ADDRESSING THE OPIOID CRISIS IN INDIAN COUNTRY WITH A PARENS PATRIAE ACTION IN TRIBAL COURT.

Robert C. Batson

According to the Centers for Disease Control and Prevention ("CDC"), the United States is in the midst of an opioid overdose epidemic.[1] The CDC defines opioids as:

> Natural or synthetic chemicals that interact with opioid receptors on nerve cells in the body and brain, and reduce the intensity of pain signals and feelings of pain. This class of drugs that include the illegal drug heroin, synthetic opioids such as fentanyl, and pain medications available legally by prescription, such as oxycodone, hydrocodone, codeine, morphine, and many others.[2]

"Opioids killed more than 33,000 people in 2015, more than any year on record. Nearly half of all opioid overdose deaths involve a prescription opioid."[3] Between 1999 and 2015, "the number of overdose deaths involving opioids quadrupled."[4] The CDC has concluded that,

> [O]verdoses from prescription opioids are a driving factor in the 15-year increase in opioid overdose deaths. The amount of prescription opioids sold to pharmacies, hospitals, and doctors' offices nearly quadrupled from 1999 to 2010, yet there had not been an overall change in the amount of pain that

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[1] *Opioid Overdose*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/index.html (last visited Oct. 23, 2017).

[2] *Commonly Used Terms*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/opioids/terms.html (last updated Aug. 28, 2017).

[3] CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 1.

[4] *Understanding the Epidemic*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/epidemic/index.html (last visited Aug. 30, 2017) (footnote omitted).

Americans reported.[5]

1. PARENS PATRIAE LAWSUITS

One response to the opioid overdose epidemic has been the use of civil litigation against the companies that manufacture and market opioids for the treatment of chronic pain.[6] While "individual and class action lawsuits have not been very successful[,] [p]arens patriae [law]suits brought by state attorneys general . . . have fared better and have led to some fairly generous settlements for the states involved."[7] In parens patriae lawsuits, states seek "to protect or vindicate the state's 'quasi-sovereign' interests in the health, safety, and welfare of their citizens."[8]

States successfully used the parens patriae principle to sue tobacco companies to recoup costs they incurred as a result of the use of tobacco products, particularly costs incurred by state Medicaid programs.[9] In 1998, the attorneys general of forty-six states and four tobacco companies entered into an agreement to settle cases brought under state consumer protection and anti-trust laws.[10] The states argued "that cigarettes contributed to health problems that triggered significant costs for public health

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[5] *See id.* (footnotes omitted).

[6] Alana Semuels, *Are Pharmaceutical Companies to Blame for the Opioid Epidemic?*, THE ATLANTIC (June 2, 2017), https://www.theatlantic.com/business/archive/2017/06/lawsuit-pharmaceutical-companies-opioids/529020/.

[7] Richard C. Ausness, *The Role of Litigation in the Fight against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1120 (2014). *See also* People v. Grasso, 893 N.E.2d 105, 107 n.4 (2008).

> Parens patriae is a common-law standing doctrine that permits the state to commence an action to protect a public interest, like the safety, health or welfare of its citizens. To invoke the doctrine, the Attorney General must prove a quasi-sovereign interest distinct from that of a particular party and injury to a substantial segment of the state's population.

Id.

[8] Ausness, *supra* note 7, at 1121 (citing Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and the Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 932 (2008)). The doctrine of *parens patriae* derives from the time of Edward I (1272-1307) when the English Crown claimed a type of wardship over mentally ill persons and others who were incapable of managing their own affairs, eventually extending to providing for the care of children. Lawrence B. Custer, *The Origins of the Doctrine of* Parens Patriae, 27 EMORY L. J. 195, 195 (1978).

[9] Ausness, *supra* note 7, at 1146–47.

[10] Kathleen Michon, *Tobacco Litigation: History & Recent Developments*, NOLO, https://www.nolo.com/legal-encyclopedia/tobacco-litigation-history-and-development-32202.html (last visited Nov. 21, 2017).

systems. In these lawsuits, the tobacco companies could not use the defense that had proven so successful in lawsuits brought by individuals—that the smoker was aware of the risks and decided to smoke anyway."[11]

The government plaintiffs "relied on a variety of liability theories, including unjust enrichment and restitution, negligent entrustment, engaging in an abnormally dangerous activity, negligent marketing, and public nuisance."[12] Since most of these cases were settled, these legal theories have not been tested in court.[13]

"[The] terms of the settlement are referred to as the Master Settlement Agreement."[14] The defendant tobacco companies agreed to pay the states $206 billion over twenty-five years and to various conditions with respect to the sale and promotion of tobacco products.[15]

Attorneys General and some county legal officers have begun to investigate "the marketing and sales practices of drug companies that manufacture opioid painkillers."[16] The attorneys general for Mississippi and Ohio have filed lawsuits against five pharmaceutical manufacturers.[17] The companies have issued statements denying wrongdoing, noting that their products were approved by the Food and Drug Administration as safe and effective, and that they contained warning labels that disclose their risks.[18] The lawsuit filed by Ohio on May 31, 2017 said, "the drug companies disseminated misleading statements about the risks and benefits of opioids as part of a marketing scheme aimed at persuading doctors and patients that drugs should be used for chronic rather than short-term pain."[19] As of June 15, 2017, similar lawsuits had been filed by "two California counties, the cities of Chicago, Illinois and Dayton, Ohio, three Tennessee district attorneys, and nine New York counties." [20]

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[11] *Id*.

