
INSURANCE FOR PUBLIC NUISANCE: MASTERS PHARMA GETS IT RITE



By Adam Fleischer, Partner, BatesCarey LLP

On September 7, 2022, in *Acuity v. Masters Pharmaceutical*, Slip Op. No. 2022-Ohio-3092 (Ohio 2022), the Ohio Supreme Court followed the groundbreaking decision from the Delaware Supreme Court in *Ace American Insurance Co. v. Rite Aid Corp.*, Case No. 339, 2020 (Del. Jan. 10, 2022), and found that governmental suits for reimbursement of their expenditures on public health crises are not insured as claims “because of bodily injury,” given that they do not involve any claims to defend or compensate individual bodily injuries, as would be required to trigger an insurer’s duty to defend.

The Ohio Supreme Court's ruling is just one in a series of dominoes that has been lined up behind the Delaware *Rite Aid* decision. The question of whether a public nuisance claim can trigger coverage as if it were an individual claim "because of bodily injury," is pending in the Sixth Circuit in *Motorists Mut. Ins. Co. v. Quest Pharm., Inc.*, and new opioid insurance cases have been filed in Delaware involving CVS and AmerisourceBergen, all seeking application of the *Rite Aid* precedent, and now the *Masters Pharma* reasoning.

With these important insurance disputes growing across the country, the question arises, will the courts get it *Rite*? The *Rite Aid* ruling, the *Masters Pharma* ruling, and the potential impact is discussed below.

A. The Nonderivative Nature of Claims in the Opioid MDL

With millions of Americans suffering from opioid addiction, the states and counties litigating against opioid manufacturers and distributors made a bold choice. Knowing the impossibility of proving which pills caused what harm to whom, the governmental claimants rooted their claims in **public nuisance**, arguing that manufacturers and distributors are liable for intentionally over-selling opioids. This theory has generated multi-billion-dollar settlement payments to governments to abate the ongoing epidemic. In changing the opioid landscape from individual compensation to generic future abatement of a societal harm, a serious question arose: Do insurance policies cover a suit aimed at funding governmental programs, when the suit contains no individual bodily injury claims for insurers to investigate, defend, or settle?

For five years, the National Prescription Opiate Litigation in Cleveland, *In Re National Prescription Opiate Litig.*, Case No. 17-md-2804 (N.D. Ohio) (the "MDL"), has been home to over 3,000 lawsuits filed mostly by cities, counties, and state governments seeking funding for their costs to abate the country's opioid epidemic. Defendants have included opioid manufacturers such as Mallinckrodt and Endo, opioid distributors such as McKesson and AmerisourceBergen, and opioid retailers, such as Walgreens, CVS, and *Rite Aid*.

The government plaintiffs' pleadings have made very clear that the government lawsuits **do not involve claims** to compensate the individual bodily injuries that may have been suffered by specific citizens. The governmental plaintiffs instead seek billions of dollars to fund the governmental costs for policing, emergency medical services, social services, and more.

Unlike lead paint public nuisance cases, which have been characterized as "representative claims" brought to obtain relief on behalf of impacted citizens and property (See, *Sherwin-Williams v. Certain Underwriters*, Case No. 11087, Ohio App., Sept. 1, 2022), the Ohio Supreme Court recognized in *Masters Pharma* that the opioid cases do not seek damages for any specific bodily injuries on behalf of injured citizens. The governmental opioid lawsuits instead seek funding for the government entities' own administrative costs. This understanding was the centerpiece of both the *Rite Aid* and *Masters Pharma* decisions discussed below.

B. Nonderivative Claims Do Not Trigger Insurance Coverage

The Delaware Supreme Court examined *Rite Aid*'s 2015 ACE primary general liability policy that covers "those sums that the insured becomes legally obligated to pay as damages because of personal injury." The type of damages insured include damages "claimed by any person or organization for care ... resulting at any time from the personal injury."

ACE denied coverage for the governmental suits against *Rite Aid*, arguing that the damages at issue were **not** to compensate specific bodily injury, but were instead claims that corporations must help fund the abatement of social harms caused by their intentional sales programs. The argument whether such a public nuisance claim involves insured damages "because of bodily injury" was presented to the Delaware Supreme Court.

