

**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, |

v. |

ACE AMERICAN INSURANCE COMPANY, ET AL., |

Defendants. |

Case No. 22SL-CC02974

Division 2

**PLAINTIFF’S OPPOSITION TO ASPEN INSURANCE UK, LTD.’S
MOTION TO DISMISS FIRST AMENDED PETITION OR, ALTERNATIVELY,
MOTION FOR MORE DEFINITE STATEMENT**

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Plaintiff, the Opioid Master Disbursement Trust II, also known as the Opioid MDT II (the “Trust”), for its Opposition to Aspen Insurance UK, Ltd.’s (“Aspen”) Motion to Dismiss First Amended Petition or, Alternatively, Motion for More Definite Statement (the “Motion”) states as follows:

The Trust is a statutory trust created by the Fourth Amended Plan of Reorganization (the “Plan”) of Mallinckrodt plc, et al. (“Mallinckrodt” or the “Debtors”), for the benefit of individuals and entities harmed by Mallinckrodt’s role in creating, perpetuating, and contributing to the nationwide opioid crisis.¹ The Trust filed this action seeking a declaratory judgment that the insurer Defendants, including Aspen, are obligated to provide coverage for Mallinckrodt’s liability for Opioid Mass Tort Claims.² FAP ¶¶ 12, 141.

Notwithstanding that the Trust’s First Amended Petition contains 144 paragraphs of allegations totaling 60 pages that support each element of its claims for relief, Aspen, alone among the Defendant insurers, contends that the Petition lacks sufficient specificity to enable it to mount a defense. Specifically, Aspen asserts that “the Trust fails to plead facts sufficient to establish that Aspen’s policies have been triggered” (Mot. at 1), and that to do so the Trust must—as to each of the thousands of Opioid Mass Tort Claims that were asserted prior to Mallinckrodt’s bankruptcy and each of the potentially tens of thousands or more additional Opioid Mass Tort Claims as to

¹ A complete list of the Debtors is available at <http://restructuring.primeclerk.com/Mallinckrodt>, and is incorporated herein by reference. The Debtors principally responsible for developing, manufacturing, promoting, and distributing branded and generic opioid pharmaceuticals, and active pharmaceutical ingredients that were included in opioid pharmaceuticals, are Mallinckrodt LLC, Mallinckrodt APAP LLC, Mallinckrodt Enterprises LLC, SpecGx LLC, and SpecGx Holdings LLC. All were located in Missouri at all relevant times. See First Am. Pet. for Declaratory Relief (the “Petition” or “FAP”) ¶¶ 19–24.

² Capitalized terms used or quoted in this Motion and not otherwise defined herein have the meanings ascribed to them in the Petition, or to the extent not defined in the Petition, in the Plan. The Plan was provided to the Court as an attachment to the FAP. Attach. 1 to FAP. Opioid Mass Tort Claims include claims brought by individuals (or in the case of decedents, their estates) seeking damages because of bodily injuries for which they allege the Debtors are responsible. They also include claims brought by certain public and private entities seeking damages because of amounts they incurred because of opioid-related bodily injuries suffered by their citizens, patients, insureds, or others. FAP ¶ 102.

which the Plan resolved Mallinckrodt's liability³—plead the exact time period during which each claimant suffered “bodily injury” and the precise losses incurred with respect to that claimant.

Aspen is wrong. As it well knows, the Petition is, if anything, more detailed than is typical in mass-tort insurance coverage litigation and fully satisfies Missouri's fact-pleading standard, as detailed below. In fact, seven other insurers answered the Petition, and no other insurer (out of thirteen in total) asserted that the Petition was deficient in this regard, underscoring that the Petition is sufficient, and Aspen's demand for this information is not warranted. Aspen simply does not need the requested information to mount a defense to the Trust's claims. Aspen's Motion thus should be denied, as further detailed below.

