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Christine@OpioidSettlementTracker.com

Presentations are my livelihood. I am a self-employed JD-activist who is chipping away at her law school loans using, in part, her awesome PowerPoint skills (haha). My work is funded by the non-profit organizations who hire me to consult on projects and speak at events like these, which means that I'd be happy to consider speaking to your group as well!

Thank you kindly,
Christine

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OST & NOPN/D4H

- Birds-eye view: **opioid settlements** and **states' spending plans**
- **Contractual protections** and **opportunities for advocacy**
- Open Society Foundations x OST's joint analysis of **Exhibit E**

Update on Opioid Settlements

“national” or “global” opioid settlement (2022)

\$26 billion offer to settle made July 21, 2021, finalized February 25, 2022

Defendant-offerors — “big three” opioid distributors McKesson, AmerisourceBergen, Cardinal Health + manufacturer Johnson & Johnson
Plaintiffs — “48” (Reuters) state AGs (state court) + subdivisions (fed. MDL)

Resolves **both** states’ and localities’ litigation **against above-named defendants only**

Does not resolve Purdue, Mallinckrodt, etc.
Why pharmacies are still in litigation

BIG TOBACCO MSA (1998)

\$206-246 billion Master Settlement Agreement

Defendant-offerors — “the majors” (four biggest tobacco manufacturers)
Plaintiffs — 46 states’ AGs

For more: “The Cure for America’s Opioid Crisis? End the War on Drugs” (*Harvard Journal of Law & Public Policy*, C. Minhee & S. Calandrillo)

original non-participating states

Alabama — \$141 million with McKesson, \$70.3 million with J&J (both April 2022) (ABC and CAH TBD)

Georgia

Nevada

~~**New Mexico**~~ — \$195.5 million combined (Dec. 2021 / Jan. 2022)

Dec. 2021: AG announces settlement with big three (amt undisclosed) and trial against J&J in Sept. 2022

Jan. 2022: AG announces settlement with J&J (“combined,” “nearly \$200 million”) with all J&J \$s in 2022 w/ max participation

Mar. 2022: AG announces allocation deal and “significant portion” of \$195.5 million paid out by 2025

Oklahoma — ~\$250 million with big three in June 2022, \$465 million verdict against J&J from 2019 *overturned*

Washington — \$518 million settlement ends big three bench trial in May 2022, trial against J&J in September 2022 “*postponed indefinitely*”

original partially participating states

New Hampshire — \$115 million only with big three, ~~trial against J&J in September 2022~~ *as of Thursday*: J&J avoids 9/7 scheduled trial with \$40.5 million settlement announced 9/1

~~**New Mexico**~~ — settling only with “big three”

~~**Rhode Island**~~ — settling only with J&J

technically ineligible

West Virginia — \$37 million with McKesson in 2019, \$16 million with AmerisourceBergen 2017, \$20 million with Cardinal Health 2017, and \$99 million with J&J April 2022, plus cities’ and counties’ \$400 million with big three (but Huntington & Cabell lose MDL)

States' Spending Plans: The Default Allocation

15% - 15% - 70%

state cities, counties abatement fund

“Base payments for each Settling State will ... be allocated fifteen percent (15%) to its State Fund, seventy percent (70%) to its Abatement Accounts Fund, and fifteen percent (15%) to its Subdivision Fund. **Amounts may be reallocated and will be distributed as provided in Section V.D” (Settlement Fund Reallocation and Distribution” by **State-Subdivision Agreement, Allocation Statute, and Statutory Trust**). *Section V.C.1.***

California's Spending Plan: **The Rare Default Allocation**

15% - 15% - 70%

state **cities, counties** **abatement fund**

From the *California State-Subdivision Agreement (Distributors and Janssen*, though citations from here on out will be from the former) (“SSA”) — “...shall be allocated as follows: 15% to the State Fund; 70% to the Abatement Accounts Fund; and 15% to the Subdivision Fund.” SSA 4.

