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Litigation

Will Directors and Officers Have Insurance Coverage for Opioid Claims?

By Robert Chesler and Carrie DiCanio

Dozens of state and local governments have filed suit against opioid manufacturers and distributors to recover the costs of addressing the opioid epidemic. Individual corporate directors and officers are now also facing criminal and civil liability for the effects of the opioid crisis. In October 2017, the federal prosecutor in Massachusetts brought criminal charges against John Kapoor, founder and director of Insys Therapeutics, manufacturer of the opioid Subsys, for various felonies, including RICO conspiracy, conspiracy to commit mail and wire fraud, and conspiracy to violate the Anti-Kickback Law. The prosecutor has also charged six of his colleagues. Meanwhile, in November 2017, the New Jersey Attorney General added Mr. Kapoor to its opioid civil suit against Insys for Mr. Kapoor's alleged direct involvement in a scheme to promote ''off label'' uses of Subsys.

The government proceedings against Mr. Kapoor and other directors and officers in opioid litigation present an important issue for these defendants: will they have insurance coverage for these claims?

The short answer is that these individuals may be entitled to have their defense costs paid, but questions persist as to whether their insurance companies will have a duty to indemnify them for settlements or judgments of the opioid suits. Moreover, it is imperative that the directors and officers review the complaints filed against them to determine that all potentially applicable insurance policies are given notice of the claims.

Which Policies Apply?

Some opioid complaints may seek damages 'because of bodily injury' (damages typically covered by a commercial general liability (CGL) insurance policy), while others will only seek damages for economic harm (which would typically be covered under a Directors and Officers (D&O) insurance policy). Thus, the question arises as to which policies apply. Indeed, in addressing the opioid complaint filed by the State of West Virginia, one federal district court held that the complaint only sought damages because of economic harm, while another held that it sought damages 'because of bodily injury.' *Compare Cincinnati Ins. Co. v. Richie Enterprises LLC*, 2014 BL 58698, at *9 (W.D. Ky. Mar. 4, 2014) (finding coverage under CGL policy due to allegations of bodily injury), *with Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co*., 2015 BL 247779, at *7 (C.D. Ill. July 28, 2015) (finding no coverage under CGL policy, reasoning that ''West Virginia is not seeking reimbursement of damages sustained by its citizens on account of their bodily injury and it is not seeking reimbursement for liability to its citizens''), *rev'd* 829 F.3d 771 (7th Cir. 2016). The best practice for companies that manufacture or distribute opioids is, if a director or officer is sued, to give notice on all potentially applicable insurance policies.

Is There a ''Claim''?

D&O coverage is triggered by a ''claim.'' However, D&O policies can differ dramatically as to what constitutes a ''claim.'' For example, with respect to coverage for individual directors and officers (typically called Side A and B coverage), many D&O policies define ''claim'' to include a ''demand for monetary or non-monetary relief'' and a ''civil, criminal or administrative proceeding.'' Since a criminal proceeding has been filed against Mr. Kapoor, his D&O insurance company should be obligated to pay his attorneys' fees, subject to the conduct exclusions discussed below.

Past the general definition set forth above, definitions of 'claim' have expanded in recent years to include, for

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example, certain regulatory investigations, government subpoenas, and even grand juries. A director or officer can incur defense costs from any one of a variety of sources, and having the broadest definition of 'claim' possible in your organization's D&O policy is critical.

D&O Policies and the Conduct Exclusions

D&O policies contain what are known as the conduct or intentional acts exclusions, which prohibit coverage for fraud and other intentional wrongdoing. The opioid complaint brought by the State of New Jersey seeks recovery under the False Claims Act and the Consumer Fraud Act, and arguably only seeks coverage for intentional wrongdoing. The conduct exclusions, unless modified, may foreclose coverage for such a suit.

The conduct exclusions are often modified in two ways. The first is by the use of ''in fact'' or other conditional language, which requires a determination of wrongdoing by a court in order for the exclusion to apply. In *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562, 568 (5th Cir. 2010), the insurance company asserted that this meant that it could deny coverage when it made its own determination that there was wrongdoing. The court disagreed, and held that the ''in fact'' language meant that a finding ''in fact'' by a court was required before the insurance company could deny coverage. *Id.* at 574. However, *Pendergest-Holt* also determined that the ''in fact'' language does permit the D&O insurance company to bring a coverage action against its own policyholder seeking such a finding even before the underlying proceeding concludes, forcing it to litigate on two fronts simultaneously. *Id.*

If possible, it is highly preferable that your policy not only require an adjudication ''in fact'' but also contain ''final adjudication'' language and in particular, require that the conduct exclusion only apply after a ''final nonappealable adjudication in the underlying proceeding.'' This language protects the policyholder until the underlying case comes to a close and results in an actual finding of fraud. The insurance company cannot bring an independent coverage suit until that point and the insurance company must continue to provide a defense through appeal. Particularly since many cases settle before final adjudication, this language provides maximum protection.

