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A HISTORIC OPIOID SETTLEMENT COULD PRESENT OPPORTUNITIES FOR INSURERS TO SEEK REIMBURSEMENT

In early November, it was announced that the nation's three largest retail pharmacies – CVS, Walgreens, and Walmart – had agreed 'in principle' to pay \$13.8 billion in damages in a settlement to resolve thousands of claims related to the opioid epidemic.

Due to the uniquely insidious nature of opioid addiction and the truly devastating scale of the crisis, hundreds of thousands of Americans have lost their lives, families have been shattered, and governments and health insurers alike have spent tens of billions of dollars on rehabilitation and increased claim costs.

If this settlement proceeds, as appears very likely as of this writing, insurers, including self-funded plan sponsors, could have new opportunities to recover funds on behalf of their plan participants.

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Earlier settlements related to the opioid crisis, totaling tens of billions of dollars, were reached between many state attorneys general and drug manufacturers, including Purdue Pharma.

This settlement is notable not only for its size but also because it would be the first nationwide deal reached with retail pharmacies. The claims at issue were brought by states, localities, and tribal entities. Why would these pharmacy chains agree to settle such claims?

This is mostly because evidence emerged in various trials, during the discovery process, that executives at these companies ignored repeated warnings from their own pharmacists that their dispensing actions were fueling the opioid crisis.

According to the Centers for Disease Control and Prevention, prescription opioids can be up to 50 times more powerful and addictive than heroin. In 2021, as many as 100,000 Americans died from drug overdoses.

Not all of these deaths were caused by prescription painkillers, but the vast majority of them were caused by opioids, both synthetic opioids and prescription opioids. The recent COVID-19 pandemic and the burgeoning nationwide mental health crisis have caused overdose deaths to spike in recent months; a trend which the data suggests will continue into next year.

The economic toll of the opioid crisis cannot be overstated. In late September, the Joint Economic Committee of the U.S. Congress release a detailed report revealing that the opioid crisis has cost the country nearly \$1.5 trillion in economic losses in 2020 alone.

For health insurers, the cost has skyrocketed over the past few years, reaching well into the tens of billions of dollars. The scope and size of opioid-related claims may not be entirely obvious, even to seasoned industry veterans, and so they are worth reviewing here.

A 2018 report from BioMed Central (BMC) concluded that “[i]ndividuals with high-risk prescription opioid use have significantly higher healthcare costs and utilization than their counterparts, especially those with chronic high-dose opioid use.”

This study's findings are in line with numerous other studies conducted by esteemed medical research institutions, including the Johns Hopkins Bloomberg School of Public Health.



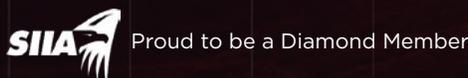
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The BMC report demonstrated that the average claim cost for an employee who is prescribed a single opioid increased by a factor of four to eight. The specific claim costs the authors focused on were addiction treatment, rehabilitation, emergency room visits, death, and obviously, increased prescription drug costs.

The most recent data available from Peterson-Kaiser Family Foundation, going back to 2016, reveals that the cost to large employers has jumped significantly, to \$2.6 billion in 2016, up from \$300 million in 2004, a more than nine-fold increase.

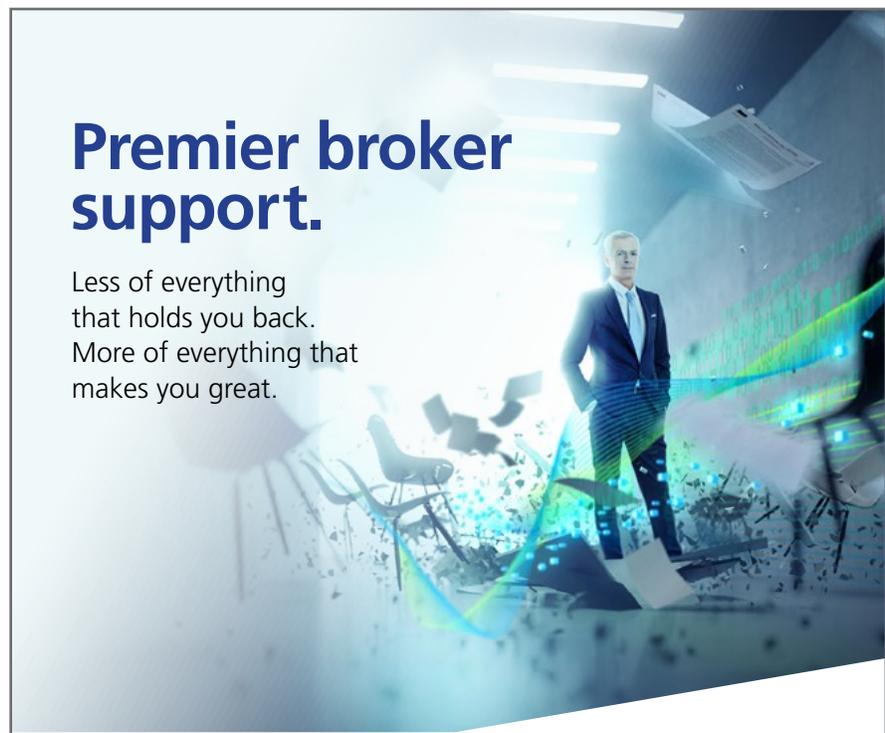
Put another way, FAIR Health, which owns and continuously updates a database of more than 21 billion claims from privately insured individuals, concluded back in 2015 that “on average, private insurers and employers providing self-funded plans paid nearly \$16,000 more per patient for those with diagnoses of opioid abuse or dependence than for those with any diagnosis.”

