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Expert Analysis

The Evolution Of Opioid Suits And Insurance Coverage

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In the midst of the worst drug crisis in American history, two key developments took place last week that could have far-reaching impacts on both the underlying liability claims as well as the insurers to who the defendants are looking to finance hundreds of millions of dollars in exposure. First, a new lawsuit in Tennessee seeks to subject legal distributors of prescription opioids to the same civil damages as the state provides for illegal drug dealers. As that unique theory evolves, a large group of national attorneys general banded together last week to join forces in using their unique civil enforcement mechanisms to continue the pursuit of tens of millions of dollars in recoveries from those companies that have profited to date from prescription opioids.

On June 13, 2017, the Tennessee attorney general joined a juggernaut of state and local governments that have filed suits against prescription opioid manufacturers to recover millions of dollars in public health expenditures. The Tennessee suit (Case No. C41916 filed in the Circuit Court for Sullivan County, Tennessee), tells the story of Baby Doe who, as one of epidemic's tiniest, yet most common, victims, was born addicted to opioids.

According to the suit, the costs of dealing with Baby Doe, and the millions of others left in the destructive path of prescriptions opioids, is the fault of drug manufacturers, who allegedly perpetrated an intentional scheme to mislead doctors and the public to misuse prescription opioids for maladies for which the drug was never intended, all the while keeping hidden the true exceptionally addictive nature of the products. The suit alleges that, when the physical, social and economic wreckage of the epidemic became known, pain clinics and others exacerbated the problem by racing to reap billions of dollars in sales that were otherwise impossible to explain pursuant to any legitimate medical need or measure in the areas where the

drugs were being sold. The Tennessee suit targets industry giants such as Purdue Pharma, Mallinckrodt PLC and Endo Health Solutions.

The legal theories and factual issues raised by the Tennessee litigation present some unique points, and others that already pervade the more than 20 other cases pending across the country that target the opioid industry. One unique aspect of the Tennessee litigation is that it is brought pursuant to the Tennessee Drug Dealer Liability Act, Tenn. Code. Ann. §29-38-101, which is alleged to govern in utero exposure to drugs such as OxyContin, Roxicodone Opana, Lortab and others.

The Drug Dealer Liability Act is a seldom used Tennessee law intended to allow the legal guardians of drug-addicted newborns to recover damages from those in the community who marketed the types of illegal drugs that caused the injuries. Under the law, the prescription drugs at issue are considered "illegal" if sold and distributed without a valid prescription. The Drug Dealer Liability Act extends its reach to any person or entity that knowingly participated in the chain of distribution of such a drug. Through this legislation the suit seeks to make legal manufacturers and distributors of prescription opioids liable for the public health consequences resulting from the blind-eye that was turned by the industry as its drugs seeped onto the black market and became overused and abused at every turn. The use of such statutes intended for illegal drug traffickers as a method of pursuing those in the prescription opioid distribution line is a somewhat new approach to these claims, the success of which remains to be seen.

One repercussion to the use of such "drug dealer" statutes to attack the opioid distribution line, is that such claims may be clearly outside the scope of liability insurance for the defendants. For example, the Tennessee statute specifically provides that "a third party shall not pay damages awarded under this chapter, or provide a defense or money for a defense on behalf of an insured under a contract of insurance or indemnification." T.C.A. §29-38-108.

More traditional theories of fraudulent marketing, failure to report, and failure to supervise the distribution channels, have been the hallmarks of similar opioid litigation filed in other states. Although West Virginia has been called "ground zero" for the initial explosion of opioid litigation and the tens of millions of dollars in settlements to date, recent lawsuits have also

been filed in Cook County, Illinois, California, Ohio, Kentucky, the Cherokee Nation in Oklahoma, and Washington state. In those lawsuits, the insurance coverage challenges for the defendants are destined for litigation.

For example, there already exist at least two cases expressing different views on whether a liability policy provides any coverage at all to cover generalized harm or nuisance to a group of the public at large, as opposed to specific claims for damages by specific individuals. The Western District of Kentucky in Cincinnati Insurance Co. v. Richie Enterprises, 2014 WL 3513211 (W.D. Ky. July 16, 2014) found that, if a policy states that it only covers suits seeking damages "because of bodily injury," then such a policy has no obligation to defend West Virginia's suit against the opioid distributors. The court reasoned that West Virginia's claims against the distributors do not really seek damages "because of bodily injury." Instead, West Virginia was seeking reimbursement for public expenditures due to the defendants' distribution of drugs in excess of legitimate medical need, and this is not the same as paying compensation "because of bodily injury."

A different decision came in July 2016, from the Seventh Circuit Court of Appeals, in Cincinnati Insurance Co. v. H.D. Smith, 2016 WL 3909558 (7th Cir. July 19, 2016). The court held that it does not matter if West Virginia is seeking recovery of amounts paid to compensate the injured drug users themselves, or alternatively, in reimbursement for expenses incurred by the state. The court concluded that West Virginia's effort to recover its healthcare expenditures is no different than a mother's lawsuit to recover her money spent to care for her injured son. Both payments, the court determined, implicate "bodily injury" coverage because the payments were "because of bodily injury," thereby requiring the insurer to defend.

Such insurance and liability challenges revolving around opioid litigation are certain to increase after last week's announcement that a bipartisan group of attorneys general have joined together to investigate the marketing and sales practice of companies that manufacture and distribute prescription opioids. The group joining forces includes the top law enforcement arms of Massachusetts, Texas, Illinois, Pennsylvania, the District of Columbia, and is believed to include a majority of the states.

While the exact membership of the coalition is not known at this time, nor is the exact focus of the coordinated investigation, it is almost certain that the newly announced coordination will result in increased targeting of companies and evolved legal theories. As with all public epidemics before it, such efforts by those charged with defining public policy will result in a two-fold response from the insurance industry.

First, insurers will need to determine the extent to which past liability coverages will respond at all to claims that are rooted in disgorgement of ill-gotten gains, intentional acts, and generalized harm to the public, rather than bodily injury to specific individuals. While those issues are unfolding, insurers will be tasked with determining how these risks can be underwritten going forward and how the risks can be sufficiently spread to protect an industry of otherwise legal corporations, distributing otherwise legal products. These issues and others are sure to be at the confluence of the opioid cases, claims and coverage issues that will develop and evolve, as the industry is forced to respond to the worst drug crisis that America has ever faced.

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