

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

OPIOID MASTER DISBURSEMENT TRUST II, A/K/A		
OPIOID MDT II,		
Plaintiff,		Case No. 22SL-CC02974
v.		Division 2
ACE AMERICAN INSURANCE COMPANY, ET AL.,		
Defendants.		

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**PLAINTIFF’S (1) OPPOSITION TO ASPEN’S & ACE’S JOINT MOTION FOR SUMMARY JUDGMENT ON THE TRUST’S 11 EXEMPLAR OPIOID LAWSUITS; (2) OPPOSITION TO OLD COLONY’S JOINDER IN ASPEN’S & ACE’S JOINT MOTION FOR SUMMARY JUDGMENT ON THE TRUST’S 11 EXEMPLAR LAWSUITS; AND (3) CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT DIRECTED TO ASPEN INSURANCE UK LTD., ACE AMERICAN INSURANCE COMPANY, AND OLD COLONY STATE INSURANCE COMPANY**

Plaintiff the Opioid Master Disbursement Trust II (the “Trust”) respectfully submits this (1) Opposition to Aspen’s and Ace’s Joint Motion for Summary Judgment on the Trust’s 11 Exemplar Opioid Lawsuits; (2) Opposition to Old Colony’s Joinder in Aspen’s and Ace’s Joint Motion for Summary Judgment on the Trust’s 11 Exemplar Opioid Lawsuits<sup>1</sup>; and, (3) Cross-Motion for Partial Summary Judgment (the “Cross-Motion”) Directed to Aspen Insurance UK, Ltd., ACE American Insurance Company, and Old Colony State Insurance Company. In support of its Opposition and Cross-Motion, the Trust states:

1. Through their motion, Defendants Aspen Insurance UK Ltd. (“Aspen”) and ACE American Insurance Company (“ACE”) seek a declaration that the underlying opioid claims against the Mallinckrodt debtors fall within the scope of a “Products-Completed Operations

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<sup>1</sup> Plaintiff’s use of the term “Opposition” throughout this pleading shall refer to its opposition to both Aspen’s and Ace’s motion as well as Old Colony’s joinder, unless otherwise noted.

Hazard Claims Made Retained Limit Endorsement” (“Products Hazard Claim Made Endorsement”) incorporated into the Aspen and ACE policies because “any injury or damage alleged in the claims ‘aris[es] out of’ Mallinckrodt’s opioid products and its representations regarding [its] opioid products.”

2. Because the “Products Hazard Claims Made Endorsement” requires all claims for damages for bodily injury arising out of Mallinckrodt’s products to have been made during the policy period and reported to the insurers during the policy period, and none of the underlying claims were made or reported during the subject policy periods, Aspen and ACE argue that they do not owe any coverage with respect to the underlying opioid claims. They thus argue that the Products Hazard Claim Made Endorsement functions as an exclusion for products hazard claims, and because in their (mistaken) view Mallinckrodt’s claims are entirely within the products hazard, the Endorsement excludes all coverage for Mallinckrodt’s opioid liability. But they are mistaken because, as set forth in the Trust’s other briefs, Mallinckrodt was liable at least in part because of bodily injury arising out of non-Mallinckrodt products and illicit opioids, and that bodily injury is not within the products hazard.

3. Through its separate joinder to Aspen’s and ACE’s joint motion, Old Colony State Insurance Company (“Old Colony”) seeks an identical order with respect to one policy it issued to Covidien Ltd., Mallinckrodt’s former parent. Old Colony adopts and incorporates by reference Aspen’s and ACE’s joint motion as well as the memorandum of law, statement of facts, and exhibits submitted by Aspen and Ace in support of their joint motion. Throughout this pleading, Aspen, ACE, and Old Colony are collectively referred to as the “Insurers.”

4. The Trust opposes Aspen’s and ACE’s joint motion, as well as Old Colony’s joinder, and in support of its Opposition adopts and incorporates the facts and arguments set forth

in the following pleadings: (1) Plaintiff's Memorandum of Law in Support of its Motion for Partial Summary Judgment Against National Union Fire Insurance Company of Pittsburgh, Pa. Regarding the Scope of the Products Hazard (AKA "Your Products") Exclusion; (2) Plaintiff's Statement of Uncontroverted Facts in Support of Plaintiff's Motion for Partial Summary Judgment Against National Union Fire Insurance Company of Pittsburgh, Pa. Regarding the Scope of the Products Hazard (AKA "Your Products") Exclusion; (3) Plaintiff's Reply in Further Support of its Motion for Partial Summary Judgment Against National Union Fire Insurance Company of Pittsburgh, Pa. Regarding the Scope of the Products Hazard (aka "Your Products") Exclusion and Opposition to National Union Fire Insurance Company of Pittsburgh, Pa. and American Home Assurance Company's Cross-Motion for Summary Judgment; and, (4) Plaintiff's Response to Aspen's & ACE's Statement of Uncontroverted Facts in Support of Joint Motion for Summary Judgment on the Trust's 11 Exemplar Opioid Lawsuits, and (5) Plaintiff's Statement of Uncontroverted Facts in Support of (1) Plaintiff's Cross-Motion for Partial Summary Judgment Directed to American Guarantee and Liability Insurance Company, and (2) Plaintiff's Cross-Motion for Partial Summary Judgment Directed to Aspen Insurance UK Ltd., ACE American Insurance Company, and Old Colony State Insurance Company.

