

Analysis

# Tribes Insist On Being Heard In Noisy Opioid MDL

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Share us on: By [Andrew Westney](#)

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Law360 (May 18, 2018, 9:52 PM EDT) -- Native American tribes appear to have a receptive ear in the Ohio federal judge heading up the king-sized multidistrict litigation over the opioid epidemic, but it remains to be seen whether their unique concerns will be drowned out by other parties clamoring for a cut of what could be a massive potential settlement.

As tribes' suits against opioid manufacturers and distributors are increasingly being swept into the Ohio MDL, attorneys for tribes want to make sure that the tribes' distinctive characteristics — including many tribes' extensive funding through the federal [Indian Health Service](#) and the particularly harsh impact of the epidemic on rural tribes — are addressed by the court.

While U.S. District Judge Dan A. Polster is seeking a broad settlement and has repeatedly promised that tribes will be a key part of it, the complexity of the litigation and the speed with which the judge is seeking to act means tribes risk getting short shrift, attorneys say.

What tribes are really seeking is something more than just a payout, however substantial, and that finds long-term answers through education and reform to the opioid industry to reverse the epidemic in Native communities, which have been particularly hard-hit by opioid-related problems, according to David A. Domina of the [Domina Law Group PC LLO](#), who asked Judge Polster last week for a separate track within the MDL to deal with tribes' claims.

"There is a very important distinction to be drawn between a settlement and a solution," said Domina, who represents four Nebraska tribes in the MDL. "You settle a lot of civil lawsuits by who's going to pay whom how much, but right now, and certainly for Native people, this litigation is more than a math problem over dollars."

Judge Polster, known for his experience in massive cases, has targeted a quick and sharp drop in narcotic painkiller sales through an anticipated settlement, saying in a [May 10 public hearing](#) that even the litigation track within the MDL is meant to help spur a deal.

While that urgency is laudable, attorneys say, it begs the question of whether the facets of tribes' claims that set them apart from those of states or local governments will get the attention they need.

"Some things of interest to the tribes would never occur to the current MDL structure because they're unique to tribal governments," Domina said, including dealing with sky-high unemployment rates and higher addiction rates on many reservations and the role of the federal government in funding tribal health care, which often extends beyond what states or local governments provide.

At the hearing, Judge Polster acknowledged that tribes have been "disproportionately affected by the opioid epidemic" and stressed that "if there is a resolution, there won't be one without them, so this court is not going to marginalize them ... whether they're a separate track or an integral part of the plaintiffs' track."

Steven J. Skikos of [Skikos Crawford Skikos & Joseph LLP](#), who is on the plaintiffs' executive committee, said in a statement that the committee "supports Judge Polster's statements."

Skikos said that the litigation has specific tracks, with a tribal claims committee "actively working to coordinate" claims of various tribes, although he added that "to describe these tracks as 'separate' is not entirely accurate, as all are coordinated and sequenced in an organized basis, as befits a large MDL."

While the MDL is still sorting through tribes' claims, not all tribes are committed to taking part. In particular, some of the largest tribes — the [Navajo Nation](#), the [Cherokee Nation](#) and the Muscogee (Creek) Nation — are continuing to pursue their claims independently.

Lloyd Miller of [Sonosky Chambers Sachse Miller & Monkman LLP](#), who represents each of those three tribes in their separate suits, said that "the great failing of current doctrine is that the tribes are unable to bring their own cases in their own courts," as the Cherokee had to refile their claims in state court and may now see them taken to federal court and the MDL.

But while the tribes may be forced into an "imperfect system," Miller believes they can get a positive outcome from the federal courts.

The Cherokee, which filed one of the first suits over opioids by a tribe, wanted a swifter resolution to its claims than a federal court and particularly an MDL might provide, he said.

But while "MDLs are notoriously complex and slow ... I think Judge Polster and the [special] masters are perhaps going to make this the exception," Miller said.

The essential thing for tribes is to avoid being shut out of a legal resolution, as they were in the tobacco litigation that is often viewed as a precursor to the opioid MDL, according to Miller.

