

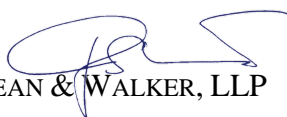
215 SW Washington St. Ste 200 T 503.242.1745
Portland, OR 97205 F 503.242.1072

HOBBSSTRAUS.COM

MEMORANDUM

June 1, 2023

TO: TRIBAL CLIENTS

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP 

RE: *Opioid Litigation Updates*

We are writing to report on four major updates in tribal opioid litigation:

- First, the percentage of funding each Tribe will receive from the opioid abatement trust funds created pursuant to numerous tribal opioid settlements was finalized and released recently. The trustees of the opioid abatement trust funds are also expected to make their first distributions to Tribes within the next few months, depending on how quickly Tribes submit required information.
- Second, the multidistrict litigation (MDL) against consulting firm McKinsey & Co. recently entered the early stages of the tribal bellwether case selection process.
- Third, bankruptcy proceedings for opioid manufacturer Endo International Plc are currently before a bankruptcy judge in the Southern District of New York, and Tribes may need to take action in connection with that proceeding in the near future.
- Finally, the Second Circuit Court of Appeals recently affirmed the bankruptcy restructuring plan submitted in conjunction with Purdue Pharma's bankruptcy. After years of delay, this development potentially clears the path for Purdue's creditors—including Tribes—to recover funds from Purdue to address the opioid crisis.

We discuss each of these in turn below.

Tribal Opioid Settlement Allocation Formula Finalized; Payments to Tribes Expected Soon

Over the last few years, nine companies have entered global settlements with Indian Country to resolve Tribes' opioid claims against those companies. These settlements are with manufacturers Johnson & Johnson (Janssen), Teva Pharmaceuticals, and Allergan Plc; distributors McKesson Corporation, Cardinal Health, and AmerisourceBergen; and pharmacy chains CVS, Walmart, and Walgreens. Those settlement funds will be routed through a series of

Tribal Abatement Fund Trusts (TAFTs) overseen by Trustees Mary Smith, Dean Kevin Washburn, and Kathy Hannan. In addition, Indian Country received a share of the bankruptcy estate of manufacturer Mallinckrodt, and the tribal portion of that settlement will also be overseen by those same Trustees. All told, over \$1 billion will be distributed to Tribes for opioid abatement and remediation over the next decade or so.

Recently, the Honorable Layn Phillips and Special Master David Cohen released their second and final tribal abatement order fixing the formula for distributions through the TAFTs. Pursuant to that order, all funds flowing through the TAFTs will be distributed according to the “Purdue Allocation” matrix first established years ago in the Purdue Pharma bankruptcy proceedings. The Purdue Allocation weighs six factors to determine the percentage of funding that each Tribe will receive: (1) 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); (2) opioid and other drug overdose rates for each Tribe for the years 2003-2017; (3) Indian Health Service user population for each Tribe, based on 2018 data; (4) citizenship population for each Tribe, based on the CARES Act population list and other sources (as verified or updated by Tribes that participated in the verification process); (5) relative poverty rates imputed to each Tribe based on Census data for 2018; and (6) the relative cost of living imputed to each Tribe, based on the C2ER Cost of Living Index for Health Care expenses for 2020.

Payments from the settling defendants to the TAFTs have already begun. The Trustees should be in a position soon to begin the first distributions of these opioid funds to Tribes. All Tribes and Alaska tribal health organizations are eligible to participate, but must submit participation forms and payment information in order to receive their share of settlement funds. **Please let us know as soon as possible if you would like assistance submitting this information in order to participate in the settlements.**

McKinsey MDL Tribal Bellwether Selection Begins

A couple of years ago, the nationwide opioid litigation MDL, discussed above, spun off a second MDL to address claims against global consulting company McKinsey & Co. Whereas the claims in the nationwide opioid MDL were brought against manufacturers, distributors, and pharmacies for their roles in creating, distributing, and selling opioids, claims brought against McKinsey allege that McKinsey committed various legal harms by helping its clients target, market, advertise, and maximize sales of its clients’ opioids. McKinsey provided consulting services for Purdue Pharma for 15 years, and is already notorious for its efforts to “turbocharge” the sale of OxyContin and for advising the Food & Drug Administration on the regulation of opioids while McKinsey was simultaneously working for its opioid clients.

Cases against McKinsey & Co. were consolidated into an MDL before Judge Charles Breyer in the Northern District of California. The pre-trial proceedings in that MDL are wrapping up and Judge Breyer plans to run bellwether trials—essentially test cases—to ascertain

the litigation prospects of the parties. The parties and Judge Breyer have been convening to establish a process to select a tribal bellwether case, and earlier this month a pool of 50 potential tribal bellwether plaintiffs was selected. The potential tribal bellwethers have until June 23, 2023, to consent to proceed with their cases in the Northern District of California. If a tribal plaintiff does not consent to proceed, it will be replaced by another candidate until there are 50 consenting candidates. Those Tribes whose cases are selected as bellwethers will have to complete a Plaintiff Fact Sheet—a court-ordered, self-attested profile of each Tribe, its injuries, and its claims against McKinsey. Following the submission of the Fact Sheets by the final 50 candidates, the plaintiffs and defendants will review those submissions and select the tribal bellwether case. In the event they are unable to agree, Judge Breyer will choose the tribal bellwether case from among those 50. The Plaintiff Fact Sheets are quite extensive and not due to the court until mid-July. Accordingly, we do not expect to know the final tribal bellwether plaintiff until late summer or early fall, at the earliest.

As was the case for the main opioid MDL, Tribes could stand to recover money from McKinsey if McKinsey and tribal plaintiffs decide to settle claims rather than go to trial. In the main opioid MDL, the Cherokee Nation served as the tribal bellwether and prosecution of its case yielded settlement agreements that helped set the precedent for global tribal settlements.

