

Walmart Scores Defense Win In Ark. Opioid Coverage Fight

By **Shane Dilworth**

Law360 (January 2, 2024, 6:53 PM EST) -- Walmart is entitled to a defense from its insurers against at least 10 government suits brought over the opioid epidemic, an Arkansas state court judge ruled Friday, finding the suits involve a potentially covered occurrence and were brought "because of" bodily injuries.



An Arkansas state court judge ruled that primary commercial general liability policies issued by AIG and excess insurers over 25 years could provide coverage for suits involving foreseeable but unintended injuries resulting from Walmart's distribution of prescription pain medications. (AP Photo/Mark Lennihan)

Benton County Circuit Court Judge John R. Scott ruled that primary commercial general liability, or CGL, policies issued by AIG and excess insurers over the course of 25 years could provide coverage for suits involving foreseeable but unintended injuries resulting from Walmart's distribution of the prescription pain medications.

Representatives of Walmart told Judge Scott during oral arguments held in November that the policies issued by AIG units National Union Fire Insurance Co. of Pittsburgh, Pa. and American Home Assurance Co. provided coverage for wrongful acts that include the distribution of prescription medications.

Judge Scott agreed, writing that the "policies clearly anticipate covering intentional and foreseeable harm so long as the harm is not expected or intended."

He went on to write that coverage "for liability arising out of the sale or distribution of drugs would be meaningless if foreseeable adverse consequences of ingesting such drugs were not covered."

The ruling in favor of the Bentonville, Arkansas-based retail giant is a long-awaited win for policyholders seeking a defense under CGL policies. Many rulings have recently held that insurers are not obligated to provide a defense against suits lodged by state and local governments seeking to recover the rising costs of responding to the opioid epidemic.

The trend in favor of insurers began in January 2022 with the **Delaware Supreme Court's ruling** that Rite Aid was not entitled to a defense against suits brought by three Ohio counties. In a 4-1 ruling, the majority concluded that the pharmacy giant's policies were not triggered because the underlying suits were not brought "because of" bodily injuries.

The Ohio Supreme Court **reached a similar conclusion** in September 2022, ruling that a now out-of-business drug wholesaler was not entitled to a defense from its insurer, Acuity.

In January 2023, the Sixth Circuit **continued the trend** in favor of insurers when a three-judge panel ruled that Motorists Mutual Insurance Co. and Westfield Insurance were not obligated to defend Quest Pharmaceuticals Inc. against 77 suits brought by governments over the increased costs of responding to the opioid epidemic.

A North Carolina drug wholesaler did land a win **last August** when a federal judge said it could tap into \$10 million in coverage from Chubb to defend against more than 100 suits related to the opioid epidemic. The case, however, involved a three-part policy that offered coverage for directors and officers, entity liability and employment practices liability and not a CGL policy.

Walmart's dispute with its primary, excess and umbrella insurers dates back to November 2022. According to the retailer, its insurers are obligated to defend it against at least 10 so-called representative suits brought by governments over the opioid epidemic and provide coverage for settlements it reached to resolve some of the actions. One settlement, which was reached in December 2022, required Walmart to pay \$3.1 billion to resolve claims brought by all 50 states over the opioid epidemic.


According to court records, the retailer is facing more than 2,400 suits over the opioid epidemic, and the insurers involved in the suit provided policies to Walmart that were in effect between 1995 and 2019.


The parties filed competing motions for partial summary judgment on the duty to defend in September. AIG and the excess insurers argued that they are not obligated to provide a defense because the underlying government suits do not involve an occurrence and were not brought "because of" bodily injuries or property damage. Walmart countered that there is a duty to defend because it did not intend to cause injuries by filling prescriptions for the pain medications. While the risk of injuries resulting from the dispensing of opioids is foreseeable, Walmart argued that it did not intend for individuals to become addicted to or overdose on the medications.

The retailer also contended that the representative suits were brought "because of" bodily injuries and noted that one of the settlements it reached provides money for treating individuals adversely affected by the use of opioids.

Judge Scott found that the representative suits involve an occurrence, or accident, because they accuse Walmart of acting negligently when dispensing opioids by failing to implement adequate policies and training designed to prevent the improper distribution of the medications.

"Based on these allegations, there is certainly a 'possibility' that Walmart could be held liable in the representative suits for alleged harms that it did not 'expect' or 'intend,'" Judge Scott wrote.

The judge was also persuaded by the Fourth Circuit's 2015 ruling in **Liberty Mutual Fire Ins. Co. v. JM Smith Corp.**  In that case, the federal appeals court said that under South Carolina law, an opioid-related suit alleged an occurrence because it was possible that a state court could find that the defendant did not take sufficient measures to catch suspicious prescriptions, thus accidentally causing harm.

Judge Scott overruled AIG's argument that he should follow the **April 2022 decision** in **AIU Insurance Co. v. McKesson Corp.** , where a California federal judge found that opioid-related suits do not involve an occurrence. U.S. District Judge Jacqueline Scott Corley of the Northern District of California said in her ruling that the suits against McKesson did not involve an occurrence because bodily injuries resulting from

the distribution of prescription painkillers are not an accident.

