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Opioids, COVID-19, and Beyond: How to Abate the Nuisance Driving Social Inflation

I. Description and General Overview of Drivers of Social Inflation

Social inflation is a term coined by Warrant Buffet in 1977, and at the time, he defined it as a "broadening definition by society and juries of what is covered by insurance policies." Over the years, the concept of social inflation has broadened to include all factors potentially giving rise to record-breaking verdicts. At the time, the idea of "nuclear verdicts" projected verdicts in the millions of dollars. Nuclear verdicts have also changed considerably from the 1970's to the present day: million-dollar verdicts are now mainstream, and verdicts in the billions are becoming common.

II. The Rise of Public Nuisance and Abatement Claims as a Driver of Social Inflation

One component of social inflation rests with the plaintiffs' bar in asserting novel liability and damages claims. Among other types of claims, we have recently seen a proliferation of novel public nuisance claims brought on behalf of state attorneys' general and other municipalities against product manufacturers or others. Creative plaintiff's attorneys began asserting public nuisance claims in mass tort cases in the 1980's to avoid some of the burdens of proof required for strict liability and negligence claims. Early efforts to prove these causes of action were unsuccessful in the asbestos context, and public nuisance claims brought against "Big Tobacco" ultimately settled before courts were able to opine on their validity. Courts were initially unwilling to forge new and expensive remedies to punish otherwise lawful conduct (sales of products, for example), satisfied to leave remedies for public harm to the legislature to enact. In recent years, however, claims involving lead paint, opioids, and vaping products have all surpassed motion to dismiss in various jurisdictions, which signals a significant societal and judicial change.

Instead of past damages, the focus of public nuisance municipality claims is on forward-looking relief, which allows plaintiffs to use expert testimony to forecast excessive abatement amounts and avoid traditional notions of proximate cause. The influx of novel public nuisance claims brought by municipalities seeking abatement as relief is one factor that has led to what the Wall Street Journal reported in December 2019 as a "tort environment that has deteriorated beyond our elevated expectation." We discuss below several of the recent examples of public nuisance and abatement claims, which in our view, have impacted social inflation in recent years.

A. Opioid Lawsuits

1. The Causes of Action Narrow to Focus on Public Nuisance

Over 3,000 opioid-related lawsuits have been filed, most of which are consolidated before Judge Dan Aaron Polster in: *In Re: National Prescription Opiate Litigation*, No. 1:17-md-02804 (N.D. Ohio) (the "MDL"). The lawsuits have been brought to date against various opioid manufacturers, distributors, and pharmacies, alleging that they caused a public nuisance when they misrepresented the risk of addiction in opioids and/or failed to prevent diversion of opioid drugs. The plaintiffs encompass every conceivable type, from individual drug users, to drug-addicted babies, and third-party payors, but the largest category of plaintiffs constitutes governmental entities seeking to recover the costs of increased public services caused by the opioid epidemic – collectively reported to cost the United States an estimated annual sum of $170 to $214 billion.

As the opioid litigation has progressed, politicians, the media, and plaintiffs have increasingly called for assurances that funds derived from opioid settlements or judgments will be used to "fix" or "combat" the opioid crisis. The concern is that, if funds are not effectively designated for specific uses at the outset of any settlement, they may be diverted to other uses, as was the case with the Big Tobacco settlement funds. In response to these concerns, plaintiffs have abandoned other causes of action and have on public nuisance and abatement remedies, which include, among other things, future expenses to treat opioid addiction and to educate health care professionals and the public regarding the dangers of opioid addiction and use.

