-ASO those Opioid Funds distributed to Clallam, Jefferson, and Kitsap counties or authorize that Opioid Funds allocated to Clallam, Jefferson, and Kitsap County be paid over directly to SBH-ASO.
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> 4. SBH-ASO shall maintain Opioid Funds in a separate fund and Opioid Funds shall not be comingled with other funds received by SBH-ASO from HCA or other sources.

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[1] Section C.4.h says: "Prior to any distribution of Opioid Funds within the Allocation Region, The Participating Local Governments must establish an Opioid Abatement Council (OAC) to oversee Opioid Fund allocation, distribution, expenditures and dispute resolution. The OAC may be a preexisting regional body or may be a new body created for purposes of executing the obligations of this MOU."

[2] Section 15 says: "To the extent (i) a region utilizes a pre-existing regional body to establish its Opioid Abatement Council pursuant to the Section 4.h of the MOU, and (ii) that pre-existing regional body is subject to the requirements of the Community Behavioral Health Services Act, RCW 71.24 et seq., the State and the Participating Local Governments agree that the Opioid Funds paid by the Settling Distributors are subject to the requirements of the MOU and this Allocation Agreement."

[3] Section 8 says, "The Washington Abatement Amount shall and must be used by the State and Participating Local Governments for Opioid Remediation as defined in Section I.SS of the Global Settlement, except as allowed by Section V of the Global Settlement. Exhibit 4 is a non-exhaustive list of expenditures that qualify as Opioid Remediation. Further, the Washington Abatement Amount shall and must be used by the State and Participating Local Governments as provided for in the Distributors Settlement."

5. Ten percent (10%) of Opioid Funds received by SBH-ASO will be reserved, on an annual basis, for administrative costs related to managing, distributing, and administering Opioid Funds consistent with Approved Purposes. SBH-ASO will provide an annual accounting for actual costs and any reserved funds that exceed actual costs will be reallocated to Approved Purposes.

The 2022 Five Pharmacies Settlement

Representatives of numerous plaintiffs, including the State and Jefferson County negotiated a national settlement with five national pharmacy defendants: (1) Allergan, (2) CVS, (3) Teva, (4) Walgreens, and (5) Walmart.

On December 21, 2022, Attorney General Bob Ferguson announced that Washington was joining multistate resolutions with these five companies. The Attorney General's Office estimates that these five settlements could total $434.4 million for the State:[4]

- Allergan: $50 million over the next seven years;
- CVS: $110.6 million over 10 years;
- Teva: $90.7 million over the next 13 years;
- Walgreens: $120.3 million over 15 years; and,
- Walmart: $62.6 million and 97% of that paid in the first year.

All eligible cities and counties joined as they did for the distributor settlement, and received half of the amount of $217.2 million that the State received. This amount must be spent on Opioid Remediation to abate the opioid crisis in their communities.[5]

An Allocation Agreement II (attached as Appendix B) effectuates the allocation between the State and the municipalities for the pharmacy settlement. In addition to other terms, including limits on payments to law firms, Allocation Agreement II provides for a 50/50 split, as in the prior distributor settlement pursuant to the MOU (as amended in Allocation Agreement II).

The 2024 Johnson & Johnson Settlement

The Washington Attorney General initially declined to participate in the national deal proposed by Johnson & Johnson in 2021 and had intended to proceed to trial in its own case against Johnson & Johnson, which was filed in King County Superior Court. According to the Attorney General, the settlement "provides Washington and its local governments with tens of millions of dollars more to combat the fentanyl epidemic compared to the settlement that Ferguson rejected in 2021. Washington is one of three states receiving more than they would have under the 2021 multistate settlement." The proposed settlement resolves all of the State's claims against Johnson & Johnson ***and*** all of Jefferson Counties' claims against Johnson & Johnson in

[4] *See* https://www.atg.wa.gov/opioid-pharmacy-manufacturer-settlements.
[5] Here is a link to approved abatement strategies: https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Approved%20Uses.pdf.

the MDL. The Washington Attorney General's Office has set up a website with important information and documentation. Here is a summary of the settlement:

- The abatement amount is $123.34 million in a one-time payment. The same cities and counties from past opioid settlements are eligible to join—the ones identified in the One Washington MOU. Unlike previous settlements, the settlement amount will be made in one payment if certain conditions are met including if all litigating local governments participate in the settlement.

- The settlement agreement splits the $123.34 million between the State and local governments 50/50. The local government allocation of 50% would be $61,670,000.00.

- Attorney fees will be withheld from the payment the same as the other settlements. The maximum fee withholding is 15% is $9,250,500.00 and $6,598,385.12 is the estimated requirement.

- If all eligible cities and counties join, the one-time payment would be made in June 2024.

- The required local government participation rate is slightly different than past settlements. All of the 37 litigating subdivisions need to join for the settlement to become effective. As to the remaining non-litigating local governments listed in the agreement, if all join, then the full 100% is paid by Johnson & Johnson this year. If not all join, Johnson & Johnson will hold back 5% and will pay 95% this year. As to the remaining amount, the State and local governments will receive that amount two years later so long as none of the non-joining non-litigating local governments file suit in that two-year period.

- The deadline for cities and counties to join the Johnson & Johnson settlement is May 11, 2024.

ANALYSIS:

KR worked on the Johnson & Johnson settlement and recommends that Jefferson County join in the settlement. The Jefferson County Prosecuting Attorney's Office agrees with KR's recommendation.

FISCAL IMPACT:

The County's lawyers at KR estimated Jefferson County's share will be a minimum of $231,544.13 and the estimated actual payment of $243,258.89.

Under the ILA, these funds will go to the Salish Behavioral Health Administrative Services Organization (SBH-ASO) for distribution per the MOU.

RECOMMENDATION:

Approve the Johnson & Johnson settlement for Jefferson County. Authorize the Chair to sign all the necessary documents to effectuate the settlement on behalf of Jefferson County.

DEPARTMENT CONTACT:

Philip C. Hunsucker, Chief Civil Deputy Prosecuting Attorney at Extension 219.

REVIEWED BY:

Mark McCauley 4/18/24

Mark McCauley, Date
Interim County Administrator