

US insurer ordered to defend prescription drug lawsuit

By [Sharon Snell](#)

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Lawsuits by US states to hold pharmaceutical companies liable for the costs of dealing with prescription drug abuse is on the rise. There is a heavy social cost associated with addiction and it is estimated that the costs of the non-medical use of prescription drugs alone was more than \$53bn annually in the US. These costs are funded from the fiscus.

Therefore insurers should review the wording of their commercial liability policies, as an insurer has been ordered by the US Court of Appeals to defend a pharmaceutical distribution company which was sued for contributing to this epidemic. The courts held that the insurance contract made provision for damages arising "because of bodily injury" and the insurer had a duty to defend and indemnify the insured.



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Duty to defend is much broader than duty to indemnify

The appeal case of [Cincinnati Insurance Company v H D Smith](#) concerned an insurance claim by HD Smith, a pharmaceutical distribution company. West Virginia sued HD Smith and other pharmaceutical distributors, holding them liable for contributing to prescription drug abuse. The state alleged that certain pharmacies knowingly provided citizens with hydroco-done, oxycodone, codeine, and other prescription drugs. This was not done for legitimate medical uses but rather to fuel and profit from the citizens' addictions. The state contended that they had incurred excessive costs related to diagnosis, treatment and cure of addiction and had provided the necessary medical care, facilities, and services for treatment of citizens addicted to prescription drugs.

HD Smith requested that their insurer, Cincinnati, defend the suit brought by West Virginia. The insurance company approached the courts for a declaratory order as they were of the view that their commercial liability insurance policy did not cover the type of injury for which HD Smith was being sued.

The district court agreed and the matter was taken on appeal. The appeal court focused on the plain wording of the policy under which Cincinnati agreed to cover any damages that HD Smith became legally obligated to pay "because of bodily injury". and further Cincinnati agreed to defend HD Smith against any suit seeking such damages. In the policy "bodily injury" was defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time".

Further provisions stated that "damages because of bodily injury" include "damages claimed by any person or organisation for care, loss of services or death resulting at any time from the bodily injury".

Looking at the case law applicable to the insurer's duty to defend, the court held that:

- The courts had to compare the allegations in the underlying complaint to that of the policy language in order to determine whether the insurer's duty to defend had arisen;
- The court had to liberally construe the allegations in favour of the insured. Due to the fact that the duty to defend is generally regarded as much broader than the duty to indemnify, the courts would generally find that a duty to defend exists unless it is clear from the face of the underlying complaint, that the case is not within or potentially within the insured's policy coverage;
- West Virginia asserted numerous legal theories and the courts held that even if there were several theories of recovery that were alleged in the underlying complaint against the insured, the insurer's duty to defend would arise even if only one of several theories was within the potential coverage of the policy; and
- The wording of the policy that Cincinnati issued to HD Smith covers suits seeking damages "because of bodily injury". The court held that such a policy provides broader coverage than one that covers only damages "for bodily injury".

How prevalent is prescription drug abuse?

According to the United Nation's Report of the International Narcotics Control Board, prescription drug abuse exacts a heavy human and economic toll, costing governments billions annually. In the US prescription drugs is one of the leading causes of accidental death even outnumbering those involving heroin and cocaine combined.

The most common prescription drug uses are pain killers called opioids which are taken recreationally to achieve a sense of euphoria. Other prescription drugs abused are steroids, stimulants and tranquilisers. According to South Africa's [National Drug Masterplan 2013- 2017](#), the known direct costs of drug and alcohol abuse is almost 6,4% of GDP.

ABOUT SHARON SNELL

Sharon Snell holds a masters degree in law, and she is the Chief Executive Officer of the National Museum located in Bloemfontein.

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