

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**IN RE: OPIOID LITIGATION**

**CIVIL ACTION NO. 19-C-9000**

**THIS DOCUMENT APPLIES TO ALL CASES**

**OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL'S OBJECTIONS TO THE  
ORDER APPROVING THE COMMON BENEFIT FUND COMMISSIONER'S  
RECOMMENDATIONS REGARDING ATTORNEY FEES AND EXPENSES**

The Office of the West Virginia Attorney General ("WVAGO") objects to the Panel's adoption of the *Common Benefit Fund Commissioner's Recommendation Regarding Attorney Fees and Expenses*. As previously discussed with the Common Benefit Commissioner both verbally and in written objections, the WVAGO has serious concerns regarding the payment of attorney fees. Those objections are as follows.

**The Recommended 15% of Gross Settlements for Aggregate Amount of Fees is Excessive**

The most concerning portion of the Commissioner's Recommendation is that 15% of the aggregate settlement amount be paid to attorney fees. While we believe that a substantial amount of time, effort, and work by numerous firms has led to the recovery in these matters, the payment of 15% of the gross settlement amounts in attorney fees is not appropriate in this matter.

The total recovery in these matters is currently \$940,386,000 and may very well exceed \$1 billion with the resolution of the remaining matters currently in bankruptcy courts. The resulting \$141,057,900 Attorney Fee Fund may well grow to exceed \$150 million under the current recommendation. Such an amount is wildly excessive and will directly reduce the amount of money that can be used to save people's lives. This amount does not include the additional MDL assessment of 7.5% of the \$400 million aggregate settlement reached with the distributors. Taken together, the real amount being paid in fees and costs for this litigation becomes \$171,057,900 (18.2%).

Furthermore, if the Panel were to ultimately authorize the payment of 15% attorney fees, that amount would greatly exceed what is recoverable under W.Va. Code §5-3-3a. That section requires that any contingency fee award by agreement or court order, related to state claims, cannot exceed:

- 25% of the first \$10 million recovered; plus
- 20% of the recovery between \$10 million and \$15 million; plus
- 15% of the recovery between \$15 million and \$20 million; plus
- 10% of the recovery between \$20 million and \$25 million; plus
- 5% of the recovery exceeding \$25 million.

That statutory tiered fee structure results in following fee amounts and relative percentages:

25%	First \$10 million	\$2,500,000	\$2,500,000 (25%)
20%	\$10-15 million	\$1,000,000	\$3,500,000 (23.33%)
15%	\$15-20 million	\$750,000	\$4,250,000 (21.25%)
10%	\$20-25 million	\$500,000	\$4,750,000 (19%)
5%	>\$25 million	\$50,000 per million	

The statute further provides that in no event shall the aggregate fee for any legal matter exceed \$50 million for any matter arising from a single event or occurrence, exclusive of reasonable costs and expenses, and irrespective of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery. *Id.*

The following chart demonstrates the large discrepancy between the recommended payment of attorney fees and those that would be available under W.Va. Code §5-3-3a:

Case	Settlement Amount	Fees Under 5-3-3a	15% Attorney Fees
J&J	\$99,000,000.00	\$8,450,000.00	\$14,850,000.00
Teva (cash only)	\$83,331,000.00	\$7,666,550.00	\$12,499,650.00
Walgreens	\$83,000,000.00	\$7,650,000.00	\$12,450,000.00
CVS	\$82,500,000.00	\$7,625,000.00	\$12,375,000.00
Kroger	\$68,000,000.00	\$6,900,000.00	\$10,200,000.00
WalMart	\$65,070,000.00	\$6,753,500.00	\$9,760,500.00
Allergan	\$51,200,000.00	\$6,060,000.00	\$7,680,000.00
Rite Aid	\$ 5,000,000.00	\$1,250,000.00	\$ 750,000.00

Distributors	\$ 400,000,000.00	\$ 23,500,000.00	\$ 60,000,000.00
Total	\$ <b>937,101,000.00<sup>1</sup></b>	<b>\$ 75,855,050.00</b>	<b>\$ 140,565,150.00</b>
Percentage		<b>8.09%</b>	<b>15.00%</b>

While W.Va. Code §5-3-3a does not apply to claims asserted by political subdivisions, it demonstrates a clear public policy to minimize the amount of an award or settlement that is paid in attorney fees. That policy is sound, especially here where every dollar that is paid in attorney fees is one dollar less available for abatement. As a result, we recommend that the aggregate award of attorney fees not exceed the amount that would be paid to any firm or attorney pursuant to W.Va. Code §5-3-3a.

