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Evolving Insurance Coverage Challenges in Opioid Litigation

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The opioid crisis in the United States has sparked hundreds of lawsuits throughout the nation. More than 100 cities and states have filed suits against pharmaceutical companies, suppliers, distributors, and health care providers for allegedly contributing to the growing opioid epidemic. Despite being found guilty in the court of public opinion, the targets of these lawsuits have mounted vigorous defenses, giving rise to various complex insurance coverage issues. This article provides an overview of some of the emerging coverage issues courts have addressed so far.[1]

The Opioid Crisis

In the late 1990s, medical care providers began to prescribe opioids in large numbers for a myriad of pain-related issues. During the next several decades, the prevalence of opioids led to widespread addiction and abuse. According to the U.S. Department of Health and Human Services (HHS) over 11 million people misused prescription opioids in 2016 alone. According to the Centers for Disease Control and Prevention, approximately 115 Americans die every day from an opioid overdose. In 2017, HHS declared a public health emergency to address the national opioid crisis. Still, as casualties continue to mount, so does the litigation seeking redress against opioid manufacturers and distributors.

The Underlying Actions

The lawsuits by governmental entities against opioid manufacturers and distributors vary, but generally, the plaintiffs allege forms of fraudulent and negligent conduct against the defendants. For instance, in January 2018, city and/or state governments in Maryland, Pennsylvania, and New York filed lawsuits against opioid manufacturers and distributors alleging violations of state consumer protection acts, public nuisance, fraud, unjust enrichment, negligence,

[1] Substantial portions of the article appear in "Emerging Insurance Coverage Issues Involving Opioid Litigation." Westlaw Journal Insurance Coverage, Vol. 28 Issue 27 (April 13, 2018), by Michael Hamilton and Bradley Ryba.

and negligent marketing.[2] The complaints typically seek compensatory and punitive damages, as well as statutory penalties and costs.

Generally, the lawsuits allege that the manufacturers operated a fraudulent, yet very successful, scheme to convince medical care providers that opioids were a low risk, highly effective drug for treating various pain-related issues, resulting in huge rates of opioid addiction. Some lawsuits also allege the manufacturers or distributors knew their products were eventually diverted for non-legitimate uses, but continued to perpetuate their fraudulent scheme for vast profits.[3] With respect to distributors, lawsuits frequently allege that the distributors failed to monitor and report suspicious orders of prescription opioids. The lawsuits typically seek damages for costs associated with the opioid crisis, such as government money spent on addiction-treatment services, hospitalizations, and emergency services. Pharmacies have also been named as defendants with allegations that these so-called "pill mills" failed to identify suspicious opioid prescriptions.[4] In some cases, even doctors have been named as defendants for publishing educational materials with allegedly false information about the benefits and safety of opioids.[5]

Beyond these state court actions, multidistrict litigation in the U.S. District Court for the Northern District of Ohio currently has over 200 consolidated cases from around the nation.[6] In granting centralization, the court determined that all the lawsuits involved "common factual questions about, *inter alia*, the manufacturing and distributor defendants' knowledge of and

[2] *See, e.g.*, Complaint for Damages, *Prince George's County Maryland v. Purdue Pharma L.P.*, No. CAL-18-02008, 2018 WL 692931 (Md. Cir. Ct., Prince George's Cnty. Jan. 23, 2018). Purdue Pharma L.P., the maker of OxyContin, is a common defendant in opioid lawsuits across the nation.
[3] *See* Complaint, *Candler Cnty., Ga. v. AmerisourceBergen Drug Corp.*, No. No. CV618-11, 2018 WL 795378 (S.D. Ga. Jan. 29, 2018).
[4] *See* Complaint for: 1. Nuisance; 2. Negligence & Gross Negligence; 3. Unjust Enrichment; 4. Common Law Fraud; and 5. Civil Conspiracy, *Big Sandy Rancheria of Western Mono Indians v. McKesson Corp.*, No. CGC-18-564736., 2018 WL 1381287 (Cal. Super. Ct. San Francisco Cnty. Mar. 2, 2018).
[5] *See* Complaint, *The County of Erie, v. Purdue Pharma, L.P.*, 2017 WL 2559217 (N.Y.Sup. Erie Cnty. Feb. 1, 2017).
[6] *In re Nat'l Prescription Opiate Litig*., No. MDL 2804, 2017 WL 6031547.

