

## Opioid Settlement FAQs for Tennessee Subdivisions

This document is intended to assist Tennessee subdivisions evaluating the settlement agreements resolving opioid claims with the three largest pharmaceutical distributors – AmerisourceBergen Corporation, Cardinal Health, Inc., and McKesson Corporation (“Distributors”) – and manufacturer Janssen Pharmaceuticals, Inc., and its parent company, Johnson & Johnson (collectively “J&J”). This document is subject to correction and being updated. The terms of the settlement agreements and the Tennessee State-Subdivision Opioid Abatement Agreement are controlling and are not amended or in any way affected by this document. Copies of these agreements, the 2021 opioid settlement legislation, and other materials can be found at this website: <https://www.tn.gov/attorneygeneral/working-for-tennessee/filings-of-interest/opioids.html>.

### **1. How much will Tennessee receive for abatement?**

Tennessee is eligible to receive a maximum payment of approximately \$613 million in “abatement funds” under the agreements with the Distributors and J&J if it meets all the settlement incentives and no penalties or offsets are applied. The Distributors would make their base and incentive payments over 18 years and J&J would make these payments over nine years. Payment schedules and overall maximum payment amounts are attached to the relevant settlement agreements as Exhibit M. Tennessee’s allocable share of the maximum payments is 2.6881474977%, a figure that is substantially higher than the state’s share of the national population and that reflects the greater impact of the opioid crisis on the state. Generally, the actual amount of settlement funds a state receives is highly dependent on the level of subdivision participation and the avoidance of penalties incurred by subdivisions filing new litigation. However, because the 2021 opioid settlement legislation included a process for releasing pending claims and barring future opioid claims against the settling companies, it is anticipated that Tennessee should achieve the incentives that would allow for the maximum payments and the avoidance of penalties and offsets. This is not to say that maximum payments are guaranteed, which is why Tennessee and its subdivisions should also work to lock in maximum payments through broad participation of the state’s counties and cities.<sup>1</sup>

### **2. How are the settlement funds allocated within Tennessee?**

The allocation of settlement funds within Tennessee is controlled by several sources of authority: 1) the Distributor and J&J settlement agreements; 2) the 2021 opioid settlement legislation; and 3) the Tennessee State-Subdivision Opioid Abatement Agreement. In providing a general overview of the allocation of funds, this FAQ response does not attempt to fully describe all provisions related to allocation of payments.

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<sup>1</sup> If the statutory release of claims were not enacted, more than half of the state’s settlement payments would be dependent on the level of county and city participation and the imposition of penalties and offsets could further reduce those payments. The greatest protection of maximum payments is the combination of full subdivision joinder and the implementation of the statutory release of claims.

Assuming maximum payments and full subdivision joinder, the base and incentive payments made by the Distributors and J&J and allocated to Tennessee are initially divided into three abatement sub-funds under the terms of the settlement agreements: 15% to the Subdivision Fund, 70% to the Abatement Accounts Fund, and 15% to the State Fund.

*2.a. How is the Subdivision Fund allocated among Tennessee counties and cities?*

The Subdivision Fund payments are made directly to the participating subdivisions that are eligible to receive such payments. Under default provisions in Exhibit G of the settlement agreements, Subdivision Funds are paid to the following subdivisions: all litigating counties and cities, all other counties, and all other municipalities with populations over 10,000. However, the Settlement Agreements allow for the allocations to be adjusted by agreements between states and their subdivisions and the Tennessee state-subdivision agreement raises the population threshold for municipalities to receive direct allocations from the Subdivision Fund. If the state-subdivision agreement is adopted (as expected), the Tennessee subdivisions eligible for direct payments from the Subdivision Fund will be:

- All litigating counties and municipalities
- All other counties
- All other municipalities with either a population of 30,000 or greater or a Subdivision Fund allocable share (as shown in Exhibit G of the settlement agreements) of 0.5% or greater

The population threshold for non-litigating municipalities to receive direct Subdivision Fund payments recognizes that the efficient delivery of opioid abatement services is hindered if the funds are divided into thousands of small allocations. Even with more than \$600 million potentially being paid into Tennessee, allocating funds among several hundred smaller cities and towns would result in minimal payments for most subdivisions. In many cases, it would be less than a few dollars a year. For non-litigating municipalities that do not meet the threshold, the funds are allocated to the county where the smaller city or town is located, so the money stays in the communities and can be more efficiently spent on abatement.

