A TOUGH PILL TO SWALLOW FOR INSURERS – SEVENTH CIRCUIT FINDS DEFENSE OWED FOR STATE'S PRESCRIPTION DRUG SUIT

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The U.S. Court of Appeals for the Seventh Circuit recently held in *Cincinnati Ins. Co. v. H.D. Smith, LLC*,[1] that a general liability insurer's duty to defend suits seeking damages "because of bodily injury" was triggered when the state of West Virginia sued a pharmaceutical distributor, alleging it had contributed to an epidemic of prescription drug abuse, causing the state to spend money to care for addicted citizens.

Background

H.D. Smith, LLC, is a pharmaceutical distributor operating in West Virginia. The state of West Virginia sued H.D. Smith and others seeking to hold them liable for contributing to the state's epidemic of prescription drug abuse. Certain pharmacies, known as "pill mills," allegedly are providing citizens with hydrocodone, oxycodone, codeine, and other prescription drugs to profit from those citizens' addictions. According to the state, H.D. Smith acted negligently and recklessly by filling unusually large orders for these drugs from these pill mill pharmacies because it should have known the drugs were being used for illicit purposes. West Virginia sought damages for amounts it spent caring for citizens injured by drug use.

H.D. Smith was insured under a general liability policy issued by Cincinnati Insurance Company ("Cincinnati"). Under the policy, Cincinnati agreed to defend H.D. Smith against suits seeking damages "because of bodily injury," which included "damages claimed by any person or organization for care, loss of services or death resulting at any time from the bodily injury." H.D. Smith asked Cincinnati to defend the suit. Cincinnati declined to do so and sought a declaration in federal court that it had no duty to defend H.D. Smith. The court awarded summary judgment to Cincinnati, finding that West Virginia did not seek damages "because of bodily injury," as required for coverage. H.D. Smith appealed.

Holding

On appeal, the court held that Cincinnati had a duty to defend because the damages sought by West Virginia were, in part, "because of bodily injury," and therefore within the scope of the policy's coverage. Cincinnati argued that West Virginia's damages were not within the policy's coverage because they represented the state's own losses and not damages on behalf of injured citizens. The court rejected this argument, finding that it was "untethered to any language in the policy." The court found that the language "*because* of bodily injury" in the Cincinnati policy, was broader than coverage that applies only to damages "*for* bodily injury." The court illustrated this distinction by referring to another case where an individual sought, as damages, costs for making his house wheelchair accessible after being injured in a car accident. The court had explained in that case that if the policy covered only damages "for bodily injury," these costs would not be covered and there would be no duty to defend. But where the policy covered damages "because of bodily injury," the insurer would be obligated to defend. Applying this reasoning to the instant case, the court required Cincinnati to defend H.D. Smith because the costs West Virginia had incurred were "because of bodily injury" to its citizens.

Implications

Cincinnati illustrates that the general liability policy's defense coverage is not to be read narrowly; rather, the causal connection between the damages alleged and any "bodily injury" to which they relate can be quite attenuated and still be sufficient to trigger a defense. Thus, simply because a lawsuit seeks damages not directly related to the injury sustained should not stand as an impediment to coverage. The decision also is a reminder that subtle variations in policy language can mean the difference between a defense for an entire lawsuit and no defense at all. Policyholders should carefully review policy language, even in provisions that appear formulaic, and not accept insurers' interpretations at face value. Further, policyholders should actively seek policy forms with more favorable policy language to maximize their risk protec-

tion when deciding on a general liability policy, or any other type of policy. Experienced coverage counsel can evaluate policy language at both the renewal stage and after a claim arises to identify the scope of coverage available.

Note

[1] No. 15-2825 (7th Cir. July 19, 2016).

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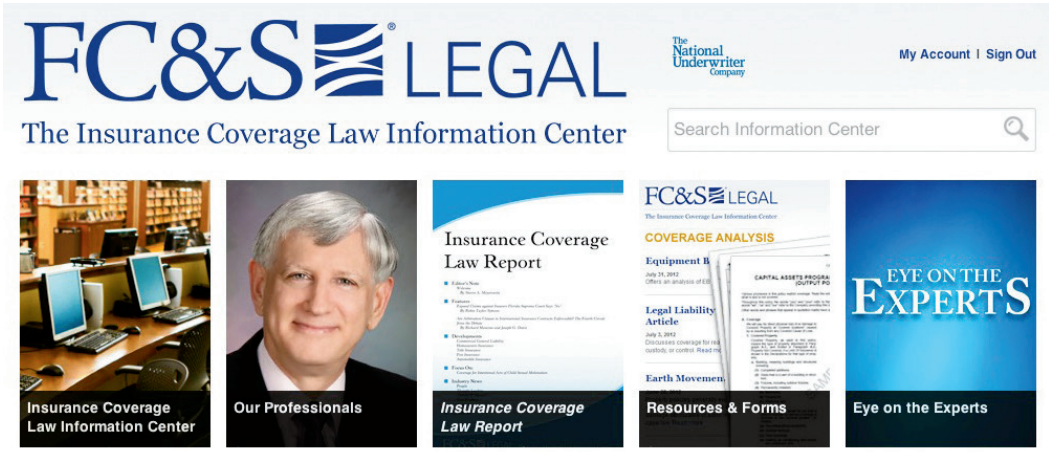

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