conduct regarding the alleged diversion of these prescription opiates, as well as the manufacturers' alleged improper marketing of such drugs."[7] At the first MDL hearing for the consolidated cases, the court declined to enter a discovery schedule and directed the parties to begin settlement discussions.[8] But, for the first time on March 6, 2018, the court allowed a limited litigation track, including discovery, motion practice, and bellwether trials.[9] Currently, three Ohio trials are scheduled for 2019.[10]

Still, the court has encouraged the parties to engage in active settlement negotiations. On April 2, 2018, the U.S. Department of Justice (DOJ) filed a motion to participate in the settlement discussions as friend of the court. In its motion, the DOJ notes its participation can help ensure that settlement discussions are structured to serve the public interest, and that it is in a unique position to help craft non-monetary remedies to combat the opioid crisis on a nationwide basis.

Aside from the governmental actions, shareholders have also initiated lawsuits against the directors and officers of their companies.[11] These lawsuits allege that the directors and officers were negligent in monitoring opioid distribution and/or made false public statements about opioid practices, both of which resulted in company losses. In addition, hospitals have sued manufacturers in an attempt to recover costs for treating opioid-addicted patients.[12]

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[7] *Id.*
[8] *See* Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. Times (Mar. 5, 2018), at https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html
[9] *See* Jeff Overley and Emily Field, *Opioid MDL to Get Litigation Track Amid Settlement Talks*, Law360 (Mar. 7, 2018), at https://www.law360.com/articles/1019484/opioid-mdl-to-get-litigation-track-amid-settlement-talks
[10] Andres Welsh-Huggins & Geoff Mulvihill, *Opioid Trials to Begin in 2019 as Settlement Is Also Pushed*, The Associated Press (Apr. 12, 2018), at http://abcnews.go.com/Health/wireStory/opioid-trials-begin-2019-settlement-pushed-54417509.
[11] *See* Amended Complaint for Violations of the Federal Securities Laws, *Huang v. Depomed Inc.*, No. 17-cv-4830-JST, 2018 WL 737905 (N.D. Cal. Feb. 6, 2018).
[12] *See* Complaint, *The Candler Cnty. Hosp. Auth. v. AmerisourceBergen Drug Corp.*, No. CV 618-12, 2018 WL 795421 (S.D. Ga. Jan. 29, 2018).

The lawsuits present an enormous exposure for insurers. Considering the complexity of the issues involved and the high volume of discoverable materials, litigation costs will be substantial. Moreover, a single lawsuit could result in a several hundred million dollar judgment or settlement.[13]

Insurance Coverage Issues Implicated

Considering certain class actions have already settled for millions of dollars, these lawsuits have the potential to greatly impact the insurance industry. For instance, in 2017, global insurer XL Catlin shortlisted the opioid epidemic as an emerging risk facing underwriters and clients. The lawsuits present a myriad of insurance coverage questions for commercial general liability (CGL) and directors and officers liability (D&O) policies, including:

- Should these lawsuits be covered under a policy's insuring agreement as an "occurrence" resulting in a "bodily injury"?
- Should coverage for these actions be barred under policies that contain products or intentional conduct exclusions?
- If an insurer has a duty to defend, what type of awards will be covered under the policies?

Damages Because Of "Bodily Injury"

Because many of the lawsuits are brought by governmental entities seeking recovery for economic losses, insurers have argued that the lawsuits are not covered under a commercial general liability policy's insuring agreement because they do not seek damages due to "bodily injury" or "property damage." Courts, however, have reached differing conclusions on this issue. These contrasting cases illustrate the fine distinctions courts can make when determining whether coverage exists.

[13] *See* Corinne Ramey, *NYC: Opioid Crisis Has Cost City $500 Million*, Wall St. J. (Feb. 26, 2018), at https://www.wsj.com/articles/nyc-opioid-crisis-has-cost-city-500-million-1519682333

For instance, in *Cincinnati Insurance Co. v. Richie Enterprises LLC*, the underlying action involved an eight-count complaint by West Virginia against opioid distributors, including Richie Enterprises.[14] The complaint sought damages distributors for the distributors' alleged illegal distribution of opioids to medical care providers in excess of actual medical need. It contained counts for (1) violation of the state's Uniform Controlled Substances Act; (2) negligence in over-distributing opioids; (3) violation of the state's Consumer Credit and Protection Act; (4) public nuisance; (5) unjust enrichment; (6) negligence in failing to guard against third-party misconduct; (7) a court-approved medical monitoring program; and (8) violation of the state's Antitrust Act. Richie's CGL insurer, Cincinnati Insurance, brought an action seeking a declaratory judgment that it had no duty to defend or indemnify Richie.

