

Tamika Wright-Evans  
11/10/2022 10:03 AM  
WAYNE COUNTY CLERK  
Cathy M. Garrett  
22-013439-CZ FILED IN MY OFFICE

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

OTTAWA COUNTY, a Michigan  
municipal corporation,

Plaintiff,

v

STATE OF MICHIGAN, and its  
ATTORNEY GENERAL, Dana Nessel,  
in her official capacity,

Defendants.

\_\_\_\_\_  
Douglas W. Van Essen (P33169)  
Lee T. Silver (P36905)  
SILVER & VAN ESSEN, P.C.  
Attorneys for Plaintiff  
300 Ottawa Ave N.W. , Ste 620  
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(616) 988-5600  
\_\_\_\_\_

Hon.

Case No. 22-

- CZ

**COMPLAINT**

There is no other pending or resolved civil action arising out of  
The transaction or occurrence alleged in the complaint

Plaintiff, Ottawa County through its attorneys, Silver & Van Essen, P.C., hereby  
complains of the Defendants as follows:

**PARTIES**

1. Plaintiff, Ottawa County is a Michigan municipal corporation as prescribed in the  
Michigan State Constitution. See Mich Const. 1963, Art 7, §1. Ottawa County has its county  
seat at 414 Washington Avenue, Grand Haven, Michigan.

2. Defendant, State of Michigan is a state of the United States and is controlled by the Michigan Constitution approved by its citizens. See Mich Const. 1963.

3. The Defendant Attorney General is the chief legal officer of the State of Michigan, who rightfully calls herself the “people’s lawyer,” and by Constitutional provision is elected to a 4-year term. See Mich. Const. 1963, Art 5, §21.

### **JURISDICTION AND VENUE**

4. The Circuit Court is a Constitutional Court of general jurisdiction. Mich Const. 1963, Art 6, §11. Plaintiffs seek declaratory and equitable relief and the amount in controversy far exceeds \$25,000.

5. The Michigan Court of Claims Act generally confers exclusive jurisdiction over claims against the State of Michigan in the Court of Claims division of the Michigan Court of Appeals. However, that Act also creates an exception for claims arising out of federal court matters. See MCL§600.6419 and MCL§600.6440.

6. Ottawa County’s claims herein challenge Michigan’s planned distribution of Opioid settlement proceeds derived from and controlled by the Federal Multi District 2804 Opioid Litigation, which is case No. 1:17-MD-2804 in the Northern District of Ohio (hereinafter referred to as the “MDL 2804 Opioid Litigation”). Michigan’s planned distribution is governed by the “Michigan State-Subdivision Agreement for Allocation of Distributor Settlement Agreement and Janssen Settlement Agreement” (“MSSA”), attached as Exhibit A, that was legislatively approved through 2022 SB 993-995 (hereinafter referred to as the “Opioid Settlement Acceptance Legislation” or “OSAL”).

7. The OSAL was signed into law by the Michigan Governor in May of 2022 and the MSSA was filed in the MDL 2804 Opioid Litigation. MSSA Section III, Paragraph 1 identifies Michigan law as applicable to the MSSA and the state courts as the venue for any litigation arising thereunder. On information and belief, Michigan has identified the Wayne County Circuit Court as the jurisdiction in which Ottawa County may challenge the MSSA, as was recognized by the Northern District of Ohio in the Notice to Ottawa County of its of its deadline to file suit, attached as Exhibit B.

8. Thus, this Court has subject matter jurisdiction over this case and venue is properly laid in the Wayne County Circuit Court, through MCL§600.6440 and/or the OSAL as itself a statutory exception to MCL§600.6419.

#### **STANDING AND GENERAL ALLEGATIONS**

9. As in most MDL matters, the MDL 2804 Opioid Litigation involved bellwether cases. The first such case was the *statutory* public nuisance claim brought by the Ohio Counties of Summit and Cuyahoga under Ohio statutory law for “community damages” caused by allegedly tortious public nuisance activities of the Defendant Opioid drug makers and pharmacies (hereinafter referred to as the “Opioid Industry”). The federal court rejected the Opioid Industry’s motion to dismiss the Ohio counties complaint on the premise that under the Ohio public nuisance statute, the Ohio counties had properly plead a claim for community public nuisance damages. See Exhibit C.

