On the Defensive: Analyzing Insurers' Duty to Defend Pharmaceutical Companies for Contributing to the Opioid Epidemic

Opioids have had a devastating impact on the United States. They have drained governmental agencies' resources, decreased property values, and destroyed families and entire communities. A growing number of individuals, local governments, and states have filed lawsuits, aiming to hold pharmaceutical companies accountable for their negligent contributions to the epidemic.[1] *Such manufacturers, distributors, and retailers have called upon their insurers, asserting that their commercial general liability policies demand an insurer-backed and -bankrolled defense. Courts are divided in their interpretation of the language contained within the at-issue policies. Some consider the claims made by certain states and local governments to stem from a "bodily injury," as is necessary to trigger coverage. Others disagree.*

Using a form provided by the Insurance Services Office, this Note construes the at-issue policies in conjunction with the underlying claims and evaluates the holdings reached by the Sixth and Seventh Circuits and the Supreme Courts of Delaware and Ohio. An analysis of the government's claims reveals that they are too vague and attenuated to be covered, especially as they are the result of decades and decades of reckless pill-pushing. Ultimately, this Note concludes that the manufacturers, distributors, and retailers must be left to fend for themselves, given both the plain and unambiguous language of their policies and the ramifications of such a conclusion, socially and otherwise.

1. YNGVILD OLSEN & JOSHUA M. SHARFSTEIN, THE OPIOID EPIDEMIC 236 (2019).

INTRODUCTION

Within just a four-hour window on August 15, 2016, there were twenty-seven overdoses, including one death, in Huntington, West Virginia.[2] "It was . . . like a mass casualty event," said Director Gordon Merry of Cabell County's Emergency Medical Services ("EMS"), which led the response to the crisis in Huntington.[3] Overwhelmed, Cabell County's EMS dispatched seven ambulances within only a few minutes, scrambling to respond to the devastating amount of overdoses.[4]

This mass casualty event is just one example of the destruction that opioids have wrought on West Virginia. According to the Centers for Disease Control and Prevention ("CDC"), West Virginia consistently has the highest drug overdose mortality rate of any state, with 90.9 deaths per 100,000 residents in 2021 alone.[5] Tennessee and Louisiana

2. Tony Marco, *West Virginia City Has 27 Heroin Overdoses in 4 Hours*, CNN, https://www.cnn.com/2016/08/17/health/west-virginia-city-has-27-heroin-overdoses-in-4-hours (last updated Aug. 18, 2016, 9:14 PM) [https://perma.cc/M8HK-RSKB]; Jerry Mitchell, *Heroin(e) Tells Story of 3 Heroines Saving Lives*, CLARION LEDGER (Feb. 22, 2018, 5:11 PM), https://www.clarionledger.com/story/entertainment/2018/02/22/heroin-e-tells-story-3-heroines-saving-lives/364682002/ [https://perma.cc/Z86H-VRPE].

3. Marco, *supra* note 2.

4. *Id.*

5. *Drug Overdose Mortality by State*, CDC, https://www.cdc.gov/nchs/pressroom/sosmap/drug_poisoning_mortality/drug_poisoning.htm (last reviewed Mar. 1, 2022) [https://perma.cc/2Z7B-3WYU].

followed, with 56.6 and 55.9 deaths per 100,000 residents, respectively.[6] As the "hardest-hit state," West Virginia has often been referred to as "ground zero" for the nation's ever-growing opioid epidemic.[7]

It is difficult to encapsulate the depth and scope of the epidemic's devastation, even with statistics. It is distinctly and tragically personal, touching the lives of addicts as well as their families. Indeed, Judge Dan Aaron Polster of the Northern District of Ohio articulated it best:

> It is accurate to describe the opioid epidemic as a man-made plague, twenty years in the making. The pain, death, and heartache it has wrought cannot be overstated. . . . [I]t is hard to find anyone . . . who does not have a family member, a friend, a parent of a friend, or a child of a friend who has not been affected.[8]

Everyone in Huntington knows someone who has been affected. My own brother passed, in the midst of drafting this Note, from an overdose after a hard-fought, years-long battle with addiction that began when his then-girlfriend was prescribed opioids after an accident. He left behind an adoring son, four parents, five siblings, and hundreds of friends. His absence is deeply felt, as is the absence of the hundreds of thousands of others who, too, have lost the fight.[9]

The impact of the opioid crisis extends beyond the devastation of lives lost. Residents of Huntington have seen an increased incidence of diseases, including Neonatal Abstinence Syndrome, Hepatitis B and C, Endocarditis, and Human Immunodeficiency Virus.[10] They have also experienced increased crime and decreased property values.[11] The crisis has depleted the population and, by extension, the workforce and tax base.[12] Consequently, Huntington and Cabell County have responded.

To that end, Huntington established response-centered initiatives, including the Mayor's Office of Drug Control Policy ("MODCP")[13] and the Training Responders to Assess, Initiate, and Navigate ("TRAIN") Project.[14] Emphasizing prevention, treatment, and

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6. *Id.*

7. City of Huntington v. AmerisourceBergen Drug Corp., 609 F. Supp. 3d 408, 419 (S.D.W. Va. 2022).

8. *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2018 WL 6628898, at *21 (N.D. Ohio Dec. 19, 2018).

9. *Drug Overdose Deaths*, CDC, https://www.cdc.gov/drugoverdose/deaths/index.html (last reviewed June 2, 2022) [https://perma.cc/YKH6-3GMQ].

10. *City of Huntington*, 609 F. Supp. 3d at 420–21.

11. *Id.* at 421.

12. *Id.*

13. *See, e.g.*, Kathryn Robinson, *Huntington to Create New Programs to Fight Drug Epidemic*, WSAZ (May 1, 2017, 5:02 PM), https://www.wsaz.com/content/news/Huntington-to-create-new-programs-to-fight-drug-epidemic-420940513.html [https://perma.cc/22PX-TCJM] (discussing the MODCP's plan for addressing the opioid crisis).

14. Press Release, Bryan Chambers, Commc'ns Dir., City of Huntington, City of Huntington Receives $2 Million Grant to Address Substance Use Epidemic (Aug. 15, 2022),

recovery, the MODCP and TRAIN have sought, in part, to expand access to treatment.[15] In particular, TRAIN serves the unsheltered by "closing the deadly gaps in the continuum of care."[16] Meanwhile, the MODCP has expanded access to medication-assisted treatment, including methadone, establishing a regional center for users.[17]

Still, Huntington lacked adequate resources and expertise.[18] Officials turned to the Codirector of the Johns Hopkins Center for Drug Safety and Effectiveness, Dr. Caleb Alexander, who penned an abatement plan.[19] Dr. Alexander advised Huntington to implement a fifteen-year plan focusing on inpatient care, residential rehabilitation care, intensive outpatient treatment, and routine outpatient care.[20] This plan was cost prohibitive, valued at $2.54 billion.[21]

Eventually, Huntington sued three distributors, AmerisourceBergen Drug Corporation ("ABDC"), Cardinal Health, Inc. ("Cardinal"), and McKesson Corporation ("McKesson"), alleging that each had created a public nuisance by oversupplying opioids in Huntington and Cabell County.[22] Between 2006 and 2014, ABDC, Cardinal, and McKesson delivered eighty-one million opioid pills to Huntington, which had a population of only 49,138 in 2010.[23] This

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https://www.cityofhuntington.com/news/view/city-of-huntington-receives-grant-to-address-substance-use-epidemic [https://perma.cc/F49B-9HHD].

15. Robinson, *supra* note 13.

16. Chambers, *supra* note 14.

17. Robinson, *supra* note 13.

18. *See* Courtney Hessler, *Proper Funds, Programs Could Reduce by Half the Local Impact of the Opioid Crisis, Expert Says*, HERALD-DISPATCH (June 29, 2021), https://www.herald-dispatch.com/news/opioid-abatement-plan-will-cost-2-54-billion-for-huntington-cabell-experts-say/article_54a80bd9-69b2-5367-a14b-2a1017a1d639.html [https://perma.cc/HHY4-2R5A].

19. *Id.*; *G. Caleb Alexander, MD, MS*, JOHNS HOPKINS UNIV., https://hbhi.jhu.edu/staff/g-caleb-alexander (last visited May 19, 2024) [https://perma.cc/2JSE-CY7S].

20. Hessler, *supra* note 18.

21. *See* Courtney Hessler, *Opioid Abatement Plan Will Cost $2.54 Billion for Huntington, Cabell Experts Say*, HERALD-DISPATCH (June 29, 2021), https://www.herald-dispatch.com/news/opioid-abatement-plan-will-cost-2-54-billion-for-huntington-cabell-experts-say/article_54a80bd9-69b2-5367-a14b-2a1017a1d639.html [https://perma.cc/WRR6-G57D] (noting that the annual cost of implementing the opioid abatement plan exceeded the annual budgets of Cabell County and the city of Huntington).

22. The Associated Press, *A Federal Judge Sides with 3 Major Drug Distributors in a Landmark Opioid Lawsuit*, NPR (July 4, 2022, 10:26 PM), https://www.npr.org/2022/07/04/1109772095/a-federal-judge-sides-with-3-major-drug-distributors-in-a-landmark-opioid-lawsui [https://perma.cc/VPC2-VC22]. Of note, the Supreme Court of Appeals of West Virginia has defined a "public nuisance" as an "act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons." *See, e.g.*, Duff v. Morgantown Energy Assocs., 421 S.E.2d 253, 257 (W. Va. 1992) (quoting Hark v. Mountain Fork Lumber Co., 34 S.E.2d 348, 354 (W. Va. 1945)).

23. Brian Mann, *Was it 'Reasonable' to Ship 81 Million Opioid Pills to This Small West Virginia City?*, NPR (July 30, 2021, 5:01 AM), https://www.npr.org/2021/07/30/1021676306/was-it-reasonable-to-ship-81-million-opioid-pills-to-this-small-west-virginia-ci [https://perma.cc/6RYV-BVFP]; *QuickFacts: Huntington City, West Virginia*, U.S. CENSUS BUREAU,

amounted to more than 1,500 pills for every man, woman, and child. Seeking $2.5 billion in damages, Huntington attempted to recover the cost of the above-mentioned abatement plan.[24]

Other states, cities, and municipalities have followed suit. Defendant-Distributors, like Anda, Inc. ("Anda"), have sought insurance coverage, asserting that the governmental entities' claims fall within the ambit of their commercial general liability policies.[25] Defendants contend that their insurers are obligated to provide a defense as well as indemnification.[26] Insurers, in response, argue that the governmental entities' claims are too attenuated to trigger coverage, given that they are not "because of 'bodily injury.' "[27] Courts are split in their resolution of the matter.[28]

Part I of this Note traces the trajectory of the opioid epidemic from the 1800s through the 2010s, acknowledging that litigation, in part, has become a favored response—by individuals as well as by states, cities, and municipalities.[29] In addition, Part I unpacks the at-issue policies, identifying and defining key terms.[30] Part II evaluates the arguments for and against requiring insurers to defend insured manufacturers, distributers, and retailers against the governmental entities' claims, analyzing the at-issue policies as contracts.[31] Ultimately, Part III proposes a solution. When the at-issue policies are regarded as contracts and as social instruments, insurers should not be legally required to provide a defense to such broad, public nuisance-based claims.[32] This resolution accords both with the policies' plain text as well as their purpose—and, significantly, offers a strong disincentive for manufacturers, distributors, and retailers who may otherwise be interested in blindly pushing the next "miracle" drug.

