

Insurance Coverage for Opioid Lawsuits & Investigations

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Insurance Recovery

Dozens of pharmaceutical manufacturers, wholesale distributors, and retailers have been named as defendants in opioid-related lawsuits, investigations, and congressional inquiries across the country. These actions and investigations include allegations that defendants misleadingly marketed opioids, failed to comply with regulatory requirements to report suspicious orders of opioids, and improperly filled fraudulent prescriptions for opioids. Some of these companies and their directors and officers are also targets of securities class action and shareholder derivative lawsuits related to the companies' marketing, sale, distribution, and dispensing of opioid painkillers. Defendants are disputing these allegations and mounting a vigorous defense.

As outlined below, several types of insurance policies potentially cover defense costs as well as the costs of any ultimate liability in these opioid-related claims.

General Liability Policies. Opioid-related claims may well be covered under commercial general liability ("CGL") policies. CGL policies typically insure "sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage" caused by an "accident." Importantly, CGL insurers generally are obligated to fund an insured's defense where the allegations against the insured are partially or even potentially within the scope of coverage, regardless of whether any final settlement or judgment is covered.

Several recent court decisions concerning insurance coverage for opioid lawsuits provide a preview of coverage defenses that insurers may raise, as well as counterarguments policyholders may make. These include:

- *Injury caused by an "accident."* In several cases, insurers have argued that the conduct and harms alleged in the opioid lawsuits result from intentional acts on the part of defendants—not "accidents." Most courts addressing these arguments have recognized that the opioid lawsuits allege, or at least potentially involve, negligent conduct, which is sufficient to trigger an insurer's duty to defend the suits. At least one court, however, has held that the allegations against pharmaceutical manufacturers in two early lawsuits could only be read to allege intentional conduct and thus did not trigger coverage. That decision was upheld on appeal, but the policyholder has recently petitioned the Supreme Court of California for review.
- *Damages because of "bodily injury."* The majority of opioid lawsuits to date have been initiated by states, counties, and cities. Those lawsuits seek to recover increased costs the states and municipalities allegedly have incurred as a result of opioid addiction—*e.g.*, costs associated with diagnosis and treatment of opioid addiction and overdose, increased law enforcement and police operations, and higher demands on hospitals, emergency rooms, and prisons. Insurers have argued that the state and municipal plaintiffs do not seek damages "because of bodily injury," but rather seek damages solely for economic

harms. The small number of decisions from courts on this issue have not been consistent—some have favored the policyholder, others have favored the insurer. The only appellate court to have reached the issue to date, however, sided with the policyholder, holding that the insurer was obliged to defend a wholesale distributor against a suit brought by West Virginia because the state sought reimbursement for damages incurred, at least in part, because of bodily injury to its residents.

- *Other exclusions.* Some CGL policies have additional terms that insurers may contend exclude coverage for opioid-related lawsuits. For example, a few recent court decisions considered CGL policies that expressly excluded coverage for bodily injuries arising out of the policyholder's products and/or representations about its products. Exclusions such as these—present in some but not all policies—highlight the need for policyholders to review carefully the language in their insurance contracts, both when purchasing coverage and at the point of claim.

Professional Liability/Errors & Omissions Policies. Errors & Omissions (“E&O”) policies tend to have broad coverage grants that potentially respond to opioid lawsuits and investigations. E&O policies typically cover losses a policyholder incurs as a result of a claim made against it for an “actual or alleged act, error, misstatement, misleading statement, omission, neglect, or breach of duty.” Some E&O policies limit coverage to claims where the insured's alleged act or omission was committed “solely in the performance of or the failure to perform professional services.”

Insurers may assert defenses under E&O policies, such as:

- *Intentional acts exclusions.* The typical E&O policy will exclude claims arising out of fraudulent and criminal acts or omissions, and willful violations of the law. Insurers may invoke such exclusions where policyholders are alleged to have intentionally engaged in misleading promotion of opioids, or knowingly shipped suspicious orders or filled forged prescriptions. The precise wording of these exclusions varies from policy to policy, with some written more favorably for policyholders than others. For example, many E&O policies do not preclude coverage unless a “final adjudication” in the underlying proceeding establishes that the policyholder engaged in “deliberately fraudulent or deliberately criminal” conduct.
- *Restitution/d disgorgement/illegal profits.* E&O policies often purport to exclude damages in the form of restitution or disgorgement for unjust enrichment, or where the policyholder gained profit or advantage to which it was not entitled. Many of the opioid lawsuits include counts alleging unjust enrichment or seeking restitutionary-type damages. However, even where an E&O insurer says it does not cover such damages, the policy may still provide coverage for other claimed damages as well as for defense costs and settlement payments. As is the case generally, the scope and flexibility of E&O coverage will be dictated by the precise language of these policy provisions.
- *Civil and criminal fines/penalties.* In the case of defendants that are alleged to have violated statutes or regulations carrying civil penalties or fines, insurers may cite provisions in some (but not all) E&O policies that purport to exempt these types of losses from coverage. Even policies that insurers say do not cover fines or penalties may nevertheless still insure the cost of defending such claims or fund settlements resolving allegations of statutory and regulatory violations.
- *Bodily injury exclusion.* E&O policies may say they do not cover claims “arising out of bodily injury.” To the extent a policyholder facing opioid liabilities is insured under both CGL and E&O lines of insurance, it needs to understand the interrelationship and any

overlap between multiple lines of coverage to ensure that it is getting the full value of the insurance that it purchased.