Examining the full context of the policy language and its intent, the Delaware Supreme Court explained that coverage depends on whether the bodily injury that is said to trigger coverage was suffered **by the party making the claim against the policyholder**, or at least by someone asserting liability for that injury "derivatively for the harmed party."¹

The court found that the policy was intended to apply when the damages the insurance company was being asked to pay were being asserted by a party seeking to demonstrate “the existence and cause of the injuries.”²

Applying this insight, the Delaware Supreme Court noted that the governmental plaintiffs had specifically pled that they were **not** seeking damages for any injury to any person, and that their public nuisance claims were for public harm, and “are not based upon or derivative of the rights of others.” **Therefore, there were no bodily injury claims giving rise to a duty to defend.**³

C. Rite Aid Frames the Benefit of the Insurance Bargain

The Delaware Supreme Court properly concluded that, for a complaint to trigger an insurer’s duty to defend, the “complaint must do more than relate to a personal injury — it must seek to recover for the personal injury or seek damages derivative of the personal injury.”⁴

Why is this ruling so fundamental to the very nature of commercial liability coverage?

An insurer that accepts a duty to defend against a bodily injury claim obtains two very important rights relative to the bodily injury claim that the insurer is defending.

First, the insurer has the right to challenge liability for the bodily injury. The insurer may engage counsel to take depositions, review medical records, examine causation, and investigate all the other things that arise from the bodily injury claim that triggered insurance obligations.

Second, the insurer has the contractual right to evaluate the compensation for the bodily injury that triggered the insurer’s coverage. The insurer maintains the right to attend mediations or settlement conferences and actively evaluate the proper cost of compensating the bodily injury for which liability was alleged against the policyholder, and which triggered coverage.

It would be contrary to the commercial foundation of liability insurance to find that bodily injuries suffered by unspecified citizens can give rise to an insurer’s duty to defend, when there is actually no bodily injury



liability being litigated to defend against, nor is there compensation sought for bodily injuries over which the insurer can exercise its right to evaluate and potentially settle. The Ohio Supreme Court recognize this concept in its *Masters Pharma* ruling.

D. The Ohio Supreme Court’s Masters Pharma Decision

Prior to Rite Aid, the most prominent opioid insurance ruling was *Cincinnati Ins. Co. v. H.D. Smith, LLC*, No. 15-2825, 2016 WL 3909558 (7th Cir. July 19, 2016). The Seventh Circuit held that a policy providing coverage for damages “because of bodily injury” does indeed potentially cover a claim by West Virginia against a distributor seeking reimbursement of healthcare expenses related to the opioid epidemic.

The *H.D. Smith* decision did not quite reach the conundrum of how an insurer can investigate, defend, or settle bodily injury claims when the lawsuit that triggered these obligations contains no such claims in the first place.

By diverging from the Seventh Circuit’s *H.D. Smith* decision, the *Rite Aid* ruling established a deeper

analysis of insurance coverage concepts, and presented an evolutionary path forward for pending cases, including one that the Ohio Supreme Court followed in *Masters Pharma*.

In September of 2021, the Ohio Supreme Court heard from insurers who argued that general liability coverage is intended to cover claims for damages resulting from the injuries of specific individuals. The insurers argued that, while the policy may indeed insure “damages claimed by any person or organization for care, loss of services or death resulting at any time from the ‘bodily injury,’” this coverage only applies to consequential damages after there is actually a specified “bodily injury” during the policy period for which the policyholder is alleged to be liable.

In response, *Masters Pharmaceutical* argued that government plaintiffs seek damages for healthcare and drug treatment, and that nothing in the Acuity policies requires that claims must be tied to the personal injuries of specific people. *Masters Pharmaceutical* argued that the insurers are attempting to rewrite the policies to insert requirements that do not exist.

In issuing its recent opinion, the Ohio Supreme Court examined the conflicting legal precedent on insurance coverage for opioid public nuisance claims, and determined that the Delaware Supreme Court indeed got it *Rite*.

The *Masters Pharma* decision examined the context and intent of the general liability coverage at issue. The court noted that the policy does not quite cover every claim in the world arising from generic injuries to members of the public, but instead the policy applies to “the” bodily injury that is caused by an occurrence, and “the” bodily injury that takes place during the period, and “the” bodily injury that was not known prior to the period. All of these references, the Ohio Supreme Court determined, suggest that, for an insurance policy to be triggered, the lawsuit at issue must contain some particular bodily injury to a specific person or persons, which the insurer is being asked to defend against.

The court wrote, “To hold otherwise would be to conclude that a duty to defend exists simply because a consequence of the alleged public-health crisis is bodily injury, regardless of the fact that the underlying parties

do not seek damages because of any particular bodily injury sustained by a person.”

