AMERICAN COLLEGE OF COVERAGE COUNSEL

Beyond *Rite-Aid*: A Continuing Examination of Coverage Issues Concerning Opioid Litigation

April 13, 2022

Barry Buchman, Haynes and Boone, LLP

Karen Libertiny Ludden, Novara Tesija Catenacci McDonald & Baas, PLLC

Vince Morgan, Bracewell LLP

Opioid-Related Insurance Coverage Issues Remain a Hot Topic

- *Opioid Coverage Wars Expand To RI With CVS Suit*, Law360 (Feb. 28, 2022)
- *Chubb, Rite Aid Battle Over Scope Of Opioid Defense Ruling*, Law360 (Feb. 28, 2022)
- *Varied Claims May Blunt Del. Opioid Coverage Ruling's Impact*, Law360 (Jan. 19, 2022)
- "It may not be the sexiest of topics, but the intricacies of insurance policies may prove to be paramount in deciding who winds up footing the bill …." *See Policies may not cover the drywall*, Herald Tribune, June 6, 2009.

Underlying Opioid Litigation Remains Active Despite Recent Settlements

- *See, e.g., Key Opioid Cases To Watch As Massive Wave Of Trials Looms*, Law360 (Mar. 11, 2022).
- These lawsuits tend to fall within two broad classes:
  - **(1) Tort claims relating to personal injury**
    - Government Plaintiffs
      - States, counties, cities (including Houston, Dallas, and Hopkins)
      - Claims: misleading the public/medical professionals by falsely marketing opioids as non-addictive; public nuisance; failure to control "pill mills"; "medical monitoring"; economic losses
    - Private Citizens
      - Class action suits brought by families, medical professionals, businesses
      - Claims: increased health insurance costs; claims on behalf of opioid-addicted babies and infants

Underlying Opioid Litigation Remains Active Despite Recent Settlements

- **(2) Shareholder and Government Agency Claims**
  - Shareholder Claims
    - Opioid Defendants made materially false/misleading statements in failing to disclose opioid-drug sales/marketing practices; and
    - Share prices fell upon disclosure of the information or upon withdrawal of the opioid drug.
  - Government Agency Claims
    - Some federal and state agencies, e.g., the DEA, have initiated investigations and/or enforcement proceedings against certain Opioid Defendants.

Main Insurance Coverage Disputes So Far

- They have arisen principally under two types of policies
  - CGL/GL policies
  - D&O policies.
- Most disputes so far have been under CGL/GL policies
  - "Occurrence" – "Accident"/"Expected or Intended" Injury
  - Whether government economic damage claims involve damages "because of" or "for" "bodily" injury
  - Whether government/municipalities have standing to bring such a claim
  - Products Exclusion
  - Pre-Existing/Known Loss
  - Res Judicata from early test suit
- D&O (and other claims-made) Policy Disputes So Far
  - Notice
  - Prior Litigation Exclusion/Related Claims
  - Products Exclusion

"Occurrence" – "Accident"/"Expected or Intended" - Conflicting Cases

Compare…

- *Cincinnati Ins. Co. v. Richie Enters. LLC*, No. 1:12-CV-00186, 2014 WL 838768, at *1 (W.D. Ky. March 4, 2014) ("***Richie I***") (pro-policyholder).
- *Liberty Mut. Fire Ins. Co. v. JM Smith Corp.*, 602 F. App'x 115 (4th Cir. 2015) (pro-policyholder).
    - Both cases involved a dispute over coverage for a lawsuit brought by West Virginia.
- *Giant Eagle, Inc. v. Am. Guar. & Liab. Ins. Co.*, 499 F. Supp. 3d 147 (W.D. Pa. Nov. 9, 2020) (pro-policyholder), *withdrawn and vacated on other grounds*, No. 2:19-cv-00904-RJC, 2021 WL 6276267 (W.D. Pa. May 25, 2021).
- *Certain Underwriters at Lloyd's, London v. NL Indus., Inc.*, No. 650103/2014 (N.Y. Sup. Ct. Dec. 29, 2020) (pro-policyholder lead paint case), *aff'd*, No. 2021-00241 (N.Y. App. Div. Mar. 24, 2022).
- *Cincinnati Ins. Co. v. Discount Drug Mart, Inc.*, No. 110151, 2021 WL 6142648 (Ohio App. Dec. 30, 2021) (pro-policyholder), *motion for reconsideration denied* (Feb. 8, 2022).

