

## Opioid Insurance Litigation Is Mounting With Mixed Results

By **Scott Seaman**

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The opioid epidemic has been describe as “the deadliest drug crisis in American history. Overdoses, fueled by opioids, are the leading cause of death for Americans under 50 years old — killing roughly 64,000 people last year, more than guns or car accidents.”[1] Estimates place the costs of the epidemic in excess of \$75 billion and growing.

Suits are pending across the country against manufacturers, distributors, pharmacies and others. With defendants looking to insurers to defend and indemnify them, the number of opioid coverage actions and decisions are mounting with mixed results depending upon a variety of factors, including: whether the issue being decided relates to defense or indemnity; the allegations and theories asserted in the underlying litigation; the policy language; and the court deciding the issue.



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We are in the early stages of the opioid insurance coverage war. So far most decisions address three sets of issues: (1) accident/fortuity issues; (2) application of product exclusions; and (3) whether or not the claims involve damages “because of” or “for” “bodily injury.”

### California Here We Come

The California Court of Appeal is the most recent court to rule against coverage for opioid addiction lawsuits. The court ruled in *The Traveler’s Property Casualty Company of America v. Activis Inc.*, No. G053749 (Cal. Ct. App. Nov. 6, 2017) that a CGL insurer is not obligated to defend opioid-related lawsuits.

#### *The Claims Alleged*

Alleging that an “epidemic of addiction, overdosing, death, and other problems brought on by the increasing use and abuse of opioid painkillers” has placed a financial strain on state and local governments, the county of Santa Clara and the county of Orange brought a lawsuit against various pharmaceutical manufacturers and distributors. The California action alleges various pharmaceutical companies collectively referred to here as Activis or Watson engaged in a “common, sophisticated, and highly deceptive marketing campaign” designed to expand the market and increase sales of opioid products by promoting them for treating long-term chronic, nonacute and noncancer pain for which

Watson allegedly knew its opioid products were not suited. The city of Chicago brought a similar lawsuit in Illinois. Both actions were brought in 2014 and the decision involved the most recent amended complaints in those actions.

The California action asserts causes of action for false advertising in violation of Business and Professions Code section 17500, unfair competition in violation of Business and Professional Code section 17200, and public nuisance under Civil Code section 3479. The counties sought injunctive relief, restitution and civil penalties and an order of abatement. The Chicago action asserted counts for consumer fraud — deceptive practices, consumer fraud — unfair practices, misrepresentation with sale or advertisement of merchandise, false statements to the city, false claims, conspiring to defraud by getting false or fraudulent claims paid or approved by the city, recovery of city costs of providing services, insurance fraud, civil conspiracy, and unjust enrichment. The complaint seeks injunctive relief, restitution, treble restitution, civil penalties, disgorgement of profits, treble damages and costs incurred by the city of Chicago.

Travelers denied Activis' demand for a defense and brought this lawsuit to obtain a declaration that it has no duty to defend or indemnify. The trial court — after a bench trial based on stipulated facts conducted in March 2016 — found that Travelers had no duty to defend because the injuries alleged were not the result of an “accident” within the meaning of the primary CGL policies in effect from 2006 to 2010 and that the claims alleged fell within a policy exclusion for the insured's products (and warranties and representations made about those products). The Court of Appeals in a decision certified for publication, affirmed, holding Travelers has no duty to defend the pharmaceutical companies under the policies.

### **It Ain't No Accident**

The existence of unexpected and unintended injury or damage is a central component of liability occurrence coverage whether stated in the definition of “accident” or “occurrence,” whether stated in an intentional acts exclusion, or whether embodied in the concept of fortuity. This is another recent coverage decision in which a court returned to this fundamental concept.

The Court of Appeals affirmed the trial court's ruling that neither the California action nor the Chicago action create a potential for coverage for an “accident” because they are based, and can only be read as being based, on the deliberate and intentional conduct of Watson that produced injuries — including a resurgence in heroin use — that were neither unexpected nor unforeseen. According to the court:

The injuries alleged by the California Complaint and the Chicago Complaint are: (1) a nation 'awash in opioids'; (2) a nationwide opioid-induced 'public health epidemic'; (3) a resurgence in heroin use; and (4) increased public health care costs imposed by long-term opioid use, abuse, and addiction, such as hospitalizations for opioid overdoses, drug treatment for individuals addicted to opioids and intensive care for infants born addicted to opioids.

None of those injuries was additional, unexpected, independent, or unforeseen. The complaints allege Watson knew that opioids were unsuited to treatment of chronic long-term, nonacute pain and knew that opioids were highly addictive and subject to abuse, yet engaged in a scheme of deception in order to increase sales of their opioid products. It is not unexpected or unforeseen that a massive marketing campaign to promote the use of opioids for purposes for which they are not suited would lead to a nation 'awash in opioids.' It is not unexpected or unforeseen that this

marketing campaign would lead to increased opioid addiction and overdoses. Watson allegedly knew that opioids were highly addictive and prone to overdose, but trivialized or obscured those risks.

