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'Opioid Babies' Seek Class Cert. In MDL

By **Emily Field**

Law360 (January 7, 2020, 6:27 PM EST) -- Legal guardians of babies born to mothers who took opioids during pregnancy asked the Ohio federal judge overseeing the opioid multidistrict litigation to certify a class for the purpose of medical monitoring, saying Tuesday that the babies are the most vulnerable victims of the opioid crisis.

The guardians said the children were "bathed in opioids" as their nervous systems and bodies were forming in utero and were diagnosed with neonatal abstinence syndrome, or NAS, in which infants whose mothers took opioids suffer from withdrawal after birth. The NAS diagnosis means the children will face significant challenges and additional risks as they grow and will benefit from early medical monitoring, the guardians said.

But even though the opioid crisis has raged for more than 20 years, and hundreds of thousands of babies have been born with NAS, there is no long-term, large-scale medical surveillance of these children at any level, the guardians said.

The problems the children face include delayed and impaired cognitive development and long-term behavioral problems, according to the guardians.

The medical monitoring would include yearly cognition and learning testing, according to the motion. It would be funded by the defendants in the MDL, which include drug companies Purdue Pharma LP and Johnson & Johnson.

"We need to harness data, medicine, social workers and educators and immediately make them available to these innocent children," Marc Dann of Dann Law, counsel for the guardians, told Law360. "Every day we as a society wait to do that, the job gets harder."

Attorneys representing the babies asked the Judicial Panel for Multidistrict Litigation to create a special NAS infant litigation track separate from the opioid MDL, arguing that the children's unique needs and damages differentiate them from the claims brought by the local governments that opioid manufacturers and distributors fueled the opioid epidemic by reckless marketing of opioids.

But that request was **shot down** by the JPML in December 2018 on the basis that those unique damages don't outweigh the inconvenience caused by such a separation.

The guardians also argued that certifying their class is necessary because the cities and counties don't have the legal ability to bring claims on behalf of the children and don't have a duty to care for them.

"It is our position that the critical needs of the NAS children should not be subordinated to the less urgent desires of the cities and counties that have dominated this MDL," the guardians said.

Hunter Shkolnik of Napoli Shkolnik, a top plaintiffs attorney in the MDL, told Law360 that the protection and care of the babies with NAS has been a "major focus" of the counties and the MDL leadership.

"This was best outlined by the first settlement, money being allocated to help the mothers and babies at all hospitals in Cuyahoga and Summit counties before any other treatment options,"

Shkolnik said.

The guardians also highlighted "one of the most appalling misdeeds" of the opioid crisis: the flow of prescriptions to pregnant women, especially those enrolled in Medicaid.

"With nationwide numbers of over 20% of Medicaid-enrolled mothers being prescribed opioids, some states — including Ohio — have been hit even harder with upwards of 30% of pregnant mothers receiving opioids," the guardians said. "Thus, the numbers of NAS children within the Medicaid system are startling."

One of the proposed class representatives, Jacqueline Ramirez, was injured in 2001 and was diagnosed with pain disorder and prescribed opioids, according to the motion. She became dependent on opioids before she became pregnant with her youngest child and continued to be prescribed opioids during her pregnancy, according to the motion.

The guardians seek to certify a class of legal guardians of U.S. residents who were born after March 16, 2000, who were diagnosed with NAS and whose mothers were prescribed opioids while they were pregnant.

Purdue declined to comment on Tuesday. Representatives for the remaining defendants didn't immediately respond to requests for comment on Tuesday.

The guardians are represented by Marc E. Dann of Dann Law, Scott R. Bickford and Spencer R. Doody of Martzell Bickford & Centola, Celeste Brustowicz, Barry J. Cooper and Stephen H. Wussow of Cooper Law Firm LLC, Kevin W. Thompson and David R. Barney of Thompson Barney Law Firm, Kent Harrison Robbins of the Law Offices of Kent Harrison Robbins PA and Donald Creadore of the Creadore Law Firm PC.

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 Mike Curley. Editing by Jay Jackson Jr.

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