[12] Ausness, *supra* note 7, at 1147.

[13] *Id*. The author noted that one of the motivations for defendants to settle was to avoid the high cost of protracted litigation. *Id.* at 1165.

[14] Michon, *supra* note 10.

[15] Ausness, *supra* note 7, at 1147.

[16] Nate Raymond, *U.S. state attorneys general probe opioid drug companies*, REUTERS (June 15, 2017, 2:08 PM), https://www.reuters.com/article/usa-opioids/u-s-state-attorneys-general-probe-opioid-drug-companies-idUSL1N1JC1DZ.

[17] *Id.*

[18] *Id*.

[19] *Id*.

[20] *Id*. According to the New York State Association of Counties, New York

The New York law firm Simmons Hanly Conroy "currently represents governmental entities in Illinois, Louisiana, Texas, and eight New York counties in on-going litigation against pharmaceutical companies and physicians."[21] The complaint filed on behalf of Erie County names several companies that manufacture and market opioids, and four physicians who are alleged to have been instrumental in promoting the sale and distribution of opioids in Erie County and nationally.[22] Causes of action include: (1) violation of General Business Law §349 by engaging "in deceptive acts or practices in the conduct of business, trade or commerce in this state"; (2) violation of General Business Law §350 by engaging "in false advertising in the conduct of a business trade or commerce in this state"; (3) public nuisance by "[I]ntentionally, recklessly, or negligently engag[ing] in conduct or omissions which endanger or injure the property, health, safety or comfort of a considerable number of persons in Erie County by their production, promotion, and marketing of opioids for use by residents of Erie County"; (4) violation of Social Services Law §145-B "because they knowingly, by means of a false statement or representation, or by deliberate concealment of any material fact, or other fraudulent scheme or device, on behalf of themselves or others, attempted to obtain or obtained payment from public funds for services or supplies furnished or purportedly furnished pursuant to Chapter 55 of the Social Services Law"; (5) fraud by making "misrepresentations and omissions of facts material to Plaintiff and its residents to induce them to purchase, administer, and consume opioids," and that "[b]y reason of their reliance on Defendants' misrepresentations and omissions of material fact Plaintiff and its residents suffered actual pecuniary damage"; and (6) unjust enrichment.[23]

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counties are required to administer and partially pay the cost of Medicaid, the program that provides health coverage to low income persons. *Mandate Relief*, NYSAC, http://www.nysac.org/mandaterelief (last visited Dec. 3, 2017).

[21] *Opioid Litigation*, SIMMONS HANLY CONROY, https://www.simmonsfirm.com/opioid-litigation/ (last visited Oct. 2, 2017).

[22] Complaint at 10–15, County of Erie v. Purdue Pharma L.P., No. 8016712017, 2017 WL 2559217 (N.Y. Sup. Ct. Erie Cnty. Feb. 1, 2017). The New York State Supreme Court Litigation Coordinating Panel granted defendants' motion for an order directing the coordination of the actions of nine counties before a Coordinating Justice of Suffolk County. County of Suffolk v. Purdue Pharma L.P., 2017 NYLJ LEXIS 3071, at *3 (N.Y. Sup. Ct. Suffolk Cnty. Oct. 24, 2017).

[23] Complaint at 71–74, County of Erie v. Purdue Pharma L.P., No. 8016712017, 2017 WL 2559217 (N.Y. Sup. Ct. Erie Cnty. Feb. 1, 2017).

On December 5, 2017 the U.S. Judicial Panel on Multidistrict Litigation centralized 64 actions alleging improper marketing of and inappropriate distribution of various prescription opiate medications by transferring them to the Northern District of Ohio.[24]

2. OPIATE CRISIS IN INDIAN COUNTRY

Health officials and tribal leaders are reporting a significant problem with opioid abuse in Indian Country.[25] University of Colorado researchers funded by the National Institute on Drug Abuse found that annual heroin and Oxycontin use among American Indian high school students was about two to three times higher than the national averages during the years 2009–2012.[26]

In the most recent United States Census (2010), 2.9 million people identified as American Indian and Alaska Native.[27] Approximately one-third of this number lived in American Indian/Alaska Native communities, what the Census Bureau

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[24] In re Nat'l Prescription Opiate Litig., MDL No. 2804, 2017 U.S. Dist. LEXIS 200501 (J.P.M.L. Dec. 5, 2017). A subsequent order transferred an additional 254 cases to the Northern District of Ohio. In re Nat'l Prescription Opiate Litig., MDL No. 2804, 2018 U.S. Dist. LEXIS 22139 (J.P.M.L. Feb. 12, 2018).

