THOMSON REUTERS
Westlaw®

Emerging insurance coverage issues involving opioid litigation

By Michael A. Hamilton, Esq., and Bradley R. Ryba, Esq., *Goldberg Segalla LLP*

APRIL 13, 2018

The opioid crisis 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 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 analysis provides an overview of some of the emerging coverage issues courts have addressed so far.

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.

In 2016, over 11 million people were misusing prescription opioids, according to the U.S. Department of Health and Human Services. And the Centers for Disease Control and Prevention says roughly 115 Americans die every day from an opioid overdose.

HHS declared a public health emergency to address the national opioid crisis last year. As casualties continue to mount, so does the litigation seeking redress against opioid manufacturers and distributors.

THE UNDERLYING ACTIONS

Though the specifics of governmental lawsuits against opioid manufacturers and distributors vary, they all generally accuse the defendants of engaging in fraudulent and negligent conduct.

For instance, in January 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 and negligent marketing.[1]

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

Generally, the lawsuits allege 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 nonlegitimate uses but continued to perpetuate their fraudulent scheme to reap vast profits.[3]

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, targeted by allegations that these so-called pill mills failed to identify suspicious opioid prescriptions.[4]

Aside from the governmental actions, shareholders have also initiated lawsuits against the directors and officers of their companies. 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.[5]

In addition, hospitals have sued manufacturers in an attempt to recover costs for treating opioid-addicted patients.[6]

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 several insurance coverage questions for commercial general liability and directors-and-officers liability 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?

Thomson Reuters is a commercial publisher of content that is general and educational in nature, may not reflect all recent legal developments and may not apply to the specific facts and circumstances of individual transactions and cases. Users should consult with qualified legal counsel before acting on any information published by Thomson Reuters online or in print. Thomson Reuters, its affiliates and their editorial staff are not a law firm, do not represent or advise clients in any matter and are not bound by the professional responsibilities and duties of a legal practitioner. Nothing in this publication should be construed as legal advice or creating an attorney-client relationship. The views expressed in this publication by any contributor are not necessarily those of the publisher.

the answer company™
THOMSON REUTERS®

- 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 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.

In 2014 West Virginia filed an eight-count complaint seeking damages against opioid distributors for allegedly illegally distributing controlled substances by supplying opioids to medical care providers in excess of actual medical need.

Initially, the complaint contained a cause of action seeking the costs of creating a medical monitoring program for opioid addicts. West Virginia later amended its complaint to remove that count.

This proved important in the ensuing coverage dispute involving Cincinnati Insurance Co., which had issued a CGL policy to Richie Enterprises, a pharmaceutical drug distributor and one of the defendants in the West Virginia action.

After initially finding that Cincinnati Insurance owed a duty to defend, the District Court found that the amended complaint (which removed the medical monitoring claim) was seeking purely economic damages, not damages because of "bodily injury" to the state's citizens. *Cincinnati Ins. Co. v. Richie Enters. LLC*, No. 12-cv-186, 2014 WL 3513211 (W.D. Ky. July 16, 2014).

In doing so, the court cited *Medmarc Casualty Insurance Co. v. Avent America Inc.*, 612 F.3d 607 (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 District Court noted the distinction between the phrases "because of bodily injury" and "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."

Richie Enterprises' policy also contained the much broader "because of bodily injury" language. Nevertheless, the court determined that West Virginia was seeking damages solely for money it spent because of the opioid epidemic due to the distributor's statutory violations. West Virginia did not need to prove "bodily injury" to establish that the distributors violated the statutes.

As a result, the court found that physical harm caused by opioids merely explained the state's economic loss. In other words, West Virginia was not seeking damages "because of bodily injury," but rather damages it incurred due to the distributors' alleged distribution of drugs in excess of legitimate medical need.

In another coverage lawsuit, *Cincinnati Insurance Co. v. H.D. Smith LLC*, there were similar allegations in the underlying action that West Virginia spent money caring for its drug-addicted citizens.[7] Again, Cincinnati Insurance's CGL policy covered damages "because of bodily injury," and again the court relied on *Medmarc*.

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, the distributor, allegedly distributed opioids negligently, which in turn resulted in greater hospital visits by those who were unable to afford their own care.

The court apparently did not see as problematic the fact that the underlying lawsuit was alleging 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" that is covered under the policies. Because many complaints include allegations of both negligent and intentional conduct, however, some courts may be likely to find a duty to defend.

For instance, in 2015 the 4th U.S. Circuit Court of Appeals found Liberty Mutual Fire Insurance Co. owed a duty to defend JM Smith Corp., a pharmaceutical drug distributor, with respect to a complaint alleging both intentional and negligent conduct, since a court or jury could find that harm resulted from the distributor's failure to understand the opioid drug abuse epidemic.[8]

Last year, a California appeals court held that an insurer had no duty to defend in a coverage dispute that arose from 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.

© 2018 Thomson Reuters

The California case involved claims for false advertising, unfair competition and public nuisance.[9] The Chicago case involved similar consumer fraud claims.[10]

The complaints alleged that 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 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 4th District Court of Appeal affirmed the decision.[11] It held that Watson's intentional conduct was the potential basis for its liability in the underlying suits. Alternatively, it determined the underlying claims would fall within the policies' products exclusions.

