

Cherokees Slam Drug Cos.' Bid To Pause Opioid Suit

By Adam Lidgett

Law360 (May 23, 2018, 3:45 PM EDT) -- The Cherokee Nation on Tuesday urged an Oklahoma federal judge not to pause the tribe's suit against drug distributors and retail pharmacies for their alleged role in the opioid epidemic, asking him instead to rule soon on whether the case should be sent back to state court.

Drug distributor McKesson Corp. and other companies have asked the court **to stay proceedings** pending a U.S. Judicial Panel on Multidistrict Litigation decision over whether the suit should be **transferred to the MDL**, where it would join hundreds of related cases. The Cherokee Nation, however, said in its motion on Tuesday that it wants Judge Ronald A. White to reach the merits of the tribe's motion to remand the case **back to state court** before the end of the month, arguing that should the court not make a ruling on its motion, the case could stall in the MDL.

"Indeed, as far as McKesson is concerned, stalling is a form of winning — and giving credit where credit is due, by that standard McKesson has been remarkably successful," the tribe said. "Since the Cherokee Nation originally filed its complaint in April 2017, McKesson and the other defendants have managed to avoid answering the complaint or producing a single document or witness to the Cherokee Nation in discovery."

The other companies named in the suit are AmerisourceBergen Corp., Cardinal Health Inc., CVS Health Corp., Walgreens Boots Alliance Inc. and Walmart Inc.

The tribe and the companies have been locked in **a multifront battle** since last year, when the Cherokee Nation filed a lawsuit in its tribal court accusing the companies of helping to create rampant opioid addiction among tribal members. At the heart of the fight are the tribe's allegations that the companies allowed opioids to be diverted to unauthorized users and to the black market.

The companies **filed their own lawsuit** in Oklahoma federal court in June to prevent the tribal court case from proceeding, and in January, U.S. District Judge Terence Kern **issued a preliminary injunction** in their favor, deciding that the tribal court lacked jurisdiction to hear the tribe's claims.

Shortly afterward, the tribe dismissed its tribal court lawsuit and took its claims **to Oklahoma state court** instead. But then McKesson filed to take the tribe's claims **to Oklahoma federal court**, based on the company's exclusive contract with the federal government to be the primary distributor of prescription medications to both the U.S. Department of Veterans Affairs and the Indian Health Service.

William Ohlemeyer of Boies Schiller Flexner LLP, an attorney for the Cherokee Nation, said in a statement that the companies are trying to do anything at all "to delay an examination of their misconduct in a courtroom in Oklahoma."

"The defendants' desire to delay these proceedings contributes nothing to the effort necessary to remedy the harm associated with the opioid epidemic," he said

AmerisourceBergen said in a statement that it is doing its part in a distributor role to "mitigate the diversion of these drugs without interfering with clinical decisions made by doctors, who interact directly with patients and decide what treatments are most appropriate for their care."

"Beyond our reporting and immediate halting of potentially suspicious orders, we refuse service to customers we deem as a diversion risk and provide daily reports to the [Drug Enforcement Administration] that detail the quantity, type and the receiving pharmacy of every single order of these products that we distribute," AmerisourceBergen said.

John Parker, a spokesman with trade association Healthcare Distribution Alliance, whose members include co-defendants AmerisourceBergen, Cardinal Health and McKesson, said in a statement on Wednesday that "those bringing lawsuits would be better served addressing the root causes, rather than trying to redirect blame through litigation."

"Given our role, the idea that distributors are responsible for the number of opioid prescriptions written defies common sense and lacks understanding of how the pharmaceutical supply chain actually works and is regulated," Parker said.

A representative for Walgreens declined to comment on Wednesday.

Representatives for the other parties did not immediately respond to requests for comment on Wednesday.

The Cherokee Nation is represented by tribe Attorney General Todd Hembree and Assistant Attorneys General Chrissi Ross Nimmo, John Young and Chad Harsha, by Tyler Ulrich, Patricia A. Melville and William Ohlemeyer of Boies Schiller Flexner LLP and by Curtis N. Bruehl of the Bruehl Firm.

McKesson is represented by Stuart D. Campbell and Kaylee Davis-Maddy of Doerner Saunders Daniel & Anderson LLP.

AmerisourceBergen is represented by D. Michael McBride III and Susan E. Huntsman of Crowe & Dunlevy, Alvin L. Emch of Jackson Kelly PLLC, Robert A. Nicholas and Thomas H. Suddath Jr. of Reed Smith LLP, and Thomas F. Gede of Morgan Lewis & Bockius LLP.

CVS is represented by Amy D. White and G. Calvin Sharpe of Phillips Murrah PC, and Richard Schirtzer and J.D. Horton of Quinn Emanuel Urquhart & Sullivan LLP.

Walgreens is represented by Steven E. Holden, Don W. Danz, Jane L. Cowdery and Stuart P. Ashworth of Holden & Montejano.

Cardinal Health is represented by Joel L. Wohlgemuth and Ryan A. Ray of Norman Wohlgemuth Chandler Jeter Barnett & Ray PC, James J. Proszek and Timothy S. Posey of Hall Estill Hardwick Gable Golden & Nelson PC, and Enu Mainigi, F. Lane Heard and Steven M. Pyser of Williams & Connolly LLP.

Walmart represented by Larry D. Ottaway, Amy Sherry Fischer and Jordyn L. Cartmell of Foliart Huff Ottaway & Bottom, and Karen P. Hewitt, Christopher Lovrien, Claire E. Castles, Sarah G. Conway and Laura Jane Durfee of Jones Day.

The cases are McKesson Corp. et al. v. Hembree et al., case number 4:17-cv-00323, in the U.S. District Court for the Northern District of Oklahoma, Cherokee Nation v. McKesson Corp. et al., case number 6:18-cv-00056, in the U.S. District Court for the Eastern District of Oklahoma, and Cherokee Nation vs. McKesson Corp. et al., case number CJ-2018-11, in the District Court of Sequoyah County, State of Oklahoma.

--Additional reporting by Andrew Westney, Christine Powell and Michael Phillis. Editing by Stephen Berg.