IN THE CIRCUIT COURT FOR THE COUNTY OF ST. LOUIS, STATE OF MISSOURI

OPIOID MASTER DISBURSEMENT TRUST II, A/KA/ OPIOID MTD II,	)	
	)	Case No. 22SL-CC02974
Plaintiff,	)	
	)	Division No. 2
	)	
	)	**JURY TRIAL DEMANDED**
	)	
ACE AMERICAN INSURANCE COMPANY, *et al.*,	)	
	)	
Defendants.	)	

ASPEN INSURANCE UK, LTD.'S MOTION TO DISMISS FIRST AMENDED PETITION OR, ALTERNATIVELY, MOTION FOR MORE DEFINITE STATEMENT

Now comes Defendant, Aspen Insurance UK, Ltd. ("Aspen"), by and through its undersigned counsel, and moves, pursuant to Missouri Supreme Court Rule 55.27(a)(6), to dismiss the First Amended Petition for Declaratory Relief ("FAP"), filed by Plaintiff, Opioid Master Disbursement Trust II ("Trust"), because the FAP fails to state a claim upon which relief may be granted. Alternatively, Aspen moves, pursuant to Missouri Supreme Court Rule 55.7(d), for a more definite statement. Under Missouri's fact-pleading standard, the Trust fails to plead facts sufficient to establish that Aspen's policies have been triggered. Absent allegations of facts necessary to satisfy this precondition to coverage, the issue of whether and to what extent the policies may afford coverage for the underlying claims cannot be efficiently litigated or resolved. The FAP must be dismissed or, at the very least, the Trust must be compelled to provide a more definite statement to include the most basic factual prerequisites to coverage.

INTRODUCTION

Each policy at issue in this motion applies to: 1) claims first made against an insured entity and reported to the insurer during the policy period, for claims seeking damages within the

"products-completed operations hazard" for pharmaceuticals; and 2) claims involving "bodily injury" taking place during the policy period, for claims seeking damages outside the "products-completed operations hazard." The FAP does not allege which of the thousands of underlying claims for which the Trust seeks coverage it contends seek damages within the "products-completed operations hazard," when those claims were first made against an insured entity, or when the claims were first reported to the insurers. Nor does the FAP allege which of the thousands of underlying claims for which the Trust seeks coverage it contends seek damages outside the "products-completed operations hazard" or whether those claims allege "bodily injury" taking place during the policy period. The FAP's failure to allege any fundamental facts about the underlying claims means that the FAP likewise fails to allege that Aspen's policies have been triggered, as to either type of coverage.

The genesis of this coverage dispute is the role that Mallinckrodt plc and its affiliates (collectively, "Mallinckrodt"), manufacturers of prescription opioids, allegedly played in sparking and fueling the national opioid epidemic. The epidemic led to hundreds of thousands of deaths and billions of dollars in government costs across the country. As a result, government entities have filed thousands of lawsuits against opioid manufacturers (including Mallinckrodt), distributors, and retailers to recoup their economic losses arising from the epidemic.

After Mallinckrodt settled just two government entity lawsuits for $30 million, it filed for bankruptcy protection. The bankruptcy court ultimately approved a $1.7 billion settlement with the opioid claimants, discharging Mallinckrodt from liability for thousands of pending and even future opioid lawsuits ("Underlying Opioid Claims"). As part of the bankruptcy proceedings, Mallinckrodt assigned to the Trust its rights under its insurance policies. The Trust now alleges that it has exclusive rights to the policies and any recovery thereunder.

The Trust filed the present declaratory relief action against Mallinckrodt's insurers. The Trust demands coverage for defense and indemnity costs in connection with the Underlying Opioid Claims, even though Mallinckrodt never previously reported these claims to many of the policies named in the FAP. Among the policies named in the FAP are certain Aspen policies, collectively effective from November 15, 2008 to November 15, 2011.[1]

The Trust is eager to begin litigating this expansive coverage dispute. Despite never having noticed the Underlying Opioid Claims to the 2008–2011 Aspen Following Policies, the Trust alleges that Aspen has nevertheless breached the policies by refusing to reimburse unspecified sums of defense costs and settlements. The Trust also alleges that it is entitled to a declaration that Aspen must pay some portion of future settlements. The Trust even insists that the insurers immediately accept service of discovery and coordinate briefing on common issues.

