

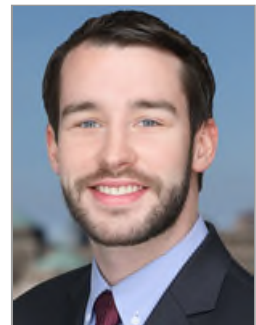
What Conn. Opioid Ruling Means For Liability Insurers

By **Patrick Bedell and Kevin Harris** (January 15, 2019, 3:45 PM EST)

The opioid epidemic has given rise to thousands of lawsuits against manufacturers, distributors and retailers of prescription opioids. Today, state and local governments have filed over 1,700 such lawsuits, which seek to recover billions of dollars they have spent to address the opioid epidemic, including costs for government services ranging from police overtime to neonatal care. The problem with these claims, as Connecticut state court Judge Thomas Moukawsher recently explained in his ruling in *City of New Haven v. Purdue Pharma, et al.*,^[1] is that the causal link between the manufacture of opioids and the costs for emergency and social services borne by municipalities is too attenuated. In addition, he observed, government plaintiffs cannot possibly prove which municipal expenditures were caused by which defendant. In his ruling, Judge Moukawsher refused to assign liability to pharmaceutical defendants by (what he terms) “junk justice” and dismissed lawsuits filed by 37 municipal plaintiffs. As we discuss further below, his ruling may have far-reaching impact upon thousands of other opioid lawsuits pending across the country, as well as the liability insurers to which those claims have been tendered.



Patrick Bedell



Kevin Harris

The Ruling in New Haven

At issue in New Haven were claims filed by municipal plaintiffs against prescription opioid manufacturers and wholesale distributors, alleging that the defendants’ fraudulent marketing and excessive distribution of prescription opioids contributed to a surge in abuse, addiction and overdose deaths involving prescription opioids and illicit opioids such as heroin and fentanyl. The plaintiffs’ claims assert causes of action for nuisance, unfair trade practices, fraud, negligence and unjust enrichment, and seek recovery of costs relating to emergency services, medical and drug treatment, law enforcement, criminal justice, social services and other public services.

The pharmaceutical defendants moved to dismiss the plaintiffs’ claims, arguing that the causal link between the defendants’ alleged conduct and the plaintiffs’ economic damages is too remote for the defendants to be held liable. The defendants also argued that the plaintiffs cannot prove each defendant’s share of the alleged harm. Over two days of oral argument, the plaintiffs failed to explain how they will prove the harm an individual defendant caused a specific city.

In his ruling, which was issued Jan. 8, 2019, Judge Moukawsher agreed with the defendants and dismissed the plaintiffs’ claims, concluding that the alleged causal link between the manufacture of opioids and the costs for emergency and social services borne by municipalities is too attenuated. In addition, he reasoned, the plaintiffs cannot “rationally calculate[] what part of the actual harm alleged — municipal expenses — was legally caused by what defendant.” Although a court could assign damages to each defendant based on its market share, Judge Moukawsher noted that such an approximation would not reflect the harm each defendant actually caused. Without the ability to calculate the amount of damages for which each defendant is responsible, the question of how much to pay each plaintiff “would look more like the distribution of alms from the community chest than like the judgment of a court.”

Judge Moukawsher acknowledged that courts may be tempted to overlook plaintiffs' burden of proof to levy damages that could be used to fund solutions to the opioid epidemic. But, he observed, the opioid suits "are ordinary civil damages cases and face the ordinary civil rules about who can sue for what." Civil suits cannot survive without proof of causation. Although in the interest of easing the strains on municipal budgets "[i]t might be tempting to wink at this whole thing and add to the pressure on parties who are presumed to have lots of money and possible moral responsibility," that approach would be "bad law" and "junk justice."

Impact of the New Haven Ruling

Judge Moukawsher's ruling comes as thousands of county and municipal governments seek to recover billions of dollars in opioid related costs in the tort system. Courts across the country must now grapple with the problems of proof and causation outlined by Judge Moukawsher in New Haven.

Nowhere are these issues more prevalent than in the multidistrict litigation in the U.S. District Court for the Northern District of Ohio, where roughly 1,600 opioid suits are now pending before Judge Dan Aaron Polster. Notably, Judge Polster may be more open to allocating liability among the defendants on the basis of market share because, unlike the claims consolidated before Judge Moukawsher, the opioid MDL includes claims under the Racketeer Influenced and Corrupt Organizations Act and civil conspiracy. Allegations that defendants coordinated to create the opioid epidemic may allow the MDL plaintiffs to argue that the defendants are collectively liable for plaintiffs' damages.

