

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

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PENNSYLVANIA MANUFACTURERS’ ASSOCIATION INSURANCE COMPANY,	:	
	:	No.
<i>Plaintiff,</i>	:	
	:	
v.	:	
	:	
NORTH CAROLINA MUTUAL WHOLESALE DRUG COMPANY,	:	
	:	
<i>Defendant.</i>	:	

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**COMPLAINT – ACTION FOR DECLARATORY JUDGMENT**

Plaintiff, Pennsylvania Manufacturers’ Association Insurance Company (“PMA”), by and through its undersigned counsel, hereby brings this declaratory judgment action against Defendant North Carolina Mutual Wholesale Drug Company (“Mutual Drug”), and in support hereof, avers as follows:

1. This action is filed pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, as there is an actual case and controversy between the parties that requires adjudication by the Court.

2. PMA seeks a declaration that it has no duty to defend or indemnify Mutual Drug with respect to suits brought by municipalities and counties in North Carolina, Virginia and South Carolina (the “Opioid Suits”), all arising from the national opioid epidemic .

**I. PARTIES**

3. Plaintiff PMA is an insurance company with its principal place of business at 380 Sentry Parkway, Blue Bell, PA 19422-0754.

4. Defendant Mutual Drug is a North Carolina corporation with its principal place of business at 816 Ellis Road, Durham, North Carolina 27703

## **II. JURISDICTION AND VENUE**

5. This Court has jurisdiction over PMA's claim pursuant to diversity jurisdiction under 28 U.S.C. § 1332 because the amount in controversy is over \$75,000 and the lawsuit involves citizens of different states.

6. This action is also brought pursuant to the Declaratory Judgments Act, 28 U.S.C. § 2201.

7. Venue in this Court is proper under 28 U.S.C. § 1391(b)(2) because Mutual Drug is a resident of this District.

8. The Court has personal jurisdiction over Mutual Drug in that it has its principal place of business in this District.

## **III. FACTUAL BACKGROUND**

9. Mutual Drug is a wholesale distributor of products sold in pharmacies, including pharmaceuticals.

10. Mutual Drug distributes pharmaceuticals in North Carolina, Virginia and South Carolina.

11. Mutual Drug is owned and managed by the pharmacies to which it distributes.

12. Among the pharmaceuticals distributed and sold by Mutual Drug are opioid-based medications.

13. Mutual Drug is a party to national opioid prescription litigation, specifically, Multi-District Litigation 2804 - National Prescription Opiate Litigation, *The County of Summit, Ohio et al. v. Purdue Pharma, L.P. et al.* filed in the United States District Court for the Northern District of Ohio, Eastern Division 17-md-2804. Multiple Opioid Suits filed in various federal courts have been ordered consolidated for handling to the Northern District of Ohio with the Summit County, Ohio case as the lead case. A copy of the Second Amended Complaint in the Summit County case is attached hereto as Exhibit A.

14. There are currently sixty-nine Opioid Suits pending in the United States District Court for the Northern District of Ohio involving Mutual Drug. Six of those Suits were filed by Virginia counties in federal court in Virginia. Seven were brought by North Carolina municipalities in North Carolina federal courts. The remaining fifty-six Opioid Suits were brought by North Carolina counties in federal court in North Carolina. All of these cases have been consolidated to the Northern District of Ohio for handling as part of the National Prescription Opiate Litigation. In addition, Mutual Drug has been named as a defendant in the South Carolina Opioid litigation pending in Greenville County court, C.A. 2018-CP-23-01294. A list of the current pending Opioid Suits in which Mutual Drug is named is attached hereto as Exhibit B.

15. The allegations of the Jones County, North Carolina complaint (“Jones County Complaint”), United States District Court for the Northern District of Ohio, 1:19-op-45142, are set forth here as exemplars for the remaining Opioid Suits, the allegations of which are extremely similar if not identical to those in the Jones County Complaint. A copy of the complaint in the Jones County case is attached hereto as Exhibit C.

16. The allegations of the Jones County Complaint and those in all of the other Opioid Suits apply generically to all Distributor Defendants. There are no specific acts alleged against any individual Distributor Defendant, including Mutual Drug.

17. The Jones County Complaint alleges generally that the Distributor Defendants intentionally and/or willfully breached their legal duties under federal and state law to monitor, detect, investigate, refuse and report suspicious orders of prescription opiates.

18. The Jones County Complaint alleges that the volume of opiates sold in the community (Jones County) is excessive and obviously improper on its face and that the distributors failed to report suspicious orders and unlawfully filled suspicious orders.

19. While the Jones County Complaint alleges that the Distributors Defendants' violations of public safety laws constitute prima facie evidence of negligence under state law, the Complaint also alleges that their conduct was purposeful and intentional, constituting an intentional refusal to abide by the federal and state law.