ARGUMENT

I. The Motion Should Be Denied Because the Petition Satisfies Missouri's Pleading Requirements.

Aspen asserts that the Petition fails to meet Missouri's pleading requirements and should therefore, either be dismissed under Rule 55.27(a)(6) or subject to a more definite statement under Rule 55.27(d). Both assertions are without merit.

A. Missouri Requires That Pleadings Contain a Short and Plain Statement of the Facts.

Missouri Supreme Court Rule 55.05 requires a pleading to contain “a short and plain statement of the facts showing that the pleader is entitled to relief.” Put differently, a petition should “define[] the issues so that [the parties and] the trial court . . . know what issues are to be tried, what discovery is necessary, and what evidence may be admitted at trial.” *State ex rel. Harvey v. Wells*, 955 S.W.2d 546, 547 (Mo. banc 1977). An appropriate pleading will “enable a person of common understanding to know what is intended.” *Gardner v. Bank of Am., N.A.*,

³ The precise number of Opioid Mass Tort Claims is not known because no claims bar date was set during the Debtors' bankruptcy proceedings. See Plan ¶ 274.

466 S.W.3d 642, 646 (Mo. Ct. App. 2015). In determining the sufficiency of a petition, a court must give pleadings “their broadest intendment, and construe all allegations favorably to the pleader.” *Murray-Kaplan v. NEC Ins., Inc.*, 617 S.W.3d 485, 491 (Mo. Ct. App. 2021); Mo. Sup. Ct. R. 55.27(a)(6).

With respect to Aspen’s request for dismissal, a petition is not to be dismissed for failure to state a claim unless it appears that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See Am. Drilling Serv. Co. v. City of Springfield*, 614 S.W.2d 266, 271 (Mo. Ct. App. 1981). Nor should a petition be dismissed “for mere lack of definiteness or certainty or because of informality in the statement of an essential fact.” *Grewell v. State Farm Mut. Auto. Ins., Co.*, 102 S.W.3d 33, 36 (Mo. banc 2003) (citation omitted); *see also Paddock Forest Residents Ass’n v. Ladue Serv. Corp.*, 613 S.W.2d 474, 476 (Mo. Ct. App. 1981) (petition should not be dismissed even if the claim is “imperfectly or defectively stated”); *State ex rel. State Highway Comm’n v. City of St. Louis*, 575 S.W.2d 712, 724 (Mo. Ct. App. 1978) (attack on pleading lacked merit because it was apparent that the defendant “was not misled by the pleading[s]”). A motion to dismiss should only be granted where the claims “have no basis in fact,” and are instead based upon “mere speculation or bluff.” *State ex rel. Harvey*, 955 S.W.2d at 548.

With regard to Aspen’s request for a more definite statement, such relief is appropriate only if a pleading “is not averred with sufficient definiteness or particularity to enable the party properly to prepare responsive pleadings” Mo. Sup. Ct. R. 55.27(d). Such a motion must be denied “when the petition already alleges sufficient facts to appraise the defendant of the acts with which he is charged so that he can prepare a responsive pleading.” *Butler v. Circulus, Inc.*, 557 S.W.2d 469, 480 (Mo. Ct. App. 1977); *see also State ex rel. Koster v. Morningland of the*

Ozarks, LLC, 384 S.W.3d 346, 350–51 (Mo. Ct. App. 2012) (denying motion for more definite statement where there was “no indication that [defendant] would be unable to prepare a responsive pleading absent the requested information”); *Einhaus v. O. Ames Co.*, 547 S.W.2d 821, 825 (Mo. Ct. App. 1976) (denying motion for more definite statement that sought to require plaintiff to identify the specific defects of a hammer alleged simply to be “defective and unreasonably dangerous”).

B. The Petition Contains a Short and Plain Statement of the Relevant Facts, Including Facts Showing That Aspen’s Policies Are Triggered.

