

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE: NATIONAL PRESCRIPTION)	CASE NO. 1:17-MD-2804
OPIATE LITIGATION)	
)	David R. Cohen
THIS DOCUMENT RELATES TO:)	Hon. Layn Phillips
<i>“All Tribe Cases”</i>)	
)	
)	<u>TRIBAL ALLOCATION ORDER NO. 2</u>

INTRODUCTION

On March 22, 2023, the undersigned Tribal Allocation Appointees issued “*Tribal Allocation Order No. 1*” (hereinafter, “*TAO-1*”).¹ In *TAO-1*, the Appointees declared that settlement payments made under the seven Master Settlement Agreements and received by the TAFT in Calendar Year 2023 shall be allocated amongst the Tribes as follows:

- 87.5% of those settlement payments are allocated according to the “Purdue Allocation.”
- Allocation of the remaining 12.5% would be decided in a second Tribal Allocation Order (“*TAO-2*”).

See *TAO-1* at 2. The Appointees also explained in *TAO-1* how they would later allocate settlement payments received after Calendar Year 2023. *Id.* at 3.

This document is *TAO-2*. As promised, the Appointees now declare the allocation for the remaining 12.5% of settlement payments received by the TAFT in Calendar Year 2023. Specifically, for the reasons stated below, the undersigned conclude that the remaining 12.5% of

¹ TAO-1 is posted at www.tribalopioidsettlements.com/IntertribalAllocation.

those settlement payments shall *also* be allocated according to the “Purdue Allocation.”

In addition, the Appointees explain below modifications to how they will allocate settlement payments received after Calendar Year 2023.

I. The Remaining 12.5%.

As noted in *TAO-1*, to determine how to allocate the remaining 12.5% of the 2023 settlement payments, the Appointees needed more time to examine two principal factors: “(1) information provided by Tribes in their previously-submitted Allocation Briefs; and (2) updates to the data sets used in the Purdue Allocation.” *Id.* at 2. The Appointees have completed this examination and conclude as follows.

A. Allocation Briefs.

Regarding the Allocation Briefs, 70 different Tribes provided a total of 72 submissions – 46 Opening Submissions and 26 Response Submissions. (All but two of the Response Submissions were from Tribes that had not made an Opening Submission.) Many of the submissions, however, were identical – that is, counsel filed the same document on behalf of numerous Tribes.² Each Submission fell clearly into one of two groups: (1) requests by a Tribe for a higher share than contained in the Purdue Allocation; or (2) requests that no changes be made for *any* Tribe from the Purdue Allocation.

Regarding the former group, it was striking that nearly all Submissions beseeching a higher

² *See, e.g.*, “Cultural Heritage Partners Opening Submission,” submitted on behalf of 6 Tribes, including Monacan Indian Nation; “Sonosky Response Submission,” submitted on behalf of 22 Tribes, including Muscogee (Creek) Nation.

allocation relied upon the same evidence. Tribes repeatedly invoked extreme poverty, high unemployment rates, geographic remoteness, high rates of opioid misuse, increased levels of drug addiction and death, and lack of health care and treatment facilities. Tragically, these are not “extraordinary circumstances” that justify a different allocation for a given Tribe, because so many Tribes suffer the same situation – including Tribes that made no Submission at all. Indeed, the fact that *groups* of Tribes made identical Submissions citing to the same sad evidence undercuts the premise that their circumstances are extraordinary, and thereby justify a greater allocation of abatement funds at the expense of other Tribes.³

Regarding the latter group, the Appointees found most compelling the “Sonosky Response Submission” and the “Lieff Cabraser Response Submission.” Because the reasoning is fairly short and powerful, the latter is quoted here in its entirety:

We have reviewed the submissions regarding the Inter-Tribal Allocation of Settlement and strongly recommend that the Tribal Allocation Appointees utilize the [original] Purdue Allocation methodology The submissions reflect a common truth – that all Tribes have been significantly impacted by the opioids crisis in a variety of ways. Indeed, our Tribe has been impacted by many of the same factors described in the submissions, including but certainly not limited to: increased rates of addiction and overdoses; the dramatic increase in the presence of illegal opioids

³ Another problem with the Submissions is that some Tribes cite “opposite reasons” for an increased share. As one example, many Tribes assert they should get more funds because they are *small and rural*, which leads to increased costs to obtain medical support. *See, e.g.*, Keller Rohrback letter at 5 (Nez Pierce 2353) (“it is more difficult and costly to provide [health care] service[s] in a rural setting, and that fact should be reflected in the allocation of settlement funds”) (emphasis added). At the same time, however, some Tribes assert they should get more funds because they are *large and urban*, which leads to easier opioid access and higher medical costs. *See, e.g.*, Moskowitz letter at 2 (Seminole of Florida 2396) (arguing that, because its “members are principally based in . . . the most populous counties in Florida . . . , the Tribe “has suffered far more opioid-related overdoses and fatalities than most other states and counties”) (emphasis added). There is no non-subjective way for the Appointees to resolve this type of inconsistent argument; or, for that matter, to conclude one Tribe’s social problems are more deserving than another’s.

in our community and the resulting burdens imposed on our already over-stretched law enforcement; the major disruptions to families ravaged by opioids; the difficulty of providing care in rural communities; and the ongoing burdens to Tribal social services. The continuing economic demands to provide services and healing to our community is no less significant than those other Tribes highlighted in their submissions.

