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Insurance Language Lesson From An Opioid Ruling

By **Vivian Bickford and Caroline Meneau** (June 16, 2021, 5:43 PM EDT)

Vivian Bickford

Caroline Meneau

Last month, the U.S. District Court for the Western District of Kentucky issued an important decision in Motorists Mutual Insurance Company v. Quest Pharmaceuticals Inc., holding that lawsuits by state governments for damages caused by the opioid epidemic were not because of bodily injury and, therefore, there was no coverage under the drugmaker's commercial general liability policies.[1]

In so holding, the Kentucky district court distinguished the U.S. Court of Appeals for the Seventh Circuit's 2016 ruling in Cincinnati Insurance Co. v. H.D. Smith LLC, which reached the opposite outcome.[2]

In light of these competing rulings, policyholders should continue to pay close attention to the language in their general commercial liability, or GCL, policies. Policyholders should also pay attention to how courts in their jurisdiction treat "because of" language and potentially seek out "arising out of" language instead.

The Motorists ruling arose from an insurance coverage dispute in which Quest sought coverage from its insurance provider, Motorists Mutual Insurance Company, after being sued in 77 lawsuits by various plaintiffs, including cities, counties, private health clinics and health departments, seeking to recover damages alleged to have been incurred as a result of Quest's improper distribution of opioids.

Quest's commercial general liability and umbrella insurance policies included coverage for covered occurrences that are because of bodily injury. The policies define "[d]amages because of 'bodily injury [to] ... include damages claimed by any person or organization for care, loss of services, or death resulting at any time from the 'bodily injury.'"

Motorists argued that the plaintiffs in the underlying lawsuits against Quest were not seeking damages because of bodily injury and therefore Motorists had no obligation to defend Quest in the underlying lawsuits.

Quest, on the other hand, argued that courts construe "because of" policy language with similar breadth as "arising out of" policy language, that the plaintiffs would not have suffered damages absent the

bodily injury suffered by individuals affected by the opioid epidemic, and therefore the plaintiffs in the underlying litigation were seeking damages because of bodily injury.

In making this argument, Quest relied on the Seventh Circuit precedent that analyzed identical policy language in an analogous situation and on Kentucky precedent analyzing policies with "arising out of" language. Ultimately, the court agreed with Motorists and granted summary judgment in its favor.

The court began its analysis by declining to consider the precedent cited by Quest. First, the court reasoned that the Seventh Circuit's interpretation of identical policy language was not binding because the Seventh Circuit applied Illinois law in its decision. Second, the court reasoned that the Kentucky precedent Quest cited was inapposite because it considered "arising out of" policy language rather than "because of" policy language.

Instead, the court looked to Kentucky Supreme Court precedent in Kentucky Central Insurance Co. v. Schneider,[3] a 2000 case apparently cited by neither party, in which the Supreme Court analyzed policy language covering damages sustained from an uninsured motorist "because of 'bodily injury.'" There the Kentucky Supreme Court treated "damages for bodily injury" as interchangeable with "damages because of bodily injury," defining the former as:

compensatory damages and includ[ing] the expense of cure, value of time lost, fair compensation for physical and mental suffering caused by the injury, and for any permanent reduction of the power to earn money.[4]

Applying this definition, the Kentucky Supreme Court held that the policy's "because of bodily injury" language did not cover a punitive damages award against the uninsured motorist, as such damages are not damages for bodily injury but rather are intended to deter and punish.

With this precedent as its guide, the Kentucky district court read Quest's "because of bodily injury" policy language to cover only damages for bodily injury, and declined to give it the broader reading given to "arising out of" policy language.

The court then looked to precedent cited by Motorists — an analogous case involving identical policy language, the 2014 Western District of Kentucky case, Cincinnati Insurance Co. v. Richie Enterprises LLC. Pharmaceutical drug distributor Richie was seeking insurance coverage for a lawsuit brought by West Virginia, relating to Richie's involvement in the opioid epidemic.[5]

Although Richie argued that the court should interpret the phrase "because of bodily injury" more broadly than the phrase "for bodily injury," the court disagreed. The court ruled that because West Virginia did not need to prove that persons were injured by prescription drugs to make its case, Cincinnati did not have a duty to defend Richie in the lawsuit.

The court further noted that:

West Virginia is not seeking damages "because of" the citizens' bodily injury; rather, it is seeking damages because it has been required to incur costs due to Richie and the other drug distribution companies' alleged distribution of drugs in excess of legitimate medical need. This distinction, while seemingly slight, is an important one.

The Motorists court, like the Richie court, found that the plaintiffs in the underlying lawsuits were not seeking damages for or because of bodily injury because the plaintiffs did not need to prove that its

citizens or patients experienced any bodily injury in order to make their case.

Based on the above precedent, the Motorists court held that Motorists had no duty to defend or indemnify Quest under the insurance policy.