20. It is also alleged that the Distributor Defendants acted with actual malice with conscious disregard for rights and safety of others, and that their conduct was wanton, willful, or reckless conduct or criminal indifference to their obligations, justifying an award of punitive damages.

21. The Jones County Complaint alleges that Distributor Defendants' actions have caused the opioid epidemic in the Jones County community.

22. The Jones County Complaint states that "Plaintiff seeks damages for economic losses and does not bring an action for personal injury, death, or physical injury to property. . . .

Plaintiff does not bring any product liability claims or causes of action and does not seek compensatory damages for death, physical injury to person or emotional distress. Claimant does not bring common law claims for physical property damage.” In addition to economic damages, plaintiff seeks punitive damages and injunctive relief.

23. The Jones County Complaint alleges the following causes of action:

Count I -- Public nuisance under North Carolina statutory and common law. This count alleges that all defendants’ actions were wrongful and illegal and intentional. It is alleged that defendants acted with actual malice and with conscious disregard for the rights and safety of others.

Count II -- Violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO Act”), alleging that all defendants participated in an illegal enterprise (the “Opioid Diversion Enterprise”) and did so fraudulently. Predicate offenses alleged include mail and wire fraud. It is alleged the defendants’ racketeering activities involved the sale and distribution of controlled substances and Defendants’ crimes are punishable as felonies.

Count III – Violation of RICO Act, specifically, Section 1962(d), through a pattern of racketeering activity by means of the Opioid Diversion Enterprise.

Count IV -- Negligence and negligent misrepresentation. Count IV alleges that defendants have certain legal duties regarding the reasonable marketing and selling of opiates and that the distributors breached their duties by failing to monitor and report highly suspicious orders. It is alleged that defendants misrepresented their compliance with these duties, that their breaches were intentional and unlawful and their conduct willful, wanton, malicious, reckless oppressive and/or fraudulent.

Count V -- Negligence per se, arising from violation of North Carolina's controlled substance laws.

Count VI -- Violation of North Carolina's unfair and deceptive trade practices act, including a willful course of ongoing conduct.

Count VII -- Civil Conspiracy to create a public nuisance and to commit fraud and misrepresentation. It is alleged that "Defendants acted with malice, purposely, intentionally, unlawfully, and without a reasonably or lawful excuse."

Count VIII -- Fraud and fraudulent misrepresentation.

#### **IV. PMA's POLICIES ISSUED TO MUTUAL DRUG**

24. PMA has continuously insured Mutual Drug since July 1, 2002 with Commercial Insurance policies renewing annually through the present (the "Policies").

25. Except where noted, the Policies are identical for the purposes of the coverage issues addressed herein. Mutual Drug has provided notice of the Opioid Suits under the policy dated 7/1/18-7/1/19 (the 2018-19 Policy). A copy of the 2018-19 Policy is attached hereto as Exhibit D.

26. The Policies provide coverage for bodily injury and property damage as follows:

#### **COVERAGE A --- - BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

##### **1. Insuring Agreement**

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. . . .

This insurance applies to "bodily injury" and "property damage" only if:

The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

The "bodily injury" or "property damage" occurs during the policy period; and

Prior to the policy period, no insured listed under Paragraph 1. of Section II ---- Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

27. "Bodily Injury" is defined by the Policy as "injury, sickness or disease sustained by a person including death resulting from any of these at any time."

28. The Opioid Suits do not allege bodily injury as defined by the Policy.

29. First, the plaintiffs are not persons but governmental entities incapable of suffering bodily injury.

30. Second, Opioid Suits in Groups 1 and 3 in Exhibit B expressly state that plaintiffs are not seeking damages for bodily injury or property damage. The Group 2 suits and the South Carolina suit also do not include bodily injury and property damage in the damages sought by plaintiffs.

31. By way of example, Plaintiff in the Jones County suit seeks “economic damages from the Defendants as reimbursement for the costs associated with past efforts to eliminate the hazards to public health and safety.” Specifically, the Jones County Complaint alleges that the Jones County has suffered the following damages:

costs for providing medical care, additional therapeutic and prescription drug purchases, and other treatments for patients suffering from opioid-related addiction or disease, including overdoses and deaths;

costs for providing treatment, counseling, and rehabilitation services;

costs for providing treatment of infants born with opioid-related medical conditions; (4) costs associated with law enforcement, with public safety relating to the opioid epidemic; and (5) costs associated with providing care for children whose parents suffer from opioid-related disability or incapacitation. The Plaintiff has suffered, and continues to suffer directly, these damages.

These alleged costs are not for bodily injury and thus are not within the Policies’ scope of coverage.

32. An “occurrence” is defined by the Policies as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

33. The claims alleged in the Opioid Suits do not arise from an accident as defined by the Policy; rather they result from intentional acts that caused injury that was intended or substantially certain to occur.

34. In addition, any sums for which Mutual Drug are held liable may not be sums Mutual Drug is “legally obligated to pay,” to the extent that any claims in the Opioid Suits are barred by the applicable statutes of limitations.

