ASPEN RE

THE OPIOID EPIDEMIC IN THE USA AND THE EFFECTS ON THE INSURANCE INDUSTRY

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HOW DID THE EPIDEMIC BEGIN - THE PRIMARY ISSUES

It has been widely reported that there are two primary issues which fueled the opioid epidemic. The first is the proliferation of legal use in fighting pain. The second is a direct result of the War on Drugs that has been waged since the 1960's. There are no clear demarcation points for each of these issues, as they tend to interrelate in a death spiral which is ultimately more difficult to answer than the age old question "Which came first: The chicken or the egg?"

In an effort not to politicize the issues or moralize one way or the other, this paper will not try and grapple with the two primary issues. Instead this paper is simply designed to track the known and reported data on the Opioid Epidemic and the impact on the Insurance industry from a liability perspective.

THE PROLIFERATION OF OPIOIDS AND OVERDOSE DEATHS IN THE US SINCE 1999

In an article by Heyoun Park and Matthew Bloch in the NY Times dated January 19, 2016 the authors tracked Overdose Deaths in the Unites States from 1999 through 2016.

From a statistical perspective according to the Article, in 1999 the number of overdose deaths was 5 per 100,000 in 1999. In 2015 the number was calculated at 15 per 100,000, with many areas experiencing death rates due to overdose exceeding 20 per 100,000.

The CDC tracks the actual numbers of overdose deaths. (The NIH has compiled a composite of the CDC data at https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates). In tracking the actual number in deaths, the 2015 number was 52,404 people. The number in 2016 was 64,070 (As of March 28, 2018 this number was revised downward to 63,632.) See https://www.cdc.gov/media/releases/2018/p0329-drug-overdose-deaths.html. The numbers for 2017 have not been tabulated as of this paper.

The CDC also tracks the number of overdose deaths for specific drugs including, cocaine, cocaine with an opioid component and opioid deaths. These numbers paint a very clear picture as to why opioids are the focus of virtually every story.

With regard to numbers of deaths involving opioids (heroin and non-methadone Synthetics) - the death toll in 2000 was under 5,000. In 2015 the number exceeded 20,000. According to CDC numbers, there were more than 42,000 opioid related deaths in 2016. (On March 29, 2018 the CDC stated that nearly 66% of the 63,632 overdose deaths involved a prescription or illicit opioid. See https://www.cdc.gov/media/releases/2018/p0329-drug-overdose-deaths.html)

The numbers show other alarming correlations, especially when the number of deaths from other drugs is examined both with and without an opioid component.

In 2002 the number of cocaine deaths without an opioid factor was approximately 4,500. This number has gradually increased from 2002 to approximately 7,000 in 2015. Cocaine deaths with an opioid component: In 2002 the number was approximately 2,000 which increased to over 4,000 in 2015.

Deaths from Benzodiazepines (the Xanax family of drugs) were under 1,000 without an opioid component in 2002. The number of deaths from benzodiazepines without an opioid component remained relatively flat with numbers staying at or below 1,000 per year from 2002 through 2015. When we add an opioid component, this number changes dramatically. The deaths in 2002 with the opioid component were roughly 2,000 and climbed continuously through 2015 where the number is roughly 9,000.

Making matters even worse, in addition to the actual death toll, is the costs for the living. Specifically, in 2016 there were more than 30 non-fatal overdoses for every opioid related death in 2016. This amounts to over 750,000 opioid related overdoses that did not result in death.

To put these numbers of lost lives in perspective, drug overdoses became the leading cause of death for Americans younger than 50 years old in 2017. See NY Times, Drug Deaths in America Are Rising Faster Than Ever, Josh Katz, June 5, 2017. Additionally, the average life expectancy for all Americans decreased by 2 and1/2 months for the second year in a row and now a third time since 1993. See NCHS Data Brief, No. 293 December 2017 and https://www.npr.org/sections/health-shots/2017/12/21/572080314/life-expectancy-drops-again-as-opioid-deaths-surge-in-u-s.

WHY HAVE OPIOIDS BEEN ON THE RISE IN SUCH A HUGE WAY?

The first thing to understand is that not all opioids are created equal. There are opioids that are much stronger and/or much weaker than others. The measuring stick for opioids is morphine. All other opioids are described as more potent or less potent than morphine.[1] The simple reason is that morphine is the actual active ingredient in the opium plant.

Codeine - Morphine is roughly seven times more powerful than codeine. A 200 mg dose of codeine is the equivalent of 30mg of morphine.

Hydrocodone - This is commonly prescribed as Vicodin. It is the rough equivalent of morphine. The difference is that it is semi-synthetic and has a longer efficacy than morphine.

Oxycodone - This is OxyContin. It is roughly 50% more potent than morphine. A 20mg dose of Oxycodone is equivalent to a 30 mg dose of morphine.