Initially, the court found Cincinnati Insurance owed a duty to defend Richie because the complaint alleged that, in the absence of a medical monitoring program, opioid users would not receive appropriate medical care necessary to prolong their lives.[15] As such, this would be damages because of a "bodily injury." The court further rejected Cincinnati Insurance's argument that the intentional and criminal act exclusion would preclude a duty to defend, finding that "the alleged prescription drug abuse epidemic can be fairly characterized as accidental."[16]

West Virginia, however, later amended its complaint to remove the medical monitoring count. The court then found that the amended complaint was seeking purely economic damages, not damages because of "bodily injury" to the state's citizens.[17]

[14] No. 1:12-CV-00186-JHM, 2014 WL 838768, at *1-2 (W.D. Ky. Mar. 4, 2014).
[15] *Id.* at *8.
[16] *Id.* at *9.
[17] *Cincinnati Ins. Co. v. Richie Enterprises LLC*, No. 1:12-CV-00186-JHM, 2014 WL 3513211, at *5 (W.D. Ky. July 16, 2014).

In doing so, the *Richie* court cited a Seventh Circuit case, *Medmarc Casualty Insurance Co. v. Avent America, Inc.*, 612 F.3d 607, 616 (7th Cir. 2010). In *Medmarc*, the policy's insuring agreement provided that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" ... to which this insurance applies." The court noted the distinction between the phrases "because of bodily injury" versus "for bodily injury." *Medmarc* used the illustration of an automobile insurance claimant who becomes paralyzed due to an accident. The *Medmarc* court said that if the claimant sued to recover costs for making his house wheelchair accessible, such costs would not be "for bodily injury," but would be "because of bodily injury." The policy in *Richie* also contained the much broader "because of bodily injury" language. Nevertheless, the *Richie* court determined that West Virginia was seeking damages solely for money it spent because of the opioid epidemic due to the distributors' alleged statutory violations. The court reasoned that West Virginia did not need to prove "bodily injury" to establish that the distributors violated the statutes, engaged in negligent conduct, or created a public nuisance. As a result, the *Ritchie* court found that physical harm caused by opioids merely explained the state's economic loss. Specifically, the court held:

> West Virginia is not seeking damages "because of" the citizens' bodily injury; rather, it is seeking damages because it has been required to incur costs due to Richie and the other drug distribution companies' alleged distribution of drugs in excess of legitimate medical need. This distinction, while seemingly slight, is an important one.[18]

The Seventh Circuit reached a conflicting result in *Cincinnati Insurance Co. v. H.D. Smith LLC.*[19] With respect to the same West Virginia lawsuit in *Ritchie*, Cincinnati Insurance sought a declaration that it had no duty to defend or indemnify its other insured, H.D. Smith. Again, the

[18] *Id.* at *5.
[19] *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771, 773 (7th Cir. 2016).

policy covered damages "because of bodily injury." This time, however, the court found that the insurer owed a duty to defend because the state had spent money caring for its citizens due to alleged bodily injury from opioids. Specifically, the court explained that H.D. Smith allegedly distributed opioids negligently, which in turn resulted in greater hospital visits by those who were unable to afford their own care. Accordingly, the Seventh Circuit found the underlying complaint linked the distributors' conduct to the state's citizens' bodily injuries. In response Cincinnati Insurance's argument that the state was seeking its own damages, rather than damages on behalf of it citizens, the court responded "[b]ut so what?" The court apparently did not see as problematic the fact that the underlying lawsuit alleged somewhat more of a generalized "bodily injury," rather than bodily injury to an individual or group of people.

Injury Caused By An Accident

Most CGL policies provide coverage for injuries and damages only if they result from an "occurrence," which is typically defined as an "accident." This is axiomatic since most forms of insurance are intended to cover only fortuitous risks. Accordingly, many insurers have argued that the conduct typically alleged in the underlying lawsuits relates to intentional acts, and thus, is not an "accident" covered under the policies. However, because many complaints include both negligent and intentional conduct, some courts may be likely to find a duty to defend.

