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Opioid Litigation and Insurance Coverage in New Jersey



OPIOID LITIGATION AND INSURANCE COVERAGE IN NEW JERSEY

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New Jersey has leaped into the midst of the national wave of claims against opioid manufacturers and distributors. The State of New Jersey has now launched two opioid litigations against opioid manufacturers, the first against Insys Pharmaceuticals and then a second suit against Purdue Pharma. The State has now also sued the president of Insys. The City of Newark has filed suit against several opioid manufacturers, and the City of Paterson has indicated that it will also file suit. Other municipalities and counties will undoubtedly follow.

The survival of some of the opioid companies may depend on whether they can access their insurance coverage. If coverage exists, it would be under general liability policies, which provide coverage for damages 'because of bodily injury.' General liability policies do not cover intentional wrongdoing, but do cover negligent and even reckless conduct. General liability policies not only provide for a duty to indemnify, but also a broad, unlimited duty to defend. So far, opioid insurance litigation has centered on the duty to defend.

Whether a duty to defend for opioid litigation exists under New Jersey law will depend on two factors. The first is the way in which the complaining party drafts its complaint. If the complaint only contains allegations of intentional wrongdoing, as opposed to negligent or reckless conduct, the policyholder will have a more difficult time obtaining coverage. A similar issue arises as to whether the complaint alleges damages because of bodily injury.

The second factor is New Jersey insurance coverage law. That law is less favorable to policyholders than the law of many other states. First, New Jersey has what is known as the Burd doctrine, which can convert the duty to defend, paying legal bills as they are incurred, into a duty to reimburse after the fact. Second, the New Jersey Supreme Court has encouraged courts to allocate defense costs between covered and uncovered causes of action, rather than to cover the full cost of defense if any single cause of action is covered.

The complaint brought by the State of New Jersey only has causes of action under the Consumer Fraud Act and the False Claims Act. Moreover, the body of the complaint is pled mainly in terms of intentional conduct; negligent or reckless conduct is not mentioned. See *Travelers Property & Casualty Co. v. Actavis, Inc.*, No. GO53749 (Cal. Ct. App. 2017) (no duty to defend opioid manufacturer because complaint only alleged intentional conduct.)

The complaint by the City of Newark is very different. Of its three causes of action two are pled alternatively in intentional or negligent conduct. This provides a stronger case for the policyholder for a duty to defend.

The underlying complaint must also allege damages 'because of bodily injury.' In *Cincinnati Ins. Co. v. Richie Enterprises*, No. 1:12-CV-00186 (W.D. Ky. 2014), the

court found that the only one of seven causes of action in the State of West Virginia's complaint that alleged damages because of bodily injury was the one seeking medical monitoring costs. However, in *Cincinnati Ins. Co. v. H.D. Smith*, 829 F. 3d 773 (7th Cir. 2016) the Seventh Circuit, addressing the same West Virginia complaint, found that all of the causes of action asserted damages because of bodily injury.

The complaint brought by the State of New Jersey, in addition to such damages as injunctive relief and punitive damages, seeks disgorgement of profits, which insurance companies contend is not covered. The City of Newark complaint seeks disgorgement, but also seeks unspecified damages which could be because of bodily injury.

A policyholder seeking coverage for the City of Newark complaint may also run into the problem of *Burd v. Sussex Mutual Ins. Co.*, 56 N.J. 383 (1970). In *Burd*, the New Jersey Supreme Court ruled that when a complaint contains both negligent and intentional allegations, and the underlying case will not determine the nature of the policyholder's conduct, the duty to defend becomes a duty to reimburse. While the continuing viability of *Burd* has been questioned, it still might be a powerful weapon for an insurance company seeking to avoid its duty to defend.

If an opioid company survives *Burd*, it still needs to confront the issue of allocation of defense costs between covered and uncovered claims. *Hebela v. Healthcare Ins. Co.*, 370 N.J. Super. 260 (App. Div. 2004) is the leading case on this issue. *Hebela* held that attorneys' fees incurred that solely benefit the uncovered cause of action are the policyholder's responsibility, and likewise fees that go solely to covered causes of action are the insurance company's responsibility. However, mixed fees that benefit both covered and uncovered causes of action are solely the insurance company's responsibility. Such mixed costs are often the bulk of the fees incurred in a case, so that *Hebela* can be a favorable allocation formula for the policyholder.

Conclusion

The manner in which the plaintiff drafts its complaint will often be determinative of whether the defendant will obtain insurance coverage. The availability of insurance coverage will often be determinative of whether the plaintiff ultimately is compensated. A plaintiff that truly wants to punish an evil wrongdoer can style its complaint purely in terms of intentional wrongdoing to deprive it of insurance coverage. Conversely, a plaintiff counting on insurance coverage as its source of recovery can couch its complaint in terms of negligence, and style its damages as compensation because of bodily injury to opioid users. Targeted opioid companies can only hope that plaintiffs will be cognizant of the insurance implications when they draft their complaints.

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