Heroin - This is the "old-school" drug that was and remains the drug that most people think about when they think opioids. Heroin is roughly two to four times more powerful than morphine.[2] Because heroin is not produced in industrial labs and has natural deviations in consistency and "purity" (it is often cut with other substances rendering it an "impure" product), the potency levels can only be generalized.

Dilaudid - Dilaudid is roughly four times more powerful than morphine. A 7.5 mg dose of Dilaudid is equal to a 30mg dose of morphine.

Fentanyl - Fentanyl, a synthetic opioid developed in the 1960s, is referred to as the "gold standard" of opioids. It is roughly one hundred times more powerful than morphine. A 0.25 mg dose of Fentanyl is equivalent to a 30 mg dose of morphine. As of 2017, it was the most widely legally used synthetic opioid in medicine. Fentanyl is a particularly vexing problem because of the wide range of delivery methods. In its early versions, it was used as an anesthetic in a salt form. It is now available in liquid, pill, patch, lollipop and ready-strips (like Listerine Pocket-Packs).

"Grey Death" - There is also a new emerging threat called "Grey Death". This is an illicit combination of opioids that have been tested and reported to be up to ten thousand times more powerful than morphine. See https://www.usatoday.com/story/news/nation-now/2017/05/25/gray-death-its-10-000-times-more-powerful-than-morphine/344371001/. Grey Death is generally a combination of U-47700 (developed by Upjohn in the 1970's), heroin, Fentanyl and Carefentanil (a synthetic derivative of Fentanyl). See https://en.wikipedia.org/wiki/Gray_death. Carefentanil is so powerful by itself that there are concerns of it being used as a chemical weapon. See Associated Press' article "Chemical weapon for sale: China's unregulated narcotic" at https://apnews.com/3e3c2b624edc46f8a57e78d236091798.

The problem with opioids is that manufacturers are continuing to market drugs with significantly higher potencies, with faster and easier delivery mechanisms, than ever before. This is fueling an increase in abuse, addiction, deaths and a long term continual problem for public entities that are left to deal with the fallout through social services, healthcare, unemployment, police and other services.

THE MONETARY COSTS ASSOCIATED WITH THE OPIOID CRISIS

The raw number in the "cost of lives" above is staggering. The monetary cost for the opioid crisis is equally massive.

In 2015, the CDC calculated the costs for the opioid crisis $78.5 billion in 2015. Roughly $28 billion of those dollars were directly spent on health care related to opioid abuse, with insurance bearing the vast majority of those costs ($26 billion). Lost productivity related to non-fatal overdoses and incarceration accounted for $20 billion, while fatal overdoses cost $21.5 billion in lost productivity and health care costs. The remainder of the financial cost of the opioid epidemic, $7.7 billion, is attributed to criminal justice costs.

The CDC's numbers at the time of publication seemed to be staggeringly large. However, there were many critics of the CDC's numbers who believed that the CDC had wildly underestimated the cost of the opioid crisis. As a result, the White House Council of Economic Advisors was tasked with studying the costs from a wider perspective.

On November 19, 2017, the White House Council of Economic Advisers published the results of their study and eviscerated the CDC's number by over $420 billion. The White House Council of Economic Adviser's estimated that the cost of the opioid crisis actually **exceeded $504 billion annually for 2015**. This, if correct, represents 2.8% of the United States Gross Domestic Product. *See* https://www.whitehouse.gov/briefings-statements/cea-report-underestimated-cost-opioid-crisis./. *See also* http://thehill.com/policy/healthcare/361151-white-house-economic-cost-of-opioid-crisis-about-504b

Much of the health care costs are borne by insurance companies and the government. All of the criminal justice costs are borne by the government. This has caused the proliferation of governmental law suits against the drug manufacturing companies to seek restitution for the havoc that the opioids have brought upon government's budgets and finances. The legal theories and scope are discussed below.

OPIOID LITIGATION

There are presently more than 700 pending lawsuits in federal and state courts nationwide that were commenced by various states, cities, counties, municipalities and Indian Nations in the United States. This includes suits by more than 60 cities such as New York, Philadelphia, Chicago, Baltimore, and Miami, all of which seek to offset the costs that the municipalities have incurred as a result of the opioid epidemic.

With respect to the federal court suits, by Order dated December 12, 2017, a Multi-District Litigation captioned In Re: *National Prescription Opiate Litigation*, MDL No. 2804, was empaneled in the United States District Court for the Northern District of Ohio by Order dated December 5, 2017. Judge Dan A. Polster is presiding over the MDL. Initially, 46 lawsuits were transferred to the MDL from federal courts

in Alabama, California, Illinois, Kentucky, Ohio, Washington state, and West Virginia. By February 2018, about 350 suits had been transferred to the MDL and it is presently estimated that a total of up to 700 lawsuits will ultimately be transferred. Presently, the consolidated suits name a total of 149 defendants, mostly manufacturers and distributors.