10. Thereafter, the federal court chose the claims of Monroe County, Michigan as the Michigan law bellwether case. The Opioid Industry challenged Monroe County’s pleading on the basis that under Michigan law, the power of a county to sue is limited to actions concerning

“local interests,” and because the MDL 2804 Litigation involved “statewide interests,” the local units’ suits “infringed on the Attorney General’s powers.” See *In re National Prescription Opiate Litigation*, 458 F. Supp 3d 665, 675 (N.D. Ohio 2020), attached as Exhibit D.

11. Relying on its Summit County decision, the federal court rejected the Opioid Industry’s pleadings challenge, and permitted Monroe County’s case to continue to discovery on Monroe County’s pleading that Opioid epidemic had “forced the County to make large, unplanned-for expenditures in order to protect the health and welfare of its community costing millions in treatment services, emergency visits, medical care treatment for related illnesses and accidents and lost productivity to Monroe County’s workforce, increased law enforcement and judicial expenditures, increased prison and public works expenditures, increased substance abuse treatment and increased substance abuse treatment and diversion plan expenditures, lost economic activity and lost reputation and good will.” *Id* at 675.

12. Unlike Ohio law, however, Michigan law does not have a public nuisance statute that confers on Michigan counties or local units of government the right to pursue community damages for a public nuisance. Rather, only the Attorney General of the State of Michigan (the “People’s Lawyer”) can sue for community damages caused by a public nuisance created within the State and Michigan’s counties, townships, cities and villages may only sue for “special” damages that they suffered as municipal corporations (hereinafter “corporate damages”). See e.g., *Morse v. Liquor Control Commission*,, 319 Mich 52, 58-59 (1947).

13. Municipal claims for community damages do not infringe on the Attorney General’s rights in *Morse*, they simply fail to state a claim, and while the rule in *Morse* does not justify a dismissal of Monroe County’s corporate damages claims, certainly the broad damage

claims of Monroe County as described by the federal court could not have been realized had the merits of Monroe County's claim been litigated in MDL 2804 Opioid Litigation.

14. To be more specific and with all due respect to its sister county, Monroe County does **not** operate a hospital or prison and has no statutory obligation to provide opioid treatment; nor an obligation nor even right to undertake newborn baby treatment; nor to pursue damages to the workforce in the County or the lost economic activity in the County or the loss of community reputation.. These are all community, not corporate damages, which are beyond Monroe County's reach in any lawsuit.

15. Ottawa County chose not to sue in the MDL 2804 Opioid Litigation because like most Michigan municipalities—while its community has been ravaged by the legal/illegal Opioid epidemic and the public nuisance therein caused by the Opioid Industry, it has *de minimis* special damages as a municipal corporation. That is to say that if its Sheriff's Deputies employ Narcan, the cost of that Narcan is a corporate or special damage. However, as is true for all 260 communities that are seeking State of Michigan opioid funds, Ottawa County does not fund Medicaid and is, therefore, not obligated to treat the residents in Ottawa County whose lives are ravaged by opioid addiction, nor does it fund the social welfare programs that the State employs to deal with the economic and social effects of the Opioid epidemic. Moreover, addiction is not a crime and while some drug addicts commit crimes, the proximate cause of the law enforcement efforts even in those cases is the crime itself, not the public nuisance. To suggest that Ottawa County has employed more sheriff's deputies to place on patrol, expanded its jail or employed additional judges as a result of the Opioid epidemic or any public nuisance caused by the Opioid Industry would not have passed Rule 11 pleading standards. On information and belief, Monroe

County has not employed more deputies, expanded its jail, or hired more judges as a result of the Opioid Industry's public nuisance.

16. If the MDL 2804 Opioid Litigation cases filed by Michigan municipalities had proceeded to the merits, including the claims of Monroe County, the total recovery would have been limited to the municipalities proximately caused corporate or special damages, which as noted above, are nominal at best.

17. Ottawa County was expecting that its residents would eventually receive State distributions from the MDL 2804 Opioid Litigation as "residents of the State of Michigan" and as beneficiaries of the efforts of the People's lawyer, who alone can sue to recover their community damages, as recognized in *Morse, supra*. This is exactly what had happened in the previous tobacco litigation and the settlement distributions from the State share out of that federal MDL public nuisance case.