Management Liability/Director’s & Officer’s Liability Policies. As with E&O policies, the coverage grant under Director’s and Officer’s Liability (“D&O”) policies, particularly coverage for individual insureds, is broad and potentially covers defendants facing opioid-related shareholder class actions, derivative suits, and government inquiries and investigations.

D&O policyholders may face many of the coverage defenses highlighted above: intentional acts exclusions; carve-outs for restitution, disgorgement, illegal profits, fines, and penalties; and exclusions for bodily injury. Two additional issues potentially affect the extent of recovery for opioid-related losses under a D&O policy:

- *Limited entity coverage.* Although D&O policies frequently offer broad coverage for claims against individual directors and executives (and sometimes other employees), so-called entity coverage for the company itself is limited under some policy forms to shareholder suits or other claims alleging violation of securities laws. Other forms may extend entity coverage (with or without separate sublimits or retentions) to derivative investigation costs, costs of defending derivative suits, or specified types of government investigations or proceedings. The exact scope of entity coverage varies widely among different D&O forms. For example, some provide no coverage for the costs of responding to regulatory investigations, while others cover specified forms of information requests; some only cover proceedings before specified securities regulators, while others cover governmental proceedings more broadly. Policyholders must scrutinize their D&O policies for potential application to opioid-related lawsuits, investigations, subpoenas, requests for testimony, and other government inquiries.
- *Professional services exclusion.* Some D&O policies purport to exclude claims involving the performance by an insured of “professional services.” The scope and interpretation of such exclusions varies widely: they may be confined to the so-called learned professions of law and medicine, or they may encompass any “activity done for remuneration.” Again, policyholders should be mindful to advance coordinated coverage positions on issues such as “professional services” under their CGL, E&O, and D&O lines in order to avoid gaps in coverage.

Specialized Insurance Lines: Pharmaceutical, Life Sciences, and Product Liability Policies.

Policyholders operating in the pharmaceutical industry may have purchased specialized insurance products tailored to their business, such as policies written specifically for liabilities arising out of their products and advertisements/representations made about their products. Assessments of the potential for coverage under these specialized products will necessarily depend on the particulars of the policy, but one or more of the potential issues outlined in the above discussions could arise under a specialized product liability policy.

Practical Tips for Policyholders. In addition to carefully reviewing all potentially responsive insurance policies, policyholders should keep in mind the following:

- *Timely notice.* Most insurance policies require prompt notice to the insurer. The policy language should be consulted for the details.
- *Consider current and prior policies.* When reporting actual or potential claims to an insurer, policyholders should remember policies issued in prior years that may respond to current and future opioid-related suits and investigations. Some policies (often E&O, D&O, but

also CGL and Bermuda Form variants) respond to claims made against the policyholder during the policy period. Other policies insure a policyholder for injuries that occurred during the policy period, even if the policyholder is not sued for those injuries until years later. To the extent the harms alleged in an opioid lawsuit allegedly took place in prior policy periods, policyholders should investigate what coverage they purchased during those periods and consider notifying the claims under those earlier policies.

- *Cooperation obligations.* Liability policies may have conditions purporting to require policyholders to cooperate with their insurers in the defense and investigation of claims. Policyholders should be careful to avoid waiving attorney-client privilege or work product protections when performing their cooperation duties. Insurance-specific confidentiality agreements and careful attention to what and how information is shared can help mitigate the risks of waiver in the disclosures necessary to cooperate with their insurers.
- *Consent obligations.* Insurance policies may purport to require insurers' consent when policyholders retain defense counsel, incur defense expenses, or negotiate or enter into a settlement. Some policies do not impose consent obligations until the loss has exceeded the policy retention: that is, for defense costs or settlements within the retention amount, the policyholder may not need the insurer's consent. Policyholders can sometimes find themselves facing intransigent insurers when views diverge on the appropriate defense and settlement strategy. Coverage counsel can help navigate these potential risks to help ensure policyholders get the full benefit of their insurance.
- *Track defense costs.* In many cases, insurance may cover the costs of defending opioid actions and/or may be used to satisfy any applicable self-insured retention or deductible. In situations where the insurer has a duty to reimburse defense costs, policyholders should put in place a system for tracking the defense costs incurred that are covered by insurance. Policyholders submitting defense invoices to insurers for reimbursement should be aware that, because defense invoices typically contain defense counsel's descriptions of services provided, waiver of privilege issues may arise in the event of conflicts with the insurer. Again, an insurance-specific confidentiality agreement between the policyholder and insurer can help mitigate this risk.

If you have questions concerning the material discussed in this client alert, please contact the following members of our Insurance Recovery practice:

Anna Engh	+1 202 662 5221	aengh@cov.com
Matt Schlesinger	+1 202 662 5581	mschlesinger@cov.com
René Siemens	+1 424 332 4751	rsiemens@cov.com
Gretchen Hoff Varner	+1 415 591 7056	ghoffvarner@cov.com
Cléa Liquard	+1 212 841 1173	cliquard@cov.com

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