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https://www.census.gov/quickfacts/fact/table/huntingtoncitywestvirginia/POP010210 (last visited May 19, 2024) [https://perma.cc/SDG3-8ZHK].

24. *See* City of Huntington v. AmerisourceBergen Drug Corp., 609 F. Supp. 3d 408, 470 (S.D.W. Va. 2022) (discussing the cost of the abatement plan).

25. *See, e.g.*, Travelers Prop. Cas. Co. of Am. v. Anda, Inc., 658 F. App'x. 955, 956–57 (11th Cir. 2016).

26. *See* COM. GEN. LIAB. COVERAGE FORM § I.1.a, at 1 (INS. SERVS. OFF. 2015) (coverage for bodily injury and property damage liability).

27. *See, e.g.*, Cincinnati Ins. Co. v. Disc. Drug Mart, Inc., 183 N.E.3d 538, 540–41 (Ohio Ct. App. 2021), *vacated*, 199 N.E.3d 538 (Ohio 2022) (mem.).

28. *Compare* Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co. (*H.D. Smith I*), 829 F.3d 771, 775 (7th Cir. 2016) (finding coverage), *with* Acuity v. Masters Pharm., Inc. (*Acuity II*), 205 N.E.3d 460, 474 (Ohio 2022) (finding no coverage).

29. *Infra* Part I.

30. *Infra* Part I.

31. *Infra* Part II.

32. *Infra* Part III.

I. THE CONVERGENCE OF OPIOIDS AND INSURANCE COVERAGE

It is imperative, first, to understand both the history underlying the claims and the language that triggers—and, in some cases, fails to trigger—coverage. To that end, Section I.A describes an original as well as a modern opioid epidemic, each of which has exhibited a cyclical pattern.[33] Separately, Section I.B expounds upon the at-issue claims, detailing the governments' assertions as well as the insureds' attempts to obtain coverage.[34] Finally, Section I.C unpacks a standardized commercial general liability policy in order to underscore key aspects of the at-issue language.[35]

A. The Opioid Epidemic

1. The Original Opioid Epidemic

Opioids first surged in the 1800s, prescribed to veterans and then to middle- and upper-class women.[36] Physicians used morphine and other "wonder" drugs to treat well-known ailments, including "asthma, headaches, alcoholics' delirium tremens, gastrointestinal diseases and menstrual cramps."[37]

The growth in utilization was rampant and polarizing, even in the 1800s.[38] Patients started to request additional doses and abandoned their day-to-day responsibilities.[39] Physicians were considered "lazy," "incompetent," and "poorly trained" for pushing their patients into addiction[40]—and were labeled as "murderer[s]" for devastating their patients' "soul[s] and mind[s]."[41] The American Pharmaceutical Association's Committee on the Acquirement of the Drug Habit demanded action, hoping to restrict manufacturers and prescribers.[42]

Eventually, Congress passed the Harrison Act in 1914, establishing a regulatory structure mandating that opioids be available only to patients with a "good faith" prescription.[43] The Harrison Act was

33. *Infra* Section I.A.

34. *Infra* Section I.B.

35. *Infra* Section I.C.

36. OLSEN & SHARFSTEIN, *supra* note 1, at 139.

37. Erick Trickey, *Inside the Story of America's 19th-Century Opiate Addiction*, SMITHSONIAN MAG. (Jan. 4, 2018), https://www.smithsonianmag.com/history/inside-story-americas-19th-century-opiate-addiction-180967673/ [https://perma.cc/ZU6D-VJWZ].

38. *See, e.g.*, OLSEN & SHARFSTEIN, *supra* note 1, at 139–40.

39. *Id.* at 139.

40. Trickey, *supra* note 37.

41. OLSEN & SHARFSTEIN, *supra* note 1, at 140.

42. *Id.*

43. *Id.* at 140–41.

a "near-prohibition" that was used, in part, to preclude doctors from continuing to prescribe opiates to "maintain an addict's habit."[44] The Supreme Court reaffirmed the aims of the Harrison Act in 1919, upholding the indictment of a physician for failing to obtain a written order before needlessly prescribing heroin to an addict.[45]

Opioids subsequently moved and flourished underground.[46] The fear, though, remained. By the 1970s, President Richard Nixon declared an "all-out offensive."[47] As such, President Nixon sought to challenge the "tide of drug abuse," which he aptly identified as "public enemy number one."[48]

This is a story that is all too familiar, marked by the cyclical rise, fall, and unimpeded resurgence of addiction.[49] Indeed, Yngvild Olsen, the Director for the Center of Substance Abuse Treatment ("CSAT"), and Joshua Sharfstein, the Vice Dean for Public Health Practice and Community Engagement at Johns Hopkins University, assert that this pattern has begun to repeat itself anew, with "eerie similarities" and unparalleled consequences.[50] Significantly, Olsen and Sharfstein have detailed four discrete phases of the original epidemic: (1) the "overprescri[ption of opioids] for pain;" (2) the "clampdown on opioid use in medicine;" (3) the "rising use of illicit opioids;" and (4) the "conflicted response, including both greater access to treatment and strong criminal penalties."[51] And these phases, notably, have started over.

2. The Modern Opioid Epidemic

Physicians became more reluctant to prescribe opioids for chronic use, hoping to avoid prosecution under the Harrison Act.[52] By the 1980s, however, the "culture of medicine" underwent a countershift, with physicians acknowledging opioids' significance for patients with persistent pain.[53] Pain was labeled the "fifth vital sign," given its

44. Trickey, *supra* note 37 (internal quotation marks omitted).

45. United States v. Doremus, 249 U.S. 86, 95 (1919).

46. OLSEN & SHARFSTEIN, *supra* note 1, at 141.

47. David Farber, *The Advent of the War on Drugs*, *in* THE WAR ON DRUGS: A HISTORY 17 (David Farber ed., 2021) (internal quotations omitted).

48. *Id.*

49. *See* OLSEN & SHARFSTEIN, *supra* note 1, at 138 (describing the four distinct stages of the United States' history with opioids).

50. *Id.*

51. *Id.*

52. *Id.* at 142–43.

53. *Id.* at 143.

increased recognition.[54] Studies revealed disparities in the treatment of chronic pain in African Americans, Hispanic Americans, and Asian Americans.[55] This shift prompted advocates to push physicians to prescribe more opioids.[56]

This initiative was also backed by pharmaceutical manufacturers, distributors, and retailers, who quickly began to market a new iteration of "long-acting opioids."[57] For example, Purdue Pharma ("Purdue") spent hundreds of millions of dollars selling OxyContin to prescribers and, by extension, to patients.[58] Purdue recruited and trained medical professionals to advertise the drug, motivating them with well-attended conferences, gifts, and bonuses.[59] Likewise, Purdue encouraged patients to request the drug, providing them with coupons for free prescriptions.[60]

Olsen and Sharfstein contend that the countershift in the culture of medicine, which fortified the perceived utility of opioids, reached "every corner of medical practice," impacting everything from primary care to emergency medicine.[61] The never-ending cycle, spurred by the countershift, had begun yet again.

A predictable crackdown came in the 2010s, as pharmaceutical manufacturers, distributors, and retailers were accused of oversupplying towns with painkillers.[62] For example, the House Energy and Commerce Committee revealed that one of these companies, within a ten-year period, delivered 20.8 million hydrocodone and oxycodone pills to Williamson, West Virginia, a town of 2,900.[63]

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54. Diana Mason, *The Pain and Opioid Epidemics: Policy and Vital Signs*, JAMA F. ARCHIVE (Aug. 9, 2016), https://jamanetwork.com/channels/health-forum/fullarticle/2760063 [https://perma.cc/5D95-3JCZ].

55. OLSEN & SHARFSTEIN, *supra* note 1, at 143.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 143–44.

60. *Id.* at 144.

61. *Id.*

62. *See, e.g.*, Lindsey Bever, *A Town of 3,200 Was Flooded with Nearly 21 Million Pain Pills as Addiction Crisis Worsened, Lawmakers Say*, WASH. POST (Jan. 31, 2018, 3:24 PM), https://www.washingtonpost.com/news/to-your-health/wp/2018/01/31/a-town-of-3200-was-flooded-with-21-million-pain-pills-as-addiction-crisis-worsened-lawmakers-say/ [https://perma.cc/L2DM-PMS9] (discussing a variety of accusations against companies for oversupplying small towns with painkillers).

63. Eric Eyre, *Drug Firms Shipped 20.8M Pain Pills to WV Town with 2,900 People*, CHARLESTON GAZETTE-MAIL (Jan. 29, 2018), https://www.wvgazettemail.com/news/health/drug-firms-shipped-m-pain-pills-to-wv-town-with/article_ef04190c-1763-5a0c-a77a-7da0ff06455b.html [https://perma.cc/J6L5-Y87Y].

Still, opioids—and, as a result, overdoses—surged.[64] The Director of the Cabell-Huntington Health Department, Michael Kilkenny, echoed Olsen and Sharfstein:

> When I graduated from medical school in 1982, we used opioids for patients with acute pain and those close to death and dying only, not for chronic pain, because they were thought to be addictive. Then, in the 1990s, our thinking changed and we thought we were under-treating pain, so we started using more opioids . . . . [W]e began prescribing much less opioids in 2010 because we thought they were harming people . . . . But then they turned to heroin.[65]

The "conflicted response" has been to litigate.[66] Parties are awaiting their day in court, intending to hold pharmaceutical manufacturers, distributors, and retailers accountable for their contributions to the opioid epidemic.[67]

B. Opioid-Related Litigation

1. Cities/Municipalities v. Companies

It is unsurprising that pharmaceutical manufacturers', distributors', and retailers' alleged misrepresentations of the advantages and disadvantages of opioids have led states, cities, and municipalities to file hundreds of lawsuits.[68] Such manufacturers, distributors, and retailers are accused of creating a " 'public nuisance' by impeding the public's health."[69] Plaintiffs seek to recover the costs incurred in attempting to mitigate the epidemic's effects.[70]

The resulting caseloads were considered incredibly cumbersome, prompting a judicial panel to consolidate all of the cases in a multidistrict litigation ("MDL").[71] Presiding, Judge Dan Aaron Polster of the Northern District of Ohio has been asked to resolve the

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64. *See, e.g.*, Marco, *supra* note 2 (reporting that Huntington, West Virginia, had twenty-seven heroin overdoses within four hours).