It also is not unexpected or unforeseen that promoting the use of opioids would lead to a resurgence in heroin use. The California Complaint alleged: ‘The pain-relieving properties of opium have been recognized for millennia. So has the magnitude of its potential abuse and addiction. Opioids, after all, are closely related to illegal drugs like opium and heroin.’ Both the California Complaint and the Chicago Complaint allege: ‘Defendants had access to scientific studies, detailed prescription data, and reports of adverse events, including reports of addiction, hospitalization, and deaths—all of which made clear the significant adverse outcomes from opioids and that patients were suffering from addiction, overdoses, and death in alarming numbers.’

Watson argues the alleged injuries are not the ‘normal consequences of the acts alleged’ and, for its opioid products to end up in the hands of abusers, it was necessary for doctors to prescribe the drugs to abusers. The test, however, is not whether the consequences are normal; the test is whether an additional, unexpected, independent, and unforeseen happening produced the consequences. The role of doctors in prescribing, or misprescribing, opioids is not an independent or unforeseen happening. The California Complaint and the Chicago Complaint allege: ‘Nor is Defendants’ causal role broken by the involvement of doctors, professionals with the training and responsibility to make individualized medical judgments for their patients. Defendants’ marketing efforts were ubiquitous and highly persuasive. Their deceptive messages tainted virtually every source doctors could rely on for information and prevented them from making informed treatment decisions.’

### **Complaints In Other Actions Allege Facts Potentially Implicating The Duty To Defend**

Other courts have concluded insurers have a duty to defend pharmaceutical companies in opioid-related lawsuits as Activis pointed out. However, the California Court of Appeals in Activis distinguished the underlying complaints in the matter before it from those in *Liberty Mut. Fire Insurance Co. v. JM Smith Corp.*[2] and *Cincinnati Insurance Co. v. Richie Enterprises LLC*,[3] where courts concluded the insurer had a duty to defend the pharmaceutical companies. According to the court, the allegations in the other lawsuits were appreciably different from those in the California complaint and the Chicago complaint inasmuch as they allege claims based on negligence and did not allege intentional harm. Secondly, the court distinguished South Carolina law and Kentucky law that supplied the rule of decision in those cases from California law. It pointed out that, under South Carolina law a deliberate act is an accident if the resulting injury is unintentional. Under Kentucky law, a loss or harm is fortuitous/accidental if unintended by the insured. In contrast, under California law, a deliberate act is not an accident, even if the injury is unintentional, unless the injury was produced by an additional, unexpected, independent and unforeseen happening. Under California law “the term ‘accident’ does not apply where an intentional act resulted in unintended harm.”

### **It’s A Nuisance**

The California Court of Appeals rejected Activis' argument that its liability under the public nuisance cause of action of the California Complaint can be based on negligent conduct or omissions.

A 'nuisance' is '[a]nything which is injurious to health' (Civ. Code, § 3479), and a 'public nuisance' is 'one which affects at the same time an entire community or neighborhood, or any considerable number of persons' (id., § 3480). Both are remediable by civil suit or abatement. (Id., §§ 3491, 3493, 3494.) The public nuisance statutes do not require a finding that the nuisance was created or furthered by intentional acts. However, 'it is not the form or title of a cause of action that determines the carrier's duty to defend, but the potential liability suggested by the facts alleged or otherwise available to the insurer.' [Citations Omitted.] The duty to defend is triggered by allegations on the face of the complaint and from extrinsic information available to the insurer and whether those allegations and facts create a potential for coverage under the terms of the policy. ... The facts alleged in the California Complaint and the Chicago Complaint suggest potential liability based only on Watson's intentional conduct. But to the extent the complaints create a potential for liability against Watson based on unintentional conduct, the claims fall within the Products Exclusions.

The court's reasoning with respect to the lack of an "accident" is sound and has broad application among general liability policies. It always is encouraging when courts pay attention to fundamental elements of insurance coverage in deciding coverage matters. Given the breadth of the duty to defend, courts sometimes strain to find allegations or imagine facts that simply were not asserted and this court properly refused to do so. It is difficult to determine the overall impact of this ruling because plaintiffs wanting to implicate insurer defense obligations often employ creativity and alternative pleading to assert negligence with respect to at least one count of a complaint.

### **Barred By Product Exclusions**

Following the trial court's lead, the Court of Appeal adopted a "belt and suspenders" approach ruling that the claims fall within the products exclusions of the policies. The subject policies contained product exclusions. As described by the court,

The Products Exclusions exclude coverage for bodily injury "arising out of" (Travelers Policies) or that "results from" (St. Paul Policies) "[a]ny goods or products ... manufactured, sold, handled, distributed or disposed of by: [¶] ... [y]ou." The Products Exclusions also exclude coverage for bodily injury that arises out of or results from "[w]arranties or representations made at any time, or that should have been made, with respect to the fitness, quality, durability, performance, handling, maintenance, operation, safety, or use of such goods or products." Thus, the Products Exclusions bar coverage for bodily injury that arises out of or results from (1) goods or products manufactured, sold, handled, distributed, or disposed of by Watson and (2) warranties or representations made with respect to the fitness, quality, durability, performance, handling, maintenance, operation, safety, or use of those goods or products.

