

Insurance Coverage for Opioid Litigation Costs

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Pharmaceutical companies at risk of opioid-related litigation should consider whether they are covered by their insurance policy.

Liability insurance coverage may be available for defense costs under Comprehensive General Liability Insurance ("CGL") policies. Whether coverage is available turns on the specific policy language, the relevant state law rules of construction and interpretation, and the particular allegations in a given lawsuit.

The Case Law is Limited

Currently, there are relatively few decisions addressing coverage specifically tied to opioid cases. All such decisions, however, follow a standard analysis.

In *Cincinnati Insurance Co. v. H.D. Smith, LLC*, 829 F.3d 771 (7th Cir. 2016) (applying Illinois law); *Cincinnati Insurance Company v. Richie Enterprises LLC*, C.A. No. 1:12-CV-00186-JHM-HBB (W.D. Ky 2014) (applying Kentucky law); and *Liberty Mutual Fire Insurance Co. v. J.M. Smith Corp.*, 602 Fed. Appx. 115 (4th Cir. 2015) (applying West Virginia law) (together "the West Virginia Cases") each of the courts held insurers were responsible for paying defense costs in cases brought by West Virginia against distributors of opioids.

By contrast, in *The Traveler's Property Casualty Company of America v. Actavis, Inc.*, Super. Ct. No. 30-2014-00746842, slip. Op. (Cal. Ct. App. 2014), the California Court of Appeals affirmed the judgment of the California Superior Court that the CGL policies in question did not require *Travelers* to defend or indemnify pharmaceutical company *Watson* for claims arising from the marketing and distribution of opioids.

In *Actavis*, the court found that coverage was not available because the pleadings "could only be read as being based, as in the deliberate and intentional conduct of *Watson*"; the court excluded the possibility that liability could be based on negligence. *Actavis*, Slip. Op. at 5. In addition, the court concluded that any injuries fell within the policies' products/completed operations exclusions since the misrepresentation concerned opioid products manufactured and sold by *Watson*. By contrast, in the West Virginia cases, while there were allegations of intentional conduct, the courts found some of the claims were negligence based. As such, there was no applicable exclusion and the insurers were obliged to defend. Eg. *Liberty Mutual*, at **3.

In each of these cases, the courts paid close attention to policy language and carefully considered other policy interpretation issues, such as whether the conduct alleged was an "occurrence" as

defined, and whether the liability arose from a “bodily injury”.

Potential Defendants Should Be Prepared

Any business involved in opioid related litigation should carefully review their coverage with this perspective in mind. Whether or not there is coverage will turn on the nature of the conduct, not necessarily the label on the claim. A statutory or nuisance based claim may well be premised on unintentional conduct that could support insurance coverage, notwithstanding the absence of a negligence claim.

Keeping You Updated

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