LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

9th Circ. Says No Duty To Defend McKesson Opioid Suits

By **Ganesh Setty**

Law360 (January 26, 2024, 7:43 PM EST) -- An AIG unit and a Chubb unit have no duty to defend McKesson Corp. over claims it intentionally oversupplied opioids and inflamed the ongoing opioid epidemic, the Ninth Circuit ruled Friday, finding that the three underlying bellwether suits at issue "describe purely deliberate conduct."

The Ninth Circuit found that AIG and Chubb units don't need to defend McKesson Corp. in suits alleging it contributed to the opioid epidemic. (AP Photo/Richard Drew)

Affirming the insurers' summary judgment win, a three-judge panel noted in its unanimous **unpublished decision** that the bellwether suits also claimed that McKesson acted negligently and "should have known" about the public health consequences of its alleged conduct. But, such language was used to establish that there was a "foreseeable risk of harm," the panel said.

"It is simply not credible that when doctors prescribed the drugs McKesson allegedly pushed, when pharmacists filled those prescriptions with drugs McKesson distributed, and when end users became addicted to those drugs, overdosed, resorted to heroin, and died, that was a mere 'matter of fortuity,'" the panel said.

In April 2022, U.S. District Judge Jacqueline Scott Corley found that McKesson's insurers — AIG unit National Union Fire Insurance Co. of Pittsburgh, Pa. and Chubb unit Ace Property & Casualty Insurance Co. — had **no duty to defend** the drug distributor in underlying opioid litigation.

Another AIG unit, AIU Insurance Co., was also party to the coverage litigation but did not join the insurers' summary judgment bid, which was the basis of McKesson's appeal. The three bellwether suits also included public nuisance claims, alleging that McKesson's overdistribution of opioids caused municipalities to incur heavy costs as they responded to the public health crisis.

In an April 2021 memo supporting its unsuccessful bid for partial summary judgment on the insurers' duties to defend, the drug distributor said it had incurred more than $270 million in defense costs for all underlying opioid suits as of March 2021. A $26 billion settlement **was finalized** in February 2022 to resolve much of the underlying litigation, with 46 states signing on to the deal that included McKesson, among other drug distributors and parties.

"The complaints do not premise liability on the mere fact that McKesson 'shipped opioids to its pharmacy customers,' as the company suggests. Rather, they seek to hold McKesson accountable for the deliberate manner in which it distributed opioids: by flooding the market, concealing facts, disregarding its duties, and ignoring risks," Friday's panel continued.

The fact that the bellwether suits contained negligence claims "does not transform those allegations into allegations of merely accidental conduct," they said, adding that there could still be a duty to defend if there were some unforeseen and independent intervening cause that contributed to the bellwether suits' alleged damages.

The suits still "exhaustively demonstrate," however, that downstream addiction, overdoses and deaths were all the direct result of McKesson's alleged distribution scheme, the panel said, finding there was no independent, intervening cause. They cited the 2017 state appeals case Travelers Property Casualty Co. of America v. Actavis Inc. , which similarly involved a drug manufacturer's unsuccessful bid for opioid litigation coverage.

"As the Actavis court bluntly stated, '[t]he role of doctors in prescribing, or misprescribing, opioids is not an independent or unforeseen happening,'" the panel said. "The same is true here for the doctors, pharmacists, and drug users upon whom McKesson seeks to lay blame."

In a footnote, the judges further addressed McKesson's position that the Actavis case was inapplicable since it dealt with an opioid manufacturer, not a distributor, and that the case dealt with deceptive marketing, fraud and misrepresentation claims rather than overdistribution claims.

The Actavis case made "no principled distinction" between manufacturers and distributors, and its rationale is "no less applicable simply because of differences in its fact pattern and theories of liability," the panel said.

Given the conclusion that the underlying suits only alleged deliberate, uninsurable conduct, Friday's panel did not address McKesson's additional argument that the alleged damages were "because of" bodily injury. The insurers, meanwhile, had argued the underlying suits sought recovery for their economic losses but not losses tied to any particular opioid-related injury or death.

Judge Corley said she was not persuaded by the Delaware Supreme Court's January 2022 **majority opinion** in Ace American Insurance Co. et al. v. Rite Aid Corp. et al. , in which the state's justices found that Ohio's Summit and Cuyahoga counties' economic damages claims were too far removed from any specific bodily injury. The Ohio Supreme Court issued a **similar ruling** in September 2022, and the Sixth Circuit **followed suit** thereafter in January 2023. The Seventh Circuit notably ruled the **opposite way** in July 2016.

A representative of Chubb declined to comment. Representatives of AIG and McKesson did not immediately respond to requests for comment.

U.S. Circuit Judges Richard R. Clifton and Milan D. Smith Jr., of the Ninth Circuit, and Eugene E. Siler Jr., of the Sixth Circuit, sat on the panel.

McKesson is represented by Clea Liquard, S. Conrad Scott, Donald W. Brown and Anna P. Engh of Covington & Burling LLP.

National Union is represented by Jocelyn M. Sher and Christopher J. St. Jeanos of Wilkie Farr & Gallagher LLP and Richard Joseph Doren, Theodore J. Boutrous Jr., Matt Aidan Getz, Bradley J. Hamburger, Madeleine McKenna and Matthew Allan Hoffman of Gibson Dunn & Crutcher LLP.

Ace is represented by Jonathan D. Hacker and Rachel Chung of O'Melveny & Myers LLP, Robert M. Mangino, Daren McNally, Susan Koehler Sullivan and Douglas J. Collodel of Clyde & Co. LLP and Michael S. Shuster, Daniel M. Sullivan, Daniel M. Horowitz and Blair E. Kaminsky of Holwell Shuster & Goldberg LLP.

The case is AIU Insurance Co. et al. v. McKesson Corp., case number 22-16158, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Shane Dilworth and Emily Field. Editing by Emma Brauer.
