

Company Participants

- Andrea Warren, Partner
- Paige M Steffan, Associate

Other Participants

- Holly Froum, Senior Litigation Analyst
- Matthew Palazolo, Senior Insurance Analyst

Presentation

Matthew Palazolo

Good morning. Welcome to our Webinar on Insurers and Opioid Litigation. My name is Matt Palazzola. I'm the Senior Property & Casualty Insurance Analyst at Bloomberg Intelligence. With me is Holly Froum, our Consumer and Industrial Litigation Analyst. We're joined by Andrea Warren from Barnes & Thornburg. She is an attorney representing companies seeking recoveries from insurers, and Paige Steffen, from BatesCarey, who works on behalf of insurance companies.

I'm just going to go through some quick admin before we start the call. This call is recorded. There will be a replay. Just some quick notes on Bloomberg Intelligence, which is the third slide here. We provide in-depth research on data on industries, companies as well as governments, ESG, credit litigation and other factors that can impact business decisions. There is no formal slides. So we have slide with the photos on it is the last one you're going to see. With that, we're going to get into some initial comments and then we're going to go in a Q&A format.

So over 2 million people have died in the United States due to the opioid crisis with annual cost estimated about \$80 billion per year. Relatively recently hundreds of lawsuits have been filed by municipalities against opioid manufacturers and distributors. These companies have insurance coverage and litigation over that coverage will have significant financial implications and I'll pass it on to Holly.

Holly Froum {BIO 20219265 <GO>}

Hi, everyone. So picking up where Matt left off, there are over 2,000 lawsuits in Federal Court filed by counties and cities against manufacturers, distributors and retailers. States have also sued separately in their own State Courts. Manufacturers are accused downplaying the risks of addiction and overseeing the benefits of opioids. So, manufacturers who make both branded and generic drugs are accused of inflating demand and oversupplying. Meaning, failing to report suspicious orders and distributors are also accused of failing to monitor and report suspicious orders.

FINAL

Bloomberg Transcript

FINAL

So the status of the litigation is that there is a trial scheduled for October 21st. J&J, Mallinckrodt, Allergan and Endo, which are manufacturers -- four manufacturers have settled that -- their first litigation. Purdue, which is a manufacturer that also is a defendant in many of these cases filed for Chapter 11 after announcing it had settled with roughly half of the states and a group of lawyers representing the counties in the federal litigation. In the next trial, Teva and Amerisourcebergen, Cardinal Health, McKesson and Walgreens are the remaining defendants.

Distributors in Teva as well as Ohio, the State of Ohio has sought to stay the trial, but we don't think that's likely to happen. And acquaints in the next trial include federal and state conspiracy claims, as well as Houston. The claimant was tried in Oklahoma against Johnson & Johnson was nuisance and the release sought for nuisance is abatement. A jury will decide liability for nuisance and the remedy -- and if the manufacturers and distributors, et cetera are found liable, the remedy for nuisance will be determined by the judge. Plaintiffs are also suing for compensatory damages in connection with their conspiracy claims. As for settlement possibilities, we think distributors can pay more than the \$10 billion they reportedly offered to states and we estimate manufacturers could pay less than \$50 billion.

Matthew Palazolo

Great. Thanks, Holly. So we're going to move into question-and-answer. So the first question I had for Andrea was, could you pick up on the current landscape of litigation around insurance coverage. Have we gone to the point where indemnifications are actually being litigated? Or are all the cases currently focused on defense costs?

Andrea Warren {BIO 20258010 <GO>}

Yes, we have reached that point, within the last year or so. And in fact, we just had a big opinion issued last week or a few weeks ago by a federal court sitting in Illinois. In terms of the commercial general liability policies, CGL policies of course, they provide that insurers have a duty to defend and indemnify their insurers facing liability for damages because of bodily injury. And over the last few years, as we know, many courts have found that the opioid lawsuits, our suits seeking those types of damages because of bodily injury and as a result, there is a duty to defend the insurers and those losses.