Quest, on the other hand, relied on the Seventh Circuit's decision in Cincinnati v. Smith.[6] The Motorists court made clear that it would not consider the Seventh Circuit approach in Smith because the precedent relied on in Smith applied Illinois law. The Smith court considered a case identical to Motorists and Richie but reached the opposite conclusion.

There, H.D. Smith, a pharmaceutical distributor, sought coverage from its insurance carrier, Cincinnati, for a lawsuit it was facing from West Virginia relating to its involvement in the opioid epidemic. Like in Motorists and Richie, Smith's insurance policy with Cincinnati covered damages "because of bodily injury."

The Smith court held that "[s]uch a policy provides broader coverage than one that covers only damages 'for bodily injury'" and found that Cincinnati had a duty to defend Smith. The court largely based its decision on the following example:

Suppose a West Virginian suffers bodily injury due to his drug addiction and sues H.D. Smith for negligence. Cincinnati's counsel acknowledged that such a suit would be covered by its policy. Now suppose that the injured citizen's mother spent her own money to care for her son's injuries. Cincinnati's counsel acknowledged that her suit would be covered too — remember the policy covers "damages claimed by any person or organization for care ... resulting ... from the bodily injury."

The mother's suit is covered even though she seeks her own damages (the money she spent to care for her son), not damages on behalf of her son (such as his pain and suffering or money he lost because he missed work). Legally, the result is no different merely because the plaintiff is a state instead of a mother.

The court explained that like the mother in the above example, West Virginia seeks reimbursement of "damages and losses sustained as the proximate result" of Smith's negligence, so West Virginia's lawsuit should similarly be covered by the policy.

The above cases are just a few notable examples of opioid-related insurance disputes, but there are dozens of similar cases pending with billions of dollars at issue. Accordingly, it is important for policyholders in the drug development and distribution industries to be alert to the above issues as well as other issues that might affect their insurance coverage in lawsuits arising out of the opioid epidemic.

For instance, in response to these lawsuits, the insurance industry has developed opioid endorsements and exclusions to preclude coverage for such lawsuits. Policyholders in this industry should be mindful of these exclusions when shopping policies.

Of course, in some situations an insurer's duty to defend may depend on factors outside the policyholder's control. For example, an insurer's duty to defend pursuant to a general commercial liability policy may depend on the language of the underlying complaint. In the opioid context, where courts are inclined to interpret "because of bodily injury" interchangeably with "for bodily injury," coverage may depend on whether the plaintiffs seek damages for bodily injury in addition to economic damages.

For example, in Richie, West Virginia initially sought damages for a medical monitoring program that it created in response to the opioid epidemic, in addition to economic damages. The court held that costs relating to the medical monitoring program were damages "for bodily injury," which triggered Cincinnati's duty to defend.

However, when West Virginia amended its complaint to remove the count relating to the medical monitoring program, the court found that Cincinnati no longer had a duty to defend because the plaintiffs no longer sought damages "for bodily injury."

Where coverage for opioid-related lawsuits is precluded under a general commercial liability policy, policyholders may look to their directors and officers policy for potential coverage. However, this is less likely to be a viable option where the complaint alleges bodily injury along with economic damages, as D&O policies are typically limited to economic damages.

In addition, D&O policies often contain exclusions for intentional misconduct. Accordingly, to the extent the underlying complaint alleges intentional or fraudulent conduct, obtaining coverage under a D&O policy may be more difficult.

Insurance disputes arising out of opioid-related lawsuits provide lessons for policyholders even beyond the opioid context. First, policyholders should be mindful of the bodily injury coverage in their general commercial liability policies. In general, it may be advantageous to seek out "arising out of" rather than "because of" language, because it may be construed to provide broader coverage. Policyholders should also look at the definition of "bodily injury" in their policies and seek out broad definitions.

Second, policyholders should be aware of exclusions in their policies. Finally, policyholders should track how their insurer has handled past litigation involving significant general commercial liability matters.

Vivian Bickford is an associate and Caroline Meneau is a partner at Jenner & Block LLP.

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[1] Motorists Mut. Ins. Co. v. Quest Pharms. Inc., No. 5:19-cv-00187-TBR, 2021 U.S. Dist. LEXIS 86071 (W.D. Ky. May 5, 2021).

[2] Cincinnati Insurance Co. v. H.D. Smith LLC, 829 F.3d 771 (7th Cir. 2016).

[3] Kentucky Central Insurance Co. v. Schneider, 15 S.W.3d 373 (Ky. 2000).

[4] 15 S.W.3d at 376.

[5] Cincinnati Ins. Co. v. Richie Enterprises LLC, No. 1:12-CV-00186-JHM, 2014 WL 3513211 (W.D. Ky. July 16, 2014).

[6] Cincinnati Insurance Co. v. H.D. Smith L.L.C., 829 F.3d 771 (7th Cir. 2016).