

Ohio Ruling Continues Pro-Insurer Shift In Opioid Wars

By **Shane Dilworth**

Law360 (September 12, 2022, 2:31 PM EDT) -- The Ohio Supreme Court's recent reversal of a ruling that insurers have a duty to defend against government public nuisance suits over the increased costs of responding to the opioid epidemic has legal experts saying the tide is now turning in favor of carriers.

The Buckeye State high court's five-justice majority held in last week's ruling that it would be too tenuous to conclude that damages in lawsuits brought by counties in Michigan, Nevada and West Virginia against drug wholesaler Masters Pharmaceuticals Inc. were "because of" bodily injuries, which would trigger Acuity Inc.'s duty to defend.

In reaching its decision, Ohio's high court looked kindly to a similar ruling issued earlier this year by the Delaware Supreme Court, which found 4-1 that three Chubb units had no duty to defend Rite Aid Inc. in similar opioid public nuisance suits brought by Ohio counties.

Courts 'Joined Forces'

Jonathan Schwartz of Freeman Mathis & Gary LLP told Law360 it was as if the two state high courts "joined forces" to reach sound and well-reasoned decisions.

"I'm glad that the Ohio Supreme Court found the way that it did because it creates a consistent and predictable result," said Schwartz, who represents insurers. "I think that the courts that have found similarly are rebuking those that may have inaccurately found before that there was or may have been coverage for these types of opioid epidemic claims."

One court that found in favor of policyholders was the Seventh Circuit, in a 2016 decision *Cincinnati Insurance Co. v. H.D. Smith*. The majority in *Acuity* fired back against that ruling, which found that an insurer had a duty to defend claims brought by West Virginia against another opioid wholesaler.

Scott Seaman of Hinshaw & Culbertson LLP applauded the ruling, describing the Buckeye State high court majority's analysis as "solid" and that its concurrence with the Delaware Supreme Court was sound.

"As the court noted, the governmental entities tie their alleged losses to the aggregate economic injuries they have experienced as a result of the opioid epidemic, not to any particular bodily injury that they or anyone in particular sustained and the requirement in the policies of 'damages because of bodily injury' is not satisfied," said Seaman, who represents insurers.

Crowell & Moring LLP's Laura Foggan also found the ruling significant, not only for its alignment with the ruling in Rite Aid, but also for what she characterized as its thoughtfulness and detail.

"The court fully grasped the issues, and detailed important reasons why the broad interpretation of 'damages because of bodily injury' is at odds with the plain policy terms and with any reasonable application of them," she said. "As the court noted, the concept of 'bodily injury' to a person or persons is central to the coverage at issue."

Foggan, who represents carriers, concluded that the decision "respects the importance of that core coverage term."

Added Language, Narrowed View

The Buckeye State high court majority's decision has not been received well by policyholders, who believe the duty to defend was interpreted too narrowly.

Scott D. Greenspan of Pillsbury Winthrop Shaw Pittman LLP strongly disagreed with the "one-sided" decision, telling Law360 that the majority's ruling is a "head scratcher" and that its logic "straight-jacketed the duty to defend."

"It's an abandonment of the duty to defend," said Greenspan, who noted that the duty should be interpreted broadly by the courts.

"If you ask anyone on the street whether the opioid epidemic originates from bodily injury, they will tell you that it does," said Pillsbury's Greenspan, who represents policyholders. "At its core, it's about addiction, an injury to people, and there wouldn't be these governmental losses without bodily injury."

The Pillsbury senior counsel went on to say that the majority narrowed the scope of the duty to defend and added language to the policy issued to Masters.

"This looks like post-loss underwriting. To have a court read additional requirements a carrier didn't write into a policy is rewriting the bargain that these parties struck," Greenspan said. "Essentially what the court is doing is effectively rewriting the duty to defend that these parties agreed to in the policy. That should not happen."

Jodi Green of Nash Miller told Law360 that it was "noticeable and telling" that the dissenting opinions in both Ohio and Delaware were both "vigorous."

"The majority reaches its conclusion by committing the very error it yields against Masters to deny coverage: adding language to the policy that is simply not there," said Green, who represents policyholders. "The majority suggests only that 'particular[ized]' bodily injuries tethered to a specifically identifiable person are covered, but as the dissent points out: 'this interpretation adds words to the policies; the language in the policies does not specify who, or whether a particular claimant, must suffer the bodily injury for coverage.'"

Defenses From Other Policies

Raymond Tittmann of TittmannWeix, who represents carriers, told Law360 that a pattern of rulings

favoring insurers in opioid coverage disputes is now forming as a result of the Ohio Supreme Court's decision.

"With the Ohio State Supreme Court's ruling in Acuity, we are now there," Tittmann said. "Coupling Acuity with the Delaware's Supreme Court decision in Rite Aid and the California appellate court ruling in Actavis, the pattern is unmistakable."

With luck running out for a defense under commercial general liability policies, Tittmann, who represents carriers, said he anticipates "plaintiffs and policyholders will shift their theories now towards other kinds of policies that do not require a bodily injury or occurrence to trigger coverage, such as those covering errors and omissions, directors and officers liability and media advertising."

Seth Lamden of Blank Rome LLP, who represents policyholders, said companies may seek coverage beyond general liability insurance. For instance, the Ohio and Delaware high courts' reasoning may not preclude coverage under a directors and officers policy, he said.

"While most D&O policies have exclusions for certain types of losses arising out of bodily injury, those exclusions may not apply where a court has found that opioid lawsuits are seeking economic losses rather than damages because of bodily injury," he said.

Pillsbury's Greenspan said the ruling may lead parties to examine where to litigate future opioid coverage disputes.

"Insurance coverage is a creature of state law and forum can be significant," he said. "This ruling increases the likelihood that parties to these disputes, including insurers, will look harder at what forum should govern these cases."

Representatives of Acuity and Masters did not respond to requests for comment.

Justices Sharon L. Kennedy, Patrick F. Fischer, R. Patrick DeWine and Michael P. Donnelly formed the remainder of the majority.

Justice Jennifer Brunner agreed with the dissenting opinion.

Acuity is represented by Benjamin C. Sasse and Irene C. Keyse-Walker of Tucker Ellis LLP, by Gary L. Nicholson of Gallagher Sharp LLP, by Karen Libertiny Ludden of Dean & Fulkerson PC and by John Chlysta of Hanna Campbell & Powell LLP.

Masters is represented by Paul A. Rose and Amanda Michelle Leffler of Brouse McDowell and by Jennifer K. Nordstrom of Garvey Shearer Nordstrom PC.

The Ohio Insurance Institute, amicus curiae for Acuity, is represented by Richard M. Garner, David L. Lester and James S. Kresge of Collins Roche Utley & Garner.

Complex Insurance Claims Litigation Association, American Property Casualty Insurance Association and the National Association of Mutual Insurance Companies, amici curiae for Acuity, are represented by Gary W. Johnson of Weston Hurd LLP.

United Policyholders, amicus curiae for Masters, is represented by Jason E. Hazlewood of Reed Smith LLP.

The case is Acuity Inc. v. Masters Pharmaceuticals Inc., case number 2020-1134, in the Supreme Court of Ohio.

--Editing by Amy Rowe.

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