



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

**ORDER AUTHORIZING COMMON BENEFIT FUND AND
APPOINTING COMMON BENEFIT FUND COMMISSIONER**

Pending before the Panel is the Motion of Attorney General Patrick Morrissey, as Plaintiffs' Coordinator, for Entry of an Order Authorizing a Common Benefit Fund and Appointing a Common Benefit Fund Commissioner (Transaction ID 66983764). Based upon review of the Motion and the Responses thereto, the Panel makes the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Panel appointed Patrick Morrissey, Attorney General for the State of West Virginia, as Coordinator of the Opioid Litigation on behalf of all Plaintiffs in its *Order Regarding Rulings Issued During September 10, 2021 Status Conference* (Transaction ID 66922721).

2. The Panel thereafter ordered an expedited bench trial on liability for all City/County Plaintiffs and all Hospital Plaintiffs to commence July 5, 2022 in its *Order Regarding Voluntary Dismissal of Legal Claims Discussed During September 10, 2021 Status Conference* (Transaction ID 66980151), and stated therein that if any or all Defendants are found liable and public nuisance abatement is found warranted, then the Panel will consider an award of attorney fees as a component of any equitable remedy which will replace enforcement of contingency fees.

3. The Motion by Attorney General Morrissey, as Plaintiffs' Coordinator, requests that the Panel authorize the creation of a common benefit fund for the reimbursement and

compensation of expenses and work incurred and performed for the common benefit of Plaintiffs in the West Virginia courts (including proceedings in and on appeal from this Court, the other circuit courts on remand, the federal courts from which cases herein have been remanded, and the bankruptcy courts) in the event of a recovery of money through litigation or settlement, on terms to be set forth in a (Proposed) Order to be submitted after consultation by the parties with the Honorable Christopher C. Wilkes, Discovery Commissioner, or such other candidate as the Panel selects, to oversee the common benefit fund's establishment and administration pursuant to W. Va. R. Civ. P. 53.

4. The Panel's authority as a matter of equity to order payment of common benefit attorneys' fees and litigation costs in the event of a recovery of money through litigation or settlement for the benefit of others is well-established under West Virginia law. *See, e.g., Crumlish's Adm'r v. Shenandoah Val. R. Co.*, 40 W. Va. 627, 22 S.E. 90 (1895); *Stafford v. Bishop*, 98 W. Va. 625, 127 S.E. 501 (1925); *Roach v. Wallins Creek Collieries Co.*, 111 W. Va. 1, 160 S.E. 860 (1931); *Capehart v. Church*, 136 W. Va. 929, 69 S.E.2d 127 (1952); *Security Nat'l Bank & Trust Co. v. William*, 153 W. Va. 299, 168 S.E.2d 555 (1969); *see also Nelson v. W. Va. Pub. Employees Ins. Bd.*, 171 W. Va. 445, 456, 300 S.E.2d 86, 97 (1982) (Neely, J. concurring).

5. A trial court's equitable authority to order payment of common benefit attorneys' fees and litigation costs also is widely recognized by federal and state courts beyond West Virginia. *See, e.g., Trustees v. Greenough*, 105 U.S. 527 (1881); *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing v. Van Gemert*, 444 U.S. 472 (1980); *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1044 (Del. 1996) ("The common fund

doctrine is a well-established basis for awarding attorney's fees in the [Delaware] Court of Chancery.”); *Serrano v. Priest*, 569 P.2d 1303, 1307 (Cal. 1977) (“[O]ne who expends attorneys’ fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs.”) (internal quotation marks and citation omitted).

6. The Panel’s authority as a matter of fair and efficient case management of mass litigation to establish procedures for determining any payment of common benefit attorneys’ fees and litigation costs also is well-established and widely recognized. *See Manual for Complex Litigation, Fourth* (Federal Judicial Center 2004), §§ 10.21-10.225; 14.21-14.216; 22.62; and corresponding sections in the Third (1995) and Second (1985) editions. Similar provisions in the (revised) First Edition of the *Manual*, published in 1973, were the bases for the Fifth Circuit’s landmark decision affirming federal MDL transferee courts’ broad case management authority to provide for common benefit assessments in *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1012-19 (5th Cir. 1977); *see also Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (recognizing “the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”).

7. The above-captioned Mass Litigation involves claims by the State by and through Attorney General Morrisey, by County and City Plaintiffs, and by Hospital Plaintiffs against Manufacturer, Distributor, and/or Dispenser Defendants concerning the Defendants’ alleged conduct in relation to the alleged epidemic of opioid use and abuse in and throughout the State of West Virginia. The Plaintiffs seek relief that includes equitable public nuisance abatement in the

form of the payment of costs to abate the alleged public health and safety harms of the opioid epidemic.

8. If any or all Plaintiffs are successful in obtaining a judgment on or settlement of these claims against or with any or all Defendants, the result may include the payment of money by one or more Defendants for the benefit of multiple Plaintiffs. This is precisely the scenario for which the Panel's equitable authority to authorize payment of common benefit attorneys' fees and litigation costs is recognized.

ORDER

Based upon the Findings of Fact and Conclusions of Law, as set forth above, the Panel **FINDS** that authorization of a Common Benefit Fund and appointment of a Common Benefit Fund Commissioner will help fairly and expeditiously resolve matters in this Mass Litigation. Accordingly, the Motion of Attorney General Patrick Morrisey, as Plaintiffs' Coordinator, for Entry of Order Authorizing Common Benefit Fund and Appointing Common Benefit Fund Commissioner is **GRANTED**. The Honorable Christopher Wilkes is **APPOINTED** to serve as Common Benefit Fund Commissioner pursuant to W. Va. R. Civ. P. 53. It is **ORDERED** that Commissioner Wilkes shall forthwith confer with counsel for the parties individually or collectively to develop a proposal for the terms of the Common Benefit Fund. It is further **ORDERED** that Attorney General Patrick Morrisey, as Plaintiffs' Coordinator, shall within 30 days of the issuance of this Order submit to the Panel a proposal for the terms of the Common Benefit Fund.

It is so **ORDERED**.

ENTERED: October 4, 2021.

/s/ Alan D. Moats
Lead Presiding Judge
In re: Opioid Litigation

/s/ Derek C. Swope
Presiding Judge
In re: Opioid Litigation