65. *Id.*

66. *See, e.g.*, OLSEN & SHARFSTEIN, *supra* note 1, at 138, 236.

67. *Id.* at 236.

68. *See* Terri A. Sutton, *General Liability Insurance and the Opioid Epidemic*, *in* INSIGHTS 7, 8–9 (Winter 2018) (discussing opioid lawsuits).

69. Jan Hoffman, *The Core Legal Strategy Against Opioid Companies May Be Faltering*, N.Y. TIMES (Nov. 11, 2021), https://www.nytimes.com/2021/11/11/health/opioids-lawsuits-public-nuisance.html [https://perma.cc/UH5Q-U44S].

70. *Id.*

71. Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html [https://perma.cc/MPZ2-YJ45]. Significantly, 28 U.S.C. § 1407 authorizes "multidistrict litigation," allowing "actions" that involve "one or more common questions of fact" to be "transferred," collectively, to a single district for "consolidated pretrial proceedings." 28 U.S.C. § 1407(a). Such actions are later "remanded" to their original district. *Id.*

governmental entities' claims against manufacturers, distributors, and retailers.[72] His caseload has grown from four hundred to up to three thousand, in spite of some settlements.[73]

Plaintiffs assert that such manufacturers, distributors, and retailers contributed to the epidemic by aggressively marketing and shipping pills in "alarming quantities," notwithstanding protocols.[74] They have relied upon a variety of theories, alleging violations of public nuisance, fraud, racketeering, and corruption laws, as well as federal and state regulations of controlled substances.[75]

Some states, cities, and municipalities have been unsuccessful. For example, Judge David A. Faber entered judgment for ABDC, Cardinal, and McKesson after Huntington alleged that the companies' distribution of prescription opioids created an opioid epidemic, thereby causing a public nuisance.[76] Judge Faber deliberated for nearly a year, holding a bench trial from May 3, 2021, to July 28, 2021, before signing an opinion on July 4, 2022.[77] Ultimately, Judge Faber found in favor of ABDC, Cardinal, and McKesson, declining to extend the law of public nuisance to the "sale, distribution, and manufacture of opioids."[78]

Some manufacturers, distributors, and retailers have elected to settle.[79] Recently, Johnson & Johnson, ABDC, Cardinal, and McKesson collectively negotiated a settlement, agreeing to pay billions of dollars to resolve thousands of claims.[80] As a result, manufacturers, distributors, and retailers have turned to their insurance companies to fund these settlements—and more importantly, to provide a defense when litigation ensues.[81]

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72. Hoffman, *supra* note 71.

73. Valerie Bauman, *States, Cities Eye $26 Billion Deal: Opioid Litigation Explained*, BLOOMBERG L. (July 26, 2021, 4:31 AM), https://news.bloomberglaw.com/health-law-and-business/states-cities-eye-26-billion-deal-opioid-litigation-explained [https://perma.cc/7YD8-UJQH].

74. Hoffman, *supra* note 71.

75. *Id.*

76. City of Huntington v. AmerisourceBergen Drug Corp., 609 F. Supp. 3d 408, 413 (S.D.W. Va. 2022).

77. *Id.*

78. *Id.* at 475.

79. *See* Brian Mann, *4 U.S. Companies Will Pay $26 Billion to Settle Claims They Fueled the Opioid Crisis*, NPR (Feb. 25, 2022, 7:39 AM), https://www.npr.org/2022/02/25/1082901958/opioid-settlement-johnson-26-billion [https://perma.cc/X7J7-Q5B2].

80. *Id.*

81. *See, e.g.*, Travelers Prop. Cas. Co. of Am. v. Anda, Inc., 658 F. App'x. 955, 956–57 (11th Cir. 2016) (example of Anda seeking defense and indemnification under its commercial general liability policies).

2. Insureds v. Insurers

But the story does not end with these lawsuits and settlements. ABDC, Cardinal, and McKesson may have mounted a successful defense, at least against Huntington.[82] Others, though, refuse to pay for their settlements and defenses, arguing that their transgressions are covered under commercial general liability policies.[83] They have routinely turned, then, to their insurance companies.[84]

Both pharmaceutical and insurance companies have filed declaratory judgment actions, with the latter seeking a declaration that they have neither a duty to indemnify nor to defend insured pharmaceutical companies for claims brought as a result of their alleged contributions to the nation's opioid epidemic.[85] Courts have been asked to interpret the at-issue policies.

C. Commercial General Liability Coverage

A policyholder's liability coverage offers the policyholder and other additional insureds "protection, including a defense, against lawsuits and liability that may result in judgments or settlements."[86] Usually, liability insurance is general, providing protection against claims for bodily injury or property damage that arise from the policyholder's alleged negligence.[87]

Both public and private businesses purchase commercial general liability insurance in order to acquire protection and "transfer . . . the risk of liabilities for fortuitous injury or damage arising out of the conduct of the insured's business" to the insurer.[88]

A commercial general liability form may be custom written but is often standardized.[89] The Insurance Services Office ("ISO") produces standardized forms, which are comprised of the following: (1) a declarations page, (2) insuring agreements, (3) terms and conditions, and (4) endorsements.[90] Usually, the only component of the "standard

82. Mann, *supra* note 79.

83. *See, e.g.*, *Travelers Prop. Cas. Co.*, 658 F. App'x. at 956–57.

84. *See id.*

85. *See, e.g.*, Cincinnati Ins. Co. v. Disc. Drug Mart, Inc., 183 N.E.3d 538, 540–41 (Ohio Ct. App. 2021), *vacated*, 199 N.E.3d 538 (Ohio 2022) (mem.).

86. RANDY MANILOFF & JEFFREY STEMPEL, GENERAL LIABILITY INSURANCE COVERAGE 1 (2d ed. 2012).

87. *Id.*

88. *E.g.*, ALAN S. RUTKIN & ROBERT TUGANDER, THE REFERENCE HANDBOOK ON THE COMMERCIAL GENERAL LIABILITY POLICY 1 (2d. ed. 2014).

89. *Id.* at 2.

90. *Id.*

policy" that is customized is the declarations page, as it contains information that is specific to the transaction, including the identification of insureds, limits, and deductibles.[91]

The scope of coverage provided by a commercial general liability policy is defined by the insuring agreement.[92] ISO Form 13 indicates,[93]

> We will pay those sums that the Insured becomes legally obligated to pay as damages *because of "bodily injury"* or "property damage" to which this insurance applies. We will have the right and *duty to defend* the Insured against any "suit" seeking those damages. However, we will have no duty to defend the Insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any *"occurrence"* and settle any claim or "suit" that may result.[94]

ISO Form 13 involves "core coverage," applying to "claims involving accidental bodily injury or property damage for which the insured is legally responsible."[95]

Notably, ISO Form 13 adds caveats, including,

> This insurance applies to "bodily injury" and "property damage" only if: (1) *the "bodily injury"* or "property damage" is caused by an "occurrence" that takes place in the "coverage territory[;]"[ ] (2) *the "bodily injury"* or "property damage" occurs during the policy period; and (3) prior to the policy period, no insured listed . . . knew that *the "bodily injury"* or "property damage" had occurred, in whole or in part.[96]

"An insurance policy is a contract" and, as such, will be interpreted in accordance with its terms' plain and ordinary meaning.[97] Courts must consider the allegations contained within the underlying complaint to interpret a commercial general liability policy—and, by extension, to determine if the insurer has a duty to indemnify or defend the insured in a given instance.[98] Given the significance of the at-issue policies' language, Subsection I.C.1 through Subsection I.C.3 will analyze ISO Form 13.[99]

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91. James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation: Text Versus Context*, 24 ARIZ. ST. L.J. 995, 996 (1992).

92. RUTKIN & TUGANDER, *supra* note 88, at 3.

93. *ISO General Liability (CGL) Multistate Forms List - Archive*, NAT'L UNDERWRITER (May 25, 2022, 9:15 AM), https://www.nuco.com/fcs/2022/05/25/iso-cgl-multistate-forms-list/ [https://perma.cc/F3M4-3Y5A].

94. COM. GEN. LIAB. COVERAGE FORM § I.1.a, at 1 (INS. SERVS. OFF. 2015) (emphasis added).

95. *See, e.g.*, RUTKIN & TUGANDER, *supra* note 88, at 3.

96. COM. GEN. LIAB. COVERAGE FORM § I.1.b, at 1 (INS. SERVS. OFF. 2015) (emphasis added).

97. *Acuity II*, 205 N.E.3d 460, 465 (Ohio 2022).

98. *Id.*

99. *Infra* Subsections II.C.1–3.

1. Bodily Injury

"A third-party claim against the insured that does not allege either 'bodily injury' or 'property damage' is not covered under [ISO Form 13] . . . ."[100] It is therefore imperative to determine if the claim, as brought, alleges "bodily injury" or "property damage."[101]

ISO Form 13 defines "bodily injury," albeit circuitously, as "bodily injury, sickness, or disease sustained by *a person*, including death resulting from any of these at any time."[102] It is unclear if "bodily" serves to modify "injury," "sickness," and "disease" or just "injury."[103] Courts have often been reluctant to conclude that a covered "bodily injury" has occurred if the claimants' injuries lack a physical manifestation.[104]

Subsequently, ISO Form 13 fails to define the very terms used in its definition: "bodily injury," "sickness," or "disease."[105] Such terms must be given their plain and ordinary meaning and, therefore, must be further defined.[106] To begin, *Black's Law Dictionary* defines "bodily injury" as "physical damage to a person's body."[107] It defines "sickness," in pertinent part, as "the quality, state, or condition of suffering from a disease, [especially] a disease that interferes with one's vocation and avocations."[108] Finally, it defines "disease," in pertinent part, as "a deviation from the healthy and normal functioning of the body."[109]

Part II will further analyze the scope of the term "bodily injury." In attempting to obtain coverage for liability arising from the opioid crisis, insured manufacturers, distributors, and retailers have frequently framed the state and municipal lawsuits as having alleged "bodily injury."[110] They make such assertions in spite of the fact that these lawsuits' underlying claims seek damages for economic losses, as brought about by the governmental parties' response to the opioid crisis.[111]

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100. RUTKIN & TUGANDER, *supra* note 88, at 21.

101. *Id.*

102. COM. GEN. LIAB. COVERAGE FORM § V.3, at 13 (INS. SERVS. OFF. 2012) (emphasis added).

103. RUTKIN & TUGANDER, *supra* note 88, at 23.

104. *Id.* at 24.

105. *See* COM. GEN. LIAB. COVERAGE FORM (INS. SERVS. OFF. 2012).

