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The National Opioid Crisis: Who Pays for the Solution?

Today, the entire country is struggling to identify a solution to the largest health crisis in American history – the opioid crisis. While the country and the courts continue to debate who is responsible for the crisis, the pressing issue remains who will pay for the solution. While thousands of lawsuits currently are pending against manufacturers, distributors, and retailers of prescription opioids, liability insurers also are being targeted as a source of funding for a solution. Liability insurance, however, is no more suited to remedy generalized societal harm than courts are to resolve claims for it. Government plaintiffs have proposed multi-billion dollar prospective equitable abatement plans to be funded by pharmaceutical defendants, and potentially their liability insurers. Yet liability insurance simply is not structured to fund generalized abatement of social harm, and the facts in support of the opioid plaintiffs' cases highlight the inherent incompatibility between the purpose and language of liability insurance policies and the relief sought by the opioid plaintiffs.

I. The Opioid Plaintiffs Sue an Entire Industry

There are now over 2,000 opioid lawsuits pending in multidistrict litigation (MDL) in Cleveland, Ohio, involving over 1,600 local governmental plaintiffs, and hundreds more pending nationwide. In addition to those suits, forty-eight state attorneys general have filed their own lawsuits against the pharmaceutical industry. Generally, these suits allege that opioid manufacturers, distributors, and retailers are to blame for creating the opioid crisis. At the heart of these claims is the assertion that the opioid defendants created and nurtured a market for prescription opioids based on unapproved uses for those drugs and then oversupplied that market. What resulted, plaintiffs allege, is the opioid crisis, which the plaintiffs claim the defendants now must pay to clean up.

So how does one clean up an epidemic? According to the plaintiffs, the answer lies in the deep pockets of the pharmaceutical industry, which the plaintiffs are asking to fund massive prospective abatement plans to address the crisis and prevent future harm, as well as to compensate the plaintiffs for any future damages incurred as a result of the opioid crisis. 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 their requests for prospective equitable relief.

II. Understanding the Opioid Claims

A. The opioid claims do not seek compensation for injuries suffered by individuals

The vast majority of the opioid claims are not premised on injury to a particular person or group of people. Nor are they premised on alleged injury that can be traced to a specific defendant. Accordingly, while the opioid lawsuits are framed as traditional tort actions seeking traditional tort recovery, they are anything but that. Significantly, the opioid lawsuits are not premised on traditional evidence or proof of causation required for viable tort claims. So one must ask, can these underlying lawsuits even survive the tort system?

B. The plaintiffs seek to prove liability without individual evidence or proof of causation

The opioid plaintiffs are very open about the fact that they cannot, and are not attempting to, prove individualized injury caused by specific defendants. Rather, they are suing the industry as a whole, alleging that it created the crisis and, therefore, must pay to clean it up. Using the courts and the tort system to pursue such relief is problematic because the opioid crisis has countless interwoven social, political, and interpersonal contributing causes, which vary significantly on a case-by-case basis. Use of the judicial system to seek relief for tort claims carries with it the burden of satisfying stringent tests of causation, without which plaintiffs could foist the financial burden of social harm on deep-pocketed corporations, regardless of proof. These well-established causal requirements allow, in part, corporations and their insurers to operate, innovate, compensate, and manage risk properly. The opioid lawsuits threaten this balance.

C. A Connecticut State Judge recognizes there cannot be liability with proof of causation

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

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. Specifically, Judge Moukawsher found 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).

D. The MDL Court allows the opioid plaintiffs to rely on "causation by conjecture"

In stark contrast to Judge Moukawsher's reasoning, Judge Polster, who is overseeing the over 2,000 cases in the MDL, allowed two bellwether cases relying on aggregate data to head to trial on October 21, 2019. The first phase of those two lawsuits eventually settled for $250 million on the morning of opening statements. The MDL court now is wrestling with the selection of new "bellwether" trials to pick up where the first two left off.