For instance, the Fourth Circuit, in *Liberty Mutual Fire Insurance Co v. JM Smith Corp.*, found Liberty Mutual owed a duty to defend JM Smith, an opioid distributor, with respect to the same West Virginia lawsuit noted *supra*.[20] In the coverage dispute, Liberty Mutual contested whether the complaint alleged an "accident" rather than contesting whether the complaint alleged a bodily injury. The Fourth Circuit began its analysis by noting that although the term "accident"

[20] 602 F. App'x 115, 122 (4th Cir. 2015).

was undefined in the at-issue policy, it was well accepted to that an act or an injury resulting from an act be unintentional. Still, the court drew a distinction between intentional acts and intended consequences. The court determined there would be a duty to defend even without the negligent marketing and distribution count because a failure to prevent a diversion of opioids could be found to be a result of the JM Smith's failure to understand the opioid drug abuse epidemic. Specifically, the court noted:

> Though the defendants here may have known generally that prescription drug abuse was a problem in West Virginia, the complaint does not allege knowledge of harm directly attributable to any one distributor such that further violations must necessarily be done with intent to harm. Surely the attenuated chain of causation here creates at least a possibility of coverage in this case.[21]

The court held that the insurer had no duty to defend in *The Traveler's Property Casualty Company of America v. Activis, Inc.*, 225 Cal Rptr. 3d 5 (Cal. Ct. App. Nov. 6, 2017). This coverage dispute arose out of two 2014 lawsuits -- one by California's Santa Clara and Orange counties and one by the city of Chicago -- against various pharmaceutical manufacturers and distributors, including Watson Pharmaceuticals, Inc. (Watson). The three-count California complaint involved claims for false advertising, unfair competition, and public nuisance.[22] The ten-count Chicago involved similar consumer fraud claims.[23] The complaints alleged Watson engaged in a fraudulent scheme to promote opioids for uses it knew the drug was not suited for and that Watson overstated the benefits of opioids and trivialized its risks. Watson's two CGL insurers denied coverage and filed an action in California state court seeking a declaration that

[21] *Id.* at 121.
[22] Complaint, *People v. Purdue Pharma, et al.*, No. 30-2014-00725287-CU-BT-CXC, 2014 WL 2207503 (Cal. Super. Ct., Orange Cnty. May 21, 2014).
[23] *City of Chicago v. Purdue Pharma L.P.*, 211 F. Supp. 3d 1058 (N.D. Ill. 2016).

they had no duty to defend or indemnify Watson in the underlying lawsuits. In March 2016, the trial court found no duty to defend because the injuries alleged were not the result of an accident.

The California Court of Appeal affirmed the decision in November 2017. The court held that Watson's intentional conduct was the potential basis for its liability in the underlying suits. Watson maintained that an "accident" can occur when an insured commits another intentional act that causes unintended consequences. The court noted that an "accident" cannot occur from any deliberate act unless an unexpected act intervenes to cause damage. The court determined it was "not unexpected or unforeseen that this marketing campaign would lead to increased opioid addiction and overdoses."[24] Additionally, the court found "[t]he role of doctors in prescribing, or misprescribing, opioids is not an independent or unforeseen happening."[25] Alternatively, the court determined the underlying claims would fall within the policies' products exclusions. Specifically, the court determined

> the complaints allege a direct connection between the statements and representations made by Watson in its alleged campaign to increase sales of its opioid products and the abuse, addiction, death, and other injuries caused by those products. Indeed, this campaign, which allegedly misrepresented the efficacy of opioid painkillers, overstated their benefits, and trivialized their risks, is the very basis on which liability against Watson is premised.[26]

On Feb. 21, 2018, the California Supreme Court granted review of the lower court's ruling. It stayed briefing of the matter pending its resolution of a non-opioid case, *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., Inc.*, which has the potential to be a seminal California case involving the definition of an "occurrence."[27] The case involves whether negligent hiring and retention of an employee, which results in injuries, can qualify as an "occurrence" under an

[24] *Traveler's Prop. Cas. Co. of Am. v. Actavis, Inc.*, 225 Cal. Rptr. 3d 5, 18 (Cal. Ct. App. Nov. 6, 2017).
[25] *Id.* at 19.
[26] *Id.* at 22.
[27] *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., Inc.*, 834 F.3d 998 (9th Cir. 2016).

employer's CGL policy. In that case, the Ninth Circuit sought certification from California Supreme Court whether there is a distinction, for purposes of coverage under a CGL policy, between actions that inflict injury and the preceding negligence that allowed such injury to occur. The case could have huge ramifications for insurers and policyholders as it could eliminate coverage for accidental consequences of myriad intentional acts.

