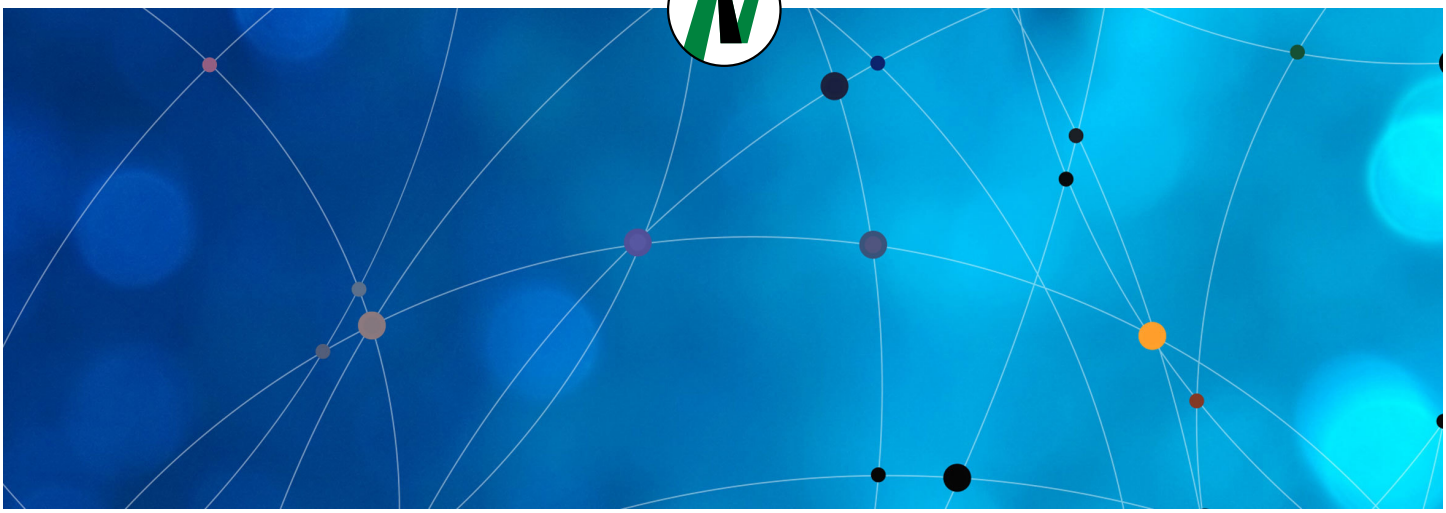

More on the Duty to Defend

05.01.2018

Recently we wrote about a case which has been argued before the Supreme Court of California and is now awaiting decision (see *The Duty to Defend in California*). In that case, *Liberty Surplus Insurance Co. v. Ledesma & Meyer Construction Co., Inc.*, the issue is whether an employer, sued for negligent hiring of a workman who had allegedly molested the plaintiff, is entitled to a defense from his general liability insurer. That decision has not been handed down yet.

Another interesting defense coverage case is waiting in the wings. The California Supreme Court recently granted review in *Travelers Property & Casualty Co. v. Actavis, Inc.*, a very unusual case where two counties sued the manufacturers of opiate medicines for allegedly engaging in a sophisticated and highly deceptive marketing campaign to increase their sales of opioid products by promoting them to prescribing physicians for uses for which the products were not suited. Thereby, the counties claimed, the manufacturers opened the door to an opioid epidemic of non-prescription uses which cost them great expense. The manufacturers sued their liability insurers for a defense, but the court of appeal ruled that the plaintiffs had alleged that the conduct was alleged to have been intentional, so that no coverage was required.

There appears to be no dispute between the parties that even if the manufacturers were aware that the opioid medications were subject to abuse, they had still been approved by government authority and served certain patients' medical needs. For this reason, the defense coverage issue here should come down to whether the marketer's knowledge of possible abuse of its product by downstream users makes its efforts to sell the product for use by people with legitimate medical needs an intentional case of tortious conduct, and thus uninsured. Here as well, the court's decision should determine whether California will maintain its rule that to obtain a defense, the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot. (*Montrose Chemical Corp. v. Superior Court* (1933) 6 Cal. 4th 290, 300.)

The policyholders' side in these cases should find support in a new decision of the California court of appeal. In *Those Certain Underwriters at Lloyd's London et al. v. Connex Railroad LLC,* that court found that

the insurer owed a defense to a railroad company whose train operator took his eyes off the rails to engage in private texting – surely more than careless conduct, where 25 people were killed in the ensuing derailment.