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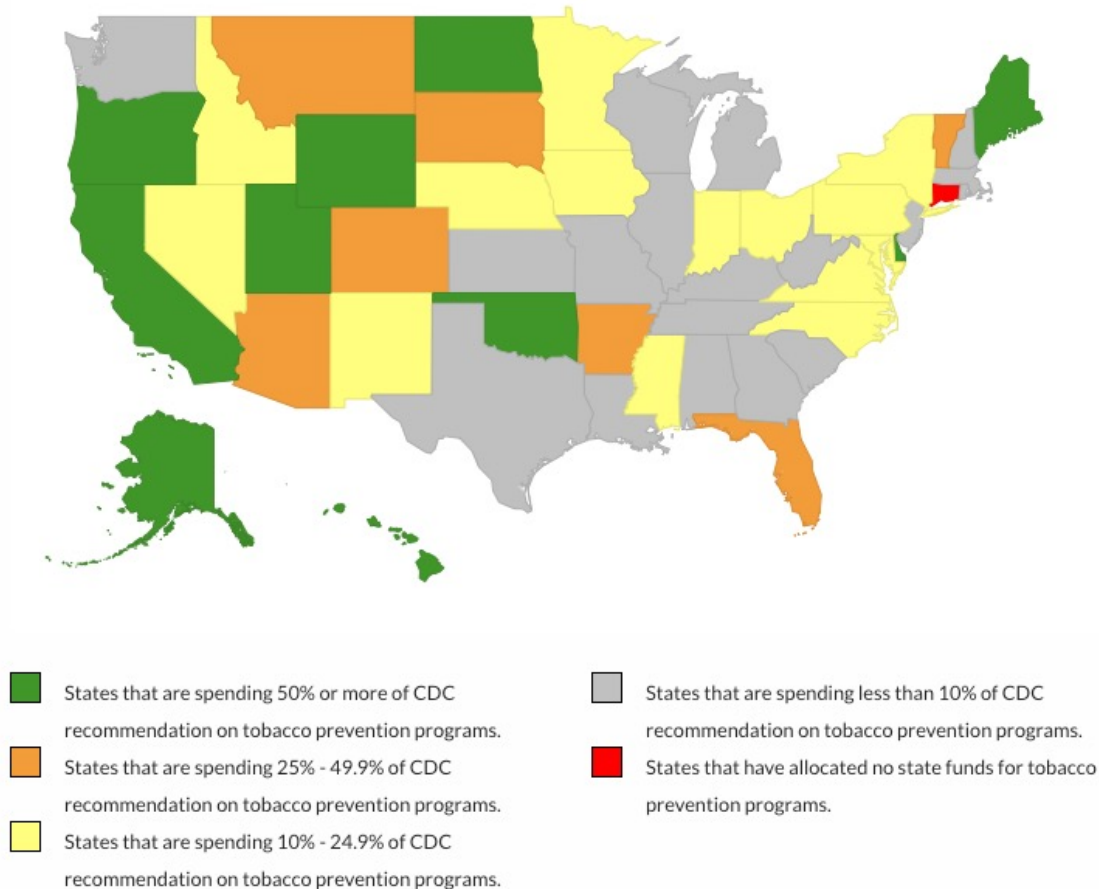
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“The Big Tobacco Nightmare”

www.tobaccofreekids.org/what-we-do/us/statereport

MAP: STATE FUNDING FOR TOBACCO PREVENTION

Click on each state to view the full data. Follow this link for information on the *District of Columbia*.

