

Tribes Get Tentative Green Light In Opioid MDL

By **Sophia Morris**

Law360 (April 2, 2019, 6:47 PM EDT) -- The majority of the claims brought by the Blackfeet Tribe and the Muscogee (Creek) Nation in the opioid multidistrict litigation should be allowed to move forward, a federal magistrate judge has said.

U.S. Magistrate Judge David A. Ruiz issued two reports Monday recommending trimming the tribes' claims against drug manufacturers, distributors and pharmacies, but concluded that the bulk of their suits should withstand defense motions to dismiss, leaving claims alleging Racketeer Influenced and Corrupt Organizations Act violations, negligence and nuisance in play.

The tribes accuse the manufacturer defendants, which include Purdue Pharma and Endo Pharmaceuticals along with generic drug companies such as Allergan, of making misleading statements about the addiction risks associated with using opioids for pain treatment.

They want to hold those companies accountable for what they say are **disproportionately high rates** of opioid addiction and related deaths in their communities: In 2014, Native Americans had the highest death rate from opioid overdoses out of any ethnic group, according to the Centers for Disease Control and Prevention.

In response to those claims, the brand-name drug manufacturer defendants said the state law claims brought by the tribes were preempted by the U.S. Food and Drug Administration's regulations on product labeling. The tribes allege that the companies should have included warnings on their products related to the potential risk of addiction. But the manufacturers said they were complying with FDA requirements, and that the agency would never have approved the product warnings sought by the tribe.

To support their argument, the manufacturers cited the agency's response to a 2012 petition requesting greater constraints on opioid marketing. Responding to the petition, the FDA declined to specify a maximum daily dosage for opioids or put a limit on how long the drugs should be used for or to implement other marketing restrictions.

But Judge Ruiz said the brand-name manufacturers' arguments were not supported by case law, and that they had not shown the warnings requested by the tribes "would impose state law requirements that would render it impossible for manufacturers to comply with federal law requirements."

The Muscogee Nation also claimed generic manufacturers are liable for not putting warnings on their products even though those labels were never displayed by their brand-name counterparts. But Judge Ruiz said the generic manufacturers had no duty to go further with their labeling than the brand-name companies.

"Consequently, to the extent that the state law claims depends upon those allegations — and only to that extent — the undersigned recommends finding they are preempted because it would be impossible for the generic manufacturers to comply with both federal law and the supposed state law duty," the Muscogee report and recommendations said.

The manufacturer defendants also said the tribes' claims were barred by the statute of limitations. But Judge Ruiz said the statute of limitations is subject to tolling, citing evidence put forward in the bellwether case in the MDL, filed by Summit County, Ohio, that manufacturers were part of "a

conspiracy of silence" to conceal alleged violations of the law.

The tribes' RICO claims should also survive, Ruiz said. The tribes have standing to bring RICO claims, and they have provided enough evidence at this stage to show that their alleged injuries were caused by the defendants, the court said.

The Muscogee (Creek) Nation had also alleged violations of the Lanham Act, but Judge Ruiz recommended dismissal, saying the tribe lacked standing to bring the claim as it has not suffered the requisite economic injury. Separately, Judge Ruiz recommended the Blackfeet Tribe's public nuisance claim be tossed.

Scott Gilbert, an attorney for the Muscogee (Creek) Nation, told Law360 via email Tuesday that he and his team are "reviewing the magistrate judge's recommendations with care."

"We are pleased that he has confirmed the viability of our client's claims against the manufacturer, distributor and pharmacy defendants," he said. "We will continue our efforts to bring this case to an expeditious and successful conclusion, to enable the Muscogee and other tribes to address fully this crisis plaguing their nations."

A representative for Walgreens declined to comment Tuesday. Representatives for the other defendants did not immediately respond to requests for comment.

The Blackfeet Tribe is represented by Levin Papantonio Thomas Mitchell Rafferty & Proctor PA, Ketchum Farrell Bailey & Tweel LLP, McHugh Fuller Law Group PLLC, Baron & Budd PC, Powell & Majestro PLLC, and Hill Peterson Carper Bee & Deitzler PLLC.

The Muscogee (Creek) Nation is represented by its own attorney general's office, Fields PLLC, Gilbert LLP, Sonosky Chambers Sachse Miller & Monkman LLP, Savage O'Donnell Affeldt Weintraub & Johnson, Keating Muething & Klekamp PLL and Boies Schiller Flexner LLP.

Cardinal Health is represented by Williams & Connolly LLP.

AmerisourceBergen is represented by Reed Smith LLP.

McKesson is represented by Covington & Burling LLP.

The Pharmacy Buying Association is represented by Lathrop Gage LLP.

Watson, Actavis and Teva are represented by Morgan Lewis & Bockius LLP.

Par is represented by Arnold & Porter.

Mallinckrodt and SpecGx are represented by Ropes & Gray LLP.

Walmart is represented by Jones Day.

CVS is represented by Zuckerman Spaeder LLP.

Walgreens is represented by Bartlit Beck Herman Palenchar & Scott LLP.

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 Andrew Westney. Editing by Stephen Berg.

-- *Update: This story has been updated to include additional counsel information for the Muscogee (Creek) Nation.*