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Expert Analysis

Senate Bill May Force Rise In Suits For Opioid Funding

By **Adam Fleischer and R. Patrick Bedell, BatesCarey LLP**
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Last week's unveiling of the Better Care Reconciliation Act of 2017 (BCRA) by Senate Republicans may complicate the efforts of pharmaceutical companies and insurers to evaluate the exposures from the expanding volume of lawsuits against the opioid industry. With the worst drug crisis in American history bearing down on pharmaceutical companies and those who insure them, the Senate proposal to repeal and replace the nation's healthcare law, the Affordable Care Act (ACA) may significantly reduce funding for opioid treatment. In the wake of those cuts, state and local governments seeking new sources of funding to combat the epidemic may have increased incentive to sue manufacturers and distributors of prescription opioids. An increase in such suits may inevitably shift the financial burden of the crises to the pharmaceutical defendants and their liability insurers.

As described below, the proposed bill would roll back current regulations requiring coverage for opioid treatment and cut federal funding for such treatment:

Optional "Essential Benefits": In the context of the opioid epidemic, one of the key elements of the 2010 ACA was the newly introduced requirement that all insurance plans cover addiction treatment as something called "an essential health benefit." In a striking change from this requirement, the current Senate plan would allow states the option to not require insurers to cover substance abuse treatment. This could mean that, even if people with substance use disorders have insurance coverage, they could face thousands of dollars in out-of-pocket costs for treatment, putting such treatment out of reach for many.

Medicaid Reduction: Medicaid, at its most basic, is a federal program that has been in place for half a century to allow the federal government to match state funding of healthcare costs for the poorest residents. To date, there has been no specific cap on the amount of Medicaid matching funds a state can receive. In 2010, the ACA expanded Medicaid funding to the states by lowering the minimum requirement to qualify for these funds to apply to people who earn up to 138 percent of the federal poverty level, and who live in one of 31 specified states that elected to expand the funding in this manner. This change is often referred to as "Medicaid expansion." This change to Medicaid funding resulted in coverage to an additional 11 million Americans. Under the current Senate proposal, this Medicaid expansion would begin to be reduced in 2021, with the extra funding cut off completely in 2025.

To put this in context of the opioid crisis, Medicaid expansion has accounted for 61 percent of the total Medicaid spending on substance abuse in Kentucky, 56 percent in Michigan, and 45 percent West Virginia. To better understand the impact: last year, Ohio spent $939 million on the opioid epidemic, with 70 percent of that expenditure covered by Medicaid. If that money is to significantly decrease, the states hardest hit by the opioid epidemic will be forced to seek alternative funding sources to combat the crisis. It may not be coincidence then that states like Ohio, Missouri and Tennessee have each filed their own lawsuits within the last few weeks against the pharmaceutical industry, seeking to recoup tens of millions of dollars in opioid treatment and opioid related law enforcement expenditures.

Opioid Earmarked Funds: Senator Rob Portman (R-Ohio), along with Senator Shelley Moore Capito (R-W.Va.), had requested that the bill provide $45 billion over the course of ten years, specifically set aside to battle the opioid crisis. The bill instead proposes to allocate only $2 billion to opioid treatment, and all in 2018. Senators Portman and Moore Capito represent two of the states hardest hit by the opioid crises, but their issues are far from unique. The specifically earmarked opioid funds that were requested represented an effort by those closest to the devastating path of the epidemic to soften the blow of the lost Medicaid funding that would be available to fight opioid addiction.

Lawsuits as an Alternative Source of Funding Treatment: With the Senate bill potentially resulting in a massive reduction in opioid addiction funding and services, the worst drug crisis in American history is likely to result in more injuries to more people, and more impact on the costs of combating this epidemic. With the elimination of key sources of funding for opioid addiction, state and local governments are confronted with the hard political choice of reducing funding for opioid addiction treatment or raising taxes to close the funding gap created by cuts in Medicaid. Faced with this "Catch 22," states and counties can be expected to mitigate the political fallout from unpopular cuts in funding or tax increases by exploring new and novel theories of recovering their expenses from the corporations in the opioid distribution chain.

As is the hallmark of any national crisis, the funding mechanism to resolve the past claims and to protect against future claims will ultimately fall to the insurers of the companies at issue. These insurers will face difficult issues in terms of whether to provide coverage for harm to the general public without the proof of compensation paid for specific "bodily injuries" to specific individuals. They will be forced to walk the difficult line between protecting their insureds from sensational claims of fraud and collusion, while simultaneously guarding against insuring damages from those intentional marketing schemes that may indeed be proven through the course of the litigation to come. In the end, the pockets from which the opioid crisis may be combated could depend in large part upon the scope of changes negotiated to the Better Care Reconciliation Act of 2017 in the coming weeks.

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

R. Patrick Bedell is a partner at BatesCarey and is actively involved in monitoring and evaluating a range of liability and coverage issues for the firm's opioid coverage task force.