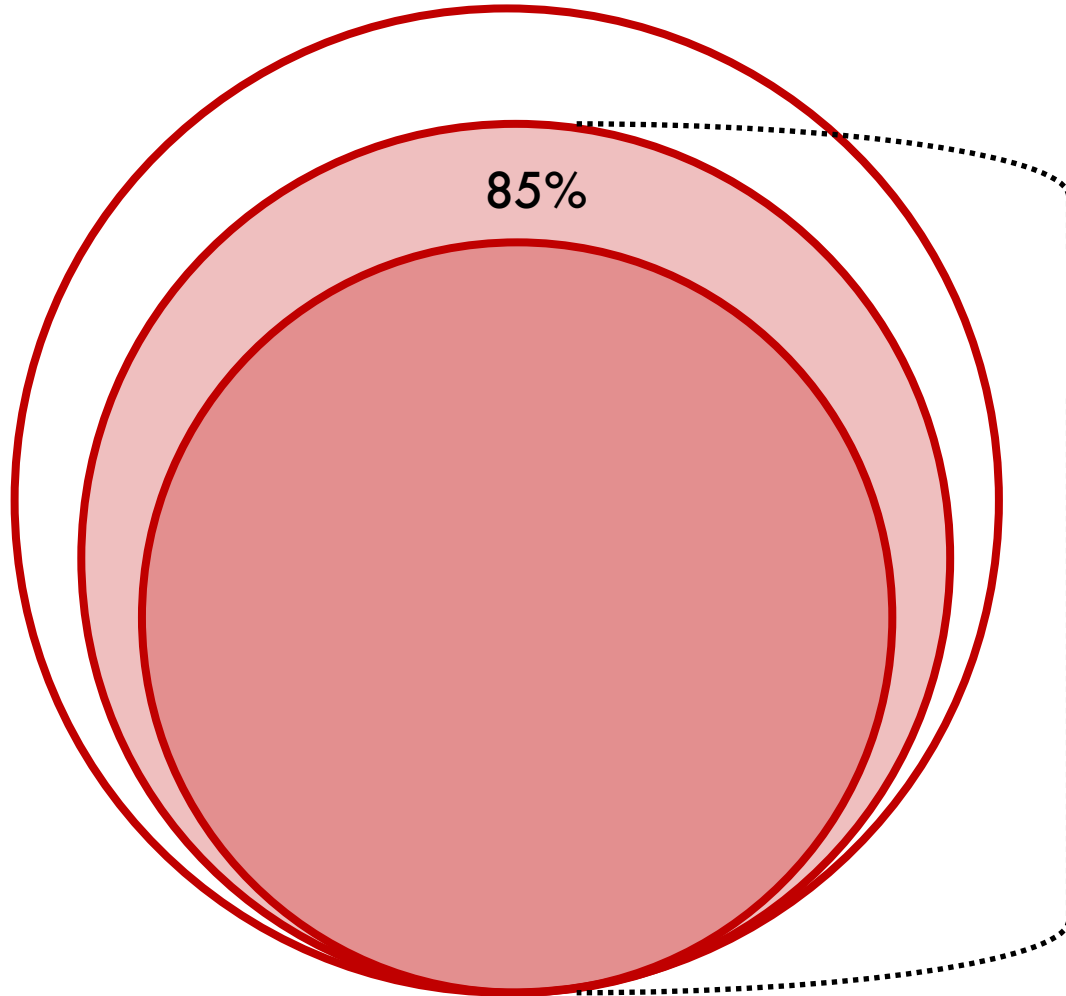


“In the current budget year, Fiscal Year 2022, the states will collect \$27 billion from the settlement and taxes. **But they will spend just 2.7% of it — \$718.5 million — on programs to prevent kids from smoking and help smokers quit.**”

“This total is a 9.5% increase from last year but still barely a fifth (21.7%) of the total funding recommended by the Centers for Disease Control and Prevention (CDC).”

“The **top three states** in actual spending (California, Florida and New York) **spent** a total of \$365.4 million or **more than the other 47 states and Washington, D.C. combined** (\$353.2 million).”

Contractual Protections Against the Big Tobacco Nightmare

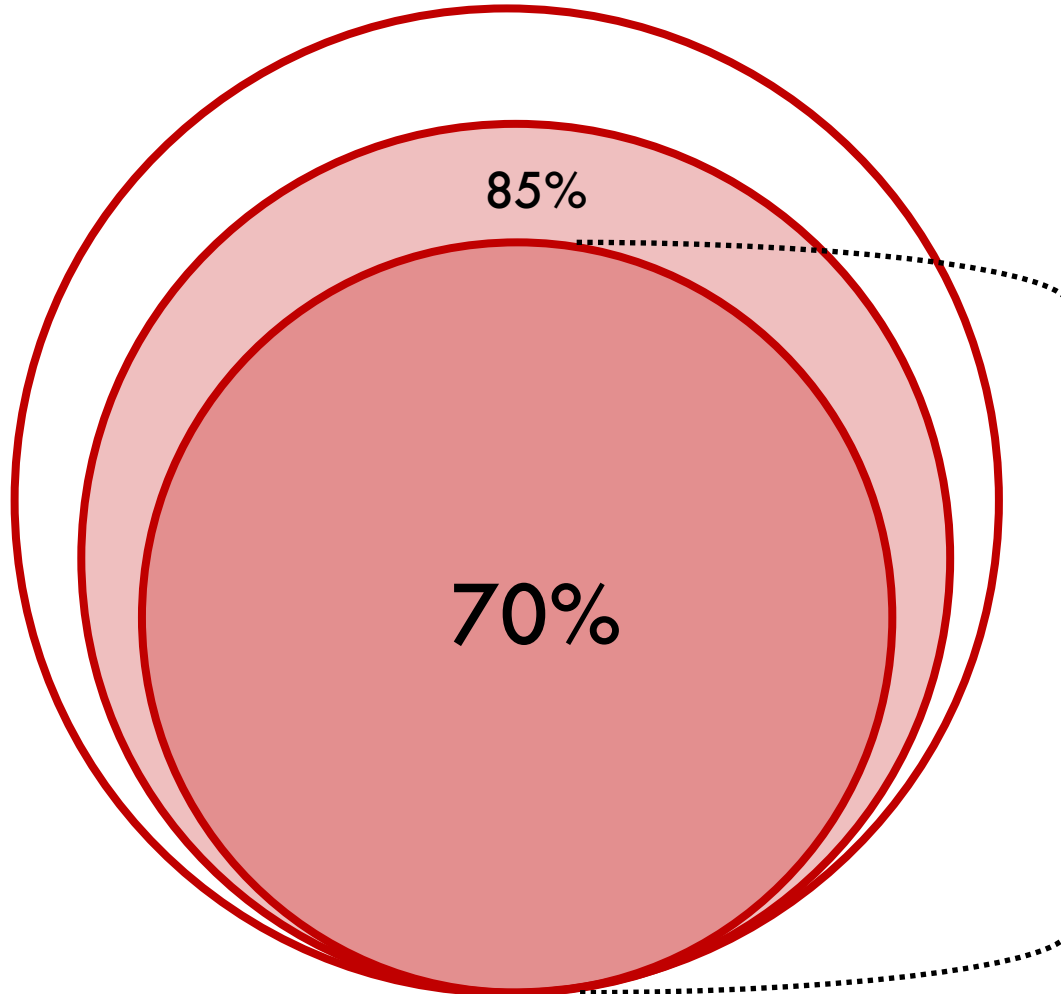


85% for Opioid Remediation

Section V.B.1: “In no event may less than **eighty-five percent (85%)** of the Settling Distributors’ maximum amount of payments ... be spent on **Opioid Remediation.**”

Section I.SS: **Opioid Remediation:** programs, expenditures, **reimbursement** (except where restricted to “future”), **“reasonabl[y] related” administrative expenses** designed to address misuse of opioid products, treat OUD/ related disorders, and mitigate “other alleged effects of ... the opioid epidemic.”

