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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Fortuity Rules May Incite Coverage Row Over Opioid Lawsuits

By **Monica Sullivan and Jodi Green** (August 7, 2018, 4:22 PM EDT)

Monica Sullivan

Jodi Green

At the heart of every form of liability insurance is the concept of fortuity. Unlike life insurance, which accepts the certainty of loss from the policyholder's ultimate demise, liability insurance protects only against unforeseen risks. This leaves no room for a fait accompli, and as such liability insurance will not cover a loss that was known to the insured or certain to occur before the policy period commenced. While the notion itself seems simple, it is deceptively so. In practice, it is one of the most complex coverage concepts to apply because of its fact-intensive nature.

Because fortuity is a fundamental principle of insurance coverage, insurance policies are rife with terms and exclusions deriving from that concept. Familiar questions found in most insurance applications require the putative insured to acknowledge the existence of claims or circumstances that may lead to a future claim. It is hardly surprising then, that a policyholder's failure to disclose known claims or circumstances can be fatal to coverage under the common law known loss doctrine, as well as under policy exclusions and endorsements excluding coverage based on prior knowledge, prior litigation and known circumstances.

Typical exclusions in general liability policies preclude coverage for bodily injury that has occurred, in whole or in part, prior to the policy's inception date. Claims-made policy exclusions, found in professional liability or directors and officers coverages, may eliminate coverage for any known claim or circumstance that the policyholder could have reasonably foreseen would lead to a claim prior to the policy period. Likewise, similar exclusions found in the typical Bermuda form state that the policy does not afford coverage for previously notified occurrences or claims, and known occurrences, such as:

> Any Occurrence, including any Batch Occurrence, Integrated Occurrence or similar term as defined under any other Policy, Personal Injury, Property Damage or Advertising Liability or any Claim or potential Claim arising therefrom, notice of which has been given or deemed to have been given under any other policy prior to the Inception Date.
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> Actual or alleged liability arising from any Occurrence, including any Batch Occurrence, Integrated Occurrence or similar term as defined under any other policy, of which any Executive Officer …

was aware prior to the Inception Date, irrespective of whether such person believed or expected such Occurrence, including any Batch Occurrence, Integrated Occurrence or similar term as defined under any other policy, would involve this Policy.

Jurisdictional differences in interpreting all of these exclusions, including whether the courts apply a subjective or objective standard of prior knowledge, make it difficult to forecast potential outcomes in cases involving known loss, prior litigation or prior knowledge defenses.

Despite the complexities of applying fortuity principles and related exclusions, courts will not hesitate to do so when the right circumstances exist. Such an opportunity recently presented itself in Miami-Luken Inc. v. Navigators Insurance Co.,[1] where the court applied a "Specific Litigation Exclusion" in a D&O policy issued to Miami-Luken, an opioid distributor, to preclude coverage for a criminal investigation by the U.S. Drug Enforcement Administration against the distributor. Prior to obtaining coverage from Navigators, Miami-Luken was named as a defendant in State of West Virginia ex rel. Patrick Morrisey et al. v. AmerisourceBergen Drug Corp. et al.[2] The State of West Virginia lawsuit was premised on the defendants' distribution of excessive quantities of opioids to "pill mill" pharmacies, such as the Sav-Rite pharmacy in the tiny 400 person town of Kermit, West Virginia, which received a deluge of 9 million doses in two years. Before the policy was issued, Miami-Luken completed a standard prior knowledge application question in which it disclosed the State of West Virginia lawsuit.

For this reason, the policy at issue in Miami-Luken included a manuscript exclusion that precluded coverage for: "any Loss in connection with any Claim made against any Insured based upon, arising out of, relating to, directly or indirectly resulting from, or in consequence of, or in any way involving the following: Action brought by the Attorney General of the State of West Virginia or the same or substantially the same facts, circumstances or allegations which are the subject of or the basis for such proceeding(s)."