The MDL order noted that the plaintiffs allege that opioid manufacturers overstated the benefits and downplayed the risks of their drugs and aggressively marketed them directly and through key opinion leaders to physicians, and drug distributors failed to "monitor, detect, investigate, refuse and report suspicious orders of prescription opiates." The panel said drug manufacturers and distributors are obligated under the Controlled Substances Act, 21 U.S. Code ch. 13 § 801 et seq., "to prevent diversion of opiates and other controlled substances into illicit channels. Plaintiffs assert that defendants have failed to adhere to those standards, which caused the diversion of opiates into their communities." The MDL panel noted that the lawsuits being consolidated include claims under various Racketeer Influenced and Corrupt Organizations Act laws, state consumer protection laws, state analogues to the Controlled Substances Act, and common-law claims of public nuisance, negligence, negligent misrepresentation, fraud and unjust enrichment.

Some state courts are likewise consolidating opioid suit, at least for discovery and pre-trial purposes. For example, suits brought by seven New York counties to date have been consolidated into the *In Re Opioid Litigation*, Index No. 40000-17, which is pending in the Supreme Court of New York, Suffolk County.

The complaints nationwide are virtually identical as to the factual predicate, alleging that all of the defendants engaged in a sophisticated deceptive and unfair marketing campaign since the 1990s to persuade medical providers to use opioids to treat chronic pain, which included concerted actions to misrepresent, conceal, and engage in other deceptive and misleading acts/practices that misled county residents into believing that opioids were safe for chronic pain management when they were not; and violated duties under New York State law to monitor, detect, investigate, refuse and report suspicious orders of prescription opiates originating from the various counties to prevent diversion of opiate prescriptions for non-medical purposes, but failed to do so.

As a result, the complaints allege that millions of prescriptions were diverted for non-medical purposes in each city/county/municipality; the diversion caused prescription opiate abuse, addiction, morbidity and mortality, and the "opioid epidemic plaguing" each plaintiff; and the opioid epidemic caused a corresponding heroin abuse/addiction epidemic in each location. According to the complaints, opioid overdose deaths have increased exponentially in the last 15 years, and non-fatal drug overdoses requiring medical care have increased significantly during that period. The complaints allege that those epidemics constitute an immediate hazard to public health and safety and an unabated public nuisance.

The complaints also allege that the defendants were negligent in failing to do the following: prevent and reduce distribution of opiates; monitor and guard against third party misconduct; disclose suspicious orders of opioids; prevent diversion of medicines for illegal purposes; acquire or use special skills and knowledge relating to dangerous activities to prevent or ameliorate the distinctive and significant dangers of opioids; and failure to exercise due care, prudence, watchfulness and vigilance to prevent "the injuries to the [plaintiff] and its residents" as a result of the manufacture and distribution of opioids.

The plaintiffs allege that their ability to address these problems at the community level are limited by budgetary constraints at the state and federal levels, and they seek to alleviate the budgetary constraints by holding the defendants financially responsible for the economic cost of eliminating these hazards and abating the nuisance caused by their misconduct, including costs for healthcare, emergency services, extra police services, drug addiction treatment and rehabilitation programs and facilities, and increased healthcare costs for county employees, etc.

While the factual averments are virtually identical in all complaints nationwide, the causes of action asserted vary (although all allege public nuisance). For example, the New York state court complaints assert the following causes of action: Violation of New York General Business Law §349 "Deceptive Acts and Practices" based on false advertising; False Advertising – Violation of New York General Business Law §350; Public Nuisance; Violation of New York Social Services Law §145-B (knowingly, by false statements, representations or deliberate concealment of material facts and other fraudulent schemes, obtaining payment from public funds); – Fraud; Unjust Enrichment; and Negligence. The New York complaints seek damages including the following: unspecified compensatory damages, disgorgement of profits, treble damages under the Social Services Law §145-B, treble damages, penalties and costs under New York G.B.L §349 and §350, punitive damages, attorney's fees, interest, costs and disbursements of this action.

However, lawsuits filed by various County Commissions in West Virginia (which were transferred to the MDL) allege that the defendants owed a duty under the federal Controlled Substances Act and West Virginia Code 7-1-3kk, which empowers County Commissions to "take all appropriate actions for the elimination of hazards to public safety and health and to abate or cause to be abated anything which the Commission deems to be a public nuisance." These complaints seek economic damages for past costs to eliminate the public health/safety hazard and future costs to permanently abate the public nuisance; non-economic damages for annoyance, discomfort and inconvenience caused by the public nuisance; and punitive damages.

Given the magnitude of the litigation, experience suggests that the courts are likely to set very short discovery deadlines and speedy trial dates in an attempt to move swiftly toward settlement exploration if possible rather than prolonging discovery and depleting resources that could be used to fund settlements. Indeed, the MDL court on April 10, 2018 consolidated three lawsuits brought against drug companies by Ohio local governments (including the city of Cleveland), and set a "rocket docket," scheduling them for a three-week bellwether trial beginning on March 18, 2019. The Judge made clear that he intends to "avoid a drawn-out MDL" and

warned the parties that he "does not intend to move the trial date" even if discovery takes longer than currently planned. Law360 *"Opioid MDL Judge Sets Litigation Plan, Bashes DEA"* (April 22, 2018).

