New Jersey Law Journal
STATEWIDE LEGAL AUTHORITY SINCE 1878
An ALM Publication
VOL. 223 NO. 45 MONDAY, NOVEMBER 6, 2017 NJLJ.COM

INSURANCE LAW

Insurance Coverage for Opioid Litigation

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The State of New Jersey and the City of Newark have joined the long and growing list of states, counties, municipalities and Indian Nations that are suing pharmaceutical manufacturers and distributors as a result of the opioid epidemic. New liabilities quickly give rise to new insurance coverage issues. So far, the suit brought by the State of West Virginia has produced the country's only opioid insurance cases. That suit essentially alleges, in eight separate statutory and common law causes of action, that "drug distributors illegally distributed controlled substances by supplying physicians and drugstores with drug quantities in excess of legitimate medical need." *Cincinnati Insurance Company v. Richie Enterprises,* No.1:12-CV-00186 (W.D. KY. 2014) ("*Richie I*"). The West Virginia case has now led to four insurance decisions in three states. All of the cases involve drug distributors. The cases illustrate the dispositive differences in the ways in which courts have addressed these insurance claims, and provide guidance for pharmaceutical companies seeking insurance coverage.

For insurance purposes, the New Jersey complaint varies tremendously from that brought by West Virginia. While the West Virginia complaint contains eight diverse statutory and common law causes of action, including several sounding in negligence, the New Jersey complaint only has four causes of action, three under the Consumer Fraud Act and one under the False Claims Act. As discussed below, the difference between the two complaints could be dispositive on the issue of coverage.

Is There an Occurrence

With respect to the West Virginia complaint, the first issue that the

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courts addressed was the existence of an "occurrence," or accident. In *Liberty Mutual Fire Insurance Company v. J.M. Smith Corporation*, C/A No. 7:12-2824 –TMC (D.S.C. 2013), Liberty Mutual argued that it had no duty to either defend or indemnify because "the Underlying Complaint alleges facts which support only knowing misconduct." Liberty Mutual's argument was that by pumping massive quantities of pills into West Virginia, J.M. Smith had to know that it was contributing to opioid addiction.

The court rejected this argument, because the West Virginia complaint contained counts sounding in both negligent and intentional causes of action. Under South Carolina law, an insurance company must defend if the complaint contains even one covered cause of action. As a result, the court held that Liberty Mutual had to defend its policyholder. See also, *Richie 1*.

Damages "Because of" Bodily Injury

Pharma companies principally seek coverage for opioid liability under general liability policies. Those policies typically provide coverage for damages *because of* bodily injury, and not simply *for* bodily injury. This "because of" formulation provides very broad coverage and, as set forth below, can be dispositive in coverage litigation.

The West Virginia complaint contained one cause of action for medical monitoring. In *Richie*, Richie's lawyers mistakenly argued that there should be coverage because the complaint's allegations were *for* bodily injury, when in fact the insurance policy used the "because of" language. The court agreed that the insurance company should defend Richie, but only because of the count for medical monitoring, which the court reasoned was "for" bodily injury. The court found that the other causes of action sought only economic damages. Unfortunately, the West Virginia attorney general then deleted the medical monitoring count from the complaint.

The insurance company moved for a rehearing. *Cincinnati Insurance Co. v. Richie*, No. 1:12-CV-00186 v (D. Ky. 2014) ("*Richie 2*"). Richie argued for the first time that the "because of" language was broader than the "for" language. The court held that this argument was untimely, but even if the court were to consider it, the court would reject it. "In this case, in the absence of the medical monitoring claim, West Virginia is solely seeking damages for the money it has been required to spend because of the prescription drug abuse epidemic in West Virginia," and not because of bodily injury. As a result, the court reversed itself and denied coverage.

In *Cincinnati Insurance Co. v. H.D. Smith*, 829 F. 3d 773 (7th Cir. 2016), which also involved the West Virginia action, the Seventh Circuit reached the opposite conclusion, and ordered the insurance company to defend. The district court had ruled against coverage, and the Seventh Circuit reversed. The court emphasized that the insurance policy provided coverage for damages "because of bodily injury." The court found that "West Virginia alleged that its citizens suffered bodily injury and the state spent money caring for those injuries." The insurance company argued that West Virginia sought its own damages, and not damages on behalf of its citizens. The Seventh Circuit replied, "But so what?" The court analogized West

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Virginia's situation to that of a mother who spends her own money to pay for the care of her son. In either case, the court reasoned that the costs were because of bodily injury.

The court noted that, "To be sure, West Virginia asserts numerous legal theories and seeks a variety of remedies …." However, under applicable Illinois law, the court held that if even one theory of recovery fell within coverage, the insurance company had to defend.

The New Jersey Complaint

Unlike the West Virginia complaint, the New Jersey complaint seeks coverage under only two statutes, and in both cases arguably only for intentional wrongdoing. Insurance coverage exists for negligent and reckless wrongdoing. It does not exist for intentional wrongdoing. Insurance coverage may not exist for the New Jersey complaint against Insys. *SL Industries v. American Motorists Ins. Co.,* 128 N.J. 188 (1992).

Even if an issue as to intent should arise, New Jersey has structured its complaint in such a way that a court could apply an objective instead of a subjective test for intent. *Morton, Int'l v. General Accident Ins. Co*., 134 N.J. 1 (1993), concerned the intentional dumping of mercury waste into a river. The state Supreme Court found that Morton's actions were so egregious that the court would objectively find that *Morton* was an intentional polluter. The New Jersey complaint against Insys is so phrased that it could lead to a similar result, despite the normal rule in New Jersey that requires subjective intent. It is noteworthy that in *Liberty Mutual v. J.M. Smith*, the court states that "J.M. Smith alleges it 'accidentally' funneled massive quantities of controlled substances into West Virginia." A New Jersey court, following *Morton*, could well apply an objective standard for insurance purposes to such a defense.

Even if the Insys litigation did contain a negligence count, New Jersey insurance law treats complaints with mixed allegations of negligent and intentional conduct very differently than do the decisions discussed above. Under the controlling law of South Carolina and Illinois, the insurance company had to defend the entire suit if there was even one covered cause of action. New Jersey law is different, and requires allocation where possible between defense costs incurred with respect to covered and non-covered causes of action. The New Jersey Supreme Court has expressed its clear preference for allocation. *SL Industries*.

For insurance purposes, the opioid complaint brought by the City of Newark is very different. The second count of the complaint is entitled "Public Nuisance," and specifically alleges that the defendants acted "intentionally, recklessly or negligently." The third count is entitled "Fraudulent and Negligent Misrepresentation." Thus, in an insurance coverage action governed by New Jersey law, a defendant may have a better chance of arguing successfully that its insurance company must defend it.

Conclusion

A single rule for insurance coverage for opioid litigation will never exist. State law on key issues will always diverge dramatically. The facts surrounding each company's distribution and sale of opioids will be different. Perhaps most importantly, as demonstrated by the differences between the West Virginia and New Jersey complaints, drafting by the plaintiffs could have a dispositive impact on coverage. The inclusion of a negligence count can be the difference as to whether a drug company receives a defense from its insurance company, and to that extent preserve its resources for settling claims. That is the result that the opioid plaintiffs seek: an equitable contribution by the drug companies to the current crisis. Without insurance coverage, that result becomes difficult to achieve. ■