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Del. High Court Gets It Right With Opioid Nuisance Ruling

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The Delaware Supreme Court issued a groundbreaking insurance ruling on Jan. 10 destined to help define the fundamental bargain at the heart of commercial insurance coverage and demonstrate why insurance is not triggered where no compensation for bodily injury liability is alleged against the policyholder.

In Ace American Insurance Co. v. Rite Aid Corp.,[1] the court examined whether governmental lawsuits against an opioid retailer to obtain reimbursement for a government's economic expenditures might fall within insurance coverage for claims because of bodily injury.

In taking a deeper dive into this issue than any preceding court, the ruling explained that, because there were no injured claimants and no specific bodily injuries that were part of the governmental claims for which insurance payment was demanded, the claims simply could not qualify in the insurance construct as either claims for or because of bodily injury.

The steps that led to this ruling, as well as the explanation of how the ruling illuminates the benefit of the insurance bargain between insured and insurer, are discussed below.

Nonderivative Nature of Claims in the Opioid MDL

For five years, the National Prescription Opiate Litigation in Cleveland[2] has been home to over 3,000 lawsuits filed mostly by cities, counties and state governments seeking to recoup the administrative costs incurred for the country's opioid epidemic.

These government entities have sued opioid manufacturers, distributors and retailers, arguing that because those entities did not properly monitor their sale and distribution of opioids, the drugs were diverted for improper use, thereby resulting in billions of dollars of increased governmental costs for policing, emergency medical services, social services and more.

Early on, the government plaintiffs realized that no court was likely to allow a government suit to usurp the rights of individual citizens who may have their own claims for their addiction to and/or overdose from prescription opioids.

Therefore, the government plaintiffs' pleadings, and the MDL court rulings, have made very clear that the government lawsuits do not involve any claims whatsoever to compensate the individual bodily injuries that may have been suffered by specific citizens.

In fact, two bellwether suits filed by Cuyahoga County, Ohio, and Summit County, Ohio, which were chosen to serve as a template for all other MDL lawsuits, specifically pled that the governments' damages "are of a different kind and degree than Ohio citizens at large" and "can only be suffered by [the counties]" and "are not based upon or derivative of the rights of others."[3]

The MDL court recognized the government plaintiffs' assertion that their lawsuits were premised only on their own economic loss, advising that the counties "do not seek recovery based on injuries to individual residents" but instead "seek recovery for direct injuries suffered by the Plaintiffs themselves," and even if a recovery might "also tend to collaterally benefit their residents" that benefit "does not mean that Plaintiffs seek to litigate on behalf of those residents."[4]

The Delaware Supreme Court noted that the governmental lawsuits in the MDL were really not seeking derivative damages that were incurred from any particular bodily injuries, but instead were claims for the government entities' own administrative costs, and were therefore deemed "non-derivative" of any specific bodily injury claims.

Armed with this understanding of the core nature of the governmental lawsuits in the MDL, the Delaware Supreme Court set about determining whether the claims brought by Cuyahoga and Summit County against Rite Aid might trigger a duty to defend or indemnify under the commercial general liability insurance issued to Rite Aid by Ace American Insurance Co. and its affiliates.

Nonderivative Claims Do Not Trigger Coverage

Rite Aid was insured by a 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 damages insured include damages "claimed by any person or organization for care ... resulting at any time from the personal injury."

The personal injury insured is defined in part to include "bodily injury, sickness or disease sustained by a person." ACE denied coverage for the governmental suits against Rite Aid, arguing, in part, that the damages at issue were not because of bodily injury.

The Delaware Superior Court disagreed with ACE and found that ACE had a duty to defend Rite Aid. On Sept. 22, 2020, the Superior Court ruled that the economic reimbursement sought by the government entities was related to injuries that had been suffered by individuals, and therefore was "arguably because of bodily injury."[5]

The Superior Court found that the medical expenditures incurred by the governmental entities were precisely the type of damages for care resulting from the personal injury that triggered insurance coverage under the ACE policy. The Delaware Supreme Court accepted certification of an interlocutory appeal relative to the finding of a duty to defend.

