

OPIOID SETTLEMENT FUNDS AND LITIGATION

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House Bills 5968 and 5969 as reported from committee
Sponsor: Rep. Mary Whiteford

Analysis available at
<http://www.legislature.mi.gov>

House Bill 5970 as reported from committee
Sponsor: Rep. Christine Morse

Committee: Judiciary
Revised 5-1-22

BRIEF SUMMARY: House Bills 5968 and 5969 would respectively amend the Michigan Trust Fund Act and the Legislative Council Act, while House Bill 5970 would create the Opioid Liability Litigation Act. Together, the bills would create legislation to manage the disbursement of settlement funds as a result of opioid-related lawsuits.

FISCAL IMPACT: House Bills 5968 and 5969 would increase costs for certain state agencies, while House Bill 5970 would have an indeterminate fiscal impact on local court funding units. (See **Fiscal Information**, below, for more information.)

THE APPARENT PROBLEM:

Because of the staggering statistics surrounding opioids, the consensus is that the United States is battling an opioid epidemic. An opioid can be a prescription drug, often referred to as painkillers, or an illicit substance, such as heroin. Overdoses are killing nearly 47,000 people per year in the United States, and according to the Michigan Department of Attorney General, more Michiganders died from drug overdoses than car accidents in 2018, and 8.4 million opioid prescriptions were filled in Michigan in that same year.¹ As a result, more than 3,000 state and local governments across the United States have filed lawsuits against opioid makers and distributors in the hope of recouping billions of in tax dollars spent to combat the epidemic. On July 21, 2021, a bipartisan coalition of attorneys general announced final agreements with Johnson & Johnson, a manufacturer of opioids, and the three major pharmaceutical distributors: AmerisourceBergen Corporation, Cardinal Health, Inc., and McKesson Corporation. These agreements resolve legal claims against those companies stemming from actions that fueled the opioid addiction epidemic in return for their payment of \$26.0 billion and commitment to make major changes in how they do business to improve safety and oversight over the distribution of prescription opioids.² Michigan is anticipated to receive approximately \$776.0 million of the settlement, distributed over the course of 18 years.

More information on the Distributor Settlement Agreement (the agreement with the three major pharmaceutical distributors: AmerisourceBergen, Cardinal Health, and McKesson) and the Johnson & Johnson Settlement Agreement (also called the Janssen Settlement), including the

¹ <https://www.michigan.gov/opioids>.

² National Association of Attorneys General, *Opioids*, [Opioids - National Association of Attorneys General \(naag.org\)](https://naag.org).

final settlement documents and local units of government eligible to receive proceeds from the settlements, can be found on the Michigan Department of Attorney General website.³

THE CONTENT OF THE BILLS:

House Bill 5968 would amend the Michigan Trust Fund Act to create the Michigan Opioid Healing and Recovery Fund in the Department of Treasury. The state treasurer would have to deposit into the fund all proceeds received by the state as a result of any judgment, settlement, or compromise of claims pertaining to violations, or alleged violations, of law related to the manufacture, marketing, distribution, dispensing, or sale of opioids, except those received under the Medicaid False Claim Act, and could deposit money or other assets from any other source as allowed under law. The state treasurer would have to direct the investment of the fund consistent with 1855 PA 105, which regulates the disposition of surplus funds in the treasury, and credit to the fund interest and earnings from the investments. Money in the fund at the close of the fiscal year would remain in the fund and not lapse to the general fund.

The Department of Treasury would be the administrator of the fund for audits and would be required to expend money from the fund, upon appropriation, in a manner and for purposes consistent with the opioid judgment, settlement, or compromise of claims from which the money was received. Money in the fund would have to be used to create or supplement programs or services and could not be used to replace any other governmental funds that would otherwise have been appropriated or expended for any other program or service.

Additionally, the Michigan Department of Attorney General could expend money from the fund, upon appropriation, to pay costs and reasonable attorney fees incurred in pursuing an opioid judgment, settlement, or compromise of claims, except one under the Medicaid False Claim Act. However, if possible, the department would have to attempt to have costs and attorney fees paid by a defendant or source other than the fund.