The MDL Judge also ordered the United States Drug Enforcement Agency (DEA) to comply with discovery demands swiftly and completely regarding to give the plaintiffs voluminous information about opioid sales and suspicious orders from 2006 to 2014 in Ohio, West Virginia, Illinois, Michigan, Florida and Alabama. The DEA has been reluctant to divulge certain information, saying it could jeopardize corporate trade secrets and compromise law enforcement investigations. Judge Polster overruled those objections, finding that "there is overwhelming need for the plaintiffs in this case to learn the truth surrounding marketing and distribution of opioids, including what the manufacturers, distributors, retailers and DEA knew and when they knew it." Id.

Additionally, although no such lawsuits have yet been filed, plaintiffs' counsel in the MDL suits are actively attempting to recruit workers compensation and health insurers to join the nationwide litigation to recoup the increased medical payments and other costs associated with workers who were prescribed opioids for chronic pain management from work-related injuries. These efforts are based upon reports that the opioid crisis has led directly to increased workers compensation costs (See, https://www.claimsjournal.com/news/national/2018/05/21/284773.htm); estimating that health and workers comp insurers are bearing one-third of the costs of the opioid epidemic while the public sectors bears only one-quarter of those costs (See, https://www.claimsjournal.com/news/national/2017/12/07/281919.htm); and concluding that "prescription opioids are presently the number one workers comp problem in terms of controlling the ultimate cost of indemnity losses." See, http://www.lockton.com/Resource_/PageResource/MKT/wc-pbm10-9-2012.pdf. Given the high percentage of costs allegedly borne by those carriers, it is foreseeable that such lawsuits will be forthcoming as well.

OPIOIDS AND ISSUES IN INSURANCE

The gravamen of the complaints against the manufacturers/distributors nationwide is virtually identical – they all focus on allegedly deceptive marketing practices in violation of various state and federal statutes, fraud, collusion, and other intentional conduct/misconduct, based on the manner in which opioids were marketed for chronic pain management despite alleged knowledge of the high likelihood of addiction. Toward this end, the complaints uniformly allege fraud, deceptive trade practices, collusion/conspiracy theories, and public nuisance. However, the plaintiffs' bar has (in some cases more artfully than others) been careful to include straight negligence claims and/or pled in other ways aimed at triggering an "occurrence" under the manufacturers'/distributors' general liability and/or products 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. Choice of law applicable to the particular policy at issue will heavily impact the outcome of these questions.

"Bodily Injury"

The complaints generally allege that numerous residents of each plaintiff entity suffered injuries as a result of opioid use/abuse, including addiction and death. The plaintiffs in these suits uniformly allege that the defendants' allegedly misleading and deceptive advertising about the addictive qualities of opioids for chronic pain management led to "a dramatic increase in opioid use, addiction, overdose, and death" and caused "deaths, serious injuries and severe disruption of public peace, order and safety" to their residents. The complaints also allege that "[p]laintiff and its residents have been injured" as a result of the defendants' conduct in violation of these statutes. The complaints further allege that the plaintiffs have spent millions of dollars each year to pay for health care, services, and other services/programs for indigent or otherwise eligible county residents who were addicted and/or died, the complaints seek unspecified compensatory damages.

However, the suits are not brought by individuals seeking to recover damages for those injuries. The question then becomes whether the plaintiff states/cities/municipalities/Indian tribes have standing to recover for bodily injury to its residents under any of the causes of action pled, or merely for purely economic loss to the states/cities/municipalities/tribes themselves.

The few courts that have addressed this issue to date have reached disparate results. In *Cincinnati Ins. Co. v. Richie Enterprises LLC,* [3]*("Richie")*, the court addressed the question in the context of a suit brought by the West Virginia Attorney General against the drug manufacturers/distributors. That court rejected the distributor's argument that the State of West Virginia qualifies as an organization seeking damages "because of bodily injury" for the care, loss of services and death due to the state's alleged prescription drug epidemic. The court held that that the actual harm complained of was economic loss to the State of West Virginia, thus Cincinnati did not owe a defense. A Florida federal trial court reached the same result in *Travelers Prop. Cas. Co. v. Anda, Inc. ("Anda")*,[4] holding that a Gemini policy did not apply to the West Virginia AG's lawsuit because the AG was seeking damages for the economic loss to the state and not for "bodily injury."

However, the Fourth Circuit Court of Appeals in *Liberty Mutual Ins. Co. v,. J.M. Smith Corp.*[5] found a duty to defend an opioid distributor in the same underlying West Virginia AG suit involved in the Richie and Anda cases, holding that the complaint could be read to allege an "occurrence" under South Carolina law. It should be noted that Liberty did not raise the issue of whether the West Virginia AG's complaint alleged "bodily injury" in its initial appeal brief, thus the Fourth Circuit deemed the issue have been waived. For this reason, the Richie court rejected the South Carolina court's interpretation of "occurrence" as having no persuasive value. The Seventh Circuit also found a duty to defend the West Virginia AG suit in *Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co.*,[6] holding that the damages sought by the

state were, in part, "because of bodily injury."

