BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: INFANTS BORN OPIOID-DEPENDENT PRODUCTS LIABILITY LITIGATION **MDL-2872**

Moore v. Purdue LLC, et al.
S.D. WV., C.A. 2:18-cv-01231

Rees v. McKesson Corporation, et al.
S.D. IL, C.A. #18-00511; MDL Case #1:18-OP-45252;

Wood v. Purdue Pharma L.P., et al.
E.D. MO, C.A. #18-00385; MDL Case #1:18-OP-45264;

Salmons v. Purdue Pharma L.P., et al.
S.D. WV, C.A. #18-00385; MDL Case #1:18-OP-45268;

Ambrosio v. Purdue Pharma L.P., et al.
C.D. CA, C.A. #18-02201; MDL Case #1:18-OP-45375;

Flanagan v. Purdue Pharma L.P., et al.
W.D. TN, C.A. #18-02194; MDL Case #1:18-OP-45405;

Hunt v. Purdue Pharma L.P., et al.
D. MD, C.A. #18-01349; MDL Case No. #1:18-OP-45681

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. §1407 FOR COORIDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

NOW COME the Amici, Child Welfare League of America, Facing Addiction with NCADD, and Love on Wheels, together with the Amici filing in IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION, MDL-2804, ECF#2452, West Virginia Citizen Action Group, Rise Up West Virginia, Catholic Committee of Appalachia, Appalachian Catholic Worker and NETWORK Lobby for Catholic Social Justice, by and through undersigned counsel, Debra L. Hamilton, Esquire, and present the following brief as a friend of the Court.

I. THEIR NEED IS REAL; RESOURCES ASSIGNED TO ASSIST NAS BABIES MUST BE PROTECTED

The nongovernmental organizations (NGOs) set forth above are devoted to children and families, including those hundreds of thousands impacted by the opioid scourge. These NGOs have a keen interest in ensuring that children injured by *in utero* exposure to opioids have the resources they, their families and caretakers need to mitigate their injuries and assist them in becoming thoughtful, healthy and capable adults. Their needs are real and include medicine, education, speech, socialization and other medical and social services. Their needs are immediate and will be required well into the future. The costs will be high, but they are costs we must bear, as doing nothing will surely cost more. The choices are stark: intervene now and help them for years to come or risk losing a generation of children.

To expand upon the Amicus Curiae brief filed in In Re: National Prescription Opiate Litigation, MDL 2804 [ECF # 2452] on September 6, 2018 ["the West Virginia amicus brief"], two national NGOs now join the amici on the West Virginia brief in presenting this related brief which seeks to extend the cautionary tale set forth in the West Virginia brief and present some examples of the national experience with the Multistate Tobacco Settlement. These examples are limited to the states which securitized their tobacco proceeds, a circumstance which in large part was encouraged by Wall Street as soon as the ink was dry on the Master Settlement Agreement (MSA). The use of tobacco monies by the states discussed herein continues the warning that funds intended to be used for the on-going monitoring and treatment of Neonatal Abstinence Syndrome (NAS)-afflicted children ("NAS Babies") should not be entrusted to state governments or other political entities but, rather, should be dedicated to a trust fund for the benefit of the innocent children affected by the opioid crisis.

This brief details the dangerous precedent set by various state legislatures which diverted funds intended by the MSA to be used for tobacco cessation programs and tobacco-related disease

to other uses. Like West Virginia, many other states had also earmarked the tobacco funds to address tobacco use and injury but succumbed to other political or financial pressures. The West Virginia brief discusses the almost annual erosion of that State's commitment to using the tobacco funds for their intended purpose from the initial receipt of the moneys until 2007, at which time the West Virginia Legislature authorized the proceeds to be used as security for the repayment of bonds to be sold, with State receiving a lump sum followed by decades of debt repayment with the ensuing years' tobacco proceeds, a use which continues to date. This brief points out that this was not an anomaly, but actually the primary use of the tobacco proceeds by some of the biggest states receiving the bulk of the settlement moneys. The result was the same, with very little money being used for tobacco prevention. The specifics of when the money was dedicated to bond repayment – and the purpose to which the bond proceeds were used – vary among these "securitized states" but one thing is constant: hundreds of millions of dollars in tobacco settlement proceeds were used and are still being used for debt repayment rather than the purposes for which they were intended.