5. Additionally, the Trust hereby files this Cross-Motion for Partial Summary Judgment, seeking summary judgment that the Products Hazard Claims Made Endorsement contained in, or incorporated through follow-form provisions into, the Insurers' policies that are the subject of the joint motion and joinder do not apply to liability of Mallinckrodt insureds (individually and collectively "Mallinckrodt") because of bodily injury that arose in whole or in part from non-Mallinckrodt opioid drugs. In other words, to the extent that Mallinckrodt was liable because of bodily injury resulting in whole or in part from opioid pharmaceuticals manufactured,

sold, handled, distributed, or disposed of (“manufactured or sold”) by other pharmaceutical companies or from illicit opioid drugs, whether because of Mallinckrodt’s role in creating and fueling the nationwide opioid crisis through the unbranded promotion of opioid drugs generally or otherwise, such liability does not fall within the Products Hazard Claims Made Endorsement contained in, or incorporated into, the policies issued by the Insurers, which applies only to bodily injury arising solely from “your [Mallinckrodt’s] product[s]”.

6. In support of its Cross-Motion, the Trust incorporates the same documents referenced in paragraph 4.

**I. The Court Must Reject Aspen’s and ACE’s Estoppel Argument.**

7. Finally, the Trust responds to an argument unique to the Insurers’ joint motion and joinder, in which they argue the Trust is judicially estopped from arguing that a portion of Mallinckrodt’s underlying liability arises out of non-Mallinckrodt products or illicit drugs and is therefore not barred by the Products Hazard Claims Made Endorsement. *See Aspen’s & ACE’s Memorandum of Law in Support of Joint Motion for Summary Judgment on the Trust’s 11 Exemplar Opioid Lawsuits (“Aspen/ACE MOL”)* at 25–28.<sup>2</sup> The Insurers contend that statements made by Mallinckrodt during its bankruptcy case that opioid lawsuits “concern[ed] the production and sales of its opioid products” are inconsistent with the Trust’s position in this case that Mallinckrodt was also liable for other manufacturers products and illicit opioids. *See Aspen/ACE MOL* at 27. Their position is that the earlier statements concerning liability for Mallinckrodt products estop the Trust from contending here that Mallinckrodt was liable, at least in part, for non-Mallinckrodt products and illicit opioids. By this argument, the Insurers want to block the Trust from seeking any coverage for Mallinckrodt’s opioid-related liability.

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<sup>2</sup> To the extent Old Colony joins in this argument, the Trust’s response is directed to Old Colony as well.

8. The Insurers' position is without merit and must be rejected. As set forth more fully below, there is nothing inconsistent between the Trust's present position and statements Mallinckrodt made during its bankruptcy proceedings. A statement that Mallinckrodt was liable for its own products does not preclude Mallinckrodt's liability for non-Mallinckrodt products and illicit opioids. Both can be, and indeed are, true. In any event, nothing in the bankruptcy case turned on the distinction between Mallinckrodt's liability because of bodily injury arising out of its own products versus bodily injury arising out of non-Mallinckrodt products. The bankruptcy court did not make any rulings or findings on this point. On the contrary, the confirmation order discharged Mallinckrodt for *all* liability arising out of *any* opioid products, not only those that it manufactured and sold.

9. Under Missouri law, factors a court should consider when determining whether a party is judicially estopped from taking a particular position include “(1) a party's later position is clearly inconsistent with its earlier position; (2) whether the party was successful in persuading a court to accept the party's earlier position such that judicial acceptance of an inconsistent position in a later proceeding would create the perception that a court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Dunn v. Missouri Department of Corrections*, 645 S.W.3d 565, 573 (Mo. Ct. App. 2022) (quoting *Banks v. Kansas City Area Transp. Auth.*, 637 S.W.3d 431, 445 (Mo. App. W.D. 2021)). The Missouri Supreme Court has said these factors are not elements that must be present to apply judicial estoppel in Missouri, but a showing that the prior statement and current statement are “truly inconsistent” must be made before the doctrine is applied. *Vacca v. Missouri Dept. of Labor and Indus. Relations*, 575 S.W.3d 223, 235 (Mo. Banc 2019).