With…

- *Traveler's Prop. Cas. Co. of Am. v. Actavis Inc.*, 16 Cal. App. 5th 1026 (2017) (pro-insurer), *review dismissed and cause remanded*, 427 P.3d 744 (Cal. 2018).
    - Case involved a dispute over coverage for lawsuits brought by the City of Chicago and the County of Santa Clara -- the same two government entities that brought similar public nuisance-style cases in the lead paint context.
    - *Ledesma* and choice-of-law factors.
- *Certain Underwriters at Lloyd's of London, v. ConAgra Grocery Products Co.*, No. CGC-14-536731, 2020 WL 3096821 (Cal. Sup. Ct. Feb. 26, 2020) (pro-insurer lead paint case), *judgment entered*, 2020 WL 3096822 (Cal. Sup. Ct. Jun. 2, 2020), *appeal docketed*, No. A160548 (Cal. App. Jul. 24, 2020).
- *AIU Ins. Co. v. McKesson Corp.*, No. 3:20-cv-07469 (N.D. Cal. Apr. 5, 2022) (pro-insurer).

Intentional Act vs. Intentional Harm?

“Damages” “Because of” or “For” “Bodily Injury”: Conflicting Cases

Compare…

- *Cincinnati Ins. Co. v. Richie Enters. LLC*, No. 1:12-CV-00186, 2014 WL 3513211, at *1 (W.D. Ky. July 16, 2014) (“***Richie II***”) (holding that underlying claim by West Virginia **does not** allege **bodily injury**).
- *Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, 90 F. Supp. 3d 1308 (S.D. Fla. 2015), *aff’d on other grounds*, 658 F. App’x 955 (11th Cir. 2016) (holding that the same underlying claim by West Virginia **does not** allege **bodily injury**).
- *Motorists Mutual Ins. Co. v. Quest Pharmaceuticals, Inc.*, Case No.: 5:19-cv-00187-TBR, 2021 WL 1794754 (W.D. Kentucky May 5, 2021) (holding that underlying claims by government entities **do not** allege **bodily injury**), *appeal docketed*, No. 21-cv-6043 (6th Cir. 2022).
- *Ace Am. Ins. Co. v. Rite Aid Corp.,* 2022 WL 90652 (Del. Jan. 10, 2022) (holding that underlying claims by counties **do not** seek damages for or because of **bodily injury** and reversing contrary trial court decision).

With…

- *Cincinnati Ins. Co. v. H.D. Smith*, 829 F.3d 771 (7th Cir. 2016) (holding that insurer had duty to defend because underlying West Virginia claim **did** allege **bodily injury**).
- *Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co.*, 410 F.Supp.3d 920 (C.D. Ill. 2019) (holding that insurer had duty to indemnify distributor for settlement of West Virginia claim), *appeal dismissed per stipulation*, 2020 WL 8020466 (7th Cir. Aug. 6, 2020).
- *Acuity v. Masters Pharmaceutical, Inc.*, No. C-190176, 2020 WL 3446652 (Oh. Ct. App. Jun. 24, 2020) (holding that the underlying claims **do** allege **bodily injury**, and reversing contrary trial court decision), *appeal allowed*, No. 2020-1134, 160 Ohio St. 3d 1495 (Ohio Dec. 15, 2020).
- *Giant Eagle, Inc. v. Am. Guar. & Liab. Ins. Co.*, 499 F. Supp. 3d 147 (W.D. Pa. Nov. 9, 2020) (holding that the underlying claims **do** allege **bodily injury**), *withdrawn and vacated on other grounds*, 2021 WL 6276267 (W.D. Pa. May 25, 2021).
- *Cincinnati Ins. Co. v. Disc. Drug Mart, Inc.*, No. 110151, 2021 WL 6142648 (Ohio App. Dec. 30, 2021) (holding that the underlying claims **do** allege **bodily injury**), *motion for reconsideration denied* (Feb. 8. 2022).

Bodily Injury?

Do Medical Monitoring Claims Seek "Damages" "Because of" or "For" "Bodily Injury"?