[25] *Native Americans Hit Hard by Opioid Epidemic*, CBS NEWS (Sept. 21, 2016, 12:39 PM), https://www.cbsnews.com/news/native-americans-hit-hard-by-opioid-epidemic/. Indian Country is defined as:

> [A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2012).

[26] *Substance Use in American Indian Youth is Worse than We Thought*, NAT'L INST. ON DRUG ABUSE: NORA'S BLOG (Sept. 11, 2014), https://www.drugabuse.gov/about-nida/noras-blog/2014/09/substance-use-in-american-indian-youth-worse-than-we-thought. *See* Linda R. Stanley et al., *Rates of Substance Use of American Indian Students in 8th, 10th, and 12th Grades Living on or Near Reservations: Update, 2009–2012*, 129 PUB. HEALTH REP. 156, 156 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3904895/.

[27] TINA NORRIS, PAULA L. VINES, & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU, C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 1 (2012), https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf ("[A total of] 5.2 million people in the United States identified as American Indian and Alaska Native, either alone or in combination with one or more other races.").

called American Indian areas and Alaska Native village statistical areas.[28] A study in 2012 found that 2003 to 2011 data "indicate[s] that American Indians or Alaska Natives were more likely than persons from other racial/ethnic groups to have needed treatment for alcohol or illicit drugs in the past year (17.5 vs. 9.3 percent)."[29]

a. Tribal Court Systems

One way for tribes and Alaska Native communities to deal with the problem may be to use their court systems to bring parens patriae lawsuits against the companies that manufacture and market opioids. Tribal court systems are empowered to resolve conflicts and controversy, and many resemble modern state courts.[30]

Modern western-style tribal court systems began with the enactment of the Indian Reorganization Act of 1934.[31] Tribes had dispute resolution mechanisms before that time that had as their goal repairing relationships and restoring harmony in the community at large.[32] This authority of tribes to deal with internal disputes was acknowledged by the U.S. Supreme Court in the 1883 case *Ex Parte Crow Dog*.[33] Crow Dog was a member of the Brule Band of the Lakota who shot and killed Spotted Tail, a Lakota Chief.[34] Crow Dog was prosecuted for murder in federal court, found guilty, and sentenced to hang.[35] The Supreme Court, in granting Crow Dog's application for a writ of habeas corpus, held that crimes between Indians were to be dealt with by each tribe, and that the U.S. District Court had no jurisdiction to try Crow

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[28] *Id.* at 12 fig.6 ("[The term American Indian areas] [i]ncludes federal American Indian reservations and/or off-reservation trust lands, Oklahoma tribal statistical areas, tribal designated statistical areas, state American Indian reservations, and state designated American Indian statistical areas.").

[29] *Need for and Receipt of Substance Use Treatment among American Indians or Alaska Natives*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/data/sites/default/files/NSDUH120/NSDUH120/SR120-treatment-need-AIAN.htm (last visited Sept. 25, 2017).

[30] Tribal Law & Policy Inst., *Tribal Courts*, TRIBAL CT. CLEARINGHOUSE, http://www.tribal-institute.org/lists/justice.htm (last visited Oct. 3, 2017).

[31] Indian Reorganization Act of 1934, Pub. L. No. 73-383, 49 Stat. 984 (codified as amended in scattered sections of 25 U.S.C.).

[32] Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, AM. INDIAN DEV. ASSOCIATES, http://www.aidainc.net/publications/ij_systems.htm (last visited Dec. 3, 2017).

[33] 109 U.S. 556, 559–60 (1883).

[34] *Id.* at 557.

[35] *Id.*

Dog.[36]

Sidney L. Harring, in his book about the case, described the tribe's process for dealing with Crow Dog:

> The process that occurred in the homicide case of Crow Dog, that of a tribal council meeting to arrange for a peaceful reconciliation of the parties with an ordered gift of horses, blankets, money, or other property, was one of a number of conflict resolution mechanisms available to the Sioux. Apparently it was used only after the most serious of tribal disturbances. The council met not to adjudicate the dispute but to reconcile the parties involved. Hence, the result of the case—the offering of property to one side by the other—does not indicate any substantive resolution of the merits of the case: Crow Dog had been in no way "convicted" by a tribal council. Nor was the offered property "blood money," a payment to relatives to atone for the killing in a substantive way or to take the place of blood revenge. It was an offer of reconciliation and a symbolic commitment to continuation of tribal social relations. Although the family of Spotted Tail accepted the offer, this was not necessary to resolve the conflict. Often the recipients refused to take the offered property, a position that showed the tribe both their pride and their wealth.[37]

The Supreme Court held that the Lakota had a sovereign right to use this system to settle disputes, even when the dispute involved a homicide.[38] The decision was controversial, and led to calls for legislation to authorize the punishment of crimes on Indian reservations.[39] In 1885, Congress responded by enacting the Indian Major Crimes Act which authorized federal prosecution of certain enumerated offenses committed by one Indian against another on a reservation.[40]

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[36] *Id.* at 559.

