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Covering an American Epidemic: Insurance Coverage Issues Arising out of the Opioid Crisis

By: Michael Kassak and Andrew Lipton

(This article is based on a presentation the authors made at White and Williams' twelfth annual Coverage College® at the Pennsylvania Convention Center on October 4, 2018. Every year, hundreds of insurance professionals come to Philadelphia to participate in a full day of lectures and interactive presentations by White and Williams' lawyers about the latest issues and challenges involved in claim handling and insurance litigation.)

The opioid crisis gripping the United States is a national tragedy affecting hundreds of thousands of lives, with a significant ripple effect on businesses and public entities. Between 1999 and 2016, opioid overdoses killed more than 350,000 Americans. The Centers for Disease Control and Prevention estimates that roughly 115 Americans die *every day* from an opioid overdose. The overdoses are not limited to illicit drug use, and in fact, the vast majority of Americans who have died from an overdose between 1999 and 2016 died from opioids prescribed by doctors to treat pain – products including OxyContin and Vicodin. In fact, according to the American Society of Addiction Medicine, 80% of people who initiated heroin use in the past decade started with prescription painkillers. Consequently, on October 27, 2017, President Trump declared the opioid epidemic a "public health emergency."

Predictably, the opioid crisis has produced a flood of litigation primarily aimed at opioid manufacturers and distributors. Some of the more newsworthy recent lawsuits involve cities, towns, counties and other public entities suing opioid companies for the increase in costs incurred by public services as a result of the opioid epidemic.

For insurers and insurance law practitioners, substantial coverage issues are presented by these lawsuits. While these issues are far from settled, courts from various jurisdictions have issued several opinions regarding opioid lawsuit coverage issues, and specifically with respect to the lawsuits filed by states, counties, and cities against the opioid companies. These issues typically arise under commercial general liability, directors and officers, and professional liability insurance policies.

Commercial General Liability (CGL)

CGL Policies generally cover "sums that the insured becomes legally obligated to pay as damages because of bodily injury caused by an occurrence." An "Occurrence" is typically defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Bodily Injury" is typically defined as "injury, sickness, or disease sustained by a person, including death resulting from any of these at any time." Whether an "Occurrence" or any "Bodily Injury" has been alleged in opioid lawsuits has been the primary focus of opioid lawsuit coverage disputes to date.

In *The Traveler's Property Casualty Company of America v. Actavis, Inc.*, 16 Cal. App. 5th 1026 (Cal. Ct. App. 2017), a California court reviewing whether an "Occurrence" was alleged in an opioid lawsuit filed by certain California municipalities agreed with a CGL insurer's

denial of coverage on that basis. According to the court, an "accident" (and therefore, an "Occurrence") did not occur unless "additional, unexpected, independent and unforeseen" incidents occur that cause an injury. In the underlying case, the court found that none of the injuries alleged by these municipalities was "unexpected or unforeseen." The court found that the defendant opioid manufacturers engaged in an alleged deceptive marketing campaign aimed at increasing sales of opioids, and "Claims involving intentional or negligent misrepresentations do not constitute an accident under a liability policy."

In a case involving similar claims, the opposite result was reached in *Liberty Mutual Fire Insurance Co. v. J.M. Smith Corp.*, 602 Fed. Appx. 115 (4th Cir. 2015), where the Fourth Circuit upheld a district court's finding that a CGL insurer should defend its insured because the underlying suit contained allegations of an "Occurrence." The Fourth Circuit reasoned that "no defendant, and certainly not [the insured], has been accused of providing prescription drugs to any person or entity knowing it was enabling an abuser…At most, there was a risk that some of the drugs might end up in an abuser's hands."

Courts reviewing whether any "Bodily Injury" has been alleged in an opioid lawsuit filed by a public entity have also reached different conclusions. For example, in *Cincinnati Ins. Co. v. Richie Enterprises, LLC,* 2014 U.S. Dist. LEXIS 27306, (March 4, 2014, W.D. Ky.) the court held that most of the damages sought by the public entity were not "for bodily injury" because the public entity was seeking damages for its economic harm. The damages sought by the public entity for the provision of medical monitoring services for citizens affected by opioid addiction, however, showed that "in addition to seeking damages for

economic harm, the [public entity] is seeking to recover damages on behalf of its citizens for bodily injury." Thus, in *Liberty*, the court drew a line based on what type of damages was being sought by the public entity.

