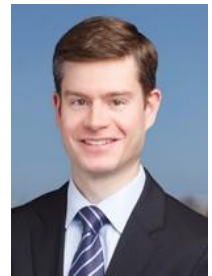


# California Appellate Ruling Against Opioid Coverage Sign of Things to Come?

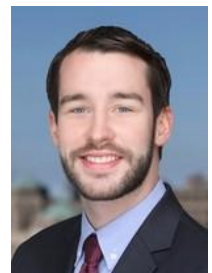
By **R. Patrick Bedell** and **Kevin Harris**

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The opioid epidemic is the worst drug crisis in American history. An estimated 64,000 Americans died from opiate overdoses last year — 175 deaths every day. The current crisis is driven by abuse of opiates including prescription opioids like oxycodone and Fentanyl, and illegal drugs such as heroin. As state and local governments incur significant expenses in connection with the epidemic in their communities, including payments for increased law enforcement and addiction treatment, they increasingly seek to recover those costs in lawsuits against prescription opioid manufacturers and distributors. The lawsuits against opioid manufacturers typically allege that they fraudulently marketed opioids to persuade doctors and patients that opioids are safe for treatment of long-term pain, while failing to disclose risks such as addiction. The lawsuits against wholesale distributors allege that they negligently or intentionally failed to monitor and report orders that were suspiciously large or subject to diversion. As the pharmaceutical industry faces increasing exposure to new opioid lawsuits, two recent developments will make it more difficult for pharmaceutical manufacturers and distributors to recover liability insurance for their prescription opioid-related liabilities.



R. Patrick Bedell



Kevin Harris

First, on Nov. 6, 2017, the California Court of Appeals issued a landmark ruling in *The Travelers Property Casualty Company of America et al. v. Actavis Inc. et al.* (Case No. G053749), holding that insurance policies issued by Travelers Property Casualty Company of America and St. Paul Fire & Marine Insurance Company do not provide a duty to defend Actavis Inc., a manufacturer of prescription opioids, in a lawsuit filed by the County of Santa Clara, California, and the County of Orange, California, (the “counties”), or in a similar lawsuit filed by the City of Chicago. The counties and Chicago seek to recover from Actavis civil penalties and costs related to addressing the opioid epidemic, such as funding emergency services and addiction treatment. Both lawsuits allege that Actavis and other defendants engaged in a fraudulent scheme to promote the use of opioids for long-term pain in order to increase corporate profits.

In September 2014, Travelers filed a lawsuit to obtain a declaration that it had no obligation under the Travelers or St. Paul policies to defend or indemnify Actavis in connection with the lawsuits filed by the counties and Chicago. The policies provide a duty to defend against suits seeking damages for “bodily injury” caused by an “event” or “occurrence,” which are both defined to mean an “accident.” The policies also contain exclusions precluding coverage for “bodily injury” within the “products-completed

operations hazard,” which is defined as “bodily injury” “arising out of ‘your product’ or ‘your work.’” In April 2016, the trial court ruled that Travelers has no duty under the policies because the counties and Chicago do not allege an “accident” as required by the definition of “occurrence” or “event,” and because the products exclusions precluded coverage for damages arising from Actavis’ products.

The Court of Appeals’ opinion affirms the trial court’s ruling in its entirety. The court held Travelers does not have a duty to defend because the underlying suits, which are based on allegations that Actavis engaged in a deliberate marketing campaign to increase the sale of opioids, do not allege an “accident.” The court noted that whether Actavis intended to cause injury was not relevant to its determination whether an insurable accident occurred, and concluded that injuries arising from a resurgence in heroin use caused by opioid addiction are not unexpected or unforeseen. The court also held that the claims alleged by the counties and Chicago fall within the products exclusions because the opioid epidemic “arises out of” Actavis’ marketing of its opioid products. The opinion in Actavis is a significant development in the insurance law emerging in response to the recent wave of opioid-related lawsuits, as it suggests that insurance coverage may not be available for payments that pharmaceutical manufacturers make to resolve lawsuits alleging that their fraudulent marketing has contributed to the opioid epidemic.

Second, manufacturers and distributors may find it difficult to obtain coverage for recent lawsuits filed by county and local governments seeking to recover costs incurred addressing the opioid epidemic. General liability policies provide insurance for lawsuits seeking damages “because of ‘bodily injury,’” but do not provide coverage for lawsuits that only allege economic loss. In 2014, the Western District of Kentucky in *Cincinnati Insurance Co. v. Richie Enterprises LLC*, 2014 WL 3513211 (W.D. Ky. July 16, 2014), 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 United States Court of Appeals for the Seventh Circuit reached a contrary holding in *Cincinnati Insurance Co. v. H.D. Smith*, 2016 WL 3909558 (7th Cir. July 19, 2016), concluding that West Virginia’s suit alleged that damages were sustained “because of ‘bodily injury’” to its citizens. The Seventh Circuit reasoned that it does not matter if the damages were paid to West Virginia instead of an opioid user that actually suffered “bodily injury.” Either payment, according to the Seventh Circuit, would be for damages “because of ‘bodily injury.’”

In recent weeks, more than 40 government plaintiffs in Ohio, Illinois, Alabama and Kentucky have filed suits seeking “economic damages” for public funds spent on services to address the opioid epidemic, including medical care, drug rehabilitation and law enforcement, and specifically clarify that they do not seek damages for bodily harm. For example, on Nov. 6, 2017, Crawford County, Ohio, filed a lawsuit in U.S. District Court for the Southern District of Ohio confirming that it “does not seek compensatory damages for death, physical injury to person, or emotional distress.” In asserting that disclaimer, government plaintiffs have pled their claims to seek only economic loss which, as the *Richie Enterprises* court recognized, is not covered by liability insurance.

Following the California Court of Appeal’s opinion in Actavis and recent lawsuits disclaiming damages for bodily harm, the pharmaceutical industry faces new challenges in recovering insurance for opioid lawsuits filed by government plaintiffs. Despite these setbacks, pharmaceutical companies are expected to continue to seek insurance coverage for their opioid-related liabilities, and may seek to limit the Actavis holding to the language of Travelers’ policies or California law recognizing there is no “occurrence” where the insured is alleged to have intended the act causing harm. In addition, manufacturers and distributors will continue to cite the Seventh Circuit’s opinion in *Cincinnati Insurance Co. v. H.D. Smith* in seeking a defense to opioid lawsuits that do not specifically disclaim damages for bodily harm. As courts begin to resolve some of the novel insurance coverage questions arising from opioid lawsuits filed by state and local governments, the pharmaceutical industry’s increasing exposure for the worst drug

epidemic in our country's history will continue to generate new insurance coverage questions and cases that will determine whether opioid claims are covered by insurance.

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*[R. Patrick Bedell](#) is a partner and [Kevin F. Harris](#) is an associate at [BatesCarey LLP](#) in Chicago. They monitor and evaluate a range of liability and coverage issues for the firm's opioid coverage task force.*

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