The Miami-Luken court held that the exclusion eliminated coverage for a DEA investigation that included allegations similar to the State of West Virginia lawsuit. In particular, the DEA alleged that Miami-Luken "failed to maintain effective controls and report suspicious orders in distributing oxycodone and other controlled substances" to pharmacies in the Appalachian Tri-State region of Ohio, Kentucky and West Virginia. While the court found that the DEA investigation encompassed a broader geographic area and timeframe than the State of West Virginia lawsuit, it involved many of the same pharmacies, the same controlled substances and the same alleged failure to control the diversion of opioids. At the core of the court's reasoning was the broad language of the exclusion encompassing claims "arising from" or "relating to" similar "facts, circumstances, or allegations." The court easily concluded that this broad language meant that the policy excluded coverage for the DEA investigation, even though it involved different parties and legal theories. Rejecting Miami-Luken's arguments in favor of coverage, the court ultimately found the case to be one involving undisputed facts and "clear-cut insurance contract interpretation."

It also bears mentioning that in November 2017 the California Fourth District Court of Appeals already held in Travelers Property Casualty Co. of America v. Actavis Inc. that the injuries alleged in two other opioid lawsuits, including the existence of an opioid-induced public health epidemic and related costs were not "additional, unexpected, independent, or unforeseen" effects of the defendants' actions in fraudulently marketing opioids as nonaddictive.[3] Consequently, in Travelers, the court found no duty to defend under a general liability policy because the complaint at issue did not allege an occurrence, or accident. Although addressing the existence of an occurrence, the Travelers decision may also serve to bolster insurers' arguments in favor of applying a known loss or prior knowledge defense.

The Miami-Luken decision foreshadows future litigation involving similar known loss provisions, regardless of the type of policy at issue. Whether in a directors & officers, professional liability or commercial general liability policy, the prior knowledge language is broadly worded to preclude coverage for losses that are not fortuitous. Moreover, like the State of West Virginia lawsuit at issue in the Miami-Luken case, other lawsuits brought against defendants that allegedly contributed to the opioid epidemic, hundreds of which form the multidistrict litigation centered in the Northern District of Ohio known as In re: National Prescription Opiate Litigation,[4] are riddled with allegations that could support some species of a prior litigation, prior knowledge or known loss defense. For example, most opioid lawsuits allege that defendant manufacturers, distributors and pharmacies knew that opioid drugs could cause harmful effects, including addiction, overdose and death. Many lawsuits also allege that drug manufacturers and distributors knew that opioid drugs were being diverted from certain pharmacies and intentionally failed to stop the diversion in the interest of reaping greater profits.

The application of prior knowledge exclusions will, of course, depend on the particular facts that are developed, the policyholder, the policy language and the policy period at issue. Unlike most cases, which must slog though discovery to develop the facts known by the insured prior to the policy period, the media investigations surrounding the opioid epidemic have already unearthed a wealth of information relevant to known loss. For example, in addition to the general allegations above, many opioid lawsuits focus on the defendants' multimillion-dollar payments of criminal fines, such as Purdue's $600 million settlement in 2007 to resolve criminal charges that it admittedly misbranded OxyContin as less addictive than other drugs; Cardinal Health's payments of $34 million in 2008 and $44 million in 2016 to resolve a DEA investigation into opioid diversion; and McKesson's payments of $13.5 million in 2008 and $150 million last year on similar grounds.

Insurers issuing policies to these and other companies that were investigated and fined for potential fraud or diversion may have a colorable argument that any present liability associated with the opioid epidemic is not fortuitous, and as such, is barred from coverage under the known loss doctrine or other prior knowledge exclusions. In general, however, in light of the timeline — where the bulk of criminal fines appear to have been first levied in 2007 and 2008, and the State of West Virginia lawsuit was settled in 2012 — insurers issuing policies in more recent years may have more success establishing that the loss was known prior to the policy period than those issuing pre-2007 policies.

Above all, Travelers and Miami-Luken both underscore the bedrock concept that loss must be accidental and fortuitous to be covered. As the In re: National Prescription Opiate Litigation multidistrict litigation and related state opioid lawsuits move forward, so too will companion insurance coverage lawsuits that raise issues such as prior knowledge and known loss.

Monica T. Sullivan is a founding partner and Jodi S. Green is an associate at Nicolaides Fink Thorpe Michaelides Sullivan LLP.

[1] No 1:16-cv-00876 (S.D. Ohio July 11, 2018)

[2] Case No. 12-C-141 (Boone County Circuit Court, W. Va.) (the "State of West Virginia Lawsuit")

[3] See The Travelers Property Casualty Co. of America v. Actavis, Inc., 16 Cal. App. 5th 1026, 1043 (2017). The case is currently on appeal to the California Supreme Court.

[4] No. 1:17-md-02804