106. *See, e.g.*, *Acuity II*, 205 N.E.3d 460, 465 (Ohio 2022) (applying a plain meaning analysis).

107. *Bodily Injury*, BLACK'S LAW DICTIONARY (11th ed. 2019).

108. *Sickness*, BLACK'S LAW DICTIONARY (11th ed. 2019).

109. *Disease*, BLACK'S LAW DICTIONARY (11th ed. 2019).

110. *See, e.g.*, Cincinnati Ins. Co. v. Disc. Drug Mart, Inc., 183 N.E.3d 538, 549 (Ohio Ct. App. 2021), *vacated*, 199 N.E.3d 538 (Ohio 2022) (mem.).

111. *See, e.g.*, ACE Am. Ins. Co. v. Rite Aid Corp., 270 A.3d 239, 247 (Del. 2022) ("The Counties claim only 'indirect and purely economic injuries' that are 'primarily in the form of increased social spending . . . .' ").

2. Occurrence

Coverage, as provided by ISO Form 13, is also implicated only by an "occurrence." The touchstone for determining if the allegations stem from an "occurrence" is whether the insured "foresaw or expected" the alleged injury or damage.[112] Indeed, ISO Form 13 defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[113] Fortuity is the core requirement for the trigger of an "occurrence."

Black's Law Dictionary's definition of "occurrence" likewise emphasizes fortuity, chance, and unforeseeability.[114] It defines "occurrence" as "something that happens or takes place," including "an accident, event, or continuing condition that results in personal injury or property damage that is neither expected nor intended from the standpoint of an insured party."[115]

It is worth acknowledging that, in some cases, insurers have successfully argued that pharmaceutical companies' extended involvement in the proliferation of the opioid epidemic was intentional and thus not an "occurrence."[116] Although this topic is beyond the scope of this Note, there is extensive debate and litigation on the subject.[117]

3. The Duty to Defend

ISO Form 13 also includes a coverage grant, or promise, that incorporates both a duty to indemnify and a duty to defend.[118] Such a coverage grant guarantees that if the above-discussed conditions are met, the insurer will "pay on behalf of the insured sums that the insured is legally obligated to pay" and will "defend the insured against claims seeking such sums."[119] This would amount to the insurer both defending the manufacturers, distributors, and retailers against the governmental entities' claims and, in the event of a loss or settlement, paying the requisite sum.

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112. RUTKIN & TUGANDER, *supra* note 88, at 76.

113. COM. GEN. LIAB. COVERAGE FORM § V.13, at 15 (INS. SERVS. OFF. 2012).

114. *Occurrence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

115. *Id.*

116. *See, e.g.*, Travelers Prop. Cas. Co. of Am. v. Actavis, Inc., 225 Cal. Rptr. 3d 5, 15–16 (Cal. Ct. App. 2017) (distinguishing between accidental and intentional actions); AIU Ins. Co. v. McKesson Corp., No. 22-16158, 2024 WL 302182, at *1 (9th Cir. Jan. 26, 2024).

117. *See, e.g.*, *Travelers Prop. Cas. Co. of Am.*, 225 Cal. Rptr. 3d at 15–16; *AIU Ins. Co.*, 2024 WL 302182, at *1.

118. RUTKIN & TUGANDER, *supra* note 88, at 3; COM. GEN. LIAB. COVERAGE FORM § I.1.a, at 1 (INS. SERVS. OFF. 2012).

119. RUTKIN & TUGANDER, *supra* note 88, at 3.

An insurer's duty to defend is broader and more comprehensive than its duty to indemnify.[120] An insurer must defend an insured against "groundless" actions if an allegation "may potentially come within the coverage of the policy."[121] By contrast, an insurer is required to indemnify an insured only if an ultimate judgment falls within the scope of their policy's coverage.[122]

An insurer's duties to its insureds are at the heart of all coverage-based litigation.[123] And determining the scope of these duties is key to resolving the opioid-related cases brought by governmental entities. To that end, Part II considers whether a duty to defend, but not a duty to indemnify,[124] exists in these cases.[125] Specifically, Part II highlights the unique aspects of such contract-based interpretations and, in some cases, rejects the treatment of the phrase "because of 'bodily injury.' "[126]

II. APPLYING THE PLAIN AND ORDINARY MEANING OF "BODILY INJURY"

Jurisdictions are split with respect to opioid-related insurance litigation, as a "growing and diverging" body of law on the subject continues to develop.[127] The Seventh Circuit, for example, has determined that insureds are entitled to coverage, thereby ordering Cincinnati Insurance Company ("Cincinnati") to defend H.D. Smith, LLC ("H.D. Smith").[128] Alternatively, the Sixth Circuit has declined to extend the scope of the at-issue policies to cover such attenuated claims, leaving Masters Pharmaceutical, Inc. ("Masters") to defend itself without the backing of Acuity.[129] It is still unclear, at least in some jurisdictions, if a policy that provides coverage for damages "because of 'bodily injury' " extends to the governmental entities' attempts to recover the costs of responding to opioid-related crises. Nevertheless,

120. *See Acuity II*, 205 N.E.3d 460, 465 (Ohio 2022) (distinguishing the two duties).

121. *See* ACE Am. Ins. Co. v. Rite Aid Corp., 270 A.3d 239, 246 (Del. 2022) (explaining the insurer's obligation).

122. *See, e.g.*, Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co. (*H.D. Smith II*), 410 F. Supp. 3d 920, 933 (C.D. Ill. 2019).

123. *See, e.g.*, Cincinnati Ins. Co. v. Disc. Drug Mart, Inc., 183 N.E.3d 538, 540–41 (Ohio Ct. App. 2021) (describing the centrality of the insurer's duty to the litigation), *vacated*, 199 N.E.3d 538 (Ohio 2022) (mem.).

124. *See, e.g.*, *H.D. Smith II*, 410 F. Supp. 3d at 933 (discussing an insurer's duty to indemnify an insured distributor for an opioid-related settlement).

125. *See infra* Parts II–III.

126. *See infra* Parts II–III.

127. *See, e.g.*, *Acuity II*, 205 N.E.3d 460, 465 (Ohio 2022) (describing the nature of opioid-related litigation).

128. *See H.D. Smith I*, 829 F.3d 771, 775 (7th Cir. 2016) (finding coverage extended there).

129. *Acuity II*, 205 N.E.3d at 469.

Section II.A will consider the nature of contract-based interpretations, and Section II.B will demonstrate that the policy's language is unambiguous and does not provide coverage.

A. Contract Interpretation, Generally

An insurance policy is a contract of adhesion, as entered into by the insurer and the insured.[130] An insurance policy is subject to "specific rules governing insurance contract interpretation," which may overcome other, more traditional rules of contract interpretation.[131] These rules work to enhance the position of the insured.[132] They expand coverage and thereby protect the insured, especially given the insurer's position as the drafter.[133]

Courts will invoke the "pro-insured bias" if they consider a term to be ambiguous.[134] Courts indicate that ambiguous terms must be construed against the insurer, in favor of the insured.[135] That is, "where two interpretations equally fair may be made, that which affords the greatest measure of protection to the insured *will* prevail."[136] Courts will not consider extrinsic evidence if a term is ambiguous.[137] They will find in favor of the insured.[138]

Courts will still construe an unambiguous term in a way that is consistent with its plain meaning.[139] Significantly, then, an unambiguous term's meaning will not be displaced by the application of the pro-insured bias rule of interpretation.[140] Of note, a term is deemed unambiguous if its meaning is "susceptible of only one construction."[141]

Courts, in their evaluation of potential coverage for the governmental entities' claims, must decide if the term "because of 'bodily injury' " is ambiguous or unambiguous. If a court deems "bodily injury" susceptible to multiple interpretations, the court will interpret any ambiguity to favor the insured, rendering it more likely that the

130. Fischer, *supra* note 91, at 1008.

131. *Id.* at 1002.

132. *Id.*

133. *Id.* at 1004.

134. *Id.* at 1002, 1005.

135. *See, e.g.*, *H.D. Smith I*, 829 F.3d 771, 774 (7th Cir. 2016) (acknowledging that the Court must "liberally construe the allegations in favor of the insured").

136. Fischer, *supra* note 91, at 1003 (emphasis added) (citation omitted).

137. *See id.* at 1004.

138. *Id.*

139. *Id.*; *Acuity II*, 205 N.E.3d 460, 469 (Ohio 2022).

140. Fischer, *supra* note 91, at 1001.

141. *Id.* at 1004.

insured is entitled to coverage.[142] If, however, a court finds that the term "because of 'bodily injury' " is unambiguously inapplicable to the governmental entities' opioid-related claims, the insured will not be entitled to coverage.[143]

B. Bodily Injury, Specifically

It is important to briefly reconsider the nature of the allegations that underlie the governmental entities' complaints against manufacturers, distributors, and retailers.[144] Governments have sought to recover damages for costs associated with the opioid epidemic, including increased demand for emergency response services, law enforcement and incarceration, and addiction treatment.[145] They also allege that, as a result of the opioid epidemic, property values have diminished.[146] In attempting to recover for these economic damages, government plaintiffs have asserted claims of public nuisance and even negligence against pharmaceutical industry defendants.[147]

Governments are not required, given the nature of their claims, to allege that certain, named individuals have sustained physical injuries as a result of their use of opioids. Indeed, the *Restatement (Third) of Torts* indicates that "[a] public nuisance arises when a defendant's wrongful act causes harm to a public right."[148] Governments need not link—and, in fact, have not linked—their claims

142. *See, e.g.*, Cincinnati Ins. Co. v. Disc. Drug Mart, Inc., 183 N.E.3d 538, 553 (Ohio Ct. App. 2021) ("Accordingly, we find that Cincinnati's commercial general liability insurance policies arguably or potentially cover the underlying absolute public nuisance claims . . . and Cincinnati . . . has a duty to defend DDM . . . ."), *vacated*, 199 N.E.3d 538 (Ohio 2022) (mem.). A claim must also be for "damages" stemming from an "occurrence," as discussed *supra* Section I.C.

143. *See, e.g.*, ACE Am. Ins. Co. v. Rite Aid Corp., 270 A.3d 239, 247 (Del. 2022):

> But we find that, under the 2015 Policy, damages for bodily injury are covered losses only when asserted by 1) the person injured, 2) a person recovering on behalf of the person injured, or 3) people or organizations that treated the person injured or diseased . . . . Thus, Chubb has no duty to defend those suits.

144. *Acuity II*, 205 N.E.3d at 460.

145. *Id.* at 467.

146. *Id.*

147. *Id.* at 463.

148. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. b (AM. L. INST. 2020). West Virginia, in identifying the scope of statutory public nuisance, has followed the Restatement of Torts. *See, e.g.*, City of Huntington v. AmerisourceBergen Drug Corp., 609 F. Supp. 3d 408, 472 (S.D.W. Va. 2022) (relying on the Restatement). However, the *Restatement (Third) of Torts* acknowledges that, in some locations, the definition of public nuisance is a matter of statute, at least when claims are brought by public officials. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. a (AM. L. INST. 2020).

to specific injuries.[149] They have expressly disclaimed such a link, explaining that they do not seek to recover for death or even physical injury.[150] Governments, instead, allege that manufacturers, distributors, and retailers wrongfully contributed to the proliferation of prescription opioids, thereby harming individuals and exacerbating the cost of medical services.[151] They allege, then, that this wrong caused a "public health crisis," which resulted in their ultimate economic loss.[152]

Facing liability, the insured manufacturers, distributors, and retailers have argued that their insurance policies do, in fact, cover the costs associated with the government entities' lawsuits. Specifically, they have argued that because their policies cover damages "because of" bodily injury—rather than "for" bodily injury—the policies' plain language broadens coverage beyond immediate physical harm. [153] Such an argument is certainly viable in some jurisdictions.[154] The Seventh Circuit, for example, has analogized the difference:

> [A]n individual caused an accident in which another individual became paralyzed . . . [T]he paralyzed individual sues the insured driver only for the cost of making his house wheelchair accessible, not for his physical injuries. If the insured driver had a policy that only covered damages "for bodily injury" it would be reasonable to conclude that the damages sought . . . do not fall within the insurer's duty. However, if the insurance contract provides for damages "because of bodily injury" then the insurer would have a duty to defend and indemnify . . . .[155]

Insureds contend, then, that the governmental entities' claims for response- and enforcement-related costs are akin to a wheelchair-accessible ramp. They argue that the underlying complaints seek compensation for "expenses, damages, and losses" sustained "because of 'bodily injury' " (e.g., addiction and death).[156] They do not argue that such losses are "for bodily injury" but instead contend that they are

149. Judge R. Guy Cole Jr. of the Sixth Circuit Court of Appeals explained, for example, that the Government is not required to "plead and prove the existence of a covered bodily injury." Westfield Nat'l Ins. Co. v. Quest Pharms., Inc., 57 F.4th 558, 563 (6th Cir. 2023).

150. *See, e.g.*, Cincinnati Ins. Co. v. Disc. Drug Mart, Inc., 183 N.E.3d 538, 549 (Ohio Ct. App. 2021), *vacated*, 199 N.E.3d 538 (Ohio 2022) (mem.).

151. *See generally Acuity II*, 205 N.E.3d 460, 468–69 (Ohio 2022) (providing examples of this type of allegation).

152. *Id.*

153. *H.D. Smith I*, 829 F.3d 771, 774 (7th Cir. 2016).

154. *Cf. Westfield Nat'l Ins. Co.*, 57 F.4th at 564 ("It is not apparent that such a distinction exists [in] Kentucky . . . , or, even if it does, that Kentucky . . . would interpret 'because of' to be so broad as to cover the underlying lawsuits here.").

155. *H.D. Smith I*, 829 F.3d at 774 (quoting Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 616 (7th Cir. 2010)).

156. *See, e.g.*, Cincinnati Ins. Co. v. Richie Enters., LLC, No. 12-CV-00186, 2014 WL 3513211, at *4 (W.D. Ky. July 16, 2014).

"because of bodily injury"—language that allows for a more attenuated link between the harm inflicted and the cost incurred.[157]

This argument may seem appealing, at least initially. It has been made by a number of insureds. For example, Quest Pharmaceuticals, Inc. ("Quest") asserted that the governmental entities' underlying economic claims would not exist absent bodily injuries that were prompted or caused by opioid use and addiction.[158] Insureds, perhaps, have articulated that the plain and ordinary meaning of the policies demands coverage—or they have, at a minimum, noted an ambiguity warranting a pro-insured interpretation.[159] Plaintiffs, absent opioid-induced bodily injuries, would lack damages, right?

The Seventh Circuit agreed, reasoning that West Virginia sought reimbursement for costs associated with "car[ing] for someone who was injured" by an insured.[160] Therefore, the Seventh Circuit held that Cincinnati had a duty to defend H.D. Smith, at least as against West Virginia.[161]

The Court of Appeals of Ohio's Eighth District ("Eighth District"), in a recently vacated opinion, echoed the Seventh Circuit, finding that Cincinnati also had a duty to defend Discount Drug Mart, Inc. ("Discount Drug Mart") against Ohio's Cuyahoga and Summit Counties' claims ("Cuyahoga and Summit").[162] The Eighth District determined that the governmental entities' claims were, in part, for services that Cuyahoga and Summit "*had* to provide" as a result of "bodily injury."[163]

Yet, the Seventh Circuit and the Eighth District may have oversimplified the nature of the governmental entities' claims. The Seventh Circuit determined, first, that West Virginia sought to recover the cost of care of "someone who was injured."[164] But the Seventh Circuit also acknowledged that West Virginia had endeavored to care for its citizens, generally.[165] The Seventh Circuit failed to recognize or even address the distinction between specific claims (i.e., for

157. *See, e.g.*, *Westfield Nat'l Ins. Co.*, 57 F.4th at 562 (analyzing the difference in the plain meaning of the two texts).

158. *Id.*

159. *Acuity II*, 205 N.E.3d 460, 465 (Ohio 2022).

160. *H.D. Smith I*, 829 F.3d at 773.

161. *Id.* at 775 ("Given West Virginia's allegations . . . , Cincinnati has a duty to defend H.D. Smith.").

162. Cincinnati Ins. Co. v. Disc. Drug Mart, Inc., 183 N.E.3d 538, 553 (Ohio Ct. App. 2021), *vacated*, 199 N.E.3d 538 (Ohio 2022) (mem.).

163. *Id.* at 552 (emphasis added).

164. *H.D. Smith I*, 829 F.3d at 773.

165. *Id.* at 774.

"someone"), which are certainly covered, and general claims (i.e., for "citizens"). It would seem that the Seventh Circuit ignored a key component of the standard policy's definition of "bodily injury": the requirement that the harm be sustained "by a person."[166]

It is undisputed that such specific claims, like an injured citizen's mother's care-related claims, would be covered.[167] Such claims, however, are not analogous. West Virginia does not seek to recover for someone's care.[168] Rather, West Virginia seeks to recover for everyone's care, even if they have not yet sustained a "bodily injury."[169] That is, West Virginia seeks relief from the costs to "hospitals, schools, courts, social service agencies, jails[,] and prisons . . . ."[170] It also seeks to recover for costs sustained through decreased property values. Such expenditures apply to impacted (i.e., addicted individuals and their caregivers) and unimpacted citizens alike. Consider, for example, the West Virginians who have neither personally suffered from opioid addiction nor cared for anyone who suffered from an opioid addiction. They would still endure underfunded hospitals, schools, and other social services, given that the state's tax base has been diverted toward emergency opioid response. They would be less likely to recover the value on their home, given the decreased property values. Thus, West Virginians will suffer a host of economic injuries only tenuously related to the original physical harm of an individual's addiction.

This, alone, indicates that the policies do not unambiguously provide coverage, as the plaintiffs' damages cannot be reduced to those "because of" bodily injury.[171] They do the opposite, unambiguously foreclosing coverage for insured manufacturers, distributors, and retailers, at least as against governmental entities.

The policies, when read as a whole, are instructive. They do not simply indicate that insurers have a duty to defend claims that seek damages "because of 'bodily injury.' "[172] It is evident from the insuring agreements' plain language that coverage—and, as such, a defense—should be granted "only if . . . *[t]he* 'bodily injury' " meets certain

166. COM. GEN. LIAB. COVERAGE FORM § V.3, at 13 (INS. SERVS. OFF. 2012).

167. *H.D. Smith I*, 829 F.3d at 774.

168. *See id.* at 773.

169. *Id.* ("West Virginia alleged that [H.D. Smith] 'acted negligently, . . .' and cost the state hundreds of millions of dollars every year . . . . [T]hat money was spent caring for drug-addicted West Virginians . . . ."). Of course, West Virginia has not provided—and is not required to provide, given its claims—an itemized list of costs.

170. Brief for Plaintiff-Appellee at 6, *H.D. Smith I*, 829 F.3d 771 (No. 15-2825).

171. *See, e.g.*, Fischer, *supra* note 91, at 1003 (explaining that the rules of insurance contract interpretation are not as simple as the general rules of contract interpretation).

172. COM. GEN. LIAB. COVERAGE FORM § I.1.a, at 1 (INS. SERVS. OFF. 2012).

enumerated criteria (e.g., "is caused by an 'occurrence' that takes place in the 'coverage territory' ").[173]

What does it mean, though, for "[t]he 'bodily injury' " to meet such criteria?[174] *Merriam-Webster* identifies "the" as a definite article used in part "as a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance."[175] Likewise, the *Collins English Dictionary* indicates that "the" may be used to "refer to . . . something that [the speaker has] already mentioned or identified."[176] It is specific, not general.[177] This strongly suggests that the at-issue policies require evidence of a "bodily injury" to a specific person to be triggered.

A claim will not satisfy the insuring agreement's enumerated criteria unless it alleges a "definite" or "previously specified" bodily injury.[178] In fact, the Supreme Court of Ohio agreed with this conclusion, reasoning that the policies' plain and ordinary meaning requires more than a "tenuous connection" between the claims and the bodily injury.[179] Therefore, the Supreme Court of Ohio aptly held that the governmental entities' damages must be linked to a person's "particular bodily injury" to trigger coverage.[180]

This conclusion, too, is bolstered by the policies' own definition of "bodily injury." Recall that ISO Form 13 defines "bodily injury," in part, as "bodily injury, sickness, or disease sustained by *a person*."[181] Thus, the Supreme Court of Ohio strictly—and, indeed, appropriately—construed the policy's plain and ordinary meaning to cover only claims related to a person's "particular bodily injury" and concluded that West Virginia, Michigan, and Nevada had not pleaded such claims.[182] This led the Supreme Court of Ohio to decline to require Acuity to defend Masters, at least as against West Virginia, Michigan, and Nevada.[183]

It is the plain language of the policies that forecloses coverage and the attendant defenses for pharmaceutical manufacturers,

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173. *Id.* § I.1.b (emphasis added).

174. *Id.*

175. *The*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/the (last visited May 19, 2024) [https://perma.cc/QY3S-LJFZ].

176. *The*, COLLINS ENG. DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/the (last visited May 19, 2024) [https://perma.cc/6ZCR-7LAL].

177. MERRIAM-WEBSTER, *supra* note 175.

178. *See, e.g.*, *id.*

179. *Acuity II*, 205 N.E.3d 460, 469 (Ohio 2022).

180. *Id.* at 470. The Ohio Supreme Court reversed an oft-cited opinion from the Court of Appeals of Ohio's First District. Acuity v. Masters Pharm., Inc. (*Acuity I*), No C-190176, 2020 WL 3446652, at *6 (Ohio Ct. App. June 24, 2020).

