Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Expert Analysis

Evolution Of A Crisis: Opioid Claims Pick Up Speed

By **Adam Fleischer**

October 16, 2017, 12:53 PM EDT


Adam Fleischer

The evolution of the worst drug crisis in American history is picking up speed, as the legal implications for the drug and insurance industries have become even more pronounced in recent weeks. As discussed in previous articles, the opioid epidemic that is killing more than 91 Americans each day has sprouted over 100 lawsuits across the country against the manufacturers, distributors and pharmacies that are alleged to have either negligently or fraudulently misrepresented and mismanaged the proper means of using, prescribing and dispensing opioids. Over 60 such suits are currently the subject of a motion for consolidation in a federal multi-district litigation (MDL). With the damages and deaths mounting, legislative proposals have come under fire for falling far short of what is needed. New developments in recent days have broadened the liability attacks on the pharmaceutical industry, and have alleged governmental complicity, all of which may have significant impacts on insurers involved in the crisis.

60 Minutes Introduces Pathway to New Evidence

On Sunday, Oct. 15, 2017, the results of a six-month joint investigation by 60 Minutes and The Washington Post concluded that "the drug industry, with the help of Congress, turned the opioid epidemic into a full blown crisis" by intentionally turning a blind eye to the diversion of pain pills from pharmaceutical distributors to illicit users in communities across the nation. By way of example, the investigation highlights the town of Kermit, West Virginia, population 392, wherein one pharmacy allegedly received over 9 million doses of hydrocodone pills over 2 years.

The investigation involved months of research with former U.S. Drug Enforcement Administration officials who indicated that members of Congress allied with the country's major drug distributors to achieve a "multifaceted campaign by the drug industry to weaken aggressive DEA enforcement efforts against drug distribution companies that were supplying corrupt doctors and pharmacists who peddled narcotics to the black market." The investigation concluded that the politician working most closely to weaken the DEA laws was Rep. Tom Marino, R-Pa, who was nominated last month by President

Donald Trump to head the Office of National Drug Control Policy.

For the drug industry and its insurers, the 60 Minutes investigation may represent a watershed event. The investigation takes the often vague and ambiguous allegations of "knowing and fraudulent conduct" that have appeared in hundreds of opioid lawsuits, and it lends names, documents, places and dates to what could otherwise be seen as the typically unsupported aspirations of what plaintiffs' counsel hope to prove. For the insurers of the entities involved, new facts uncovered by 60 Minutes and The Washington Post are destined to give rise to a number of questions as to whether the repercussions of intentional business schemes and efforts of the drug industry can be covered by general liability insurance, which typically only covers damages caused by accidental conduct.

A New Plaintiff? Labor Union Suits

The last week has also seen a potential expansion of the plaintiff classes pursuing the opioid litigation against the drug industry. On Oct. 13, 2017, the International Brotherhood of Electric Workers Local 38 Health and Welfare Fund, a labor union based in Ohio, filed a purported class action against manufacturers such as Purdue Pharma and Teva Pharmaceutical Industries, as well as wholesale distributors including AmerisourceBergen Corporation, Cardinal Health and others in the U.S. District Court for the Northern District of Ohio. While most of the opioid litigation to date has been filed by municipalities seeking recovery of public expenditures for health or law enforcement expenses, this is believed to be the first suit filed by a labor union.

The suit generally alleges that manufacturers fraudulently marketed prescription opioids as safe for treating chronic, long-term pain, and that distributors failed to monitor, identify, report and refuse to fill suspicious order for prescriptions opioids as required by federal and state law. The labor union alleges that, as the party responsible for funding its members' health insurance plans, it was faced with a vast over-prescription of opioids, and thereby was forced to unwittingly fund millions of dollars in inappropriate prescriptions on behalf of its members. The suit seeks to certify a class of "all unions and/or health welfare funds who, from October 12, 2011 to the present, paid charges for a member or employee's opioid prescription that was prescribed and filled in Ohio for a period greater than ninety (90) continuous days."

For the defendants and their insurers, this new suit raises yet another significant issue relating to both liability and insurance coverage: who exactly has suffered the injury and what is it? For example, the unnecessary funding for opioids that arose from overprescription and illicit diversion is a key aspect of ongoing lawsuits filed by states, counties, and municipalities across the country against the drug industry, as well as claims that the pharmaceutical industry has already settled. To what extent do the costs and expenses at issue in those claims overlap with the costs and expenses at issue in the labor union claims? Furthermore, the real parties in interest who have suffered actual bodily injury from the defendants' alleged conduct are the individuals harmed by the opioids. At what point do governments' *in loco parentis* suits brought on behalf of individuals actually infringe upon the individuals' rights to bring claims on their own behalf? To the extent that the claims sound more in public nuisance and financial loss, these suits by labor unions and municipalities would appear not to involve compensation for actual bodily injury, as would normally be a fundamental requirement for insurance coverage to exist.

A New Defendant? Insurers and Pharmacy Benefit Managers

Another recent investigation, this one by The New York Times, concluded last month that many insurers and pharmacy benefit managers have helped perpetuate the opioid epidemic by limiting individuals'

access to pain medications that carry a lower risk of addiction than the opioids that are currently a formative part of so many prescription drug plans. These allegations were formalized on Sept. 18, 2017, in a joint letter from 37 attorneys general to the president of America's Health Insurance Plans.

The attorneys general letter urges that when patients seek treatment for chronic pain, doctors should be encouraged to prescribe effective nonopioid alternatives, ranging from nonopioid mediations to physical therapy, acupuncture, massage and chiropractic care. The attorneys general suggest that part of the reason such alternative prescriptions are not used by doctors is because the plans do not allow proper financial compensation for these sources of pain management, but they do allow for compensation for opioid treatment.

The New York Times piece goes further to explain that it examined prescription drug plans that cover 35.7 million people, and discovered that: 1) only one-third of the plans gave individuals any access to Butrans, which are alleged to contain a less addictive and less risky opioid, buprenorphine, and; 2) every drug plan that covered nonaddictive lidocaine patches for pain treatment also required prior approval for such a prescription, thereby making the access to this nonaddictive option much more difficult than accessing opioids. The investigation also found that the insurers and managers of these drug plans offer highly addictive drugs like morphine at a low cost of $29 for a month's supply, whereas less addictive drugs like Butrans are either not covered or covered at a much higher cost of $342 a month, thereby driving the prescription of opioids.

Conclusion

In the coming months, insurers and pharmacy benefit managers are expected to undertake new and innovative efforts to control and disincentive the use and prescription of opioids. In fact, CVS Health has already announced plans to limit opioid prescriptions to seven days or less for certain patients, as opposed to the previous 20-day limitation. As health insurers and pharmacy benefit managers undertake such efforts to curb the opioid epidemic, those that don't join the efforts, or join too late, are likely to be the focus of new suits as plaintiffs' counsel seek a wider array of deep pockets to pursue.

Adam H. Fleischer is a partner with the Chicago firm BatesCarey LLP. He is chairman of the firm's opioid coverage task force.