The Opioid Crisis: Litigation Comes for Corporate Officers and Directors

Insurance Recovery, Litigation & Counseling Alert

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Litigation related to the opioid crisis is on the rise, and now corporate shareholders are entering the fray. In recent months, shareholders have brought a number of lawsuits against opioid manufacturers and distributors, as well as their directors and officers. These shareholder suits open a new front in opioid litigation, joining dozens of already pending cases brought by states, counties, and municipalities against manufacturers and distributors. As opioid litigation expands in new directions and subjects companies and their executives to financial risk and expense, now is the time for entities and individuals to review their insurance coverage and shore up their protection.

In 2012, the state of West Virginia sued certain opioid distributors, alleging violation of consumer protection laws. Since then, states, counties, and municipalities have brought a growing wave of lawsuits seeking to recover from manufacturers and distributors the steep costs of responding to the opioid crisis. Allegations range from varying forms of negligence, to violation of consumer protection statutes, to violation of the False Claims Act. Manufacturers and distributors have understandably called on their general liability insurance carriers to share the burden of defending these suits. But at least some insurers pushed back, and opioid-related insurance coverage disputes have begun to wend their way through the courts, with some conflicting results. One court, for example, concluded that West Virginia's lawsuit asserted claims "because of bodily injury" – requiring the insurer to provide coverage – while another reached the opposite conclusion.

With coverage under general liability policies still relatively untested for these exposures, the recent spate of securities suits undoubtedly will present new issues under a different set of insurance contracts: Directors and Officers (D&O) policies. Some of the recent suits allege that officers and directors of opioid distributors failed to monitor the size and frequency of shipments and report aberrations to the Drug Enforcement Administration, resulting in civil fines or other liabilities. Other suits claim that the defendant companies, and certain officers and directors, made materially false public statements regarding the company's opioid practices, resulting in drops in share price when misstatements were corrected or drugs were withdrawn from the market in response to FDA pressure.

D&O policies are intended to protect directors, officers, and often the company itself against allegations of wrongful conduct, including claims grounded in breach of duties, neglect, error, misstatements, misleading statements, and other omissions or acts. D&O insurers often attempt to defeat or limit their coverage obligations by citing policy provisions such as:

- **Bodily injury exclusions:** which may preclude coverage for loss arising from certain bodily injury-related claims.
- **Conduct exclusions:** which may exclude coverage for loss relating to certain types of conduct, such as fraudulent or criminal misconduct, or illegal profits or remuneration. Fortunately, proactive policyholders can place conditions on this exclusion so that it is triggered only when the conduct in question has been "adjudicated" by the court in the context of the underlying claim.
- **Imputation of knowledge provisions:** which address when one director's or officer's conduct – such as excluded fraudulent conduct – may be attributed to another director or officer, or to the insured entity.
- **Related claims/interrelated wrongful acts provisions:** which may treat certain "related" or "interrelated" acts or events as a single claim. Insurers frequently cite these provisions to attempt to push claims out of their policy period, reduce the limits available, or dispute the policyholder's timely notice.

Although many D&O policies contain provisions falling under the broad umbrellas identified above, even small differences in policy language can be critical. For that reason, it is essential for corporate policyholders to act now. Any entity that may be impacted by an opioid-related suit should immediately review its D&O policies to understand the coverage it has – and take steps to secure the coverage it needs. McCarter & English's Insurance Coverage team has extensive experience in reviewing, negotiating, and improving D&O insurance policies. We can undertake a privileged and confidential review of your insurance program's coverage, and facilitate underwriting discussions with brokers and insurers to improve your D&O policies. If your company is concerned about potential opioid liabilities, we are here to help.