The trial court found the allegations of the California complaint and the Chicago complaint fell within the scope of the products exclusions because "[a]ll of the harm that is asserted in the lawsuits — narcotics addiction, the public nuisance in the California action and the public health costs, etc. highlighted in the

Chicago [Action] — stem from [Activis'] products and what [Activis] said and did not say about the products." In finding the exclusion bars coverage for both actions, the Court of Appeal stated:

The 'bodily injury' alleged by the California Complaint and the Chicago Complaint falls into two categories. The first category relates to use and abuse of opioid painkillers and includes injuries such as overdose, addiction, death, and long-term disability. The second category relates to use and abuse of heroin, the resurgence of which is alleged to have been triggered by use and misuse of opioids.

As the Court of Appeals recognized, the Eleventh Circuit, applying California law, held that products exclusions barred coverage for opioid addiction related claims in *Travelers Property Casualty Co. of America v. Anda Inc.*[4] It also referenced other public nuisance decisions such as the Florida Supreme Court's decision in *Taurus Holdings v. U.S. Fidelity*,[5] which addressed whether CGL policies excluded coverage for lawsuits brought by municipalities against gun manufacturers to recover the costs of medical and other services incurred as a result of gun violence. The court held there was no coverage because the claims fell within exclusions for "'bodily injury and property damage ... arising out of your product.'"

The ruling that there is no duty to defend because coverage is barred by the products exclusions is significant with respect to opioid claims against pharmaceutical manufacturers and distributors because many policies issued to such companies contain general products exclusions or exclusions for pharmaceutical products.

Public nuisance claims have taken on greater significance in recent years. For example, in the area of lead abatement, a billion dollar plus judgment against lead paint manufacturers was reversed in part and remanded last week by the California Court of Appeal.

### **Damages "Because Of" Or "For" "Bodily Injury"**

The California Court of Appeals did not have occasion to address another common issue in opioid coverage litigation concerning whether insurance policy requirement of damages "because of bodily injury" or "for bodily injury" are satisfied. Compare *Cincinnati Insurance Co. v. Richie Enterprises* [6] (holding no obligation to defend suit against the opioid distributors seeking reimbursement for public expenditures due to the defendants' distribution of drugs in excess of legitimate medical need as claims against distributors do not seek damages "because of bodily injury") with *Cincinnati Insurance Co. v. H.D. Smith* [7] (holding insurer has a duty to defend West Virginia claim seeking to recover its healthcare expenditures as such expenditures were no different than a mother's lawsuit to recover money spent to care for her injured son as both payments were "because of bodily injury").

In *Travelers Property Casualty Co. of America v. Anda Inc.*[8] the district court concluded that the policies did not afford coverage because the state's amended complaint in the West Virginia Action asserted claims "for" and "because of" economic harm to the state rather than "bodily injury." The Eleventh Circuit declined to reach the question, stating "the better conclusion is that the ... policies do not afford coverage because of the policies' Products Exclusions."

### **Other Coverage Issues on the Horizon**

Opioid coverage actions will present numerous other coverage issues as the types of claims and entities embroiled in opioid-related litigation expand. For starters, other issues may include: trigger; allocation, exhaustion and reallocation; coordination of coverage among different lines of coverage; intentional

acts fortuity, occurrence, known loss and knowledge-based defenses; number of occurrences; claims made issues; compliance with policy conditions, including notice; applicability of product and various other exclusions; whether a particular matter constitutes a “suit” for duty to defend purposes; whether the particular relief sought constitutes “damages” for indemnity purposes; and whether the claim involves damages “because of” or “for” “bodily injury.”

These and other coverage defenses and issues are likely to be litigated vigorously in view of the high stakes and complexities presented. Sufficit to say, in many cases general liability insurance will not provide financial “pain relief” to pharmaceutical companies for their opioid-related liabilities.

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[1] “The Opioid Epidemic: A Crisis Years in the Making” New York Times (Oct. 26, 2017).

[2] 602 Fed.Appx. 115 (4th Cir. 2015).

[3] 2014 U.S.Dist Lexis 27306 (W.D. Ky. 2014).

[4] 658 Fed.Appx. 955 (11th. Cir. 2016).

[5] 913 So.2d 528 (Fla. 2005).

[6] 2014 WL 3513211 (W.D. Ky. July 16, 2014).

[7] 2016 WL 3909558 (7th Cir. July 19, 2016).

[8] 658 Fed.Appx. 955 (11th. Cir. 2016).