But over the last year, we've extended and we've seen more argument and now an opinion showing that the carrier has indemnity obligations for that opioid litigation and the resulting settlements there from. And that's important because of the settlements, and if it doesn't settle then ultimately the judgment from a trial that these policy holders are facing. And a few weeks ago that Illinois Federal Court granted our client summary judgment finding that the carrier has the duty to indemnify it for the entire amount of its settlement. It was a pharmaceutical distributor for the cost paid in that settlement of an attorney general's lawsuit against it and several other wholesale drug distributors, alleging responsibility for the opioid epidemic in that state. And this was one of the first opinions, if not first finding a duty to indemnify in the opioid litigation context, which is a significant victory for policyholders, because of course, the duty to indemnify is narrower than the duty to defend where if -- in the duty to defend context if there is any allegation even

potentially covered, the insurer has that duty to then defend the policyholder for the entire actions.

So now that we're in the indemnity round, it's a little different, it's a little narrower and now that we have this opinion, we have some foresight on how courts will rule and of course, in the settlement context, most CGL policies will provide that their allegations of negligent and intend to act in these underlying opioid actions, most CGL policies will only cover the negligent act. So insurers would first will argue that the settlement either isn't covered or must be allocated between what portion of the settlement constituted and settlement for the alleged negligence versus the alleged intentional act. And because of this predicament that this puts the insurers in for obviously, requiring them to defend themselves in the underlying allegation, and then in turn, turn around and say, well, here's how we are portioning our liability that doesn't make sense.

So a lot of courts have found that if an insured enters into a settlement that disposes as both covered and non-covered claims. So claim for negligence and intentional act, then the insurers needed to identify encompasses that entire settlement as long as covered claims were the primary focus of the litigation and not with the lawsuit a few weeks ago or the opinion on that lawsuit came down and said that the primary focus was of the negligent act. The -- they were -- those were the primary focus. So we're not going to allocate. The insured has that -- has the ability to get insurance coverage for the entire settlement and the insurer has the duty to indemnify its policyholder for the amount of the entire settlement. We're not foreseeing the insurer to allocate between the underlying allegations that of course were never proven, because the case never went to trial. So yes, we have entered that realm and it will be interesting to see more cases that are issued, now that it's being litigated more.

Holly Froum {BIO 20219265 <GO>}

So that's interesting. Do we have the name of that case in Illinois?

Andrea Warren {BIO 20258010 <GO>}

Yes It's the Cincinnati Insurance Company versus H.D. Smith Wholesale Drug Company.

Holly Froum {BIO 20219265 <GO>}

So wow. Okay. That's interesting. And Paige, we understand that there are coverage issues in current cases, one based on the definition of an occurrence, and the other relating to whether or not the claims relate to bodily injuries. Can you explain those and how successful those two have been?

Paige M Steffan

Of course. So I think Andrea, touched on this a little bit in some of the litigation that's been going on, but I'll kind of step back a little bit, discuss the policy language and then move forward to what's actually been litigated. So, I'll start with the issue of bodily injury. So, in typical commercial general liability policies, those policies generally provide

FINAL

coverage for loss that an insured pays by reason of liability for damages, because of or account of or for bodily injury that takes place during the policy period. So the interesting thing with some of these lawsuits is a lot of them are filed by government plaintiffs. And the argument or the question is that some of these lawsuits filed by government plaintiffs appear to allege economic damages from increased expenditures on public services such as police services or welfare services, things of that nature.

And in fact, we've actually seen some of the government plaintiffs in the Track One Opioid MDL concede in some of their lawsuits that they're are only seeking economic damages for injury for their communities rather than for damages for personal harm suffered by an individual or group as the policy would demand. However, we also do recognize that there are suits actually filed by individuals or suits filed on behalf of babies that have become addicted to opioids through their mothers, which obviously, that changes that argument as well. And the complaints are all drafted a little differently, but it's definitely a focus of the insurers.

And within that argument of bodily injury, we also have a separate issue regarding the damages. So the policies require that the damages because of bodily injury that takes place during the policy period. What we're seeing a lot of is a lot of these governments are looking for perspective, equitable abatement, which essentially forward-looking or preventative measures to stop this opioid crisis and to provide treatment for their residents, so that this addiction does not keep growing.

So something interesting about that, would -- there be an argument that the damages occurring would not be compensatory that they would be future looking and also that those damages would not be treating any bodily injury that took place during the policy period, instead those damages would be treating injury that has not yet occurred or at least not occurred during the policy period.