Although novel, courts have denied motions to dismiss public nuisance causes of action, brought by municipalities in the opioid litigation showing a reluctance to deprive the Plaintiffs of their opportunity to pursue their theories at trial. MDL Judge Polster, for example, noted in denying a motion to dismiss brought by various defendants that "while the allegations do not fit neatly into the legal theories chosen by Plaintiffs, they fit, nevertheless. Whether Plaintiffs can prove any of these allegations remains to be seen, but this Court holds that they will have that opportunity." *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 WL 6628898, at *21 (N.D. Ohio Dec. 19, 2018). *See also In re Nat'l Prescription Opiate Litig*., 477 F. Supp. 3d 613 (N.D. Ohio 2020), *clarified on denial of reconsideration*, No. 1:17-MD-2804, 2020 WL 5642173 (N.D. Ohio Sept. 22, 2020) (finding that public nuisance claim could be brought against pharmacy defendants due to alleged "broad harms to the public allegedly caused by the Pharmacies' dispensing conduct"); *In re Nat'l Prescription Opiate Litig.,* No. 1:17-MD-2804, 2019 WL 3737023, at *15 (N.D. Ohio June 13, 2019) (allowing public nuisance claims brought by native American tribe); *City of Boston v. Purdue Pharma, LP*, No. 1884CV02860, 2020 WL 416406, at *8 (Mass. Super. Jan. 3, 2020) (finding that opioid plaintiffs adequately plead a significant interference with public health); *City & Cty. of San Francisco v. Purdue Pharma L.P.,* No. 3:18-CV-07591-CRB, 2020 WL 5816488, at *5 (N.D. Cal. Sept. 30, 2020) (holding that plaintiffs made prima facie showing under California law that Walgreens' alleged conduct—distributing and dispensing large amounts of opioids that it knew could not be used for legitimate uses—plausibly resulted in the City's immense costs"); *In re Opioid Litigation*, No. 400000/2017, 2018 WL 3115102, at *22 (N.Y. Sup. Ct. June 18, 2018) (allowing nuisance claim to go forward against manufacturers on grounds that it is at least arguable that the defendants were able to anticipate or prevent the claimed injuries).

2. The Relief Sought Focuses on Abatement Costs

Using an abatement framework, the first and only reported judgment in an opioid case was $465 million, which is the total award for just one year of abatement (which notably was reduced after trial

from $572 million due to a math error in the judge's calculation of damages). *State of Oklahoma v. Purdue Pharma, et al*., Final Judgment after Non-Jury Trial, No. CJ2017-816 (Nov. 15, 2019). The Abatement Plan, as ordered by the Court, consists of the following total yearly costs for services in 2019 dollars:

Category	**Description**	**Yearly Cost in 2019 Dollars**
Addiction Treatment Services	All Oklahoma residents in need of treatment services will be eligible to receive a biopsychosocial assessment based on the American Society of Addiction Medicine ("ASAM") level of care placement criteria, and comprehensive treatment and recovery services based on ASAM level of care needed, including early intervention, outpatient services, ambulatory detoxification, intensive outpatient, partial hospitalization, residential care, medically managed detoxification, and medication.	$232,947,710
Addiction Treatment – Supplementary Services	Housing services, employment services, as well as care navigators to coordinate with opioid affected youth in the juvenile justice and other State systems.	$31,796,011
Public Medication and Disposal Programs	Maintaining existing programs like Safe Trips for Scripts and developing home based medication take-back and disposal programs.	$139,883
Universal Screening	Enabling all primary care practices and emergency departments to enroll in the Screening, Brief Intervention and Referral to Treatment ("SBIRT") program for academic detailing, continuing education, electronic medical record integration, and implementation of universal substance use patient screening and intervention.	$56,857,054
Pain Services	Pain prevention and non-opioid pain management therapies, including cognitive behavioral therapy for pain, physical therapy, and exercise programs.	$103,277,835
Naloxone Distribution/Education	Expanded and targeted naloxone distribution and overdose prevention education to those at high risk of experiencing or witnessing overdose.	$1,585,797
Medical Case Management/Consulting (Project Echo)		$3,953,832
Vermont Oxford Network	Developing and disseminating NAS treatment	$107,683,000

Category	Description	Yearly Cost in 2019 Dollars
Quality Improvement	evaluation standards, including continuing education courses. This program will provide intensive training in and support to Oklahoma birthing hospitals to help accredit them as centers of excellence in NAS evaluation and assessment.	
Oversight of NAS Birth Documentation and Reporting	Funding the development of NAS as a required reportable condition, including OSDH and hospital-level management and infrastructure costs.	$181,983
Prenatal Screening	Implementing universal substance use screening for pregnant women and enabling all OB/GYN practices and hospitals to enroll in the SBIRT practice dissemination program for academic detailing, continuing education, electronic medical record consultation, and embedded practice facilitation services.	$1,969,000
Medical Treatment for Infants Born with NAS	Additional costs above and beyond costs for an ordinary birth for infants born with NAS due to the nuisance.	$20,608,847
Funding for Investigatory and Regulatory Actions Related to the Nuisance	Costs to address heavy caseloads and additional staffing needs because of the nuisance, including for the Oklahoma Department of Mental Health and Substance Abuse Services; Oklahoma Bureau of Narcotics; Oklahoma licensure boards; Oklahoma Office of the Chief Medical Examiners; and Oklahoma Office of the Attorney General.	$11,101,076

