

Updates:
**Contract Support Costs Litigation and
National Prescription Opiate
Multidistrict Litigation (MDL) and
Settlements**

Geoff Strommer

Hobbs, Straus, Dean & Walker, LLP

October 24, 2023

Contract Support Cost Litigation

- Historically IHS has only paid CSC on Section 106(a)(1) funds, but Tribes have asserted a right to be paid on all funds, including third party revenues.
- IHS has opposed these claims, and several years ago the federal Circuit Court of Appeals court in the *Swinomish* case agreed with the IHS position.
- This year the 9th and 10th Circuits - in the *San Carlos Apache* and *Northern Arapaho* cases – agreed with the tribal position.
- These rulings have created a circuit split and the IHS has petitioned the Supreme Court for review of both the *San Carlos* and *Northern Arapaho* cases.
- Both Tribes agree that the Court should hear and decide the issue, but each thinks its case is the better vehicle for the Court to take up.
- A decision by the Court about taking up one of the cases should happen in November.

Background: National Prescription Opiate Multi-District Litigation (MDL)

- MDLs assign multiple, independent lawsuits involving the same parties and/or legal claims to a single judge for consolidated or coordinated pre-trial proceedings and “bellwether” trials.
- Created in 2017 to consolidate cases against the manufacturers, distributors, and retailers of prescription opioids, the National Prescription Opiate MDL was assigned to Judge Dan A. Polster in the Northern District of Ohio.
- Thousands of plaintiffs—many governments—ultimately joined.
- Plaintiffs alleged that the Defendants knew that opioids were highly addictive, but aggressively marketed and sold them anyway.

Background: National Prescription Opiate Multi-District Litigation (MDL)

- The MDL court appointed a Tribal Leadership Committee (TLC) to manage the tribal track litigation and represent tribal interests in settlement negotiations.
- The MDL has now resulted in multiple bankruptcies and national settlement deals, including seven final tribal settlements with nine separate defendants, and more in the pipeline.
- The finalized settlements involve the three largest distributors of prescription opioids in the U.S. (AmerisourceBergen, Cardinal Health, and McKesson Corporation), as well as manufacturers Janssen/J&J, Teva, and Allergan, and major pharmacy chains Walmart, Walgreens, and CVS.

MDL Tribal Settlements: Overview of Amounts

- Johnson & Johnson: \$150 million over two payments
- Distributors (McKesson, Amerisource Bergen, and Cardinal Health): \$440 million over 7 payments (to be paid within 5 years)
- Teva: \$119 million over 13 payments, plus 200,000 overdose reversal medication kits distributed over ten years (20,000 per year)
- Allergan: \$71 million over 7 payments
- Walmart: \$78 million in a single lump-sum payment
- Walgreens: \$148 million over 15 payments
- CVS: \$130 million over 10 payments

MDL Settlements

- In all, these settlements will bring over \$1 billion in opioid abatement funds to Indian Country.
- The settlement funds are deposited into settlement trusts administered by court-appointed Special Master David Cohen in coordination with three individuals recommended by the TLC: former Indian Health Service acting Director Mary Smith, former Assistant Secretary of Indian Affairs Kevin Washburn, and Kathy Hannan, chair of the National Museum of the American Indian's Board of Trustees and former partner with the accounting firm, KPMG.
- The settlement trusts distributed the first round of payments in August, 2023 and will continue to make payments on an annual basis.

Amounts for Distribution Per Year

The chart below lists **estimated** total amounts that will be distributed from the tribal trusts each year to Tribes for opioid abatement initiatives, **based on the currently finalized settlements**. Costs and attorney fees have been removed from these estimates.

Abatement 2023	Abatement 2024	Abatement 2025	Abatement 2026	Abatement 2027	Abatement 2028	Abatement 2029	Abatement 2030
\$385,939,058.63 (actual)	\$81,089,798.32	\$87,051,839.10	\$87,051,839.10	\$88,099,902.20	\$35,474,772.36	\$36,007,047.71	\$30,031,997.56
Abatement 2031	Abatement 2032	Abatement 2033	Abatement 2034	Abatement 2035	Abatement 2036	Abatement 2037	
\$30,021,816.94	\$30,021,816.93	\$18,475,136.41	\$18,475,136.41	\$18,475,136.41	\$10,140,763.12	\$10,140,763.12	

Additional Proposed Settlements: McKinsey & Co.