So another argument that -- or a difference, coverage issue that we discussed is whether there is an occurrence. So the same CGL policies generally provide coverage for damages paid on account of bodily injury, like we discussed that is caused by an occurrence. An occurrence is typically defined to mean an accident or a continuous or repeated exposure to substantially the same or general harmful conditions. I think Andrea, touched on this a little bit, where although there are allegations of negligence, there are some allegations in these complaints that the manufacturers participated in a scheme to fraudulently market their prescription opioids as safe and effective, even though they may have known that there will be deductive qualities. And there's also allegations that the distributors intentionally failed to comply with their duties under the Controlled Substances Act.

So in one of the cases that we've seen in Travelers versus Actavis, the California Court of Appeals held that Actavis, which is a manufacturer of prescription opioids was not entitled to coverage for the opioid suits filed by the State of California in the City of Chicago, because their claims for damages were based entirely on Actavis' alleged fraudulent marketing of opioids. But we will distinguish this case because as Andrea said, many of the lawsuits that are at play now and the thousands of thousands that still remain, actually

do allege at least some negligent conduct in courts typically reviewing those claims that allege negligent conduct have found that there is an occurrence.

And I will touch on a final coverage issue, which is known loss. So these policies generally do not provide coverage for harm that an insured knew about before the policy period or that the insured expected or intended. Perhaps, maybe because these coverage defenses are highly fact dependent and based very much so on what exactly each defendant knew, courts have not yet really had the opportunity to decide whether these known loss or intentional conduct coverage defenses applied to the opioid claims. But essentially what we would look at there is seeing whether the insured knew that their products or what they were distributing caused damage and whether they were aware of any harm and if so when and who exactly knew that. So I would say, those would be some of the three top coverage issues that we're looking at for the opioid claims, which would be whether there is bodily injury, whether there is an occurrence, and whether there is a known loss.

Matthew Palazolo

Okay. Great, Paige. Thank you. So, Andrea, we've been talking about CGL, general liability policies. Is that really the only policy type at issue here or do directors and officers in Arizona missions D&O, E&O policies are they coming into play at all yet?

Andrea Warren {BIO 20258010 <GO>}

Well, I think that policyholders are starting to look to their D&O and E&O policies as well. But as far as litigation is concerned that has mostly centered on those CGL policies. And of course, the policyholders that may have a specialized life science policy that is tend to coverage for a product liability or some of the Bermuda firms have specialized market offering pharmaceutical policies, of course, you would want to look to those as well. It really depends on the policy language and the underlying allegation and really just figuring out what policies you have, what they could cover and they are really treating and our situating and considering their coverage positions and thinking about what coverages you may have.

For D&O policies of course, those are issued to protect the personal assets of corporate directors and officers, student capacity and sometimes as a corporate. And E&O policies are going to cover the professional [ph]mark active type claim, usually alleging some type of failure to vendor professional services to a third party. But both D&O and E&O policies will have that bodily injury exclusion for claims based on or arising out of alleged bodily injury.

So that goes back to what Paige was saying where many courts are starting to find that these underlying opioid lawsuits are alleging bodily injury because there is no exclusion in the policy for economic damages. And the damages that these lawsuits are seeking -- bodily injury should be interpreted more broadly if and when its determined because of bodily injury -- the increased hospital needs, [ph]police needs, germ needs and that H.D. Smith case I had discussed earlier, the court found that it doesn't matter that the State Attorney General West Virginia saw it's own damages and dealing with the opioid usage

FINAL

compared it to a mother who's fourth child, concluding that the alleged costs were incurred because of bodily injury.

So if the court finds that the underlying opioid lawsuits are indeed because of that allocation for damages, because of bodily injury, then that could get you excluded under the D&O and E&O policies. On the other hand some courts find that these are not allegations of bodily injury. So then maybe you could look through D&O and E&O policies and you can avoid that bodily injury exclusion. So it really depends on the jurisdiction. It depends on your policy language and just being really aware of the interplay between the different types of policies and as Paige indicated, making sure that you provided notice and that you look at some of the prior notice exclusions and then of course, in the current D&O policy, there are lot of exclusions for opioid litigation, there may be a very specific, but very specific exclusion for it, but you must submit your timely notice of claim and then sometime -- some policies circumstances that could lead to future claims and pursue the acknowledgment of those claims and really scrutinize your coverage position. So that you don't give up coverage under one of these, what we, -- what may have first been perceived as an ancillary D&O and E&O coverage for this type of underlying opioid litigation, but which may in fact provide coverage. And because of the breadth and the number of claims arising from this opioid crisis, the insurers are going to look to those policies provision for coverage when substantially similar actions were claimed, were known, or should have been known to the insured prior to the policy period. So you really have to step in and consider what you have, what allegations you may be facing and make sure that notice is given timely.