These Amici recognize the validity of the claims asserted by governments and hospitals seeking reimbursement for damages that in many cases has pushed state and local governments into the red, but those case differ greatly from the class of individuals sought to be protected by consolidating the NAS-Baby cases into the instant MDL. Given the dire need for treatment and monitoring of NAS Babies in this country, the opioid settlement money cannot again be a political football that can too easily be thrown out-of-bounds. The Amici seek to bring to the Panel's attention that West Virginia's history of tobacco settlement expenditures leading eventually to one hundred percent securitization of the tobacco proceeds (*see* Part B.2.(e) of the West Virginia brief) is not unique. It is hoped the extent of this cautionary tale will impress upon the Panel that class actions seeking trust funds dedicated to the medical monitoring and medical treatment of those born opioid-dependent offers the best path toward ensuring that desperately needed funds are preserved

and spent for the care of NAS Babies, not to pay off bonded indebtedness or other government-sanctioned expenditures. The best hope these children have is a dedicated funding source that no one can divert for another purpose. It is these amicis' best hope to help We believe the children's best hope is our best hope. And this is why we write to you.

II. BRIEF HISTORY OF WHY WE HAVE AN OPIOID EPIDEMIC

In 1995, Purdue Pharma obtained FDA approval to sell Oxycontin, a drug whose active ingredient was twice as potent as morphine. The 'thinking' was that cancer and other chronic conditions coupled with this time-released formulation would help those suffering with untreated pain. Purdue set out on an extensive marketing campaign such that by 2003, nearly half of the physicians prescribing it were primary care doctors, and diversion became a serious problem. Diversion is where the drug is used for illicit and illegal purposes. The history and reasons for this epidemic are well stated in December 2003 GAO Report "PRESCRIPTION DRUGS Oxycontin Abuse and Diversion and Efforts to Address the Problem." *Exhibit 1*.

Congress, the States, various medical and associated trade organizations, and law enforcement were all aware of the fact that this medication was adversely affecting patients by dramatically increasing the incidence of addiction. The problem initially rose to epidemic proportions in Maine, West Virginia, and Pennsylvania. With addiction came dramatic increases in crime and the growing problem of *in utero* exposure to opioids causing thousands of babies to be born dependent against their will and suffering toxic exposure while their bodies and organs were developing. In 2001 and 2002, there were Congressional hearings where many begged that the pills be removed from the market. Many strategies were considered and decisions made. Programs to teach doctors and patients were instituted. Law enforcement was given additional funding and resources. However, the medication continued to be prescribed. In hindsight, those decisions and efforts were woefully inadequate as demonstrated by the ballooning epidemic today which covers every state in this country.

III. NATIONWIDE EXTENT OF THE OPIOID/NAS-BABY PROBLEM

First, what does it mean to be a NAS Baby or one born opioid-dependent? It means the newborn was so exposed to the drug in utero that it actually became dependent and will suffer withdrawal symptoms when not given opioids. This is why most NAS Babies are placed in the intensive care unit for the first days and weeks of their lives. It also means that the infants are at risk for other injuries because they were chemically assaulted during gestation. Long-term effects include decreased educational performance, motor skill dysfunction, poorer socialization, and other adverse effects on cognitive development.[1] Other health problems include gastrointestinal issues often resulting in weight loss or inability to gain weight, respiratory symptoms such as slowed breathing, and central nervous system effects including seizures and tremors.[2] Additionally, the chaotic drug-seeking behaviors of mothers typically lead to decreased ability to retain or seek medical or social services, contributing further to negative effects such as illness and increased mortality for both the mother and her child.[3]

The numbers of injured infants are staggering. In 2012 alone, 21,732 infants were diagnosed with NAS, according to a 2016 study by the New England Journal of Medicine.[4] This represents a five-fold increase in the number of NAS Babies born between 2000 and 2012.[5] The number will continue to rise until the opioid epidemic can be checked and diminished. It is a safe bet that the opioid epidemic will continue to be a significant public health concern for the foreseeable future.

