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## The Opioid Epidemic: As The Pharmaceutical Industry Is Targeted, Will It Be Covered By Insurance?

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# Commentary

## The Opioid Epidemic: As The Pharmaceutical Industry Is Targeted, Will It Be Covered By Insurance?

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### I. THE PRESCRIPTION OPIOID LAWSUITS

The United States is currently battling the worst drug crisis in its history. Each day, ninety one Americans die from an opioid overdose,[1] and overdose is now the leading cause of death in Americans under age fifty.[2] In 2016, drug related deaths likely exceeded 59,000, the largest annual jump ever recorded in the United States.[3] Reminiscent of the tobacco lawsuits of the 1990s, state and local governments have filed lawsuits against the pharmaceutical industry, seeking to recover the costs they have incurred addressing the opioid epidemic. In 2017 alone, states, cities and counties have filed over twenty lawsuits against manufacturers and distributors of prescription opioids, as well as the pharmacies that fill prescriptions. As pharmaceutical companies begin to seek insurance for these claims, the insurance industry is confronted with exposure to a new mass tort. In this article, we review the origins of the opioid public health crisis, the lawsuits it has engendered, and the questions it poses for the insurance industry.

#### A. The Opioid Epidemic

The current drug crisis is largely driven by abuse of opiates such as prescription opioids (synthetic opiate painkillers), heroin and illicitly manufactured fentanyl.[4] Opiates such as morphine block pain but also produce feelings of euphoria and, when used over time, physical dependence.[5] In 1996, Purdue Pharma introduced OxyContin, a prescription opioid painkiller, and marketed it as a safe form of opiate that used time-release capsules to level out the high and diminish the risk of addiction.[6] However, addicts discovered that those capsules could be crushed and then injected or snorted.[7] Drug dealers on the street started selling OxyContin and doctors operating pain management clinics, often referred to as "pill mills," aggressively prescribed opioids to hundreds of people a day, with some traveling hours to obtain a prescription.[8]

To address rising opiate abuse, the Centers for Disease Control and Prevention ("CDC") issued new guidelines advising that doctors should treat pain holistically through exercise and pain therapy rather than with opioids, and Purdue Pharma introduced a modified version of OxyContin that is harder to crush.[9] However, as the number of prescriptions for opioids began to drop, drug cartels introduced addicts to heroin, a much cheaper opiate than black market OxyContin, and fentanyl, an opioid that is 10,000 times more potent than morphine and is used medically as an anesthetic.[10] According to the CDC, three out of four new heroin users abused prescription opioids before turning to heroin.[11]

As a result of the rapid increase in opioid abuse, the United States is facing a health crisis that is being compared to the HIV/AIDS epidemic of the 1980s and 1990s.[12] In addition to the loss of life, the crisis has presented significant costs to state and local governments, which have devoted resources to treatment of addicts and cracking down on the criminal sale of opiates. One study estimates that the costs related to the opioid epidemic in 2013 alone were $78.5 billion.[13]

### B. State And Local Governments Seek Damages For Costs Related To The Opioid Epidemic

State and local governments are taking legal action to hold companies profiting from the sale of prescription opioids accountable for the costs relating to the opioid crisis. Since 2012, the States of West Virginia, Kentucky, California, Mississippi, and most recently Ohio and Missouri, have filed lawsuits against pharmaceutical companies, alleging they have contributed to the widespread abuse of prescription opioids and resulting epidemic. Cities and counties in Illinois, Washington, New York, Tennessee as well as the Cherokee Nation, have followed suit. These lawsuits initially targeted manufacturers, but their scope has grown to include wholesale distributors and retail pharmacies. Recently, attorneys general in more than twenty states, including Wisconsin, South Carolina, Alabama, South Dakota, Pennsylvania and Indiana, have announced a joint investigation into the role pharmaceutical companies have played in the opioid epidemic.[14]

#### 1. Lawsuits Against Manufacturers

In 2014, the City of Chicago and State of California filed substantially identical lawsuits against manufacturers of prescription opioids such as Purdue Pharma, Teva Pharmaceuticals and Actavis. These lawsuits allege that manufacturers fraudulently marketed opioids to persuade doctors and patients that opioids are safe for treatment of long-term pain, while failing to disclose risk such as addiction, overdose and death.

On December 15, 2015, the State of Mississippi filed a similar lawsuit, alleging that since the 1990s manufacturers have engaged in a common scheme to deceptively market their opioid products.

On May 31, 2017, the State of Ohio filed a similar lawsuit alleging that manufacturers falsely and fraudulently marketed their products as non-addictive and safe for treating chronic pain. As a result, Ohio alleges, it has spent: (1) $175 million on defendants' opioid products; (2) $110 million on addiction-countering drugs; (3) $462 million in treatment and counseling services; and (4) $16 million to fund courts, jails and prisons. Ohio also seeks over $200 million as restitution for Ohioans' purchases of opioids from 2006-2016.