18. Similarly, the federal court is distributing all of the MDL 2804 Opioid Litigation Settlement funds for Michigan to the State of Michigan for community damages and restricts their use to "Opioid Abatement" for residents of Michigan. In other words, the MDL 2804 Litigation Common Fund distribution to Michigan constitutes community damages for the people of the State of Michigan, not corporate damages for the municipalities in Michigan that sued or made application without suing.

19. Stated differently, the Michigan Attorney General is the ONLY public official with the standing to have sued for the funds that were allocated to Michigan in the MDL 2804 Opioid Litigation.

20. Stated differently in yet another way, no county or municipal corporate damages are compensated by the MDL 2804 Opioid Settlement and none of these settlement dollars represent dollars that the Michigan counties and municipalities that sued could have recovered in the MDL 2804 Opioid litigation.

21. In recognition of the above, except for a litigation cost carve out to the litigating municipalities (which is itself legally flawed) in Section II, Paragraph 5, the MSSA attempts (albeit in a constitutionally flawed manner) to treat all Michigan municipalities, although not their residents, the same in the distribution of Michigan's Opioid settlement funds regardless of whether the municipality sued, but only if the municipality files an application.

22. Mich Const. 1963, Art I, §1 requires that any distribution of public funds to Ottawa County's resident occur through a system that is rational and not arbitrary and capricious

23. Mich Const. 1963, Art I, §2 requires that any distribution of public funds to Ottawa County residents occur through a system that affords them equal protection when compared to other Michigan residents.

**COUNT I**  
**DECLARATORY RELIEF—THE ATTORNEY GENERAL IS THE ONLY PUBLIC**  
**LAWYER THAT MAY SUE FOR COMMUNITY DAMAGES ARISING FROM A**  
**PUBLIC NUISANCE IN MICHIGAN**

24. Ottawa realleges and incorporates by reference, as if fully set forth herein, its allegations in Paragraphs 1 through 23, above.

25. Imbedded in the MSSA and OSAL is the flawed legal assumption that municipalities such as Ottawa County, have standing to sue for community public nuisance damages and the related assumption that the Attorney General is not the exclusive people's

lawyer with the standing to sue for such damages despite the controlling holding of *Morse, supra* (hereinafter this error will be referred to as the “Morse Error”).

26. The Morse Error is imbedded also in the retainer agreements that the lawyers representing the Michigan municipalities in the MDL 2804 Litigation have used. More specifically, these agreements falsely assume that each municipality has the legal authority to commit its portion of community damages flowing from the State through the MSSA or OSAL to attorneys.

27. Ottawa County has standing to challenge the MSSA and OSAL on this point for several reasons:

A. The MSSA and OSAL confer on Ottawa County the standing to represent its residents relative to the MSSA and OSAL, as recognized by the federal court in the MDL 20804 litigation notice to sue sent to Ottawa County.

B. Based on the Morse Error, Section II, Paragraph 5 of the MSSA falsely assumes that the estimated \$400 million to be distributed to Michigan municipalities over the next twenty years is a common fund achieved by the Litigating municipalities and to reward those communities, siphons significant funds that would otherwise flow to the residents of Ottawa County and redirects them directly to the litigating municipalities or into a litigation attorney’s fees fund.

C. Also, the Morse Error in the MSSA and OSAL has the result of pitting Ottawa County against the cities and townships located therein, as well as its sister counties and the local units in those sister counties in competition for this fixed sum. This result is wholly inappropriate and against public policy.



D. In all future federal MDL public nuisance cases<sup>1</sup>, the plaintiff's bar will again scurry around the State to sign up counties and cities and townships to sue for community public nuisance damages, forcing Ottawa to have to falsely reconsider its reliance on *Morse* and the Attorney General to represent its residents' community damages. Indeed, the Attorney General's sole response to Ottawa County's timely objection to the MSSA in the federal court pursuant to the federal court's notice, was to complain that Ottawa County did not sue for such damages, a position directly inconsistent with *Morse*. See Exhibit E.