The bellwether plaintiffs asserted that they could prove their cases using aggregate data that demonstrated that the opioid defendants, as a group, flooded the market with prescription opioids, without tying any alleged injury to any particular defendant. The defendants moved for summary judgment on the plaintiffs' claims, arguing that the connection between the defendants' alleged conduct and the plaintiffs' alleged injuries was too attenuated to support a finding of proximate causation. Judge Polster disagreed and held 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.

Under Judge Moukawsher's reasoning, opening such a path to proof is "junk justice." Judge Polster, however, has demonstrated a predisposition to allow the opioid plaintiffs to rely on this type of approach to get their claims to a jury and potentially encourage settlement.

E. It remains to be seen whether other courts will accept this new tort construct to remedy social harm

With thousands of other opioid lawsuits pending across the country, the viability of the plaintiffs' claims will continue be measured and tested in the coming year. It remains to be seen whether other courts will find liability without proof of individualized harm or causation in order to permit recovery for social harm, or whether these claims will be deemed an attack on the legal system that is designed to dip into deep corporate pockets without accounting for traditional requisite concepts of causation and damages.

III. The Plaintiffs Seek Reimbursement for Societal Harm 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, solely relying on market effects to extrapolate societal injury and damages. Acceptance of such an untraditional damages model could have far-reaching consequences, motivating plaintiffs' attorneys to pursue other claims for generalized societal harm, with potentially devastating outcomes for defendants and their insurers.

A. The opioid plaintiffs' four step societal damages model

The plaintiffs' societal damages model has four steps, proffered through various expert reports and testimony:

1) Assuming that all of 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;

2) Identify the amount of various types of social harm that resulted from the portion of the product added to the market due to the defendants' wrongful conduct calculated in step one;

3) Identify the cost of the social harm that was calculated in step two; and

4) Extrapolate these harms and costs to future decades, relying on an abatement expert.

This societal damages model is a far cry from traditional notions of proof, causation, and damages.

B. The defendants' challenges to the societal damages model

Through summary judgment filings in the MDL, the opioid defendants have challenged the societal damages model, highlighting several notable flaws, including that the plaintiffs do not present any evidence that specific marketing conduct caused particular purchases of prescription opioids and the resulting addiction or harm, the model inaccurately assumes that all the defendants' marketing efforts were illegal, the model assumes that all opioid-related harm after 2011 was caused by pre-2011 conduct, and the model does not account for the myriad of intervening causes that have both broken the causal chain and contributed funds to abate the opioid epidemic. Such intervening causes include investigations, settlements, and/or judgments of various members of the pharmaceutical industry for fueling the crisis, as well as government programs already in place to fund the abatement of the crisis.

Despite the defendants' challenges to the societal damages model, Judge Polster has allowed the plaintiffs to rely on it to get their claims in front of a jury, ruling that any challenge to causation is reserved for trial.

IV. Insurance Implications of Damages Without Individual Harm or Causation

Liability insurance simply is not structured to fund the future abatement of generalized social harm.

A. Liability policies generally do not cover intentional or fraudulent conduct

Most liability policies only insure damages caused by an "occurrence," which is defined to mean an "accident." The plaintiffs' conspiracy and public nuisance claims are largely premised on intentional conduct. Accordingly, 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."

B. 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 knowledge-based defenses are enumerated in the policies and/or applied by courts through various common law doctrines. 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.

C. Liability policies generally only cover damages "because of" or "for" "bodily injury."

As discussed above, the majority of the relief sought by the MDL bellwether plaintiffs is prospective equitable abatement of the opioid crisis and future damages. Such relief arguably is not damages "because of"/"for" "bodily injury." In fact, some courts already have ruled that insurance does not cover generalized costs to society incurred to address to opioid epidemic because such costs 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).

D. Liability policies generally do not cover injury that does not take place during the policy period

Not only is prospective equitable abatement unlikely to qualify as damages "because of"/"for" "bodily injury," it is a forward-looking remedy funding future services for injuries that have not yet happened. Accordingly, such relief is not for injury "during the policy period" as required by most liability policies. As Judge Polster has 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 simply 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). Furthermore, some courts hold that the payment for preventative 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).