PLUNKETT COONEY

Public Nuisance, Your Products Exclusion Coverage Update

March 17, 2025

Public Nuisance – Florida Law

Publix Super Markets, Inc. v. ACE Prop. & Cas. Ins. Co.
No. 8:22-CV-2569-CEH-AEP (M.D. Fla. Mar. 14, 2025)

The U.S. District Court for the Middle District of Florida granted Publix Super Markets, Inc.'s (Publix) renewed unopposed motion so that Publix could file an appeal of the district court's judgment, which declared that, under Florida law, the insurance policies issued by 19 different insurance companies to Publix did not provide Publix defense or indemnity coverage for underlying opioid lawsuits because they did not allege injuries or damages "because of bodily injury."

In November 2022, Publix filed a declaratory judgment action in the federal court against 19 insurance companies that had issued policies to Publix that provided various layers of coverage between 1995 and 2018. Publix sought a declaration that the insurers had a duty to defend and indemnify Publix in pending lawsuits related to the opioid epidemic (the underlying lawsuits). In April 2023, Publix moved for partial summary judgment against seven insurers, arguing that the insurers had a duty to provide coverage for Publix's defense costs incurred in the underlying lawsuits under their respective policies issued for the policy period of Jan. 1, 2013 to Jan. 1, 2014. Per Publix, it was limiting its dispositive motion to the 2013 policies to streamline motion practice and because the trial court's ruling could significantly simplify the litigation going forward.

In October 2024, the trial court issued an order denying Publix's motion for partial summary judgment finding that, under Florida law, the 2013 policies issued by the seven insurers did not provide coverage for the underlying lawsuits because the specific injuries and damages alleged in the underlying lawsuits were too attenuated to constitute damages "because of bodily injury." The trial court then directed Publix to show cause why summary judgment should not be granted in favor of the seven defendant-insurers. In response to the show cause order, Publix filed an unopposed motion, stating that it could not explain why the summary judgment in favor of the seven defendant-insurers that issued the 2013 policies should not be granted and asked the trial court to enter a final judgment against all counts of its amended complaint and all defendants so that Publix could file an appeal.

In December 2024, the trial court denied Publix's unopposed motion because the trial court's October 2024 ruling that there was no coverage under the 2013 insurance policies did not extend to the remaining policies and Publix's statement that the remaining policies contained language that was functionally similar to the 2013 policies was not sufficient for the trial court to enter a final judgment

with respect to those policies and all insurers. The trial court, however, noted that the remaining policies could come before the court on motion or by stipulation of the parties. Thereafter, the parties filed a joint stipulation that attached 150 policies issued to Publix by all defendants that spanned from 1995 to 2020 and stipulated that each policy "limit[s] coverage to claims against Publix alleging 'damages because of' or 'for bodily injury,' or follow form to the same." Given the joint stipulation and policies, the trial court granted Publix's unopposed motion and entered a corrected final judgment on March 14, 2025, declaring, among other things, that, because the underlying lawsuit did not allege damages "for bodily injury" or 'because of bodily injury," the 19 defendant insurers did not have a duty to defend or indemnify Publix against the claims in the underlying lawsuit. It is expected that Publix will appeal the final judgment to the U.S. Court of Appeals for the Eleventh Circuit.

By: Amy Diviney

'Your Products' Exclusion – Missouri

Opioid Master Disbursement Trust II v. ACE Am. Ins. Co.
Case No. 22SL-CC02974, St. Louis County Circuit Court, Missouri (Mar. 10, 2025)

Since at least 1995, Mallinckrodt Pharmaceuticals and its affiliates (Mallinckrodt) have developed, manufactured, marketed and sold both branded and generic opioid pharmaceuticals. In addition, Mallinckrodt engaged in an extensive promotional campaign to promote the use of opioid pharmaceuticals generally.

By 2020, Mallinckrodt had been named in over 3,000 opioid mass tort claims filed in courts throughout the United States, resulting in the company declaring chapter 11 bankruptcy. In order to exit its bankruptcy, in March of 2022, a trust was created for the benefit of the individuals harmed by Mallinckrodt's production and promotion of opioid pharmaceuticals. Opioid Master Disbursement Trust II (Opioid MDT II) was granted the sole authority to pursue Mallinckrodt's insurance coverage rights in relation to the opioid mass tort claims that had been filed against Mallinckrodt.

In July of 2022, Opioid MDT II sought a declaration regarding the insurance coverage available to Mallinckrodt. More specifically, Opioid MDT II filed a motion for partial summary judgment against National Union Fire Insurance Company of Pittsburg, PA (National Union) regarding the scope of the Your Product exclusion in primary insurance policies issued to Mallinckrodt. In response, National Union and American Home Assurance Company (collectively "the insurers") filed a cross-motion for summary judgment seeking a ruling that coverage for the bodily injury claims was precluded by application of the Your Product exclusion. The Insurers' motion was joined by other excess insurers for Mallinckrodt.

According to Opioid MDT II, the Your Product exclusion did not extend to underlying claimants seeking to hold Mallinckrodt liable for promoting opioids generally, as promotional efforts were not Mallinckrodt's specific opioid products. Conversely, the Insurers argued that this was an overly broad interpretation of the Your Product exclusion, which was intended to preclude coverage for bodily injury arising out of not only Mallinckrodt's products, but also the representations Mallinckrodt made about its products.

Ultimately, the trial court was persuaded by the insurers' interpretation of the Your Product exclusion and granted summary judgment in favor of the Insurers. The court noted that under Missouri law, the phrase "arising out of" is interpreted broadly to mean "originating from" or "growing out of" and includes a broader spectrum than the term "caused by." The trial court further noted that Your Product was defined to include not only "products" but also "representations" Mallinckrodt made about its products.

Therefore, the trial court held that any alleged injuries caused by Mallinckrodt's promotion of opioids generally did arise out Mallinckrodt's products because even unbranded representations were a part of Mallinckrodt's efforts to boost its own opioid product sales, as well as because unbranded representations about of the safety of opioids in general encompassed Mallinckrodt's products.

By: Nicholas Badalamenti