Contractual Protections Against the Big Tobacco Nightmare



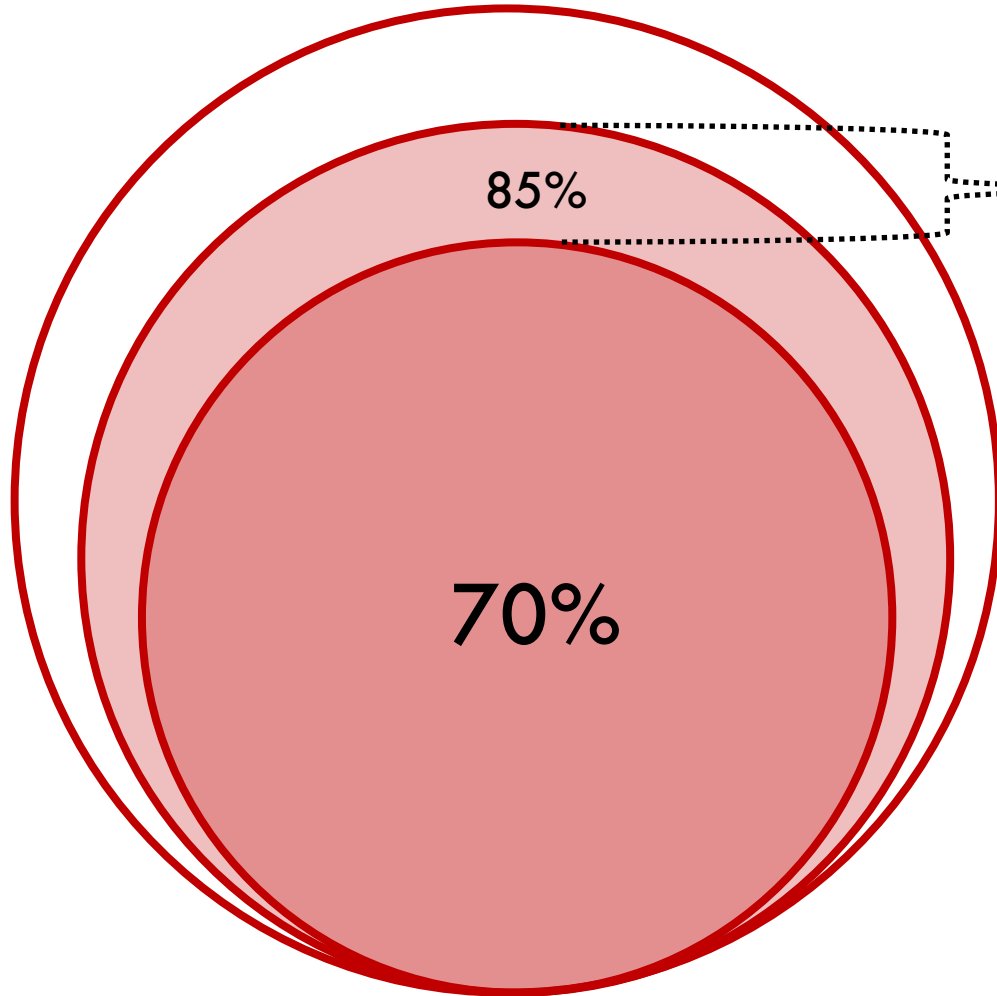
70% for **future** Opioid Remediation

Section V.B.1: “Any State-Subdivision Agreement ... shall be applied only if it requires: (a) that all amounts be used for Opioid Remediation, except as allowed by Section V.B.2, and (b) that at least **seventy percent (70%)** of amounts be used solely for **future Opioid Remediation.**” (*Section V.B.2* reiterates threshold for allocation statutes.)

