Square Pegs in Round Holes

Can America's Opioid Epidemic Squeeze into Tort or Insurance Law?

By Adam H. Fleischer and Allyson C. Spacht

The opioid lawsuits are not premised on the traditional evidence or causation proof concepts, and liability insurance simply is not structured to fund generalized abatement of social harm.

The worst drug crisis in American history has trampled its way through all traditional constructs of both tort law and insurance law, with much of this long, strange trip yet to come. Whether the tort system can be contorted to allow recovery for social harm in the absence of individual evidence or causation, and how liability insurance may respond to such societal injury, will be the subject of increasing debate in the coming months. The issues at the heart of this debate, and the challenges they raise, are discussed below.

The Claims at Issue

There are now over 2,000 lawsuits pending in multidistrict litigation in Cleveland, Ohio, involving over 1,600 local governmental plaintiffs. In addition to those suits, forty-eight state attorneys general have filed their own lawsuits against the pharmaceutical industry. Recent reports tell of a $48 *billion* global settlement being discussed by just a subset of defendants.

Generally, these suits allege that opioid manufacturers, distributors, and retailers are to blame for improperly marketing and selling opioids. Essentially, the plaintiffs allege that the opioid defendants created a market for opioids for unapproved uses, oversupplied that market, manufactured a nation of addicts, and now must pay to clean it up. While the plaintiffs assert a variety of causes of action against the opioid defendants, including negligence, unjust enrichment, fraud, and violations of consumer protection laws, their public nuisance and conspiracy theories are really what is at the heart of their claims and the remedies they seek. Specifically, the plaintiffs have asked the defendants to fund a prospective abatement plan to address the epidemic and prevent future harm, as well as to compensate

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the plaintiffs for any future damages incurred as a result of the opioid epidemic.

The problem with the opioid claims is what they are *not*. They are *not* suits seeking compensation for the injuries suffered by individuals. In fact, they are not premised on any particular person or group of people who can trace a specific injury to the specific conduct of any specific defendant. So while the opioid lawsuits are framed as tort actions seeking tort recovery, they are not premised on the traditional evidence or proof of causation required for viable tort claims. Accordingly, the first question when analyzing an opioid lawsuit is whether such a claim for "societal injury" can even survive in the tort construct.

Can There Be Liability Without Individual Evidence or Causation?

The opioid plaintiffs make no secret of the fact that they cannot, and are not trying to, prove individualized injury caused by specific defendants. The plaintiffs point out that they are not suing individual defendants for the particularized harm that the defendants caused; they are suing the industry as a whole, alleging that it caused an epidemic. This is tremendously problematic as a tort claim because the opioid epidemic has innumerable intertwined and engrained social, political, criminal, and interpersonal contributing causes, all differing on a case-by-case basis. The judicial system historically has not functioned to circumvent, ignore, or blur those differing causes. Instead, it has held fast to stringent tests of causation to prevent, for social convenience, foisting the financial burden of social harm on deep-pocketed corporations, irrespective of proof. In part, these stringent legal tests for liability have been relied on to allow corporations and their insurers to innovate, operate, compensate, and manage risk properly—perhaps until now.

The temptation of casting aside proof in favor of social welfare funding, particularly in the opioid context, was addressed earlier this year by a Connecticut state court in *City of New Haven v. Purdue Pharma, et al.*, No. X07HHDCV6086134S, 2019 WL 423990 (Conn. Sup. Ct. Jan. 8, 2019). In that January 2019 decision, Connecticut state court Judge Thomas Moukawsher dismissed the claims of Connecticut cities against twenty-five drug companies because the plaintiffs would never be able to prove which defendant or defendants caused the governments' expenditures for the opioid crisis.

Judge Moukawsher contrasted the civil claims before him with the criminal law enforcement actions that present claims that are "the righteous manifestations of government vindicating the public interest." *Id*. In contrast, the court explained, in this instance, the plaintiffs sought not to "vindicate the public interest," but instead, to "gain money solely for themselves," so strict civil rules must apply about who can sue who for what. *Id*. In this respect, Judge Moukawsher noted, while all of society surely has suffered from the opioid crisis, we cannot all simply line up for our personal share of tax recoupment, declining property values, rising crime rates, and personal anguish. If we are to safeguard a rational legal system, Judge Moukawsher explained, courts cannot endorse a "wildly complex and ultimately bogus system that pretends to measure the indirect cause of harm to each individual [municipality] and fakes that it can mete out proportional money awards for it." *Id*. at * 2.