Burning Limits

D&O policies are ''burning limits'' policies. This means that defense costs erode policy limits. If the policy has a limit of $1,000,000, for example, that is the limit for all defense and indemnity costs. Every dollar paid for defense means one dollar less for settlement.

In the case of Insys, the D&O policy will have to have limits sufficient to pay for seven individuals' criminal defense fees as well as Mr. Kapoor's attorneys' fees in the proceeding brought by the State of New Jersey, plus amounts to indemnify individual defendants for the cost of settling such suits that are not indemnifiable by Insys. It is important for a company to consider such scenarios when deciding what coverage limits it needs and whether to purchase Side-A only coverage to protect its directors and officers if the company is unable to indemnify them due to their corporate by-laws, statutory law, or even insolvency.

General Liability Policies and the Duty to Defend

D&O insurance policies provide broad coverage for allegations of financial loss, but generally do not provide coverage for bodily injury or property damage. General liability policies, however, do provide insurance coverage for such injuries and are a good place to look for coverage where your D&O policy may not apply. Thus, in some instances, a general liability policy would provide a duty to defend where a D&O policy would not advance defense costs, and *vice versa*.

Under a general liability policy, an insurance company provides coverage for negligent and reckless conduct, but not for intentional wrongdoing. Generally, the insurance company's duty to defend is determined based on four corners of the underlying complaint. If the complaint only contains allegations of intentional wrongdoing, the insurance company may not need to defend the action. In *The Traveler's Property Casualty Company v. Actavis, Inc.*, 16 Cal. App. 5th 1026, 1044, 225 Cal. Rptr. 3d 5, 20 (2017), the court denied coverage to Actavis under a general liability policy because the underlying complaint only alleged intentional wrongdoing. In this regard, the way in which the plaintiff drafts the underlying complaint can be dispositive on coverage.

Another example is *Cincinnati Ins. Co. v. Richie Enters. LLC, supra*, where the underlying complaint by the State of West Virginia contained seven causes of action, including one for medical monitoring. Richie sought coverage under its general liability policy. The court found that the medical monitoring count sought damages for bodily injury, and as a result ordered the insurance company to defend the entire case. *Id.* at *9. However, the State then dropped the medical monitoring count. As a result, the court reversed itself and found that the insurance company did not have a duty to defend. *Cincinnati Ins. Co. v. Richie Enters. LLC*, 2014 BL 197097, at *7 (W.D. Ky. July 16, 2014).

Cincinnati Ins. v. H.D. Smith Wholesale Drug Co., 829 F.3d 771 (7th Cir. 2016), also involved an opiate distributor seeking coverage for the West Virginia complaint under a general liability policy. There, the Seventh Circuit found that all of the counts sought damages because of bodily injury, and ordered the insurance company to defend the action. The Court reasoned that ''West Virginia alleged that its citizens suffered bodily injuries and the state spent money caring for those injuries—money that the state seeks in damages. On its face, West Virginia's suit appears to be covered by Cincinnati's policy. Cincinnati argues to the contrary, stressing that West Virginia seeks its own damages, not damages on behalf of its citizens. But so what?'' *Id.* at 774.

Allocation

A complaint seeking damages for opioids may contain a mix of claims. Some may be based on economic damages other based on bodily injury. In many states, if the underlying complaint contains even one covered cause of action, a general liability insurance company

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must defend the *entire* complaint. In such cases, if the D&O policy also covers the pending action, the general liability insurance company may seek contribution from the D&O insurer. However, some jurisdictions require that a policyholder's defense costs be completely paid for by any one insurance company on the risk and that the insurance company must seek contribution from other insurance companies separately.

Other states, such as New Jersey, encourage courts to allocate between covered and uncovered causes of action. In such cases, both the general liability insurance company and the D&O insurance company would share in the defense based upon the nature of the complaint's allegations. The insurance companies may assert that the policyholder must pick up a share of the defense costs for causes of action not covered by either policy.

Conclusion

Since the onslaught of asbestos litigation and through Accutane and talc litigation, corporate America--and particularly medical products companies--has been subject to waves of product-related litigation. Corporations have turned to their insurance companies to assume these burdens, and the insurance industry, in case after case, has placed obstacles in the path of coverage. Opioid insurance coverage now appears to be following the same course. We have provided some insight into coverage issues that may arise in opioid litigation and how to address this issue in order to maximize coverage for such claims.

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