But all of this is premature. Before the parties can litigate whether and to what extent the policies may cover the Underlying Opioid Claims, including agreeing to a discovery plan and identifying common issues, the Trust must first plead that the polices have been triggered—a prerequisite to coverage. This, the FAP does not do. The FAP does not quote or attach the relevant policy language, and omits key facts about the thousands of Underlying Opioid Claims

[1] Aspen issued the following policies: 1) Policy No. K0A0DKT08A0E, effective November 15, 2008 to November 15, 2009; 2) Policy No. K0A0DKT09A0E, effective November 15, 2009 to November 15, 2010; and 3) Policy No. K0A0DKT10A0E, effective November 15, 2010 to November 15, 2011 (collectively, "2008–2011 Aspen Following Policies" and attached as "Group Exhibit A," with premium information redacted). Aspen issued two additional policies: 1) Policy No. K0A0DKT11A0E, effective November 15, 2011 to November 15, 2012; and 2) Policy No. K0A0DKT12A0E, effective November 15, 2012 to November 15, 2013 (collectively, "2011–2013 Aspen Following Policies"). The 2011–2013 Aspen Following Policies are the subject of Aspen's contemporaneously filed joinder in the motion to dismiss filed by co-Defendants, Allianz Global Corporate & Specialty SE, incorrectly sued as "Allianz Global Risks US Insurance Company," HDI Global SE, Lloyd's of London Syndicate #1218, a/k/a Newline Syndicate 1218, and SJ Catlin Syndicate SJC 2003. All arguments raised herein apply equally to the 2011–2013 Aspen Following Policies.

for which it seeks tens of millions of dollars in insurance proceeds. Without specific factual allegations establishing that the Underlying Opioid Claims trigger coverage under the 2008–2011 Aspen Following Policies, the FAP does not satisfy Missouri's fact-pleading standard.

The Trust compounds its pleading defects by attempting to recast the nature of the Underlying Opioid Claims. At their core, the Underlying Opioid Claims seek damages within the "products-completed operations hazard," which includes "bodily injury" arising out of Mallinckrodt's warranties, representations, and/or failure to provide warnings or instructions about opioids. Accepting at face value the Trust's allegations that the Underlying Opioid Claims also seek damages outside the "products-completed operations hazard," solely for purposes of the present motion, it is still incumbent on the Trust to allege which Underlying Opioid Claims implicate which type of coverage and the relevant facts establishing each coverage trigger. Without such facts, it is impossible for Aspen to assess whether and to what extent the 2008–2011 Aspen Following Policies might be triggered.

The only workable solution is to dismiss the FAP or direct the Trust to replead to provide a more definite statement. Otherwise, Aspen will be manifestly prejudiced, as Aspen will be left to simply guess which of its policies the Trust believes are responsive to thousands of disparate Underlying Opioid Claims. That is, Aspen faces the prospect of preparing a responsive pleading with an insufficient factual basis on which to raise all applicable coverage defenses.

To be clear, discovery is not an appropriate remedy to cure the Trust's pleading defects. The parties should not be forced to litigate the case for years, and at great expense, only to find out at the end what type of coverage is being sought for which Underlying Opioid Claims under which policies and for what sums. Rather, the Trust's pleadings must define these parameters at the outset. This sets a course for the most efficient way forward by narrowing the contested

issues, streamlining case management, and expediting a trial on the merits, leaving the parties free to focus their efforts on the ultimate issue of coverage.

In sum, the deficient FAP cannot stand and must be dismissed. Alternatively, the Trust should be compelled to replead to provide a more definite statement, as explained further below.

FACTUAL BACKGROUND

The 2008–2011 Aspen Following Policies follow form to and incorporate certain underlying policies issued by National Union Fire Insurance Company of Pittsburgh, PA ("NU"). (Grp. Ex. A at ASP 8193, ASP 8195, ASP 8200, ASP 8202, ASP 4261, ASP 4263) The NU policies include: 1) Policy No. BE 2227062, effective November 15, 2008 to November 15, 2009; 2) Policy No. BE 27471560, effective November 15, 2009 to November 15, 2010; and 3) Policy No. BE 15972632, effective November 15, 2010 to November 15, 2011 (collectively, "NU Followed Policies" and attached as "Group Exhibit B," with premium information redacted).[2]

The NU Followed Policies afford general liability coverage for damages because of "bodily injury," defined as "bodily injury, sickness or disease sustained by any person, including death, mental anguish, mental injury, shock or humiliation resulting from any of these at any time." (Grp. Ex. B at ASP 13653, ASP 13669, ASP 25903, ASP 25919, ASP 25992, ASP 26008) The NU Followed Policies specify that the "bodily injury" must take place during the policy period. (Grp. Ex. B at ASP 13653, ASP 25903, ASP 25992)

[2] Submission of the policies does not convert Aspen's motion to dismiss to a motion for summary judgment. MO. SUP. CT. R. 55.27(a). Because the FAP and First Amended Exhibit A to the FAP refer to the policies, they do not constitute evidence beyond the pleadings. (FAP at ¶¶ 119–35; First Am. Ex. A at 3–6) MO. SUP. CT. R. 55.12 ("An exhibit to a pleading is a part thereof for all purposes."); *Kraus v. Hy-Vee, Inc.*, 147 S.W.3d 907, 913 (Mo. Ct. App. 2004) (holding that defendants' motion to dismiss was not converted to a motion for summary judgment, where the parties neither submitted nor referred to evidence beyond the pleadings).

