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Ohio Ruling Adds To Insurance Uncertainty For Opioid Suits

By **Jodi Green, Monica Sullivan and Meaghan Sweeney** (July 8, 2020, 6:10 PM EDT)

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Buried under the headlines of the global COVID-19 pandemic, another crisis smolders beneath the surface — one that has been described as the worst drug epidemic in history. The opioid epidemic has consumed countless lives, while spawning nationwide litigation, novel theories of liability, and settlement numbers of epic proportions.

Over 3,000 opioid-related lawsuits have been filed, most of which are consolidated before Judge Dan Aaron Polster In re: National Prescription Opiate Litigation, in the U.S. District Court for the Northern District of Ohio. The first and only reported judgment in an opioid case was $465 million.[1] The first MDL bellwether case settled on the eve of trial for a reported $260 million. Multiply those figures by 3,000 pending cases, and the true economic weight of this litigation sinks in.

The plaintiffs are a sprawling group, including medical centers, union and benefit funds, and drug-addicted babies, but the largest category of plaintiffs is governmental entities seeking to recover the costs of increased public services caused by the opioid epidemic — collectively reported to cost the U.S. an estimated annual sum of $170 billion to $214 billion.[2]

In turn, the defendants are a who's who list of the biggest names in pharma: drug manufacturers, distributors and pharmacies accused of fueling the nation's opioid crisis to line the company coffers. Criminal convictions characterizing pharma executives as street-level drug dealers pile up,[3] and the media collects sensational stories evidencing the defendants' knowledge of opioid diversion, like the 2009 email that described opioids as "[j]ust like Doritos; keep eating, we'll make more."[4]

With even multibillion-dollar companies like Purdue Pharma LP facing bankruptcy, the opioid cases truly are bet-the-company litigation. So too for insurers already reeling from the combined onslaught of losses arising from nuclear verdicts brought on by social inflation, catastrophic property events, and now COVID-19.

With so much at stake, opioid defendants have launched a search for coverage under every conceivable line of insurance, from the 1990s to the present. The most recent case addressing insurance coverage for opioid litigation is Acuity v. Masters Pharmaceutical Inc.[5]

There, on June 24, the Court of Appeals for the First Appellate District of Ohio, Hamilton County, Ohio, found that a commercial general liability insurer had a duty to defend a pharmaceutical distributor against a litany of opioid lawsuits. Without addressing the duty to indemnify, the Acuity court's answers to these questions amplify — rather than resolve — the uncertainty surrounding insurance coverage for any judgments or settlements in the still-growing opioid litigation.

Acuity v. Masters Pharmaceutical Inc.

In Acuity, Masters Pharmaceutical Inc. sought coverage under several consecutive commercial general liability policies for opioid lawsuits filed by governmental entities in three states. Masters' insurer, Acuity, sought a declaration that it had no duty to defend or indemnify Masters. The trial court found in favor of Acuity.

First, the trial court concluded that the damages sought by plaintiffs were not damages because of bodily injury, reasoning in part that governmental entities lacked standing to recover damages on behalf of individual citizens who sustained bodily injury, such as addiction. The trial court also relied on the policy's standard loss-in-progress clause, reasoning that Masters knew that its overdistribution of opioids would lead to the opioid epidemic. The appellate court disagreed on both grounds, addressed below.

Damages "Because of" Bodily Injury

The existence of damages because of bodily injury is a hotly contested legal issue in governmental opioid cases, at least under CGL policies. Contrary to an established line of cases finding no coverage, the Acuity court found although the government entities were seeking their own economic losses, "some of those losses (such as medical expenses and treatment costs)" were arguably because of bodily injury.

The Acuity court relied heavily on a 2016 U.S. Court of Appeals for the Seventh Circuit case finding a duty to defend an opioid lawsuit brought by the state of West Virginia: Cincinnati Insurance Co. v. H.D. Smith LLC.[6]

The H.D. Smith case examined the same language in the Acuity policies, which states that damages because of bodily injury include damages "claimed by any person or organization for care, loss of services or death resulting at any time from the bodily injury."[7] H.D. Smith found that the policy covered damages sought by West Virginia to care for citizens' injuries.

