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Ohio Supreme Court Rules Insurer Has No Duty to Defend Opioid-Related Lawsuits as Relief Sought Is Not “Damages Because of ‘Bodily Injury’”

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In *Acuity v. Masters Pharmaceutical, Inc.*, Slip Opinion No. 2022-Ohio-3092 (Ohio. Sept. 7, 2022), the Ohio Supreme Court considered whether an insurer, Acuity, owed a duty to defend its insured, Masters Pharmaceutical, Inc. (“Masters”), in several lawsuits brought by cities and counties in West Virginia, Michigan, and Nevada (“the governments”) for economic losses caused by the opioid epidemic. Masters purchased several commercial general liability insurance policies from Acuity, which imposed on Acuity a duty to defend the insured against any suit seeking “damages because of ‘bodily injury.’” The trial court concluded that Acuity did not owe Masters a duty to defend it in the underlying suits because the governments sought damages for their own economic losses. The First District Court of Appeals reversed, finding that some of the governments’ economic losses were arguably “because of bodily injury.” The Ohio Supreme Court reversed the judgment of the court of appeals concluding that Acuity did not owe Masters a duty to defend, and reinstated the trial court’s entry of summary judgment in favor of Acuity.

Initially, the Ohio Supreme Court recognized a growing and diverging body of case law on the issue of whether an insurance policy that provides coverage for “damages because of bodily injury” covers claims brought by governmental entities to recover economic costs they incurred as a result of the opioid epidemic. Some courts have interpreted nearly identical policy language and held that similar opioid-related lawsuits filed by governmental entities invoked the insurer’s duty to defend because those entities sought “damages because of bodily injury.” See, e.g., *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771 (7th Cir.2016); *Giant Eagle, Inc. v. Am. Guar. & Liab. Ins. Co.*, 499 F.Supp.3d 147 (W.D.Pa.2020). Other courts, however, have concluded that no duty to defend exists in such lawsuits because the governments sought to recover their own increased economic costs resulting from a public-health crisis and did not tie their claims to an individual opioid-related injury, which would require proof of that specific injury. See, e.g., *ACE Am. Ins. Co. v. Rite Aid Corp.*, 270 A.3d 239 (Del. 2022); *Westfield Natl. Ins. Co. v. Quest Pharmaceuticals, Inc.*, 2021 WL 1821702 (W.D. Ky. May 6, 2021).

Ultimately, the Ohio Supreme Court sided with Acuity and those decisions finding that the underlying complaints sought reimbursement for costs for increased governmental services provided to the public on account of the opioid epidemic, not for bodily injury experienced by any specific person or persons. The court acknowledged that some of the complaints included allegations that the governments' citizens sustained opioid-related injuries and that the damages sought by the governments include costs for providing medical care and treatment services. According to the court, however, the governments' theory of relief in the underlying suits was not that specific opioid-related injuries sustained by their citizens occurred because of the insured's alleged failure to prevent the improper diversion of prescription opioids or that the damages sought flowed from the care of those specific opioid-related injuries. Rather, the governments' theory of relief was that Masters's alleged failure to prevent the improper diversion of prescription opioids was a "direct and proximate cause of the opioid epidemic" and the "economic damages" sought were based on that public-health crisis. Stated differently, the Ohio Supreme Court reasoned that the governments sought damages for their own aggregate economic injuries caused by the opioid epidemic and Masters's alleged failures, not damages for any particular opioid-related bodily injury sustained by a citizen.

To be sure, the opioid epidemic, as a public-health crisis, necessarily relates to bodily injuries, such as opioid addictions, hospitalizations, and deaths. According to the court, however, allegations of bodily injury alone do not automatically bring an action within the coverage for "damages because of 'bodily injury.'" The allegations in the governments' complaints regarding the opioid-related overdoses, addiction, and injuries sustained by their citizens merely provided context for their public nuisance, negligence, and RICO claims. But, the court reasoned that the plain language of the policies required more than a tenuous connection between the damages sought and the bodily injury. For example, the ordinary meaning of "because of" is "by reason of" or "on account of." And while some courts have interpreted the phrase "because of bodily injury" broadly, the Ohio Supreme Court found no case in which Ohio courts have made the distinction between the phrases "because of bodily injury" and "for bodily injury" for purposes of commercial general liability policies. Instead, the court found that the policies used the phrase "because of bodily injury" interchangeably with "for bodily injury" in Coverage A(1)(a) of the basic insuring agreement. Moreover, the court found that the repeated use of the phrase "the bodily injury" suggested that the damages sought in the underlying suit need to be tied to a particular bodily injury sustained by a person or persons in order to invoke coverage under the policies. If the phrase were interpreted as broadly as the insured argued, it would be difficult in the court's view to determine whether "the bodily injury" occurred during the policy period, was caused by an occurrence in the coverage territory, or had occurred in whole or in part prior to the policy period.

In the end, the Ohio Supreme Court concluded that the phrase "damages because of bodily injury" in the Acuity policies required more than a tenuous connection between the alleged bodily injury sustained by a person and the damages sought. The court offered that a sufficient connection would likely exist under standard commercial general liability policies when the damages sought in the underlying suit are for losses asserted by (1) the person injured, (2) a person recovering on behalf of the injured person, or (3) a person or organization that directly suffered harm because of another person's injury—in which case, the existence and cause of the injury must be proved. In *Masters*, however, the governments tied their alleged losses to the aggregate economic injuries they experienced as a result of the opioid epidemic, not to any particular bodily injury. The governments' claims in the underlying suits did not seek damages for bodily injury sustained by themselves, nor did they seek damages for bodily injury on behalf of their injured citizens. Accordingly, the underlying suits did not seek "damages because of bodily injury" and Acuity did not have a duty to defend its insured in the underlying suits. "To hold otherwise would be to conclude that a duty to defend exists simply because a consequence of the alleged public-health crisis is bodily injury, regardless of the fact that the underlying parties do not seek damages because of any particular bodily injury sustained by a person," which, in the court's words, was "an extraordinarily expansive view and one that gives us much pause given the potential floodgates it might open."