For claims seeking damages within the "products-completed operations hazard" for pharmaceuticals, however, the NU Followed Policies afford coverage on a claims-made-and-reported basis. The NU Followed Policies contain a substantially similar manuscript "Products-Completed Operations Hazard Claims Made Retained Limit Endorsement." (Grp. Ex. B at ASP 13728–35, ASP 25975–82, ASP 26065–72) The endorsement imposes a claims-made-and-reported trigger for "claims" or "suits" seeking damages within the "products-completed operations hazard" for pharmaceuticals. (Grp. Ex. B at ASP 13728, ASP 25975, ASP 26065) Such a claim must be first made in writing against an insured, and written notice must be received by the insurer, during the policy period or any applicable Extended Reporting Period. (Grp. Ex. B at ASP 13729, ASP 25976, ASP 26066–67)

The NU Followed Policies define "products-completed operations hazard" as "'bodily injury' … occurring away from premises you own or rent and arising out of 'your product' or 'your work.'" (Grp. Ex. B at ASP 13674, ASP 25924, ASP 26013) "Your product" and "your work" are defined to include warranties or representations with respect to the fitness, quality, durability, performance, or use of 'your product' or 'your work' and the providing of or failure to provide warning or instructions. (Grp. Ex. B at ASP 13685, ASP 25926, ASP 26015) In other words, the claims-made-and-reported trigger applies to claims involving both Mallinckrodt's products and Mallinckrodt's work, including Mallinckrodt's warranties, representations, and/or failure to provide warnings or instructions about non-Mallinckrodt products.

Because the Underlying Opioid Claims were not first made against an insured entity or reported to Aspen during the 2008–2011 Aspen Following Policies' effective dates, the Trust hopes to avoid the claims-made-and-reported trigger imposed by the "Products-Completed

Operations Hazard Claims Made Retained Limit Endorsement." As such, the Trust alleges that the Underlying Opioid Claims sought recovery for damages unrelated to Mallinckrodt's opioids:

> - The Opioid Mass Tort Claims include claims by individuals who suffered bodily injuries due to the use of Debtors' opioid pharmaceuticals, and to the use of other manufacturers' opioid pharmaceuticals, and illicit opioid drugs, for which Debtors were responsible. The Opioid Mass Tort Claims also include claims by entities, including governmental entities and others, that incurred costs because of the bodily injuries of such individuals.
>
> - Debtors engaged in an extensive unbranded promotional campaign, not specific to Debtors' opioid pharmaceuticals, that promoted the use of opioid pharmaceuticals generally and caused individuals to use not only Debtors' opioid pharmaceuticals but the opioid pharmaceuticals of other manufacturers, as well as illicit opioid drugs.
>
> - [T]he Opioid Mass Tort Claims seek to hold the Debtors liable for bodily injuries, and costs incurred because of bodily injuries, allegedly caused by: (1) the Debtors' products; (2) the Debtors' alleged conduct in creating and fueling the nationwide opioid crisis; (3) the opioid products of other manufacturers; and (4) illicit opioids.
>
> - [T]he Opioid Mass Tort Claims seek to hold the Debtors liable for more than harm allegedly caused by the Debtors' products. … These injuries do not arise out of the Debtors' own products, but instead are alleged to arise out of the Debtors' extensive use of unbranded promotional activities to change the way the medical community and the public perceived, prescribed, and used opioids in general, and their concomitant or resulting use of other manufacturers' opioid products and illicit opioids.

(FAP at 2, ¶¶ 80, 101, 134)

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

I. Legal Standard

Missouri is a fact-pleading state. *Gibson v. Brewer*, 952 S.W.2d 239, 245 (Mo. 1997). A pleading must contain "a short and plain statement of the facts showing that the pleader is

entitled to relief." MO. SUP. CT. R. 55.05. This requires the pleader to set forth the ultimate facts, or allegations from which such facts may be inferred, supporting each element essential to recovery. *Hoag v. McBride & Son Inv. Co.*, 967 S.W.2d 157, 174 (Mo. Ct. App. 1998); *see also Charron v. Holden*, 111 S.W.3d 553, 555 (Mo. Ct. App. 2003) (requiring a pleading to allege "ultimate facts informing the defendant of what the plaintiff will attempt to establish at trial").