[37] SIDNEY L. HARRING, CROW DOG'S CASE 104–05 (Frederick Hoxie & Neal Salisbury eds., 1994).

[38] *Id.* at 105.

[39] *Id.* at 136–37.

[40] Indian Major Crimes Act, ch. 341, sec. 9, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2012)). The Supreme Court held that the Major Crimes Act was constitutional. United States v. Kagama, 118 U.S. 375, 385 (1886). Professor Harring noted that this case was "the Supreme Court's first

In 1896, the Supreme Court held that Bill of Rights protections did not apply to tribes and tribal courts, stating that:

> [T]he existence of the right in congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers federal powers arising from and created by the constitution of the United States. It follows that, as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution [sic], they are not operated upon by the fifth amendment [sic], which, as we have said, had for its sole object to control the powers conferred by the constitution [sic] on the national government.[41]

b. Allotment and the "Checkerboarding" of Tribal Territories

Tribal court jurisdiction was further impacted by the Indian General Allotment Act (Dawes Act) of 1887.[42] The Dawes Act provided for the division of tribal lands for allotments for individual Indians.[43] Communal tribal lands were divided into individual parcels and distributed to their members.[44] Lands not allotted were declared "surplus" and sold to non-Indians.[45]

The result of allotment was the "checkerboarding" of reservations, with blocks of non-Indian owned land interspersed with tribal-owned land and Indian-owned allotments.[46] This pattern of land tenure has major implication for tribal court jurisdiction, particularly what jurisdiction tribes have over non-Indians on non-Indian owned lands, and non-Indians on the reservation generally.[47]

One result of allotment was the breakdown of tribal governmental structures.[48] The Indian Reorganization Act of 1934 (IRA) "attempted to reverse [the] devastating effects [of the

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statement of the plenary power doctrine, the principle that Congress's power over Indian affairs is unlimited by treaty rights or tribal sovereignty." HARRING, *supra* note 37, at 142.

41 Talton v. Mayes, 163 U.S. 376, 384 (1896).

42 25 U.S.C. § 331 (repealed 2000).

43 25 U.S.C. § 331 (repealed 2000).

44 Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1, 5 (1995).

45 HARRING, *supra* note 37, at 153.

46 *Id.* at 153–54.

47 *Id.*

48 WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 64 (6th ed. 2015).

General Allotment Act] and, at the same time, give Native Americans a chance at a 'New Deal' that ran parallel to many other programs Roosevelt was creating for all Americans."[49] The IRA authorized tribes to organize and adopt a constitution and by-laws effective upon a majority vote of adult tribal members and approval by the Secretary of Interior.[50] In recent years, many "tribes have organized their own tribal courts that administer tribal codes."[51] Tribal courts vary from complex, multi-level court systems with trial and appellate parts, to part-time single judge courts.[52]

c. Limitations on Tribal Court Jurisdiction

Two significant events defined and limited the criminal jurisdiction of tribal courts. The Indian Civil Rights Act of 1968 extended many of the Bill of Rights and constitutional limitations to tribal governments, including their courts.[53] In 1976, the Supreme Court held that tribes do not have criminal jurisdiction over the actions of non-Indians on the reservation.[54]

The civil jurisdiction of tribal courts in matters involving non-Indians has been developed in a number of court decisions. A 1959 Supreme Court decision held that the tribe had exclusive jurisdiction over a contract dispute arising in Indian country between an Indian and a non-Indian.[55]

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[49] Murray Lee, *The Indian Reorganization Act of 1934*, PARTNERSHIP WITH NATIVE AM. (Sept. 2, 2014), http://blog. nativepartnership.org/the-indian-reorganization-act-of-1934/. *See also* Indian Reorganization Act of 1934, Pub. L. No. 73-383, 49 Stat. 984 (codified as amended in scattered sections of 25 U.S.C.).

[50] 25 U.S.C. § 5123(a) (1994) (formerly appeared as 25 U.S.C. § 476).

[51] CANBY, JR., *supra* note 48, at 68.

[52] *Id.* at 68–69.

[53] *See* Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303 (2012).