The population thresholds do not apply to municipalities with populations under 30,000 if those subdivisions are already litigating against the companies. The settlement agreements' terms reflect the companies' desire to address existing litigation and there are incentives directly tied to resolving the claims of litigating subdivisions. Therefore, despite the concerns about the efficient use of abatement funds, even very small litigating municipalities are able to receive direct payments. Where these amounts are small, such cities and towns are encouraged (but not required) to direct their Subdivision Fund allocation to their county.

Subdivision Fund allocation percentages are set out for counties and cities in Exhibit G of each settlement agreement. The allocation percentages are the ones developed by the Plaintiff's Executive Committee ("PEC") in the federal multi-district litigation for opioid cases. The PEC is made up of counsel for subdivisions and the states did not participate in determining the formula used for the subdivision allocation percentages. Generally, they reflect metrics measuring impact

of the opioid crisis on a particular community and the level of health-related funding by subdivisions. Because some municipalities are listed solely based on their “litigating subdivision” status,<sup>2</sup> they may not be listed in Exhibit G for both settlement agreements. For example, a municipality with a population under 10,000 that has previously filed suit against the Distributors but not J&J will be listed on the Distributor settlement agreement Exhibit G but not the exhibit for J&J.<sup>3</sup>

It should be noted that Exhibit G includes provisions to amend the list of subdivisions receiving direct allocations from the Subdivision Fund to reflect any state-subdivision agreement provisions. Thus, it is anticipated that the non-litigating municipalities with populations between 10,000 and 30,000 and allocable shares under 0.5% will be removed from the exhibits when the Tennessee state-subdivision agreement is adopted. As stated, the allocations for those municipalities will be redirected to the relevant counties to be used for abatement.

*2.b. How is the Abatement Accounts Fund allocated in Tennessee?*

By statute, Tennessee’s Abatement Accounts Fund payments are placed in the Tennessee Opioid Abatement Fund. This is a trust fund, separate from the State’s general fund, and money in the fund must be spent on future opioid abatement and remediation. Funds from the Distributor and J&J settlements that are paid into the abatement fund are allocated pursuant to the 2021 legislation:

- 65% of these funds are allocated by the independent Opioid Abatement Council. Per the legislation, the Council is required to seek input from communities throughout the state in determining needs and how funds should be spent on abatement.
- 35% of the funds are allocated to counties that participate in the settlement. These funds are still required to be spent on future Opioid Abatement Council-approved abatement programs, but the county will control its share of the funds. The county allocations will be based on population and data measuring prescription opioid sales and overdoses. Details can be found in Exhibit A to the state-subdivision agreement.

*2.c. How is the State Fund Allocated in Tennessee?*

The 15% State Fund is paid to the State’s general fund unless it is directed to the Tennessee Opioid Abatement Fund by future legislation.

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<sup>2</sup> A number of small municipalities are listed in Distributor settlement agreement Exhibit G because they are treated as “litigating subdivisions” based on the understanding that they either have already filed a motion to substitute into the *Bryant C. Dunaway, et al. v. Purdue Pharma L.P., et al.* lawsuit as a party or intend to substitute in as a party. (This is also why they are included on Exhibit C of the Distributors’ agreement.)

<sup>3</sup> This would not change if such a subdivision were to file a new lawsuit at this stage because under the two settlement agreements the subdivision would be considered a “Later Litigating Subdivision” not a “Litigating Subdivision.”

**3. How can a subdivision calculate its maximum payment from the Subdivision Fund?**

Subdivisions that receive direct payments from the Subdivision Fund from one or both of the Distributor and J&J settlement agreements can calculate potential maximum payments by using their allocation percentages in Exhibit G of those agreements and applying it to the payment information in Exhibit M of the agreements. It is important to note that any calculations will only be rough estimates of maximum payments, and figures will not reflect any acceleration of payments, prepayments, or administrative costs. **The figures and calculations set out below are designed to give subdivisions a rough estimate of the maximum amounts that could be paid. No amount is guaranteed and the provisions in the settlement agreements are controlling.**

For these calculations, the starting point is the estimated total maximum payments into the Subdivision Fund for Tennessee. This is calculated by taking the maximum abatement amount paid in each settlement, multiplying that dollar amount by Tennessee’s allocation of 2.6881474977% and then multiplying that figure by 15% for the Subdivision Fund portion. Applying this formula and accounting for all payments over 18 years, the estimated total maximum Subdivision Fund amounts are:

Distributor Maximum Subdivision Fund Payments:	\$74,813,888
J&J Maximum Subdivision Fund Payments:	+ <u>\$17,195,873</u>
Total Maximum Subdivision Fund Payments:	\$92,009,761

For subdivisions with the same allocation percentage in Exhibit G for both settlements, multiply that percentage by \$92,009,761 million to get an estimate of the maximum total payment from the Subdivision Fund. For example, for a county with an allocation percentage of 1.0%, the maximum total payment would be \$92,009,761 million x 1.0% = \$920,098.

For subdivisions with different Exhibit G allocation percentages, the calculations need to be done separately for the Distributor and J&J settlements. For example, the calculations for a county with a 1.0% allocation in the Distributor Exhibit G and a 1.2% allocation in the J&J Exhibit G would be:

For Distributors:	\$74,813,888 x 1.0% =	\$741,839
For J&J:	\$17,195,873 x 1.2% =	+ <u>\$206,350</u>
Total maximum payments to county:		\$948,189

Estimates of maximum payments for a particular year can also be calculated by using the payment schedules in Exhibit M of the agreements. Again, these are estimated maximum payments that may be changed not only by the failure to earn maximum payments but also by changes to the payment schedule, such as the acceleration of certain J&J payments or a prepayment by one or more companies.

**4. How can a county calculate its maximum allocation from the Opioid Abatement Fund?**

In addition to receiving a direct payment from the Subdivision Fund, participating counties also control 35% of the proceeds from the Distributor and J&J settlements allocated to the Abatement Accounts Fund and paid into the Tennessee Opioid Abatement Fund. A county may estimate the maximum amount of Abatement Funds it would control. For these calculations, the starting point is the estimated total maximum payments into the Tennessee Opioid Abatement Fund. This is calculated by taking the maximum abatement amount paid in each settlement, multiplying that dollar amount by Tennessee's allocation of 2.6881474977% and then multiplying that figure by 70% for the Abatement Accounts Fund portion. Applying this formula and accounting for all payments over 18 years, the estimated total maximum abatement fund amounts are:

Distributor Maximum Abatement Fund Payments:	\$349,131,478
J&J Maximum Abatement Fund Payments:	+ \$ 80,247,406
Total Maximum Abatement Fund Payments:	\$429,378,884

Next, the 35% county share of the fund can be calculated:  $\$429,378,884 \times 35\% = \$150,282,609$ .

Finally, a county's allocation percentage can be applied, which will be different than those used for the Subdivision Fund allocation. A county's allocation percentage will be listed in Exhibit A to the Tennessee state-subdivision agreement when the data used for calculating the percentages is updated. Once the percentages are posted, a county may take its percentage and apply it to the share of funds controlled by the counties. For example, a county with a 1.0% allocation, the maximum total amount of abatement funds allocated to the county would be  $\$150,282,610 \times 1.0\% = \$1,502,826$ .

Of course, such calculations only show the Opioid Abatement Fund amounts that are allocated by the counties directly. Communities will also be benefiting from the larger share of funds allocated by the Opioid Abatement Council.

**5. Can a municipality join the settlements even if it does not receive a Subdivision Fund allocation?**

Yes. The settlement agreements allow for all subdivisions to join, even ones that are not directly allocated amounts from the Subdivision Fund and listed on Exhibit G. For municipalities with populations greater than 10,000, joinder assists in the earning of incentives and maximizing payments. For all municipalities, joinder makes a subdivision eligible for direct payments should a grants program or other process be established to directly allocate settlement funds to smaller cities and towns. (The settlement agreements bar any direct payments to subdivisions that have not joined the settlements, though this does not limit the funding of abatement programs benefiting the residents of such communities.) To be clear, it is not known whether the Opioid Abatement Council, the State, or counties will establish a grants or similar program that would make direct payments to municipalities as decisions concerning how to allocate funds for particular abatement programs are not predetermined by any of the agreements or the legislation. However, dedicating

funds for a grants program or directing amounts to smaller subdivisions for local abatement expenditures are options available to the entities receiving settlement funds.