Fact-pleading serves an important and salutary goal: narrowing the contested issues and streamlining the case. *Norman v. Wright*, 100 S.W.3d 783, 786 (Mo. 2003) ("Pleadings present, define, and isolate the issues, so that the trial court and all parties have notice of the issues."); *Gibson*, 952 S.W.2d at 245 (Mo. 1997) ("Fact-pleading presents, limits, defines and isolates the contested issues for the trial court and the parties in order to expedite a trial on the merits.").

In deciding a motion to dismiss for failure to state a claim, all properly pled facts are accepted as true. MO. SUP. CT. R. 55.27(a)(6); *Hendricks v. Curators of Univ. of Mo.*, 308 S.W.3d 740, 747 (Mo. Ct. App. 2010). Critically here, bald assertions, conclusory statements, and legal conclusions must be ignored. *Cooper v. Minor*, 16 S.W.3d 578, 581 (Mo. 2000); *see also Transit Cas. Co. ex rel. Pulitzer Publ'g Co. v. Transit Cas. Co. ex rel. Intervening Emps.*, 43 S.W.3d 293, 302 (Mo. 2001) (demanding "more than mere conclusions that the pleader alleges without supporting facts"); *Hendricks*, 308 S.W.3d at 747 (refusing to credit legal conclusions and conclusory fact allegations); *Molumby v. Shapleigh Hardware Co.*, 395 S.W.2d 221 (Mo. Ct. App. 1965) ("Conclusions of law and the construction and interpretation placed on documents pleaded in the petition are not admitted by the motion to dismiss.").

Failure to state a claim upon which relief can be granted deprives the court of jurisdiction, requiring dismissal of the petition. *Townsend v. E. Chem. Waste Sys.*, 234 S.W.3d 452, 469 (Mo. Ct. App. 2007); *see also State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 300 (Mo.

2009) ("If a party cannot state facts sufficient to justify court action or relief, it is fundamentally unjust to force another to suffer the considerable expense and inconvenience of litigation. It is also a waste of judicial resources and taxpayer money.").

II. The FAP does not plead facts establishing that the 2008–2011 Aspen Following Policies have been triggered, a fundamental prerequisite to coverage.

An "occurrence" policy generally provides coverage for an event that occurs during the policy period, regardless of when a claim is asserted. *Grissom v. First Nat'l Ins. Agency*, 371 S.W.3d 869, 874 n.4 (Mo. Ct. App. 2012). Coverage under a claims-made-and-reported policy is triggered when the negligent act or omission is discovered and reported to the insurer during the policy period, regardless of when the act or omission occurred. *Id.* at 874. A claims-made-and-reported policy places special reliance on notice to the insurer during the policy period. *Id.* Absent timely notice, there is no coverage, even if the insurer was not prejudiced. *Id.*; *see also Wittner, Poger, Rosenblum & Spewak, P.C. v. Bar Plan Mut. Ins. Co.*, 969 S.W.2d 749, 754 (Mo. 1998) (reasoning that the reporting requirement helps define the scope of coverage).

Here, the 2008–2011 Aspen Following Policies are governed by two triggers of coverage: 1) claims-made-and reported, for claims seeking damages within the "products-completed operations hazard," which includes Mallinckrodt's warranties, representations, and/or failure to provide warnings or instructions about others' products; and 2) "bodily injury" taking place during the policy period, for claims seeking damages outside the "products-completed operations hazard." Despite this fundamental prerequisite to coverage, the FAP contains no allegations that—if accepted as true—would demonstrate that the 2008–2011 Aspen Following Policies have been triggered. The FAP does not identify or describe the Underlying Opioid Claims that the Trust contends implicate the "products-completed operations hazard" coverage; does not identify or describe the Underlying Opioid Claims that the Trust contends implicate the general

liability coverage; does not allege when the Underlying Opioid Claims were first made against any specific insured entity; does not allege when (if ever) the Underlying Opioid Claims were reported to Aspen; and does not allege when the "bodily injury" at issue occurred. Accordingly, the Trust has not pled that it settled or will settle any Underlying Opioid Claim that was first made against an insured entity and reported to Aspen during the 2008–2011 Aspen Following Policies' effective dates (for purposes of triggering the "products-completed operations hazard" coverage) or that involved "bodily injury" occurring during the 2008–2011 Aspen Following Policies' effective dates (for purposes of triggering the general liability coverage).