E. The Sixth Circuit’s Pending Quest Pharma Decision

Just as the Ohio Supreme Court wrestled with whether insurers might have “bodily injury” insurance obligations triggered when there are no individual bodily injury claims to defend, so too is the Sixth Circuit considering the same issue.

In May 2021, a Kentucky federal court in *Motorist Mutual Ins. Co., v. Quest Pharma., Inc.*, concluded that government opioid suits filed against Quest Pharmaceuticals, a distributor, do not allege damages “because of ‘bodily injury’” and, as a result, do not implicate coverage. 2021 WL 1794754 (W.D. Ky. May 5, 2021).

Quest Pharma appealed to U.S. Court of Appeals for the Sixth Circuit, which will now decide whether “bodily injury” insurance coverage can be triggered by lawsuits that explicitly allege they are **not** seeking damages because of bodily injury.

While the Sixth Circuit weighs the strength and precedential value of *Rite Aid*, and now *Masters Pharma*, as they may apply to public nuisance coverage, a line of other lawsuits has appeared in Delaware to address the same issue.

F. More Delaware Cases to Push Whether the Courts Have It *Rite*

Public nuisance lawsuits are not going away. In fact, the multi-billion-dollar settlements plaintiffs have reached with opioid defendants send a disturbing legal message that perhaps damages for societal harm are achievable through public nuisance litigation, without plaintiffs having to prove any individual elements of product identification, causation, extent of injury, or even to compensate individuals for the alleged injuries that led to the nuisance suit. This makes for a very attractive theory of damages for governmental plaintiffs, and raises many insurance coverage concerns.

With a wave of public nuisance cases on the horizon, it is more important than ever that courts set firm parameters to address insurance obligations for such suits, particularly given that bodily injuries which may



trigger coverage are not in fact part of the suits insurers are being asked to defend and indemnify.

The *Rite Aid* and *Masters Pharma* decisions opened the line of reasoning as to why such public nuisance claims are simply outside the scope of typical general liability coverage. Whether the Sixth Circuit Court of Appeals and other courts follow or expand on this reasoning, remains to be seen.

In the meantime, insureds and insurers have turned Delaware into the most desired and hated insurance jurisdiction, at the same time. One of the largest opioid distributors in America, AmerisourceBergen, is currently engaged in litigation with its insurers as to whether its opioid insurance claims are more properly litigated in California or Delaware. CVS is battling its insurers in opioid coverage litigation, as to whether it should

proceed in Delaware or Rhode Island. And, of course, Rite Aid continues battling its insurers as to whether the scope of the Delaware Supreme Court insurance decision applies to all opioid claims against Rite Aid, or only to some subgroup of such claims.

The governmental lawsuits in the opioid MDL are, by the very definition of public nuisance, not the type of bodily injury claims that trigger commercial liability insurance. The governmental lawsuits do not present any bodily injuries to defend against.

With billions of dollars of insurance riding on these issues now, and for the future, both policyholders and their insurers will anxiously await the next round of coverage rulings, to determine if the courts will follow the Ohio and Delaware supreme courts and “get it *Rite*.”

About the Authors



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Adam H. Fleischer has earned a national reputation for innovative advocacy in complex insurance matters across the United States including health hazard matters, managed care and medical device claims, construction defect claims, malicious prosecution challenges, advertising injury claims and more. Adam serves as BatesCarey’s chair of the nation’s first Opioid Coverage Task Force and works with insurers world-wide to manage and litigate opioid insurance claims. Adam has argued insurance precedent in COVID-19 business income suits in the U.S. Courts of Appeals for the Fifth Circuit, Eighth Circuit and Sixth Circuit. Adam has been honored as a “Boutique Trailblazer” by the National Law Journal, a “Notable Leader in the Law” by Crain’s Chicago Business and is regularly recognized by peers as one of the nation’s top insurance coverage practitioners through rankings in London-based Who’s Who Legal and Chambers and Partners.

¹ *Rite Aid Corp. et al. v. ACE Am. Ins. Co. et al.*, C.A. No. N19C-04-150 EMD CCLD, 2020 WL 5640817, at *16 (Del. Super. Ct. Sept. 22, 2020).

² Opinion at 8, *Ace Am. Ins. Co. et al. v. Rite Aid Corp. et al.*, Case No. 339, 2020 (Del. Jan. 10, 2022).

³ Id. at 6.

⁴ Id. at 24.