

Finding That Public Nuisance Claims Allege Damages Because Of Bodily Injury, Ohio Appellate Court Rules That Insurer Must Defend Drug Store In Opioid Litigation (Insurance Law Alert)

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An Ohio appellate court ruled that an insurer was obligated to defend public nuisance suits brought by government entities against a drug store, finding that the underlying complaints alleged damages because of bodily injury. *Cincinnati Ins. Co. v. Discount Drug Mart, Inc.*, 2021 WL 6142648 (Ohio Ct. App. Dec. 30, 2021).

The underlying complaints were nearly identical to those in *Rite Aid*, alleging that Drug Mart failed to adequately monitor suspicious opioid orders. An Ohio trial court ruled that the insurer had a duty to defend the suits because they alleged “damages” “because of” bodily injury caused by an “occurrence.” The appellate court affirmed.

The appellate court held that the underlying claims alleged “damages” even though they sought only “forward-looking, equitable” relief. The court acknowledged that Ohio courts have generally deemed equitable relief to be outside the scope of covered “damages,” but noted certain exceptions to this rule and concluded that the term “damages” was ambiguous. Construing this ambiguity in the policyholder’s favor, the court ruled that “the payment of money into an abatement fund in this context, although an equitable remedy, arguably or potentially falls within the scope” of coverage.

In addition, the appellate court ruled that the claims sought damages “because of” bodily injury, even though the complaints expressly disclaimed damages for physical injury (either directly or derivatively). The court reasoned that the economic losses at issue were “because of” bodily injury because they were based on money spent on medical and treatment services provided to individuals who were addicted to opioids.

Finally, the court rejected the insurer’s contention that the underlying claims did not allege an accidental “occurrence” because public nuisance requires a showing of intentional conduct. The court noted that Ohio law distinguishes between an intent to act and an intent to cause injury and explained that while the complaints alleged that Drug Mart intentionally marketed and distributed opioids, they did not allege that it intended to cause injury to individuals or to increase the counties’ public service expenses.

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