The FAP's conclusory and sweeping allegation that the Underlying Opioid Claims "trigger the Defendants' coverage obligations under the terms and conditions of the Insurance Policies and applicable law" falls far short of Missouri's fact-pleading standard. (FAP at ¶ 127) The numerous policies named in the FAP contain different coverage triggers, requiring the Trust to plead a unique set of facts to establish each type of trigger.

Underscoring the Trust's pleading deficiencies, the FAP does not quote the relevant policy language or attach the policies as exhibits. This failure alone merits dismissal. MO. SUP. CT. R. 55.22(a) ("When a claim or defense is founded upon a written instrument, the same shall be recited verbatim in the pleading, or a copy shall be attached to the pleading as an exhibit."); MO. SUP. CT. R. 55.22(d) ("A court may, upon motion of a party or of its own accord, dismiss a cause of action without prejudice for failure to comply with … this Rule.").

For these reasons, the FAP is bereft of factual allegations supporting the Trust's conclusory assertion that all policies at issue have been triggered—a threshold showing that must be made before the Trust can seek to establish coverage under any of the policies at issue. Unless and until the Trust states a claim upon which its request for declaratory relief may be granted,

Aspen cannot be put to the burden and expense of litigating this expansive and protracted coverage dispute. Therefore, the FAP should be dismissed.

ALTERNATIVE MOTION FOR A MORE DEFINITE STATEMENT

I. Legal Standard

When a petition fails to allege facts with sufficient particularity, impeding preparation of a responsive pleading, a court may order plaintiff to provide a more definite statement:

> A party may move for a more definite statement of any matter contained in a pleading that is not averred with sufficient definiteness or particularity to enable the party properly to prepare responsive pleadings or to prepare generally for trial when a responsive pleading is not required. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

MO. SUP. CT. R. 55.27(d); *see also* MO. REV. STAT. § 509.310.

Although a motion for a more definite statement presumes that a cause of action has been stated, filing such a motion with a motion to dismiss for failure to state a claim does not constitute a waiver as to the sufficiency of the pleadings. MO. SUP. CT. R. 55.27(a) ("Motions and pleadings may be filed simultaneously without waiver of the matters contained in either. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.").

II. To determine whether the 2008–2011 Aspen Following Policies have been triggered, the FAP must allege more specific facts concerning the Underlying Opioid Claims.

If and only if the Court finds that the FAP contains the bare minimum of facts required to state a claim upon which relief may be granted, the Trust must nevertheless allege additional facts about the nature of the Underlying Opioid Claims before Aspen can adequately prepare a responsive pleading. To assess whether the 2008–2011 Aspen Following Policies' "products-

completed operations hazard" coverage has been triggered, the operative petition must plead such additional facts as:

- each Underlying Opioid Claim that the Trust contends seeks recovery for "bodily injury" arising out of Mallinckrodt's warranties, representations, and/or failure to provide warnings or instructions relative to opioids;
- for each such claim, when the claim was first made against an insured entity;
- for each such claim, when the claim was first reported to the insurer(s); and
- for each such claim, the amount of defense costs and indemnity paid relative thereto.

To assess whether the 2008–2011 Aspen Following Policies' general liability coverage has been triggered, the operative petition must plead such additional facts as:

- each Underlying Opioid Claim that the Trust contends does not seek recovery for "bodily injury" arising out of Mallinckrodt's warranties, representations, and/or failure to provide warnings or instructions relative to opioids;
- for each such claim, the time period during which the relevant "bodily injury" allegedly took place; and
- for each such claim, the amount of defense costs and indemnity paid relative thereto.

Without this additional key information, Aspen will be hamstrung in its ability to raise and litigate applicable coverage defenses under its two potentially-relevant coverage parts, and will otherwise be forced to engage in broad, unfocused discovery that is neither proportional to the needs of the case nor an efficient use of the parties' and the Court's resources. Therefore, the

Trust should be compelled to provide a more definite statement regarding the specifics of the Underlying Opioid Claims.[3]

CONCLUSION

Wherefore, as to the 2008–2011 Aspen Following Policies, Aspen respectfully requests that the Court award the following relief: 1) dismiss the FAP for failure to state a claim upon which relief may be granted; 2) alternatively, direct the Trust to amend the FAP to plead the additional facts set forth above; and 3) grant such further relief as the Court deems just.

Dated: October 11, 2022

Respectfully submitted,

/s/ *Adam H. Fleischer*

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[3] Aspen's counsel contacted the Trust's counsel via telephone and email to discuss the matters set forth herein, in a good faith effort to resolve the disputed issues. The below undersigned counsel certifies that no resolution was reached. LOC. R. 33.5.