

Summary of Key Provisions on the Use of Funds
Received from National Opioid Settlements

Funds are now flowing to Virginia’s local government subdivisions from certain national opioid settlements. Specifically, the first two settlement payments from the national settlement with three major opioid distributors (McKesson Corporation, Cardinal Health, Inc., and AmerisourceBergen Corporation), and the first payment from the national settlement with the opioid manufacturer Janssen Pharmaceuticals, Inc. (a subsidiary of Johnson & Johnson), were distributed in the summer and fall of 2022.

In January of 2023, the first payment from the national settlement with Mallinckrodt PLC was distributed. Mallinckrodt is an opioid manufacturer that filed for bankruptcy in 2020. The bankruptcy court approved a reorganization plan for Mallinckrodt, which became effective on June 16, 2022. The court-approved reorganization plan incorporates the multistate settlement structure and timetable.

As payments from these settlements are distributed and received, it is important for localities that receive settlement funds to keep in mind that the different settlements sometimes have different requirements regarding permissible uses of the funds, recordkeeping, and reporting. Additionally, the Commonwealth’s Opioid Abatement Fund and Settlement Allocation Memorandum of Understanding (MOU), which all Virginia localities have approved, also contains relevant provisions regarding the use of opioid settlement funds.

This document provides an overview and summary of certain key provisions in the MOU and the various settlement agreements that govern how those funds may be used, and what kinds of recordkeeping and reporting on the uses of those funds are required. **Please note that localities should consult with their county or city attorney or their outside counsel for specific legal advice regarding application or interpretation of the settlements’ terms.** Several factors can affect the permissible uses of settlement funds, and the recordkeeping and reporting requirements applicable to them. These factors include:

- The settlement from which the funds originated;
- Whether the locality receiving the funds is considered a litigating or non-litigating locality—i.e., whether the locality had initiated a lawsuit against the opioid company at the time of the settlement; and
- Whether the locality received the funds as a direct share payment from the settlement, or as a distribution from the Virginia Opioid Abatement Authority.

I. The Memorandum of Understanding

The MOU establishes a default allocation formula for opioid settlement funds in which 15% of the funds from any opioid settlement are allocated to the Commonwealth, 30% are allocated to participating local subdivisions, and 55% are allocated to the Opioid Abatement

Authority. The 30% share allocated to the localities is divided into two equal components—15% is restricted to uses for opioid abatement and remediation, and 15% is “unrestricted.” The 15% share that is restricted to abatement uses is subject to a recordkeeping and transparency requirement, stating that “[u]pon request, a Participating Political Subdivision shall make publicly available information showing the purpose for which the Participating Political Subdivision used Direct Subdivision Abatement Share funds.”

Moreover, the MOU also makes clear that any provisions in opioid settlement agreements that restrict the use of settlement funds to abatement purposes take precedence over and supersede the MOU’s allowance for “unrestricted” funds. That is, if a settlement agreement requires that a greater percentage—or all—of the funds from that settlement must be used for abatement purposes, the settlement agreement’s terms control, and some or all of the 15% MOU share to the localities that otherwise might have been “unrestricted” will be restricted to use for opioid abatement purposes.

Furthermore, in addition to the direct shares that localities receive from the settlements, localities also will receive settlement funds from the Opioid Abatement Authority. The Virginia statute that created the Authority provides that 15% of the Authority’s share must be allocated for use by participating localities, to be distributed according to the schedule of allocation percentages attached to the MOU. Additionally, 35% of the Authority’s share will be allocated for regional efforts (i.e., partnerships of at least two participating localities within a community services board region), and another 35% may be used or allocated by the Authority at its discretion. *See* Va. Code § 2.2-2374(D). So it might be possible for localities to receive additional settlement funds from the Authority. However, **any funds that a locality receives from the Authority must be used for abatement or remediation purposes, and such funds may not be used to supplant funding for an existing program, to continue funding for an existing program at its current level, or for indirect administrative costs.** *See* Va. Code § 2.2-2370(A).

Also, Virginia law includes a recordkeeping and transparency requirement for localities that receive funds from the Authority. Any locality that receives funds from the Authority must **“provide the Authority with such information regarding the implementation of the effort and allow such monitoring and review of the effort as may be required by the Authority to ensure compliance with the terms under which the support is provided.”** *See* Va. Code § 2.2-2370(A)(5).