"Everywhere I go, tribes tell the same story to me: 'There's no way we'll allow that to happen ever again,'" he said. "It's a little bit of a 'been there, done that' attitude. And it's also a representation of the current self-determination, self-governance era in which tribes are increasingly acting more and more on their own and not relying on the United States as their advocate or their protector."

Still, the split among tribes, as well as local governments, between taking part in the MDL and proceeding outside of it could make reaching a settlement an especially tough challenge, according to Elizabeth Chamblee Burch, professor at the University of Georgia School of Law.

The plaintiffs operating outside the opioid MDL have stronger representation than typically seen with a federal MDL, and "it gets really tricky when you're trying to negotiate a global deal and you don't necessarily have everyone in the same room," Burch said.

And to the extent tribes may be harder-hit by the opioid crisis, they could lose out, as the compromises involved in reaching a deal — particularly a large, nationwide agreement, as is likely to be sought in the opioid case — mean plaintiffs entitled to more might end up with less, and vice versa, she added.

"When I teach mass torts, I say at the beginning: When you have mass claims resolution, everybody gets a haircut, and some of the haircuts are worse than others," Burch said.

While most tribes that have filed opioid suits have already been pulled into the MDL, those that haven't will be keeping an eye on how well it responds to tribes' concerns, according

to [Kilpatrick Townsend & Stockton LLP](#) partner Keith M. Harper.

Harper, who represents several tribes that are planning on filing opioid suits, said that while he was happy to see Judge Polster's "pragmatic and solution-oriented" approach to ensuring tribal participation in the case, deciding whether to enter the MDL will depend on "whether the venue is going to adequately consider the differentiating factors relating to tribes."

And the process must strike a balance between recognizing those needs and achieving the speed Judge Polster seeks, Harper said.

"I would use the phrase 'all deliberate haste,' in the sense we need the process to be deliberative and ensure that it meets the overall objectives, but we want to do that as quickly as conceivably possible, because it is an ongoing epidemic," Harper said.

--Editing by Katherine Rautenberg and Alanna Weissman.

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# Opioid MDL Judge Says Litigation Track Is A Settlement Aid

Share us on: By [Emily Field](#)

Law360 (May 10, 2018, 8:33 PM EDT) -- The Ohio federal judge overseeing the massive multidistrict litigation over the opioid epidemic said Thursday that the newly formed litigation track is no substitute for a settlement, emphasizing his goal of reaching a quick resolution to the litigation.

During the second public hearing in the litigation, U.S. District Judge Dan A. Polster said that he viewed the litigation track, created a month ago, as an aid to his goal of settlement and not as a replacement. **At the first hearing**, in January, the judge set a goal of dramatically cutting the number of opioids in circulation by the end of 2018 and directed the parties — largely local governments suing opioid manufacturers and distributors— to focus on reaching a resolution.

“It’s necessary to do [the litigation track], and we’re doing it, but it’s not a substitute or replacement in any way,” the judge said Thursday. “I still am resolved to be the catalyst to take some steps this year to turn the trajectory of this epidemic down and rather than up, up, up.”

Judge Polster has set a bellwether trial date of March 18, 2019, for three consolidated lawsuits brought by local governments in Ohio, including the city of Cleveland. The bellwether cases are intended to resolve disputed legal issues and steer hundreds of lawsuits toward settlement. At issue is whether drug companies underplayed opioid risks and heedlessly funneled excessive amounts of painkillers into communities.

A case management order last month created a litigation plan for states, Native American tribes, local governments, hospitals and third-party payors, such as union benefit plans.

But complicating the mix are proposed class actions recently filed on behalf of babies suffering from neonatal abstinence syndrome and **buyers of private insurance plans**, special master David Cohen told the judge on Thursday. These are different groups that the court has not yet worked with, Cohen said.

“That is something the court is going to have to get its hands around,” Cohen said. “This is obviously one of the most, if not the most, complex pieces of litigation that the federal system has seen.”

Also complicating matters are the judge’s recent orders directing the federal government to **release nationwide data** on opioid sales, Cohen said. Naturally, other plaintiffs attorneys around the country would like to see the data to determine if they want to amend their complaints to add or drop defendants, Cohen said.