The Trust’s Petition satisfies Missouri’s pleading requirements under Rule 55.05 in all respects, including as to the issue on which Aspen contends the Petition lacks sufficient detail—the triggering of Aspen’s policies. As set forth in the Petition, and as Aspen acknowledges in its Motion, coverage under its policies for claims seeking damages not within the “products-completed operations hazard” is triggered if such a claim involves “bodily injury” during the policy period (as is typical for standard form general liability policies such as these). FAP ¶¶ 124, 127; Mot. at 2. The Petition sets forth a short and plain statement of the nature of the claims seeking damages not within the “products-completed operations hazard” and the nature of the bodily injury during the policy periods of Aspen’s policies that triggers those policies.⁴

Indeed, the Petition goes beyond a short and plain statement. It explains that the claims seeking damages not within the “products-completed operations hazard” are those that “arise out

⁴ Aspen also contends that the Petition lacks sufficient information regarding the extent to which coverage under its policies is triggered for claims seeking damages within the “products-completed operations hazard.” Because the coverage for claims seeking damages within the “products-completed operations hazard” was written on a “claims-made” basis, it involves a different trigger than coverage for claims seeking damages not within the “products-completed operations hazard,” which was written on an “occurrence” basis. But Aspen’s assertion is a red herring, as the Trust advised Aspen in writing on October 11, 2022, before Aspen filed its Motion, that the Trust was “not currently pursuing claims” under Aspen’s policies for “damages within the ‘products-completed operations hazard.’” Rather, based on the information currently available to it, the Trust is at present pursuing coverage for claims seeking damages within the “products-completed operations hazard” only as to policies issued in 2016 and 2017. Notably, all of the insurer Defendants who issued those policies have answered the Petition.

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 that “seek to hold the Debtors liable for bodily injuries allegedly caused by the Debtors’ conduct in creating and fueling the nationwide opioid crisis,” specifically injuries suffered from “the opioid products of other manufacturers and illicit narcotics.”⁵ FAP ¶ 134; *see also id.* ¶¶ 96–98 (describing the “serious and wide-ranging bodily injuries caused by the use and misuse of opioid pharmaceuticals and illicit opioid drugs”). The Petition also alleges that the Debtors engaged in this “extensive unbranded promotional campaign,” which “caused individuals to use . . . the opioid pharmaceuticals of other manufacturers, as well as illicit opioid drugs,” since “at least 1995,” and resulted in over 3,000 claims against the Debtors prior to their bankruptcy filing. *Id.* ¶¶ 2–3. These opioid claims, in the words of Mallinckrodt’s Chief Transformation Officer, could have “quickly aggregate[d] into the billions or tens of billions of dollars if even a fraction of plaintiffs are successful in winning all the damages they seek.”⁶ Declaration of Stephen A. Welch, Chief Transformation Officer, in Support of Chapter 11 Petitions and First Day Motions ¶ 91, *In re Mallinckrodt PLC*, No. 20-12522-JTD (Bankr. D. Del. Oct. 12, 2020), ECF No. 128. The policy periods for Aspen’s Policies cover November 15, 2008 to November 15, 2013—squarely within the period of the bodily injuries alleged in the Opioid Mass Tort Claims. Ex. A to FAP.

In other words, the Petition’s allegations—if accepted as true as they must be in deciding this Motion—explain how and why Aspen’s policies are triggered with respect to coverage for claims seeking damages not within the “products-completed operations hazard.” These allegations

⁵ Aspen suggests that the claims-made trigger applicable to claims seeking damages within the products-completed operations hazard “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.” Mot. at 6. While not material to this Motion, this assertion is inconsistent with the language and coverage of the relevant policies and without merit.

⁶ Mallinckrodt also incurred more than \$100 million defending these claims from 2017 through its bankruptcy filing in 2020. FAP ¶ 3.

more than satisfy Missouri’s pleading standards and show why the Motion must fail. *See, e.g., Nichols v. Preferred Risk Grp.*, 44 S.W.3d 886, 896 (Mo. Ct. App. 2001) (“[I]nsured must plead compliance with the policy conditions, but may do so generally.”); *Arnold v. Am. Fam. Mut. Ins. Co.*, 987 S.W.2d 537, 542 (Mo. Ct. App. 1999) (noting that bare pleading of compliance with insurance policies’ obligations was sufficient, even without specifically stating the obligations or how plaintiff complied, having found “no authority which requires this degree of specificity in pleading in order to survive a motion to dismiss”).