Matthew Palazolo

Okay, great Andrea. I want to follow-up with one more for you, Andrea. So far the defendants have been limited to manufacturers and distributors. Is it possible that the group of potential defendants expands, it could impact even maybe doctors who prescribe these pills. I'd like to hear from actually both of you on that, but maybe Andrea go first.

Andrea Warren {BIO 20258010 <GO>}

Okay. Well, I mean the underlying litigation itself is again a retailer pharmacies and prescribing physicians, even pharmacy benefit manager. So the group of defedants has a little more experience than that and keep in mind that the group of plaintiffs is also expanding, there are now class actions by individuals and businesses that are buying healthcare, private healthcare insurance including anyone who have paid into an employer provided health care program. They are doing in class actions, opioid manufacturers and distributors for the increased health care costs and that would be premium deductible co-pays due to the opioid crisis, alleging that the insurers have -- alleging that the insurers have passed to customers, those costs in the form of higher premiums and deductibles and co-pays. So really those fields, is the way I see it is somewhat more expensive.

Matthew Palazolo

Okay. Paige, your thoughts on that.

Paige M Steffan

One thing I'll just add about the question of whether doctors will be pulled into this litigation more. I think it's interesting to note that in the past couple of years, doctors have actually been criminally charged with some of their actions of over prescribing opioids for non-medical reasons and in some cases we've even seen doctors charged for some of their patients that have overdosed on their drugs. So I think some of the focus on the doctors has been from more of a criminal route, and at least how -- what we've seen so far, and Andrea, like she said before, some of these doctors are actually named in some of the underlying litigation. It's just that most of the focus and media attention has been on some of these large Fortune 20 companies that we see in the news, quite a bit.

Matthew Palazolo

Okay, great. So Paige, we've been using the tobacco settlement as an analog for what's going on with opioids. In that situation and sure saw very little liability. Are there differences between opioids and tobacco? Are there similarities? Could you talk about -- compare the two situations?

Paige M Steffan

Yes. So I would say that although there are many parallels, there's also a lot of aspects of this litigation that would distinguish tobacco from opioids. So first, I would say the parallel some of them are pretty obvious. Both of the two involved allegations of fraudulent marketing of dangerous addictive products that really caused a significant human toll in this country. Although the opioid epidemic is relatively new and actually has caused fewer injuries than that of tobacco, it's still extremely significant and obviously something that needs to be resolved.

However, with that, we do see significant things that we can distinguish. The first I think being that opioids have a legitimate medical purpose. Opioids as much as we're talking about how they're addictive and have caused significant injury, they also help people and they have a purpose in medicine, and they actually can do a lot of good as opposed to tobacco where there was no legitimate medical purpose for that product.

Another kind of interesting thing that we see with opioid is the entire supply chain, how we were just discussing is has been roped into this litigation, all the way from the companies that grow the poppies that's used to manufacture the opioids all the way down to the pharmacist that's actually distributing the pill to the consumer. As in tobacco it was a lot more concentrated into a smaller group of manufacturers and we never really saw that branch out into the distributors or retailers essentially.

And another thing that's interesting and I think unique to the opioid epidemic is these intervening causes. We see illicit fentanyl, we see criminal actions by some of the doctors that I spoke about, we see some black markets and all of these things really play into whether the plaintiff's can even prove causation or liability on behalf of the manufacturers and retailers and distributors, when there is a completely separate group of these intervening causes of criminal actions that really kind of change up the whole story. And

we didn't we -- something that we did not really see in tobacco or something that we didn't have to work through.

