



ASPEN OPINION

THE U.S. OPIOID EPIDEMIC: LOOKING AT THE LIABILITY



Beatrice Morley, Global Head of Casualty at Aspen Re, considers the extent of litigation concerning the cost of the U.S. opioid crisis. It has been called the “second coming of tobacco” and, government entities

filing lawsuits to recoup tax payers’ dollars and liability (re)insurers in the direct line of attack. Given the number of complaints filed and the magnitude of damages, policyholders have also looked to implicate additional coverages. A recent white paper, co-authored by Aspen Re and Traub Lieberman Straus & Shrewsbury LLP, takes a closer look at the potential impact of this litigation on liability (re)insurers.

Counting the cost

Today, drug overdose is the leading cause of death for Americans below the age of 50 and is responsible for a fall in average life expectancy in the U.S. for the second successive year.^{1,2} The use of opioids has been responsible for the

increasing mortality rate and, as shown in Chart 1, the number of deaths attributed to opioids has risen from 47 percent of drug overdose deaths in 1999 to nearly 66 percent in 2016. Closer analysis of individual drug mortality statistics during this period tells a similar story. For example, deaths involving opioids increased from 51 percent to 66 percent within the cocaine category and from 62 percent to 85 percent within the benzodiazepines category.³ The cost of the opioid crisis is not simply related to increasing mortality: in 2016, for every opioid-related death, there were a further 30 non-fatal overdoses.⁴

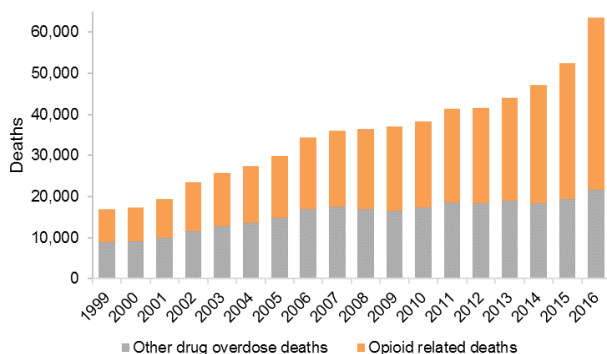
Opioids range in strength from codeine through to hydrocodone, oxycodone, heroin, dilaudid and fentanyl. Manufacturers have continued to market drugs with significantly higher potencies with faster and easier delivery mechanisms than ever before. This in turn has led to an increase in abuse-addiction deaths, which has left public entities to deal with the fallout through the provision of social, healthcare, unemployment, police and other services, thus presenting a long-term problem.

The human cost incurs a financial cost which has prompted wide ranging estimates. While the Centre for Disease Control and Prevention (CDC) estimates USD78.5 billion for 2015, the wider perspective taken by the White House Council of Economic Advisers estimates a total in excess of USD504 billion for that same year. With such large sums having directly impacted government budgets – both current and future – it is not surprising that there has been a proliferation of lawsuits seeking restitution.

Continued overleaf



CHART 1: 1999-2016 DRUG OVERDOSE AND OPIOID-RELATED DEATHS



Source: Centre for Disease Control and Prevention (CDC.gov), Aspen Re

Litigation levels

In the U.S., there are currently more than 700 pending lawsuits in federal and state courts which seek to offset the costs that municipalities have incurred as a result of the opioid epidemic. A Multi-District Litigation (MDL) was empaneled in December 2017 and, as of February 2018, approximately 350 suits had transferred from federal courts, naming a total of 149 defendants comprised of mostly manufacturers and distributors.⁵ The MDL order noted that opioid manufacturers had not only overstated the benefits, but had also downplayed the risk of drugs, while aggressively marketing them to physicians and drug distributors who in turn had failed to “monitor, detect, investigate, refuse and report suspicious orders of prescription opiates”. The defendants were charged with misleading people into the belief that opioids were safe for chronic pain management and for violating duties to report suspicious orders of prescription opiates to prevent diversion for non-medical purposes.

While drug manufacturers and distributors may have been the MDL's key targets, the list of defendants now includes pharmacies, who are alleged to have failed to identify suspicious prescriptions or recognize when repeat prescriptions had reached an unusually large volume. Healthcare practitioners – including hospitals, clinics and medical groups – have also been joined with lawsuits alleging negligent and unnecessary prescription/over prescription of opioids. In addition, pharmacy benefit manufacturers have recently been involved due to their role as middlemen between doctor, patient and pharmacy, which aims to enable communities to access a larger amount of prescription opioids than could otherwise be supported when based on the legitimate medical needs of that community.

Given the volume of litigation, the courts are likely to set very short discovery deadlines and expedite trial dates. A MDL judge recently indicated that he intends to avoid a drawn out MDL – even if discovery took longer than currently planned. Further, he also told the Drug Enforcement Agency to comply with discovery demands swiftly and completely – despite its

reluctance to divulge such information. While no MDL to date has included workers' compensation and health insurers, it is envisaged that they may yet join the nationwide litigation to recoup the increased medical payments and other costs associated with workers who were prescribed opioids for chronic pain management in respect of work-related injuries.