In turn, the first MDL "bellwether" case settled on the eve of trial for a reported $260 million. Multiply those figures by 3,000 pending cases, and the true potential economic impact of the opioid litigation sinks in.

B. Other Types of Public Nuisance Claims

Following the record-breaking judgments and settlements in the opioid cases, public nuisance cases have essentially gone viral – multiplying with pandemic speed. Governmental public nuisance claims have been brought in the following additional types of cases: climate change; vaping; and COVID 19, among a host of others.

The climate change cases, for example, were first brought in 2017 by cities and counties in California state courts seeking to "abate" the public nuisance caused by fossil fuel companies. The City of San

Francisco alleges, among other things, that it may cost an estimated $5 billion to shore up its seawall to protect the city from the rising ocean water levels caused by climate change. Other states and localities quickly filed their own lawsuits, alleging that the defendants had known about the dangers associated with the use of fossil fuel products since the 1950's.

In 2019, vaping lawsuits because the next big thing. In response to the public health crisis caused by the vaping epidemic, governmental entities filed lawsuits targeting e-cigarette companies, alleging that the industry is preying on America's youth and that fraudulent marketing will cause state governments to incur significant costs to undo the damages caused by the vaping crisis. *See, e.g*., *People of the State of Illinois, et al., v. Juul Labs, Inc.* (Lake County, Illinois). Like the opioid lawsuits, the vaping municipality claims have now been centralized in a multi-district litigation. With the MDL Court draying on the court's analysis in the opioid litigation, the vaping claims brought under a public nuisance theory have surpassed motions to dismiss. *In re JUUL Labs, Inc., Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 19-MD-02913-WHO, 2020 WL 6271173 (N.D. Cal. Oct. 23, 2020) (finding that nuisance claims were sufficiently alleged for pleading purposes where damages resulted from an ongoing deceptive marketing campaign that caused municipalities to incur costs for counseling, training, educating, and disciplining students and various vaping cessation programs and prevent campaigns).

In 2020, COVID-19 eclipsed both opioids and the vaping epidemic in terms of the volume of claims. Most of these claims involved economic and first-party business losses, but public nuisance claims arising from COVID-19, however, are the newest variant. To date, class-action lawsuits have been filed against Amazon, McDonald's, and Smithfield Foods alleging public nuisance. Motions to dismiss have been granted in two of the three cases thus far. *See Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 459 F. Supp. 3d 1228, 1244 (W.D. Mo. 2020) ("Because of the significant measures Smithfield has implemented to combat the disease and the lack of COVID-19 at the facility, the Plant cannot be said to violate the public's right to health and safety"); *Palmer v. Amazon.com, Inc.*, No. 20-CV-2468 (BMC), 2020 WL 6388599, at *7 (E.D.N.Y. Nov. 2, 2020) (holding that an action for private public nuisance could not be brought because the injury of COVID-19 is suffered by the community at large). *But see Massey v. McDonald's Corp*., No. 20 CH 4247, 2020 WL 5700874, at *1 (Ill. Cir. Ct. June 24, 2020) (denying motion to dismiss on grounds that plaintiffs adequately plead that the possibility of an infection and injury at McDonald's is "highly probable").

While the above cases were brought by individual employees, it is likely that governments will follow the trend of the opioid, climate change, and vaping plaintiffs in lodging claims of their own to recoup public costs arising from the COVID-19 epidemic, which would be evaluated under a different standard than private employee claims. *See, e.g., County of Los Angeles v. Grace Community Church of the Valley*, No. 20STCV30695, 2020 WL 6302630, at *2 (Cal. Super. Sep. 10, 2020) (denying motion to dismiss nuisance claim against church on the basis that indoor services constitute a public nuisance and granting injunctive relief).