**6. What is the purpose of the Statutory Release of Claims and when would it be implemented?**

The structure of the Distributor and J&J settlement agreements clearly shows the interest the companies have in achieving a global resolution to the claims of both the states and their political subdivisions. The companies have been sued by thousands of governmental entities, including many types that are not receiving direct allocations under the settlement agreements. At the national level, the list now includes villages, school districts, hospital districts, sheriff's offices, fire districts and many others. To address this, there are incentive and financial penalty provisions that relate to the threat of litigation by all types of governmental subdivisions. Thus, even if all Tennessee counties, large cities, and litigating subdivisions were to join the settlement and sign releases, there would still be a risk that even this level of support would not fully deliver all settlement incentives and avoid all penalties.

To address this risk, the 2021 legislation allows for the Attorney General, with the approval of the Governor and the Comptroller, to release the claims of all governmental subdivisions when entering a settlement with the Distributors or J&J. This includes releasing claims of both litigating and non-litigating subdivisions against these four companies and their related entities, which will also bar future litigation against the companies for the claims being released. Applying the statutory release of claims should qualify the state and its subdivisions for the incentive provisions and protect against penalties and offsets, allowing for maximum payments. In its simplest terms, this is the best way to get all possible settlement funds to address the opioid problem. The legislation and this release process do not keep qualifying subdivisions from participating in the settlements and receiving funds if they join during the initial sign-on period. In fact, it works to maximize the amount funds the subdivisions receive.

The legislation does not specify when the release of claims should be effected. However, the current focus is on maximizing county and municipality joinder and it is not anticipated that the release of claims would occur until the initial sign-on period concludes on January 2, 2022.

**7. Does the Tennessee State-Subdivision Opioid Abatement Agreement apply to matters other than the Distributor and J&J settlement agreements?**

Yes. The Tennessee State-Subdivision Opioid Abatement Agreement also replaces default provisions in the Purdue Pharma L.P. and Mallinckrodt plc bankruptcy plans. Under those plans, 100% of funds paid to the State and its subdivisions will be paid into the Tennessee Opioid Abatement Fund and must be used for abatement purposes. Under the state-subdivision agreement, counties will be allocated the same 35% share of the funds from these bankruptcies as they receive for funds flowing through the Opioid Abatement Fund from the Distributor and J&J settlements. Additionally, the state-subdivision agreement establishes a structure for allocating settlement

funds that can be adopted for future opioid-related settlements that include both the state and subdivisions.

**8. When would the Tennessee State-Subdivision Opioid Abatement Agreement become effective?**

The Tennessee State-Subdivision Opioid Abatement Agreement becomes effective when the State and a sufficient number of subdivisions sign onto it. The Distributor and J&J settlement agreements and the Purdue and Mallinckrodt bankruptcy plans all have similar provisions concerning when a state-subdivision agreement becomes effective and replaces default provisions. The Tennessee state-subdivision agreement incorporates those provisions. Attorney General Herbert H. Slatery III has joined the agreement on behalf of the State. Given that the state-subdivision agreement is the product of negotiations between the State and subdivision representatives, it is anticipated that the subdivision participation threshold will be reached well before the end of the year.

**9. How do Tennessee subdivisions join the settlements and the state-subdivision agreement?**

Subdivisions listed in Exhibit G of the Distributor and J&J settlement agreements, which should have directly received a written notice of the settlements, may execute the settlement documents electronically through a “DocuSign” process. Each notice had a specific Subdivision Registration Code for the subdivision to use, starting with registering on the national settlement website: <https://nationalopioidsettlement.com>. Subdivisions are able to join both the Distributor and J&J settlement agreements and the Tennessee State-Subdivision Agreement through the DocuSign process. To use the process, an individual must be given the authority to execute the required settlement joinder documentation for the subdivision. Model resolutions granting such authority can be found on the Attorney General’s Tennessee-specific website: <https://www.tn.gov/attorneygeneral/working-for-tennessee/filings-of-interest/opioids.html>.

Non-litigating municipalities with populations under 10,000 were not sent notices and are not able to use the DocuSign process. As explained above, such cities and towns may want to join the settlements. They do not, however, need to join the settlements by January 2, 2022. Instead, they would just need to join the settlements prior to any settlement funds being directly allocated to them through grants or another program. If such subdivisions want to join the settlements, they can contact the Attorney General’s Office to receive the subdivision joinder forms by using a special email address: [TNopioidsettlementinfo@ag.tn.gov](mailto:TNopioidsettlementinfo@ag.tn.gov).