

The opioid crisis and the products-completed insurance exclusion

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APRIL 6, 2018

President Donald Trump has declared the opioid crisis a public health emergency.¹ Cities and municipalities across the country have reacted to the crisis by filing suit against pharmaceutical manufacturers, distributors and others. A judicial panel consolidated over 400 federal opioid cases into an MDL before U.S. District Judge Dan Polster of the Northern District of Ohio.

Against the mounting mass litigation, pharmaceutical companies have naturally turned to their insurance carriers. However, several courts, including the 11th U.S. Circuit Court of Appeals, have held that insurers issuing commercial general liability policies with a “products-completed exclusion” may have no duty to defend or indemnify against these claims.

Depending on the type and limits of insurance carried, and the specific allegations asserted, those in the opioid chain of manufacturing and distribution may have no insurance coverage under their CGL policies.

CGL POLICIES

CGL policies are purchased by businesses to protect against liability occurring as a result of business operations at designated and insured locations. Coverage under CGL insurance policies is most often triggered by allegations of bodily injury, property damage or personal and advertising injury.

Standard CGL policies tend to exclude coverage for product liability. In fact, the “products and completed operations hazard exclusion” or “products-completed operations hazard exclusion” found in most CGL policies excludes coverage for bodily injury arising out of or resulting from the insured’s products.

Products/completed operations coverage and other specialized policies are available and generally insure against losses arising from an insured’s completed operations or products.

This analysis focuses specifically on whether a standard CGL insurance policy excluding products would provide coverage for those companies named in opioid claims.

CGL POLICIES AND OPIOID CLAIMS

The majority of opioid lawsuits allege that the pharmaceutical industry created an artificial market for their opioid products, resulting in a foreseeable over-supply of addictive pain medication. Accordingly, this over-supply led to excessive opioid abuse and a resulting economic strain on governmental services.

States and other governmental entities are alleging substantial opioid-fueled burdens on their taxpayer-funded services, including law enforcement, medical and social services, and court systems.

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States and municipalities are hoping to recover against the pharmaceutical manufacturers and distributors for these immense damages just as they did against “Big Tobacco,” and as they attempted to do against gun manufacturers, for their alleged roles in creating similar public health problems.

As in the tobacco and gun lawsuits, the courts will be asked to determine whether insurers are ultimately responsible for these costs. Recent case law indicates that CGL policies that exclude products are generally not required to respond to opioid claims.

The first line of defense of a CGL insurer would be that there is no bodily injury claims in the opioid suits.

For example, in its successful motion for summary judgment in *Travelers Property Casualty Co. v. Anda Inc.*, Federal Insurance Co. argued that the economic damages West Virginia claimed against wholesale pharmaceutical distributor Anda Inc. did not constitute damage “for” or “because of” bodily injury as required under the applicable CGL policy.²

Other federal courts had already considered this issue and held that there was no duty to defend where the state sought only economic damages but did not allege “bodily injury,” as such injury is required to trigger coverage under CGL policies.³

The court in *Anda* agreed that the damages alleged by West Virginia in the underlying action were for economic harm, not bodily injury.⁴

As its second proposition, Federal argued that even if the court found that the damages were triggered because of bodily injury, and therefore covered, coverage would still be excluded under the products-completed exclusion under the Florida Supreme Court’s decision in *Taurus Holdings Inc. v. U.S. Fidelity & Guaranty Co.*⁵ The District Court did not reach the second question.

On appeal, however, the 11th Circuit addressed the products exclusion issue without considering the bodily injury issue.

It held that the products-completed operations exclusion precluded coverage based on its earlier coverage decision in *Taurus*, which was based on an appeal from a dismissal of a lawsuit against gun manufacturers. The suit claimed that the manner in which gun manufacturers made, distributed and marketed firearms contributed to the gun violence epidemic.⁶

The crux of both the products-completed operations exclusion in *Anda* and *Taurus* CGL policies is the “arising under” language.

The 11th Circuit acknowledged, as Federal had argued below, that the analysis in *Anda* paralleled that of *Taurus*, as the legal questions and factual circumstances revolving around opioid and gun manufacturers and the use and misuse of their products were strikingly similar.