The Acuity court also relied on Beretta U.S.A. Corp. v. Federal Insurance Co.,[8] which evaluated coverage for governmental nuisance lawsuits involving handgun violence. Although the Beretta court found no coverage due to a products exclusion, it summarily rejected the insurer's argument that the handgun lawsuits at issue did not involve damages because of bodily injury.

Invoking the same "person or organization" language from H.D. Smith, the Beretta court reasoned that the duty to defend was triggered because the government entities damages for medical care in response to handgun violence.

The Acuity court disregarded earlier opioid cases finding no coverage, including Cincinnati Insurance Co. v. Richie Enterpises LLC[9] and Travelers Property Casualty Co. of America v. Anda Inc., describing them

as "a web of case law that is either no longer good law, has been distinguished as relating to opioid cases, or has been declined to be followed,"[10]

In Richie, the court reasoned that the same state of West Virginia lawsuit at issue in H.D. Smith was not covered because the state did not need to prove that any citizens were injured to prevail on its causes of action for public nuisance or negligence.[11] Significantly, Richie involved the same "person or organization" language at issue in H.D. Smith, but the court reiterated that the state's damages were not because of bodily injury but because of the diversion of opioids.[12]

In Anda, the U.S. District Court for the Southern District of Florida likewise found that the state of West Virginia did not "purport to assert claims on behalf of individual citizens for the physical harm personally sustained by those citizens," further noting that "any reference to the drug abuse and physical harm to West Virginia citizens merely provides context explaining the economic loss to the state."[13]

Other cases involving coverage for government entities have reached divergent results, including one Ohio case finding no coverage for the costs to abate a public nuisance involving lead paint.[14] In Millennium Holdings LLC v. Lumbermens Mutual Casualty Co., which was not addressed in Acuity, an Ohio trial court echoed the same reasoning in Richie, stating that the nuisance claim was not covered because property damage was not an element of the nuisance cause of action.[15]

Against this backdrop, the Acuity ruling adds further uncertainty to the question of whether insurance policies cover damages sought by a government entities for their own economic losses.

The Loss in Progress Clause

The Acuity court's ruling on the "loss in progress" provision, also known as a Montrose clause, is a reminder that outcomes in the interpretation of knowledge-based coverage defenses are extremely difficult to forecast.[16] The Montrose clause, commonly found in the insuring agreement of CGL policies issued after the late 1990s, derives from the fundamental concept of fortuity found in every insurance policy.

In policies that include this provision, coverage is afforded only if "[p]rior to the policy period, no insured … knew that bodily injury or property damage had occurred, in whole or in part."

In interpreting the clause, the Acuity court stated the issue as one of first impression, having found no cases examining similar provisions in the context of the opioid epidemic. But cases involving other fortuity concepts, like known loss, the existence of an occurrence, or expected and intended injury, may offer guidance. These concepts derive from the same overarching proposition that formed the basis for implementing the Montrose clause: "the insurance never, under any circumstances, responds to injury or damage that is known by the insured prior to the policy period."[17]

The most-cited opioid case involving knowledge of the opioid epidemic is The Travelers Property Casualty Co. of America v. Actavis Inc., where a California court found no duty to defend a pharmaceutical manufacturer on the basis of no occurrence.[18] The Actavis court found that the existence of an opioid-induced public health epidemic was not an unexpected, independent or unforeseen effect of the fraudulent marketing of opioids.

