

TRAVELERS DOES NOT OWE PHARMACEUTICAL COMPANY DEFENSE, INDEMNITY, IN OPIOID SUITS

An intermediate appeals court in California has ruled that Travelers and St. Paul Insurance companies owe no duty to defend or indemnify Watson Pharmaceutical in governmental suits against the pharmaceutical company over the deceptive marketing of opioids.

In *Travelers Prop. Cas. Co. of Am. v. Actavis, Inc., et al.*, No. G053749, 2017 Cal. App. Lexis 976 (Nov. 6, 2017) (Fybel, J.), the Court of Appeals of California held that under CGL policies issued by Travelers and Saint Paul, the exclusion from coverage of any liability arising out of manufactured products or "completed operations" relieved the insurers of the duty to defend or indemnify. In the Court's opinion, Associate Justice Richard Fybel described the nature of the underlying litigation against Watson and the other Parma defendants:

The California Complaint and the Chicago Complaint are based on allegations that Watson and the other defendants engaged in a fraudulent scheme to promote the use of opioids for long-term pain in order to increase corporate profits. Both complaints allege that Watson had by the 1990's developed the ability to cheaply produce opioid painkillers, but the market for them was small. Defendants knew that opioids were an effective treatment for short-term postsurgical pain, trauma-related pain, and end-of-life care and knew that, except as a last resort, "opioids were too addictive and too debilitating for long-term use for chronic non-cancer pain." Defendants knew the effectiveness of opioids decreases with prolonged use, requiring increases in dosages and "markedly increasing the risk of significant side effects and addiction.

While acknowledging an insurer's duty to defend was separate and broader than its duty to indemnify, the Court found no potential for coverage in the underlying suits because the conduct complained in the underlying suits was not accidental or fortuitous:

The injuries alleged [in the underlying suits] are: (1) a nation 'awash in opioids'; (2) a nationwide "opioid-induced [*24] 'public health epidemic"; (3) a resurgence in heroin use; and (4) increased public health care costs imposed by long-term opioid use, abuse, and addiction, such as hospitalizations for opioid overdoses, drug treatment for individuals addicted to opioids and intensive care for infants born addicted to opioids.

None of those injuries was additional, unexpected, independent, or unforeseen. The complaints allege Watson knew that opioids were unsuited to treatment of chronic long-term, nonacute pain and knew that opioids were highly addictive and subject to abuse, yet engaged in a scheme of deception in order to increase sales of their opioid products. 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." It is not unexpected or unforeseen that this marketing campaign would lead to increased opioid addiction and overdoses. Watson allegedly knew that opioids were highly addictive and prone to overdose, but trivialized or obscured those risks.

The Court also found that the underlying complaints set forth no claims against the pharmaceutical companies potentially sounding in negligence, and that the Products and Completed Operations Exclusions were clear and unambiguous, such that they relieved the insurers from the duty to defend or indemnify the companies.



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