

Mixed Opioid Suit Rulings Complicate Disputes For Coverage

By Abraham Gross

Law360 (October 24, 2024, 2:50 PM EDT) -- Litigation against manufacturers and distributors of opioid products for their role in nationwide opioid deaths has pitted policyholders against insurers, and mixed rulings in the last year offer unclear signs of how general liability or specialty line policies will afford coverage.



Several experts told Law360 they were closely watching the ongoing appeal of the Arkansas Walmart case as a potential trendsetter. Both Walmart and the insurers have briefed the appeals court and requested oral arguments in the case. (AP Photo/Cedar Attanasio)

Courts across the country have arrived at different conclusions over the similar question of whether opioid litigation constitutes an occurrence of a covered physical injury or property damage under commercial general liability policies, clouding recovery possibilities under those policies even as policyholders explore other, more limited options.

The case law offers insurers and policyholders some guide to how to navigate coverage disputes and the various aspects of opioid claims that can prove determinative, but with such different outcomes, experts cautioned against drawing a clear inference about how ongoing and new cases will shake out.

"You really have a wildly divergent set of judicial rulings that are more or less looking at the same allegations, more or less the same policy language, and coming to wildly different results," said Matthew

Chiricosta of Calfee Halter & Griswold LLP, who represents policyholders.

Last December brought a high-profile win for policyholders seeking CGL coverage when an Arkansas state court ruled that Walmart was **owed a defense** for government suits because they were initiated "because of" bodily injury, which constituted an occurrence under the policy.

By contrast, an August decision from a Delaware court **denied CVS' request** for general liability coverage for over 200 opioid-related suits that, in the court's view, involved claims of economic harm rather than covered claims of bodily injury or property damage.

The claims share a striking similarity: an opioid distributor seeking coverage for government-led suits under similarly worded CGL policies issued, in part, by AIG. The difference, according to Thomas Breen of Mound Cotton Wollan & Greengrass LLP, who represents carriers, may lie in Walmart's settlement of one suit, which paid governments for opioid treatments.

"There's an undercurrent of thought there that the courts were persuaded by the fact that, yes, these cases do arise 'for' or 'because of bodily injury' because you can see from the settlement that the settlement funds are being used to treat these people," he told Law360.

The Seventh Circuit's 2016 decision in *H.D. Smith v. Cincinnati Insurance* concluded that coverage **applied to a government suit** against an opioid wholesaler, reasoning that medical expenses incurred by states are covered bodily injuries no different from that of a mother's medical expenses for a drug-using child.

Still, the differing decisions give some instruction as to how different jurisdictions may rule.

The Delaware decision, for example, built off a **January 2022 ruling** from the state's Supreme Court in *Ace American Insurance Co. v. Rite Aid*, which similarly found that suits brought by three Ohio counties could not constitute claims "because of" bodily injury. Consequently, thousands of lawsuits were dropped or dismissed from CVS' coverage disputes with its insurers.

"Basically in Delaware, it's clear that there is no coverage for the settlements and or defense fees that were incurred by the distributors in connection with the opioid crisis," Breen said.

Similarly, insurer wins at the **Ohio Supreme Court** in 2022 and the **Sixth Circuit above it** in 2023 likely make the possibility of CGL coverage for opioid suits in Ohio an uphill climb.

Other jurisdictions have yet to rule definitively on the core issue. A Ninth Circuit decision in January that **freed insurers** from covering drug distributor McKesson Corp.'s alleged involvement in the opioid crisis **limited its own reach** by leaning on a California state appeals court's unpublished ruling for support.

That decision raised the prospect of courts ruling against coverage on another basis: that certain opioid claims alleged manufacturers or distributors engaged in deliberate conduct that failed to meet the definition of a covered occurrence.

"The carriers are saying we rely on the very, very basic language of our policy that, on the most elementary level, covers property damage and bodily injury resulting from an accidental occurrence," Breen said.

He added that disputes over whether opioid claims constituted an occurrence presented more varied rulings, as companies could argue that they did not foresee all the injuries to individual patients even if they intended to sell or distribute opioids.

Meanwhile, the Eleventh Circuit agreed with a Hartford unit and an Alabama federal judge that opioid drugmaker KVK-Tech Inc. **failed to provide timely notice** of its suits, ending its bid for coverage early.

With diverging court rulings clouding the road to coverage under CGL policies, policyholders are exploring other paths to recovery using professional liability policies that afford directors and officers coverage or errors and omissions coverage.

For policyholder attorney Kristin Davis of Thompson HD, the quest for broader coverage reflects, in part, the diversifying nature of the opioid-related claims and the persons and entities they target.

"This whole kitchen-sink nature of claims that are being thrown at the manufacturing/distributing clients comes with additional policies that are meant to respond to allegations of misconduct in that regard," she said. "As the underlying suits are evolving, the risk is evolving and the type of policy that responds to certain risks changes."

Besides offering an additional avenue of coverage, D&O or E&O policies have the benefit of extending coverage for certain individuals in addition to the company and can often include investigation costs, she noted.

An October 2023 decision by a North Carolina court offered a hopeful sign to policyholders. There, the court allowed a drug wholesaler to tap into its **full \$10 million D&O policy** to cover opioid-related public nuisance claims, rejecting the insurer's arguments that a contract exclusion and professional services exclusion applied.

D&O policies, however, offer a limited coverage lifeline.

Calfee Halter's Chiricosta noted that defense costs erode policy limits. For companies facing hundreds or thousands of expensive, complex opioid-related suits, taking that path to coverage could amount to a long walk off a short pier.

"For the big targets in these cases, I'm sure that they're spending those amounts in eye-poppingly quick fashion," he said. "Once you waste away your policy on your defense costs, you're done; you've got no more defense coverage and no dollars left to pay any settlements or judgments."

Still, broader CGL coverage is not a foregone conclusion, despite several high-profile insurer victories.

Several experts told Law360 they were closely watching the ongoing appeal of the Arkansas Walmart case as a potential trendsetter. Both Walmart and the insurers have briefed the appeals court and requested oral arguments in the case.

"I think that could set the stage for the next wave of battles here," Chiricosta said.

As for other policies, Davis of Thompson HD said that insurers were stretching exclusions to apply in ways that weren't originally intended, putting the onus on the insurance industry to create more specific exclusions. It also created opportunities for policyholders.

"It's kind of a round-peg, square-hole situation, and it's in that situation in particular that policyholders are able to find the coverage that they need," she said. "I don't think that we have seen the end of this litigation."

--Additional reporting by Shane Dilworth, Eli Flesch, Daniel Tay, Ganesh Setty, Emily Field, Jennifer Mandato and Travis Bland. Editing by Bruce Goldman.