More recently, in Certain Underwriters at Lloyd's of London v. Conagra Grocery Products Co., a California trial court found no coverage for nuisance damages awarded to a governmental entity arising

from the sale of lead paint.[19] In applying California Insurance Code Section 533, which precludes coverage for willful acts, the court dismissed the insured's argument that it knew only of speculative risks arising from lead paint, finding that the insured knew "lead paint used on the interiors of homes would deteriorate" and "would poison children and cause serious injury."[20]

In Miami-Luken Inc. v. Navigators Insurance Co, the U.S. District Court for the Southern District of Ohio applied Ohio law to construe a specific litigation exclusion in a D&O policy issued to Miami-Luken, an opioid distributor.[21] The court applied the exclusion to preclude coverage for a criminal investigation by the DEA because the insured knew of the state of West Virginia lawsuit before the policy incepted.

Although the Drug Enforcement Administration investigation encompassed a broader geographic area and timeframe than the West Virginia lawsuit, the Miami-Luken court still found no coverage because the two matters involved many of the same pharmacies, the same controlled substances, and the same alleged diversion of opioids.

The Acuity court did not discuss any of these cases. Instead, it relied on nonopioid precedent interpreting the Montrose clause in the context of property damage involving construction defects and plumbing parts.[22]

Significantly, in Ohio Casualty Inurance. Co. v. Mansfield Plumbing Products LLC, the insured argued that even if it knew that its plumbing parts were causing damages prior to the policy period, it did not know the extent of future damages at other properties.[23] The court disagreed, finding that the insured's knowledge of some damages before the policy period compelled a finding of no coverage.

Nevertheless, the Acuity court applied a stringent rule precluding coverage for opioid claims only if Masters had knowledge of the specific injuries at issue. The Acuity court first noted that the DEA had launched an opioid investigation against Masters before the policies incepted.[24]

Despite agreeing that Masters may have been aware of a risk that opioid diversion could cause damages, the court found the evidence at the motion to dismiss stage insufficient to determine if Masters actually knew of the specific damages sought by the government plaintiffs prior to the policy period.

A Continued Ripple Effect of Uncertainty

The Acuity decision is noteworthy, as one of a handful of cases construing the availability of insurance coverage for defendants involved in the opioid epidemic. Yet, in addition to the conflicting web of cases it finds companionship with, Acuity's overall impact may be tempered by several other important caveats.

First, the case was construed under Ohio law, which may differ in important respects from other jurisdictions' interpretations of the provisions at issue. As exemplified by the cases discussed above, consensus across jurisdictions may be difficult to achieve. In addition, insurance policies have different terms, and the actual policy language at issue may compel a different result.

Also, the Acuity decision was limited to the duty to defend, the analysis of which was based on only the allegations against Masters. As pleadings are amended, the analysis of this issue will likely change. Further while the Acuity court specifically held that some losses — specifically, medical-related expenses

— were arguably because of bodily injury for purposes of triggering the duty to defend, it did not hold that there was an ultimate duty to indemnify Masters for all damages sought by the government entities.

Likewise, the fact-specific nature of knowledge-based defenses — and differing objective or subjective standards applied by courts to those defenses — makes it difficult to rely on precedent.

The Acuity court's ruling did not foreclose the possibility that further evidence could be adduced in discovery to support the knowledge-based defense for purposes of indemnity. Further, allegations against other defendants, including those that paid millions of dollars in fines to the DEA, may provide indisputable evidence of intent and knowledge and trigger fortuity-related principles to limit or preclude coverage.

For now, the stakes remain as high as ever, both for policyholders embattled in the opioid litigation, and for insurers evaluating coverage for these lawsuits under an irreconcilable body of case law that continues to diverge due to differing types of policies, claims and alleged damages.

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[1] The award was reduced after trial from $572 million due to a mathematical error in the judge's calculation of damages. State of Oklahoma v. Purdue Pharma, et al., Final Judgment after Non-Jury Trial, No. CJ2017-816 (Nov. 15, 2019).