Judge Corley's ruling, however, was inapplicable to Walmart's dispute, Judge Scott ruled, because "California and Arkansas law diverge on what constitutes an 'occurrence' under a CGL policy." That case is on appeal before the Ninth Circuit, with oral arguments scheduled for next week.

Judge Scott also said that the insurers are obligated to defend Walmart, ruling that the representative suits were brought "because of" bodily injuries. In reaching his decision, Judge Scott overruled the insurers' argument that the allegations in the underlying suits need to be tethered to injuries sustained by specific individuals.

"These are not breach of contract cases where allegations of bodily injuries and property damage are merely 'lurking' in the background," Judge Scott wrote. "Rather, they are claims seeking damages, in part, to compensate the plaintiffs for the costs of treatment, care, and related services for the injured individuals. As reflected in the national settlement, the settlement of many of those suits, including numerous of the representative suits, requires that Walmart pay money expressly earmarked for the costs of treatment, care, and related services for those injured individuals."

Also, courts in West Virginia, Pennsylvania, California and Illinois have found that opioid-related suits seek damages "because of" bodily injuries, the judge said.

Lastly, Judge Scott denied QBE Insurance Corp.'s request to compel arbitration, finding that there were no arbitration provisions in policies issued by Endurance Specialty Insurance Ltd. and that even if there were, they are unenforceable under Arkansas law.

Representatives of Walmart declined comment. Representatives of the remaining parties did not respond to requests for comment.

Walmart is represented by Robin L. Cohen, Adam S. Ziffer, Keith McKenna and Orrie Levy of Cohen Ziffer Frenchman & McKenna LLP, by John E. Tull III and Vincent O. Chadick of Quattlebaum Grooms & Tull PLLC and by Christopher D. Plumlee of RMP LLP.

The AIG units are represented by Robert L. Jones III and Kerri E. Kobbeman of Conner & Winters LLP and by James Fitzmaurice and Christopher St. Jeanos of Willkie Farr & Gallagher LLP.

The Chubb units are represented by Mark Murphey Henry of Henry Law Firm, by Michael S. Shuster, Blair E. Kaminsky, Daniel M. Sullivan and Benjamin F. Heidlage of Holwell Shuster & Goldberg LLP and by Robert Mangino and Susan Koehler Sullivan of Clyde & Co. LLP.

Arrowood Indemnity Co. is represented by J. Andrew Vines of Dobson & Vines PLLC and by Kevin T. Coughlin, Suzanne C. Midlige, Patrick Coughlin, Tanya M. Mascarich and Mario Valdivia of Coughlin Midlige & Garland LLP.

Starr Indemnity & Liability Co., TIG Insurance Co. and QBE Insurance Corp. are represented by Baxter D. Drennon of Hall Booth Smith PC and by Marc Casarino, Christopher Carroll, Joshua S. Wirtshafter and Tara E. McCormack of Kennedys CMK.

Endurance Insurance Co. is represented by Mark D. Wankum of Anderson Murphy Hopkins LLP and by Monica T. Sullivan, Leena Soni and Alida Pecanin of Nicolaidis Fink Thorpe Michaelides Sullivan LLP.

Great American Alliance Insurance Co., Great American Assurance Co., Great American Insurance Co., Great American Insurance Co. of New York, Great American Spirit Insurance Co. and Princeton Excess and Surplus Lines Insurance Co. are represented by J. Cotten Cunningham and Adam D. Franks of Barber Law Firm PLLC and by Adam H. Fleischer, Colleen P. Sorensen and Lindsey D. Dean of BatesCarey LLP.

XL is represented by David S. Mitchell Jr., Bourgon B. Reynolds, E. Joseph McGehee and Ryan Smith of Rose Law Firm and by Paul R. Koepff and Ryan Westerfield of Clyde & Co. LLP.

Liberty Mutual is represented by Elizabeth Fletcher of Munson Rowlett Moore & Boone PA.

Travelers is represented by Phil Campbell of Fuqua Campbell PA and by Bryce L. Friedman and Abigail W. Williams of Simpson Thacher & Bartlett LLP.

General Security Indemnity Co. of Arizona and General Security National Insurance Co. are represented by Kirkman T. Dougherty, Carol Nixon Ricketts and Spencer G. Dougherty of Hardin Jesson & Terry PLC and by Paul L. Fields Jr., Brandon R. Gossett and Michael F. Burgess of Fields Howell LLP.

Allianz Global Risks US Insurance Co., Chicago Insurance Co. and National Surety Corp. are represented by Don A. Taylor, William F. Clark and Jacob T. Newcomb of Davis Butt Taylor & Clark PLC.

Zurich is represented by Timothy J. Wolf of Watters Wolf Bub Hansmann LLC.

Continental Insurance Co. is represented by David M. Donovan and Bradey Camille Baltz of Watts Donovan Tilley & Carson PA.

The case is Walmart Inc. v. Ace American Insurance Co. et al., case number 04CV-22-2835-4, in the Arkansas Circuit Court for Benton County.

--Additional reporting by Ganesh Setty. Editing by Nick Petruncio.