II. The Settlement Agreements

Some settlement agreements require that all settlement funds be used for abatement and remediation purposes, while others contain limited allowances for settlement funds to be used for non-abatement purposes. **However**, all of the settlement agreements **strongly encourage** settlement funds to be used for abatement and remediation. The settlement agreements that permit some funds to be used for non-abatement purposes make it clear that using settlement funds in this manner is **strongly disfavored**.

The relevant requirements of the specific settlement agreements from which localities are currently receiving funds are as follows:

A. The Distributors Settlement

Under the distributors settlement, **non-litigating localities** must use all of the funds they receive from this settlement for approved opioid remediation purposes. A list of approved opioid remediation purposes is appended to the Settlement Agreement as Exhibit E. The list is not meant to be exhaustive, but it is extensive, and likely covers most, if not all, potential remediation purposes for which a locality might want to use opioid settlement funds. The list also identifies several “Core Strategies” that represent preferred remediation uses for opioid settlement funds.

The settlement agreement contains a limited allowance for **litigating localities** to use some settlement funds for non-remediation purposes. However, as noted above, this is strongly disfavored. Moreover, any such use of settlement funds comes with significant strings attached.

First, the distributors settlement agreement requires that at least 85% of the settlement payments made over the course of the settlement must be used for opioid remediation purposes. Failure to meet this threshold could result in a reduction of settlement payments to states that fall below it.

Moreover, 7.5% of the settlement payments from the distributors settlement (i.e., 25% of the localities’ 30% share) will be allocated to the Deficiency Fund established by the MOU, and will potentially be used to cover litigation costs and attorney’s fees for litigating localities. Therefore, as a practical matter, Virginia is already halfway to the “limit” for non-remediation use of funds for this settlement.

Second, the distributors settlement agreement imposes recordkeeping and reporting requirements in connection with any use of settlement funds for non-remediation purposes. **Any use of settlement funds for a non-remediation purpose must be recorded and reported to the settlement administrator and the settling distributors. The report must include the amounts in question and descriptions of the non-remediation purposes for which they were used.** The settlement agreement further states that all reports of non-remediation uses will be made publicly available.

Lastly, the definition of “opioid remediation” in the distributors settlement agreement includes a limited allowance for the use of settlement funds as reimbursement for past programs and expenditures that would qualify as approved opioid remediation purposes under the agreement. While the settlement agreement does not impose specific recordkeeping or accounting requirements for uses of settlement funds as reimbursement for past opioid remediation expenditures or programs, as a practical matter, any such use would need to be linked through documentation or accounting to a qualifying prior expenditure. Moreover, while the settlement agreement contains this allowance, the overall preference is for settlement funds to be used for future opioid remediation as much as possible.

B. The Janssen Settlement

In most relevant respects, the Janssen settlement agreement is similar to the distributors settlement agreement. Among other things, the Janssen agreement includes the same list of approved opioid remediation uses as the distributors settlement, which is appended to the Janssen Settlement Agreement as Exhibit E. Again, the list is not meant to be exhaustive, but it is extensive, and likely covers most, if not all, potential remediation purposes for which a locality might want to use opioid settlement funds. The list also identifies several “Core Strategies” that represent preferred remediation uses for opioid settlement funds.

One difference is that the Janssen settlement, unlike the distributors settlement, does not contain a specific provision prohibiting **non-litigating localities** from using settlement funds for non-remediation purposes. The Janssen settlement treats **litigating** and **non-litigating** localities alike with respect to the potential use of settlement funds for non-remediation purposes.

Like the distributors settlement, the Janssen settlement agreement contains a limited allowance for localities to use some settlement funds for non-remediation purposes. However, as noted above, this is strongly disfavored. Moreover, any such use of settlement funds comes with significant strings attached.

First, the Janssen settlement agreement requires that at least 86.5% of the settlement payments made over the course of the settlement must be used for opioid remediation purposes. **(Note that this threshold is higher than the threshold in the distributors settlement agreement.)** Failure to meet this threshold could result in a reduction of settlement payments to states that fall below it.