Section V.E.2: “**In the absence** of a State-Subdivision Agreement, Allocation Statute, or Statutory Trust that addresses distribution, the **Abatement Accounts Fund** will be used solely for **future Opioid Remediation.**”

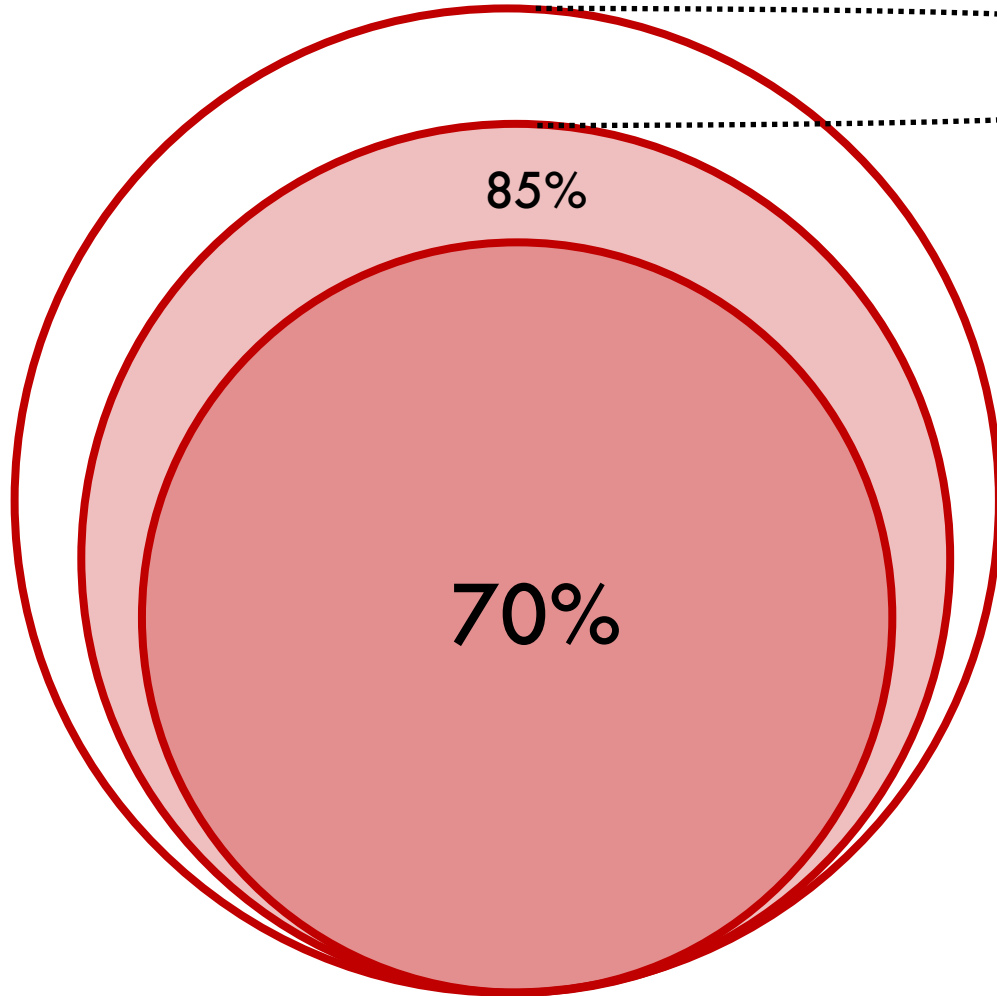
→ If 70% **future** Opioid Remediation threshold is met, can allocate money between state govt, local govts, and special fund (if any) *however*.

Contractual Protections Against the Big Tobacco Nightmare



85% for Opioid Remediation
– 70% *future* Opioid Remediation
= 15% max available for
reimbursement for past expenses

Contractual Protections Against the Big Tobacco Nightmare



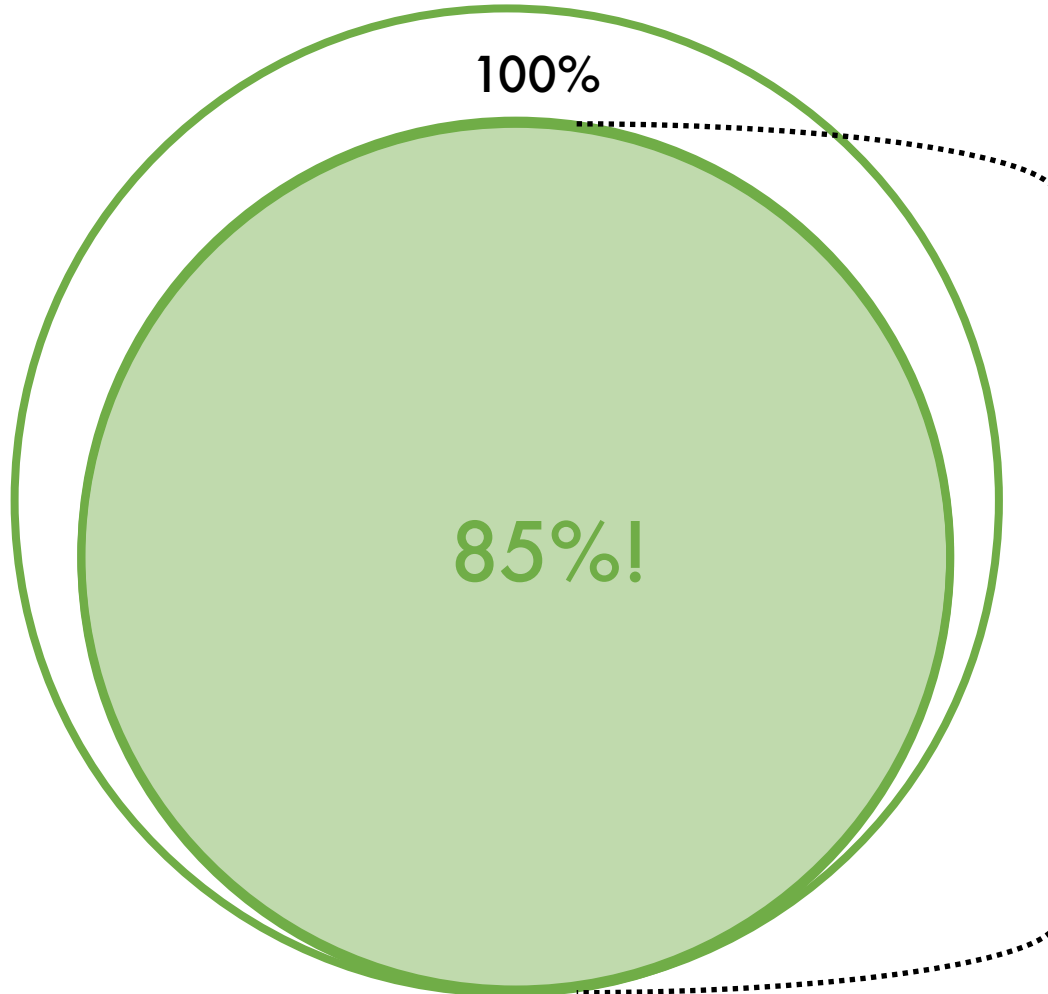
... and a *truly* unrestricted portion (i.e., big tobacco-themed nightmare slice) of **15% max**

