



## California's Highest Court Set to Rule on Insurer's Duty to Defend Lawsuits Relating to the Opioid Crisis by Geoffrey Miller and Andrew Heckler\*

The extreme cost and harm of the opioid crisis in the United States is well-documented, and the California Supreme Court is set to decide if insurance coverage is in play for many related lawsuits. Courts across the country have seen an influx of lawsuits filed against pharmaceutical companies for their role in the ongoing epidemic. The allegations have come from all over and in many forms, from wrongful death and personal injury claims to products liability and derivative suits. A number of pharmaceutical company defendants have requested coverage from their insurers and have been met with denials. Coverage disputes ensued, and in 2017 the California Court of Appeal issued one of the first decisions on the issue in Traveler's Prop. Cas. Co. of Am. v. Actavis, Inc.<sup>1</sup> The court concluded that Travelers had no duty to defend the pharmaceutical company where the subject of the underlying complaint was only intentional conduct. The California Supreme Court will hear the appeal in 2018.

In 2014, Santa Clara and Orange Counties brought a lawsuit against "Watson"<sup>2</sup> alleging, among other things, that the company was engaged in a "scheme of deception" to sell its opioid products.<sup>3</sup> According to the complaint, Watson ignored clear evidence of the addictive qualities of its products and initiated an aggressive marketing scheme to incentivize doctors to prescribe opioids in inappropriate circumstances. These practices allegedly contributed to the severe heroin and opioid epidemic that the United States faces today. Watson tendered the claim to its liability insurer, Travelers, who subsequently denied the claim because it did not allege an "accident" and because a Products and Completed Work exclusion applied.

The Court of Appeals first considered the question of whether the allegations could be deemed "accidental" and thus trigger coverage. The court noted that a duty to defend exists if the language of the complaint suggests a mere possibility of coverage. The court then concluded that there was no possibility of coverage and no corresponding duty to defend: "Because the [underlying complaints] allege that Watson engaged in deliberate conduct, there could be no insurable 'accident' under the policies unless 'some additional, unexpected, independent, and unforeseen happening' produced the injuries for which the complaints seek a remedy." Since the injuries were not "unexpected" or "unforeseen," Travelers had no duty to defend Watson. The court was clear to distinguish similar cases out of West Virginia and Kentucky, noting that the complaints in those cases were different in substance and that the law regarding an insurer's duty to defend in those states is less stringent than that of California.

The court also held that the Products Exclusion barred coverage. This exclusion eliminates coverage for bodily injury "arising out of... [a]ny goods or products... manufactured, sold, handled, distributed or disposed of by... you." According to the court, it was clear that the alleged injuries arose directly out of Watson's products, and coverage was accordingly excluded from the policy.

Watson appealed, and on February 21, 2018, the California Supreme Court granted review of this decision. The decision will have a significant impact on both the insurance and public health sectors. For one, the ruling will provide clarity to both insurers and insureds on what constitutes an "accident" under California law. The decision will also be one of the few appellate decisions so far on this issue, providing a persuasive holding and rationale for courts considering similar cases across the country. Ultimately, the determination of insurance coverage for pharmaceutical companies should have a significant impact on the behavior of these companies and on the opioid crisis as a whole.

SDV will keep you updated as this case heads to the California Supreme Court this year.

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<sup>1</sup> Traveler's Prop. Cas. Co. of Am. v. Actavis, Inc., 16 Cal. App. 5th 1026 (Ct. App. 2017), review granted (Feb. 21, 2018).

<sup>2</sup> "Watson" is the term used by the court to describe a conglomerate of the following companies: Actavis, Inc., Actavis LLC, Actavis Pharma, Inc., Watson Pharmaceuticals, Inc., Watson Laboratories, Inc., and Watson Pharma, Inc. All parties were named as defendants in the suit.

<sup>3</sup> A nearly identical suit was filed by the City of Chicago and is discussed in tandem with the present complaint.