[2] National Institute on Drug Abuse, Opioid Overdose Crisis (May 27, 2020); Economic Impact of Non-Medical Opioid Use in the United States, Society of Actuaries (October 2019), available at https://www.soa.org/globalassets/assets/files/resources/research-report/2019/econ-impact-non-medical-opioid-use.pdf

[3] General Liability Insurance and the Opioid Epidemic, CPCU Society Insights (Fall 2019).

[4] Scott Higham, Sari Horwitz, and Steven Rich, Internal drug company emails show indifference to opioid epidemic, The Washington Post (July 19, 2019), available at https://www.washingtonpost.com/investigations/internal-drug-company-emails-show-indifference-to-opioid-epidemic-ship-ship-ship/2019/07/19/003d58f6-a993-11e9-a3a6-ab670962db05_story.html.

[5] Acuity, v. Masters Pharm. Inc., C-190176, 2020 WL 3446652 (Ohio App. Ct. June 24, 2020).

[6] Cincinnati Ins. Co. v. H.D. Smith, L.L.C., 829 F.3d 771 (7th Cir. 2016).

[7] Acuity v. Masters Pharm. Inc., C-190176, 2020 WL 3446652 (Ohio App. Ct. June 24, 2020).

[8] Beretta U.S.A. Corp. v. Fed. Ins. Co., 117 F. Supp. 2d 489 (D. Md. 2000), aff'd, 17 Fed. Appx. 250 (4th Cir. 2001).

[9] Cincinnati Ins. Co. v. Richie Enters., LLC, 2014 WL 3513211, at *5 (W.D. Ky. July 16, 2014)

[10] Travelers Property Cas. Co. of Am. v. Anda, Inc., 90 F.Supp.3d 1308 (S.D.Fla.2015), aff'd, 658 Fed. Appx. 955 (11th Cir.2016).

[11] Cincinnati Ins. Co., 2014 WL 3513211, at *5 (W.D. Ky. July 16, 2014).

[12] Id. at *6.

[13] Id.

[14] See, e.g., Merchants Mut. Ins. Co. v. Allcity Ins. Co., 664 N.Y.S.2d 690 (App. Div. 1997) (finding no coverage for nuisance claims involving pollution because nebulous references to a "risk of impaired health" and a "threat to human … life" did not convert the alleged economic losses into damages for bodily injury); Diamond State Ins. Co. v. Chester-Jensen Co., Inc., 611 N.E.2d 1083 (Ill. App. Ct. 1993) (finding no coverage for claims of lost productivity asserted by the State of Illinois resulting from installation of a defective HVAC system because bodily injury was only a "tangential factor" leading to the State's complaint and the State was not seeking recover for damages sustained by its employees).

[15] Millennium Holdings LLC v. Lumbermens Mut. Cas. Co., 2013 WL 12344184, at *4 (Ohio Ct. Com. Pl. August 8, 2013).

[16] The provision was added to insurance policies after the California Supreme Court's ruling in Montrose Chem. Corp. v. Admiral Ins. Co.,10 Cal. 4th 645 (1995), which found coverage for damages even though the policyholder was aware of the loss, where the full extent of the loss was not known to the insured.

[17] See Randy J. Maniloff, Montrose Endorsement: Shining a light on the "Known Loss Doctrine," FC&S Online (Nov. 2003).

[18] The Travelers Property Casualty Co. of America v. Actavis, Inc., 16 Cal. App. 5th 1026, 1043 (2017).

[19] Certain Underwriters at Lloyd's of London v. Conagra Grocery Products Co., 2020 WL 3096821, at *3 (Cal. Super. Ct. Feb. 26, 2020).

[20] Id.

[21] Miami-Luken, Inc. v. Navigators Ins. Co., 1:16-CV-876, 2018 WL 3424448 (S.D. Ohio July 11, 2018).

[22] Acuity, supra at *9.

[23] Ohio Cas. Ins. Co. v. Mansfield Plumbing Prod., L.L.C., 2011-COA-009, 2011 WL 3930292, at *3 (Ohio App. 5th Dist. Sept. 7, 2011).

[24] Acuity, supra at *10.