

Ruling Favoring Insurers In Opioid Suits May Set Precedent

By **Shane Dilworth**

Law360 (April 6, 2022, 8:18 PM EDT) -- A California federal judge's ruling on Tuesday that relieved AIG and a Chubb unit of defending McKesson Corp. in three opioid epidemic lawsuits will have a nationwide impact and could make the state a dead jurisdiction for similar coverage disputes, legal experts say.



A federal judge found that McKesson Corp.'s overdistribution of opioids led to the foreseeable diversion of the prescription painkillers for illegitimate use, and therefore AIG and a Chubb unit have no duty to defend the company. (AP Photo/Mark Lennihan)

U.S. District Judge Jacqueline Scott Corley, who was appointed to the position on March 30, held that McKesson's overdistribution of opioids led to the foreseeable diversion of the prescription painkillers for illegitimate use.

As a result, she found that the increased costs incurred by state and local governments stemming from the opioid epidemic were not an accident that would have been covered under umbrella policies issued by AIG units National Union Fire Insurance Co. of Pittsburgh, Pennsylvania, AIU Insurance Co. and Chubb arm ACE Property & Casualty Insurance Co.



"McKesson's alleged conduct facilitated diversion in ways that made it expected and foreseen as a matter of law: McKesson allegedly shipped more opioids than could have been legitimately used, routinely and over a period of years," Judge Corley wrote.

The decision frees the insurers from paying the more than \$230 million McKesson has racked up so far in defending more than 3,200 similar suits proceeding in Ohio federal court.

No Accident

Judge Corley's ruling is a first-of-its-kind decision in the Golden State since it involves an opioid distributor and whether the overdistribution of a prescription painkiller resulted in the accidental diversion of a medication.

Raymond Tittmann of TittmannWeix told Law360 that Judge Corley's ruling is significant and may drive the future of opioid coverage in California and nationwide. The threshold question in opioid coverage disputes, he explained, is whether there is an occurrence and Judge Corley found that diversion of the prescription painkiller based on the amount distributed by McKesson was not unexpected.

Tittmann, who represents insurers and is not involved in the present case, pointed out that in [Travelers Prop. Cas. Co. of Am. v. Actavis Inc.](#) , a California appeals court also found that an opioid manufacturer's sale of the painkiller was not an accident that constituted an occurrence. The California Supreme Court's ruling in [Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co.](#) , however, cast some doubt on the value of the Actavis decision since it found that an occurrence can be based on a subsequent unexpected happening. This ruling, he elaborated, "locks in" the precedential value of the Actavis decision.

"Judge Corley's analysis addresses both decisions carefully and finds that the Actavis ruling survives Ledesma, and remains good law," he explained.

The combination of the three rulings, he went on to say, creates some "pretty strong headwinds" for carriers, and he expects that policyholders would avoid litigating similar opioid coverage disputes in California. The decisions could also teach plaintiffs how to craft complaints that will plead into coverage, Tittmann said.


'Because Of'

Judge Corley also reached an interesting conclusion on the question of whether the damages sought by two Ohio counties and the state of Oklahoma, which were cited as exemplar cases in the proceedings, arose "because of" bodily injuries.

Whether a government's increased infrastructure costs are caused "because of" bodily injuries and are thus covered by insurance is a key argument in disputes between carriers and opioid wholesalers and distributors. Insurers contend that the governments themselves have not sustained bodily injuries and that the damages are simply economic losses that are not entitled to coverage.

Judge Corley disagreed with AIG units and Chubb, saying that the "policies nevertheless provide that damages because of bodily injury can include damages claimed by an organization," such as a local government.

Rite Aid Ruling

The judge was not persuaded that the Golden State high court would agree with the Delaware Supreme Court's Jan. 10 decision in [ACE American Insurance Co. v. Rite Aid Corp.](#) , which found that three Chubb units had no duty to defend similar suits brought against the pharmacy by two Ohio counties.

In Rite Aid, a 4-1 majority found that the economic damages sought by the local governments were not covered since they did not occur "because of" bodily injuries to individuals who became addicted to or overdosed on opioid medications. The ruling reversed a trial court's finding that the suits were covered by a 2015 commercial general liability policy issued to Rite Aid.

The First State majority narrowly construed the policy language to find that damages for bodily injury were only covered when they are asserted by the injured person, a person seeking damages on behalf of the injured person or people or organizations that treated injured or deceased persons that demonstrate the cause of the injuries.

Judge Corley noted that the policy language in the present case and the policy language in Rite Aid was

"materially identical." She agreed with the dissenting judge's opinion in Rite Aid that applied a broader interpretation of the policy language.

"Nothing in the policy language limits coverage to claims asserted by the person injured, a person recovering on behalf of the person injured, or an organization that treated the person injured and demonstrates the existence and cause of the 'specific' injuries," Judge Corley wrote. "Rather, the policies cover damages claimed by an organization for care resulting at any time from the bodily injury."

Paul A. Rose of Brouse McDowell told Law360 that he found it interesting that Judge Corley concurred with the dissenting opinion in Rite Aid, which he said, "was much more analytically sound."

Rose, who represents policyholder Masters Pharmaceuticals Inc., in an opioid coverage dispute currently being deliberated by the Ohio Supreme Court went on to say that many of the judge's findings are consistent with the arguments raised by the now out-of-business drug wholesaler before the Buckeye State high court justices.

TittmannWeix's Tittmann acknowledged that Judge Corley's opinion was well-thought-out and noted that reaching such a decision is heavily dependent on how allegations in the underlying complaints are framed.

Increased Costs

AIG and Chubb have refused to defend McKesson in the actions brought by local governments seeking to recover the increased costs in responding to crime, overdoses and deaths caused by the opioid epidemic. The plaintiffs in the underlying disputes accuse McKesson of contributing to the epidemic by not failing to take sufficient steps to ensure that the prescription painkillers were being dispensed for legitimate purposes. The insurers say the suits do not involve occurrences that are covered by their policies.

The AIG units asked Judge Corley for a ruling affirming their refusal to defend McKesson in October 2020 and the distributor filed a third-party action against Chubb. In the complaint, AIG identified three exemplar cases, two suits filed by counties in Ohio and one filed by the Oklahoma attorney general, that encapsulate the allegations in the suits.

The parties later **filed** competing motions for partial summary judgment regarding the duty to defend last May. Judge Corley held a hearing on the motions on Jan. 27.

AIG declined to comment on the ruling. Chubb said the company does not comment on legal matters.

McKesson and counsel for the parties did not respond on Wednesday to requests for comment.

AIG is represented by Richard J. Doren, Matthew A. Hoffman and Madeline F. McKenna of Gibson Dunn & Crutcher LLP and by Christopher J. St. Jeanos and Jocelyn Sher of Willkie Farr & Gallagher LLP.

McKesson is represented by Gretchen A. Hoff, Anna Engh, Shannon Tucker, David Lutinger and Clea P.M. Liguard of Covington & Burling LLP.

Chubb is represented by Susan Rebecca Koehler Sullivan, Brett Charles Safford and Robert M. Mangino Jr. of Clyde & Co. US LLP and by Michael Steven Shuster, Blair Eden Kaminsky, Daniel Marc Horowitz, Daniel Martin Sullivan, James M. McGuire and Margaret Barringer Hoppin of Holwell Shuster & Goldberg LLP.

The case is AIU Insurance Co. et al. v. McKesson Corp., case number 3:20-cv-07469, in the U.S. District Court for the Northern District of California.

--Additional reporting by Daphne Zhang. Editing by Amy Rowe.