Based on the foregoing, whether any particular complaint will be deemed to seek damages on account of "bodily injury" will necessarily depend upon the specific pleadings in any particular case, along with applicable law on a state-by-state basis.

"Property Damage"

It is doubtful, in our opinion, that these complaints could be read to allege "property damage" as that term is defined in a GL policy. The complaints we have seen uniformly seek reimbursement of past costs to eliminate the public health/safety hazard and future costs to permanently abate the public nuisance resulting from opioid and heroin addiction, which are purely economic in nature. To the extent that the complaints could be read to seek non-economic damages, such generally are limited to annoyance, discomfort and inconvenience caused by the public nuisance. We are presently aware of no complaints that allege any "physical injury to or destruction of tangible property, including consequential loss of use thereof" or "loss of use of tangible property which has not been physically injured or destroyed."

Toward this end, courts generally have held that "property damage" in the context of a CGL policy contemplates coverage for tort liability for physical damage to others and not the liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.[7] In our view, it is therefore unlikely that these complaints would be found to allege any "property damage" as contemplated in a GL policy.

"Occurrence"

Even if the complaints could be deemed to allege "bodily injury" or "property damage" as those terms are defined, the next question is whether the complaints allege an accident or "occurrence" under applicable law.

Clearly, causes of action for statutory violations involving false/misleading statements/concealment, fraud, conspiracy and other intentional conduct/misconduct, do not allege an accident or an "occurrence" as those terms are defined. The question is less clear in the context of negligence, public nuisance, violations of statutes like NY GBL 349, and other statutes that are not premised exclusively on intentional conduct/misconduct. For instance, the public nuisance count in these complaints often allege that the defendants acted "recklessly or negligently in conduct or omissions which endanger or injure the public health, safety and comfort of … county residents." The fraud and unjust enrichment claims also frequently allege that the defendants' conduct was also "willful, wanton and malicious" or that the defendants acted with "willful, wanton and conscious disregard of the rights of the Plaintiff[s] and [their] residents." (emphasis added). Because the complaints are not limited to strictly intentional or deliberate conduct, the question then becomes whether the negligence and wanton/reckless conduct allegations constitutes an accident or "occurrence".

Courts generally have recognized that the term "accident" has a tortious connotation.[8] Courts generally have also held that purely economic damages resulting from non-tortious conduct (such as a breach of contract) are not damages on account of an "accident" and are not covered under a CGL policy.[9] Ohio courts have held that proximate cause is important to an analysis of "accident" or "occurrence" in insurance contracts.[10]

The complaints of which we are aware generally allege that the defendants were fully aware of their obligations to properly control the distribution of opioids but repeatedly and purposefully "breached its duties under federal and state law [to monitor, refuse, report suspicious prescriptions of controlled substances] which is a direct and proximate cause of the diversion of millions of prescription opiates for nonmedical purposes in [the] County." The complaints further allege that "the unlawful diversion…is a direct and proximate cause of prescription opiate abuse, addiction, morbidity and mortality[,]" and "the opioid epidemic remains an immediate hazard to public health and safety … [and] is a public nuisance."

In our view, the breach of federal and state statutory duties to monitor/refuse/report prescriptions of controlled substances to prevent the diversion of opiates for nonmedical use is neither an accident nor an "occurrence" as those terms are defined in the policy. However, choice of law applicable to policy interpretation will heavily impact the outcome of this question under any particular policy.

Courts that have addressed this issue to date are split. A South Carolina federal court in *Liberty Mutual Ins. Co. v. J.M. Smith Corp*, supra, found a duty to defend the West Virginia AG opioid suit because under South Carolina law, "accidents require that either the act or the injury is unintentional" thus a deliberate act resulting in unintentional injury is a accident and an "occurrence." New York law looks to whether the event (not the injury) was unusual or unexpected by the person to whom it happens. Thus the *J.M. Smith* case would be distinguishable if New York law applies to the coverage interpretation.

Conversely, the California Court of Appeals very recently found no accident or "occurrence" to exist and no duty to defend California and Illinois opioid suits in *Travelers Prop. Case. Co. of America v. Actavis, Inc ("Actavis")*.[11] The *Actavis* court determined that the seminal question in assessing whether an "occurrence" exists is whether the complaints were based solely on allegations of deliberate conduct, or raised some "additional, unexpected, independent and unforeseen happening that produced the alleged injuries." The court found that the complaints uniformly alleged that (1) the nation is "awash in opioids;" (2) there is a "nationwide opioid-induced public health epidemic;" (3) a resurgence in heroin use; and (4) increased public healthcare costs imposed by long-term opioid abuse and addiction, such as hospitalizations for overdoses, drug treatment for addicts and intensive care of infants born addicted to opioids.

