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AMERICA ON OPIOIDS

AS THE EPIDEMIC CONTINUES, THE LEGAL LANDSCAPE FOR MANUFACTURERS AND DISTRIBUTORS UNFOLDS

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As the Epidemic Continues, the Legal Landscape for Manufacturers and Distributors Unfolds

By Adam H. Fleischer and Steven Garrett

Ninety-one Americans will die today from an opioid overdose. This is the same number who died from opioids yesterday, and who will die tomorrow and every day in 2017, according to the Centers for Disease Control and Prevention.

It is widely acknowledged that opioid abuse is the worst drug crisis in American history. In 2015, more than 33,000 people died from opioid overdoses. This number has quadrupled since 1999, as has the number of prescription opioids sold in the United States. The epidemic has led to astronomical economic costs, with recent estimates of the total cost of the opioid crisis at $78.5 billion so far. This includes costs related to health care, substance abuse treatment, lost productivity, and criminal justice expenses.

Although West Virginia has been called "ground zero" for the devastation of opioid abuse, this national epidemic is certainly not limited to one state. Recent lawsuits have been filed in Illinois, California, Ohio, New York, Kentucky, the Cherokee Nation in Oklahoma, and Washington State.

The attorneys fueling these claims crisscross the country, meeting with attorneys general and seeking an exponential increase in the number of cases currently pending. Apart from the altruistic motives, there is a financial incentive for doing this. In December 2015, a suit in a remote Kentucky courthouse against opioid industry powerhouse Purdue Pharma settled for $24 million. More recently, suits against opioid distributors in West Virginia have reaped over $40 million in settlements.

So, who is being sued? For what? And is any of this insured?

Two decades ago, Purdue Pharma launched the opioid OxyContin, promising sustained pain relief for 12 hours. OxyContin generated $31 billion and sprouted an industry of potent painkillers. However, it became evident that these painkillers did not last as long as advertised. This resulted in excruciating symptoms of withdrawal, thereby causing some doctors and manufacturers to resort to higher dosages, driving patients either deeper into the clutches of prescription opioid addiction via Vicodin and Percocet, or toward the readily available and illegal cousin, heroin.

Savvy litigators tore a page straight from the tobacco litigation playbook and went to work. They discovered that, just maybe, the opioid manufacturers knew of the treacherously addictive qualities of their drugs, the agony suffered between doses, and the over-prescription for inappropriate

maladies. And so the lawsuits began to target the manufacturers, and have since spread right down the distribution line.

CLAIMS AGAINST MANUFACTURERS

In June 2014, Chicago and California filed similar lawsuits against manufacturers, including Purdue Pharma, Teva Pharmaceuticals, and Actavis. The suits allege that the manufacturers fraudulently marketed opioids to convince doctors and patients that opioids are safe for long-term use while failing to disclose risks such as addiction, overdose, and death. Chicago and California each seek payment of restitution, civil penalties, treble damages, and attorneys' fees. As of June 2017, the Chicago suit is in the midst of discovery and the California suit is awaiting the filing of an amended complaint, with three defendants having recently settled for $1.6 million.

On Dec. 15, 2015, Mississippi filed a similar manufacturer lawsuit alleging that, since the 1990s, pharmaceutical companies engaged in a common scheme to deceptively market the risks, benefits, and superiority of opioids to treat chronic pain. Mississippi allegedly has spent more than $5.6 million on opioid products through its Medicaid program and over $141 million in addiction treatment. As of June 2017, the case is proceeding into discovery.

Most recently, on May 31, 2017, Ohio's attorney general sued manufacturers, alleging that they have contributed to the opioid epidemic by falsely promoting drugs like OxyContin and Percocet as safe and non-addictive. Ohio alleges that it is "awash in opioids and engulfed in a public health crisis the likes of which [has] never been seen before."

The complaint alleges that in 2016, roughly 20 percent of the state's population was prescribed an opioid drug, and that the Ohio Department of Medicaid has spent $175 million on the defendants' opioid products.

WEST VIRGINIA ALLEGED THAT THE DISTRIBUTORS FAILED TO MAINTAIN CONTROLS AND PROCEDURES TO PREVENT THEFT AND DIVERSION OF CONTROLLED SUBSTANCES AND TO REPORT SUSPICIOUS ORDERS, AS LEGALLY REQUIRED.

CLAIMS AGAINST DISTRIBUTORS

After opioids are manufactured, they are purchased and resold by distributors. West Virginia opened this litigation door by filing suits against the three largest wholesalers: AmerisourceBergen Drug Corporation, Cardinal Health, and McKesson Corporation. West Virginia's suit alleged that its costs for the opioid epidemic were "as much as $430 million in the year 2010, with costs projected to be as much as $695 million annually by 2017."

West Virginia alleged that the distributors failed to maintain controls and procedures to prevent theft and diversion of controlled substances and to report suspicious orders, as legally required. Each distributor has since been sued in over 15 "copycat" lawsuits by West Virginia municipalities that are lining up, hat in hand. These suits also name smaller distributors such as H.D. Smith and Anda Inc.