No amount of money will heal the harm inflicted by the Opioids Defendants on any Tribe participating in these settlements. It is therefore important that the Tribal Allocation Appointees adhere to the principles that served as the foundation for the Purdue Matrix – to utilize common, objective measures of the harm caused by the opioid epidemic throughout Indian country. Adjustments based on specific factors cannot be made for an individual Tribe unless similar adjustments are made for all Tribes experiencing those same factors. In that circumstance we would expect to be afforded the opportunity to submit similar information in order to insure a similar increase in the Tribe’s allocation.

The Purdue Allocation Matrix was known to each Tribe in advance of its determination to participate in these settlements. No Tribe should be forced to accept an allocation that materially deviates from the Matrix after that decision.

Lieff Cabraser letter at 1-2 (Yurok 2408).

The same reasoning is echoed and amplified by the Sonosky Chambers firm, which notes that all of its many clients (including 22 Tribes of all sizes located across the United States) unanimously “support the Purdue allocation based on three primary considerations: (1) the Purdue allocation’s use of consistent and objective data, (2) its fair and reasonable balancing of the many

competing interests at play, and (3) the need for prompt distribution of settlement funds.”⁴ In sum, the original Purdue Allocation is good, it’s easy, it’s finished, it’s fair, and the Tribes all agreed to it.

This leads to discussion of the second factor the Appointees considered regarding allocation of the remaining 12.5% of the 2023 settlement payments – whether to update the data sets used in the Purdue Allocation.

B. Updated Data Sets.

On September 12, 2022, the Appointees invited the Tribes to make Submissions on the topic of inter-Tribal allocation of settlement funds.⁵ This invitation asked Tribes to offer their view on “the degree to which allocation of the settlement funds should deviate from the [original] Purdue Allocation (if at all),” and also to provide their thoughts on the use of “updated data.” The invitation specifically noted that more recent information was available for at least four of the six data sets used in the Purdue Allocation, which was originally created in 2021. The Appointees believed that updating the Purdue Allocation with fresher information might more accurately reflect each Tribe’s

⁴ Sonosky letter at 3 (Navajo 2417). The 11-page Sonosky submission offers more detailed and additional reasons to simply use the Purdue Allocation, which the Appointees also find convincing. Among other points, Sonosky adds: (1) over 96% of of the Tribal Class in the Purdue bankruptcy voted in favor of the Restructuring Plan, and “it would undermine settled and reasonable expectations to now significantly deviate from the Purdue allocation . . . which was understood to be the presumptive allocation for the Janssen and Distributor settlements;” (2) the fact that only 35 [sic] of the 574 Tribes sent letter-briefs seeking a change to the Purdue Allocation speaks to its fairness without modification; (3) the Purdue Allocation uses objective data and tailored design “to drive settlement funds to those communities where these objective data demonstrate the impacts of the opioid epidemic are the most severe,” and this objectivity and fairness would be corrupted by exceptions based on anecdote; and (4) any process of changing the Purdue allocation would require administrative time, effort, and costs that would ultimately diminish the settlement corpus and possibly delay payments.

⁵ See www.mdlcentrality.com/nato/Docs/Allocation_Letter_to_Counsel.pdf.

present circumstances, while the salutary methodology employed in the original Purdue Allocation – such as the use of objective data, and of relative data set weightings agreed upon by all Tribes – would remain true for an updated Allocation, too. But the Appointees wanted to receive all views for and against updating the data sets.

The positions on each side of this question are set forth in these two Submissions:

For Updating the Purdue Allocation –Weitz & Luxenberg letter at 2-3 (Passamaquoddy 2394):

[T]he opioid epidemic has worsened significantly at Indian Township since the Inter-Tribal allocation percentages for the Purdue Bankruptcy were approved by Judge Phillips in May 2021. Moreover, much of the data utilized in calculating the percentages are now outdated (e.g., the metric for overdose rates was based on data from 2003-2017). Indeed, as [the Appointees’] September 12, 2022, memo recognizes: “It appears that datasets 2, 3, 5, and 6 [of the methodology] can be updated with more recent information.”