[54] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 191 (1978); Duro v. Reina, 495 U.S. 676, 677 (1990) (holding that tribes do not have criminal jurisdiction over nonmember Indians on the reservation), *abrogated by* United States v. Lara, 541 U.S. 193, 197–98 (2004) (explaining that the *Oliphant* and *Duro* decisions were superseded by congressional action as demonstrated by 25 U.S.C. § 1301(2)). The Violence Against Women Reauthorization Act of 2013 authorized tribes to exercise special domestic violence criminal jurisdiction over all persons if either the defendant or victim is an Indian and the crime or conduct takes place in Indian Country. *See* Pub. L. No. 113-4, 127 Stat. 120.

[55] Williams v. Lee, 358 U.S. 217, 223 (1959). Acts of Congress have granted states criminal and civil jurisdiction over Indian country. *See, e.g.*, 25 U.S.C. §§ 232–233 (2012) (originating in Pub. L. No. 83-280, 67 Stat. 588 (1953)). Public Law 280 gave six states criminal and civil jurisdiction over Indian country and established a process for other states to acquire it. *See* Pub. L. No. 83-280, 67

The lingering impact of allotment and the checkerboarding of reservations was evident in a 1981 decision of the Supreme Court, which held that despite inherent tribal sovereignty, tribes did not have civil jurisdiction over the actions of non-Indians that occurred on non-Indian owned fee land within the boundaries of the reservation, known as *Montana v. United States*.[56] The Court indicated that there are two exceptions to this rule: (1) where the non-Indians had consensual relationships with the tribe and its members, and (2) where the conduct at issue threatened the political integrity, economic security, or the health and welfare of the tribe.[57]

3. CHEROKEE NATION PARENS PATRIAE ACTION

The Cherokee Nation has 317,000 enrolled members (citizens) and is located in northeastern Oklahoma.[58] Their territory encompasses all or part of fourteen Oklahoma counties in a checkerboard pattern of tribal, individual Indian, and non-Indian land.[59] As a result of allotment, most of the land in the Cherokee Territory became owned by non-Indians.[60]

In April 2017, the Attorney General of the Cherokee Nation instituted a civil action in the Cherokee Nation District Court against corporations that distribute opiates to providers and retailers, and corporations that sell prescription opioids to patients

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Stat. 588 (1953). New York was granted criminal jurisdiction over reservations within the State by 25 U.S.C. § 232, and its courts were granted jurisdiction in civil actions between Indians or between Indians and other persons by 25 U.S.C. § 233. *See* 25 U.S.C. §§ 232–233 (2012).

56 Montana v. United States, 450 U.S. 544, 545–46 (1981).

57 *See id.* at 546.

58 *About the Nation*, CHEROKEE NATION, http://www.cherokee.org/About-The-Nation (last visited Nov. 20, 2017). The Cherokee were forced to relocate from the southeast (primarily North Carolina and Georgia) to Indian Territory (now Oklahoma) in 1838 pursuant to the Indian Removal Act of 1830. Act of May 28, 1830, c. 148, 4 Stat. 411 (1830). This forced removal of the Cherokee and other tribes is known as the "Trail of Tears." *See, e.g.*, *Trail of Tears*, HISTORY, http://www.history.com/topics/native-american-history/trail-of-tears (last visited Nov. 20, 2017). *See also A Brief History of the Trail of Tears*, CHEROKEE NATION, http://www.cherokee.org/About-The-Nation/History/Trail-of-Tears/A-Brief-History-of-the-Trail-of-Tears (last visited Nov. 20, 2017).

59 *See 2010 Census General and Economic Characteristics*, CHEROKEE NATION, http://www.cherokee.org/Portals/0/Documents/2013/01/3308014_County_At_A_Glance.pdf?ver=2013-01-28-163410-630 (last visited Nov. 20, 2017).

60 Leslie Hewes, *Indian Land in the Cherokee Country of Oklahoma,* 18 ECON. GEOGRAPHY 401, 409–10 (1942).

of the Nation's healthcare system.[61] The petition reads like a parens patriae action:

> The Cherokee Nation, through Attorney General Todd Hembree, brings this civil action under the statutory and common law of the Cherokee Nation for injunctive relief, compensatory damages, statutory damages, punitive damages, and any other relief allowed by law against the Defendant opioid drug distributors and retailers that, by their actions, have knowingly or negligently distributed and dispensed prescription opioid drugs within the Cherokee Nation in a manner that foreseeably injured, and continues to injure, the Cherokee Nation and its citizens.[62]

The petition alleges that the defendants failed to fulfill their responsibility to control the availability of prescription opioids, leading to diversion of the drugs.[63] In the petition, the Nation alleges that "American Indians in general are more likely than other racial ethnic groups in the United States to die from drug-induced deaths."[64] The Nation claims that Oklahoma, where the majority of Cherokee citizens reside, "leads the country in opioid abuse," and "currently ranks as the fifth highest state with drug overdose deaths in the United States."[65] The petition also claims that between 2003 and 2014, there were 350 opioid-related deaths within the Cherokee Nation.[66]