The examples discussed above foreshadow the "next wave" of public nuisance lawsuits, which will continue to multiply if massive judgments and settlements continue to be entered in these types of claims.

III. Solutions to Help Abate the Nuisance of Social Inflation

Social Inflation has led to the increase in frequency and severity of general liability losses. We identify, below, key insurance coverage defenses to public nuisance and abatement claims in addition to regulatory and legislative solutions.

A. Key Insurance Coverage Issues

The following provides an overview of the coverage analyses and key insurance coverage issues under commercial general liability ("CGL") policies regarding the opioid claims. Similar analyses can be applied to climate change, vaping, and COVID cases, however, the below analysis solely addresses opioid claims for ease of reference and discussion.

1. Insuring Agreement Trigger

a. Bodily Injury

CGL policies generally provide coverage for loss that the insured pays by reason of liability for "damages" "because of," "on account of," or "for" "bodily injury" that takes place during the policy period and define "bodily injury" to mean injury to a person. CGL policies therefore only provide coverage for "damages" that are "because of," "on account of," or "for" injury to a person.

Over the past few years, courts across the country have begun addressing coverage issues arising out of the thousands of underlying opioid lawsuits. The law is certainly not settled, and there is considerable debate regarding coverage for these matters. In early rulings analyzing coverage for opioid lawsuits, courts concluded that government claims seeking to recover economic loss do not seek damages for personal injuries sustained by opioid users and, as a result, do not allege damages "because of 'bodily injury.'" *See, Cincinnati Ins. Co. v. Richie Enter. LLC,* No. 1:12-CV-00186-JHM, 2014 WL 3513211, at *5 (W.D. Ky. July 16, 2014) (holding that West Virginia failed to allege "damages because of 'bodily injury,'" even though the policy in question also provided that "damages because of 'bodily injury'" included damages claimed by an organization for care resulting from "bodily injury"); *Westfield Ins. Co. v Masters Pharmaceutical, Inc.,* No. A 1400064, 2015 WL 10478081 (Ohio Com. Pl. Dec. 17, 2015) (holding that a state's economic damages were not "because of 'bodily injury'"); *Travelers Prop. Cas. Co. of Am. v. Anda, Inc.,* 90 F. Supp. 3d 1308, 1314 (S.D. Fla. 2015) (holding that an insurer had no duty to defend or indemnify an opioid distributor because West Virginia's payments for medical care were for its own economic loss, rather than "for [the] bodily injury" of its residents).

However, more recently, courts have ruled that even if the underlying opioid claims seek to recover economic loss, rather than personal injury damages, those claims still allege damages "because of 'bodily injury'" because the economic loss would not exist "but for" actual injury to individuals tied to opioid addiction. The current leading case on this issue, *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.,* 829 F.3d 771(7th Cir. 2016), was decided by the United States Court of Appeals for the Seventh Circuit. The *H.D. Smith* court held that an insurer had a duty to defend a distributor named in the State of West Virginia's 2012 opioid lawsuit because the State's alleged economic loss arose from the injuries sustained by West Virginia residents and, as a result, alleged "damages because of 'bodily injury.'" In so ruling, the Seventh Circuit compared the State of West Virginia to a mother suing to recover amounts spent caring for her injured son, observing that if the mother's damages are "because of 'bodily injury,'" so are the State's damages. The court also reasoned that West Virginia's alleged economic loss qualified as damages "because of 'bodily injury'" because the policy defined "bodily injury" to include "damages claimed by any person or organization for care, loss of services or death" resulting from "bodily injury." Over the past year, other courts have addressed these types of issues, but only within the context of a duty to

defend. *See, Acuity v. Masters Pharm., Inc*., 2020-Ohio-3440 (Ohio App. Ct., June 24, 2020); *Cincinnati Ins. Co. v. Discount Drug Mart*, Case No. CV-19-913990 (Ohio C.P. Sept. 9, 2020); *Rite Aid Corp. et al. v. ACE American Ins. Corp*., Case No. N19C-04-150 (Del. Sup. Ct. Sept. 22, 2020); *Giant Eagle, Inc. and HBC Service Co. v. American Guarantee and Liability Ins. Co. and XL Specialty Ins. Co.*, 2:19cv-00904 (W.D. Pa. Nov. 9, 2020). Notably, these courts did not consider the impact of the nationwide trend of narrowing the opioid lawsuits to claims for public nuisance and conspiracy, including the "bellwether" lawsuits in the Opioid MDL. Had these courts viewed the cases under a public harm lens, the result may have been different.