The Tribe lacks the resources to retain an expert to prepare a granular analysis of the Purdue allocation methodology on its community. Nevertheless, current published data (e.g., CDC) clearly shows the datasets used in the six metrics utilized for the Purdue methodology are outdated. This new data shows that the opioid crisis — particularly the overdose death and opioid use disorder (OUD) rates, the poverty rate, and the cost of living— has worsened significantly since the time periods covered by the Purdue datasets. When this occurs in smaller, rural tribes, who simultaneously lack sufficient funding of their opioid-related programs and services, the impact on the community is necessarily magnified. As a consequence, their suffering is disproportionate and justifies consideration of an upward adjustment of their allocation in this settlement.

Against Updating the Purdue Allocation – Sonosky letter at 10 (Navajo 2417):

[T]he time and complexities of updating the various datasets (including the prospect of ‘updating’ data annually over the course of the next decade or more) is outweighed by the importance of distributing all tribal opioid funds from all sources in a consistent, efficient, and predictable manner, without further delay. * * *

While data, especially population data, will change over time for any given tribe, it will also change for all tribes, and the changes are most likely to be in the same direction. Thus, the relative impact of a change in one tribe’s data as compared

to another—which is the only important consequence here in terms of the relative allocation of funding—is likely to be exceedingly small and therefore unlikely to justify the burden, cost, risk of mistake, and inevitable delay that incorporating changed data would likely entail. [Indeed,] the States have determined that the allocations in the State/Subdivision settlements will remain static for the duration of the settlement payout period, despite the long (18-year) timeframe.

The Appointees decided to go ahead and test the concept of using updated data sets and produced an “updated Purdue Allocation” using more recent information. Having done so, the Appointees conclude that the data-update process is complicated and yields changes to Tribal allocations that are often fairly small, suggesting it is not worth the time, money, and effort. Further, the Appointees are left with substantial concern that different results between the original and updated Purdue Allocations may be driven by statistical peculiarities within the model and not actual changes in real data.⁶ And finally, experimenting with different amendments to the Purdue Allocation drives home the truth that there is no way to provide an upward deviation for one Tribe without forcing a corresponding downward deviation for some other, deserving Tribes.

In sum, the Appointees are convinced that the positions espoused in the Sonosky Response Submission are well-taken. The Appointees conclude the remaining 12.5% of settlement payments received by the TAFT in Calendar Year 2023 should be allocated just as was the first 87.5% – that

⁶ Some data sets used to manufacture the Purdue Allocation can be updated regularly, and some cannot. Even as to those data sets that are easily updated, the final allocation requires drawing many inferences. For example, although it is easy to obtain updated county population statistics, the model then makes numerous assumptions about the number of Native American deaths in a county (i.e., county death rate times *estimated* percentage of Indians in the county to yield number of Indian deaths) and uses a *negotiated* “disproportionate impact multiplier” to impute opioid death rate. Thus, while the difference between original and updated Purdue Allocations takes into account Tribe population change, there is too much fudge in the recipe to be confident that the resulting change in allocation is truly, objectively appropriate.

is, according to the Purdue Allocation.⁷

II. Payments Received by the TAFT in Later Calendar Years.

In *TAO-1*, the Appointees described how they would allocate settlement payments received in Calendar Years 2024 and beyond. The process was somewhat involved.⁸

Upon further reflection, the Appointees conclude that the simplest and fairest allocation going forward is that settlement funds made under the seven Master Settlement Agreements and

⁷ Accordingly, each Tribe's "Initial Annual Allocation," or "IAA," is simply its Purdue Allocation. *See TAO-1* at 3.

⁸ The Appointees stated that, in 2024 and beyond, they would allocate settlement payments as follows:

- 92.5% of all settlement payments received by the TAFT in Calendar Years 2024 and later are hereby allocated according to the Initial Annual Allocation. The Directors may begin making Abatement Distributions from those payment shares at any time.
- Regarding the other 7.5% of the settlement payments received by the TAFT in Calendar Years 2024 and later, the Appointees will allocate those payments annually according to various factors, including: (1) information provided by Tribes in future Allocation Briefs; and (2) updates to the data sets used in the Purdue Allocation. The Appointees expect to announce these allocations of the other 7.5% of the settlement payments in the first quarter of each Calendar Year.
- The Appointees adopt this procedure of annual reassessment in order to address any changed circumstances. The Appointees may simply conclude that the 7.5% share should be allocated according to each Tribe's IAA.

TAO-1 at 3.

received by the TAFT in **all** Calendar Years shall be allocated according to the Purdue Allocation.

The only exception will be in the event of truly extraordinary circumstances.⁹

IT IS SO ORDERED.

/s/ David R. Cohen
Layn Philips

May 16, 2023

⁹ For example, if – God forbid – a Tribe completely ceased to exist, the Appointees would have to change the Purdue Allocation (probably by simply re-allocating that Tribe’s share pro rata). Unless, in the future, a Tribe moves for modification of the Purdue Allocation based on an extraordinary circumstance that *undeniably* calls for amendment, the Appointees’ decision that settlement funds shall be allocated according to the Purdue Allocation in *all* Calendar Years will stand.