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Firm Wins Fourth Circuit Appeal in 'Pill Mill' Case

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Hughes Hubbard & Reed captured another victory for JM Smith Corporation when the Fourth Circuit upheld the trial court's ruling that the pharmaceutical drug distributor's insurer, Liberty Mutual, had a duty to defend it in an action brought by West Virginia's attorney general.

On March 13, 2015, a three-judge panel of the Fourth Circuit issued an opinion affirming the district court's decision that Liberty Mutual had a duty to defend JM Smith in the West Virginia action.

In June 2012, West Virginia sued JM Smith and a dozen other defendants for allegedly participating in a "pill mill scheme." The complaint alleged that the drug distributors, who were distributing their products to licensed pharmacies, were contributing to a well-publicized prescription drug abuse epidemic in West Virginia.

When JM Smith sought coverage for the lawsuit from its insurer, Liberty Mutual denied coverage. In September 2012, Liberty Mutual sought a ruling in South Carolina federal court that it had no duty to defend or indemnify JM Smith because the allegations in the complaint were of purely intentional conduct; JM Smith countered with its own motion for summary judgment that Liberty Mutual was obligated to defend its insured because the complaint alleged alternative theories of negligence and intentional conduct. U.S. District Judge Timothy Cain agreed with JM Smith.

Liberty Mutual appealed Judge Cain's decision in December 2013, arguing again that it had no duty to defend or indemnify JM Smith because the West Virginia complaint failed to allege an "occurrence" and damages "because of bodily injury." JM Smith argued the merits of both allegations, in addition to arguing that Liberty Mutual waived the ability to argue damages "because of bodily injury" because it failed to raise the argument in district court.

In its ruling, the Fourth Circuit upheld the district court's ruling and disposed of Liberty Mutual's appeal. On the bodily injury issue, the court stated "as Liberty Mutual failed to raise this last argument properly below, we hold this contention waived."

On the occurrence issue, the Fourth Circuit found Liberty Mutual's case law "unavailing" and its characterization of the West Virginia complaint misleading. It agreed with Hughes Hubbard that "no defendant, and certainly not the insured, has been accused of providing prescription drugs to any person or entity knowing it was enabling an abuser." Indeed, at least one count of the complaint "sounds wholly in negligence, and the others generally describe a mix of negligence and intentionality." Therefore, "there is at least a possibility of coverage under the Liberty Mutual commercial general liability policy, and Liberty Mutual thus had a duty to defend JM Smith in the underlying action."

The decision made headlines in Wolters Kluwer, a daily reporting service for attorneys.

George Tsougarakis argued the appeal. Amera Chowhan and Taylor Reynolds also represented JM Smith in this matter.

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George A. Tsougarakis

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