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From Tobacco to Opioids, Oil, and Social Media — What's Next in State AG Cooperation on Public Health Issues?

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Attorneys general have been quick to compare their ongoing opioid litigation to their efforts in the late 1990s, where they led the charge to address the public health concerns resulting from tobacco use. On the heels of a $26 billion settlement offered by four companies alleged to have contributed to the opioid epidemic, it will be interesting to see what lessons states and companies have learned and where they go from here.

The 1998 Tobacco Master Settlement Agreement (MSA) was a coming-of-age event for state attorneys general. Fifty-two state and territory attorneys general obtained the largest settlement in U.S. history after lawsuits brought by hundreds of individual plaintiffs had failed.[1] Although the MSA was viewed by the states as a win — with the tobacco companies required to pay $206 billion over 25 years — that win was tempered by problems in distributing those funds. In particular, the states struggled to decide where those funds should be directed (*e.g.,* whether the funds should be directed solely to reducing tobacco use).[2]

Now, in reaching the opioid settlement, the state attorneys general have emulated the MSA's cooperative model. On July 21, four defendants common to the opioid litigation made a $26 billion settlement offer to resolve many of the lawsuits pending against those entities.[3] Currently, 42 states, five territories, and the District of Columbia have joined that settlement. While the participating states may see the opioid settlement as a success, many questions remain: What will happen with the settlement proceeds? Will opioid defendants obtain a global resolution from states *and localities* or a patchwork of resolution terms? And what public health crisis will the states seek to address next?

What Will Happen With the Settlement Proceeds?

The settlement terms do not explicitly require states to use the settlement proceeds to fund opioid prevention and treatment. Instead, the settlement simply states that it is the "intent of the parties" that the money will be used for those purposes.[4] Similarly, although the MSA stipulated that the states should use the settlement proceeds to aid in smoking cessation and prevention, the states instead often used the payments to shore up their general budgets. One significant difference between the MSA and the opioid settlement is that state localities (*i.e.,* cities and counties) are also involved. While this difference could lead to a more targeted distribution, it could also complicate the distribution process.

On the one hand, some participating states (and nonparticipating states like Nevada) have entered intrastate

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agreements that preemptively allocate the settlement funds. Arizona's "One Arizona Plan," for example, (1) provides that funds must be spent for approved purposes like treatment and support for individuals with opioid dependency, and (2) authorizes litigation against localities that do not spend their share of the funds for these purposes. Arizona's agreement also allocates the funds between local governments and the state, with 56% of the total settlement going to the former and 44% to the latter.[5]

On the other hand, not all states have been able to reach agreements like Arizona. Those states will likely face challenges reminiscent of those arising during the distribution of the MSA proceeds. In addition, the divergent interests of states, localities, state attorneys general, and state legislatures may further complicate the process. While state attorneys general may have intended that the proceeds fund opioid treatment, their legislatures ultimately decide how to appropriate funds.[6]

Will Opioid Defendants Be Able to Obtain Global Peace Through Resolutions With Outlier States?

The global opioid settlement set a September 4 deadline for states to determine whether to sign onto that agreement. The attorneys general of 42 states and the District of Columbia signed on, leaving nine states that are not participating in the settlement either in whole or in part. Alabama, Georgia, Nevada, New Mexico, Oklahoma, Washington, and West Virginia have opted out entirely, while New Hampshire agreed to settle with only the distributors, and Rhode Island agreed to settle with only a single manufacturer. In contrast, 46 states' attorneys general participated in the MSA, with the remaining four states settling separately with the tobacco companies before the MSA was reached.

Here, the nonparticipating states likely will settle separately with the opioid companies or resolve their claims through litigation. But, by opting out of the multistate settlement, each of these states is publicly asserting that it expects to do better than the multistate agreement.

Nevada, for instance, has announced that its state and local governments will continue to pursue individual lawsuits against the settling opioid companies. Leaders in that state argue that the epidemic's unique effects on Nevada compel it to pursue a separate track from its sister states. In a preemptive effort to avoid the problems that arose from the distribution of MSA funds, Nevada's attorney general and other litigating counties and cities have reached an intrastate allocation agreement that provides a framework for any future settlements with opioid companies.[7]

Washington Attorney General Bob Ferguson shared the same sentiment: "The [s]ettlement is, to be blunt, not nearly good enough for Washington."[8] The resulting settlements or verdicts from the two trials in Washington state court set for this fall and January 2022 may establish a new expectation benchmark for nonparticipating states.

What Will Be the Localities' Role?

Just as the tobacco settlement was a coming-of-age event for the states, the opioid settlement (and related litigation) may be a coming-of-age event for cities and counties. As noted above, states' attorneys general and the tobacco companies negotiated the MSA; localities did not play a direct role.

Unlike the tobacco context, cities and counties have separately sued opioid companies. Two West Virginia localities — the city of Huntington and Cabell County — recently concluded a bench trial in the district of West Virginia in their suit against the three opioid distributors that participated in the global settlement agreement.[9] The suit is a bellwether in the National Prescription Opiate multidistrict litigation based in the Northern District of Ohio.[10] It is historic in that it represents the first municipality-led case that has proceeded to trial in the multidistrict litigation.[11] Cities and counties are anxiously awaiting the decision in the West Virginia case, which may portend more locality-driven litigation.

