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Actavis Ruling Bolsters Insurers In Opioid Coverage Battles

By **Jeff Sistrunk**

Law360, Los Angeles (November 8, 2017, 10:32 PM EST) -- A California appellate court gave insurers an edge in coverage disputes with policyholders accused of contributing to the nation's opioid abuse epidemic by ruling Tuesday that Travelers doesn't have to defend Actavis against such claims because the pharmaceutical company's allegedly deceptive marketing of its painkillers isn't a covered accident.

In a wide-ranging published opinion, a three-judge appeals panel upheld a trial judge's decision for The Travelers Property Casualty Co. of America after finding that suits against Actavis Inc. and other pharmaceutical companies lodged by two California counties and the city of Chicago don't trigger coverage under the insurer's general liability policies, because the actions are rooted in allegations of intentional wrongdoing by the drugmakers rather than accidental events.

"The allegations that [Actavis] and the other defendants engaged in 'a common, sophisticated, and highly deceptive marketing campaign' aimed at increasing sales of opioids and enhancing corporate profits can only describe deliberate, intentional acts," Judge Richard D. Fybel wrote for the panel. "Claims involving intentional or negligent misrepresentations do not constitute an accident under a liability policy."

According to attorneys who represent insurance companies, the ruling will give insurers ammunition to challenge requests for coverage of similar opioid liability cases, which have proliferated in recent years as local and state governments have looked to assign blame for the rising costs of public services for treatment of opioid addiction and associated issues.

"A court must look to the allegations of the complaint, and shouldn't read what isn't there," said Goldberg Segalla LLP partner Jonathan Schwartz. "The court's decision in this case, in finding that this complaint didn't sound in any type of negligent conduct, comports with the maxim that the accidental nature of the loss is viewed from the perspective of the tortfeasor."

But attorneys who counsel policyholders say the ruling could have limited impact outside of California, noting that the appeals court acknowledged that courts in other jurisdictions have ordered carriers to defend their insureds in opioid litigation. The availability of insurance may well depend on where the coverage suit is filed, lawyers say.

"Even assuming the decision stands as written, I think by its own terms it is limited as to the potential impact on similar cases," said Haynes and Boone LLP partner Barry Buchman. "Policyholders, therefore, should not be disheartened. They should both closely examine their policies and analyze the potential choice-of-law scenarios."

Travelers and subsidiary St. Paul Fire and Marine Insurance Co. had sued Actavis and its Watson Pharmaceuticals Inc. unit in California court in September 2014 to avoid covering the underlying suits, which were both filed several months earlier and remain pending.

In the two underlying complaints, Chicago and California's Orange and Santa Clara counties claimed Actavis and other pharmaceutical companies overstated the benefits of opioid painkillers while trivializing their risks of addiction, overdose and death in an effort to boost sales. The city and

counties also alleged that the opioid crisis has led to a resurgence in heroin use, as painkiller addicts have turned to the illicit drug for a cheaper fix. They are seeking damages for, among other things, the past and future costs of providing increased care to opioid- and heroin-addicted residents.

Following a March 2016 bench trial in the insurance dispute, Judge William D. Cluster entered a judgment in Travelers' favor, holding that Actavis has no shot at coverage because the underlying suits did not allege an accident and, alternatively, because the policies' products exclusions applied. Actavis appealed.

The appellate panel said in **Tuesday's opinion** that under California law, an accident does not occur for coverage purposes if the policyholder performs a deliberate act, unless some other "additional, unexpected, independent and unforeseen happening" occurs that causes an injury. Here, none of the injuries alleged by the municipalities were unexpected or unforeseen, the panel found.

"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,'" Judge Fybel wrote.

According to Hinshaw & Culbertson partner Larry Golub, the panel's ruling on the issue was in line with California precedent establishing that claims of fraudulent acts don't equate to a covered accidental occurrence.

"California has developed a good line of cases — especially here, where the facts were stipulated and the allegations were boiled down to this fraudulent marketing scheme — saying fraud claims don't constitute a covered occurrence," Golub said.