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."[6]

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."[7]

Applying this insight, the Delaware Supreme Court noted that the governmental plaintiffs in the MDL 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."[8] Therefore, there were no bodily injury claims giving rise to a duty to defend.

The Delaware Supreme Court went on to find that the insurance that covered the expenses of an organization in providing care to an injured person only applies when that care is actually for the personal injury that triggered coverage.[9]

When there are no claims made against the policyholder for personal injury liability, and no claims for personal injury compensation, then there are, of course, no organizational claims for reimbursement for the personal injury that can trigger coverage.

The Delaware Supreme Court conducted the proper analysis and reached the proper conclusion 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."[10]

However, the court stopped short of exploring and explaining exactly why its ruling is so fundamental to the very nature of commercial liability coverage and the duty to defend. The core principle at the heart of the court's ruling, as explained below, is that the ruling demonstrates the very benefit of the insurance bargain, which would have entirely dissolved had the trial court's ruling not been reversed.

The Benefit of the Insurance Bargain

The unwritten truth of commercial liability insurance is that when a bodily injury claim is made against a commercial policyholder, there arises a certain quid pro quo at the heart of the insurance contract.

On the one hand, the insurer may accept a duty to defend against the bodily injury claim if it is deemed to fall within the insurance contract. In return for assuming this contractual responsibility, the insurer obtains two very important rights relative to the bodily injury claim against which 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 coverage.

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.

The Delaware Supreme Court's opinion protects these benefits of the insurance bargain, and implicitly recognizes that allowing a nonderivative injury to trigger liability insurance would destroy the commercial insurance bargain.

In the context of the opioid MDL, it would be contrary to the commercial foundation of liability insurance to find that bodily injuries suffered by general citizenry 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 any compensation sought for bodily injuries over which the insurer can exercise its right to evaluate and potentially pay.

Had the lower court's ruling not been reversed, the insurer would be expected to fund an entirely different commercial risk that is nonderivative of, and completely untethered to, the allegedly triggering bodily injuries.

It would be impossible for insurers to underwrite such nonderivative risks, given that no underwriter could account for every conceivable claim to arise down the line after a bodily injury, particularly when the insurers would have no ability to contest, litigate or evaluate the bodily injury claim itself that creates coverage.

The governmental lawsuits in the opioid MDL are, by their very definition, not the type of bodily injury claims that trigger commercial liability insurance. The governmental lawsuits do not present any bodily injuries to defend against. Instead, the governmental lawsuits are, in every way, claims rooted in business torts premised on market share liability.

The Delaware Supreme Court has recognized that if an insurer is not presented with bodily injury liability to contest and defend against, then there is no bodily injury claim that can trigger the insurer's coverage. This analysis and recognition provides the foundation upon which future courts will undoubtedly analyze insurance coverage for the massive opioid settlements to come.

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Disclosure: The author represents defendants Great American Assurance Co., Great American Insurance Co, of New York and Great American Spirit Insurance Co. in the lower court case Rite Aid Corp. v. ACE American Insurance Co. at the Delaware Superior Court. The action against those defendants had been stayed pending the outcome of the Delaware Supreme Court matter.

[1] Case No. 339, 2020 (Del. Jan. 10, 2022).

[2] In Re National Prescription Opiate Litig., Case No. 17-md-2804 (N.D. Ohio).

[3] Third Amended Compl. at ¶ 1032, County of Summit, Ohio et al. v. Purdue Pharma L.P. et al., Case No. 18-OP-45090 (N.D. Ohio Mar. 21, 2019); Third Amended Compl. at ¶ 1074, County of Cuyahoga, Ohio v. Purdue Pharma

L.P. et al., Case No. 17-OP-45004 (N.D. Ohio May 10, 2019).

[4] Judge Dan Aaron Polster's Response to Petition for Writ of Mandamus, In re: State of Ohio, Case No. 19-3827 (6th Cir. Oct. 1, 2019).

[5] 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).

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

[7] Id. at 6.

[8] Id. at 13.

[9] Id. at 24.

[10] Id. at 18.