The court held that none of those injuries were additional, unexpected, independent, or unforeseen, because the manufacturer was allegedly involved in a massive marketing campaign to promote the use of opioids for purposes to which they were unsuited; and are alleged to have had access to massive studies, prescription data, adverse event reports and

other data that made clear that people addicted to opioids were turning to heroin and becoming addicted in alarming numbers. The court further held that the allegation of a public nuisance, while not requiring a finding of intentional conduct, did not specifically raise an allegation of negligence and cold not be read to infer negligence because of the complaint on its face raised only allegations of intentional and deliberate conduct on the face of the complaints. As such, the court held that there was no duty to defend or indemnify any of the three suits.

Where the complaints specifically allege negligence, as well as wanton and reckless conduct that allegedly caused injuries and death to plaintiff's residents, such complaints are not strictly limited to allegations of deliberate/fraudulent conduct like those at issue in Actavis. In places like New York where courts have held that an accident is an event that is unforeseen to the person to whom it happens, the question then becomes whether (and if so, when) the manufacturers/ distributors expected the public nuisance and other harm to the plaintiffs created by their conduct, not (as in *Actavis*) whether the individual residents' injuries were foreseeable/ foreseen. The complaints we have read generally are silent in that regard.

The complaint filed by the State of New Jersey seeks coverage under only two statutes, and arguably only for intentional wrongdoing, although the complaint is artfully worded to suggest the possibility of reckless or negligent conduct, which are a covered "occurrence" under New Jersey law.[12] Thus, a court applying New Jersey law could potentially apply an objective test instead of a subjective test for intent.[13] We note that under New Jersey law, an insurer is permitted to allocate defense costs between covered and non-covered causes of action. This would result in a different outcome than South Carolina law, where the court in *Liberty Mutual Ins. Co. v,. J.M. Smith Corp*, supra, held that the insurer was obliged to defend the entire suit based on the single allegation of negligence.

Based on the foregoing, lack of an accident or "occurrence" is an additional ground that may bar coverage, but a final coverage determination on this issue requires close scrutiny of each complaint individually in light of the applicable choice of law for the policy at issue, and could potentially require discovery and investigation depending on the specific complaint allegations.

"Personal and Advertising Injury"

Although the complaints generally allege that the defendants were aware of the opioid problem through studies, hospitalization records, adverse event reports and other sources, this may not be sufficient to trigger Coverage B of a CGL policy. A seminal issue will be the precise definition used in the policy at issue. Consider a situation where the policy limits the definition of "personal and advertising injury" to mean the following offenses: (a) false arrest, detention or imprisonment; (b) malicious prosecution; (c) wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies…; (d) oral or written publication of material that slanders or libels a person or organization or disparaged a person's or organization's good, products or services; (e) oral or written publication of material that violates a person right of privacy; (f) use of another's advertising idea in your advertisement; or (g) infringing on another's copyright, trade dress or slogan in your "Advertisement." Under that wording, nothing in the opioid complaint allegations of which we are aware even arguably allege the enumerated personal injury offenses. Absent any personal injury or advertising injury as those terms are defined, Coverage B is not triggered in the first instance.

Covered Damages

The complaints of which we are aware uniformly seek economic damages to abate the nuisance and eliminate the public health/safety hazard, and non-economic damages for annoyance, including injunction, unjust enrichment, compensatory and punitive damages. Courts generally have held that purely economic damages for abatement of a public nuisance are not covered damages. [14]

Federal courts in Ohio generally have held that equitable relief such as declaratory judgments, injunctions, unjust enrichment and civil penalties are not damages as contemplated in a CGL policy.[15] However, Ohio courts have also held that "purely economic damages" are insurable under some circumstances.[16] West Virginia courts have held likewise.[17] New York courts have held that "actual damages" resulting from false/deceptive advertising practices under the applicable New York statutes need not be pecuniary in nature,[18] and can include damages for bodily injury, emptional distress, humiliation, fear, anxiety, frustration, embarrassment and the like.[19]

Generally, restitution and return of fees or profits are equitable in nature and thus, is not covered damages under the policies. Eric Mills Holmes, Holmes' Appleman on Insurance 2d § 129.2, at 81-82 (2002)(as a general rule, the term "damages" in a CGL policy includes money that the law imposes as compensation but not the cost of complying with injunctions, orders directing restitution of property or money, or other equitable remedies).[20]

In this regard, it will be important to analyze the specific policy wording to assess whether the term "damages" is defined in the first instances and, if so, whether it includes/ excludes certain kinds of damages including fines, penalties, punitive/exemplary damages, multiplied portions of damages etc. 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 (Alabama, Alaska, Arizona, Delaware, Georgia, Hawaii, Idaho, Maryland, Mississippi, Montana, New Hampshire, New Mexico, North Carolina, South Carolina, Tennessee, Vermont, Washington, Wisconsin and Wyoming); and five states are silent or unclear on this issue (Maine, Massachusetts, Michigan, Missouri and Nebraska).

