

Expert Analysis

Courts Shouldn't Consider Bodily Injury Claims In Opioid Suits

By Adam Fleischer

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Insurance coverage confusion is seeping into America's multibillion-dollar opioid lawsuits as they creep toward resolution. The duty to defend applies to suits seeking damages for bodily injury to which this insurance applies. The narrowed public nuisance claims driving the opioid lawsuits do not seek compensation for bodily injuries of any individuals.

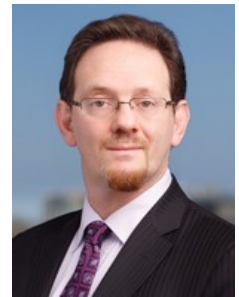
Instead, they seek funding for decades of future governmental social services necessitated by the alleged intentional business schemes of the defendants. This distinction is monumentally consequential for insurance purposes.

While compensation to individuals for injuries caused by accident could be claims "to which the defendants' insurance applies," the funding for future governmental services to abate a public nuisance is not likely a claim for bodily injuries to which the defendants' insurance applies.

A few recent insurance coverage rulings rightfully acknowledge that the bellwether lawsuits, which test the merits of thousands of similar government suits pending in the opioid multidistrict litigation, are being driven by public nuisance theories that specifically do not include any claims for individual bodily injuries.

However, when it came time to conduct insurance coverage analyses, in two rulings the courts analyzed coverage as if the suits present individual bodily injury damages to which the defendants' insurance applies.

This confused blurring of the public nuisance claims at issue with the individual bodily injury claims not at issue, threatens to simultaneously manufacture insurance coverage where it was not intended and deplete insurance where it may be needed the most.



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Three recent decisions wrestling with these issues are, *Cincinnati Insurance Co. v. Discount Drug Mart Inc.*, *Rite Aid Corp. v. ACE American Insurance Co.* and *Bliss Sequoia Insurance & Risk Advisors Inc. v. Allied Property & Casualty Insurance Co.*, discussed below.

The Hierarchy of Five Opioid Coverage Issues

To determine whether suits for future social service funding are covered by general liability insurance, there arise five related insurance coverage analyses.

1. Bodily Injury to Which the Insurance Applies

Liability policies provide that the insurer will defend the policyholder against suits seeking damages for or because of bodily injuries to which this insurance applies. Therefore, the first step in an opioid coverage analysis is to determine exactly what injuries and damages are alleged in the suit to which the insurance is alleged to apply.

2. Accidental Occurrence

If a court finds that an opioid suit seeks damages for bodily injuries to which the insurance applies, the court must next determine if the particular bodily injuries in the suit are allegedly caused by an accidental occurrence.

3. Trigger

If the bodily injuries to which the insurance applies were caused by an accidental occurrence, then the court must determine when the particular bodily injuries took place, and whether they trigger one insurance period or multiple different periods.

4. Number of Occurrences

Once a court determines when the bodily injuries alleged against the policyholder took place, the court must determine how many occurrences exist within each triggered period, and how many self-insured retentions apply within each period.

5. Prior Knowledge

For any particular bodily injury to which the insurance allegedly applies, the court must determine if that bodily injury was in progress or known to the policyholder before the policy period, thereby potentially eliminating coverage.

Does the multidistrict litigation present claims for bodily injury to which this insurance applies?

In most lawsuits, the plaintiffs have typically suffered broken limbs, burns or other bodily injuries for which they seek to hold the defendant policyholders liable. It is effectively presumed that such suits do seek to establish liability for bodily injuries to which the insurance allegedly applies.

However, in the public nuisance opioid lawsuits — there are no individual bodily injuries to which the insurance is alleged to apply. The bellwether counties specifically have pled that plaintiffs do not seek damages for death, physical injury to a person or emotional distress.

In a multidistrict litigation discovery ruling, the court noted, "Plaintiffs explain they are 'not claiming any damages for personal harm suffered by any individual or group of individuals who were harmed by Defendants' conduct.'"

So, if the opioid public nuisance claims do not seek damages for individual bodily injuries, what is the injury, damage and liability to which the insurance is alleged to apply?

The first option is that the real claims in the opioid multidistrict litigation are claims for the economic losses paid by governments for the unreasonable interference with a public right.

If the funding of governmental services are the true damages to which the insurance arguably applies, then the suits do not present claims for bodily injury to which this insurance applies, and there should be no liability coverage. Two courts have ruled in favor of insurers on this issue.

