



1899 L Street, NW, Suite 1200
Washington, DC 20036

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

September 20, 2022

GENERAL MEMORANDUM 22-017

Tribal Opioid Settlement Inter-Tribal Allocation Process Commences, Comments Sought

Early this year, Johnson & Johnson and the three largest distributors of prescription opioids—Cardinal Health, AmerisourceBergen, and McKesson Corp—announced settlements with Indian Tribes and tribal health organizations totaling approximately \$565 million. The settlements arise from the ongoing nationwide litigation against manufacturers, distributors, and retail dispensers of prescription opioids for their role in the national opioid crisis. All Tribes and Alaska Tribal Health Organizations are eligible to participate in the settlements, regardless of whether or not they are participating in the litigation.

Last week, Special Master David Cohen and the Honorable Judge Layn Phillips released the proposed process for determining the inter-tribal allocation formula for the distribution of settlement funds. Their memorandum to Tribes and their Counsel is attached to this Memorandum.

Special Master Cohen and Judge Phillips are starting from the inter-tribal allocation formula approved by two federal bankruptcy courts in separate proceedings involving Purdue Pharma, the manufacturer of Oxycontin, and Mallinckrodt plc, a major manufacturer of generic opioids. That formula weighs the following six factors: (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) drug and prescription opioid overdose rates imputed to each Tribe from county and state data 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.

Special Master Cohen and Judge Phillips are soliciting comments on the use of these factors, and are receiving suggestions regarding additional or alternative metrics or allocation formulas. Tribes that wish to comment must submit their opening briefs on allocation by **October 14, 2022**. Tribes may submit an additional brief responding to other Tribes' opening submissions by **November 4, 2022**. Tribes may also elect to meet by video-conference in lieu of submitting a written brief. **Requests for video conferences must be made by September 26, 2022.**

General Memorandum 22-017

September 20, 2022

Page 2

Additional information about the proposed formula and its development, as well as all pertinent deadlines, can be found in the attached memorandum. For more about these and other tribal opioid settlements, visit www.tribalopioidsettlements.com. Additional details regarding the Purdue allocation formula can be found on the website at: https://www.tribalopioidsettlements.com/Documents/Janssen/Purdue_Allocation.pdf.

###

Inquiries may be directed to:

Geoff Strommer (gstrommer@hobbsstrauss.com)

Ed Goodman (egoodman@hobbsstrauss.com)

Caroline Mayhew (cmayhew@hobbsstrauss.com)

To: Tribes¹ and their Counsel

From: Special Master David R. Cohen, Tribal Allocation Appointee
Honorable Layn R. Phillips, Tribal Allocation Appointee

Subject: *Inter-Tribal Allocation of Settlement Funds*

Date: September 12, 2022

The Allocation Process

This memorandum is intended for the widest possible distribution to all Tribes and their counsel. As most Tribes are aware, the Tribes recently reached global Settlement Agreements of Opioid Litigation with Janssen and the Big Three Distributors. The Settlement Agreements provide that David R. Cohen and Layn R. Phillips will determine how the settlement funds will be allocated to each participating Tribe.

This memorandum sets forth the allocation procedures. Please note: If the Tribes reach global settlement agreements with other defendants in Opioid Litigation, and Judge Philips and Mr. Cohen are appointed to allocate the settlement funds, these same procedures may be used to allocate those settlement funds as well.

We look forward to engaging with the Tribes to determine the appropriate final inter-Tribal allocation of the settlement funds. Our process will provide each Tribe with an opportunity to participate meaningfully in the allocation process and to be heard prior to the entry of the final allocation order. The process is also designed to be efficient, to ensure the settlement funds are disbursed and can be put to use by the Tribes as quickly as possible.

