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### **The Opioid Epidemic: Trending Insurance Coverage Issues**

The “opioid epidemic” has impacted communities in all 50 states, without regard for age, race or economic status. To date, over 1,900 lawsuits have been filed nation-wide alleging damages incurred over a number of years. These lawsuits are seeking to recover for increased costs allegedly incurred by state, county and municipal governments, hospitals and health insurance benefit payors against every link in the opioid supply chain. Many of these cases have been consolidated in a federal multi-district litigation pending in the Northern District of Ohio.

Deaths due to prescription opioids have increased immensely. In 2017, opioid-prescription related deaths was five times higher than in 1999. Lawsuits are being filed daily to hold manufacturers, distributors, retailers, pharmacists and providers responsible.

These matters do not seem to fall under any specific line of insurance and, due to the magnitude of the potential losses, insureds are likely to seek coverage across their entire insurance program. Insurers should be aware of this non-inclusive array of coverage issues.

- Do the allegations in the lawsuits give rise to a duty to defend?
- Should these lawsuits be covered under a policy’s insuring agreement as an “occurrence” resulting in a “bodily injury?”
- Should coverage for these actions be barred under policies that contain products or intentional conduct exclusions?

Injury caused by an “accident.” In several cases, insurers have argued that the conduct and harms alleged in the opioid lawsuits result from intentional acts on the part of defendants—not “accidents.” Some courts addressing these arguments have

recognized that the opioid lawsuits allege, or at least potentially involve, negligent conduct, which is sufficient to trigger an insurer's duty to defend the suits. However, at least one court has ruled that the alleged conduct was intentional and therefore not an "accident."

Damages because of "bodily injury." The majority of opioid lawsuits to date have been initiated by states, counties, and cities. Those lawsuits seek to recover increased costs the government entities allegedly have incurred as a result of opioid addiction—e.g., costs associated with diagnosis and treatment of opioid addiction and overdose, increased law enforcement and police operations, and higher demands on hospitals, emergency rooms, and prisons. Insurers have argued that the state and municipal plaintiffs do not seek damages "because of bodily injury," but rather seek damages solely for harms. The small number of decisions from courts on this issue have not been consistent—some have favored the policyholder, others have favored the insurer. The only appellate court to have reached the issue to date, however, sided with the policyholder, holding that the insurer was obliged to defend a wholesale distributor against a suit brought by West Virginia because the state sought reimbursement for damages incurred, at least in part, because of bodily injury to its residents. The policy language in question is likely key to the determination of whether damages because of "bodily injury" are alleged.

Other exclusions. Some CGL policies have additional terms that insurers may contend exclude coverage for opioid-related lawsuits. For example, a few recent court decisions considered CGL policies that expressly excluded coverage for bodily injuries arising out of the policyholder's products and/or representations about its products. Exclusions such as these—present in some but not all policies—highlight the need for policyholders to review carefully the language in their insurance contracts, both when purchasing coverage and at the point of claim.

The insurance coverage issues presented by opioid litigation are complex and, in many instances, unsettled. Courts will need to continue to grapple with issues regarding bodily injury, accident and whether specific exclusions apply.

The insurance industry is confronted with analyzing and investigating current claims, and developing and implementing new policy provisions to address these risks going forward.