#### 2. Lawsuits Against Distributors

After prescription opioids are manufactured, they are purchased, inventoried and sold by wholesale distributors. State and local governments have filed lawsuits against these distributors alleging they negligently or intentionally failed to monitor and report orders that were suspiciously large, frequent, or otherwise susceptible to diversion towards non-medical use.

In 2012, the State of West Virginia sued a number of distributors, alleging that their failure to maintain effective controls and procedures to guard against diversion of controlled substances and to report suspicious orders has caused West Virginia to incur "as much as $430 million annually in the year 2010 with costs projected to be as much as $695 million annually by 2017." So far, West Virginia has recovered over $40 million in settlements with opioid distributors.

In addition, West Virginia counties and cities have filed over fifteen "copycat" lawsuits against the same distributors that were targeted by West Virginia. On April 25, 2017, the Cherokee Nation sued many of the same distributors to recover opioid-related damages on behalf of the 177,000 Cherokee Nation citizens residing on tribal lands spanning fourteen counties in northeast Oklahoma. On June 5, 2017, the City of Dayton filed suit against prescription opioid manufacturers *and* distributors. Dayton alleges opioid manufacturers engaged in a scheme of fraudulent advertising, including the use of unbranded and indirect marketing tactics intended to skirt regulations on the marketing of prescription drugs, and that wholesalers negligently distributed prescription opioids far in excess of Dayton's legitimate needs and failed to report suspicious orders of prescription opioids.

### 3. Lawsuits Against Pharmacies

The most recent target of opioid related lawsuits are pharmacies, typically in rural and low population areas, that have allegedly sold prescription opioids in much greater numbers than the population they serve could use for legitimate purposes. Since December 2016, the Attorney General of West Virginia has sued three pharmacies, alleging they failed to identify suspicious prescriptions or sold prescription opioids in unreasonably large volume. In addition, at least one pharmacy has been sued by the patients to whom it sold prescription opioids. In *Tug Valley Pharmacy v. All Plaintiffs*, the West Virginia Supreme Court of Appeals ruled that substance abusers can sue prescribers and pharmacists, even though the patients engaged in illegal activity such as acquiring prescriptions by misleading physicians and pharmacists.[15] The *Tug Valley* court concluded that the jury can take account of opioid abusers' illegal conduct when it allocates responsibility between the pharmacies that sold prescription opioids and the customers who used them.

## II. ARE DAMAGES PAID BY THE PHARMACEUTICAL INDUSTRY FOR THE OPIOID EPIDEMIC COVERED BY INSURANCE?

As summarized above, the opioid epidemic has resulted in a wave of litigation against the pharmaceutical industry. Some of the opioid lawsuits have already settled, with recoveries by West Virginia, Kentucky and California exceeding $60 million. Faced with this exposure, pharmaceutical manufacturers, distributors and pharmacies will inevitably seek indemnity for their payments to state and local governments from insurance companies. But are damages paid to resolve generalized harm to society, based on allegations of intentional and fraudulent sale of prescription opioids or the failure to identify and report suspicious orders, covered by their insurance policies? Although prescription opioid litigation is expanding with increasing frequency, only a handful of courts have addressed whether claims alleged by state and local governments are covered. We discuss below a few of the insurance coverage questions presented by opioid claims.

- **Is There "Bodily Injury"?**

The opioid lawsuits filed by West Virginia and other states allege damages from expenditures on non-medical public services, such as law enforcement, prosecutions, courts and correctional facilities, as well as amounts spent on medical services, healthcare, and drug abuse education.

In 2014, the Western District of Kentucky in *Cincinnati Ins. Co. v. Richie Enterprises, LLC*,[16] found that West Virginia's claims against distributors did not trigger the duty to defend because the suit did not seek damages "because of" bodily injury suffered by a specific opioid user, but instead sought reimbursement for West Virginia's public expenditures. The *Richie Enterprises* court reasoned that West Virginia did not really seek damages "because of bodily injury" because it need not prove that persons were injured by prescription drugs to show that a distributor was liable. In 2015, the Southern District of Florida reached a similar conclusion in *Travelers v. Anda, Inc.*,[17] ruling that West Virginia sought damages for economic loss and not "*for* [the] bodily injury" of its residents.[18]

However, in July 2016, the Seventh Circuit reached a contrary decision in *Cincinnati Ins. Co. v. H.D. Smith*,[19] holding that West Virginia's alleged opioid related damages were "because of bodily injury" to its citizens. The Seventh Circuit reasoned that it does not matter if the damages are paid to West Virginia instead of an opioid user that actually suffered "bodily injury," as West Virginia's efforts to recover healthcare related costs are no different than a mother's lawsuit to recover money she spent to care for her injured son. Both payments, according to the Seventh Circuit, are "because of bodily injury."