28. Because of its embedded Morse Error, the MSSA Section II, Paragraph 5 as endorsed by the OSAL penalizes the residents of Ottawa County because the County in which they live chose to respect *Morse*. This Section is, therefore, arbitrary and capricious and without rational basis, denying Ottawa County residents their rights under Mich Const. 1963, Art I, §1.

29. Because of its embedded Morse Error, MSSA Section II, Paragraph 5 as endorsed by the OSAL negatively penalizes the residents of Ottawa County because their County chose to respect *Morse* and, therefore, discriminates against the people of Ottawa, and, therefore, denies Ottawa County residents their rights to equal protection as guaranteed by the State of Michigan under Mich Const. 1963, Art I, §2.

WHEREFORE, the County respectfully request that this Court issue a declaratory judgment as follows:

A. Only the Attorney General is the people's lawyer who can sue for community public nuisance damages and that Michigan municipalities have no obligation or right to file

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<sup>1</sup> States and municipalities are now suing 3M for community public nuisance damages caused by 3M's PFAS laden Scotch Guard waterproofing, to cite just one upcoming example.

such suits in order to fight each other for their fair share of the eventual common community damage relief fund that benefits the State of Michigan's residents in such MDL public nuisance suits.

B. MSSA Section II, Paragraph 5 as endorsed by the OSAL falsely assumes that the litigating municipalities should be compensated for achieving the community public nuisance damages reflected in the 800 million State distribution from the MDL 2804 Opioid Litigation and should be struck as violative of the due process and equal protection rights under the Michigan constitution of those residents who live in municipalities that did not sue in the MDL 2804 Opioid Litigation.

C. No Michigan municipality has the authority to pledge a percentage of its State distributed community public nuisance damages to attorneys in a retainer agreement.

D. MSSA Section II, Paragraph 5 as endorsed by the OSAL is arbitrary and capricious and without rational basis and, therefore, denies Ottawa County residents their rights under Mich Const. 1963, Art I, §1.

E. MSSA Section II, Paragraph 5 as endorsed by the OSAL unjustly discriminates against the people of Ottawa, and, therefore, denies Ottawa County residents their rights to equal protection by the State of Michigan under Mich Const. 1963, Art I, §2.

Also, Ottawa County respectfully requests its attorney's fees and costs for pursuing this Litigation as well as any additional legal or equitable relief that the Court deems appropriate.

**COUNT II**  
**DECLARATORY JUDGMENT—COMMUNITY DAMAGES CANNOT BE**  
**DISTRIBUTED ON THE BASIS OF RESIDENCY IN A COUNTY, CITY OR**  
**TOWNSHIP WITHOUT VIOLATING DUE PROCESS AND EQUAL PROTECTION**  
**STANDARDS**

30. Ottawa County realleges as if fully set forth herein, its allegations in Paragraphs 1 through 29, above.

31. Residency in a particular county, city or township has no bearing on a person’s susceptibility to the adverse effects of the Opioid epidemic.

32. Distributing the MDL 2084 Opioid Litigation community damage settlement proceeds on the basis of residency in one of 260 local communities in Michigan that chose to apply for such funds, rather than on a statewide assessment of individual need is irrational, arbitrary and capricious and has disparately and adversely affected Ottawa County residents denying them due process and equal protection as guaranteed by the Michigan Constitution. The disparity and adverse effects are partially highlighted in the table below:

<b>County</b>	<b>Population</b>	<b>%Allocation</b>	<b>Est. Settlement Total</b>	<b>Per capita</b>
Ottawa	295,894	0.0856	\$2,648,468	\$8.95
Kalamazoo	265,838	2.1433	\$6,630,451	\$24.94
Livingston	193,605	1.4441	\$4,467,578	\$23.07
Muskegon	175,824	1.9100	\$5,908,769	\$33.60
Saginaw	190,124	1.8697	\$5,784,139	\$30.42
Calhoun	133,943	1.7844	\$5,520,279	\$41.21
Ingham	293,994	2.3910	\$7,396,892	\$25.16

33. Ottawa County asserts that impact of the Opioid epidemic on Michigan residents does not depend on where they live or whether the local municipality in which they live filed an

application to receive funds and therefore the MSSA and OSAL distribution system is irrational, arbitrary and capricious.