181. COM. GEN. LIAB. COVERAGE FORM § V.3, at 13 (INS. SERVS. OFF. 2012) (emphasis added).

182. *Acuity II*, 205 N.E.3d at 472–74.

183. *Id.* at 474.

distributors, and retailers, at least for the governmental entities' claims for economic losses that are only tangentially linked to opioid addiction's physical harms. Accordingly, a claim must "seek to recover for the personal injury," directly or derivatively, not merely allege the "existence of injury."[184]

Given the policies' unambiguous language, the Supreme Courts of Delaware and Ohio rejected the overbroad interpretation that was advanced by the Seventh Circuit.[185] Instead, the Supreme Courts of Delaware and Ohio have theorized that claims, to be covered, must be asserted by either (1) "the person injured," (2) "a person recovering on behalf of the person injured," or (3) "people or organizations that treated the person injured or deceased" if they can articulate the "existence" and "cause" of their injuries.[186] A claim may be linked to "medical care" but still not be covered by such a policy.[187]

Applying this interpretation, the Supreme Court of Delaware concluded that Cuyahoga and Summit had not brought a "personal injury claim or one for derivative loss" but, instead, had brought a "direct claim for its own aggregate economic injury."[188] The Supreme Court of Delaware elaborated, explaining the key difference:

> It is analogous to a city suing an insured soda distributor for increasing its citizens' obesity rates. The city might claim costs for expanding its parks and recreational activities to address weight gain or increased public hospital expenditures for treating the population . . . But these economic claims would not stem from any individual injury.[189]

Cuyahoga and Summit's claims failed to fall within one of the above-mentioned categories. Therefore, the Supreme Court of Delaware declined to require Chubb Limited to defend Rite Aid.[190]

This interpretation is consistent with non-opioid-related cases, too. Indeed, the Supreme Court of Ohio favorably cited three cases, each of which involved one of the categories of covered claims.[191] A brief look at each of the cases' facts illustrates the parties' reasonable expectations as to the scope of the at-issue policies, especially as each

184. ACE Am. Ins. Co. v. Rite Aid Corp., 270 A.3d 239, 249 (Del. 2022).

185. *Id.* at 254; *Acuity II*, 205 N.E.3d at 473–74.

186. *ACE Am. Ins. Co.*, 270 A.3d at 247; *see also Acuity II*, 205 N.E.3d at 473 (rephrasing the third category, indicating that covered claims could be asserted by "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").

187. *ACE Am. Ins. Co.*, 270 A.3d at 247.

188. *Id.* at 253.

189. *Id.*

190. *Id.* at 247.

191. *Acuity II*, 205 N.E.3d at 472–73.

acknowledges, expressly or impliedly, that the underlying claims have alleged damages for or "because of 'bodily injury.' "[192]

First, *Fairless v. Acuity* involved a claim made by "the person injured," directly.[193] There, Gavin Connor allegedly fell and suffered a subsequent injury because of an unsafe condition at the insureds' leased premises.[194] Connor filed a complaint, claiming damages from his own injury.[195] Joseph Fairless and Bayberry Crossing, the property manager and the insured property-management company, sought coverage, relying on their policy.[196] Ultimately, the Court of Appeals of Ohio's First District extended coverage to their claims, reasoning that because Connor sought "damages for bodily injury[,]" Acuity had a "duty to defend" Fairless and Bayberry Crossing.[197] The at-issue policy was "unambiguous[ ]."[198]

Next, *U.S. Liability Insurance Co. v. Jenkins*[199] involved a derivative claim, which is a claim brought by an individual seeking to recover on behalf of an injured person.[200] There, Wendy Harsey and R. Gadston Moore sued Angelia Jenkins on behalf of E.M, their daughter. E.M. allegedly sustained "severe injuries" while under the supervision of a daycare that was owned and operated by Jenkins.[201] Jenkins sought coverage, as U.S. Liability Insurance Co. ("U.S. Liability") insured Jenkins.[202] Ultimately, the United States District Court for the Middle District of Georgia held that the underlying claim, as alleged by Harsey and Moore, fell within the scope of the policy, acknowledging that U.S. Liability had already conceded that E.M. had suffered a "bodily injury" —and, here, sought to recover because of it.[203]

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192. *See, e.g.*, Fairless v. Acuity, No. C-210165, 2022 WL 38870, at *2–4 (Ohio Ct. App. Jan. 5, 2022); U.S. Liab. Ins. Co. v. Jenkins, No. 13-CV-164, 2015 WL 3756046, at *3, *5 (M.D. Ga. June 16, 2015); Cincinnati Ins. Co. v. Robert W. Setterlin & Sons, No. 07AP-47, 2007 WL 2800383, at *7 (Ohio Ct. App. Sept. 27, 2007).

193. *Fairless*, 2022 WL 38870, at *1.

194. *Id.*

195. *Id.*

196. *Id.* at *2–3.

197. *Id.* at *4–5.

198. *Id.* at *5.

199. U.S. Liab. Ins. Co. v. Jenkins, No. 13-CV-164, 2015 WL 3756046, at *3–4 (M.D. Ga. June 16, 2015).

200. *See Acuity II*, 205 N.E.3d 460, 472 (Ohio 2022).

201. *Jenkins*, 2015 WL 3756046, at *1.

202. *See id.* ("Plaintiff United States Liability Company, which insured Jenkins . . . filed a Complaint for Declaratory Judgment, alleging that . . . the insurance company owed Jenkins no duty to defend or indemnify.").

203. *Id.* at *3, *5.

Finally, *Cincinnati Insurance Co. v. Robert W. Setterlin & Sons*[204] involved a claim made by "a person or organization that directly suffered harm because of another person's injury."[205] There, A.H. Sturgill Roof Inc. ("Sturgill"), a subcontractor, alleged that its employees' workers' compensation premiums increased after an employee sustained severe bodily injuries, which stemmed from the general contractor's negligence.[206] Sturgill sued Robert W. Setterlin & Sons ("Setterlin"), asserting that Setterlin was liable for the increase.[207] Setterlin sought coverage from Cincinnati, but Cincinnati argued that Sturgill alleged "purely economic losses" and as such, had not suffered a "bodily injury."[208] The Court of Appeals of Ohio's Tenth District disagreed, noting that Sturgill did not need to suffer a "bodily injury" as long as its damages stemmed from the injury to its employee.[209] Thus, the Court of Appeals for Ohio's Tenth District held that Cincinnati did, in fact, have a "duty to defend" Setterlin against Sturgill's claims.[210]

The Supreme Court of Ohio, in citing each of the above-discussed cases, fully agreed with the Supreme Court of Delaware, holding that the at-issue policies require more than a "tenuous connection."[211] A claim will be covered only if it is "tied to [the] specific bodily injury."[212] Ultimately, the Supreme Court of Ohio asserted that a "sufficient connection" will likely be found to exist if the claim has been asserted by someone within the above-discussed categories.[213]

Governments are not (1) "the person injured," (2) "a person recovering on behalf of the person injured," or (3) "people or organizations that treated the person injured or deceased," given that such people or organizations are required to articulate the "existence" and "cause" of their injuries.[214] Still, insureds may counter this assertion in a last-ditch effort to acquire coverage.[215] Rite Aid, for example, has argued that Cuyahoga and Summit fell within the third

204. Cincinnati Ins. Co. v. Robert W. Setterlin & Sons, No. 07AP-47, 2007 WL 2800383, at *1 (Ohio Ct. App. Sept. 27, 2007).

205. *Acuity II*, 205 N.E.3d 460, 473 (Ohio 2022).

206. *Robert W. Setterlin & Sons*, 2007 WL 2800383, at *1.

207. *Id.*

208. *Id.*

209. *Id.* at *7–8.

210. *Id.* at *8.

211. *Acuity II*, 205 N.E.3d 460, 472–73 (Ohio 2022).

212. *Id.* at 467.

213. *Id.* at 472.

214. *Id.* at 472–73.

215. *See, e.g.*, ACE Am. Ins. Co. v. Rite Aid Corp., 270 A.3d 239, 252 (Del. 2022) (explaining the insured's argument that governments' claims sought "damages claimed by an organization for care and death resulting from bodily injury").

category, thereby asserting claims as organizations that "provide[d] medical care."[216] The Supreme Court of Delaware rejected this assertion, reasoning that Cuyahoga and Summit sought to recover for a "non-derivative economic loss," not for a "personal injury."[217] That is, Cuyahoga and Summit could not—and, in fact, expressly did not—articulate the existence and source of their injuries.[218] Their claims, then, were not for care provided to the injured person, as the policy unambiguously requires.[219]

It is evident from the claims and the at-issues policies that manufacturers, distributors, and retailers are not entitled to a defense, at least as against the governmental entities' claims. The policies are unambiguous—that is, they are "susceptible of only one construction."[220] There is no doubt that a claim must be linked to a specific, "individual injury,"[221] as suffered "by a person," not an entity.[222] Governments, in alleging nonderivative claims, have not linked their damages to a specific, "individual injury."[223] They are not asking for a paralyzed individual's wheelchair-accessible ramp.[224] They are asking, instead, for an additional ambulance that, although prompted by increased opioid-related overdoses, will be used to serve their entire population's distinct yet potentially unrelated needs (e.g., a heart attack or a slip and fall). Such expenditures will benefit those who have remained unimpacted and uninjured by the alleged public nuisance.[225] They seek to recover for themselves—and for their population at large, even if they were not directly impacted by the nation's ever-growing opioid epidemic.[226]

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216. *Id.* at 244.

217. *Id.* at 250.

218. *Id.* at 247–48.

219. *Id.* at 252 ("Although some of those costs involve medical care, when an organization seeks to recover its costs incurred in caring for bodily injury, it must show that it treated an individual with an injury, how much that treatment cost, and that the injury was caused by the insured." (footnotes omitted)).

220. Fischer, *supra* note 91, at 1004.

221. *Acuity II*, 205 N.E.3d 460, 467 (Ohio 2022).

222. *See ACE Am. Ins.*, 270 A.3d at 243.

223. *See, e.g.*, *id.* at 253 (noting that the County had "disclaimed any recovery" for "individual injury").

224. *Cf. H.D. Smith I*, 829 F.3d 771, 774 (7th Cir. 2016) (analogizing claims "because of bodily injury" to an injured individual seeking costs of installing a wheelchair ramp (quoting Medmarc Cas. Ins. v. Avent Am., Inc., 612 F.3d 607, 616 (7th Cir. 2010))).

225. *See, e.g.*, *ACE Am. Ins.*, 270 A.3d at 247 ("The Counties claim only 'indirect and purely economic injuries' that are 'primarily in the form of increased social spending . . . .' ").