The *New Haven* decision explained that it would be impossible to distinguish the different harms caused by the activities of each of the many defendants to each of the many different cities. For these reasons, Judge Moukawsher dismissed the cities' claims, concluding that to establish civil liability for a social crisis "would inevitably require determining causation by conjecture. *It would be junk justice*." *Id*. (emphasis added).

Conversely, "causation by conjecture" is exactly what allowed two bellwether cases for the over 2,000 lawsuits pending in multidistrict litigation (MDL) in Cleveland, Ohio, to head to trial on October 21, 2019, before those two suits settled for $250 million on the morning of opening statements. The MDL court now is wrestling with the selection of four new "bellwether" trials to pick up where the first two left off.

The bellwether plaintiffs in the first two cases asserted that they could prove their cases by relying on aggregate data that demonstrates that the defendants, *as a group*, flooded the market with opioids, which allegedly now requires the defendants to pay for such things as increased police costs for drug crimes and funding for social programs such as foster care for children removed from opioid-addicted parents and opioid addiction treatment. The defendants moved for summary judgment on the plaintiffs' claims, arguing that the connection between the defendants' alleged conduct and the plaintiffs' claimed injuries was too attenuated to support a finding of proximate causation. Judge Polster, who presides over the MDL, rejected the defendants' arguments and found that the plaintiffs could establish causation by showing that (1) the defendants generally engaged in wrongful conduct that increased the public supply of prescription opioids in general, and (2) the governmental plaintiffs have suffered the sort of societal injury that would be an expected consequence of the defendants' wrongful conduct. While Connecticut Judge Moukawsher believes such an approach is "junk justice," Judge Polster has shown a predisposition to allow bellwether plaintiffs to rely on just such an approach to get their cases to the jury.

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It remains to be seen whether the thousands of other opioid lawsuits pending throughout the country will be accepted as a "nouveau" tort construct to permit recovery for social harm, created by courts seeking elaborate paths to establish funding for social liability for such claims, or whether these claims will be deemed an assault on the legal system that is designed to dip into deep pockets without accounting for traditional notions of causation and damages and dismissed as "junk justice," as in *New Haven*. The battlefield on which tort claims

for societal harm may ultimately live or die has been primed, and a victor may very well emerge in the coming year. Whether these tort claims for societal harm can lead to covered damages is constrained by the plaintiffs' ability to present and prove damages in the absence of individual harm and causation, as discussed below.

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Can There Be Damages Without Individual Harm or Causation?

Unable to prove individualized harm or proximate causation, the MDL bellwether plaintiffs have constructed a generalized societal damages model to support their claims. The plaintiffs effectively have relied on market effects to extrapolate societal injury and damages. If this model is permitted in the opioid realm, it may have very far-reaching consequences, driving plaintiffs' attorneys toward other claims for generalized societal harm, with potentially devastating and existential outcomes for defendants and their insurers.

The plaintiffs' "societal damages model" has four steps, proffered through various expert reports and testimony. *One,* taking it as true that all the marketing conduct of each defendant was wrongful, identify the amount of the extra morphine products that entered the market due to that wrongful conduct through expert calculations. *Two,* identify the amount of various types of social harm (*i.e.*, addiction, overdose, etc.) that was due to the portion of the product added to the market due to the defendants' wrongful conduct, which was calculated in step one. *Three*, identify the cost of the social harm that was calculated in step two. *Four*, extrapolate these harms and costs to future decades, relying on an abatement expert. Rather than using traditional tort concepts of evidence, damages, and causation, the societal damages at issue will materialize through a network of interdependent expert witnesses.

The opioid defendants have challenged this damages model through summary judgment filings that point out several notable flaws in the model. *One*, the plaintiffs do not present any evidence that specific marketing conduct caused particular purchases of prescription opioids and the resulting addiction or harm. *Two*, the model inaccurately assumes that all the defendants' marketing efforts were illegal. It also assumes that all the defendants marketed opioids, which is not accurate. *Three*, the model relies on opioid sales from 1995 to 2011 and assumes that all opioid-related harm after 2011 was caused by pre-2011 conduct, which seems facially unconvincing. *Four*, the model does not account for intervening causes that both have broken the causal chain and contributed funds to abate the opioid epidemic. For example, other well-documented causes of the opioid epidemic that must be accounted for in the opioid lawsuits include the following:

- Insys Pharmaceuticals' illegal marketing practices surrounding the promotion of its opioid products, which resulted in a criminal conviction of its top executives, as well as a $225 million settlement with the Department of Justice (DOJ);
- Reckitt Benckiser Group's contribution to the opioid epidemic through the improper marketing of the opioid addiction treatment drug Suboxone, for which it reached a $1.4 billion settlement with the DOJ;
- Morris & Dickson's conduct in failing to report suspicious orders of hydrocodone and oxycodone, as a contributing factor toward the epidemic, for which the company paid $22 million in civil penalties; and
- The Indian Health Service Hospitals' contribution to public nuisance through its deficiencies in opioid prescription and dispensing practices, which were found to increase the risk of opioid abuse, misuse, and overdoses to a vulnerable population, according to a July 2019 audit by the Office Inspector General.