Again, 7.5% of the settlement payments from the Janssen settlement (i.e., 25% of the localities’ 30% share) will be allocated to the Deficiency Fund and will potentially be used to cover litigation costs and attorney’s fees for litigating localities. Therefore, as a practical matter, Virginia is already **more** than halfway to the “limit” for non-remediation use of funds for this settlement.

Second, like the distributors settlement agreement, the Janssen settlement imposes similar recordkeeping and reporting requirements in connection with any use of settlement funds for non-remediation purposes. Thus, **any use of settlement funds for a non-remediation purpose must be recorded and reported to the settlement administrator and to Janssen. The report must include the amounts in question and descriptions of the non-remediation purposes for which they were used.** The settlement agreement further states that all reports of non-remediation uses will be made publicly available.

Lastly, the definition of “opioid remediation” in the Janssen settlement agreement includes a limited allowance for the use of settlement funds as reimbursement for past programs and expenditures that would qualify as approved opioid remediation purposes under the agreement. While the settlement agreement does not impose specific recordkeeping or accounting requirements for uses of settlement funds as reimbursement for past opioid remediation expenditures or programs, as a practical matter, any such use would need to be linked through documentation or accounting to a qualifying prior expenditure. Moreover, while the settlement

agreement contains this allowance, the overall preference is for settlement funds to be used for future opioid remediation as much as possible.

C. **Mallinckrodt**

Unlike the distributors and Janssen settlements, the Mallinckrodt settlement contains **no** allowance for settlement funds to be used for non-remediation purposes. **Settlement funds received by a locality must be used for opioid abatement only.** Among other things, this prohibits settlement funds from being used to pay attorney’s fees for litigating localities. Their sole recourse to recover any attorney’s fees or other litigation costs is from the separate national fee fund established in the Mallinckrodt reorganization plan that has been confirmed by the bankruptcy court.

The Mallinckrodt opioid settlement funds are administered by a trust established in the court-confirmed reorganization plan known as the National Opioid Abatement Trust II (“NOAT II”). A list of “Approved Uses” for settlement funds is appended as Schedule B to the NOAT II Distribution Procedures, which are in turn appended as Exhibit 4 to the NOAT II Agreement. Under the NOAT II Distribution Procedures, settlement funds must be used to fund programs or projects that fall within the list of Approved Uses, with priority given to a group of “Core Strategies” that are listed separately in Schedule A to the NOAT II Distribution Procedures. A copy of the NOAT II Agreement and its exhibits, including the NOAT II Distribution Procedures and the lists of Approved Uses and Core Strategies, can be found here: <https://www.nationalopioidabatementtrust.com/Docs/NOAT%20II%20Trust%20Agreement.pdf>.

Together, the lists of Approved Uses and Core Strategies are substantially similar to the list of approved remediation strategies that is appended to the distributors and Janssen settlements. Again, the list of Approved Uses is not meant to be exhaustive, but it is extensive, and likely covers most, if not all, potential abatement purposes for which a locality might want to use opioid settlement funds.

While the definition of “opioid remediation” in the distributors and Janssen settlements includes a limited allowance for the use of settlement funds as reimbursement for past programs and expenditures that would qualify as approved opioid remediation purposes, no such provision appears in the NOAT II Agreement or Distribution Procedures, or in the reorganization plan documents. Based on the language in these documents, **Mallinckrodt settlement funds must be used prospectively, and cannot be used as reimbursement for past programs or expenditures.**

The Mallinckrodt settlement requires recipients to provide annual reports describing their uses of the settlement funds. The Mallinckrodt settlement trustees are creating an online portal to facilitate this reporting. Reports on the use of funds received in 2023 will not be due until March of 2024—thus, because Virginia and its localities did not receive their first distributions from the Mallinckrodt settlement until January of 2023, neither the Commonwealth nor any Virginia localities will need to submit reports on their use of Mallinckrodt settlement funds until March of 2024. This will give the Commonwealth and its localities ample time to familiarize themselves with the reporting requirements and the online reporting tool. Further information about the

reporting process will be circulated to Virginia localities that received Mallinckrodt settlement funds when it becomes available.

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