35. The Policy excludes "Bodily Injury" or "Property Damage" expected or intended from the standpoint of the "insured."

36. The allegations of the Opioid Suits state that the defendants, including the Mutual Drug, acted knowingly, willfully and wantonly. There are numerous allegations that the defendants knew of the likelihood of harm as a result of their conduct but disregarded those risks. Therefore, the intentional acts exclusion bars coverage for the Opioid Suits.

37. An endorsement attached to the Policies provides:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" due to the rendering of or failure to render any professional service. This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or

"property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or failure to render any professional service.

The professional services excluded according to the endorsement are: druggist professional; medical professional; pharmaceutical professional.

38. Since 2013, the Policies have also excluded "any and all professional services rendered."

39. Coverage for the Opioid Suits is excluded by the professional services exclusion.

40. Specifically, the allegations of the Opioid Suits arise from the Distributor Defendants' intentional failure to properly perform their professional pharmaceutical services which require them to make informed judgments regarding suspicious opioid orders that may be subject to diversion or over prescription.

41. Given that Mutual Drug is owned and managed by the pharmacies that are its customers, the Opioid Suits are also excluded by the exclusion for Druggist Professional Services.

42. The Policies also exclude

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

43. Some of the allegations of the Opioid Suits allege improper distribution of information about opioids for the purpose of convincing doctors, government regulators or the public in general that the medications were not dangerous or addictive. It is alleged generally that these actions violated several laws including the RICO Act. The recording and distribution of material or information in violation of law exclusion would bar coverage for these allegations.

44. As set forth above, PMA has no duty to defend or indemnify Mutual Drug for the Opioid Suits under the Policy because: (i) the Opioid Suits do not allege "bodily injury" and therefore are not within the scope of coverage of the policies; (ii) the Opioid Suits do not allege an occurrence as defined by the Policies (iii) coverage for the Opioid Suits is barred by the policies' exclusion for intentional acts; (iv) coverage for the Opioid Suits is barred by the policies' professional services exclusion; and (v) coverage for the Opioid Suits is barred by the Policies' exclusion for material published in violation of law.

**COUNT I – DECLARATORY JUDGMENT (28 U.S.C. § 2201)**

45. PMA incorporates the averments of Paragraph 1 through 44 of this Complaint as though set forth fully.

46. The Opioid Suits do not allege bodily injury as defined by the Policies.

47. The Opioid Suits do not allege an occurrence as defined by the Policies.

48. The allegations of the Opioid Suits are excluded by the Policies as intentional acts.

49. Coverage for the Opioid Suits is barred by the policies' professional services exclusion.

50. Coverage for the Opioid Suits is barred by the Policies' exclusion for material published in violation of law.

51. Accordingly, PMA has no duty to defend or indemnify Mutual Drug with respect to the Opioid Suits under the Policies.

52. PMA seeks a declaration that it has no duty to defend or indemnify Mutual Drug with respect to the Opioid Suits under the Policies because: (i) the Opioid Suits do not allege "bodily injury" and therefore are not within the scope of coverage of the policies; (ii) the Opioid Suits do not allege an occurrence as defined by the Policies (iii) coverage for the Opioid Suits is barred by the policies' exclusion for intentional acts; (iv) coverage for the Opioid Suits is barred by the policies' professional services exclusion; and (v) coverage for the Opioid Suits is barred by the Policies' exclusion for material published in violation of law.

WHEREFORE, PMA requests that this Court enter an Order declaring that: PMA has no duty to defend or indemnify Mutual Drug with respect to the Opioid Suits under the Policies because: (i) the Opioid Suits do not allege “bodily injury” and therefore are not within the scope of coverage of the policies; (ii) the Opioid Suits do not allege an occurrence as defined by the Policies (iii) coverage for the Opioid Suits is barred by the policies’ exclusion for intentional acts; (iv) coverage for the Opioid Suits is barred by the policies’ professional services exclusion; and (v) coverage for the Opioid Suits is barred by the Policies’ exclusion for material published in violation of law.

Dated: October 14, 2019	<p><u>/s/ Andrew J. Santaniello</u> <b>CLAWSON AND STAUBES PLLC</b> Andrew J. Santaniello 756 Tyvola Road, Suite 130 Charlotte NC 28217 (704) 940-9128 andys@clawsonandstaubes.com</p> <p><b>KLEINBARD LLC</b> Steven J. Engelmyer (PA No. 42840)(<i>pro hac vice to be filed</i>) Paul G. Gagne (PA No. 42009)(<i>pro hac vice to be filed</i>) Three Logan Square, 5<sup>th</sup> Floor Philadelphia, PA 19103 (215)568-2000 sengelmyer@kleinbard.com pgagne@kleinbard.com</p> <p><i>Attorneys for Pennsylvania Manufacturers’ Association Insurance Company</i></p>
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