The corporate defendants commenced an action in U.S. District Court seeking a declaratory judgment enjoining the Attorney General and the Cherokee Nation District Court Judge assigned to

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[61] Petition at 1, 3, The Cherokee Nation v. McKesson Corp., No. 2017-203 (Dist. Ct. Cherokee Nation Apr. 20, 2017). The original complaint only named distributors of opioids; the complaint was amended in July 2017 to include retailers of prescription opioids. *See* First Amended Petition, The Cherokee Nation v. McKesson Corp., No. 2017-203 (Dist. Ct. Cherokee Nation Jul. 19, 2017).

[62] Petition, *supra* note 61, at 3.

[63] First Amended Petition, *supra* note 61, at 16 ("Opioid 'diversion' occurs whenever the supply chain of prescription opioids is broken, and the drugs are transferred form a legitimate channel of distribution or use, to an illegitimate channel of distribution or use.").

[64] *Id.* at 19.

[65] *Id.*

[66] *Id.*

the case from exercising jurisdiction in this matter.[67] They argue that the Cherokee Nation lacks jurisdiction over the corporations which are not members of the Tribe.[68] The dispute centers on whether one of the Montana exceptions applies and whether the corporate challengers must exhaust tribal court remedies on the jurisdictional issue.

In 1985, the U.S. Supreme Court held that a tribal court is not automatically precluded from exercising civil subject-matter jurisdiction over non-Indians.[69] The Court noted that:

> The existence and extent of a Tribal Court's jurisdiction requires a careful examination of tribal sovereignty, and the extent to which that sovereignty has been altered, divested or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions[70]

The Court held "that examination should be conducted in the first instance in the Tribal Court itself."[71] In a subsequent case, Justice Thurgood Marshall determined that the National Farmers Union decision indicates, "proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them, and 'to rectify any errors."[72] The petitioner was required to "exhaust available tribal court remedies before instituting suit in federal court."[73]

The Supreme Court in National Farmers Union noted three exceptions to the exhaustion requirement:

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[67] *See* Complaint at 1, McKesson Corp. v. Hembree, No. 4:17-cv-00323-TCK-FHM (N.D. Okla. June 8, 2017) (clarifying that the plaintiffs in this action are identified as the corporate defendants in this complaint).

[68] *Id.* at 2. They also argue that actions did not take place in Indian country, so jurisdiction cannot be conferred under the rule of *United States. v. Montana*. *Id.* at 9. The argument is based on the particular status of the lands of the Cherokee Nation and other tribes in Oklahoma. *Id.*

[69] Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985). Tribal courts do not have criminal jurisdiction to try and punish non-Indians committed in Indian country. *See also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 191 (1978).

[70] *Nat'l Farmers Union Ins.*, 471 U.S. at 845.

[71] *Id.* at 856.

[72] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987).

[73] *Id.* at 19.

> [W]here an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.[74]

The issues in the Cherokee Nation's action are whether the tribal court has jurisdiction to adjudicate the case, and whether the corporate defendants must exhaust tribal court remedies before the federal court will intervene.[75]

The corporate defendants argue that the Nation has not established one of the exceptions to the Montana rule.[76] They further argue that they are not required to exhaust jurisdictional challenges in the Cherokee Nation District Court because: the Nation court clearly lacks jurisdiction to the extent "that the exhaustion requirement would serve no purpose other than delay;"[77] adjudication in Nation court "patently violates express jurisdictional prohibitions under the CSA;" [78] and the Nation's court fails to provide an opportunity for an interlocutory appeal of the court's determination of its own jurisdiction.[79]

The corporate defendants' first argument pertains to the status of the territory of the Cherokee Nation, which is not legally a "reservation," and thus not "Indian Country."[80] The Nation counters that, "the modern day territory of the Cherokee Nation encompasses its treaty lands in the fourteen-county area in northeastern Oklahoma, and this territory is recognized in multiple enactments and for multiple purpose by both the United States and the State of Oklahoma as the Cherokee Nation's 'jurisdictional area.'"[81] The boundaries of the jurisdictional area "serve as the Cherokee Nation's territorial area for purposes of applying the Montana test."[82]

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74 *Nat'l Farmers Union Ins.*, 471 U.S. at 856 n.21 (citations omitted).
75 *Id.* at 857.
76 *See* Complaint, *supra* note 67, at 39.
77 *Id.* at 27.
78 *Id.*
79 *Id.*
80 *See* 18 U.S.C. § 1151 (2012).
81 Memorandum of Defendant Attorney General Todd Hembree in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 19, McKesson Corp. v. Hembree, No. 4:17-cv-00323-TCK-FHM (N.D. Okla. July 21, 2017).
82 *Id.*

