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BATTLE LINES DRAWN OVER COVERAGE FOR OPIOID LITIGATION

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▸ Opioid producers and distributors have turned to their insurance companies for relief from litigation, triggering a fierce fight.

THE PHARMACEUTICAL INDUSTRY is under siege by opioid litigation. Opioid producers and distributors are the targets of dozens of suits brought by states and municipalities, and the situation will only worsen. As with other catastrophic corporate liabilities, companies have turned to their insurance companies for relief. Judging by emerging case law, insurance companies are fighting back fiercely against assuming responsibility for these claims.

To date, coverage litigation has centered on the insurance companies' duty to defend their policyholders. The cost of defending against multiple opioid suits can cripple a company. Insurance should be a first line of defense. The insurance company's duty to defend is much broader than its duty to indemnify. In most states, it is based solely on the allegations of the underlying complaint. The court must scrutinize the complaint liberally in favor of coverage, and the insurance company must defend if there is a potential for coverage. However, since the duty to defend is based on the allegations of the underlying complaint, the policyholder may be at the mercy of the way in which the underlying plaintiff has drafted its complaint.

Intentional vs. Negligent Conduct

This is what happened to Actavis. Two California counties and Chicago sued Actavis over opioids. Actavis sought a defense from its insurance company, Travelers, which instead sued Actavis in California in 2014. The California Court of Appeal issued its decision in 2017 (*The Travelers Property Casualty Company v. Actavis, Inc.*), 16 Cal. App. 5th 1026, 225 Cal. Rptr. 3d 5, 20 (Cal. Ct. App. 2017), *sub judice* (Cal.). The court held that Travelers did not have a duty to defend because the underlying complaints "can only be read as being based on the deliberate and intentional conduct of [Actavis] that produced injuries – including a resurgence in heroin use – that were neither unexpected nor unforeseen." *Id.* at 1030, 225 Cal. Rptr. 3d at 10. The court reasoned that insurance policies do not cover intentional wrongdoing and that since the underlying complaints only alleged intentional wrongdoing, Actavis did not have any coverage. The manner in which the underlying plaintiffs drafted their complaints proved decisive on coverage.

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The court in Actavis distinguished between the case before it and a decision that found a duty to defend against an opioid complaint brought by the attorney general for West Virginia (*Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co.*, 2016). The complaint contained seven causes of action, sounding in both negligence and intentional wrongdoing. The court held that since the complaint contained allegations of negligence, the insurance company had to defend. Moreover, under the applicable law, the insurance company had to defend the entire suit even if there was only one covered cause of action.

Opioid companies must cope with the public perception of them as villains. Some courts will believe the worst of them. For example, in *Actavis*, it is at least open

to question whether Actavis actually believed that its product would lead to a resurgence of heroin use. In *Liberty Mutual Insurance Co. v. J M Smith Corp.*, No. 7:12-2824-TMC, 2013 U.S. Dist. LEXIS 136448, at *15 (D.S.C. Sep. 24,(2013), Liberty Mutual, like Travelers in *Actavis*, based its coverage defense on intention, arguing that by pumping massive quantities of pills into West Virginia, J M Smith had to know that it was contributing to opioid addiction. In *J M Smith Corp.*, though, the court rejected that argument and found that Liberty Mutual had a duty to defend because, again, the complaint contained allegations of negligent conduct. *Id.* at *18.

Bodily Injury vs. Economic Harm

All of the opioid insurance coverage litigation to date has involved general liability policies, which contain coverage for damages because of bodily injury. Whether an opioid complaint alleges damages because of bodily injury, or whether the alleged conduct is purely economic, as the insurance companies argue, is another contested insurance coverage issue.

Cincinnati Ins. Co. v. Richie Enterprises LLC, 2014 BL 58698 (W.D. Ky. Mar. 4, (2014)) also concerned the West Virginia opioid complaint. In *Richie*, the court held that of the seven causes of action, only medical monitoring involved allegations of bodily injury. *Id.* at *23. As a result, it ordered the insurance company to defend the entire case. Ultimately, however, West Virginia dropped the medical monitoring count. As a result, the court in *Richie* revisited the issue and held that insurance coverage did not exist. *Cincinnati Ins. Co. v. Richie Enters. LLC*, 2014 BL 197097 (W.D. Ky. July 16, 2014).

Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co., 829 F.3d 771 (7th Cir. 2016) reached the exact opposite conclusion addressing the same West Virginia complaint. The court emphasized that the insurance policy did not just cover bodily injury, but covered damages "*because* of bodily injury." *Id.* at 774 (emphasis in original). The court stated 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." As a result, the court found that the damages incurred by the state were because of bodily injury and the insurance company had a duty to defend. *Id.* at 775.

The issue of whether the complaint alleges bodily injury also arises in a different context. An opioid complaint brought by the state of New Jersey contains three causes of action under the Consumer Fraud Act and one under the False Claims Act. *Porrino v. Insys Therapeutics, Inc.*, (N.J. Super. Ct. Ch. Div. filed Oct. 5, 2017). None of these causes of action necessarily involves bodily injury. Moreover, the complaint principally seeks penalties and fines, which insurance companies regularly assert are not covered.