b. Occurrence

Even if the insureds can demonstrate that it has paid for "damages" "because of," "on account of," or "for" "bodily injury," those damages are only covered if the "bodily injury" is caused by an "occurrence," and define "occurrence" to mean an "*accident*, including continuous or repeated exposure to substantially the same general harmful conditions."

The original opioid pleadings generally allege intentional conduct in addition to claims for negligence that, when analyzed by courts in the context of the duty to defend, allege an "occurrence" and potentially fall within coverage. *See, e.g., Giant Eagle, Inc. and HBC Service Co. vs. American Guarantee and Liability Ins. Co. and XL Specialty Ins. Co.,* 2020 WL 6565272, *16 (W.D. Pa. Nov. 9, 2020) (Pennsylvania law) (holding that the bellwether public nuisance claims sound in negligence because, along with allegations of intentional and knowing conduct, they allege the defendants knew or should have known of the alleged injury); *Liberty Mutual Fire Ins. Co. v. J.M. Smith Corp.,* 602 Fed. Appx. 115, 122 (4th Cir. March 13, 2015) (South Carolina law) (negligence count in West Virginia's opioid suit alleged an "occurrence").

However, as set forth above, the opioid suits have largely been narrowed to public nuisance causes of action, which are rooted in an intentional conduct allegations. For example, in August 2019, the MDL "Track One" plaintiffs voluntarily dismissed their claims for "negligence" and proceeded to trial only on claims for public nuisance and conspiracy. Similarly, in the other ongoing opioid bellwether cases, the plaintiffs seek to hold the defendants jointly and severally liable for the opioid nuisance based on intentional, conspiratorial conduct. In addition, in their summary judgment brief on proximate causation, the MDL "Track Two" plaintiffs allege that the public nuisance in their communities was "the foreseeable, expected (and even intended) result of Defendants' conduct" and seek to impose joint and several liability, which requires a showing that the defendants "acted in concert with each other as part of a common plan or design resulting in harm." This record shows that the cases that are actually going forward to trial and driving settlement discussions are premised on conduct that is not an "occurrence" and should not be covered. Accordingly, potential settlements that may arise from the underlying opioid suits are arguably based entirely upon uncovered claims for intentional conduct, notwithstanding allegations of negligence in early pleadings, as the bellwether cases upon which the potential settlements will likely be based upon have been narrowed to focus on claims that do not allege an "occurrence."

c. Damages

CGL policies generally cover sums paid for "damages" because of "bodily injury." "Damages" is ordinarily understood to mean compensation for an injury that has already been sustained, rather than for potential future injury or prophylactic payments to prevent injury. *Merriam Webster.com* (January 20, 2021) ("damages" are "compensation in money imposed by law for loss or injury"). An insured's payments toward an *equitable* abatement remedy to the opioid epidemic *in the future* should not be

considered compensatory "damages" within the meaning of CGL policies. Although courts have not considered whether payments to abate the opioid epidemic are "damages," courts have previously ruled that payments to prevent the proliferation of gun violence in the United States are not covered "damages." *See, e.g., Ellett Brothers, Inc. v. United States Fidelity & Guaranty Co.,* 275 F.3d 384 (4th Cir. 2001) (applying South Carolina law and holding that payments by the insured to prospectively abate the public nuisance created by handguns are not "damages" because they do not compensate past harm). Furthermore, although some courts have ruled that equitable relief may qualify as "damages" when used to remedy *already existing* damage, these cases do not support coverage for an insured's payments to prevent future harm.

In addition, an insured's payments toward an equitable abatement remedy to the opioid epidemic in the future should not be considered damages for injury that takes place *during the policy period*. CGL policies generally cover "bodily injury" that takes place during the policy period. Abatement is a going-forward, equitable remedy, and may not constitute damages because of "bodily injury" or "property damage" that takes place during the policy period. Accordingly, any payment of funds for prospective equitable abatement or future estimated injuries should not be covered by CGL policies.