The allocation of settlement dollars is a complex process and we will consider all of the legal, factual, and equitable points raised by each Tribe as we come to our allocation decision. Please review carefully the following schedule and procedures:

- Opening Submissions - Tribes that wish to submit an opening brief on allocation must do so by **October 14, 2022**. These opening briefs should not exceed 10 pages and must use the format set out below.
- Response Submissions - Tribes that wish to submit a response brief on allocation must do so by **November 4, 2022**. Response briefs may offer positive or negative feedback

¹ This memorandum uses the term “Tribes” in the same way as the Janssen Settlement Agreement, to include: (1) a federally-recognized tribe, as provided in the Federally Recognized Tribe List Act of 1994, 25 U.S.C. § 5130; (2) a “tribal organization,” as defined in 25 U.S.C. § 5304(l); and an “inter-tribal consortium,” as defined in 25 U.S.C. § 5381(a)(5).

regarding any other Tribe's opening submission. These response briefs should not exceed 5 pages and must use the format set out below.

- Format for All Submissions - All submissions must be double-spaced, with standard margins and 12-point font, and must be in PDF format. Page limitations mentioned above include exhibits. Each submission should state at the top of the first page: (1) the name(s) of each Tribe submitting the brief; and (2) the name(s) of each Law Firm representing those Tribes, if any. Submissions should be emailed to Allocation@BrownGreer.com with the subject line "Allocation Submission," or uploaded using the website portal at www.TribalOpioidSettlements.com.
- All submissions will be available for all other Tribes to review.²
- Joint Submissions – Although not required, we encourage Tribes to collaborate and submit joint written submissions. Page limitations for joint submissions are 20 pages for an Opening Submission and 10 pages for a Response Submission. Each Tribe may submit, at most, one Opening and one Response Submission.
- Video-Conference in lieu of Written Submissions - As an *alternative* to written submissions, we will instead meet by video-conference, for a maximum of 20 minutes, with any Tribe that would rather be heard through live presentation. We ***strongly prefer*** written submissions to live presentations, but we will accommodate any Tribe that requests a video-conference meeting instead. To be clear, a Tribe that elects to meet by video-conference may *not* also submit a written brief. A Tribe that elects to meet by video-conference should inform us by **September 26, 2022**. We will then work to schedule those meetings. Recordings of video-conferences will be available for all other Tribes to review.

Tribal Submissions Should Discuss Our Tentative Allocation Process, Described Below

As the Tribes know, we have an important source of reference – a previous inter-Tribal allocation used in the Purdue Bankruptcy, which was approved by the Tribal Leadership Committee. That allocation is attached, as is a summary of the methodology used to create it.

Put briefly, this methodology weighed six data-sets: (1) MMEs (morphine milligram equivalents) imputed to each Tribe, based on ARCOS data from 2006-2014; (2) drug and prescription opioid

² Persons wanting to view Tribal Allocation Submissions who do not already have access to the website portal must send an email to Allocation@BrownGreer.com, with the subject line "Request for Access to Tribal Allocation Brief Repository." The email must contain the following information: (1) Tribe Name; (2) Law Firm Name, if any; (3) Name of Person Requesting Access; and (4) Email Address of Person Requesting Access. Access will be provided only after the applicant signs a non-disclosure agreement.

overdose rates imputed to each Tribe, based on county-level data from the National Center for Health Statistics for 2003-2017; (3) Indian Health Service (IHS) user population for each Tribe, based on IHS data for 2018; (4) citizenship population for each Tribe, based on the CARES Act population list and other sources; (5) relative poverty rates imputed to each Tribe, based on US Census SAIPS data for 2018; and (6) relative cost of living imputed to each Tribe, based on the C2ER Cost of Living Index for Health Care expenses for 2020.

Your submissions should please include a discussion of: (a) whether the Purdue allocation should be used as a starting point for allocation in this matter; and (b) the degree to which allocation of the settlement funds should deviate from the Purdue allocation (if at all), and why. We also invite Tribes to submit their own alternative allocation methodology, and any other data they believe we should consider, if they wish. We will use updated data where available.⁴ We will also consider including other relevant data-sets or data-points you may suggest, if they are meaningful and reliable.

Thank you in advance for your participation in this process. We look forward to hearing from you soon.

Special Master David R. Cohen
Judge Layn R. Phillips

⁴ For example, it appears that data-sets 2, 3, 5, and 6 can be updated with more recent information.