226. *See id.* ("Their increased costs 'are of a different kind and degree than Ohio citizens at large' and 'can only be suffered by [the Counties]' and 'are not based upon or derivative of the rights of others.' ").

The Supreme Courts of Delaware and Ohio (and, as of 2023, the Sixth Circuit) were right to decline to extend the commercial general liability policies' coverage grant to reach the governmental entities' claims.[227] They strictly construed the at-issue policies' plain and ordinary meaning, considering both pertinent definitions and applicable conditions.[228] Their conclusions were bolstered by the historical scope of such policies. Indeed, *Fairless*, *Jenkins*, and *Robert W. Setterlin & Sons* demonstrate that insurers and insureds have understood, and even conceded, that the at-issue policies cover specific, "individual injur[ies]."[229]

Such considerations were neglected by the Seventh Circuit and the Eighth District. Indeed, the Seventh Circuit and the Eighth District rightfully acknowledged that a "bodily injury" had occurred.[230] But their inquiries stopped there, failing to consider that the attenuation of such injuries is fatal to the underlying claims.[231]

III. REJECTING PHARMACEUTICAL COMPANIES' CLAIMS FOR COVERAGE OF GOVERNMENTAL ECONOMIC LOSSES

A. Insurance as a Contract

It is an understatement to suggest that the question of whether manufacturers, distributors, and retailers should be covered has resulted in an expanding but diverging body of law, as noted by the Supreme Court of Ohio.[232] In reaching their determinations on this question, courts sometimes cite opinions that are ripe to be—and, in fact, have been—overruled.[233] Courts often also fail to strictly construe

227. *See id.* at 253; *Acuity II*, 205 N.E.3d 460, 472–74 (Ohio 2022); Westfield Nat'l Ins. v. Quest Pharms., Inc., 57 F.4th 558, 567 (6th Cir. 2023) ("Nothing in the policies suggests that they were meant to cover lawsuits like the ones here, brought primarily by local governments to recover purely economic damages.").

228. *See Westfield Nat'l Ins.*, 57 F.4th at 561 (focusing on the at-issue policy's plain meaning); *Acuity II*, 205 N.E.3d at 472–73 (discussing the meaning of "bodily injury").

229. *ACE Am. Ins.*, 270 A.3d at 253; *see* Fairless v. Acuity, No. C-210165, 2022 WL 38870, at *4–5 (Ohio Ct. App. Jan. 5, 2022); U.S. Liab. Ins. Co. v. Jenkins, No. 13-CV-164, 2015 WL 3756046, at *3, *5 (M.D. Ga. June 16, 2015); Cincinnati Ins. Co. v. Robert W. Setterlin & Sons, No. 07AP-47, 2007 WL 2800383, at *7 (Ohio Ct. App. Sept. 27, 2007).

230. *H.D. Smith I*, 829 F.3d 771, 774 (7th Cir. 2016); Cincinnati Ins. Co. v. Disc. Drug Mart, Inc., 183 N.E.3d 538, 551 (Ohio Ct. App. 2021), *vacated*, 199 N.E.3d 538 (Ohio 2022) (mem.).

231. *See, e.g.*, *H.D. Smith I*, 829 F.3d at 774 (finding the government's suit indistinguishable from a mother's suit for costs of caring for her son's injuries).

232. *See Acuity II*, 205 N.E.3d at 465–66 ("There is a growing and diverging body of case law on the issue before us . . . .").

233. *Discount Drug Mart* cited *Acuity I*, not *Acuity II*, which overruled *Acuity I*. *See Disc. Drug Mart, Inc.*, 183 N.E.3d at 550 ("We note that as of the date of this opinion, the Ohio Supreme Court accepted [*Acuity I*] for review and held oral argument on September 8, 2021."), *vacated*, 199 N.E.3d

the policies' plain language.[234] They reach to locate ambiguities and reinforce a widespread and arguably problematic pro-insured bias.[235] They reach different conclusions, even though they are evaluating almost identical claims and identical policies.[236]

The Seventh Circuit and the Eighth District are incongruent with ISO Form 13.[237] Their opinions do not align with the plain language or the parties' reasonable expectations, given the historical scope of the commercial general liability policy. Their holdings serve to extend the at-issue policies, allocating risks to insurers that were clearly intended to be internalized by insureds. This perpetual tug of war should and, indeed, can be avoided.

There is a simple answer. It is evident, given the at-issue policies' plain and unambiguous language, that insurers should not be called upon to defend such insureds against governmental entities' opioid-related claims of public nuisance.[238] The underlying claims are too attenuated, wholly separate from the bodily injuries of the addicted.[239] They are purely economic.[240] And the standard commercial general liability policy was never intended to transfer the risk of a conscious business decision's economic impact from the insured to the insurer.[241]

Courts must strive to reach uniformity. They must turn to the Supreme Courts of Delaware and Ohio, relying upon the persuasive authority of their extensive interpretation of the policies' plain and unambiguous language.[242] They must consider pertinent definitions (i.e., "by a *person*") and applicable conditions (i.e., "*the* 'bodily injury' "),

538 (Ohio 2022) (mem.); *cf*. *Acuity II*, 205 N.E.3d 460. Likewise, *Discount Drug Mart* was overruled by *Acuity II*. *Acuity II*, 205 N.E.3d 460.

234. *See, e.g.*, *H.D. Smith I*, 829 F.3d at 774 ("Cincinnati argues to the contrary, stressing that West Virginia seeks its own damages, not damages on behalf of its citizens. But so what?").

235. *See, e.g.*, *id.* ("We must 'liberally constru[e]' the allegations 'in favor of the insured.' " (quoting Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co., 828 N.E.2d 1092, 1098 (Ill. 2005) (alteration in original))); Fischer, *supra* note 91, at 1002 (noting the development of a pro-insured bias).

236. *Compare H.D. Smith I*, 829 F.3d at 774–75 (finding coverage), *with Acuity II*, 205 N.E.3d at 474 (finding no coverage).

237. *See supra* Part II (demonstrating the incongruence of these approaches).

238. *See supra* Part II (making this argument).

239. *See, e.g.*, ACE Am. Ins. Co. v. Rite Aid Corp., 270 A.3d 239, 248 (Del. 2022) ("Obviously, the Counties cannot claim damages for bodily injury. And they seek compensation for their economic losses, not derivatively for the bodily injuries suffered by Ohioans in the opioid crisis.").

240. *See id.*

241. *See* RUTKIN & TUGANDER, *supra* note 88, at 73–74, 76.

242. *See, e.g.*, *ACE Am. Ins.*, 270 A.3d at 246–49 (interpreting the at-issue policy's language); *Acuity II*, 205 N.E.3d at 466 (citing *ACE Am. Ins. Co.*, 270 A.3d at 253–54).

as discussed *supra* Section II.B.[243] They must consider the traditional applications of such policies, too.[244]

The Sixth Circuit has modeled this approach, as it has already effortlessly echoed the Supreme Courts of Delaware and Ohio.[245] There, the Sixth Circuit concluded that Westfield National Insurance Company and Motorists Mutual Insurance Company were not required to cover Quest, which was engaged in seventy-seven related lawsuits.[246] Specifically, the Sixth Circuit reiterated that

> [b]ased on the plain language of the policies and their overall context and purpose . . . the insurers have no duty to defend Quest . . . The claims, all of which are for economic damages, are simply beyond the policies' scope . . . . [T]he policies' plain terms preclude coverage . . . .[247]

Courts must elect to follow the trend.[248] They must strictly construe the at-issue policies' plain language to conclude that it proscribes coverage for insured manufacturers, distributors, and retailers as to governmental entities' opioid-related claims.

B. Insurance as a Social Instrument

An ideal—but perhaps impractical—result could involve considering the ramifications of the at-issue claims in conjunction with the policies' plain language. Courts, in accepting this "broader view," would seek to interpret insurance policies by referencing their text as well as their intent and purpose.[249] This perspective would confirm contract-based analyses, at least insofar as it considers the parties'

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243. COM. GEN. LIAB. COVERAGE FORM §§ I.1.b, V.3, at 13 (INS. SERVS. OFF. 2012) (emphasis added) (internal quotation marks omitted).

244. For interpretations of such policies in contexts not involving coverage of pharmaceutical companies, see, for example, Fairless v. Acuity, No. C-210165, 2022 WL 38870, at *4–5 (Ohio Ct. App. Jan. 5, 2022); U.S. Liab. Ins. Co. v. Jenkins, No. 13-CV-164, 2015 WL 3756046, at *3, *5 (M.D. Ga. June 16, 2015); and Cincinnati Ins. Co. v. Robert W. Setterlin & Sons, No. 07AP-47, 2007 WL 2800383, at *7 (Ohio Ct. App. Sept. 27, 2007).

245. Westfield Nat'l Ins. v. Quest Pharms., Inc., 57 F.4th 558, 563–64 (6th Cir. 2023) (citing the Supreme Court of Delaware and the Supreme Court of Ohio).

246. *Id.* at 559, 563–64, 567.

247. *Id.* at 567.

248. *H.D. Smith I* and *Discount Drug Mart* preceded *ACE American Insurance Co.* and *Acuity II*, as well as *Westfield National Insurance*, which was decided most recently. *Compare H.D. Smith I*, 829 F.3d 771 (7th Cir. 2016) (decided July 19, 2016), *and* Cincinnati Ins. Co. v. Disc. Drug Mart, Inc., 183 N.E.3d 538, 551 (Ohio Ct. App. 2021) (decided December 30, 2021), *vacated*, 199 N.E.3d 538 (Ohio 2022) (mem.), *with* ACE Am. Ins. Co. v. Rite Aid Corp., 270 A.3d 239 (Del. 2022) (decided January 10, 2022), *Acuity II*, 205 N.E.3d 460 (Ohio 2022) (decided September 7, 2022), *and Westfield Nat'l Ins.*, 57 F.4th 558 (decided January 13, 2023).

249. Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1492–93 (2010).

reasonable expectations.[250] And it would avert the "excessive acceptance"[251] of the pro-insured bias, which has worried scholars.[252]

Significantly, insurance policies exist as "social institutions," serving significant, distinct functions in today's ever-evolving society.[253] They articulate the risks associated with developing technologies, encouraging "safety."[254] They serve to manage risks, facilitate commerce, and promote socially desirable choices.[255]

The Seventh Circuit and the Eight District neglected such a function. They have elected, instead, to ignore the ramifications of their holdings, engaging in a less-than-zealous analysis in order to find nonexistent ambiguities and, by extension, reinforce the pro-insured bias.[256] This too-quick jump to finding in favor of the insureds has perverse incentives. It will contribute to an inevitable but predictable disaster, as such an approach writes a blank check for insured manufacturers, distributors, and retailers to recklessly market addictive substances—prioritizing their profits over their patients.[257] Insureds have been told, by the Seventh Circuit and the Eighth District, to continue business as usual.[258] Thousands more will suffer—from opioids or, perhaps, from the next miracle drug.[259]

Insureds, in manufacturing and distributing addictive drugs, should be expected to be far more diligent.[260] The opioid epidemic has

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250. *See id.* at 1510 ("In many, perhaps most, cases, adding the social instrument perspective to traditional contract analysis will bolster a contract-driven assessment.").