2. Known Loss and Expected or Intended Harm

CGL policies generally do not provide coverage for harm that the insured knew about before the policy period or that the insured "expected or intended." For example, the insuring agreement of some policies provides that coverage applies only to "bodily injury" or "property damage" if, prior to the policy period, no insured knew that the "bodily injury" or "property damage" occurred, "in whole or in part." In addition, many policies exclude coverage for "bodily injury" or "property damage" that is "expected or intended" from the standpoint of the insured. To determine whether "prior knowledge" or "expected or intended" coverage defenses apply, courts must determine whether opioid manufacturers, distributors, and retailers were aware of the harm alleged in the opioid claims and, if so, when they became aware of it.

The opioid lawsuits alleged that the opioid crisis can at least be traced back to the late 1990s. Furthermore, many of the defendants have been investigated and settled investigations by the federal government for violations of the Controlled Substances Act for their failure to prevent diversion of opioids. In addition, discovery in the underlying lawsuits continues to reveal facts indicating that many of the defendants knew of their role in the opioid crisis well before the plaintiffs began filing their lawsuits. These facts have serious implications on potential coverage for the underlying prescription opioid lawsuits and raise coverage questions as to what policyholders knew about their role in the crisis and when.

3. Opioid/Drug Use Exclusions and Governmental Entity Exclusions

In and around 2018, after the initial avalanche of opioid lawsuits were filed, opioid and drug use exclusions began appearing more regularly in CGL policies. These exclusions generally limit or preclude coverage for the opioid claims. The wording of these exclusions varies, with the broadest exclusions precluding coverage the abuse, illicit use, or unlawful distribution of "opioids" or any "controlled substance." Other exclusions are drafted more narrowly to preclude coverage liability for a *particular type* of opioid product or include carve outs for certain exceptions, such as for an insured's failure to provide the correct drug or dosage. To date, courts have not interpreted any opioid exclusion in the context of the opioid claims.

CGL policies may also include governmental entity exclusions, which generally preclude coverage for suits brought by or on behalf of governmental entities. A vast majority of opioid lawsuits filed to date are brought by states, municipalities, and other governmental entities. Accordingly, governmental entity exclusions may significantly reduce or eliminate certain opioid exposure for certain insureds.

B. Regulatory and Legislative Issues

The future development of social inflation is difficult to predict as it depends primarily on social and political trends. However, regulatory, and legislative measures exist that can aid in combating it.

The below statutes provide examples of how regulatory and legislative measures can protect from and limit or preclude claims brought against product manufacturers. Similar measures may be helpful to address social inflation arising out of opioid, climate change, vaping, and COVID lawsuits.

- **Ohio Statute Limits Liability for Food Manufacturer (O.R.C. § 2305.36):** In 2004, Ohio enacted a statute that provides that no manufacturer of a food product can be held civilly liable for injury or death when the liability is based on the individuals weight gain, obesity, or a health condition related to weight gain or obesity. However, claims can be brought against manufacturers if they are based on a violation of state or federal statute relating to the misbranding of food, or other federal/state statutes. Approximately 22 states have enacted similar statutes limiting liability for effects of long-term consumption of food.

- **Federal Statue Limits Civil Liability for Damages against Vaccine Manufacturers (42 U.S.C. § 300aa-22):** In 1986, Congress enacted a statute that precludes liability for a vaccine manufacture when the vaccine-related injury or death is a result of side effects that were unavoidable. Additionally, vaccine manufacturers cannot be liable in a civil action for damages due to the manufacturer's failure to provide direct warning to the injured party regarding the potential dangers resulting from the administration of the vaccine.

- **Federal Statute Limits Liability for Firearm Manufacturers for Crimes Committed with their Products (15 U.S.C. §§ 7901–7903):** In 2005, Congress passed the Protection of Lawful Commerce in Arms Act which states that firearm manufacturers cannot be held liable for the crimes committed with their products. The "PLCAA" generally bars civil suits in federal or state court against firearm manufacturers when a third party criminally uses a firearm or ammunition that has been shipped in interstate or foreign commerce. However, manufacturers can still be found liable for defective products.