Other Exclusions

Other exclusions that should be evaluated in the context of opioid litigation include the following: expected or intended; known bodily injury or property damage; and prior known

or reported loss. The complaints generally allege that the defendants were involved in a "sophisticated, deceptive and unfair marketing campaign since the 1990s" to increase the use of opioids to treat chronic pain, which misrepresentations and omissions "severely and negatively impacted" the plaintiffs.

There has been some publicity calling the opioid litigation the "second coming of tobacco," because on its face, the opioid litigation likewise involves governmental entities hiring law firms on a contingency basis to sue private companies to recoup costs of public healthcare problems caused by addiction to a drug whose dangers were allegedly concealed from the consuming public. The opioid litigation is similar to the tobacco litigation in certain key respects, including the fact that the suits were commenced by governmental entities seeking to recover Medicaid and other taxpayer dollars that were used to treat tobacco-related illnesses/injuries; and the tobacco suits were likewise premised on equitable causes of action including public nuisance, unjust enrichment, fraud, conspiracy/civil RICO, and injunctive relief. The tobacco plaintiffs were able to leverage a groundbreaking global settlement valued in the hundreds of billions of dollars and requiring compensation in perpetuity based on future market share,[21] because they were able to prove, through the manufacturers' own documents, that they intended to conceal the addictive qualities and dangers of cigarettes from consumers, and indeed, marketed their products to minors with the intention of creating lifelong cigarette addicts.

One key difference, however, is that the states' case against Big Tobacco was premised on a secret weapon – formidable whistleblowers who came forward early and produced internal documents from tobacco companies clearly showing that the manufacturers hid evidence of the risks and addictiveness of smoking from the public for decades. To date, no whistleblowers have come forward in the opioid litigation with similar proof from the opioid manufacturers' own documents specifically evidencing intent to conceal the addictive qualities of opioids. As discussed above, the opioid plaintiffs are looking for "smoking guns" in the US DEA's records, which the MDL judge very recently compelled the DEA to produce in the MDL bellwether cases. It is presently unclear whether the plaintiffs will be able to prove that the opioid manufacturers were also aware of the risks of addiction and intentionally concealed those risks from the public. As such, it is likewise unclear whether coverage defenses like expected/intended and prior known loss will apply to bar coverage for the opioid suits, pending development of additional information through investigation and discovery.

Other Insurance That May Be Implicated

Given the number of complaints filed to date and the magnitude of damages being sought from each defendant, policyholders are likely to seek coverage under other kinds of policies in addition to GL and product/completed operations. Specialty policies such as pharmaceutical and life sciences policies may have additional coverages beyond GL and products coverage that could be implicated. Professional liability/errors & omissions (E&O) coverage generally covers losses incurred as a result of a claim made against it for 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." Defenses 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) 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.

Such policies must also be carefully reviewed and the specific wording be addressed in the context of each complaint and applicable law, which could result in divergent coverage obligations under the same policy wording.

CONCLUSION

There is no doubt that there is an opioid crisis. There is no doubt that the cost in human lives has been unacceptable. There is no doubt that the cost in dollars is enormous and if you take stock in the White House Council of Economic Advisers report the costs for 2015 exceed $500 billion and the numbers since 2015 have continued to grow and could foreseeably exceed $1 trillion annually. The monetary costs will be borne by everyone in the equation and those costs will ultimately be shared by every single business and person in the country.

There is no doubt that initially the costs are and will be borne by the Government and the health insurance companies for the administration of the legal prescriptions and the handling of the addiction, overdoses, and deaths for both legal and illegal opioids. From the government perspective, this will lead to higher taxing by necessity. From the health insurance perspectives, this will necessarily lead to higher premiums.

From a lawsuit and liability perspective, if any of the actions referenced above are successful, there will be a necessary fall-out as well. This fall-out will begin industry wide with manufacturers and/or their insurance companies. However, the fall-out will not end there.

If the manufacturers are found liable, they will have to pay. Those revenues will eventually come from higher prices being charged for the opiates and other drugs to offset the damage awards. The higher costs will be passed on to the health insurance companies and the government to pay for the drugs. Those costs will then be passed on to the public in the form of higher health insurance premiums and/or higher taxes.