- The issue of whether medical monitoring claims seek "damages" "because of" or "for" "bodily injury," even though there often is no past or present physical injury for which plaintiffs seek compensation, has been hotly contested in other similar contexts (e.g., lead paint).
- Many courts have held that medical monitoring claims do satisfy these requirements, at least under policies requiring damages "because of" bodily injury. *See, e.g., Millennium Chems. Inc. v. Lumbermens Mut. Cas. Co.*, No. 411388 (Ohio Ct. Com. Pl. May 8, 2002).
- Indeed, in *Richie II*, the court held that the only claim in the original lawsuit that involved "bodily injury" was the medical monitoring claim, and after the complaint was amended to remove the medical monitoring claim, the court held the remainder of the claims were only for economic damages. *Cincinnati Ins. Co. v. Richie Enters. LLC*, No. 1:12-CV-00186, 2014 WL 3513211, at *1 (W.D. Ky. July 16, 2014).

Do Municipalities Have Standing to Bring Suit/Derivative Issue.

- If courts conclude that the damages are "because of" or "for" bodily injury, do the municipalities have standing to bring suit for those bodily injuries?
- Do the municipal claims have to be derivative in nature to create the "because of" or "for" scenario?
- Does this create an issue of double collecting if both the municipality and the individual can recover for medical care?
- If taxes are currently funding these programs, should there be a refund to taxpayers? Is it double collecting for the same programs?

Products Exclusion

- *Traveler's Prop. Cas. Co. of Am. v. Actavis Inc.*, 16 Cal. App. 5th (2017), *review dismissed and cause remanded*, 427 P.3d 744 (Cal. 2018)
  - The Products Exclusions in the Actavis case excluded coverage for bodily injury either "arising out of" or that "results from" "any goods or products manufactured, sold, handled, distributed or disposed of by you."
  - The Travelers policies had the "arising out of" language and the St. Paul policies had the "results from" language.
  - Court found a sufficient casual connection between the bodily injuries asserted in the complaint and the insured's products, triggering the products exclusion.
  - Court relied on precedent, including Anda, below, construing "arising out of" very broadly.
- *Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, 658 F. App'x 955 (11th Cir. 2016)
  - "arising out of" requires only a minimal casual connection or link between the products sold or distributed and the alleged injury.
  - Court held that the alleged injuries "have, at the very minimum, a 'connection with' (the insured's) products."
- *Sentynl Therapeutics, Inc. – see* D&O slides, *infra*.

Pre-Existing/Known Loss

- The concept of a loss that pre-dates the policy and is therefore known and not covered is relevant.
- One ISO form says that bodily injury is only covered if:
  - The “bodily injury” is caused by an occurrence in the territory
  - The “bodily injury” occurs during the policy period; and
  - Prior to the policy, no insured knew that the “bodily injury” occurred.
- Thus, if municipal claims are “because of” or “for” “bodily injury,” and the insured/policyholder previously was investigated by the DEA and/or had its license revoked, insurers and policyholders likely will dispute whether the claims constitute a pre-existing/known loss.

Res Judicata From Early Test Suit

- The MDL was created after a test suit in West Virginia.
- Some insurers filed declaratory judgment actions or were sued on coverage in that case.
- Does resolution on those declaratory judgment actions work as issue or claim preclusions in declaratory judgments obtained or sought arising out of the claims in the MDL.
- What is resolution? A judicial opinion? A settlement?

D&O and Other Claims-Made Policies

- Relevant Coverage Issues
  - Definition of Claim: may include lawsuits and regulatory agency investigations, subpoenas, or other non-monetary demands.
  - Conduct Exclusions:
    - D&O policies typically exclude coverage for any claim arising out of: (1) any fraudulent and criminal acts or omissions, and willful violations of the law or (2) the gaining by an insured of any profit or advantage to which the insured was not legally entitled.
    - But those exclusions typically do not apply unless and until there has been a "final adjudication" determining that the bad conduct has occurred; insurers typically must advance defense costs in the interim.
  - Bodily Injury Exclusion:
    - D&O policies also often exclude coverage for any claims "arising out of bodily injury."
    - D&O insurers may raise this exclusion by trying to draw connections between opioid-related shareholder suits and tort suits, **but**:
      - "Arising out of" language may not extend that far; and
      - Insureds are arguing that tort suits do not involve bodily injury.
  - Products Exclusion: *see Sentynl Therapeutics, Inc. v. U.S. Specialty Ins. Co., infra*.
  - Notice: *see KVK-Tech, Inc. v. Navigators Specialty Ins. Co, infra.*
  - Prior Litigation Exclusion (and related claims): *see Miami-Luken Inc. v. Navigators Ins. Co., infra*.