34. Further, if local municipalities are to be the chosen vessels for opioid abatement pursuant to the MDL 2804 Opioid Litigation Settlement, only a common statewide per capita calculation and then subsequent distribution by local county residency can avoid the constitutional infirmities described above, because such a method distributes based on state not local residency.

WHEREFORE, the County respectfully request that this Court issue a declaratory judgment as follows:

A. MSSA's distribution of funds to local counties, cities and townships is arbitrary and capricious and without rational basis and, therefore, will deny Ottawa County residents their rights under Mich Const. 1963, Art I, §1.

B. MSSA's distribution of funds to local counties, cities and townships will have a disparate and negative effect on Ottawa County residents and, therefore, will deny Ottawa County their rights under Mich Const. 1963, Art I, §2.

C. To avoid double counting, only a statewide calculated per capita sum and then common distribution to counties based on residency can avoid the constitutional infirmities described above.<sup>2</sup>

Also, Ottawa County respectfully requests its attorney's fees and costs for pursuing this Litigation as well as any additional legal or equitable relief that the Court deems appropriate.

**COUNT III**  
**DECLARATORY JUDGMENT—THE LIMITED AND FLAWED METRICS THAT**  
**ARE SOLELY USED TO DISTRIBUTE FUNDS TO OTTAWA COUNTY DENY ITS**  
**RESIDENTS DUE PROCESS AND EQUAL PROTECTION UNDER THE MICHIGAN**  
**CONSTITUTION**

35. Ottawa County realleges as if fully set forth herein, its allegations in Paragraphs 1 through 34, above.

36. While the MSSA and OSAL contain detailed explanations for how attorneys' fees are going to be handled, neither provide any description of the metrics or data used to calculate each Local Government's Share.

37. Ottawa County has never received adequate notice of the metrics or data that have been used to make the distributions. Rather, the notices sent to it merely describe the end result of these mysterious calculations.

38. Ottawa County has never been advised as to how local townships and cities fit into the metrics or data used to make the distributions and whether there has been a double counting of data in the metrics, since all city and township residents are also county residents.

39. Ottawa County timely raised its objection to its distribution as provided for in the MDL 2804 Litigation and has been afforded its right to sue notice by the federal court.

40. After Ottawa County timely filed its objections, Counsel for the Litigating Municipalities contacted legal counsel for Ottawa County and advised that 3 metrics were evenly used to make the proposed distributions. On information and belief only, Ottawa County

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<sup>2</sup> Michigan counties are the only Michigan local units of government that are statutorily authorized to operate addiction programs, which are otherwise funded exclusively through convention and visitor tax sources. See MCL 211.24c (11) commonly known as "PA 2 funds."

assumes that then information community at that time is accurate. Such information is that there were three and only three metrics used to distribute local funds. Those metrics are as follows:

A. One third of the distribution was based on the number of opioid pills prescribed to residents in the jurisdiction during some unspecified time period and then divided into state totals.

B. One third of the distribution was based on the number of residents who died of Opioid overdoses in the jurisdiction over some unspecified time period and then divided into state totals.

C. One third of the distribution was based on the number of residents in the jurisdiction who were diagnosed with opioid addictions over some unspecified time period and then divided into state totals.

41. The settlement will be distributed over twenty years and its purpose is to address the opioid epidemic through prevention and treatment during each of those twenty years. However, the application of the metrics will only occur once as if the data used under the metrics will not change over twenty years.

42. No account in the metrics was made for the number of legal drugs illegally distributed or the distribution of illegal opiates in such a community. The preponderance of opiates in a community are illegal opiates or legal opiates that are illegally distributed. Without the inclusion of such distributions, using legal prescriptions as the sole indicator of the number of opiate drugs in a community is irrational and capricious and the results of which denied Ottawa County residents equal protection because it led to disparate and adverse effects.

43. Pills legally prescribed in a community is irrational, arbitrary and capricious as a metric for one third of the opioid abatement distributions for reasons that include but are not limited to the following:

- A. Opiate drugs may be prescribed in one community for use in another;
- B. Opiate drug prescriptions may be filled in one community for use in another;
- C. Opiate drugs may be temporarily overprescribed in a community due to the temporary presence of a drug mill doctors who are eventually caught, prosecuted and abated.
- D. Opiate drugs may be properly prescribed in a community and not abused, while doctors in another community may be more cautious and use alternatives.