The corporate defendants claim that there are no consensual activities between the distributors and the Nation or its members, and that the filling of prescriptions and hiring Nation members to work in the pharmacies does not satisfy the consensual activities exception.[83] The Nation argues that the pharmacies have entered into consensual relationships by their location within the Nation's jurisdictional area and through the marketing and selling of products, including pharmaceuticals, to members of the Nation.[84] With respect to the distributors, the Nation argues that they are doing business within its jurisdictional area by distributing products in the area, including products to clinics and hospitals affiliated with the Nation.[85]

The corporate defendants' second argument contends that the Nation is seeking to enforce the Controlled Substances Act, 21 U.S.C. §§ 801–904 (CSA), and that federal courts have exclusive authority to enforce the CSA.[86] The Nation counters that it is not seeking to enforce the CSA, but that the complaint alleges violations of the Cherokee Nation Unfair and Deceptive Practices Act and makes common law tort claims under Nation law.[87]

With respect to the third argument of the corporate defendants, the Nation argues that lack of an opportunity for an interlocutory appeal does not allow the corporate defendants to avoid exhaustion.[88] In *Iowa Mutual Insurance Co. v. LaPlante*,[89] the Supreme Court noted that the Blackfeet Tribal Code did not allow interlocutory appeals from jurisdictional rulings.[90] Thus, the Supreme Court affirmed tribal court jurisdiction even though there could be no appellate review of such jurisdiction until after a decision on the merits.

While not specifically raised by the corporate defendants, one concern may be the competence or fairness for non-Indian parties in a tribal court. The Supreme Court has previously spoken to this concern in a case in which a tribe challenged the adoption of

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[83] Complaint, *supra* note 67, at 13.

[84] *See* Memorandum of Defendant Attorney General Todd Hembree, *supra* note 81, at 37.

[85] *Id.* at 27–28.

[86] *See, e.g.*, Complaint, *supra* note 67, at 16.

[87] Memorandum of Defendant Attorney General Todd Hembree, *supra* note 81, at 29–30.

[88] *Id.* at 33–34.

[89] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

[90] Memorandum of Defendant Attorney General Todd Hembree, *supra* note 81, at 33.

children of its members by a non-Indian couple pursuant to a decree of a state court.[91] In discussing whether the possible trauma of removing the children from their adoptive family should outweigh the interest of the tribe, Justice Brennan stated, "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy."[92]

In any event, after exhausting remedies available to them in the Cherokee Nation Court, the corporate defendants could petition the U.S. District Court to review the Nation's jurisdictional determination.[93]

The U.S. District Court granted the motion of corporate defendants in the tribal court action on January 9, 2018.[94] "The Court finds that Plaintiffs [corporate defendants in the Tribal Court action] have shown that the lack of tribal court jurisdiction is sufficiently clear, such that further proceedings in the Tribal Court Action would serve no purpose other than delay."[95] Rejecting the Nation's position that the Tribal Court had jurisdiction pursuant to one of the exceptions to the Montana rule,[96] the District Court stated:

> The epidemic of opioid abuse undoubtedly has had devastating consequences for individuals and families within the Cherokee Nation, with certain economic costs borne by tribal agencies and other entities. However, these consequences do not threaten the Cherokee Nation's ability "to make [its] own laws and be ruled by them."[97]

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[91] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37–38 (1989).

[92] *Id.* at 54 (alternation in original). The case construed provisions of the Indian Child Welfare Act (25 U.S.C. §§ 1901–1963) that establish exclusive tribal jurisdiction over child custody proceedings involving Indian children domiciled on the tribe's reservation. On remand, the Mississippi Choctaw Court decided that it was in the best interests of the children to remain with their non-Indian adoptive mother and granted the adoption. Solangel Maldonado, *Race, Culture, and Adoption: Lessons from* Mississippi Band of Choctaw Indians v. Holyfield, 17 COLUM. J. OF GENDER & L. 1, 17 (2008).

[93] *Iowa Mut. Ins. Co.*, 480 U.S. at 19 (unless the District Court finds that the Nation court lacked jurisdiction, "proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts.").

[94] McKesson Corp. v. Hembree, No. 17-cv-323-TCK-FHM, 2018 U.S. Dist. LEXIS 3700 (N.D. Okla. Jan. 9, 2018).

[95] *Id.* at *20.

[96] *See* Montana v. United States, 450 U.S. 544, 545–46 (1981).

[97] *McKesson Corp.*, No. 17-cv-323-TCK-FHM, 2018 U.S. Dist. LEXIS 3700, at *17. (Citing Strate, 520 U.S. at 459.)