MCL 12.252 and proposed MCL 12.153

House Bill 5969 would add Chapter 8A to the Legislative Council Act to create the Opioid Advisory Commission in the Legislative Council. The commission would consist of the following 14 members:

- 12 voting members with experience in substance abuse prevention, health care, mental health, law enforcement, local government, first responder work, or similar fields:
 - Four to be appointed by the Senate Majority Leader.
 - Four to be appointed by the Speaker of the House of Representatives.
 - One to be appointed by the Senate Minority Leader.
 - One to be appointed by the House Minority Leader.
 - One to be appointed by the Senate Majority Leader and Speaker of the House from a list of three individuals provided by the governor.
 - One to be appointed by the Senate Majority Leader and the Speaker of the House from a list of three individuals provided by the attorney general.
- The following two members to serve as ex officio members without vote:
 - The director of the Department of Health and Human Services or a designee.

³ <https://www.michigan.gov/ag/initiatives/opioids>.

- The administrator of the Legislative Council or a designee.

Initial members would have to be appointed within 60 days after the bill's effective date. Those appointing voting members or providing a list from which they will be selected would have to ensure, to the extent possible, that the members reflect the geographic diversity of the state.

Voting members would serve terms of three years or until a successor is appointed, whichever is later, except that those first appointed would be serve staggered terms as determined by the Senate Majority Leader and Speaker of the House. Vacancies would be filled for the unexpired term in the same manner as the original appointment. The Senate Majority Leader and Speaker of the House could concur to remove a member for incompetence, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office, or any other good cause.

A member of the commission would not be entitled to compensation for commission service, but the commission could reimburse a member for actual and necessary expenses incurred in serving on the commission.

The Legislative Council administrator, or a designee of the administrator, would serve as secretary of the commission and would have to call its first meeting. At that first meeting, the commission would have to elect a chairperson and could elect other officers it considered necessary or appropriate. The commission would have to meet at least quarterly, but could meet more frequently at the call of the chairperson or at the request of seven or more members. Seven voting members of the commission would constitute a quorum for transacting business. The vote of a majority of voting members present and serving would be required for commission action. The commission would have to conduct its business in compliance with the Open Meetings Act, and a writing it prepared, owned, used, possessed, or retained in performing an official function would be subject to the Freedom of Information Act.

The commission would have to do all of the following:

- Adopt policies and procedures for its administration as allowed by law.
- Review local, state, and federal initiatives and activities related to education, prevention, treatment, and services for individuals and families affected by substance use disorders and co-occurring mental health conditions, and establish priorities to address substance use disorders and co-occurring mental health conditions, so as to recommend funding initiatives to the legislature.
- By March 30 of each year, provide a written report to the governor, the attorney general, the Senate Majority Leader, the Speaker of the House, and the chairs of the Senate and House appropriations committees that includes all of the following:
 - A statewide evidence-based needs assessment that includes at least all of the following:
 - A summary of current local, state, and federal funding used to address substance use disorders and co-occurring mental health conditions.
 - A discussion about how to prevent overdoses, address disparities in access to health care, and prevent youth substance use.
 - A description of the most common risk factors associated with substance use disorders and co-occurring mental health conditions.

- An analysis, based on quantitative and qualitative data, of the effects on Michigan of substance use disorders and co-occurring mental health conditions.
- Goals and recommendations and their rationale, sustainability plans, and performance indicators relating to all of the following:
 - Prevention, treatment, recovery, and harm reduction efforts for substance use disorders and co-occurring mental health conditions.
 - Reducing disparities in access to prevention, treatment, recovery, and harm reduction programs, services, supports, and resources.
- An evidence-based assessment of the prior use of money appropriated from the Michigan Opioid Healing and Recovery Fund, including the extent to which the expenditures abated the opioid crisis in Michigan.
- Recommended funding for tasks, activities, projects, and initiatives that would support the objectives of the commission.
- If applicable, recommended additional legislation needed to accomplish the objectives of the commission.

Proposed MCL 4.1850 and 4.1851

House Bill 5970 would create a new act, the Opioid Liability Litigation Act, to prohibit certain public bodies in Michigan from commencing or maintaining certain legal actions related to opioid settlements.

Under the bill, a **political subdivision** of Michigan would not be able to commence or maintain an action as follows:

- After January 1, 2021, an action related to the released claims against the released entities, both as defined in the **distributor settlement**.
- After January 1, 2021, an action related to the released claims against the released entities, both as defined in the **Janssen settlement**.

Political subdivision would mean a public body corporate in Michigan, an agency of a public body corporate in Michigan, a nonincorporated body in Michigan of whatever nature, or an agency of a nonincorporated body in Michigan. The term would include a county, city, village, township, school district, or special district or authority of Michigan, but would not include the state of Michigan.