The municipalities that brought suit against gun manufacturer *Taurus* alleged that the excessive and unsafe manner in which they manufactured and marketed guns contributed to a culture of gun violence, which took a toll on state resources.

Similarly, in *Anda*, the state of West Virginia sued *Anda* for knowingly or negligently flooding the West Virginia market with opioids. The state sought compensation for the economic costs incurred due to the opioid crisis, including increasing expenses and resources dedicated to law enforcement and police operations, hospitals and first responders, and jails and prisons, among others.

In both *Anda* and *Taurus*, the insureds sought coverage under their policies from various insurers, which in turn pursued declaratory actions alleging that they had no duty to defend as no coverage existed under the CGL policies.

The crux of both the products-completed operations exclusion in *Anda* and *Taurus* CGL policies is the “arising under” language. In *Taurus*, the 11th Circuit certified to the Florida Supreme Court the question of whether the economic burden on the municipality for services rendered in response to gun violence “arose out of” the use of guns.

The state high court found that the phrase “arising out of” was unambiguous and subject to broad interpretation, and concluded the damages claimed “originated from” or “had a connection to” *Taurus* gun products. Thus, it was affirmed that the products-completed exclusion of the CGL policies barred coverage because the damages claimed arose from the product.

Furthermore in *Anda*, the breadth of the “arising under” language appeared to encompass the need to establish bodily injury. The *Anda* court likewise applied this logic to opioids and found that the causal connection with alleged injuries, bodily or otherwise, was sufficient to meet the “arising out of” threshold.

Accordingly, the 11th Circuit concluded that “all the underlying claims, if covered at all, are embraced within the [products/completed operations exclusions], which render any coverage inapplicable.”⁷ As such, there was no duty to defend under the CGL policy.

CONCLUSION

The *Anda* decision will be influential in the wave of lawsuits by states, municipalities, counties and cities against large drug manufacturers and distributors. There are hundreds of pending lawsuits asserting liability against prescription drug makers for their alleged role in the opioid epidemic, with new cases filed almost every week.

As states seek legal recourse against the pharmaceutical companies, these companies will likely continue to test legal arguments to invoke coverage. However, if the insured’s CGL policy contains a products-completed exclusion, the courts will be influenced by and likely adopt the reasoning in *Anda* and its progeny to exclude coverage for harm arising from the companies’ products.

NOTES

¹ The Centers for Disease Control and Prevention estimates that of the 63,000 deaths due to drug overdose in the United States in 2016, a record 42,249 were related to opioids. Official numbers for 2017 are not yet available. U.S. Ctrs. for Disease Control and Prevention, Drug Overdose Deaths in the United States, 2017 NCHS Data Brief No. 294, <http://bit.ly/2IGMLjb>.

² Federal Insurance Co. and Great Northern Insurance Co.'s Motion for Final Summary Judgment, *Travelers Prop. Cas. Co. of Am. v. Anda Inc.*, No. 12-cv-62392 (S.D. Fla. Oct. 20, 2014), 2014 WL 11307563.

³ *Cincinnati Ins. Co. v. Richie Enters. LLC*, No. 12-cv-186, 2014 WL 3513211 (W.D. Ky. July 16, 2014).

⁴ *Travelers Prop. Cas. Co. of Am. v. Anda Inc.*, 90 F. Supp. 3d 1308 (S.D. Fla. 2015).

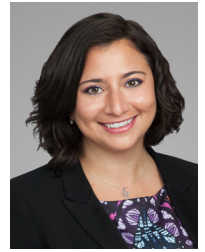
⁵ *Taurus Holdings Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528 (Fla. 2005).

⁶ Likewise, the issue of bodily injury was rendered moot by a California appeals court in comparison to the dispositive products/completed operations exclusion in a decision that subsequently fell in line with the 11th Circuit's judgment. See *Travelers Prop. Cas. Co. of Am. v. Actavis Inc.*, 16 Cal. App. 5th (Cal. Ct. App., 4th Dist. 2017).

⁷ *Travelers Prop. Cas. Co. of Am. v. Anda Inc.*, 658 Fed. Appx. 955, 956 (11th Cir. 2005).

This article appeared in the April 6, 2018, edition of Westlaw Journal Insurance Coverage.

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