251. *Id.* at 1513.

252. Fischer, *supra* note 91, at 997.

253. Stempel, *supra* note 249, at 1495.

254. *Id.* at 1504–05.

255. *Id.* at 1510.

256. *See H.D. Smith I*, 829 F.3d 771, 774 (7th Cir. 2016) (finding a duty to defend and liberally interpreting the allegations and the coverage in favor of the insured); Cincinnati Ins. Co. v. Disc. Drug Mart, Inc., 183 N.E.3d 538 (Ohio Ct. App. 2021), *vacated*, 199 N.E.3d 538 (Ohio 2022) (mem.).

257. *See* Natasha Singer, *How Big Pharma Grew Addicted to Big Profits*, N.Y. TIMES, https://www.nytimes.com/2020/03/12/books/pharma-gerald-posner.html (last updated July 8, 2021) [https://perma.cc/V8YG-8CKY] ("The highly addictive nature of [German pharmaceutical company Bayer's] products . . . coupled with no government oversight and regulation, was good for sales." (quoting GERALD POSNER, PHARMA: GREED, LIES, AND THE POISONING OF AMERICA 15–16 (2020))).

258. *See H.D. Smith I*, 829 F.3d at 775 (holding that the insurer had a duty to defend a pharmaceutical distributor against opioid-related claims from the government); *Disc. Drug Mart, Inc.*, 183 N.E.3d at 553, *vacated*, 199 N.E.3d 538 (Ohio 2022) (mem.).

259. *See* OLSEN & SHARFSTEIN, *supra* note 1, at 143 (describing opioid development and marketing in the 1990s).

260. Of course, I am not arguing that such insureds acted intentionally or even negligently. Insurers have made such arguments, given that an intentional act would not be considered an "occurrence" and, as such, would not be covered. *See, e.g.*, Travelers Prop. Cas. Co. of Am. v. Actavis, Inc., 225 Cal. Rptr. 3d 5, 16–18 (Cal. Ct. App. 2017) ("However, '[w]here the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an 'accident' merely because the insured did not intend to cause injury.' "); AIU Ins. Co. v. McKesson

been referred to as "a man-made plague, twenty years in the making,"[261] marked by the four discrete phases of the original epidemic: (1) the "overprescri[ption] of opioids for pain;" (2) the "clampdown on opioid use in medicine;" (3) the "rising use of illicit opioids;" and (4) the "conflicted response, including both greater access to treatment and strong[er] criminal penalties."[262]

The epidemic began, all over again, with the "overprescri[ption] of opioids for pain" and, thus, with the likes of ABDC, Cardinal, and McKesson taking advantage of the renewed demand.[263] Society is not well served by permitting manufacturers, distributors, and retail pharmacies to wash their hands of the damage. Insureds must confront the wreckage—and, indeed, reap that which they sowed.

Governments will still recover for their "non-derivative economic loss[es]," even absent insurers' coverage of such claims.[264] Insureds can afford to cover the cost of abatement programs, which includes, for example, residential rehabilitation care in Huntington, West Virginia.[265] After all, Big Pharma's "addict[ion]" to "producing 'staggering profits from their highly addictive products' " has led to substantial wealth.[266] In fact, Big Pharma, which includes the likes of CVS Health and McKesson, yielded $1.48 trillion in 2022.[267]

CONCLUSION

The interpretation of insurance policies for opioid-related liability impacts far more than just insurers and insureds. And though the dialogical nature of the relevant case law[268] may suggest otherwise,

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Corp., No. 22-16158, 2024 WL 302182, at *1 (9th Cir. Jan. 26, 2024) ("But '[a]n accident does not occur when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage.' ").

261. *In re* Nat'l Prescription Opiate Litig., No. 17-md-2804, 2018 WL 6628898, at *21 (N.D. Ohio Dec. 19, 2018).

262. OLSEN & SHARFSTEIN, *supra* note 1, at 138.

263. *Id.*; *see* The Associated Press, *supra* note 22 (describing litigation involving three major drug distributors).

264. *See, e.g.*, ACE Am. Ins. Co. v. Rite Aid Corp., 270 A.3d 239, 250 (Del. 2022) (holding that the insurer had no duty to defend against the government's claim for non-derivative economic losses against defendant because only personal injury claims were covered by the at-issue policy).

265. *See* Hessler, *supra* note 21 (describing a forensic economist's plan to abate the opioid crisis in Huntington, West Virginia).

266. Singer, *supra* note 257 (reporting opioid manufacturers' profits on those products).

267. Matej Mikulic, *Global Pharmaceutical Industry – Statistics & Facts*, STATISTA (Jan. 10, 2024), https://www.statista.com/topics/1764/global-pharmaceutical-industry/#topicOverview [https://perma.cc/X79U-BDCF].

268. *See supra* Part II.

it is unambiguous that the plain text of the at-issue policies forecloses coverage for insured manufacturers, distributors, and retailers.[269]

Insureds will be forced to reckon with the consequences of their actions. They will pay, figuratively and literally, for their "misrepresentations."[270] They will pay, figuratively and literally, for flooding small, vulnerable towns with hydrocodone and oxycodone.[271] They might be more careful, too, the next time they consider marketing powerfully addictive drugs as safe for broad use.

This solution will govern only existing claims. Insurers are "crafting and delivering opioid exclusions" in commercial general liability policies, with some exclusions applying to manufacturers and distributors, but not retailers.[272] For example, Navigators Specialty Insurance has begun explicitly excluding opioid-related claims.[273] Others have already followed suit, seeking to mitigate the risk of an improper finding of coverage.[274] Such exclusion-ridden policies will be even more unambiguous. Courts, like the Seventh Circuit and Ohio's Eighth District, will be forced to hold that the at-issue policies preclude coverage, in spite of their clear resistance.[275]

This result may also prompt insurers to create new, opioid-specific policies, available for insured manufacturers, distributors, and retailers. Indeed, Professor Jeffrey W. Stempel notes that "specialized . . . insurance policies" are often offered to "meet particular policyholder needs."[276] Such a response would still be preferable, given that insureds would be required to pay increased premiums—in

269. *See, e.g.*, *ACE Am. Ins. Co.*, 270 A.3d at 250 (holding that the insurer had no duty to defend against the government's claim for non-derivative economic losses against the defendant because only personal injury claims were covered by the at-issue policy).

270. *See* Sutton, *supra* note 68, at 8.

271. *See* Eyre, *supra* note 63 (discussing the House Energy and Commerce Committee's bipartisan investigation into "inordinate" amounts of opioids being distributed to small-town pharmacies by out-of-state drug companies).

272. *Opioid Crisis: Insurers on the Defense*, SWISS RE 2 (2018), https://www.swissre.com/dam/jcr:e115d42b-dd51-4339-9c74-e2a60cf468ef/ARM-18-01329-P1-Trend_Spotlight-Opioids-6-27USletter-web.pdf [https://perma.cc/L9BG-B4JY].

273. *See* Dana A. Elfin, *Insurers Seek to Avoid Being Drawn Into Opioid Litigation*, BLOOMBERG L. (Jan. 17, 2019, 4:15 AM), https://news.bloomberglaw.com/pharma-and-life-sciences/insurers-seek-to-avoid-being-drawn-into-opioid-litigation [https://perma.cc/K7UU-RDRU] ("Navigators Specialty Insurance Co. is just one of the insurers arguing it shouldn't have to defend or indemnify policy holders against opioid-related claims.").

274. *See* SWISS RE, *supra* note 272 (explaining insurers' efforts to avoid coverage of opioid-related claims).

275. *Cf. H.D. Smith I*, 829 F.3d 771, 775 (7th Cir. 2016) (holding that the insurer had a duty to defend pharmaceutical distributor against opioid-related claims from the government); Cincinnati Ins. Co. v. Disc. Drug Mart, Inc., 183 N.E.3d 538, 553 (Ohio Ct. App. 2021), *vacated*, 199 N.E.3d 538 (Ohio 2022) (mem.).

276. Stempel, *supra* note 249, at 1506.

addition to their premiums for other, unrelated policies (e.g., commercial general liability).

Of course, these exclusions and policies raise new questions. Their language, for example, could be viewed as conceding that the language was ambiguous—or, as it pertains to specialized policies, that the language was unambiguous. Parties, too, will likely also litigate the meaning of each addition. Scholars predict that litigation will span decades, akin to the long-lasting disputes over asbestos coverage.[277] Indeed, the Department of Justice sued Rite Aid on March 13, 2023, alleging that Rite Aid "knowingly filled unlawful prescriptions for controlled substances."[278] This dispute, then, is far from over.

Courts must strive to find a uniform answer, thereby guaranteeing that interpretations of the same language do not vary across jurisdictions. This answer is found in strict constructions, which consider pertinent definitions and applicable conditions.[279] The answer is also found by looking beyond the text and treating such policies as social instruments.[280] Where, as is the case here, the strict construction and purpose of a text align in the same interpretation, courts should broadly adopt that approach.

It may very well be possible to prevent the next "man-made plague" by calling upon insureds, rather than insurers, to defend such claims—and, ultimately, pay the price for the havoc they have wrought on Huntington, on West Virginia, and on the United States.[281]

*Madison Perry**

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277. Shane Dilworth, *Legal Experts Say Opioid Coverage Disputes Far From Over*, LAW360 (Apr. 21, 2022, 6:35 PM), https://www.law360.com/insurance-authority/articles/1482034/legal-experts-say-opioid-coverage-disputes-far-from-over [https://perma.cc/7DAZ-5E7E].

278. Talal Ansari, *DOJ Sues Rite Aid for Allegedly Filling Opioid Prescriptions With 'Obvious Red Flags*,' WALL ST. J., https://www.wsj.com/articles/doj-sues-rite-aid-for-allegedly-filling-opioid-prescriptions-with-obvious-red-flags-b748066a (last updated Mar. 14, 2023, 6:40 PM) [https://perma.cc/23R7-5DZS].

279. *See, e.g.*, ACE Am. Ins. Co. v. Rite Aid Corp., 270 A.3d 239, 247 (Del. 2022) (giving strict attention to the terms of policy at issue).

280. *See* Stempel, *supra* note 249, at 1495 ("[I]nsurance policies exist as social institutions . . . that serve important, particularized functions in modern society—often acting as adjunct arms of governance and reflecting social and commercial norms.").

281. *In re* Nat'l Prescription Opiate Litig., No. 17-md-2804, 2018 WL 6628898, at *21 (N.D. Ohio Dec. 19, 2018).

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