C. Aspen’s Assertion That the Trust Must Plead the Details of Each Opioid Claimant’s Injuries and Damages Is Inconsistent with Missouri Law.

Aspen asserts that the Petition’s statement of the facts showing that Aspen’s policies were triggered is insufficient, and that the Trust must state separately for each of the tens of thousands or more Opioid Mass Tort Claims against Mallinckrodt when each claimant suffered bodily injury and precisely what damages they incurred. This position is inconsistent with Missouri law and pleading requirements.

As Aspen is well aware, the specific details of each underlying claim are not traditionally included in pleadings in mass-tort insurance coverage actions, even in fact-pleading states like Missouri. Not only would including this level of detail make the pleadings inordinately long and unwieldy, but it also effectively would push discovery (and potentially expert analysis) into the pleading stage, requiring the Trust to demonstrate at the outset of the litigation the precise allocation of its liabilities and the details of its damages—issues that are the proper subject of fact discovery and expert analysis and discovery. *See State ex rel. Harvey*, 955 S.W.2d at 547–48 (“[E]arly in a lawsuit a party may not know all of the facts necessary to frame his or her pleadings for trial. In such cases an allegation may be made upon a party’s reasonable ‘knowledge,

information, and belief.”) (citation omitted).⁷ Indeed, it is unlikely that a party seeking coverage for thousands or tens of thousands of claims would present detailed information for each claim even at trial, rather than providing, for example, expert testimony regarding a random sample of claims that then would be extrapolated to the full universe of claims, or some other form of evidence that would demonstrate that the liability for which coverage is sought is within the insuring agreements of the policies. Whether and how that may be done is an issue for another day, but Aspen’s suggestion that detailed information must be presented on a claim-by-claim basis in the Petition, when it has not even been determined whether it needs to be presented at trial, puts the cart before the horse, makes no sense, and is not what is required by Missouri law.

Aspen cites no cases in support of its request for a more definite statement, and the cases cited in support of its request for dismissal merely stand for the proposition that conclusory statements, without any factual allegations, are insufficient to state a claim. In each of these cases, the pleadings were bare bones or lacked allegations to support an element of the claim.⁸

Unlike these cases, the Trust does not rely on conclusory allegations. Far from it. The Trust alleges specific factual details within its 144-paragraph Petition to support its claim that Aspen is liable under its policies, and in particular that coverage under the policies has been

⁷ It bears noting that the parties, including Aspen, recently negotiated and submitted a case management order that contemplates more than a year of discovery. Under Aspen’s formulation of the pleadings rule, whereby the Trust must prove its case in full at the outset, there would be no need for this lengthy discovery period.

⁸ See *Charron v. Holden*, 111 S.W.3d 553, 555 (Mo. Ct. App. 2003) (dismissing prisoner’s retaliation claim where “all the petition states is a conclusory allegation that his request for transfer was denied ‘in retaliation for, and to punish’” prisoner for accessing legal system) (citation omitted); *Hoag v. McBride & Son Inv. Co.*, 967 S.W.2d 157, 174 (Mo. Ct. App. 1998) (dismissing claim where essential elements included acquisition of title by a city, town or village, and plaintiff instead alleged acquisition by a development association); *Transit Cas. Co. ex rel. Pulitzer Publ’g Co. v. Transit Cas. Co. ex rel. Intervening Emps.*, 43 S.W.3d 293, 302 (Mo. banc 2001) (dismissing claim where party’s only allegations of injury were “assertions of harm” that were “vague in the extreme”); *Cooper v. Minor*, 16 S.W.3d 578, 581 (Mo. banc 2000) (dismissing prisoner’s claim for “overcrowding the prison system by denying parole releases” because the claim contained nothing more than a “bare and conclusory statement”); *Hendricks v. Curators of Univ. of Mo.*, 308 S.W.3d 740, 747 (Mo. Ct. App. 2010) (noting that allegation “defendants had waived their sovereign immunity because of the self-insurance plan was a legal conclusion that the circuit court was not required to accept as true”).