“What that in turn has created is a lot of attention and, frankly, distraction [for the plaintiffs executive committee], which is still trying to get its hands around the data, understand the data,” Cohen said. “I think we’re going to have to go back and add some direction for the parties.”

Some plaintiffs have amended their complaints, but those are under seal. Judge Polster ordered that those plaintiffs file publicly available versions of their complaints later in May.

Special master Francis McGovern, giving an update on the negotiations side, told the court that the parties have been discussing prospective injunctive relief measures and other methods to address some of the problems arising out of the opioid crisis.

“We have seen a substantial amount of progress in understanding the issues, understanding the potential methods of resolving any disputes that may exist concerning those issues, explored a variety of compromises and have had what — I could consider to be in my experience — very fruitful, very open, cooperative discussions,” McGovern said.

There are negotiating meetings scheduled for May and for each month until August, McGovern said, as well as a meeting in July featuring a presentation on business models in the U.S. health care system.

“We will also be focusing on nonlitigation solutions to problems that we may be able to facilitate here in the MDL, in accordance with your desire that we look at the problem holistically, rather than just a litigation problem,” McGovern told the judge.

One attorney representing Native American tribes urged the judge to set a separate track for them, saying they have been disproportionately affected by the crisis and have unique

concerns.

David A. Domina of the [Domina Law Group](#) told the court that Native Americans have been marginalized throughout U.S. history and have been hard hit by the opioid crisis. Dozens of tribes are among the hundreds of other plaintiffs bringing suit against opioid manufacturers and distributors in the MDL.

“I am here simply to let the court know how important it is to them that they have their own track, have the opportunity to elevate their unique concerns, and they have their unique concerns,” Domina said. “They relate not only to their own medical circumstances, their historical circumstances, but also to the means of distribution of this pernicious medication among their people.”

“So as this goes forward, I want it to be remembered that today they spoke out against being marginalized, and in favor of having a distinct track,” Domina said.

Currently, the tribes are grouped with states that have joined the litigation, although the possibility of the need for a separate track for Native Americans was raised in a motion laying out the MDL’s organizational structure that the judge [approved in January](#).

While Native Americans make up just under 2 percent of the American population, they have disproportionately borne the toll of the opioid crisis, according to the [Centers for Disease Control](#) and Prevention. In 2014, Native Americans had the highest death rate from opioid overdoses out of any ethnic group.

“[The tribes] have been, I think, disproportionately affected by the opioid epidemic, and I made it very clear that if there is a resolution, there won't be one without them, so this court is not going to marginalize them,” Judge Polster responded. “In fact, it’s the opposite ... whether they’re a separate track or an integral part of the plaintiffs’ track.”

The case is *In re: National Prescription Opiate Litigation*, case number [1:17-md-02804](#), in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Jeff Overley. Editing by Edrienne Su.

# Neb. Tribes Sue Pharma Cos. Over 'Havoc' From Opioid Crisis

Share us on: By [Danielle Nichole Smith](#)

Law360 (May 9, 2018, 4:30 PM EDT) -- Three Nebraska tribes accused [Purdue Pharma LP](#), [McKesson Corp.](#) and other opioid manufacturers and distributors in federal court Tuesday of allowing their drugs to be diverted into and wreak "havoc" on tribal communities, adding to the growing number of cases against pharmaceutical companies over the opioid epidemic.

The [Winnebago Tribe](#), the Santee Sioux Tribe and the [Omaha Tribe of Nebraska](#) said in their complaint that the pharmaceutical manufacturers and distributors had the power to prevent the opioid crisis but instead caused and allowed opioids to be redirected from their rightful destinations into illicit markets. From the opioid epidemic, the tribes and other Native Americans suffered death rates higher than those from car accidents, strains on their public health systems, and the devastation of lives and productivity, the complaint said.

“The opioid epidemic, including the NAS epidemic [a disease suffered by babies born to opioid-addicted mothers] and their consequences could have been, and should have been, prevented by the defendants who control the U.S. drug distribution industry and the defendants who manufacture the prescription opioids,” the tribes said. “The defendants have profited greatly by allowing plaintiffs’ reservations and service areas to become flooded with patients requiring service for conditions caused by opioids.”