No blanket cover

The most serious complaints against manufacturers and distributors nationwide have been virtually identical, in that they uniformly allege fraud, deceptive trade practices, collusion conspiracy theories and public nuisance. However the plaintiffs' bar has been careful to include straight negligence claims or similar claims pleaded in other ways aimed at triggering an occurrence under the manufacturers'/distributors' general liability (GL) and/or products' insurance liability insurance policies.

From a GL perspective, the threshold question is whether each complaint alleges “bodily injury”, “property damage”, “accident” or “occurrence” (as those terms are defined sufficient to trigger Coverage A), or “personal or advertising injury” (to trigger Coverage B). The choice of law applicable to the policy at issue will heavily impact the outcome of this question.

The complaints generally allege that “bodily injury” has occurred to the residents of the plaintiff entities through death or addiction as a result of opioid use/abuse. They have sought compensatory damages for the healthcare and other services subsequently provided. The suits, however, are not brought by individuals seeking to recover damages for those injuries but by municipalities. Thus, the question is whether the plaintiff has standing to recover for “bodily injury” to its residents under any of the causes of action pleaded, or merely for purely economic loss to itself. To date, courts have reached differing conclusions. It would seem that any particular complaint to seek damages on account of “bodily injury” will be dependent upon the specific pleadings in the case in question, along with the applicable law on a state-by-state basis.

It may be unlikely that complaints would be found to allege any “property damage” as pertaining to a GL policy. While much seems to bypass an “occurrence”, there is some ambiguity in the context of negligence, public nuisance and violations of statutes that are not premised exclusively on intentional conduct/misconduct. Because the complaints are not limited to strictly intentional or deliberate conduct, the question here is whether the negligence and reckless conduct allegations constitute an “accident” or “occurrence”

To date, the courts that have addressed this issue are split. It would appear that the lack of an “accident” or “occurrence” is an additional ground that may bar coverage, but a final coverage ruling would require close scrutiny of each individual complaint in light of the applicable choice of law for the policy at issue. This could potentially require discovery and investigation, depending on the specific complaint allegations.

The complaints have generally alleged that the defendants were aware of the opioid problem through studies, hospitalization

¹ New York Time, June 5 2017, Drug Deaths in America Are Rising Faster Than Ever, Josh Katz

² NPR, December 21 2017, Life Expectancy Drops Again as Opioid Deaths Surge in U.S., Andrea Hsu

³ www.cdc.gov

⁴ NPR, August 22 2018, Hospitals Could Do More For Survivors Of Opioid Overdoses Study Suggests, Andrea Hsu

⁵ www.consumersafety.org; Traub Lieberman Straus & Shrewsbury LLP



records, adverse event reports and other sources. This may not, however, be sufficient to trigger Coverage B of a GL policy. An important development will be the precise definition used in the policy in question. Furthermore, courts generally have held that pure economic damages for abatement of a public nuisance are not covered. In this regard, it will be important to analyze the wording of the specific policy to assess whether the term “damages” is defined in the first instance and, if so, whether it includes/excludes certain kinds of damages, for example, fines, penalties, punitive/exemplary damages and multiplied portions of damages. In the absence of a specific exclusion, choice of law will likewise impact this issue, especially with respect to punitive damages. While punitive damages generally are uninsurable as a matter of law or public policy in the majority of states, they generally are insurable in nineteen states absent a specific exclusion to the contrary. Furthermore, five states are silent or unclear on this issue.^{6,7}

Additional policy costs

In addition to GL and product/completed operations, policyholders are likely to seek coverage under other kinds of policies given both the number of complaints filed to date and the magnitude of damages being sought from each plaintiff. For example, pharmaceutical and life sciences policies may have additional coverages beyond GL and products coverage that could be implicated. Professional liability/errors and omissions

(E&O) coverage generally covers losses incurred as a result of an “actual or alleged act, error, misstatement, misleading statement, omission, neglect, or breach of duty.” Some E&O policies limit coverage to claims where the insured’s alleged act or omission was committed “solely in the performance of or the failure to perform professional services.” Defense under such policies may include intentional acts exclusions; exclusions for restitution/disgorgement/illegal profits; civil and criminal fines/penalties exclusion; and bodily injury exclusion. Management liability policies, including directors and officers (D&O) liability insurance policies, may also be implicated subject to similar intentional acts exclusions; carve-outs for restitution, disgorgement, illegal profits, fines and penalties; and exclusions for bodily injury as noted in the E&O context. Additionally, D&O policies may also have limited entity coverage and professional services exclusions that could bar or limit coverage for opioid litigation.

As ever, all policies should be carefully reviewed and the specific wording addressed in the context of the complaint in question and the applicable law. The effect of this could result in divergent coverage obligations arising from the same policy wording.

⁶ Alabama, Alaska, Arizona, Delaware, Georgia, Hawaii, Idaho, Maryland, Mississippi, Montana, New Hampshire, New Mexico, North Carolina, South Carolina, Tennessee, Vermont, Washington, Wisconsin and Wyoming

⁷ Maine, Massachusetts, Michigan, Missouri and Nebraska