**The Full Savings of the Negotiations with Outside Counsel are not Realized by West Virginia**

The WVAGO agrees with the Recommendation to the extent it requires outside counsel be paid for its work for the State pursuant to its contract. That contract results in one of the, if not the, lowest contingency fee rates in the nation—7.76%. Those negotiations result in a substantial savings in attorney fees below W.Va. Code §5-3-3a as outlined in the following chart:

Case	Settlement Amount	Fees Under 5-3-3a	Fees Under State Contract	
J&J	\$99,000,000.00	\$8,450,000.00	\$7,000,000.00	
Teva (cash only)	\$83,331,000.00	\$7,666,550.00	\$6,216,550.00	
Walgreens	\$83,000,000.00	\$7,650,000.00	\$6,200,000.00	
CVS	\$82,500,000.00	\$7,625,000.00	\$6,175,000.00	
Kroger	\$68,000,000.00	\$6,900,000.00	\$5,450,000.00	
WalMart	\$65,070,000.00	\$6,753,500.00	\$5,303,500.00	
Allergan	\$51,200,000.00	\$6,060,000.00	\$4,610,000.00	
Rite Aid	\$5,000,000.00	\$1,250,000.00	\$700,000.00	
<b>Total</b>	<b>\$537,101,000.00</b>	<b>\$52,355,050.00</b>	<b>\$41,655,050.00</b>	<b>Savings v. 5-3-3a</b>

<sup>1</sup> The discrepancy between the total as stated in the Commissioner’s Recommendation and the total show here is believed to be the settlement amounts recovered in the “Remnant” cases.

Percentage		<b>9.75%</b>	<b>7.76%</b>	<b>\$10,700,000.00</b>
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However, under the Commissioner’s Recommendation the citizens of West Virginia do not receive the benefit of these negotiated lower fees. Instead, the additional \$10.7 million dollars is simply used to pay attorney fees to other counsel involved in the litigations. Indeed, of the \$537,101,000 aggregate settlements of the manufacturer and pharmacy claims, a staggering \$98,910,100 is allocated for payment of attorney fees to counsel other than the State’s outside counsel.

The Commissioner’s Recommendation further applies the fee cap in W.Va. Code §5-3-3a(h) to the State’s outside counsel. The WVAGO agrees that provision limits the total amount of attorney fees payable to a Special Assistant Attorney General or other private attorney hired on a contingency fee agreement by the State to \$50 million. However, the application of that cap to limit attorney fees payable to the State’s outside counsel for work performed, and money recovered, for political subdivision clients is inconsistent with the statutory language and the Commissioner’s Recommendation to award fees to all other counsel for political subdivisions inconsistent with W.Va. Code §5-3-3a. Quite simply, if the fee cap in W.Va. Code §5-3-3a(h) applies to outside counsel for work performed for non-state clients, the provisions of W.Va. Code §5-3-3a should likewise apply to all counsel in these litigations.

For the reasons set forth above, an award of 15% of the aggregate settlement amounts, regardless of classification, is not appropriate. Rather, an award for any firm or attorney should be: 1) the amount available to that attorney from the 27.5% of the Attorney Fee Fund allocated for fulfilling contingency contracts; plus 2) the amount awarded for common benefit work up to a maximum of what is recoverable under W.Va. Code §5-3-3a, or, for the state’s claims the agreement between the WVAGO and outside counsel. The remaining funds in the Attorney Fee

Fund should then revert and be distributed in accordance with the West Virginia First Memorandum of Understanding.

However, to the extent the Court believes that 15% of the gross settlement amount is an appropriate amount for attorneys' fees, the WVAGO respectfully requests that the Court order that 15% of the gross settlement amount be inclusive of all costs, fees, and any payment that is necessary under the *Common Benefit Orders* entered in MDL 2804.

Based upon the foregoing, the WVAGO respectfully requests that the Panel Amend its Order Approving Common Benefit Fund Commissioner's Recommendation Regarding Attorney Fees and Expenses consistent with the principles outline herein. To the extent the Panel is amenable, the Attorney General will be available to discuss these issues at the hearing previously noticed for October 13, 2023.

Respectfully submitted this 9th day of October 2023.

STATE OF WEST VIRGINIA ex rel.  
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By Counsel,

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