The California Supreme Court on Feb. 21 granted review of the lower court's ruling. It stayed briefing of the matter pending its resolution of a non-opioid case, *Liberty Surplus Insurance Corp. v. Ledesma & Meyer Construction Co.*, which has the potential to be a seminal California case involving the definition of an "occurrence."[12]

The case involves whether negligent hiring and retention of an employee that results in injuries can qualify as an "occurrence" under an employer's CGL policy. In that case, the 9th U.S. Circuit Court of Appeals certified a question to the California high court as to 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.

PRODUCT 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, the 11th U.S. Circuit Court of Appeals has determined that a distributor's over-supply of opioids met the low causation requirement for the CGL policy's products exclusion to apply.[13]

In the underlying litigation, West Virginia alleged that opioid distributor Anda Inc. knowingly or negligently oversupplied opioids, which led to the state's opioid crisis, and further alleged that the opioid proliferation caused various harms, including increased crime and congested hospitals. The state sought monetary damages and an injunction to enjoin the distributor from flooding the market with opioids.

Anda's CGL policy excluded coverage for bodily injury "arising out of" or "resulting from" the insured's products. The 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.

This is a very significant decision for insurers with products exclusions since it provides a strong argument that all claims in opioid lawsuits, even negligence claims, may be barred by the products exclusions.

FRAUDULENT OR INTENTIONAL CONDUCT

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.

The courts have not yet squarely addressed this issue, but 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 their policies do not cover 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 if 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.[14]

The lawsuit alleges the defendants misled shareholders about their marketing strategy and the safety of the company's opioid drug Nucynta, which caused the shareholders to buy stock at artificially inflated prices. The shareholders say they suffered damages in the form devalued stock when the 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 being made under CGL policies. For example, many D&O policies, similar to CGL policies, contain exclusions for intentional acts.

© 2018 Thomson Reuters

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 of implementing 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.

NOTES

[1] Complaint for Damages, *Prince George's Cty. v. Purdue Pharma L.P.,* No. CAL-18-02008, 2018 WL 692931 (Md. Cir. Ct., Prince George's Cty. Jan. 23, 2018). Purdue Pharma LP, the maker of OxyContin, is a common defendant in opioid lawsuits across the nation.

[2] *See In re Nat'l Prescription Opiate Litig.,* No. MDL 2804, 2017 WL 6031547 (J.P.M.L. Dec. 5, 2017) (granting centralization and finding the Northern District of Ohio as the appropriate forum).

[3] *See* Complaint, *Candler Cty., Ga. v. AmerisourceBergen Drug Corp.,* No. 18-cv-11, 2018 WL 795378 (S.D. Ga. Jan. 29, 2018).

[4] *See* Complaint, *Big Sandy Rancheria of Western Mono Indians v. McKesson Corp.,* No. CGC-18-564736, 2018 WL 1381287 (Cal. Super. Ct., S.F. Mar. 2, 2018).

[5] *See* Amended Complaint, *Huang v. Depomed Inc.,* No. 17-cv-4830-JST, 2018 WL 737905 (N.D. Cal. Feb. 6, 2018).

[6] *See* Complaint, *Candler Cty. Hosp. Auth. v. AmerisourceBergen Drug Corp.,* No. 18-cv-12, 2018 WL 795421 (S.D. Ga. Jan. 29, 2018).

[7] *Cincinnati Ins. Co. v. H.D. Smith LLC,* 829 F.3d 771, 773 (7th Cir. 2016).

[8] *Liberty Mut. Fire Ins. Co. v. JM Smith Corp.,* 602 F. App'x 115, 122 (4th Cir. 2015).

[9] Complaint, *People v. Purdue Pharma et al.,* No. 30-2014-00725287-CU-BT-CXC, 2014 WL 2207503 (Cal. Super. Ct., Orange Cty. May 21, 2014).

[10] *City of Chicago v. Purdue Pharma LP,* 211 F. Supp. 3d 1058 (N.D. Ill. 2016).

[11] *Traveler's Prop. Cas. Co. of Am. v. Actavis Inc.,* 16 Cal. App. 5th 1026 (Cal. Ct. App., 4th Dist. 2017).

[12] *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co. Inc.,* 834 F.3d 998 (9th Cir. 2016).

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

[14] *See Huang, supra* note 5.

This article first appeared in the April 13, 2018, edition of Westlaw Journal Insurance Coverage.

ABOUT THE AUTHORS

Michael A. Hamilton (L) is a partner and member of the global insurance services practice group at **Goldberg Segalla LLP** in Philadelphia. He handles sophisticated and high-exposure insurance coverage claims and commercial litigation. He also is a vice chair and former chair of the International Association of Defense Counsel's Insurance and Reinsurance Committee. He can be reached at mhamilton@goldbergsegalla.com. **Bradley R. Ryba** (R) is an associate and member of the global insurance services practice group at Goldberg Segalla in Chicago. He can be reached at bryba@goldbergsegalla.com.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.

© 2018 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit legalsolutions.thomsonreuters.com.