

# **Frequently Asked Questions About the Settlements of Tribal Opioid Claims Against Janssen/Johnson & Johnson and the Three Major Opioid Distributors**

**March 2022**

On February 1, 2022, the court-appointed Tribal Leadership Committee (TLC) announced comprehensive settlements of opioid claims asserted in cases filed by federally recognized tribes against Janssen/Johnson & Johnson (J&J) and against the three major distributors of opioid pharmaceuticals—McKesson, Amerisource Bergen and Cardinal Health (Distributors).

This FAQ answers key questions about both settlements:

**Q. How much money will tribes receive from the Distributor settlement?**

**A.** The overall settlement between the Distributors and all federally recognized tribes is for a total amount of up to **\$515,000,000**, depending on how many tribes participate in the settlement. Of this amount, \$75,035,000 was, by separate agreement with the Distributors last summer, reserved for payment to the Cherokee Nation in order to resolve the Nation’s active litigation against the distributors in a tribal bellwether case. The balance of up to \$439,964,500 will be paid to the other federally recognized tribes who agree to participate in the settlement.

**Q. How much money will tribes receive from the J&J settlement?**

**A.** In a separate settlement between all federally recognized tribes and J&J, the company will pay up to **\$150,000,000**, again depending on participation by tribes.

The settlements together total **\$655,000,000** to be paid to federally recognized tribes by the distributors and J&J.

**Q. Over what period of time will the Distributor’s settlement money be paid?**

**A.** The settlement funds from the Distributors will be paid over a period of six and a half years, in seven equal installments of \$62,852,071 each. The first payment will be made within 30 days of the “effective date,” and additional payments will be made on an annual basis starting July 1, 2022.

The “effective date” is 60 days after the date on which at least 95% of all “litigating” tribes (those tribes that have filed lawsuits against the Distributors) have agreed to participate in the settlement and at least 14 “non-litigating” tribes with populations exceeding 5,000 tribal

members have also agreed to participate. (For purposes of determining whether the 95% participation level for “litigating” tribes is reached, each tribe’s allocation share (see below) will be used.)

**Q. Over what period of time will the J&J settlement money be paid?**

**A.** The settlement funds from J&J will be paid in two equal payments of \$75,000,000, with the first payment to be made within 30 days of the “effective date.”

For purposes of the J&J settlement, the “effective date” is the date on which at least 95% of all “litigating” tribes (those tribes that have filed lawsuits against J&J) have agreed to participate in the settlement. (There is no threshold requirement in the J&J settlement for participation by “non-litigating” tribes.)

**Q. Is my tribe eligible to participate in the settlements and receive a share of the settlement funds?**

**A.** *ALL 574 federally recognized tribes* are eligible to participate in the settlements and to receive a share of the settlement funds. In addition, tribal organizations that are Co-Signers of the Alaska Tribal Health Compact are eligible to participate to receive a portion of their member tribes’ allocations.

**Q. Can my tribe or Alaska tribal health organization participate in the settlement if we did not file a lawsuit against these defendants?**

**A.** Yes. Every federally recognized tribe and Alaska tribal health organization may participate in the settlement regardless of whether it previously filed a lawsuit against these defendants.

**Q. What does my tribe have to do to participate in the settlements and receive its share of the settlement funds?**

**A.** Any tribe that wishes to participate in the settlement must sign a Participation Agreement in which the tribe agrees to the terms of the settlement, agrees to dismiss any lawsuit the tribe has filed against these defendants (if the tribe has filed a lawsuit), and agrees to release all opioid-related claims that the tribe may have against these defendants. Tribes that are represented by counsel will be able to get Participation Agreement forms from their counsel. Other tribes will be able to obtain these forms from the Directors of the tribal settlement trust accounts (see below) who have been appointed by the court to implement and administer the settlements.