... subject to our \$26 billion settlement documents' only reporting requirements:

Section V.B.2: “While disfavored by the Parties, a Settling State or ... Subdivision ... **may use monies** from the Settlement Fund (that have not been restricted by this Agreement solely to future Opioid Remediation) for purposes that do not qualify as Opioid Remediation. ... [S]uch Settling State or ... Subdivision ... **shall identify such amounts** and report to the Settlement Fund Administrator and ...Distributors how such funds were used[.] ... **It is the intent of the Parties that the reporting under this Section V.B.2 shall be available to the public.**”

If you can't even hit 70%, confess your failures to the settlement authorities. Also, it'd be nice if you publicly reported this stuff too, but not required.

California's (Additional) Contractual Protections



“Pursuant to Section V(D)(1) of the Distributor Settlement Agreement [*Distribution by State-Subdivision Agreement*]”:

- a) all Settlement Fund payments will be used for **Opioid Remediation**, except as allowed by Section V(B)(2) of the Distributor Settlement Agreement [*“While disfavored by the parties...”*]; and
- b) at least seventy percent (70%) of Settlement Fund payment amounts will be used solely for **future Opioid Remediation**.” *SSA 3.*

**15% state share
+ 70% abatement share
85% on future Opioid Remediation!**

- **State (15%)** — “Fifteen percent of the total Settlement Fund payments will be allocated to the State and used by the State for **future Opioid Remediation**.” *SSA 4.A.*
- **Localities’ funds from abatement share (70%)** — “The CA Abatement Accounts Funds will be used for **future Opioid Remediation** in one or more of the areas described in the List of Opioid Remediation Uses, which is Exhibit E to the Distributor Settlement Agreement.” *SSA 4.B.ii(a).*

Plus some change from the CA Subdivision Fund’s 15%...

- **Localities’ funds from subdivision fund (15%)** — “CA Subdivision Fund[s] ... will be used, subject to any limits imposed by the Distributor Settlement Agreement and this CA Distributor Allocation Agreement, to fund **future Opioid Remediation** and reimburse past opioid-related expenses, which may include fees and expenses related to litigation, and to pay the ... fees ... of the Special Master.” *SSA 4.C.i.*

California's Opportunities for Advocacy

California: The Default Allocation Star Pupil

“Pursuant to Section V(D)(1) of the Distributor Settlement Agreement [*Distribution by State-Subdivision Agreement*]”:

- a) all Settlement Fund payments will be used for **Opioid Remediation**, except as allowed by Section V(B)(2) of the Distributor Settlement Agreement [*“While disfavored by the parties...”*]; and
- b) at least seventy percent (70%) of Settlement Fund payment amounts will be used solely for **future Opioid Remediation**.” SSA 3.

California is in the minority of states to explicitly impose reporting requirements on state spending.

- **State (15%)** — “DHCS will prepare an annual written report regarding the State’s use of funds.” SSA 5(a).
- **Localities (70% + at least 7.5%)** — “Each CA Participating Subdivision that receives payments ... will prepare written reports at least annually” and “include a certification that all funds ... have been used in compliance [with the global settlement agreements and SSA].” SSA 5(b).

California is in the minority of states to requiring itself to publish any expenditures on a website.