The other option is that the liability and damages alleged in the multidistrict litigation suits are for general public injury for which the governments are providing social services. In an Oct. 6 memorandum filed by the opioid plaintiffs, they explained:

Plaintiffs' claims ... are based on harms to public health and public safety. ... The burden of the opioid epidemic is borne by the community as a whole. ... Plaintiffs' claims are based on a significant interference with rights common to the general public: the rights to the health and safety of the community at large.

If a court finds that such general public harm is the real injury at issue, then a court must determine whether this general public harm constitutes bodily injury to which this insurance applies. If a court finds that it does, it would then be this general public injury that an insurance analysis must run through the hierarchy of coverage issues discussed herein.

Opioid coverage confusion abounds when courts fail to recognize the difference between individual bodily injury claims, which are not at issue in the opioid multidistrict litigation, and the economic or general public injury, which is the only harm now at issue in the opioid multidistrict litigation.

Rite Aid v. ACE American Insurance

Rite Aid filed suit in the Delaware Superior Court against ACE, which issued primary liability insurance from 2007 to 2018. Rite Aid sought a defense for over 1,100 opioid suits, including the multidistrict litigation bellwether suits, which had been narrowed to plead only public nuisance and conspiracy. Rite Aid moved for summary judgment on the duty to defend under ACE's 2015 policy.

Bodily Injury to Which Insurance Applies

In finding that ACE has a duty to defend, the court intertwined the claims for which a defense was sought, with other claims and damages not even pled.

To begin, the court properly recognized the underlying plaintiffs seek "billions in governmental and economic costs incurred in providing a wide array of public services in response to the influx of opioids into their communities."

These claims present "a public health epidemic of addiction, abuse, overdose and death." The court recognized these claims are based on the "severe and far reaching public health, social services and criminal justice consequences" of the epidemic.

However, when determining the claims to which the insurance applies, the court looked beyond the damages to the general public alleged in the lawsuit, and found that the liability in the suit was for bodily injury to individuals — completely ignoring that the individual bodily injuries were not the claims to which the insurance was even being asked to apply.

This created coverage confusion and inconsistencies when the court moved through the remaining hierarchy of coverage issues discussed below.

Accidental Occurrence

The Rite Aid decision framed the alleged cause of the public nuisance claims as a marketing scheme and a supply chain scheme involving the distribution and disbursement of opioids.

In fact, the multidistrict litigation court itself characterized the public nuisance claims as anything but accidental in a ruling that commented "Plaintiffs clearly allege Defendants engaged in intentional conduct to dispense opioids in a manner that caused an oversupply of highly addictive drugs in Plaintiffs communities."

Nevertheless, despite the recognition that the allegations are rooted in an intentional business scheme, the Rite Aid court skipped this analysis and simply presumed that the governmental damages arise from an accidental occurrence.

Trigger

The Rite Aid court was tasked with deciding whether the alleged public nuisance first manifested prior to 2015, in which case the nuisance claim could not trigger the 2015 policy under Pennsylvania law.

In determining when the general public harm alleged in the multidistrict litigation first manifested, the Rite Aid court again mistakenly looked beyond the general public harm for which insurance is sought, and looked instead to the manifestation of individual injuries which are specifically not pled in the lawsuits.

The court concluded that it could not determine when an individual's suffering of opioid abuse and opioid use disorder first manifested, because it believed such injuries are somehow latent in nature. The court noted that "the complaints do not establish when any one or all persons' alleged bodily injury caused by Rite Aid occurred."

Of course this information would never be alleged in a suit that seeks no liability or damages for individual injuries. Nevertheless, because the court believed that some individual bodily injuries potentially took place during 2015, the court found that the 2015 policy year was triggered, potentially in addition to other policy years.

If, the court properly recognized that the claims to which insurance may apply are claims seeking damages to fund social services for general public impact of the opioid epidemic, then it becomes clear for the trigger analysis that the general public injury at issue in the multidistrict litigation was certainly known across the country many years before 2015.

Prior Knowledge

The insurance provisions in Rite Aid precluded coverage if the loss to which the insurance applies was known in whole or in part prior to the policy period.

Creating further opioid coverage confusion, the court recognized that although there were no individual injury damages or liability for which insurance is sought, it was nevertheless reasonable to conclude that, because Rite Aid could not have previously known of injuries to individuals who were injured during 2015, then the prior knowledge defense failed.

This analysis again shows the inconsistent interplay between the coverage issues. If there are no individual claims for which damages are sought in the suit, then it should be impossible to conclude that unpled and unspecified individual injuries in 2015 are the ones to which this insurance applies, and the ones against which prior knowledge is measured.