**Q. Is there a deadline to participate in these settlements?**

Because the “effective date” for the settlements depends on participation by tribes reaching certain threshold levels, the sooner those participation levels are reached, the sooner the settlements will go into effect and the settlement funds will start flowing to participating tribes. Non-litigating tribes will lose their right to participate in the J&J settlement if they do not file Participation Agreements within three years after the “effective date.” They will lose their right to participate in the Distributor settlement if they do not file Participation Agreements within four years after the “effective date.”

**Q. What rights within these settlements does a tribe have once it signs the Participation Agreement?**

A. The signed term sheet with both J&J and the Distributors sets forth four specific rights of each tribe that participates in the settlements: (1) Each participating tribe will have the sole, ultimate, and final say over which approved abatement uses are best for the tribe as that tribe continues to address the opioid crisis; (2) Each tribe shall have the right to meaningfully participate in the final allocation process; (3) Each tribe shall have the right to be heard prior to entry of the final allocation order; and (4) The defendants acknowledge and expressly agree that they have no role whatsoever in the allocation of settlement funds among the tribes.

**Q. How is my tribe’s share of the settlement funds determined?**

A. Judge Daniel Polster of the federal district court in the Northern District of Ohio, who is supervising the nationwide multi-district opioid litigation, has appointed Special Master David R. Cohen and former federal Judge Layn Phillips to determine the final allocation of the settlement funds among the participating tribes for each settlement. (Order Appointing Judge Layn Phillips and Special Master David R. Cohen to Decide Allocation Issues, Appointing Special Master Cohen as Qualified Settlement Fund Administrator and Appointing Tribal Settlement Trust Directors, Doc # 4264, filed 02/01/22).

**Q. Will my tribe have the right to participate in the process to determine our allocation?**

A. Yes. Every tribe will have the right to meaningfully participate in the final allocation process and a right to be heard prior to entry of the final allocation order. Special Master Cohen and Judge Phillips will set forth the procedures by which they will determine the inter-tribal allocation, and how tribes can participate in that process.

The TLC expects that Special Master Cohen and Judge Phillips will start from an inter-tribal allocation matrix adopted by the bankruptcy court in New York supervising the Purdue Pharma bankruptcy. For that proceeding, the TLC developed a proposed inter-tribal allocation matrix that uses a variety of metrics to allocate settlement funds among all tribes. The metrics

consider the severity of harms caused by the opioid epidemic throughout Indian country. The allocation matrix is built around six data points: MMEs (morphine milligram equivalents) imputed to each tribe; drug and prescription opioid overdose rates imputed to each tribe; Indian Health Service (IHS) user population for each tribe; citizenship population for each tribe; relative poverty rates imputed to each tribe; and relative cost-of-living imputed to each tribe.

For purposes of the Purdue proceeding, Judge Phillips reviewed and approved the proposed allocation, and it was adopted by the bankruptcy court.

If Special Master Cohen and Judge Phillips do decide to use the Purdue allocation as the starting point for allocation in the J&J and Distributor settlements, they will receive information from any participating tribe that believes its allocation share should be changed. If, for instance, the allocation formula uses an incorrect population number for that tribe, or if a tribe believes that there are special circumstances that should be taken into consideration in determining the allocation for that tribe, there will be an opportunity to present any such information to Special Master Cohen and Judge Phillips, who will have the authority to modify the allocation matrix if they decide it is appropriate to do so.

**Q. If my tribe participates in the settlement, will we have to pay attorney fees out of our recovery?**

**A.** No. Under the terms of the settlement, 15% of the total recovery from the distributors will be set aside for attorney fees. For the J&J settlement, 14% will be set aside for fees. The balance of the funds will be distributed to participating tribes pursuant to the allocation matrix and none of that money can be used for paying attorney fees. Attorneys working on the opioid litigation who receive compensation from the fee pots set aside for each settlement agree not to seek further compensation from their tribal clients.

**Q. What happens to the settlement money that is allocated to tribes that decide not to participate in the settlements?**

**A.** In both settlements, if a “litigating” tribe decides not to participate in either or both settlements, its allocated share of the settlement funds in that case will be kept by the defendants.