And I would say another thing that the municipalities have kind of learned from the tobacco settlement and are trying to stay away from is a lot of the money gained through the Master Settlement Agreement for tobacco was not really returned to combat the crisis. And now we see a lot of municipalities focusing on this abatement and focusing on requesting relief that's very focused on treatment and education and making sure that that this crisis can somehow come to an end. And I think some of those things, maybe more than others will ultimately play into coverage issues and may affect coverage down the line. But I think I would be hesitant to say that tobacco and opioids would follow a similar path, because of all these differences that we see in the opioid epidemic.

Matthew Palazolo

Okay, awesome. So Paige, actually one more for you. We're talking about settlements. Can you talk about the mechanics maybe of how much an insurer might be involved in the negotiations for that, or what role they play in a settlement?

Paige M Steffan

So I would say that's highly dependent on policy language and whether the insurer has the right to consent to settlement, and whether how closely they are working with the insurer. And I will just comment on how there is a couple of different routes of potential settlement going on and that may be a good example of how and when insurers may be able to participate. So in terms of global revolution, so trying to resolve the thousands and thousands of claims that are pending, we've seen a couple different attempts at global settlement, which I believe Holly spoke on briefly in the beginning.

One was, what I'll call a state-centric model, which was actually reported by Bloomberg back in August, where some of the state AG's demanded \$45 billion for a global settlement from what we call the Big 3. The Big 3 distributors being AmerisourceBergen Corporation, Cardinal Health, and McKesson Corporation. And currently these Big 3 responded with a \$10 billion offer. So as that state-centric model is working, we're also looking at a similar negotiation track, which is headed by the cities and counties taking place in the opioid MDL in Cleveland. So back in September, Judge Polster, who is heading this opioid MDL, certified this very novel negotiation class under which every municipality in the US, which is more than 30,000 municipalities has until the end of November to opt out of this class. And once the class is set, negotiators will then be able to negotiate which -- with I believe is about 13 of the defendants, and they're negotiating based on the conspiracy and the Controlled Substances Act violations.

So if some sort of a preliminary agreement is decided, then it will turn back to the class and I believe it's 75% of the class or about that will have to vote in order for there to be approval. And then from there the money would be allocated by -- to the municipalities by relative number of opioids sold and death in each county. So both of these tracks, the state-centric model is moving forward at the same time that the city and county negotiation track is moving forward.

FINAL

And in the mix of all this, to make it even more confusing, we have Purdue filing bankruptcy, which Holly also referenced, which automatically stays all of its active litigation, including all of its opioid claims, which will then be moved -- to Bankruptcy Court. So essentially Purdue is using that as another tool for settlement. So as you see there is lots of pieces kind of moving at the same time and insurers and insured kind of being pulled in different directions. But -- so I think the next couple of months will be very interesting as the Track One Trial approaches and whether it goes forward or not, we've seen a lot of movement in settlement, specifically I think like Holly mentioned before with Endo and Allergan and Mallinckrodt, settling these bellwether trials as the MDL approaches in these next couple of weeks.

Matthew Palazolo

Thanks. So, Andrea, could you talk about -- in a potential Master Settlement what role insurers might play?

Andrea Warren {BIO 20258010 <GO>}

I would really just piggyback of what Paige had mentioned, and it really is going to depend on the insurers participation in the matter and whether or not they've acknowledged their coverage obligations and what the policy language says about those obligations, and really be taken by a case-by-case basis.

Matthew Palazolo

Okay. So, maybe first Paige, maybe Andrea has some additional insurance. But at some point, I'm assuming insurers recognized opioids could be misused, they probably sort of adding some exclusions in policies relating to opioids. Is that true? And if so, when or if could that have started?

Paige M Steffan

Yes. So, after there was a huge influx in the opioid cases, which was about the end of 2017 into 2018 that's only really saw a lot of opioid exclusions being written into policies. The interesting thing about these is the wording of the opioid exclusions, it really varies, and we've seen all different sorts of exclusions. Some of the broadest exclusions preclude coverage for the abuse, the illicit use, or the unlawful distribution of any opioid or any controlled substance.