However, the MDL plaintiffs still must prove that the defendants caused their alleged economic harm. Recently, the MDL court ordered several "bellwether" plaintiffs to identify samples of harmful opioid prescriptions, people harmed as a result of taking prescribed opioids, and prescriptions written on the basis of defendants' misrepresentations. Although the plaintiffs agreed to comply with those discovery rulings, they have indicated they do not intend to prove their case by proving individual harm, i.e., that a specific prescription caused a specific opioid user to become injured and the government plaintiff to incur costs. Instead, plaintiffs are prepared to prove their case at trial by relying upon aggregate statistical evidence to establish generalized harm to society. It remains to be seen whether Judge Polster will, like Judge Moukawsher, ultimately find that such generalized proof — which presumably does not account for harm caused by intervening causes such as illicit opioid use — is nothing more than "causation by conjecture" and "junk justice."

Insurance Implications

Judge Moukawsher's ruling that the tort system is not the proper forum for addressing social problems resonates with liability insurers which, like pharmaceutical defendants, have been targeted as a source of funding. Liability insurance, however, is no more suited to remedy generalized societal harm than courts are to resolve claims for them.

Liability insurance serves an important social function in protecting the insured when it faces liability for its own negligent conduct that caused discrete harm to individual people. It is not (and cannot reasonably be) underwritten or priced to serve as a safety net for generalized economic harm to society resulting from the intentional business schemes of policyholders. If the bargain between insurer and insured is retroactively transformed to insure social problems, insurance may no longer be available to cover the insured's risk for liability for true bodily injury.

To ensure that liability insurance operates as intended, policies generally provide coverage for "ordinary civil damages cases" that apply "ordinary civil rules about who can sue for what," i.e., lawsuits seeking compensation for "bodily injury" arising from tortious acts that result in injury sustained by a person. Courts have already ruled that insurance does not cover generalized costs to society incurred to address the opioid epidemic because such damages are not "because of bodily injury" that is sustained by "a person."^[2] Although one court has held that opioid claims for economic recoupment may present a claim for damages "because of bodily injury" for purpose of determining the duty to defend,^[3] no court has found that an insurer must indemnify a government's economic loss for the opioid epidemic.

Fortunately, solutions to the opioid epidemic are beginning to emerge from sources other than

efforts to squeeze “junk justice” out of the courts and liability insurance. On Oct. 24, 2018, President Donald Trump signed into law the bipartisan “SUPPORT for Patients and Communities Act,” which utilizes a combination of funding and reforms to expand addiction treatment and increase transparency in the distribution and sale of prescription opioids. In particular, the new law provides:

- Billions of dollars to educate doctors and prescribers regarding opioid addiction;
- Billions of dollars in addiction treatment;
- Access to sales data so wholesale distributors can determine whether a geographical area is oversupplied with opioids; and
- Access to state databases so patients attempting to purchase opioids across state lines are flagged.

In addition to legislative action, solutions to the epidemic are being developed at the local level. For example, police departments are developing specialized teams of officers and social workers to respond to overdoses, ensuring that addicts get the treatment they desperately need, and criminal courts are experimenting with programs that emphasize treatment of nonviolent opioid users over punishment.

Conclusion

The opioid epidemic is a multifaceted social problem with innumerable contributing factors. In addition to the pharmaceutical industry, doctors, patients, regulators and an illicit market for opioids may all have contributed to the current crisis. Social problems of this magnitude call for social solutions, such as legal reforms and legislative funding, rather than “junk justice” that imposes liability without regard to proof. Courts may be tempted to “wink” at the requirements of proof to levy damages to help solve a social problem but, as Judge Moukawsher recognized in New Haven, that approach is “bad law.” It would also transform liability insurance, which is designed to pay for unintended and unexpected individual harm proven in court, into a funding mechanism for social problems that it was not designed to cover and cannot bear.

R. Patrick Bedell is a partner and Kevin F. Harris is an associate at BatesCarey LLP.

Disclosure: BatesCarey LLP represents a number of the insurance companies that have issued policies to the pharmaceutical manufacturers and distributors being sued in the cases discussed above.

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[1] Superior Court, Judicial District of Hartford, Case No. X07 HHD CV 6086134 S, Docket No. 244 (January 8, 2019).

[2] **Cincinnati Ins. Co. v. Richie Enterprises LLC** , 2014 WL 3513211 (W.D. Ky. July 16, 2014); **Travelers Property Cas. Co. of America v. Anda, Inc.** 90 F. Supp. 3d 1308 (S.D. Fla. 2015).

[3] see **Cincinnati Ins. Co. v. H.D. Smith, LLC** , 2016 WL 3909558 (7th Cir. July 19, 2016))