---

[1] *See Exhibit 2*, Oei JL, Melhuish E, Uebel H, et al., *Neonatal Abstinence Syndrome and High School Performance*, Pediatrics, 2017;139(2):e20162651. Pages 1 through 10 cite 48 major works and studies that are all of interest, especially Articles 32, 39, 40, 41 and 42.

[2] *Id.*

[3] *See Exhibit 3*, Sarah C. Haight, MPH, et al., *Opioid Use Disorder Documented at Delivery Hospitalization — United States, 1999–2014,* Center for Disease Control (CDC) Morbidity and Mortality Weekly Report, Vol. 67, No. 31, August 10, 2018.

[4] *Exhibit 4*, McQueen, Karen, et al., *Neonatal Abstinence Syndrome*, N Engl J Med 2016; 375:2468-24-79.

[5] *Id.*

According to the medical professionals, interventions before age 5 are key to providing real improvement probabilities to these NAS Babies. We must never forget that these babies were once opioid-dependent and are the child of at least one other opioid-user. Their nurturance requires constant vigilance of those facts. NAS-Babies' need for funding for treatment and monitoring is both immediate and long term, from birth into adulthood and perhaps for the rest of their lives. The best method for dealing with NAS Babies' medical and educational challenges is a funding source dedicated to them in the form of a fiduciary trust. Their care cannot be entrusted to a political city, county, or state governmental entity.

IV. THE NATIONAL EXPERIENCE WITH TOBACCO SETTLEMENT FUNDS.

A. The Master Settlement Agreement ("MSA").

In November 1998, tobacco manufacturers pledged to pay billions of dollars to forty-six states and some territories, to be paid in annually based on tobacco sales in each state.[6] Nothing in the MSA dictated the use of the settlement proceeds, and each state's use of the money was different and perhaps ever-changing, as discussed in detail in the West Virginia brief. Again, this Amicus brief expands upon that brief, but is limited to those states which chose to securitize their tobacco proceeds. However, none of the states made a huge commitment to tobacco prevention, tobacco control, or the reduction of tobacco-related disease, and these problems remain with us years later. This is discussed generally in a 2014 article which takes an in-depth look at the many states which pledged their future tobacco proceeds, lured by Wall Street to instead garner a lump-sum payment.[7]

B. The "Securitized States" – Obligating Tobacco Settlement Funds.

Wall Street interests stepped in after the tobacco settlement and significantly influenced some states' uses of settlement funds through securitization, or conversion or dedication of a state's annual

---

[6] *Exhibit 5*, Cezary Podkul, *How Wall Street Tobacco Deals Left States with Billions in Toxic Debt*, ProPublica, Aug. 7, 2014, 8 a.m. EDT, https://www.propublica.org/article/how-wall-street-tobacco-deals-left-states-with-billions-in-toxic-debt
[7] *Id.*

tobacco settlement payments. Tobacco bonds were purchased by investors, often at high interest rates and with significant sums going to the Wall Street brokers, and the proceeds were paid over to the state for its present use. As of 2014, at least one out of every three dollars coming from the tobacco settlement was pledged to investors. Many of the bond documents contained language that required payment to come only from the state's tobacco settlement funds rather than an obligation of state tax revenue, and this at times contemplated payouts of up to 40 years, with bondholders holding the right to further tobacco payments even after a default. *Id.* However, some states entered into agreements which are considered "toxic debt"; this investment vehicle utilized high-risk Capital Appreciation Bonds which had eventual balloon payments [8] Some states' toxic debt actually lead to increased overall debt by the state, affecting a state's credit rating and burdening taxpayers possibly only to fund basic state activities or to repay pre-existing debts.