If the manufacturers are found liable, and it is ultimately determined (under any particular state's law governing policy interpretation for a policy(ies) issued to a particular insured), that coverage exists, then the liability insurance companies will pay.. These payments will result in future limitations of coverage and/or new exclusions to encapsulate and limit the

future exposures. In addition, the liability insurance companies will undoubtedly ultimately seek increases premium. These increased costs rates will lead to higher cost of the product. These charges will be passed on to the health insurance companies and the government. Those charges will inevitably result in higher health care premiums and/or higher taxes.[22] The best hope is that technology finds a way to treat pain in a way that makes opioids obsolete so that the cycle is broken. Until that time, "Fasten your seatbelts, it's going to be a bumpy night."[23]

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1 Dosing equivalents for prescription opioids were sourced from https://emedicine.medscape.com/article/2138678-overview and https://en.wikipedia.org/wiki/Equianalgesic

2 Heroin equivalencies were derived from http://www.who.int/ipcs/publications/training_poisons/basic_analytical_tox/en/index10.html

3 Case No. 1:12-CV-00816, 2014 U.S. Dist. LEXIS 96510 (W.D. Ky. July 16, 2014)

4 90 F. Supp. 3d 1308 (S.D. Fla. 2015)

5 602 Fed. Appx. 115 (4th Cir. 2015)

6 829 F.3d 771 (7th Cir. 2016)

7 See, e.g., *Structural Bldg. Prods. Corp. v. Bus. Ins. Agency*, 281 A.D.2d 617, 619 (2d Dept. 2001); *Kvaerner N. Am. Constr. v. Certain Underwriters at Lloyd's London,* 2017 U.S. Dist. LEXIS 100705 (N.D.W.Va. 2017); *Home Ins. Co. v. OM Group, Inc.,* 2003 Ohio 3666 (Ohio Ct. App. 2003)

8 See, e.g., *Westfield Ins. Co. v. Paugh*, 390 F. Supp. 2d 511 (N.D.W.Va. 2005)); *Arthur A. Johnson Corp. v. Indemnity Ins. Co*., 7 N.Y.2d 222, 227 (N.Y. 1959)

9 See, e.g., *Ohio Cas. Ins. Co. v. Ferrell*, 2011 U.S. Dist. LEXIS 135819 (D. Or. July 27, 2011); *Franco Belli Plumbing & Heating & Sons v. Liberty Mut. Ins. Co*., 2012 U.S. Dist. LEXIS 56761 (E.D.N.Y. Apr. 23, 2012); *Westfield Ins. Co. v. Paugh*, 390 F. Supp. 2d 511 (N.D.W.Va. 2005))

10 *Navigators Specialty Ins. Co. v. Guild Assocs*., 2016 U.S. Dist. LEXIS 163484, *14 (S.D. Ohio 2016)

11 16 Cal. App. 5th 1026 (Nov. 6, 2017)

12 *SL Industries v. American Motorists Ins. Co.,* 128 N.J. 188 (1992)

13 See, e.g., *Morton, Int'l v. General Accident Ins. Co*., 134 N.J. 1 (1993)(New Jersey Supreme Court held that Morton's actions as a polluter were so egregious that the court objectively found that *Morton* was an intentional polluter)

14 See, e.g., *Everest Indem. Ins. Co. v. Valley Forge, Inc*., 140 F. Supp. 3d 421, 430 (E.D. Pa. 2015)

15 See, e.g., *Wayne Mutual—Detrex Chem. Industries, Inc. v. Emps. Ins. of Wausau*, 681 F.Supp. 438 (N.D.Ohio 1988) and *Amerisure Ins. Co. v. Acusport Corp., S.D.Ohio*, No. 2:01-cv-683, 2004 U.S. Dist. LEXIS 6901 (Jan. 30, 2004)

16 *Hartzell Indus., Inc. v. Fed. Ins. Co*., 168 F. Supp. 2d 789, 796 (S.D. Ohio 2001)(holding that purely economic damages are insurable in the context of loss of use property damage claim); *IMG Worldwide, Inc. v. Westchester Fire Ins. Co*., 572 Fed. Appx. 402, 409 (6th Cir. 2016)

17 See, e.g., *Safeco Ins. Co. of Am. v. Desantis*, 2014 U.S. Dist. LEXIS 107993 (2014)

18 *Wood v. Capital One Services, LLC*¸ 718 F. Supp. 2d 286 (N.D.N.Y. 2010)

19 *Rozier v. Financial Recovery Systems, Inc.*, 2011 U.S. Dist. LEXIS 61307 (E.D.N.Y. 6/7/2011)

20 S*ee also Mustang Tractor & Equip. Co. v. Liberty Mut. Ins. Co*., *supra* ("Insurance law recognizes the difference between money damages and equitable relief.").

21 The tobacco litigation resulted in a 1998 global settlement between "Big Tobacco" manufacturers and all 50 states Attorneys General valued at $206 billion for the first 25 years, then $9 billion per year in perpetuity thereafter, along with restrictions on future advertising and lobbying practices.63:4:1081 Vanderbilt Law Review "*Big Tobacco, Medicaid-Covered Smokers, and the Substance of the Master Settlement Agreement*"

22 We have not addressed the positive aspects of Opioids. There are numerous positive uses of Opioids when properly managed. Millions of people are in desperate need of pain management. These higher costs will most certainly impact the availability of these useful drugs and negatively impact many people in need.

23 Margo Channing, played by Bette Davis in All About Eve, 1950.