The Cherokee Nation responded by dismissing its suit in Tribal Court and filing a petition against the same defendants in the District Court of Oklahoma.[98] In a press release issued by the Cherokee Nation, Attorney General Todd Hembree stated: "The defendants prevented this case from being heard in the Cherokee Nation Tribal Court, but no matter where this case is heard the facts will clearly demonstrate the damage these defendants have inflicted on the Cherokee Nation and its people."[99]

On February 26, 2018 McKesson, one of the corporate defendants, filed a Notice of Removal in the U.S. District Court for the Eastern District of Oklahoma, removing the case from the District Court of Sequoyah County, Oklahoma to the Federal Court.[100] On March 1, 2018 the Cherokee Nation filed a motion to remand its lawsuit.[101] In its motion, "the tribe contended that McKesson supplied only 'a comparatively tiny amount of opioid products' under the federal contract and that that activity didn't lead to the opioid diversion that impacted the tribe's members."[102] The companies asked the Court to not rule on the remand request until a decision is made on whether it should be transferred to a multidistrict litigation in Ohio which is considering numerous other opioid cases.[103]

4. VIABILITY OF TRIBAL COURT PARENS PATRIAE ACTIONS

In 2013, the Fifth Circuit Court of Appeals upheld the jurisdiction of the Mississippi Band of Choctaw Tribal Court over tort claims brought by a tribal member against a corporation doing

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98 Cherokee Nation v. McKesson Corp., CV-2017-203 (D. Cherokee Nation Jan. 22, 2018).

99 *Cherokee Nation Lawsuit Against McKesson, Cardinal Health, AmerisourceBergen, CVS Health, Walgreens and Walmart Moves to State Court*, FIGHTING FOR JUSTICE (Jan. 22, 2018), https://www.theopioidcrisis.com/press-release/.

100 Notice of Removal, Cherokee Nation v. McKesson Corp., No. 18-CV-56-SPS (E.D. Okla. Feb. 26, 2018).

101 Andrew Westney, *Cherokee Push Judge to Send Opioid Suit to State Court*, LAW 360 (March 23, 2018), https://www.law360.com/articles/1025572/cherokee-push-judge-to-send-opioid-suit-to-state-court.

102 *Id.*

103 *Id.* ("Transferring the case would be more efficient for the courts and would prevent the companies having to contend with similar suits in different jurisdiction, without posing much risk to the tribe, the companies said in their Mar. 8 motion.").

business on the reservation.[104] On certiorari review, the Supreme Court tied four to four, thereby providing no written opinion and affirming the decision of the Fifth Circuit.[105] Now that the Supreme Court is back to full strength, it is likely that Justice Neil Gorsuch will be the swing vote in the next challenge to tribal court jurisdiction.

In 2016, then-Circuit Judge Neil Gorsuch wrote a Tenth Circuit Court of Appeals opinion affirming a District Court ruling dismissing a motion to enjoin an Indian Nation's tribal court lawsuit for failure to exhaust tribal court remedies.[106] Citing *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*,[107] Judge Gorsuch stated that one arguing that a tribal court has asserted jurisdiction unlawfully must first exhaust available tribal court remedies before bringing the claim to District Court.[108] "Someone has to decide whether the trial court's disposition of the Nation's 2011 claims precludes its current suit, and United Planners offers no reason to think that the tribal court will do so any less expeditiously than a federal court might."[109]

While it is not conclusive as how Justice Gorsuch might rule in a similar case before the Supreme Court, the opinion suggests that he is knowledgeable of the precedents governing tribal court jurisdiction over non-Indians, and garners a certain respect for the ability of tribal court to decide the question of its own jurisdiction.

While a parens patriae suit in tribal court is an option for a tribe looking for a way to address the distribution of opiates into its community, in the event such a case reaches the U.S. Supreme Court, it is uncertain whether a majority of Justices would find that such jurisdiction is permitted under one of the Montana exceptions. A tribe could opt to bring such an action in a court of the state in which its territory is located, since a state court would almost certainly have jurisdiction over any potential defendant. Another option would be to bring an action in U.S. District Court,

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104 Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 732 F.3d 409, 411 (5th Cir. 2013), *withdrawn and substituted by* 746 F.3d 167 (5th Cir. 2014), *aff'd per curiam by an equally divided court sub nom*, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016).

105 Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159, 2160 (2016) (per curiam).

106 United Planners Fin. Servs. of Am. v. Sac & Fox Nation, 654 F. App'x 376, 377–78 (10th Cir. 2016).

107 Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

108 *United Planners*, 654 F. App'x at 377.

109 *Id.* at 378.

understanding that it could be transferred to the Northern District of Ohio by the U.S. Judicial Panel on Multidistrict Litigation, and centralized with hundreds of other of actions dealing with the marketing and distribution of prescription opiates.[110]

[110] *See supra* note 24.