On the opposite end of the spectrum, we've also seen opioid exclusions that are drafted a lot more narrowly and preclude coverage from maybe a particular type of opioid or a specific brand name or product. For example, we've seen some that may only exclude Oxycotton or may only exclude Oxycodone. And sometimes this wording appears where an insurer is possibly a manufacturer, maybe they only manufacture that one product, so it's liability would typically only be tied to one product. Whereas, when we see some of the distributors who deal in numerous products, different brand names, it becomes more of an interesting puzzle, I would say, if a distributor is dealing with dozens and dozens of

products and say one of those products is excluded by -- in opioid exclusion then, then we'll have to dig in further into their dealings with that specific product.

We've also seen some interesting carve-outs with some exceptions. For example, maybe there will an opioid exclusion for claims arising out of opioids. However, maybe they'll include a carve-out for an insured failure to provide the correct drug or correct dosage, while feeling -- filling a prescription, which essentially would possibly go towards claims against an individual pharmacist negligence in dispensing of those opioids.

To-date, we really haven't seen too many courts interpreting these exclusions. And once we do as the litigation moves forward, it might be difficult to apply them over different policies as I said, because some of these exclusions are extremely broad and some are extremely narrow and again would also be fact dependent on the insureds dealings with these specific drugs.

Matthew Palazolo

Okay, Andrea, do you have anything to add on exclusions?

Andrea Warren {BIO 20258010 <GO>}

No, no.

Matthew Palazolo

Okay. So we're going to try to take some of the questions that we're getting through the webinar. Andrea and Paige, you know, you can both jump in on this one. So first question is, how would you size up the range of insured losses related to opioid litigation based on current expectations? They don't want to take a stab at that one.

Andrea Warren {BIO 20258010 <GO>}

Can you repeat that?

Matthew Palazolo

Sure. So how would you size up the range of insured losses related to opioid litigation based on current expectations?

Paige M Steffan

Well, I guess my comment to that would be there is quite a bit of range on the different insurers. For example, when we've seen some of the smaller manufacturers or manufacturers that have a smaller percent market share. They're settling for example, Endo settled the upcoming bellwether trial for \$10 million, Allergan settled the upcoming bellwether for \$5 million, Mallinckrodt, I believe it was \$24 million with an additional \$5 million or \$6 million in drugs. Whereas on the flip side, we see Purdue settling the State of

FINAL

Oklahoma lawsuit for \$270 million earlier this summer. And we see the judgment against Johnson & Johnson, who was the only remaining defendant, we see there being a \$572 million judgment against it.

So it's kind of hard to tell right now, because we don't have any other recent large judgments like the one against Johnson & Johnson, and we've seen some one-off settlements. I think market share will be a big issue when it comes to the settlement dollars. I also think, the number of defendants remaining in the cases for example with Johnson & Johnson being signed, basically liable for the entire opioid epidemic in the State of Oklahoma, the burden rests entirely on its shoulders there. So it will be interesting to see how these cases develop, if and when they go to trial and what defendants remain in those cases.

Matthew Palazolo

Okay, great. Let's see, so maybe Andrea, if you wanted to speculate on this, we can see. So, the question is, there are some numbers from \$70 billion to \$100 billion for total opioids settlement costs. Could you give a ballpark range of how much insurers could end up paying that or kind of what percentage is typical?

Andrea Warren {BIO 20258010 <GO>}

You know, we really haven't -- and I haven't analyzed that, so I would not be able to speak on that.

Matthew Palazolo

Okay. I think we're going to leave it there. So, a replay of this call will be available through the Bloomberg Terminal. I would like to thank Paige and Andrea. I think this is a great discussion. If you have any follow-up questions, you can find Holly or my contact informations through the webinar. So thanks very much for joining us everyone.

This transcript may not be 100 percent accurate and may contain misspellings and other inaccuracies. This transcript is provided "as is", without express or implied warranties of any kind. Bloomberg retains all rights to this transcript and provides it solely for your personal, non-commercial use. Bloomberg, its suppliers and third-party agents shall have no liability for errors in this transcript or for lost profits, losses, or direct, indirect, incidental, consequential, special or punitive damages in connection with the furnishing, performance or use of such transcript. Neither the information nor any opinion expressed in this transcript constitutes a solicitation of the purchase or sale of securities or commodities. Any opinion expressed in the transcript does not necessarily reflect the views of Bloomberg LP. © COPYRIGHT 2022, BLOOMBERG LP. All rights reserved. Any reproduction, redistribution or retransmission is expressly prohibited.