triggered. That the Petition’s allegations are sufficient is underscored by the responses of the other insurer Defendants, in particular the fact that every other Defendant filed either an answer (tacitly acknowledging that the Petition is sufficiently clear to allow a response) or a motion to dismiss on other grounds (thus waiving their right, under Rule 55.27(f), to assert the deficiencies at issue on this Motion). *See Arnold*, 987 S.W.2d at 542 (“Failure to move for a more definite statement under Rule 55.27(d) waives deficiencies in matters of particularity.” (citing *Layton v. Pendleton*, 864 S.W.2d 937, 941 (Mo. Ct. App. 1993))).

Aspen’s assertion that it will have to wait until the end of discovery to learn “what type of coverage is being sought for which Underlying Opioid Claims under which policies and for what sums” is baseless. Mot. at 4. The Petition adequately apprises Aspen that numerous Opioid Mass Tort Claims—at least thousands and likely tens of thousands of these claims or more—trigger coverage under each of its policies for claims seeking damages not within the “products-completed operations hazard” and present liability well into the billions or tens of billions of dollars or more, thus swamping the coverage issued by Aspen and the other insurer Defendants. Like its co-defendants who did answer the Petition, Aspen has sufficient information to prepare a responsive pleading, can seek additional information in discovery, and cannot avoid all liability for the damage created by the opioid epidemic that it insured against merely by arguing the Petition provides insufficient notice at the pleading stage.

In short, contrary to Aspen’s assertions, the Petition includes the necessary factual allegations and either dismissal or a more definite statement would be improper.

D. The Policies Can Be Provided to the Court and Aspen Without Re-Pleading or Unnecessary Delay.

Aspen also asserts that the Petition should be dismissed under Rule 55.22(a) for failure to quote the relevant insurance policy language or attach the policies as exhibits to the Petition. *Id.*

at 10. As this case involves over fifty insurance policies issued by more than a dozen insurers, quoting in detail or attaching each policy would have created an exceptionally voluminous filing (and would have made public insurance policies that Defendants may desire to keep confidential).⁹ Thus, rather than quote in detail or attach each policy, the Trust identified each of the policies in an exhibit to the Petition and offered to provide copies of policies to the Court and to Aspen (in an effort to efficiently comply with Rule 55.22(a)).¹⁰ See FAP ¶ 120. The Trust remains willing to do so.¹¹

CONCLUSION

For the foregoing reasons, the Trust respectfully requests that this Court deny Aspen's Motion to Dismiss and alternative Motion for More Definite Statement.

Dated: November 23, 2022
St. Louis, MO

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⁹ The Petition originally listed 90 insurance policies, but the Trust has since agreed to dismiss without prejudice 33 of those policies. The Trust anticipates that additional policies may be identified during discovery and subsequently included in this litigation.

¹⁰ In fact, the Trust has already provided copies of certain policies to other Defendants at their request.

¹¹ It also bears mentioning that the policies at issue in this case, including the Aspen policies, are standard form policies drafted by the insurance industry, FAP ¶ 121, albeit with some variations in wording, and the policies have been litigated extensively in the mass-tort context in Missouri and elsewhere across the country. The notion that Aspen does not know, without quotation in the Petition, which provisions of its policies set forth the key terms of coverage and will be at issue in this proceeding is simply not credible. The notion is belied by the fact that seven of the other insurer Defendants that answered the Petition have cited numerous alleged defenses to coverage based on provisions of these standard form policies. And, having issued the policies, Aspen is likely to have copies of them itself. While there may be some differences in the versions of the policies in Aspen's versus Mallinckrodt's files, those differences ordinarily are worked out in the course of discovery, not at the inception of the case.

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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 November 23, 2022, 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 the attached service list.

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