Despite the defendants' protestations, Judge Polster has, to date, permitted the bellwether plaintiffs to rely on the societal damages model to prove their damages, ruling that any challenge to causation is reserved for trial, and the plaintiffs can prove their case if they can show that the defendants increased the flow of opioids into the plaintiffs' communities and that the societal harm the plaintiffs seek to remedy is consistent with that conduct. Judge Polster also found that public nuisance damages are forward-looking, equitable in nature, and not compensatory, noting that such an award is not a traditional damages award but is to pay for the cost to rectify continuing and future societal harm.

The plaintiffs are relying on generalized, aggregate, market data not only to sidestep the causation requirements of their claims against opioid manufacturers, distributors, and retailers, but also to estimate prospective abatement plans and future damages spanning dozens of years to prevent and remedy future harm. The model does not specifically investigate who should fund these plans, apportion liability, or account for funding offsets from government programs and settlements. Judge Polster's willingness to accept this unapologetic reformulation of tort law to allow for the potential recovery for societal harm may have devastating consequences for defendants in tort litigation and their insurers in the future. The pressure caused by such potential financial devastation has led to a new round of disputes related to settlement, discussed below.

Settlement Implications of Societal Damages Without Causation

Considering how the MDL has unfolded, and the risks and pressures discussed above, "societal settlement" efforts were initiated that seem destined to create another universe of new legal disputes. One the one hand, Judge Polster has created a settlement class of local counties who can negotiate toward a global settlement, while on the other hand, various states are pursuing a competing effort for them to be the negotiators behind a global settlement.

Judge Polster's settlement vision relies on his judicial creation of a new and unprecedented "local negotiating class" consisting of municipalities and local gov-

ernments, to achieve a global settlement. To do so, Judge Polster uses the federal class action rules in a way that they have never been used before—to create a negotiating class involving thousands of plaintiffs who are, in fact, not part of a class action. Judge Polster's negotiating class is problematic because, if such a negotiating class does unfold pursuant to the blueprint Judge Polster has authorized, then the distribution of any settlement funds would proceed without the need for plaintiffs to tie their alleged injuries to the conduct of any one defendant. Rather, under Judge Polster's model, settlement funds would be distributed based on three metrics: (1) the number of morphine milligram equivalents in the opioid prescriptions filled within each class county; (2) the number of total overdose deaths in the county; and (3) the number of opioid-use disorder cases in the county. The negotiating class also fails to promote global resolution as it does not include as class members the other types of plaintiffs with cases pending in the MDL, including states, hospitals, and third-party payors.

On the other hand, according to an October 21, 2019, *New York Times* report, three of the largest pharmaceutical distributors in the country, McKesson Corporation, Cardinal Health, and AmerisourceBergen Corporation, are negotiating with four selected attorneys general toward a global settlement template of their own. Recent news reports indicate that these discussions involve payments in cash and services totaling over $48 billion, to be distributed over the next two decades. What remains to be seen, however, is how this proposed settlement would account for the lawsuits brought by local governments in those states. The states seek to be the stewards of societal harm and settlement talks, but it seems unlikely that the defendants would agree to multi-billion-dollar settlements that do not release them from liability for the over 2,000 lawsuits brought by local governments.

The challenges pertaining to how to conduct "societal settlement negotiations," and who has the ability and authority to do so, is indicative of the problems of allowing such societal damages into the tort arena in the first place. Furthermore, it raises serious concerns whether any such societal negotiations would be covered under any type of liability insurance.

Insurance Implications of Damages Without Causation

Liability insurance simply is not structured to fund the future abatement of generalized social harm. The plaintiffs' theory of their cases and Judge Polster's rulings highlight the inherent incompatibility between the purpose and language of liability insurance policies, and the relief sought by the opioid plaintiffs.

For example, liability policies generally do not cover intentional or fraudulent conduct. Instead, most liability policies only insure damages caused by an "occurrence," which is defined to mean an "accident." The plaintiffs' public nuisance claims are largely premised on intentional conduct, including fraudulent and deceptive marketing of prescription opioids, which Judge Polster has emphasized throughout his rulings in the MDL. The plaintiffs' allegations and the facts required to meet their burden of proof raise serious questions as to whether any liability arising from the plaintiffs' claims can fit within the insurance construct of an "accidental occurrence."