Distributor settlement would mean the master settlement agreement arising out of the **MDL** and entered into by Michigan with AmerisourceBergen Corporation, Cardinal Health, Inc., and McKesson Corporation.

Janssen settlement would mean the master settlement agreement arising out of the **MDL** and entered into by this state with Janssen Pharmaceuticals, Inc.

MDL would mean *In re Nat'l Prescription Opiate Litigation*, the multidistrict litigation consolidated in the United States District Court for the Northern District of Ohio, Case No. 1:17-MD-2804.

House Bills 5969 and 5970 could not take effect unless House Bill 5968 were also enacted.

FISCAL INFORMATION:

House Bill 5968 would direct incoming opioid settlement proceeds revenue to a single state restricted fund to facilitate management and compliance of expenditures with the terms of court settlements with opioid distributors. Currently, funds would be deposited into certain state restricted funds that would best facilitate use of the funds for opioid use remediation, or to the Lawsuit Settlement Proceeds Fund. Revenues in the Lawsuit Settlement Proceeds Fund are designated state restricted funds until the close of the fiscal year, when they lapse to the general fund. The bill would divert settlement proceed revenues from these funds to the new restricted Michigan Opioid Healing and Recovery Fund, but would not otherwise affect eligible uses of the funds, as they would be restricted by the terms of the settlements, which requires that they be used for opioid remediation with a focus on future opioid remediation. Fund revenue would be available to the state government and subject to legislative appropriation in a manner consistent with the opioid judgment or settlement from which the money was received.

Michigan is anticipated to receive approximately \$776.0 million in proceeds over the next 18 years from settlements with three opioid distributors and one opioid manufacturer. These funds are to be split evenly between the state and eligible local units of government and subdivisions over the 18-year period which begins in the current calendar year, with the state receiving approximately \$407.5 million. The state anticipates receiving two initial payments in the current calendar year, then a fixed payment each year after through the term of the settlement.

The bill would create marginal additional administrative costs for the Department of Treasury related to the creation, investment, and administration of the Michigan Opioid Healing and Recovery Fund. An estimate of the increased costs is unknown at this time.

The FY 2022-23 House recommended budget for the Department of Health and Human Services includes \$16.0 million to be appropriated from the Michigan Opioid Healing and Recovery Fund to create or supplement current opioid-related programs and services.

House Bill 5969 would increase costs for the Legislative Council by an indeterminate amount and would have no fiscal impact on local units of government. The amount of increased costs to the Legislative Council would depend upon factors concerning the Opioid Advisory Commission, such as any increased administrative costs and additional staff resources that may be required.

House Bill 5970 would have an indeterminate fiscal impact on local court funding units. Provisions of the bill are aimed at limiting the number of lawsuits likely to be filed. Any fiscal impact would be directly related to how provisions of the bill affected court caseloads, the complexity of lawsuits, and related administrative costs.

ARGUMENTS:

For:

Supporters of the bills argue that the bills are needed not only as a final step to be able to collect the proceeds from the settlements, but also to follow best practices in distributing the proceeds to Michigan communities.

The settlement agreements, in part, require that states bar further legal actions against the companies. States that do not assure this cannot receive the full proceeds under the settlement agreements and instead can only collect 60% of the proceeds in the agreements, which means that Michigan could lose 40% of the proceeds. As a result, the bills are needed to ensure that Michigan receives the full amount under the agreements.

Additionally, proponents argue that the bills set up Michigan to distribute the proceeds equitably and successfully to Michiganders. Creating an advisory commission helps ensure that the proceeds are distributed across Michigan based on the collection data showing Michigan's true needs. According to committee testimony, Michiganders were unhappy with how settlement proceeds from tobacco lawsuits were distributed, and supporters do not want to repeat those mistakes. So, instead of using a trial and error approach, which can be costly and harmful to communities, the commission will consist of specialized and knowledgeable individuals who will comb over and analyze the collected data and information and make recommendations based on that analysis.

Against:

Critics argue that the bills are too restrictive and that the creation of a commission is unnecessary and even dangerous. Instead of allowing elected officials to distribute proceeds and make recommendations based on their constituents' needs, the bills can allow lobbyists and others with conflicts of interest to push for certain spending or treatment programs that would benefit themselves or a company they might be connected with. A data-based approach data can still be used by elected legislators in the standard appropriation process.

POSITIONS:

The Michigan Association of Counties indicated support for the bills. (4-12-22)

Representatives of the Michigan Department of Attorney General testified in support of HBs 5968 and 5970 and with no position on HB 5969. (4-12-22)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.