On April 25, 2017, the Cherokee Nation sued the same opioid distributors for damages involving 177,000 Cherokee Nation citizens spanning 14 counties in northeast Oklahoma. The case is premised upon Article 13 of the 1866 Treaty of Washington between the United States and the Cherokee Nation, which grants tribal courts jurisdiction over claims arising in tribal territories. The tribe seeks up to $10,000 per violation for the defendants' failure to implement effective controls against diversion of the addictive opioids they supplied.

CLAIMS AGAINST PHARMACIES

Some pharmacies have been labeled as "pill mills," typically in rural or low-population areas where the amounts of controlled substances sold are much greater than a population of that size typically would warrant. The attorney general of West Virginia has filed lawsuits against three such pharmacies, alleging that each failed to identify suspicious prescriptions or recognize when its prescriptions reached an outrageously inflated volume. For example, it is alleged that from 2006 to 2016, Larry's Drive-In Pharmacy distributed over 7.7 million doses of hydrocodone in a county that has fewer than 25,000 residents.

One pharmacy suit has already been before the West Virginia Supreme Court of Appeals to determine whether the drug users themselves can shift blame and compensation onto the pharmacies. In *Tug Valley Pharmacy v. All Plaintiffs*, the court ruled that substance abusers could pursue compensation from those who prescribed the medications even though the abusers engaged in a series of illegal activities such as lying to physicians and "doctor shopping." The May 2015 ruling rejected the "wrongful conduct rule" that would have precluded the individuals from bringing claims arising from their own illegal activities. The court concluded that it would be for juries to allocate liability among those who used the drugs and those who supplied them.

COVERAGE ISSUES

A handful of litigated coverage disputes have so far involved two discrete questions:

- Do insurers have to defend claims when there is no specific compensation sought for bodily injury to specific individuals?
- Does the alleged violation of

business practice statutes constitute an occurrence?

In July 2014, the Western District of Kentucky in *Cincinnati Ins. Co. v. Richie Enterprises* 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 against West Virginia's distributor suit. 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 contrary decision came in July 2016 from the 7th Circuit Court of Appeals, in *Cincinnati Ins. Co. v. H.D. Smith*. 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, reimbursement for expenses incurred by the state. The court concluded that West Virginia's effort to recover its health care 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 since the payments were "because of bodily injury," thereby requiring the insurer to defend.

In a third opioid coverage case, the District Court for the Southern District of Florida examined the difference between a policy providing coverage "for bodily injury" as opposed to "because of bodily injury." In a March 2016 ruling in *Travelers v. Anda Inc.*, the court concluded that an insurer does not have a duty to defend West Virginia's distributor lawsuit because West Virginia's alleged damages were for its own economic loss, rather than "for [the] bodily injury" of its residents. This ruling may dictate that policies providing coverage "for bodily injury" can escape claims for reimbursement of public health expenditures, which may not be the case for policies covering damages "because of bodily injuries." The decision was affirmed on Aug. 26, 2016.

The Chicago and California manufacturer lawsuits are subjects of one combined coverage action filed by Travelers against Actavis in California state court. On April 11, 2016, the trial court ruled that Travelers has no duty to defend because the underlying lawsuits against the manufacturers do not allege an occurrence, as the marketing scheme alleged does not constitute an accident. Actavis filed an appeal of the court's ruling, arguing that Actavis' alleged conduct could indeed constitute an occurrence because Actavis did not intend the harm caused by its marketing scheme (even if the scheme itself was intentional). The briefing on this case was completed on Jan. 23, 2017, and is awaiting a date for oral argument.

A new distributor coverage action got underway on March 16, 2017, in which AmerisourceBergen filed a coverage suit in West Virginia against four of its insurers, seeking insurance for its $16 million settlement of the West Virginia distributor suit against it, as well as coverage for the many copycat claims that have been filed by county and local municipalities.

New coverage suits will bring new coverage issues. For example, in 2007, $160 million in fines was paid by opioid manufacturers to reimburse the federal government and states for damages suffered by Medicaid programs due to the improper promotion of OxyContin. This early knowledge that something was amiss in the world of prescription opioids will lead to coverage questions involving prior knowledge, and the extent to which those in the distribution chain were aware that the damage had begun "in whole or in part" prior to the years 2007 to 2016 that are so often now at issue.

Other inevitable questions will include if those in the distribution line were misreporting the amounts of narcotics sold, then were they also misreporting these issues on their insurance applications? Might this be a material issue leading to claims for policy rescission?

The insurance industry will also have to answer the time-honored question of how many occurrences exist for these claims. If the municipalities recover damages or fines on a per-dose basis, then why shouldn't each dose constitute a separate occurrence, perhaps triggering a separate retention? Or maybe the separate occurrence is each prescription filled, or maybe each person receiving a prescription is a separate occurrence.

With opioids, the culpability of the injured party raises questions about whether high compensatory awards will be the norm. This may be less significant if municipalities can recover expenditures paid for generalized harm to the public as opposed to individual people. Whether generalized harm to the public is an insurable risk is questionable, as is whether such damages can be covered if the public impact of the opioids was indeed the result of an intentional plan by those distributing the product.

The pervasiveness and staying power of opioid litigation may turn on the extent to which insurance coverage is available to fund such suits. For now, it is undeniable that the worst drug crisis in American history is here. It arises from legal drugs, and from legal distributors that all have their own insurance. The solutions and funding mechanisms to address these issues will be inextricably intertwined with insurance coverage for the foreseeable future. ■

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