10. Here, the Insurers do not come close to establishing any of these factors.<sup>3</sup>

11. First, the Insurers fail to demonstrate that the Trust is taking an inconsistent position from Mallinckrodt, much less a “clearly inconsistent” position. The Insurers assert that Mallinckrodt made statements in its bankruptcy proceedings where it characterized the underlying opioid litigation as “concerning the production and sales of its opioid products.” Aspen/ACE’s MOL at 27. The Trust does not dispute this and expressly acknowledged it in its memorandum of law in support of its affirmative motion (“Opening Brief”), while also noting that Mallinckrodt was liable for non-Mallinckrodt products and illicit opioids as well. Specifically, the Trust stated that, “Mallinckrodt was alleged to be liable not only for bodily injury arising out of its own opioid drugs [and] it also was alleged to be liable for bodily injury arising from other manufacturers’ opioid pharmaceuticals and illicit opioid drugs as a result of Mallinckrodt’s central role in creating and fueling the opioid crisis through the unbranded promotion of opioid drugs generally.” Opening Br. at 1. Both are true, and neither is inconsistent with the other. At no point did Mallinckrodt say that the underlying litigation “solely” or “only” “concerned the production and sales of its opioid products.”

12. Second, the Insurers cite no evidence that Mallinckrodt argued to the bankruptcy court that it was facing liability for bodily injury arising *solely* from its own products or that this distinction was addressed or ruled on by the bankruptcy court or relevant to confirmation of the Plan.

13. On the contrary, the Plan channels underlying claims to the Trust, transferred insurance rights to the Trust and discharged Mallinckrodt for liability with respect to all liability “arising out of, relating to, or in connection with any opioid product or substance,” not just that

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<sup>3</sup> Notably, while AIG, who filed its own motion for summary judgment, asserts that the Trust’s current position is at odds with Mallinckrodt’s prior statements, it does not argue that the Trust is estopped from asserting this position.

related to Mallinckrodt products. *See* Ex. 14 to AIG’s Statement of Facts, Art. IV(T); Art. I (55), (274), (284). This demonstrates that, far from relying on any alleged assertion that Mallinckrodt was liable *only* for bodily injuries arising solely from Mallinckrodt products, the bankruptcy court was aware that the nature of Mallinckrodt’s liability was broader. Everyone was on notice that Mallinckrodt’s discharge, and the insurance rights channeled to the Trust, pertained to any and all Mallinckrodt liability, whether based on its own products or otherwise.

14. Finally, the Insurers do not even attempt to argue that the Trust’s alleged “inconsistent position” would give the Trust an “unfair advantage” or impose an “unfair detriment” on the Insurers. There is nothing unfair about the Trust seeking to hold the Insurers to their coverage obligations. The Insurers do not contend that they relied on Mallinckrodt’s statement or were harmed by them. Nor do the Insurers contend, let alone prove, that they or anyone else was unaware, in the midst of the nationwide opioid crisis, that claimants were alleging that Mallinckrodt and other major opioid defendants were liable for both their own opioid products and the products of other pharmaceutical companies, based on the unbranded promotional campaign.

15. In sum, the Insurers’ arguments are hollow. They have not demonstrated that any of the bases for estoppel are present here.

16. *In re Falcon Prod., Inc.* (“*Falcon*”), the one case cited by the Insurers in support of their argument is easily distinguishable. In *Falcon*, during the debtors’ bankruptcy proceedings, the debtors took the position that a PPO healthcare plan was an “employee benefit plan,” which the bankruptcy court relied upon in entering an “Employee Benefits Order.” *Falcon*, 372 B.R. 474, 483 (E.D. Mo. 2007). When a trust established pursuant to the bankruptcy plan attempted to argue the PPO healthcare plan was not an “employee benefit plan”, the court held that the trust was judicially estopped from doing so because it had specifically relied on a contrary

representation by the debtors in issuing an order resolving a substantive issue in the bankruptcy case.

17. There is nothing like that here. In contrast to *Falcon*, there is no inconsistent statement, because Mallinckrodt's representations in the bankruptcy proceedings and the Trust's current position are not mutually exclusive. Moreover, not only have the Insurers failed to demonstrate that the bankruptcy court acted upon the notion that Mallinckrodt was only liable for bodily injuries arising out of its own products, but they also ignore that the court instead issued a confirmation order that discharged Mallinckrodt and channeled claims to the Trust arising out of Mallinckrodt products as well as other opioids. Thus, judicial estoppel does not apply.

Dated: September 18, 2024  
St. Louis, MO

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Dated: September 18, 2024  
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**CERTIFICATE OF SERVICE**

Pursuant to Missouri Rule of Civil Procedure 55.03(a), the undersigned hereby verifies that he signed the original foregoing document.

The undersigned hereby certifies that on September 18, 2024, a true copy of the foregoing was served, via electronic filing pursuant to Missouri Rules of Civil Procedure Rule 103.08, to all parties of record, and that a true copy of the foregoing was served via email pursuant to Missouri Rules of Civil Procedure Rule 43.01(c)(1)(D), to all such parties.

/s/ P. Tyler Connor  
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