New Jersey was the first state to issue tobacco bonds, raising billions of dollars thru Capital Appreciation Bonds. New Jersey continued its heavy reliance upon bond proceeds for the balancing of its state budget, doing a large deal in 2007. *See* Exhibit 5. As of 2014, 76% of New Jersey's settlement money had been pledged upon receipt to repay investors while not one penny from any source was used to fund smoking prevention programs. *See Exhibit 6*. The Capital Appreciation Bonds promised to repay $1.3 billion in 2041. To pay off that balloon payment before it became due, New Jersey pledge another $406 million of its tobacco proceeds to debt repayment beginning in 2017, another $406 million that could have been paid by the tobacco companies into the state's coffers. *See* Exhibit 5. As a result of New Jersey's massive debt and revenue projections which proved overly optimistic, requiring stopgap fixes, Standard & Poors downgraded New Jersey's credit rating in

[8] *Id.*

2011 and again in 2014, further driving up New Jersey's costs of borrowing money for activities such as improving schools and roads.[9]

In 2007, Ohio received $319 million from the sale of Capital Appreciation Bonds in exchange for its dedication of $5.53 billion of settlement money. Interest rates on these Capital Appreciation Bonds stood between 7.25 and 7.5 percent, giving a final repayment ratio of 21 times the initial amount Ohio received. In total, Ohio owes a total of $6.6 billion on these Capital Appreciation Bonds.[10] In 2014, Ohio spent an amount equal only .5% of its settlement proceeds towards smoking prevention programs.[11]

Washington State, on the other hand, chose lower risk, traditional bonds. Washington also securitized only 29.2 percent of its tobacco proceeds to repay bonds which provided lump sum proceeds of $450 million. By avoiding the high-interest Capital Appreciation Bonds and limiting the amount of securitized and therefore bond proceeds, Washington would have paid back investors by 2023.[12] However, in 2013, Washington refinanced these bonds and paid the investors back with $848 million from the refinancing. *Id.* Despite keeping 71% of its settlement proceeds, however, in 2014 Washington spent an amount equal to only .5% of its annual MSA payment to fund smoking prevention programs.[13]

By 2014, California, Illinois, New York, Rhode Island, South Dakota, and West Virginia, as well as the District of Columbia and the territories of Guam, Puerto Rico and the US Virgin Islands, had all earmarked 100% of funds received from the MSA to securitize the repayment of bonds while spending very little from other sources on smoking prevention programs. *Id.*

---

[9] *See Exhibit 6*, Cezary Podkul and Yue Qiu, *Tobacco Bonds May Be Dangerous to Your State's Financial Health*, ProPublica, August, 7, 2014, https://projects.propublica.org/graphics/tbcbonds-statemap.

[10] *See* Exhibit 5

[11] *See* Exhibit 6

[12] *See* Exhibit 5

[13] *See* Exhibit 6

C. Lessons to Be Learned: Protecting Settlement Funds from Political Manipulation

In 2018, states collectively will receive a total of $27.5 billion from both the tobacco settlement and tobacco taxes.[14] The Center for Disease Control and Prevention recommends that states should be spending a combined total of $3.3 billion of that $27.5 billion in order to mitigate the vast public health effects of tobacco use. Despite this, less than 3 percent of this money, or $721.6 Million, will be spent on smoking prevention programs. *Id.* In contrast, tobacco companies spend $8.9 billion a year marketing their products. States' use of settlement funds for general purposes, as well as their pledging their annual payment to repay debt, in some instances high-risk debt, suggest that the MSA has not met its objective of solving the public health crisis of tobacco use.

What this history reveals is that money, when left with governments who are courted by Wall Street, cannot be counted on to protect that money and use it for its intended purpose. These children need a dedicated and secure funding source to help them with their opioid-related problems, beyond the reach of grasping hands.

V. CONCLUSION

The concern these amici have as people and organizations professionally dedicated to the well-being of children and families, including this growing population of opioid-dependent babies, is that the interests and needs of NAS Babies must be recognized, and the issues adjudicated or settled on their behalf and not on behalf of anyone else.

Dated: November 20, 2018

/s/ Debra L. Hamilton
Debra L. Hamilton (W.Va. Bar No. 1553)
604 Virginia Street East

[14] *Broken Promises to Our Children: A State by State Look at the 1998 Tobacco Settlement 19 Years later*, Campaign for Tobacco Free Kids, December 13, 2017, https://www.tobaccofreekids.org/assets/images/content/2017_State_Report.pdf

Charleston, WV 25301
Telephone: (304) 610-1832
DLlaw79@aol.com
Counsel for Amici