Endo International Plc. Bankruptcy Proceedings Continue

Endo International Plc was a manufacturer defendant in the opioid multi-district litigation, and produces both generic and branded opioids, including Percocet and Opana ER (the latter of which is no longer on the market). On August 16, 2022, Endo filed for bankruptcy after reaching an estimated \$6 billion deal with some of its creditors. The deal, however, is contingent on the sale of substantially all of Endo's assets to a specific "Stalking Horse Bidder" at an auction pursuant to bidding procedures approved by the bankruptcy court. If the Stalking Horse Bidder is the successful bidder, it has agreed to establish voluntary settlement trusts for opioid claimants totaling \$550 million over ten years, subject to certain prepayment options. The terms of that agreement provide that \$450 million will be set aside for a state and local governments trust, \$85 million would fund a trust for private opioid claimants, and the remaining \$15 million would be set aside for Tribes. This amount is roughly the same percentage (approximately 3%) of government funds allocated for Tribes in other opioid settlements and bankruptcies.

The judge overseeing the Endo bankruptcy proceedings recently approved certain notices regarding deadlines and instructions for submitting proof of claim forms. As such, we think it is likely that tribal opioid claimants will be required to file proof of claim forms in the Endo bankruptcy in order to be eligible to receive funds from the bankruptcy estate. Submission of a proof of claim form is typically required of creditors in bankruptcy proceedings as a means of alerting other parties of each creditor's claims to funds of the bankruptcy estate. Tribes have not been required to submit these forms in at least one other opioid bankruptcy proceeding, but we understand the requirement with respect to the Endo bankruptcy is in part to provide assurance that claimants preserve their right to participate in an alternative bankruptcy plan should the

Stalking Horse Bidder fail to take control of Endo's assets through the bidding process. However, the deadline for filing proofs of claim for governmental opioid claims has not been set at this time. We will keep you informed of any updates that may require you to act. In the meantime, please let us know if you would like our assistance in submitting a proof of claim form once a deadline is set.

Initial Purdue Bankruptcy Settlement Affirmed

As you may recall, Purdue was the first major opioid defendant to enter bankruptcy as a result of the nationwide opioid litigation. However, the resulting bankruptcy plan was challenged on appeal and resolution has long awaited the decision of the Second Circuit. On May 30, 2023, the Second Circuit released its decision, upheld Purdue's Chapter 11 plan, and expressly affirmed that the Bankruptcy Code permits the type of third-party claim releases the Purdue plan sought to include in order to discharge liability against members of the Sackler family in their individual capacity. This resolution would seem to pave the way for the most-recent settlement agreement to take effect, though the case must first be remanded to the district court for further proceedings.

The original Purdue bankruptcy restructuring plan required the Sackler family to contribute \$4.275 billion in cash payments (in exchange for those third-party releases of civil claims against Sackler family members). Under the reorganization plan, all of the assets of the Purdue company will be turned over to a board of trustees to be appointed by various governmental participants. The trustees will continue to operate Purdue for a few years and are expected to sell the company to generate additional value for the bankruptcy estate. The profits from the company's continued operation and eventual sale will be used to make payments to creditors for the damages suffered by those creditors as a result of the opioid crisis caused by Purdue. The continued operation and sale of Purdue was estimated in 2021 to generate \$2.5-3 billion for the bankruptcy estate. The Sacklers would be required to add the \$4.275 billion in cash on top of that amount, thus bringing the estate to around \$7 billion. Of that, an estimated \$5 billion would be intended for state, local, and tribal governments (governmental creditors), and of that, Tribes are expected to receive around 3%. The money will be put into a tribal opioid abatement trust to be distributed directly to Tribes pursuant to the already court-approved Purdue allocation formula.

However, various states objected to the bankruptcy restructuring plan because of the Sackler family civil suit immunization provisions. Under the terms of a deal struck in March 2022, those states agreed to drop their objections in exchange for a commitment that the Sackler family would contribute up to \$5.5 billion to the opioid abatement trust, including a new \$1 billion cash contribution, of which \$723 million is intended for governmental creditors (3% of which would ultimately flow through to Tribes). The March 2022 settlement agreement also contemplated the creation of a new Supplemental Opioid Abatement Fund into which the remaining \$277 million of that \$1 billion increase would be deposited. However, only the nine states that objected to the bankruptcy plan would be able to access those funds. The settlement

agreement also entails a \$175 million cash contribution from the Sackler family to replace the bankruptcy plan's proposal to transfer control of the two Sackler Foundations. Finally, in the event that the sale of the Sackler family's foreign pharmaceutical companies exceeds \$4.3 billion, the Sackler family will pay 90% of the receipts in excess of \$4.3 billion, up to \$500 million. Tribes would be expected to receive 3% of these two new contributions.

There is still likely to be a long road ahead before Tribes receive money from the Purdue bankruptcy estates. As the losing party in the action before the Second Circuit, the Federal Government could seek reconsideration by the Second Circuit or review by the United States Supreme Court, either of which would again put action on Purdue funds on hold until resolution. Even if the Second Circuit's decision stands, there is still much to be worked out for the Purdue settlement's trust fund, as has been the case for the nine settlements and two other bankruptcy proceedings currently in various stages of execution.

Conclusion

If you have any questions or concerns related to the topics discussed in this memorandum, or if you would like assistance with participation in the settlements or bankruptcy proceedings discussed above, please do not hesitate to reach out to Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745), Ed Goodman (egoodman@hobbsstrauss.com or 503-242-1745), or Caroline Mayhew (cmayhew@hobbsstrauss.com or 202-822-8282).