44. Opioid deaths in a community are an irrational, arbitrary and capricious metric to use for a distribution of one-third of the opioid abatement funds for reasons that include but are not limited to the following:

- A. Sadly, those who are dead no longer need opioid abatement services.
- B. No one dies of opioid addiction or an overdose *per se*. Even overdoses produce a different proximate cause of death, such as heart attack. Many doctors who “call” a death may not ascribe the death to an overdose, much less an opioid overdose.
- C. Actual opioid overdose deaths are statistically insufficient for reliance.
- D. Deaths from opioid abuse can widely vary due to the presence of fentanyl. One fentanyl soaking in some illegally manufactured drugs in one community can deceptively skew this metric.
- E. Often, an overdose death occurs in a community other than residence.

45. Reported opioid addiction diagnoses in a community over a fixed past period is also flawed as a metric for reasons that include but are not limited to the following:

A. Most addicts do not end up in a diagnostic setting and even if they do, the physician may be reluctant to diagnose the resident as an addict.

B. Moreover, reported addiction diagnoses are statistically insignificant to use as a metric and people who are already addicted do not need opioid prevention education.

46. Most of this money is supposed to be used for opioid prevention. However, if opioid education and other prevention programs are to be successful, they should be based on population, not current addiction levels. It is irrational to expend most of the prevention funds in the areas of the State currently ravaged by addiction.

47. These metrics when applied have widely disparate and irrational results that are not supportive of the stated ends of the MDL 2804 Opioid Litigation Settlement; namely, opioid abatement.

48. Even if the metrics were not irrationally flawed as a way to link distribution to the past impact areas of the Opioid epidemic, the metrics would need to need to be recalculated under appropriate metrics for identifying communities hardest hit by the Epidemic as populations change and the effects of the Epidemic shift from community to community over the next twenty years. On information and belief, no such recalculations are planned, which is irrational, arbitrary, capricious and will cause irrational disparate effects.

49. Ottawa County is likely to find even more flaws in the metrics and data used when it is given access to the metrics and the data.



50. At the present time, however, for the reasons pled above, the MSSA and OSAL result in distribution system that is irrational, arbitrary and capricious and denies equal protection to the residents of Ottawa County in violation Mich Const. 1963, Art I, §1 and §2.

WHEREFORE, Ottawa County respectfully request that this Court issue a declaratory judgment as follows:

A. The MSSA distribution metrics as endorsed by the OSAL are arbitrary and capricious and without rational basis and, therefore, deny Ottawa County residents their rights under Mich Const. 1963, Art I, §1.

B. The MSSA distribution metrics as endorsed by the OSAL unjustly discriminate against the people of Ottawa, and, therefore, deny Ottawa County residents their rights to equal protection by the State of Michigan under Mich Const. 1963, Art I, §2.

Also, Ottawa County respectfully requests its attorney's fees and costs for pursuing this Litigation as well as any additional legal or equitable relief that the Court deems appropriate.

**COUNT IV**  
**INJUNCTIVE RELIEF**

51. Ottawa County realleges as if fully set forth herein, its allegations in Paragraphs 1 through 50, above.

52. Ottawa County has no adequate remedy at law for the abuses described above.

53. Ottawa County has a substantial likelihood or will ultimately prevail on the merits of its claims.

54. Ottawa County will be irreparably harmed if injunctive relief is not granted.

55. The public interest favors a just, rational and nondisparate distribution of the community damages distributed to the State of Michigan and its communities through the MDL 2804 Opioid Litigation common fund.

WHEREFORE, Ottawa County respectfully requests that this Court enter an order temporarily, preliminarily and permanently enjoining the Defendants from implementing the MSSA or OSAL until such time as its adjudicated constitutional defects are remediated. Ottawa County further requests that it be awarded such additional equitable relief as the Court deems appropriate, including but not limited to costs and attorneys' fees.

Dated: November 9, 2022

Respectfully submitted,  
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Attorneys for Ottawa County

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