- A proposed settlement has been reached with global consulting firm McKinsey & Co, which helped Purdue and others market their prescription opioids. Claims against McKinsey were organized in a separate MDL.
- McKinsey and the tribal plaintiffs recently announced a settlement-in-principle that would settle the tribal claims for \$39.5 million (about \$33.58 million after fees), in one lump sum payment.
- McKinsey will decide whether to move forward with the settlement next month based on tribal participation levels.
- More information at: <https://www.mckinseytribalsettlement.com/>

Additional Proposed Settlements: Other Defendants

- Although these settlements (and bankruptcy proceedings, discussed later) represent most of the major defendants involved in the prescription opiate MDL, plaintiffs' lead counsel is exploring the possibility of settlement with at least a few of the remaining defendants, most of which are manufacturers of generic opioids or regional distributors.
- A proposed settlement is currently being drafted with Kroger (\$40 million for Tribes), and others are in active mediation.
- In the meantime, litigation involving remaining defendants continues, and the MDL plaintiffs' counsel is exploring methods for litigating tribes and other plaintiffs to add defendants to update their complaints with additional defendants.

Participation Requirements

- Federally recognized Tribes and Alaska regional tribal health organizations are eligible to participate in all settlements and to receive a share of settlement funds, regardless of whether they filed a lawsuit in the opioid MDL.
- Tribes that have not already joined the settlements have three years from the effective date of most settlements to join, but should do so as soon as possible to begin receiving payments.
- Tribes that wish to participate and receive payments must sign a separate Participation Agreement for each settlement and submit them through the settlement website, along with payment information.
- Settlement website: www.tribalopioidsettlements.com

Tribal Settlement Allocation

- The MDL court appointed Special Master David Cohen and Judge Layn Phillips to determine final allocation of the settlement funds among participating Tribes and tribal health organizations.
- Special Master Cohen and Judge Phillips elected to adopt the same allocation formula previously approved by a federal bankruptcy court in the bankruptcy proceedings brought by opioids manufacturers Purdue Pharma and Mallinckrodt plc (the “Purdue formula”).

Tribal Settlement Allocation (cont.)

- The Purdue formula weighed six factors:
 - **Indian Health Service user population** for each Tribe;
 - **Citizenship population** for each Tribe;
 - **The morphine milligram equivalents imputed to each Tribe** for the years 2006-2014 (in other words, the volume of prescription opioids shipped to each Tribe's geographic area for that period, based on data from the Drug Enforcement Administration (DEA));
 - **Drug and prescription opioid overdose rates** for each Tribe;
 - **Relative poverty rates** imputed to each Tribe; and
 - **The relative cost of living** imputed to each Tribe, based on the Cost of Living Index for Health Care expenses for 2020.

Tribal Settlement Allocation (cont.)

- The Purdue formula also incorporates an inter-Alaska formula, which was adopted by consensus of the Alaska tribal caucus, to divide funds among Tribes and regional tribal health organizations in that State.
- Tribes and tribal organizations in Alaska and California have the option to keep their settlement allocation, or direct it to a tribal health organization to which they belong. (The deadline for this election in 2023 has passed, but Tribes in these States can make a new election each year if they wish.)

Use Restrictions on Settlement Funds

- All settlement funds must be used for approved opioid prevention, remediation, and abatement activities as defined in the settlement agreements (“Approved Uses”). Tribes may also use the funds for any “culturally appropriate activities, practices, teachings or ceremonies that may, in the judgment of the Tribes, be aimed at or supportive of remediation and abatement of the opioid crisis within a tribal community.”
- The “Approved Uses” are described in the document, “Purdue Approved Uses and Tribal Abatement” available on the Documents page of the settlement website, or at https://www.tribalopioidsettlements.com/Documents/Purdue_Approved_Uses_and_Tribal_Abatement.pdf.

Reporting Requirements

- Tribes and tribal health organizations that receive settlement funds must also provide an annual report to the settlement trusts reporting on how the funds were spent.
- The reporting requirement is not intended to be burdensome, but requires the reporting entity to identify the categories of “Approved Uses” for which it spent the settlement funds in that year and to certify that the information provided in the report is true and accurate.
- Tribes may provide additional description of their abatement activities, on an optional basis.

Final Note: Bankruptcy Proceedings

- Rather than settle, some MDL defendants declared bankruptcy as a result of the litigation, and their cases were moved out of the MDL and into separate bankruptcy proceedings.
- The most significant bankruptcy proceedings involve Purdue Pharma (the maker of OxyContin and other opioids), Mallinckrodt plc (one of the largest manufacturers of generic opioids), and Endo International (another manufacturer of generic and name-brand opioids). RiteAid has also recently declared bankruptcy.
- The expected proceeds from these bankruptcies are smaller and less certain than the non-bankruptcy settlements previously discussed, but they may result in some additional funds for abatement.

Questions?

Geoffrey Strommer

503-242-1745

gstrommer@hobbsstraus.com