Products Exclusions

Many CGL policies contain exclusions for bodily injury or property damage arising from the policyholder's goods or products. These exclusions have become a focal point in some of the opioid coverage litigation. For example, in *Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, the Eleventh Circuit determined that a distributor's over-supply of opioids met the low causation requirement for the CGL policy's products exclusion to apply.[28] Again, this coverage dispute arose out of West Virginia's action against opioid distributors mentioned *supra*. Travelers sought a declaration that it had no duty to defend or indemnify its insured, Anda, Inc. Travelers' CGL policy, issued to Anda, excluded coverage for bodily injury "arising out of" or "resulting from" the insured's products. The *Anda* court held that "arising out of" presents a low bar for causation and that the state's claims originated from the distributor's products. As such, the CGL policies' products exclusion barred coverage because West Virginia alleged harm due to the defendant's over-distribution of a product -- opioids. The court in *Actavis, Inc.*, found *Anda* to be instructive when it determined that a products exclusion would even bar claims relating to heroin use since such heroin was alleged to have arisen out of Watson's misrepresentations about its prescription drugs. At bottom, *Anda* is a very significant decision for insurers with products exclusions since

[28] *Travelers Prop. Cas. Co. of Am. v. Anda, Inc*., 658 F. App'x 955, 959 (11th Cir. 2016).

it provides a strong argument that all claims in opioid lawsuits, even negligence claims, may be barred by the products exclusions.

Fraudulent Conduct or Expected/Intended Injury

A similar issue to whether an opioid lawsuit alleges an "accident" is whether a CGL policy's fraudulent or intentional act, or expected or intended injury, exclusions bar coverage. Insurers may be successful in the application of these types of exclusions if courts in the underlying litigation do not find the manufacturers and distributors were merely negligent. In any event, insurers should have a strong argument that any damages that resulted from intentional conduct are barred from coverage.

Prior Knowledge Exclusions

The prior knowledge exclusion also potentially bars coverage for these lawsuits. Of course, this exclusion requires a fact-intensive analysis into the insured's conduct and knowledge, but, in the event the underlying lawsuits establish such knowledge, this exclusion may apply to preclude an insurer's obligation to indemnify an insured for losses stemming from such knowledge or conduct.

D&O Policies

Opioid litigation has also created issues under directors' and officers' liability policies. For example, in August 2017, shareholders of Depomed, Inc. filed a lawsuit against the company and two of its directors.[29] The lengthy complaint alleges Depomed secretly promoted its opioid drug, Nucynta, for off-label uses. The lawsuit alleges the defendants misled shareholders about their marketing strategy and the safety of the opioid drug, which caused the shareholders to buy stock

[29] *See* Amended Complaint for Violations of the Federal Securities Laws, *supra* note 9.

at artificially inflated prices. The shareholders say they suffered damages in the form of devalued stock when legal and regulatory scrutiny revealed the problems.

While courts have yet to address coverage issues relating to D&O policies, these disputes could involve some of the same arguments begin made under CGL policies. For example, many D&O policies, similar to CGL policies, contain exclusions for intentional acts. In addition, the "bodily injury" issue being addressed by some courts under CGL policies would take a different turn under D&O policies, which frequently contain exclusions for claims arising out of bodily injury.

Damages Awards

The courts have not yet had an opportunity to squarely address the scope of an insurer's duty to indemnify as it relates to opioid litigation. Nevertheless, it is apparent that when that time comes, insurance practitioners will be faced with equally challenging issues. For example, many policies will exclude an obligation to pay damages for restitution/disgorgement awards, civil fines and penalties, and the costs involved in complying with injunctive relief.

Conclusion

Although the opioid crisis has garnered massive amounts of attention, the problem unfortunately continues to grow. Likewise, the lawsuits against those allegedly involved in the crisis have also continued to mount. In turn, insurance practitioners will continue to see courts address with increasing frequency the significant issues concerning whether certain insurance policies provide coverage for these claims.