

MEMORANDUM

TO: Debbie Gottschalk, Legislative Attorney, Division of Research
FROM: Nicholas Brock & Jemel Green-Harris, Pro Bono Interns, DOR
DATE: March 26, 2021
RE: Constitutionality of an Opioid Settlement Distribution Commission

Question Presented

1. Are there any court decisions in Delaware or other states where the arrangement described above has been found constitutional under a state constitution with similar provisions on the legislature's authority to spend state funds and the inability of the legislature to delegate its constitutional authority?
2. Can you find any examples in Delaware where the General Assembly has delegated its authority to appropriate funds to a non-elected body that has the authority and responsibility to order the executive branch to disperse the funds to specific entities? If so, is there also an example where the subgroup of the non-elected body can make recommendations to the non-elected body and the non-elected body is required to report back if they disagree with the subgroup?

Short Answer

1. No, given the infancy of settlement agreements and strong nondelegation and separation of powers constitutional concerns, state's with similar constitutional provisions have required the approval of the legislature in proposed settlement distribution models.
2. No. Most comparably, procedures enacted through Senate Bill 8 pertaining to funds received from the 1998 Tobacco settlement agreement, required General Assembly approval before any allocations or distribution of monies received.

Introduction

Delaware Constitution: Article VIII Revenue & Taxation

Article VIII of the Delaware Constitution covers the oversight of revenues obtained and territorial limits of taxation and regulation. More specifically, §6 specifies procedures regarding the withdrawal of public monies and limitations of appropriations. Pursuant to this authority, the General Assembly enacted § 6102(a) of Title 29 which provides:

“The General Fund shall include all moneys derived from taxes, fees, permits, licenses, fines, forfeitures or from any other sources...including the sale or

disposition of surplus or other property of the State and of every agency thereof including receipts heretofore authorized as funds for specific use of any agency by the authority of any law of this State.”

This language enables the General Assembly to enact statutes to establish funds where funds are held and determine how those funds are appropriated and how it can be spent, establishing them as the approving body of spending decisions. Related examples of the legislature’s authoritative reach is exemplified through the Master Settlement Agreement entered into by the State of Delaware and the Participating Tobacco Manufacturers in 1998. [Senate Bill 8](#) created the Delaware Health Fund, a special fund composed of payments received from the settlement agreement that the Delaware Health Fund Advisory Committee (DHFAC) would issue recommendations for appropriating monies that would then require general assembly approval.

Nondelegation & Separation of Powers

The nondelegation doctrine holds that the legislative branch cannot delegate its legislative authority to other branches of government. This legislative authority is rooted in policy making discretion. Constitutional concerns arise when an interpretation of Article VIII, §6 when the proposed creation of a commission that would be able to direct how funds are spent without approval from the legislature would be in tension with this principle. Although the Delaware Constitution does not explicitly contain a separation of powers clause, the Delaware Supreme Court decision in *Opinion of the Justices* set out a three-part test to determine whether the Separation of Powers Doctrine had been violated.

1. Whether the power is exclusively executive or legislative or a blend of the two
2. The degree of control by the legislature in the exercise of the power
3. The nature of the objective sought to be attained by the legislature
 - a. Is the intent of the legislature to cooperate with the executive by furnishing some special expertise of one or more of its members?
 - b. Or is the objective of the legislature to establish its superiority over the executive department in an area essentially executive in nature?

This 3-part test was used in finding that the total transfer of executive functions of the Department of Administrative Services to an agency of the General Assembly violated the Separation of Powers Doctrine. A similar stance could be assumed in the creation of an Opioid Commission that would be able to issue and mandate recommendations to a state agency with regard to settlement funds, without approval of the legislature. In *Brandywood Civic Ass’n v. Cohan* (2020) a similar position was assumed in deciding that the allocation of CTF funds through DELDOT, with required approval by the State Senator and/or House Representative, did not violate the Separation of Powers Doctrine. State law vested this required legislator approval, providing “CTF funds

annually to each State Senator and House Representative to be used as they and their constituents believe is best for transportation improvements within their district.” While the proposed Commission would be viewed as a blend of judicial and legislative power, positions assumed in relation to Senate Bill 8 and the Tobacco settlement, where recommendations of the allocation of funds required approval of the legislature, as well as the legislature’s created Consumer Protection Fund, which provided the Attorney General with authority to expend money, but not in an unrestricted manner.

State Analysis: Opioid Settlement Distribution Models

Virginia

This year, the Virginia General Assembly enacted [Senate Bill 1469](#), creating a fund to hold settlement dollars from lawsuits received from pharmaceutical companies’ relating to their role in the opioid epidemic. The act establishes an Opioid Abatement Authority, an independent 11-member body to be drawn from medical professionals, law enforcement, the addiction and recovery community, and legislative staff.

- The fund the authority oversees would allocate 15% of the funds to localities, 15% to state agencies, and 35% to regional efforts. The remaining 35% would be unrestricted.
- Duties of the authority include:
 - Establishing specific criteria and procedures for awards from the fund
 - Establishing requirements for the submission of funding requests
 - Making and distributing funds equitably among community services board regions across the state.

The authority is empowered to make grants and disbursements from the Fund that support efforts to reduce opioid use and pay expenditures from the Fund that are necessary to carry out the purposes of the act.