The city of Newark framed its 2017 opioid complaint differently (*City of Newark, New Jersey v. Purdue Pharma*) L.P., et al., (N.J. Super. Ct. Law Div. filed Oct. 4, 2017). While the complaint brought a count under the Consumer Fraud Act, it also brought counts for public nuisance and fraudulent and negligent misrepresentation. The complaint, *inter alia*, sought damages for public nuisance and compensatory damages for fraud and negligent misrepresentation. A defendant in the *City of Newark* case has a better chance of obtaining a defense than a defendant in the state of New Jersey case.

Directors & Officers Liability Insurance and Opioid Litigation

Even aside from the bodily injury issue in *Richie* and *J M Smith Corp.*, an opioid complaint may only allege economic harm. In such a case, a private company may look to its directors and officers (D&O) insurance policy. Public company D&O policies normally only provide insurance coverage for the corporation for securities claims. However, private company D&O policies generally do not have this restriction and respond to a broad

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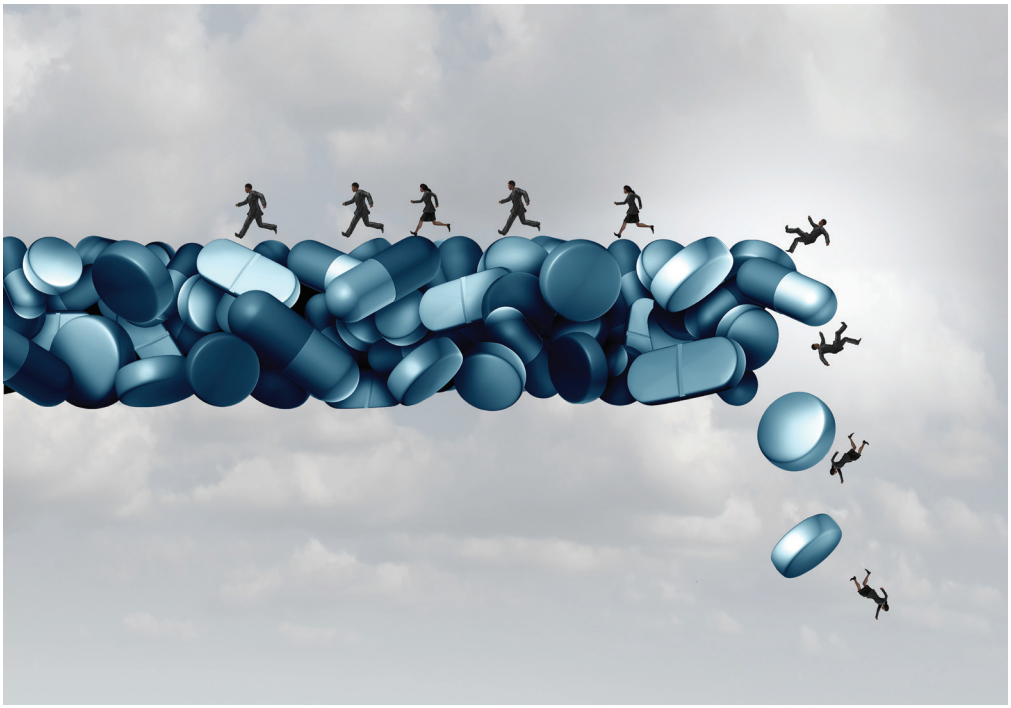
range of financial claims against the company.

D&O policies are critical in another context. The federal prosecutor in Massachusetts sued John Kapoor, the director and founder of Insys, and six of his colleagues; the state of New Jersey then added Mr. Kapoor to its action. The company's D&O policy should respond and advance defense costs for the individuals. D&O policies, however, do have limitations. They purport not to cover bodily injury or property damage. They do not respond solely to complaints, but more broadly to "claims." However, definitions of "claim" may vary dramatically. These policies contain numerous exclusions, the most important of which for these purposes are the "conduct" exclusions, which essentially foreclose conduct for fraud and intentional wrongdoing. A D&O policy should contain limiting language on these exclusions. The best such language, which is increasingly common, is that these exclusions do not apply until there is a final non-appealable adjudication of fraud or intentional wrongdoing in the underlying case.

Policyholders should be careful to note that D&O policies have "burning limits." Every dollar spent on defense erodes the policy limit, which means one dollar less for settlement. If a company that has insurance coverage intends to settle an opioid claim, it is better off doing it quickly, before defense costs eat away at the limit. Policyholders also need to carefully supervise defense counsel, especially those appointed by the insurance company, to make sure that the attorneys' fees are not exorbitant.



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In the *Insys* case in Massachusetts, each of the seven individuals may need his or her own lawyer. Attorneys' fees for seven individuals can quickly exceed a D&O policy's limit. When purchasing D&O insurance, companies must carefully review worst-case scenarios and ascertain if the policy limits are sufficient.

Finally, opioid litigation can result in related shareholder derivative litigation against the defendant company's directors and officers. The D&O policy is designed to defend and indemnify against such suits. However, policyholders and their insurance brokers need to be wary. The insurance industry is reportedly contemplating the addition of opioid exclusions to D&O insurance policies.

No End in Sight

The furor over opioids is growing more intense, and companies with opioid exposures can only expect more litigation. Insurance is an essential bulwark in fighting off these claims. However, the insurance industry is struggling mightily to avoid paying opioid claims. Policyholders must navigate numerous difficult issues before reaching the haven of insurance coverage for their opioid liabilities. ■