D&O and Other Claims-Made Policies: Recent Opioid Litigation

- *KVK-Tech, Inc. v. Navigators Specialty Ins. Co.*, No. 1:21-cv-286-KD-N, 2021 WL 6092463 (S.D. Al. Dec. 23, 2021), *appeal docketed*, No. 22-10245 (11th Cir. Jan. 21, 2022)
  - This coverage dispute is between opioid drugmaker KVK-Tech and excess insurer Navigators, which issued a **claims-made policy** to KVK-Tech for the July 22, 2016 through August 21, 2017 and August 21, 2017 through ***August 21, 2018*** policy periods.
    - Under the policy's notice provision, KVK-Tech was required to notify Navigators of any claims within 30 days from the policy's expiration (i.e., by ***September 20, 2018***).
  - At issue are two underlying personal injury lawsuits filed in August 2017 and December 2018, which seek to hold KVK-Tech liable for personal injuries and death caused by opioid use.
    - Because KVK-Tech did not inform Navigators of the underlying claims until ***January 2020***, the district court held that Navigators has no coverage obligations to KVK-Tech.
  - The case is now on appeal before the 11th Circuit.
- *Miami-Luken Inc. v. Navigators Ins. Co.*, No. 1:16-cv-876, 2018 WL 3424448 (S.D. Ohio Jul. 11, 2018)
  - The Southern District of Ohio applied a specific litigation exclusion in a D&O policy issued to opioid distributor Miami-Luken to preclude coverage for an investigation by the DEA because Miami-Luken knew of a related West Virginia lawsuit prior to the policy's inception.
- *Sentynl Therapeutics, Inc. v. U.S. Specialty Ins. Co.*, No. 21-55370, 2022 WL 706941 (9th Cir. Mar. 9, 2022)
  - Ninth Circuit affirmed that insurer is not obligated to cover costs incurred by opioid drugmaker while responding to a **DOJ investigation**, citing a broad exclusion in **D&O policy** for claims relating to the drugmaker's products.
    - The **products exclusion** barred coverage for loss in connection with a claim "**arising out of**, based upon or attributable to" Sentynl's products. (*See* slide 9 for discussion of products exclusion in CGL context.)
    - Court found that **"arising out of"** language was broader than **"caused by"** language in a policy under circuit precedent and was not in and of itself ambiguous.

Choice of Law

- As illustrated above, choice of law could determine how certain coverage issues are resolved.
- Although a discussion of choice-of-law variables is beyond the scope of this presentation, policyholders and insurers should be mindful of the potential impact of corporate and contractual relationships, including additional insured vendor endorsements.
  - The additional insured endorsement language and how the policy defines additional insured may be relevant to determining which state's law should apply.
- Thus, venue/forum also may be important. *See generally Cardinal Health, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 21-3770 (6th Cir. Mar. 30, 2022) (affirming decision sending opioid-related coverage case back to Ohio state court).
- Public policy factor
- Restatement of the Law of Liability Insurance

A Closing Note on Reptile Theory for Coverage Matters

- Reptile theory is most often discussed in the contexts of jury trials, but the principle can affect coverage decisions when the stakes involve what is perceived as a threat.
- Reptile theory generally relies on the principle that human beings are hard-wired to seek to avoid danger, so if you appeal to a juror's feelings of safety or security, they will reach a decision that favors safety and then find support for that position after.
- In the context of a coverage action, of course, there is usually no jury, but an issue like the opiate coverage litigation can trigger the same primal sense of alarm as to whether individual safety, or collective safety, is at risk.
- This can mean that judges addressing whether there is coverage in the opiate setting are experiencing the same type of emotions that a jury might in a BI trial.
- There are also significant political influences regarding this issue that can subconsciously affect coverage decisions.