

Ninth Circuit Affirms Application of Goods & Products Exclusion

On March 9, 2022, the U.S. Court of Appeals for the Ninth Circuit, in *Sentynl Therapeutics, Inc. v. U.S. Specialty Ins. Co.*, 2022 WL 706941 (9th Cir. Mar. 9, 2022) (applying California law), affirmed a district court's holding that coverage for a government investigation was unambiguously excluded by a D&O policy's goods and products exclusion. *Sentynl Therapeutics, Inc. v. U.S. Specialty Ins. Co.*, 527 F.Supp.3d 1203 (S.D. Cal. Mar. 19, 2021).

Discussion

The insured, which marketed and sold prescription opioid medications, received subpoenas from the DOJ's Opioid Task Force in connection with an investigation of potential violations of federal law by anyone illegally profiting from opioids. Specifically, the investigation focused on the insured's marketing and promotion of its products. Coverage was sought under a D&O policy for the costs of defending the investigation. However, the D&O insurer denied coverage, citing a goods and products exclusion that stated the following:

[T]he Insurer will not be liable to make any payment of Loss in connection with a Claim arising out of, based upon or attributable to any goods or products manufactured, produced, processed, packaged, sold marketed, distributed, advertised or developed by the Insured Organization; provided, that this exclusion: (i) will apply only to Claims against the Insured Organization; and (ii) will not apply to Claims brought directly or derivatively by security holders of the Insured Organization in their capacity as such.

The district court agreed with the D&O insurer, holding that the goods and products exclusion barred coverage for the subpoenas. In doing so, the district court rejected the insured's arguments that the exclusion was limited to product liability claims, and that applying the exclusion to claims other than products liability claims would eliminate all other coverage for the insured pharmaceutical company.

On appeal, the Ninth Circuit affirmed the district court's holding, observing that the phrase "arising out of" as used in the goods and products exclusion was much broader than "caused by," and that "arising out of" is "ordinarily understood to mean 'originating from,' 'having its origin in,' 'growing out of' or 'flowing from' or in short, 'incident to, or having connection with.'" In doing so, the Ninth Circuit rejected the insured's argument that the phrase should be narrowly construed because it was included in an exclusion. Although an exclusion must be narrowly construed against an insurer when it is ambiguous, the Ninth Circuit found that courts must give effect to the intent of the parties in light of a clause that broadly excludes coverage.

The Ninth Circuit also agreed with the district court that "the costs of complying with the subpoenas "ar[ose] out of ... goods or products manufactured, produced, processed, packaged, sold, marketed, distributed, advertised or developed by [the insured]." It reasoned that the subpoenas were issued as part of an investigation directed at anyone illegally profiting from opioids, and that the insured's involvement in the investigation "originat[es] from, ha[s] its origin in, grow[s] out of or flow[s] from" its opioid products. As a result, the Ninth Circuit rejected the insured's argument that the exclusion is limited to claims based on a defect in, or characteristic of, its products. This is because nothing in the language of the exclusion provided such a limitation, and because precedent supported the conclusion that a goods and products exclusion also embraces claims about what a seller "said and did not say about the products."

Finally, the court rejected the insured's argument that application of the exclusion rendered coverage illusory, reasoning that the exclusion does not apply to various claims, even under a very



Angelo G. Savino

**Chair,
Professional
Liability
Practice Group**

asavino@cozen.com
Phone: (212) 908-1248
Fax: (917) 521-5854



Rafael Rivera

Member

rafaelrivera@cozen.com
Phone: (212) 453-3879
Fax: (646) 588-1372

Related Practice Areas

- Insurance Coverage
- Professional Liability Insurance Coverage

broad definition of “arising out of.” The court contrasted such other claims with the subpoenas, which it determined were “clearly connected” to companies in the opioid market.

Analysis

Courts have generally found that unambiguous goods and products exclusions apply when the liability or alleged wrongful acts have some connection to the insured’s goods or products. *Sentynl* supports this conclusion, finding that the phrase “arising out of” is broad while simultaneously rejecting the insured’s argument that the exclusion was limited to claims based on a defect in, or characteristic of, its products. Moreover, *Sentynl* demonstrates that the phrase “arising out of” will not be narrowly construed just because it is contained in an exclusion, reasoning that courts must nevertheless give effect to the intent of the parties in light of a clause that broadly excludes coverage.

Angelo G. Savino is a member in Cozen O’Connor’s New York City office and co-chair of the firm’s Professional Liability Practice Group. Angelo concentrates his practice in the areas of Director and Officer and Professional Liability Insurance.

Rafael Rivera, Jr. is a member in Cozen O’Connor’s New York City office, and concentrates his practice in the areas of Director and Officer, Professional Liability, and Commercial General Liability Insurance.