- **Is There an "Occurrence"?**

Typically CGL insurance policies provide coverage for damages caused by an "occurrence," which is defined to mean an "accident." As discussed above, the lawsuits directed against prescription opioid manufacturers allege such manufacturers fraudulently marketed their products as safe and non-addictive. On April 11, 2016, a California trial court ruled in *The Travelers Prop. Cas. Co. of America et al. v. Actavis, Inc.*[20] that Travelers did not have a duty to defend a manufacturer lawsuit because allegations of an intentional scheme to defraud do not allege accidental conduct that would qualify as an "occurrence."[21] Actavis has since filed an appeal, which awaits resolution by the California appellate court.

Distributor lawsuits, however, are not necessarily predicated upon allegations of a fraudulent scheme and may allege a covered "occurrence." In 2015, the United States Court of Appeals for the Fourth Circuit in *Liberty Mut. Fire Ins. Co. v. J.M. Smith Corp.*[22] rejected an insurer's argument that West Virginia's negligence counts did not allege an "occurrence" because West Virginia claimed the defendants distributed drugs with "blind indifference" to West Virginia's drug epidemic. The court concluded there was "at least a possibility of coverage" because the complaint did not allege that the defendant knew its drugs caused the harm alleged.

- **Did Pharmaceutical Companies Have Prior Knowledge Of Their Failure To Control Against Addiction And Diversion Of Prescription Opioids?**

In 2007, Purdue Pharma agreed to pay some $600 million in fines and penalties to resolve charges that it "misbranded" OxyContin as a low-risk pain reliever.[23] Three executives pled guilty to criminal charges and paid $34.5 million in fines.[24] Over the past decade, pharmaceutical wholesalers have been investigated by the Drug Enforcement Administration ("DEA") for failing to adhere to their legal obligation to avoid filling suspicious orders for opioids. Some of these investigations have resulted in settlements, with distributors agreeing to pay millions in penalties.[25] If pharmaceutical companies were aware of the risks of addiction and intentionally misled consumers and regulators, or are found liable for failing to identify and report suspicious orders of prescription opioids, are they entitled to insurance for the resulting damage? This question may give rise to number of coverage defenses, including that the pharmaceutical companies had knowledge of damage before their insurance policy came into effect.

- **Does Insurance Provide Coverage For Harm To Society?**

Liability insurance usually provides coverage for damages paid for bodily injury suffered by a specific person, rather than generalized harm to a group of people or society. Therefore, even if a complaint alleges an "occurrence" and damages because of "bodily injury," a pharmaceutical defendant generally must establish that it paid damages in connection with the "bodily injury" of an individual. However, the opioid litigation presents novel questions that may broaden the analysis beyond injury to a single person. For example, if a state or local government relies upon statistical evidence to establish damages, would a pharmaceutical defendant, to obtain insurance coverage for those damages, be required to tie the government's damages to payments to specific individuals? As new opioid lawsuits are filed, courts will likely be faced with fundamental questions pertaining to the scope of insurance for injury suffered in unprecedented numbers.

## III. CONCLUSION

As the United States confronts the worst drug crisis in its history, state and local governments are spending hundreds of millions of dollars to treat opiate addicts and stop the criminal distribution of unlawful drugs. A growing number of those governments are attempting to recover their costs by suing the pharmaceutical companies that manufacture and distribute prescription opioids, as well as the pharmacies that dispense them. Although prescription opioid litigation presents insurance issues that are similar to mass tort claims of the past, it also presents new issues, such as underlying defenses involving the sale of a legal, non-defective product and the culpability of users, which may limit damages for opioid claims. Nevertheless, the prospect of insurance coverage for such claims may continue to drive new lawsuits, and the insurance industry will face novel questions regarding the allocation between covered and uncovered damages, coverage for intentional distribution of a product that their insureds may have known causes injury, and the availability of liability insurance for a public health epidemic. The answers to these questions in the coming months and years may determine whether insurers are required to bear the costs of the opioid epidemic and impact the insurance industry into the future.

## Endnotes

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4. *Id.*
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14. Todd Richmond, *Wisconsin Attorney General Reveals Opioid Investigation*, U.S. NEWS & WORLD REPORT, June 18, 2017.

15. *Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cty.,* 235 W. Va. 283, 292, 773 S.E.2d 627, 636 (2015).

16. 2014 WL 3513211 (W.D. Ky. July 16, 2014).

17. 90 F. Supp. 3d 1308 (S.D. Fla. 2015).

18. The *Anda* court's ruling was affirmed by the United States Court of Appeals for the Eleventh Circuit in *Travelers Property Cas. Co. of America v. Anda, Inc.*, but on the basis of a products exclusion. The Eleventh Circuit did not reach the question of whether West Virginia's lawsuit was "for" bodily injury.

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