- **State (15%)** — “These reports will be made publicly available on the DHCS web site.” SSA 5(a).
- **Localities (70% + at least 7.5%)** — “The report will be in a form reasonably determined by DHCS. **Prior to specifying the form of the report DHCS will confer with representatives of the Plaintiff Subdivisions.**” SSA 5(b).

(And is truly, truly special for explicitly promising a public discussion of spend.)

- “In each year in which DHCS prepares an annual report DHCS will also host a meeting to discuss the annual report and the Opioid Remediation activities being carried out by the **State and Participating Subdivisions.**” SSA 5(e).

→ My recommendations:

- 1) Keep an eye on that 15% CA Subdivision Fund. It’s the only slice that can be spent on anything within the broad definition of Opioid Remediation (which includes reimbursement and reasonably related administrative expenses).
- 2) Look to sister star pupil states (e.g., NC) for examples of robust public reporting of localities’ spending.
- 3) Please brag about your reporting requirements!

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Approved Purposes = Exhibit E

Joint analysis by the Open Society Foundations and OST

Exhibit E = “List of Opioid Remediation Uses”

15-page list attached to settlement documents for the two biggest opioid settlements — \$26 billion from “big three” distributors and *Janssen Johnson & Johnson* + \$5.5-6 billion from *Purdue* (specifically, govts’ NOAT TDP)

<https://bit.ly/distribdocs>

“non-exhaustive list of expenditures”

Just under half of the states — *reference or incorporate Ex. E* to express expenditures

Including California! “The CA Abatement Accounts Funds will be used for future Opioid Remediation in one or more of the areas described in the List of Opioid Remediation Uses, which is Exhibit E to the Distributor Settlement Agreement. ...” *SSA* 4.B.ii(a).

20ish states — *published additional Ex. E “spin-off” lists* to elaborate on priorities

Including California? “... In addition to this requirement, no less than 50% of the funds received by a CA Participating Subdivision from the Abatement Accounts Fund ... will be used for one or more of the following **High Impact Abatement Activities**” (*SSA* 4.B.ii(b)) —

- “(1) the provision of matching funds or operating costs for substance use disorder facilities within the Behavioral Health Continuum Infrastructure Program;
- (2) creating new or expanded Substance Use Disorder (“SUD”) treatment infrastructure;
- (3) addressing the needs of communities of color and vulnerable populations (including sheltered and unsheltered homeless populations) that are disproportionately impacted by SUD;
- (4) diversion of people with SUD from the justice system into treatment, including by providing training and resources to first and early responders (sworn and non-sworn) and implementing best practices for outreach, diversion and deflection, employability, restorative justice, and harm reduction; and/or
- (5) interventions to prevent drug addiction in vulnerable youth.”

EXHIBIT E

List of Opioid Remediation Uses

Schedule A Core Strategies

States and Qualifying Block Grantees shall choose from among the abatement strategies listed in Schedule B. However, priority shall be given to the following core abatement strategies (“*Core Strategies*”).¹⁴

- A. **NALOXONE OR OTHER FDA-APPROVED DRUG TO REVERSE OPIOID OVERDOSES**
1. Expand training for first responders, schools, community support groups and families; and
 2. Increase distribution to individuals who are uninsured or whose insurance does not cover the needed service.
- B. **MEDICATION-ASSISTED TREATMENT (“MAT”) DISTRIBUTION AND OTHER OPIOID-RELATED TREATMENT**
1. Increase distribution of MAT to individuals who are uninsured or whose insurance does not cover the needed service;
 2. Provide education to school-based and youth-focused programs that discourage or prevent misuse;
 3. Provide MAT education and awareness training to healthcare providers, EMTs, law enforcement, and other first responders; and
 4. Provide treatment and recovery support services such as residential and inpatient treatment, intensive outpatient treatment, outpatient therapy or counseling, and recovery housing that allow or integrate medication and with other support services.

¹⁴ As used in this Schedule A, words like “expand,” “fund,” “provide” or the like shall not indicate a preference for new or existing programs.

Approved Purposes = Exhibit E

Joint analysis by the Open Society Foundations and OST

States' additional, Exhibit E "spin-off" lists: Massive range of political priorities!

States that express additional spending priorities (beyond simply mentioning Exhibit E) treat Exhibit E either as a floor or ceiling...

Montana

MOU Section A.7(3): “support for law enforcement[] addressing the impact of opioid-related substance abuse in the communities they serve, including misuse or illicit use of heroin and/or Fentanyl”

Massachusetts

SSA Section III.4(d): “[a]pprove and fund syringe service programs and other programs to reduce harms associated with drug use, including supplies, staffing space, peer support services, referrals to treatment, fentanyl checking, syringe collection and disposal, connections to care, and the full range of harm reduction and treatment services”

Approved Purposes = Exhibit E

We all can think of examples where the letter of a law sounded great, but the spirit of its application produced something terrible. And vice versa!

