



Ohio Appellate Court Rules That Insurer Must Defend Party Involved In Opioid MDL

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The Ohio Court of Appeals last week held that liability insurers must defend their policyholders who are involved in the still-rising tide of opioid litigation, joining what is becoming a clear trend in this developing arc of the law. In *Acuity v. Masters Pharmaceutical, Inc.*, a wholesale pharmaceutical distributor, Masters, had been named in numerous lawsuits brought by governmental entities. The lawsuits alleged that Masters was liable for costs the governmental entities contend they incurred in battling opioid abuse. The majority of those lawsuits have been transferred to a federal multidistrict litigation (MDL) court in the Northern District of Ohio as part of the “National Prescription Opioid” litigation.

The governmental entities allege, among other things, that Masters acted negligently in failing to investigate and report suspicious orders of prescription opioids, and in refusing to fill those orders. They claimed that this alleged negligence contributed to the opioid epidemic, and resulted in damages including increased costs to the governmental entities for police patrols, judicial expenditures, prison and public works expenditures, substance abuse treatment, and emergency and medical care services.

Masters’ insurer, Acuity, refused to defend Masters in these lawsuits. Acuity raised a defense that many other insurers also have raised in connection with opioid litigation – that the governmental plaintiffs were seeking damages only for their own economic losses and not for their own “bodily injury.” As such, Acuity argued that the damages in these lawsuits do not constitute damages “because of bodily injury” covered by their policies. Some courts that addressed this issue in early opioid coverage lawsuits agreed with this argument.

More recent decisions, however, have rejected the position. In particular, the

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United States Court of Appeals for the Seventh Circuit's decision in [Cincinnati Ins. Co. v. H. D. Smith, L.L.C.](#) – a case litigated by Barnes & Thornburg in 2016 – concluded that governmental entities' claims in opioid litigation did seek damages "because of bodily injury" because the policies at issue defined that phrase to include "damages claimed by any person or organization for care, loss of services or death resulting at any time from the bodily injury." This clearly is the type of damages the governmental plaintiffs are seeking to recover in opioid lawsuits.

The Ohio Court of Appeals found *H. D. Smith* to be "one of the most recent and persuasive decisions" on this issue and adopted its reasoning. It also carefully distinguished and rejected the reasoning employed by other, earlier decisions that had concluded insurers did not have a duty to defend their policyholders against these claims. As the number of defendants ensnared in the nationwide opioid litigation continues to grow and expand beyond companies in the pharmaceutical industry, *Acuity v. Masters Pharmaceutical, Inc.* is a key decision reinforcing a trend of cases ruling that liability insurers must defend these claims. This decision also should be seen as persuasive authority when insurers deny coverage for consumer class action claims in which there were alleged bodily injuries, but the causes of action are pleaded under consumer protection or other statutes.