In the J&J settlement, a “non-litigating” tribe has a period of three years after the “effective date” to decide whether to participate in the settlement. If it does not sign a Participation Agreement within that three-year period, its share of the settlement funds will be redistributed to the participating tribes based on the allocation.

In the Distributor settlement, the answer is more complicated: “non-litigating” tribes have a period of four years in which to decide whether to participate in the settlement. If 67% of the “non-litigating” tribes do participate, then the share of any other “non-litigating” tribe that decides not to participate will be redistributed to all the participating tribes, up to a cap of \$20 million. Any funds allocated to “non-litigating” non-participating tribes over the \$20 million cap

will be retained by the defendants. And if the 67% threshold for participation by “non-litigating” tribes is not reached, then all of the funds allocated to the “non-litigating” non-participating tribes will be retained by the defendants.

**Q. Are there restrictions on what my tribe can do with the settlement funds?**

**A.** Yes. Money received by each tribe from the settlements must be spent for tribal programs, services and activities to address the opioid crisis in that tribe’s community. The authorized “abatement” activities are very broadly defined.

Each participating tribe will receive a lengthy memorandum listing programs, services and activities that qualify as abatement spending by state and local governments pursuant to their separate settlements with the same defendants. The same broad list of abatement programs and services will also apply to tribes. But in addition, tribes will also be able to spend settlement funds for culturally appropriate and traditional healing programs and activities, wellness courts and other tribal-specific programs and services that, in the judgment of a tribe, will promote healing, recovery and abatement in that tribe’s community.

**Q. How will the settlement funds be administered and distributed?**

**A.** Judge Polster has appointed three highly qualified and well-respected Native American individuals to act as Directors of the trust accounts where the settlement funds will be held. In that role, they will be responsible for reaching out to tribes to encourage participation in the settlement, for supervising the distribution of settlement funds to all participating tribes, and for providing information and oversight about appropriate abatement spending and other requirements.

Kevin Washburn is the dean of the law school at the University of Iowa and a former Assistant Secretary of Indian Affairs. Mary Smith is the former director of the Indian Health Service. And Kathy Hannan is a former partner at the accounting firm of KPMG and chairman of the board of the National Museum of the American Indian. They will work jointly to implement the settlement in coordination with Special Master Cohen, who will serve as administrator of the tribal trust accounts.

**Q. How will fees and expenses involved in administering the Settlement Fund be paid?**

**A.** Administration of the Settlement Fund will incur costs and fees, including compensation and expenses for directors and professional service providers, and for other needs. All such costs and fees shall be paid from interest accrued on the Settlement Fund and from the Settlement Fund itself should such interest revenues prove insufficient.

**Q. Does the TLC recommend these settlements?**

**A.** Yes. The TLC believes in the **aggregate value** of these settlements and the **internal integrity** of the inter-tribal allocation system that Judge Phillips and Special Master Cohen will conduct.

**Q. How will more information on the settlements be made available?**

**A.** Settlement documents, information, and updates will be posted on a public settlement website, <https://nationalopioidsettlement.com/>. The website will provide current information on an ongoing basis as the settlement implementation progresses.

**Q. What about the remaining defendants?**

**A.** The opioid problem in Indian country continues, and in some ways is growing worse. As confirmed by a recent study published in *The Lancet*, rates of fatal opioid overdose have grown even more for American Indian and Alaska Native people than for other groups, and now surpass all other groups. The study also found that access to powerful synthetic opioids such as fentanyl, and cheaper heroin, resulted in unprecedented lethality and made 2020 the worst year on record for fatal opioid overdoses in terms of total number of deaths and percentage increase, as compared with the prior year.

The TLC is committed to continue to prosecute the opioid cases against the remaining defendants, which include manufacturers such as Endo, Teva and Allergen, and pharmacies such as Walgreens and CVS. This is another reason why the TLC encourages tribes to sign onto the Participation Agreements in the J&J and Distributor settlements, as these settlements set important precedents for future settlements of tribal claims against the remaining defendants.