- Opioid Abatement Fund: A special, non-reverting fund administered by the Authority.
 - All funds appropriated to the Fund, from settlements, judgments, verdicts, and other court orders designated by the Attorney General under § [2.2-507.3](#) as relating to claims regarding the manufacturing, marketing, distribution, or sale of opioids

Texas

In 2020, Texas AG Ken Paxton announced a deal with all 254 counties in the state, directing how future settlement money would be distributed to people impacted from the opioid epidemic. Under the [agreement](#), 15 percent of settlement funds would be distributed to political subdivisions, 15 percent would be distributed to the Office of the Texas Attorney General as counsel for the state of Texas, and 70 percent would be distributed to the Texas Opioid Abatement Fund through the Texas Opioid Council.

- The agreement creates the Texas Opioid Council, charged with ensuring the funds recovered by Texas are allocated fairly and spent to remediate the opioid crisis in Texas
 - The Council is made up of 13 members, which are divided among statewide members and regional members. The six (6) statewide members appointed by the Governor and Attorney General (3 each) to represent the State's interest in opioid abatement.
 - The six (6) regional members are appointed by the State's political subdivisions to ensure dedicated regional, urban, and rural representation on the Council.
- The Council is attached administratively to the Comptroller and is considered an independent, quasi-governmental agency because it is responsible for the statewide distribution of the abatement settlement funds.
 - The Council is the sole decision-maker on the funding allocation process of the abatement funds but does not have rulemaking authority -- which is determined by the terms of each judgement or master settlement agreement.

New Jersey

A proposed New Jersey [bill](#) provides that funds received from opioid litigation or settlements be dedicated in financing opioid prevention and treatment programs and services through the Opioid Settlement Treatment Support Fund.

- Created in the Department of Treasury, the state treasurer deposits into the fund any monies allocated or otherwise received by New Jersey as a result of a settlement agreement entered into against opioid manufacturers and distributors.
 - The fund is used only for the purposes of financing, expanding, enhancing, and modernizing substance use disorder prevention and treatment programs and services in the State.

The bill provides for the Legislature to annually appropriate moneys in the fund to the Department of Human Services, which will be required to allocate the appropriated funds to the Division of Mental Health and Addiction Services and the Office of Licensing in the department, and to community-based service providers through the issuance of grants to effectuate the purposes specified by the bill.

New York

A [bill](#) introduced in the New York state assembly would establish an opioid settlement fund to hold funds distributed from opioid litigation.

- The fund would be established under the joint custody of the state comptroller and the commissioner of taxation and finance -- keeping separate money received from the opioid settlement and from being commingled with other funds under their department.

- Monies from the opioid settlement fund are available following appropriation by the legislature and may only be expended on programs to support services to combat substance use and addiction issues.
- The legislation also creates the opioid settlement board, which is charged with providing recommendations on how the opioid settlement fund shall be allocated to the legislature. The board shall consist of:
 - Four appointments by the governor;
 - Three appointments by the president of the senate; and
 - Three appointments by the speaker of the assembly

Massachusetts

Massachusetts established an Opioid Recovery and Remediation Fund through the enactment of [Bill H.5129](#). The use of funds would be decided upon by the Executive Office of Health and Human Services with consultation of the health and human services secretary and the opioid recovery and remediation trust fund advisory council.

- Membership of the council will include at least one person with lived experience related to opioid use and those who represent diverse communities.
- Each year, the secretary of health and human services will publish and present a report regarding activity to and from the fund, to the senate and the house of representatives. The report shall include, but not be limited to:
 - (i) the revenue credited to the fund;
 - (ii) the amount of expenditures attributable to the administrative costs of the executive office;
 - (iii) an itemized list of the funds expended from the fund; and
 - (iv) data and an assessment of how well resources have been directed to vulnerable and under-served communities.

Any remaining funds at the end of a fiscal year would not revert to the general fund.

Ohio

Ohio's share of the \$573 million settlement will be directed to the OneOhio Recovery Foundation. Governor DeWine, Ohio Attorney General Yost, and local municipalities entered into a [partnership](#) disbursing settlement funds. Local municipalities are allocated 30% of all Opioid Funds; the Foundation is allocated 55%; and the Attorney General is allocated 15% of the funds.

- The Foundation consists of a 29 member board. Five members are selected by the Governor. One member is selected by the Attorney General. Four members are selected from the legislature. 16 members are comprised of local municipalities.

Conclusion

Delaware judicial precedent relating to the 1998 Tobacco settlement, in addition to language in Article VIII §6, would appear to limit the authority of a commission to allocate funds without General Assembly approval. This is also apparent in three of the five evaluated states (NY, NJ & MA) explicitly make mention of approval or appropriation from the legislature before funds could be distributed. However, in the other remaining states (VA & TX) from a reading of the statute, it would appear that they have bypassed these constraints through the creation of an independent body, in which members would be appointed by elected officials. The language of those statute's (although Texas' is an agreement between its 254 counties) also include the specific authority of those entities to distribute monies received as a part of the settlement.

All five of the enactments included provisions requiring annual reports to the General Assembly, a creation of some entity (either independent or extension of an agency) that would manage settlement funds and input from elected members as far as the member composition of that body. While the state constitutions of those bypassing the legislature are different than Delaware's, they serve to show the models by which model states are planning to distribute opioid settlement funds.