The Seventh Circuit in *Cincinnati Ins. Co. v. H.D. Smith*, 2016 WL 3909558 (7th Cir. July 19, 2016), however, reached the opposite result concluding that an entire lawsuit brought by a public entity seeking damages for economic harm was a claim "because of Bodily Injury." According to the Seventh Circuit, it did not matter that the public entity was seeking compensation for economic harm as a result of bodily injury. The Seventh Circuit posed the hypothetical scenario of a mother who seeks redress for the economic harm she incurs to care for her son's injuries. In that hypothetical, the Seventh Circuit held that "the mother's suit is covered even though she seeks her own damages (the money she spent to care for her son), not damages on behalf of her son (such as his pain and suffering or money he lost because he missed work). Legally, the result is no different merely because the plaintiff is a state instead of a mother."

Directors and Officers Liability (D&O) / Professional Liability (E&O)

The principal purpose of D&O insurance is to protect the personal assets of corporate directors and officers when they are sued in their capacity as directors and officers of a corporation. E&O insurance typically covers professional malpractice-type claims, *i.e.* those arising out of any alleged failure to render professional services to a third party.

One of the key coverage issues arising under D&O and E&O policies within the context of opioid lawsuits is the existence of a "Bodily Injury" exclusion. Most D&O and E&O policies will contain exclusions for any claim "based upon or arising out of any actual or alleged bodily injury." This means that the coverage cases noted above regarding "Bodily Injury" in the context of public entity opioid lawsuits and CGL insurance may prove useful for D&O and E&O insurers reviewing the same underlying claims. Courts are divided on the "Bodily Injury" issue, but D&O and E&O insurers likely have some persuasive authority available to them to use should they seek to deny coverage for an opioid lawsuit based on a "Bodily Injury" exclusion.

D&O and E&O policies are also typically "claims-made" policies, meaning that they provide coverage only for claims first made during the given policy period. D&O and E&O policies also typically have an "aggregation of claims" provision which allows insurers to treat any claim submitted for coverage that arises out of the same "facts and circumstances" as a previously filed claim as a single claim first made on the earliest date such claims were filed.

The claims-made issue is another prominent coverage issue that is likely to arise in the context of opioid lawsuits, even though it has not been tested in the courts yet. With similar opioid lawsuits filed over the last 6-10 years (especially by public entities against the opioid companies) D&O and E&O insurers may have a basis to treat an opioid lawsuit submitted for coverage in 2018 as a "related claim" claim first made in 2012. If a claim is not first made during the policy period of the initial D&O and/or E&O insurance policy, insurance carriers are likely to take the position that the later claim is barred from coverage.

In addition to the claims-made issues, many D&O and/or E&O policies may contain exclusions that are focused on earlier filed opioid lawsuits, such as "specific event" or "specific litigation exclusions." This issue was explored in the recent case of *Miami-Luken, Inc. v. Navigators Ins. Co.*, 2018 U.S. Dist. LEXIS 122009 (July 11, 2018 S.D. Ohio).

In *Miami-Luken,* Navigators provided a D&O policy to Miami-Luken, an opioid distributor that was a named defendant in a 2012 opioid lawsuit filed by the state of West Virginia. The Navigators D&O policy contained a "specific litigation exclusion" that precluded coverage for any claim "based upon, arising out of, relating to, directly or indirectly resulting from, or in consequence of, or in any way involving" the "same or substantially the same facts, circumstances or allegations which are the basis or subject for" the "Action brought by the Attorney General of West Virginia." In 2015, Miami-Luken received an Order to Show Cause from the Drug Enforcement Administration which alleged that Miami-Luken failed to maintain effective controls against the diversion of opioids in a region of the United States that included West Virginia. Navigators denied coverage for the Order to Show Cause on that basis. When Navigators' denial of coverage was challenged in a coverage action, the court agreed with Navigators. According to the court "when considering whether the facts, circumstances, or allegations for the two actions are the same or substantially similar, the answer clearly is yes. At the very least, the facts or circumstances are substantially the same; arguably, so too are the allegations, but only one of three is required for the [specific litigation exclusion] to apply."

* * *

Public health crises and disasters are always a case study in risk, litigation, and insurance coverage. The opioid crisis is no different. One of the key takeaways here is the fact that there is no specific line of insurance that these matters seem to fall under, and due to the magnitude of the potential losses, insureds will attempt to seek coverage across their entire insurance program. Insurers should be aware of this non-inclusive array of coverage issues. Insurers should also keep the court decisions discussed above in mind with respect to any opioid lawsuit submitted for coverage. Because of the unique interplay among the various lines of insurance, portions of any opinion may be useful to insurers seeking persuasive authority to support any reservation of rights, or a denial of coverage.