Similarly, liability policies generally do not cover injuries that began, in whole or in part, before the insurance period, or which were known to the policyholder before the policy's inception. These "prior knowledge" defenses are either expressly enumerated in the policy language or applied by courts through various common law doctrines. The plaintiffs allege that the opioid crisis can at least be traced back to the late 1990s, and the defendants have, therefore, known since that time of the harm caused by their alleged fraudulent marketing and distribution of prescription opioids. Furthermore, many of the defendants have settled investigations by the federal government for violations of the Controlled Substances Act, arising from their failure to control distribution of prescription opioids. In addition, facts illuminated during discovery in the opioid lawsuits indicate that many of the defendants knew of their role in the opioid epidemic for many years prior to the filing of the opioid lawsuits. These facts point to insurance coverage questions related to when and to what extent the defendants knew of the harm to the public that they allegedly helped create and exacerbate, and insurance coverage after such knowledge existed may be unavailable.

In addition, liability policies are unlikely to insure the payment for prospective equitable abatement. Instead, liability policies generally cover a policyholder's legal compensation paid to a claimant "because of" or "for" "bodily injury" that takes place during the policy period. An award of "equitable abatement" to fund future public services arguably does not qualify as compensatory damages "because of" or "for" injury to a person. Some courts already have ruled that insurance does not cover generalized costs to society incurred to address the opioid epidemic because such damages are not "because of" or "for" "bodily injury" that is sustained by "a person." *See Acuity v. Masters Pharmaceutical, Inc.*, No. A1701985 (Ohio Ct. Com. Pl. 2019) (Feb. 7, 2019); *Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, 90 F. Supp. 3d 1308, 1314 (S.D. Fla. 2015), *aff'd on other grounds*, 658 F. App'x 955 (11th Cir. 2016); *Cincinnati Ins. Co. v. Richie Enterprises LLC*, No. 1:12-CV-00186-JHM, 2014 WL 3513211 (W.D. Ky. July 16, 2014). *But see Cincinnati Ins. Co. v. H.D. Smith, LLC,* 2016 WL 3909558 (7th Cir. July 19, 2016); *Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co.*, No. 12-3289 (C.D. Ill. Sept. 26, 2019).

Not only is equitable abatement unlikely to qualify as damages "because of" or "for" "bodily injury" to a person, but the funding for services that have not yet been provided, for injuries that have not yet happened, means that the damages are really not being paid for injury "during the period" of any existing insurance policy. As Judge Polster explained, "The goal is not to compensate the harmed party for harms already caused by the nuisance. This would be an award of damages. Instead, an abatement remedy is intended to compensate the plaintiff for the costs of rectifying the nuisance, going forward." *In re Nat'l Prescription Opiate Litig.,* No. 1:17-MD-2804, 2019 WL 4043938, at *1 (N.D. Ohio Aug. 26, 2019). Liability policies do not cover sums paid to address *future* injury. *See Schnitzer Inv. Corp. v. Certain Underwriters at Lloyds of London*, 341 Or. 128, 136 (Or. 2006). Some courts hold that the payment for preventive measures or equitable relief are simply not covered damages. *See Ellett Bros. Inc. v. United States Fidel. & Guar. Co.*, 275 F.3d 384, 387-88 (4th Cir. 2001); *Boeing Co. v. Aetna Cas. & Sur. Co.*, 784 P.2d

507, 516 (Wash. 1990); *Bellaire Corp. v. Am. Empire Surplus Lines Ins. Co. et al.*, 115 N.E. 3d 805, 812 (Ohio Ct. App. 2018).

Conclusion

The opioid epidemic is a multifaceted social problem with innumerable contributing factors. While social problems of this magnitude call for social solutions, such as legal reforms and legislative funding, some courts, including the *National Prescription Opiate* MDL court, may be tempted to lend a hand by ordering the pharmaceutical industry to fund future social services to address the epidemic, despite numerous issues associated with using the civil litigation framework to create funding for a true social crisis without regard to the fundamental legal tenets of the tort system.

Should a mechanism be created to allow for the resolution of the opioid claims through what the New Haven court called "junk justice," or "causation by conjecture," defendants may, on one hand, breathe easier with an escape route from existential litigation, but, on the other hand, such a route would be riddled with insurance coverage potholes. Such a mechanism may also create an ominous forecast, predicting more attempts to use civil claims in the future to fund social change, without the protective elements of civil proof, and without the traditional insurance safety net. FD