One unique feature of the opioid settlement is that the total value of the settlement fund depends on the percentage of participating localities. States will receive 100% of the proceeds only if they convince all their litigating "subdivisions" (*i.e.,* cities and counties) to surrender their claims against the participating opioid companies. This is a high bar, and some states are already having trouble clearing it. For example, Philadelphia and Allegheny County district attorneys are challenging Pennsylvania's decision to join the settlement. This objection centers on whether Pennsylvania's participation may have implications upon whether these municipalities are authorized to continue going forward with their claims independently.[12]

Despite the municipalities' current efforts to chart their own course in litigation, it is important to note that the municipalities' authority to pursue their own claims is contested.[13]

Looking Forward — What's Next?

The growing strength and national scale of state attorneys general can no longer go unnoticed. During the Trump administration, many attorneys general offices were emboldened by the perceived lack of federal regulatory enforcement. State attorneys general continue to flex their muscles to regulate perceived consumer harm and have demonstrated the ability to achieve substantial monetary recoveries.

Forward-looking litigators and regulatory attorneys are evaluating the state attorneys general's successes in their fights against the tobacco and opioid companies to prepare for the next public health showdown. One such challenge that is currently underway is in the climate context. Democratic leaders in five states and over a dozen localities have initiated climate liability litigation against oil and gas companies.[14] Climate liability litigation often includes allegations by plaintiffs that their claims have a public health component.[15] As of late, state attorneys general have particularly pointed to the alleged public health impacts of climate change in the name of "environmental justice," with their pending climate lawsuits built on legal theories and claims similar to those at issue in the opioid litigation, including public nuisance.[16] To support this goal, states have dedicated resources to create environmental enforcement divisions.[17]

Similarly, state attorneys general have shown interest in the practices of social media companies;[18] given recent reports about the public health impact of such practices, some expect that increased scrutiny by state attorneys general may follow.[19] If it does, the tobacco and opioid settlements could provide a framework for how these and other public health conflicts might be resolved.

Finally, while state attorneys general are already the top cop for investigating data security incidents in United States, the increasing passage of state data privacy laws, coupled with the formation of dedicated consumer privacy and data security enforcement divisions, will only serve to bolster this status. Data privacy legislation has

already passed in three states, with enforcement starting to ramp up in California. Additionally, the Uniform Law Commission recently voted to approve the Uniform Personal Data Protection Act, which is designed to provide a template for states to introduce to their own legislatures. We expect that the current scrutiny of data privacy protection is just the tip of the iceberg.

For more analysis, please view our recent articles on Uniform Law Commission and CCPA Enforcement.

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[1] Forty-eight of attorneys general participated in the MSA with the four major tobacco companies, and four states reached separate resolutions. *See* https://www.naag.org/wp-content/uploads/2020/09/2019-01-MSA-and-Exhibits-Final.pdf.

[2] *See* https://news.harvard.edu/gazette/story/2021/08/applying-lessons-learned-from-the-tobacco-settlement-to-opioid-negotiations/.

[3] *See* https://www.attorneygeneral.gov/wp-content/uploads/2021/07/2021-07-21-Final-Distributor-Settlement-Agreement.pdf.

[4] *See* https://www.attorneygeneral.gov/wp-content/uploads/2021/07/2021-07-21-Final-Distributor-Settlement-Agreement.pdf.

[5] *See* https://www.azag.gov/sites/default/files/docs/press-releases/2021/decrees/One_AZ_MOU_Executed_by_Counties_Towns_With_Exhibits.pdf.

[6] *See* https://www.opioidsettlementtracker.com/faq/#bigtobacco.

[7] *See* https://ag.nv.gov/News/PR/2021/Attorney_General_Ford,_Nevada_Leaders_Announce_One_Nevada_Agreement_for_the_Fair_Allocation_of_Opioid_Settlement_Funds/.

[8] *See* https://www.atg.wa.gov/news/news-releases/ag-ferguson-rejects-insufficient-opioid-distributors-settlement-heads-toward.

[9] *See City of Huntington v. AmerisourceBergen Drug Corp, et al*., No. 3:17-01362 (S.D. W.Va.).

[10] *See In re National Prescription Opiate Litigation*, No. 1:17-md-02804 (N.D. Ohio).

[11] *See* https://www.law.com/nationallawjournal/2021/04/30/first-federal-bellwether-trial-over-opioid-addiction-crisis-set-to-begin-in-west-virginia/.

[12] *See* https://www.wtae.com/article/opioid-settlement-attorney-general-district-attorneys-at-odds/37681297#.

[13] *See, e.g., City of New York v. Chevron Corp.*, 993 F.3d 81, 85-86 (2nd Cir. 2021) (affirming dismissal of city's claims against energy company because the claims were "not well-suited to the application of state law").

[14] *See* https://www.eenews.net/articles/26b-opioid-settlement-may-foreshadow-big-oil-climate-payout/.

[15] *See* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5922204/.

[16] *See* https://www.nytimes.com/2020/12/07/climate/xavier-becerra-environmental-justice.html.

[17] *E.g.*, https://www.njoag.gov/programs/environmental-justice/.

[18] *See* https://www.reuters.com/technology/state-ags-urge-facebook-cancel-instagram-younger-kids-2021-05-10/; https://portal.ct.gov/AG/Press-Releases/2021-Press-Releases/Attorney-General-Tong-Seeks-TikTok-Leadership-Meeting.

[19] *See* https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739.

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