Bliss Sequoia Insurance v. Allied Property & Casualty Insurance

The U.S. District Court for the District of Oregon was faced with a similar issue as in Rite Aid, when it was asked to decide whether insurance coverage is determined by the type of misrepresentation claims at issue in the underlying lawsuit against the policyholder, or determined by unpled bodily injury claims that preceded the claims in underlying lawsuit.

In Bliss Sequoia, a child was seriously injured at a water park. The water park did not have the proper insurance in place, and sued its insurance consultant for misrepresentation and professional negligence. The insurance consultant sought coverage under its general liability policy which covered claims because of bodily injury, but did not cover claims for professional misrepresentation.

Like the opioid defendants, the insurance consultant argued that, because the misrepresentation lawsuit arose from an unpled bodily injury claim, this meant that the misrepresentation claims in the current suit were because of bodily injury.

The Bliss Sequoia decision properly recognized that the claims in the lawsuit were not bodily injury claims and that there could be no legal obligation in the misrepresentation suit to pay damages for bodily injuries that were not even pled.[1]

While the Bliss Sequoia court properly concluded that coverage must be premised upon the claims in the lawsuit — and not upon tangentially related claims outside of the lawsuit — the court struggled to then explain how this approach was applied in Rite Aid. The court explained that although the governmental plaintiffs in the underlying lawsuits at issue in Rite Aid sought damages for economic harm, those economic harms were causally connected to bodily injuries caused by the insureds, which created the duty to defend.

However, this is wrong. There are no claims in the multidistrict litigation bellwethers that any particular individual injuries were caused by Rite Aid any more than that they were caused by one of over 20 other defendants. The Bliss Sequoia ruling demonstrates the coverage confusion that results when a court examines liability for harm to the general public as if it was a composite claim for numerous individual bodily injuries, when it is not.

Cincinnati Insurance v. Discount Drug Mart

In another recent opioid insurance decision, the Ohio Court of Common Pleas examined whether Cincinnati Insurance owed a duty to defend Discount Drug Mart against the narrowed public nuisance claims in the federal multidistrict litigation.

This court's analysis also began by properly acknowledging that the damages in the bellwethers are different in kind and degree than the harms to individual Ohio citizens. The court noted that "all of the relief sought is for economic damages incurred by the Counties because, as political entities, they cannot suffer bodily injury."

However, after recognizing that the multidistrict litigation claims for which coverage was sought include no claims for individual bodily injury, the Discount Drug Mart court inexplicably concluded that the absolute public nuisance claims pending in the multidistrict litigation do indeed seek damages because of bodily injury — with no analysis of how that can be possible.

The court mistakenly treated hypothetical bodily injury claims for which no liability was at issue, as if they were the exact claims to which this insurance applies.

Conclusion

If a restaurant's food sickens a patron, a government may well be motivated to pay for better and more regular food inspections for community restaurants. However, this does not mean that the government's economic expenditure constitutes damages because of a bodily injury to which the restaurant's insurance applies, particularly if there is no claim against the restaurant for the bodily injury.

If a negligent coach allows an errant baseball to strike a bystander at a little league game, a government may be motivated to pay for better training for coaches and protective fencing at the parks. However, this does not mean that the government's economic expenditure constitutes damages because of a bodily injury to which the coach's insurance applies, particularly if there is no claim against the coach for the bodily injury.

In the opioid context, the billions of dollars governments will pay in future decades to abate the opioid crisis are not payments because of individual bodily injury claims to which insurance applies, particularly when those individual injuries are not even pled against the policyholder defendants.

Certainly governments may pursue funding of their abatement efforts from the parties they believe caused the public nuisance, but such claims are not bodily injury claims being tendered to the defendants' insurance policies.

Drawing this differentiation will become even more important, as recent weeks have seen new insurance coverage suits filed for the public nuisance claims against opioid distributors McKesson Corp. and Cardinal Health Inc.

Should courts continue to blur the distinction between claims for individual injury as compared to governmental abatement funding, insurance policies may be unexpectedly emptied to pay for social services funding, and thereby leave nothing behind for true claims seeking liability to compensate individual bodily injury claims that may be brought.

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[1] See also, *Diamond State Ins. Co. v. Chester-Jensen Co., Inc.*, 243 Ill.App.3d 471, 477-78 (Ill. App. 1993)("[t]he fact that the State's claim for its economic losses as a result of diminished productivity may have been occasioned in part by the illness of its employees, does not transmute its economic claim for which it seeks recovery from [the insured] into one for bodily injury").