For policyholder counsel William Um of Kilpatrick Townsend & Stockton, however, the ruling represents a "troubling trend" of certain California courts holding, "incorrectly, that any deliberate act can be interpreted to preclude a finding of an accident under general liability policies."

"My view on this decision is that it goes against the principle that the duty to defend is necessarily broad," Um said. "It ignores the essence of the complaint, which is that there was unintended and unexpected bodily injury from individuals' alleged use of the opioids."

Critically, the panel rejected Actavis' assertions that the injuries alleged by Chicago and the California counties — opioid addiction, overdoses and deaths, and an uptick in heroin use — are not the "normal consequences" of the purported deceptive marketing campaign by the pharmaceutical companies, and that doctors' actions in prescribing the painkillers are independent from those marketing efforts.

"The test, however, is not whether the consequences are normal; the test is whether an additional, unexpected, independent, and unforeseen happening produced the consequences," Judge Fybel wrote. "The role of doctors in prescribing, or misprescribing, opioids is not an independent or unforeseen happening."

Nossaman LLP partner Joan Cotkin said the panel's disregard of the intervening steps in the chain of causation is perhaps the most troubling part of the ruling for policyholders.

"This opinion essentially describes these doctors as automatons, but they are licensed medical professionals with a duty of care," Cotkin said. "Certainly, these pharmaceutical companies were promoting these drugs as not terribly addictive and encouraging off-label uses, but I think the public nuisance count falls within CGL coverage, because there is no doubt there was unintended bodily injury caused by an unforeseen circumstance."

The appellate panel dealt another blow to drugmakers' hopes for opioid liability coverage by holding that Travelers was alternatively off the hook because of policy exclusions for injuries "arising out of" or "result[ing] from" Actavis' products.

The ruling was at least the second appellate-level opinion to reach that conclusion. An Eleventh Circuit panel **held in August 2016** that identical Travelers exclusions applied to bar Anda Inc.'s claims for coverage of West Virginia's suit accusing it of exacerbating the state's painkiller addiction

epidemic.

According to the California panel, the exclusions' "arising out of" language has been interpreted broadly by California courts to require only a minimal causal connection. Chicago and the California counties have clearly asserted there is a direct connection between Actavis' products — and the drugmaker's representations about the safety and use of those products — and their alleged losses from the surge in opioid addiction and heroin use, the panel said.

The panel's application of the products exclusion to opioid liability claims could be cited by insurers involved in similar coverage disputes with drugmakers, attorneys say.

"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 companies because many policies issued to such companies contain general products exclusions or exclusions for pharmaceutical products," said Hinshaw & Culbertson LLP partner Scott Seaman.

While Actavis lost on multiple fronts, attorneys say policyholders can take solace in the fact that the appellate panel acknowledged two out-of-state decisions, from the Fourth Circuit and a Kentucky federal court, that found coverage under CGL policies for West Virginia's opioid suit.

The panel pointed out that, unlike California law, the applicable state laws in those two cases permit a finding of an accidental occurrence where a policyholder engages in deliberate conduct, provided that the insured didn't intend a resulting injury. Moreover, both the Fourth Circuit and the Kentucky district court found that West Virginia's action contained claims for negligence as well as intentional wrongdoing.

Therefore, according to attorneys, companies hit with opioid liability suits in the future may be able to secure coverage from their insurers if they initiate litigation in a jurisdiction with favorable case law on the books. New complaints filed by government entities may also contain negligence theories similar to West Virginia's that could trigger coverage.

"Yet again in the area of insurance coverage, we are reminded how important choice of law is can be and thus how important choice of forum can be," said Haynes and Boone's Buchman.

"Even holding state law constant, you will have claims similar to West Virginia's suit that, even under the Actavis court's standard, likely are covered," Buchman added.

And the California appellate court's ruling may not have been the final word on opioid liability coverage in the Golden State, some attorneys say. Kilpatrick Townsend & Stockton's Um said the panel's holdings on both the accident question and the scope of the products exclusions may wind up before the California Supreme Court.

"I think this case is ripe for a petition for review, and I hope that the policyholder goes that route," Um said.

--Editing by Kat Laskowski and Catherine Sum.