

## WIDESPREAD DRUG ADDICTION AN OCCURRENCE UNDER PHARMACEUTICAL COMPANY'S CGL

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The United States District Court for the Western District of Kentucky held that an underlying complaint, which alleged that pharmaceutical company, Richie Enterprises LLC, illegally distributed controlled substances by supplying physicians and pharmacies with drug quantities in excess of legitimate medical need, constituted an occurrence under Richie's commercial general liability policy. This case is *Cincinnati Insurance Co., v. Richie Enterprises LLC*, 2014 WL 838768, Civ. No. 1:12-00186 (JHM/HBB), Mar. 4, 2014.

Richie is a pharmaceutical company incorporated in Kentucky. Richie holds a CGL policy with the Cincinnati Insurance Company. In pertinent part, the policy stated that Cincinnati will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' that is caused by an occurrence and that Cincinnati has the right and duty to defend Richie against any 'suit' seeking those damages. On June 26, 2012, West Virginia, through its Attorney General, sued Richie for becoming an "integral part of the pill mills" which has caused substantial harm to the people and economy of the state of West Virginia.

The complaint from the Attorney General asserted eight causes of action. The relevant counts claimed: that Richie "willfully and repeatedly" violated the state's Uniform Controlled Substances Act by filling suspicious orders; that Richie "willfully" and "negligently" turned a blind towards the customs, standards and practices of the pharmaceutical industry by regularly filling large quantities of controlled substances to its customers; that Richie created a public nuisance by distributing controlled substances in such quantities that it "knew or should have known" that such substances were not being prescribed and consumed in accordance with state law; that Richie was unjustly enriched by "neglecting its duty" of distributing these substance for lawful medical purposes only; that Richie "failed to exercise a reasonable duty of care" in the marketing and distribution of its products; and that Richie was "negligent in failing" to safeguard against third-party misconduct (of the 'pill mill physicians') and "breached their duty to exercise the degree of care, prudence, watchfulness, and vigilance commensurate to the dangers" involved in the business of distributing controlled substances.

When notified of the suit against it, Richie sought insurance defense from Cincinnati under its CGL policy. Cincinnati refused to defend Richie against the charges and filed this motion with the Court to declare that it has no duty to defend or indemnify Richie in the West Virginia action.

The CGL policy held between Cincinnati and Richie defined an 'occurrence' as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Accident was not defined. Under Kentucky insurance law, Cincinnati has the duty to defend Richie "if there is any allegation which potentially, possibly or might come within the coverage of the policy...regardless of merit."

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Cincinnati argued that the result of Richie's conduct (providing excessive amounts of controlled substances to pharmacies in West Virginia) was foreseeable and could not constitute an occurrence under the policy. Conversely, Richie argued that the alleged harm (the prescription drug abuse epidemic) was accidental, as it did not intend, nor could it have reasonably foreseen, that distributing its product in direct response to orders it received from West Virginia pharmacies would result in 'pill mill' operations and widespread addiction. In support of this position, Richie noted that the majority of the allegations against it were that of negligence or theories of liability founded in negligence.

To address whether or not the underlying complaint alleged a covered "occurrence," the court delved into the ordinary meaning of the term 'accident'. It reasoned that inherent in the plain understanding of 'accident' was the doctrine of fortuity. And 'fortuity' is made up of two components: intent and control, said the court.

While the complaint alleged some conduct which was intentional in nature, it also contained allegations of negligent conduct (see counts above). Accordingly, Cincinnati could not simply "overlook" those allegations in concluding that the claims against Richie did not fall within the CGL policy's limits. Richie distributed its products in response to orders it received from state-regulated pharmacies, therefore the court found that it had a reasonable expectation that those pharmacies would dispense the medications to patients with valid prescriptions written by licensed physicians for proper, legitimate medical purposes. Therefore, the court agreed with Richie that the harm alleged here was not intentional.

Regarding the control aspect of fortuity, the court stated that it must focus on whether the harm alleged was "a chance event beyond the control of the insured...one that is beyond the power of any human being to bring...to pass, [or is]...within the control of third persons..." Because Richie was not directly providing any person with its products, but rather distributing it to state-regulated pharmacies who would then give it to end-users, the harm which emanated from Richie's products was totally out of its control ruled the court.

Finding that the underlying allegations satisfied that level of fortuity required by law, the court ruled that the claims against Richie triggered a coverable occurrence under the CGL policy.

### **Editor's Note:**

This textbook analysis of 'occurrence' led the court to weigh elements of intent and control. While properly interpreted and decided in light of the facts, this case sets a dangerous precedent of which insurers and underwriters need to be aware when writing policies to pharmaceutical companies and the like. Does this decision stand for the proposition that the pharmaceutical industry's hand in widespread prescription drug addiction is fortuitous by nature, and thus coverable? Some will argue so.

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