Nevertheless, a gift for the wary:

Section VI.D (“State-Subdivision Enforcement”)

A state can go after its localities — and localities can go after the state* — if monies intended for “future Opioid Remediation” are “not used for **purposes similar to or in the nature of those uses contained in Exhibit E.**”

*Localities have these enforcement rights only if the state’s plan allows for it (e.g., AZ’s MOU),

Section VI.D.1 (“State-Subdivision Enforcement”) — “A Subdivision shall not have enforcement rights against a Settling State ... except that a Participating Subdivision ... shall have enforcement rights (a) as provided for in a State-Subdivision Agreement, Allocation Statute, or Statutory Trust with respect to ... allegations that ... the Settling State’s use of Abatement Accounts Fund monies were not used for uses similar to or in the nature of those uses contained in Exhibit E.”

while states have enforcement rights for non-Exhibit E spending regardless.

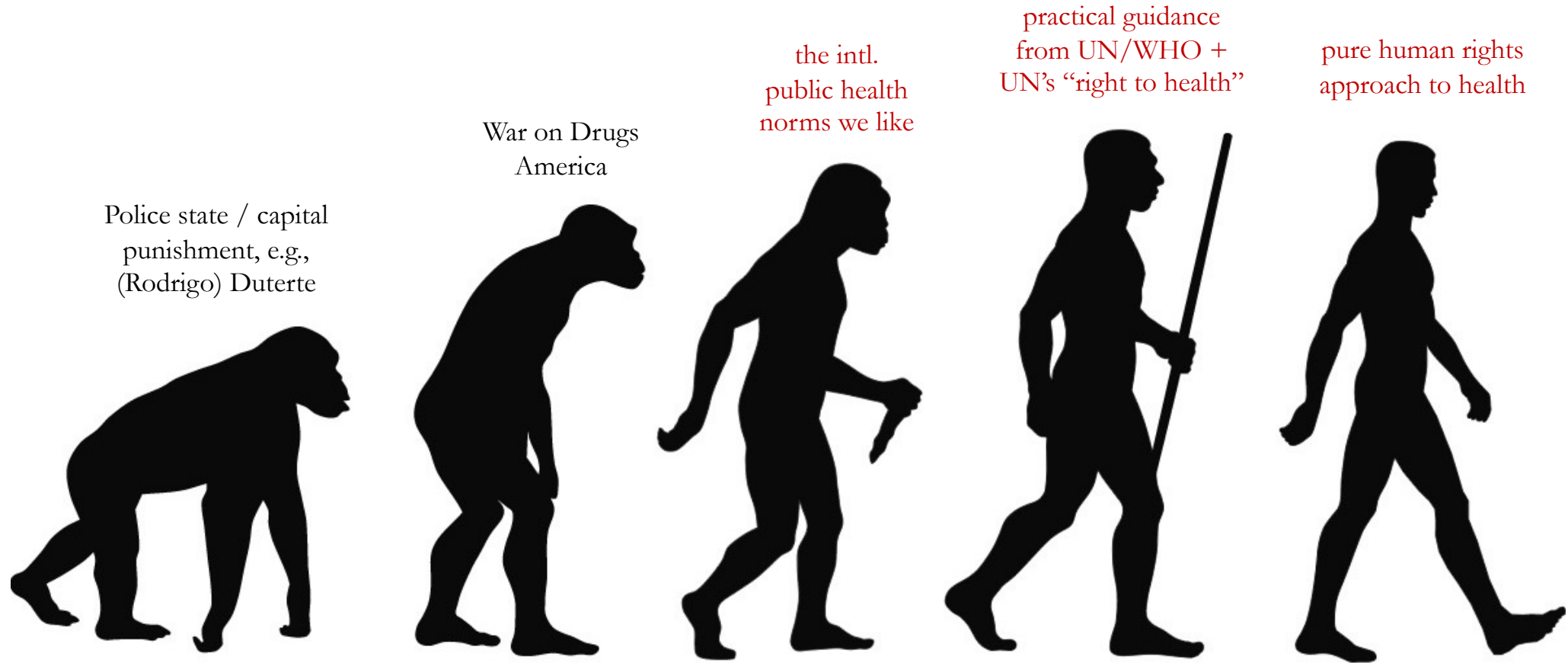
Section VI.D.2 (“State-Subdivision Enforcement”) — “A Settling State shall have enforcement rights against a Participating Subdivision located in its territory (a) as provided for in a State-Subdivision Agreement, Allocation Statute, or Statutory Trust; or (b) in the absence of [such plans], to allegations that the Participating Subdivisions’ uses of Abatement Accounts Fund monies were not used for purposes similar to or in the nature of those uses contained in Exhibit E.”



California has done this!

“The **State or any CA Participating Subdivision** may bring a motion or action in the court where the State has filed its Consent Judgment to enforce the requirements of this CA Distributor Allocation Agreement. Before filing such a motion or action the State will meet and confer with any CA Participating Subdivision that is the subject of the anticipated motion or action, and vice versa.” SSA 6(a).

Accessing Opioid Settlement Funding for **Harm Reduction** Programs



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