The tribes alleged that pharmaceutical companies — including [Teva Pharmaceutical Industries Ltd.](#), [Johnson & Johnson](#) and [Allergan PLC](#) — deceptively marketed their opioid products in Nebraska and the tribes' service areas through unbranded advertisements in order to avoid regulatory scrutiny and make the information appear independent. The companies also attempted to downplay the risks of opioid addiction through misrepresentations that were counter to scientific evidence, the tribes said.

The distribution companies, which include [Cardinal Health Inc.](#) and [AmerisourceBergen Corp.](#), ignored red flags when filling orders they should have deemed suspicious, allowing the drugs to be diverted to illegitimate purposes, the tribes said.

The tribes also accused pharmacy chains [Walgreens Boots Alliance Inc.](#) and [CVS Health Corp.](#) of failing to meet the record keeping requirements for opioid drugs established by the [U.S. Department of Justice's Drug Enforcement Administration](#) or prevent the drugs from being obtained by inappropriate patients.

Teva subsidiary [Cephalon Inc.](#), Johnson and Johnson subsidiary Janssen Pharmaceuticals Inc., Allergan subsidiaries [Watson Pharmaceuticals Inc.](#) and Actavis Inc., Endo Health Solutions Inc., Insys Therapeutics Inc. and Mallinckrodt PLLC were also named in the suit.

The tribes asked for compensatory damages for the economic burden the opioid epidemic caused them and for injunctive relief to stop the companies' behavior. The tribes also asked for the maximum amount of punitive damages, which would be given to the common school fund of Nebraska under the state's laws.

David A. Domina, counsel for the tribes, said that criminal convictions, cease-and-desist orders and civil penalties that were mentioned in the complaint hadn't deterred the companies from continuing their actions. It was time to reign them in, Domina said.

"The medicine that the American public needs is too important to be left to the runaway behaviors of these people who obviously think profit is more important than health," Domina said.

Domina is also representing the [Ponca Tribe of Nebraska](#), the fourth federally recognized tribe in the state, in a similar suit against pharmaceutical companies filed in April. He said that the cases will become a part of the [multidistrict litigation](#) against the companies currently proceeding in Ohio, though they hope and expect to have the issues remanded to Nebraska for trial after the centralized discovery.

And it's not only Nebraska-based tribes who are suing over the opioid crisis.

Most recently, two North Dakota-based tribes and a tribe in Washington [sued pharmaceutical companies](#) over the drugs in early May. And in late April, an Oregon-based tribe [filed a suit](#) over the epidemic. The [Navajo Nation](#) and [Cherokee Nation](#) also have suits against pharmaceutical companies, the [former in New Mexico](#) and the [latter in Oklahoma](#).

Representatives for Walgreens and Insys declined to comment. Spokespeople for Teva, AmerisourceBergen and McKesson provided their company's standard responses on the issue.

Teva's statement said the company was taking a "multi-faceted approach" to the issue of opioid addiction stemming from prescription drugs and that the company closely complied with state and federal regulation regarding the drugs.

The AmerisourceBergen statement said that the distributor was dedicated to mitigating the diversion of drugs and not only reported and stopped potentially suspicious orders but also denied customers who seemed at risk for diversion.

McKesson's statement said that it had strong programs for preventing opioid diversion and reported hundreds of thousands of suspicious orders to the Drug Enforcement Administration every year.

The Healthcare Distribution Alliance, a national trade organization that represents Cardinal Health, AmerisourceBergen, McKesson and others, provided a statement from its senior vice president, John Parker, challenging the idea that distributors were responsible for the number of opioid prescriptions and arguing that those bringing litigation should focus on the root causes for the epidemic instead.

The tribes are represented by David A. Domina of the [Domina Law Group](#), Kevin A. Malone of [Krupnick Campbell Malone Buser Slama Hancock Liberman](#), Stuart H. Smith of [Stuart H. Smith Law Firm](#) and Lola B. Thomas of [Lola Thomas Law Firm](#).

Counsel information for the defendants was not available Wednesday.

The case is [Winnebago Tribe of Nebraska et al v. McKesson Corporation et al](#), case number [8:18-cv-00203](#), in the U.S. District Court for the District of Nebraska.

--Editing by Emily Kokoll.