As the human and economic tolls have come increasingly into focus, it should be no surprise that thousands of lawsuits have been filed against drug manufacturers, physicians, and pharmacies. Litigation related to the opioid crisis is likely to continue for many years in suits brought by individuals, government entities, and insurers of all stripes. Indeed, there are numerous law firms working together to assemble litigation teams to help insurers recoup opioid-related costs.

One obvious way to do this is for insurers to become part of nationwide opioid litigation, joining these cases (or initiating them) as plaintiffs. Another, perhaps less obvious way, is on the back end, in the form of subrogation.

Many, if not most, of the thousands of lawsuits related to the opioid crisis will eventually end in settlements. For health insurers, this result, depending on the terms of the settlement, and any applicable law, may actually be more beneficial as it relates to recovering claim costs than relying on a judgment imposed by a court.

For one thing, health insurers, especially smaller self-funded plans with limited resources, are not likely to be able to join most lawsuits on the front end. Even if a self-funded plan was able to track down and join a particular lawsuit in any given state, it is exceedingly unclear to what extent a health insurer's claims will be prioritized in any given judgment, especially since the families of victims are almost certain to receive the lion's share of any financial compensation, followed closely by federal, state, local, and tribal governments.



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A large share of the money received in most opioid-related settlements is paid out to government entities and designated to be invested in drug rehabilitation programs and efforts to respond to the ongoing opioid epidemic.

Another, often equally substantial share, is reserved to establish victim restitution funds. True, victim restitution funds can be set up as a result of court judgments, but those set up pursuant to settlement agreements are often less restrictive. In most cases, when a victim restitution fund is established, whether by judgment or settlement, self-funded health plans have legitimate opportunities for recovery against amounts received by victims.

Arguably, plan sponsors have a duty to pursue recovery opportunities against victim restitution funds, when practical. Even within the context of opioid-related litigation and settlements, plan sponsors have a fiduciary duty to act prudently with plan assets. This means that plan sponsors should be looking to employ legal, practical means of recovery for the billions of dollars they have collectively spent on opioid-related claim costs.

In many cases, notwithstanding the fiduciary duties described above, it may not be practical, appropriate, or fair for plans to pursue recovery opportunities against funds received by a victim or a victim's family, and many plans may choose not to do this.

They may feel that the public perception of this practice in cases involving the tragic results of opioid addiction is unacceptable. That said, it is very important to remember that the recovery of plan funds in this context has a trickle down, positive impact on all employees and members of the plan, because they all rely on plan funds being used prudently to help lower premium costs for everyone and to ensure that plan funds are available to pay future claims, including in tragic cases like these.

There have already been examples of recoveries obtained by victims of the opioid crisis from trusts established after bankruptcy proceedings for opioid manufacturers, and there will undoubtedly be many more examples going forward as a result of settlement agreements.

One such example involves Mallinckrodt Plc, an opioid manufacturer that filed a Chapter 11 bankruptcy proceeding in 2020, in the U.S. Bankruptcy Court for the District of Delaware. Mallinckrodt's Chapter 11 Plan of Reorganization took effect on June 16, 2022.

As part of that Plan, the Court approved the establishment of the Mallinckrodt Opioid Personal Injury Trust. The Court also drafted procedures by which funds from the Trust could be dispersed, accounting for subrogation and reimbursement claims.



In this, what would be the first-of-its-kind settlement with nationwide pharmacy chains related to the opioid epidemic, it is likely that a victim restitution fund will be established. If it is, it would present a new opportunity for plan sponsors to recover some of the claim costs they have incurred throughout the opioid epidemic. It will also likely serve as a blueprint for future settlements with pharmacy chains as long, arduous legal battles continue to play out. ■

Brady Bizarro joined The Phia Group as a healthcare attorney in early 2016. As the Senior Director of Legal Compliance & Regulatory Affairs, he specializes in regulatory, transactional, and compliance matters related to healthcare and employee benefits law. He provides general consulting services to clients, including employers, third-party administrators, brokers, and vendors associated with health benefit plans on matters related to the health insurance industry, including ERISA, ACA, and HIPAA compliance. He also performs contract review and due diligence on healthcare transactions and assists with dispute resolution efforts between the various players in the healthcare industry in an effort to protect plan members and plan sponsors.

During law school, Brady participated in the Edward C. Stone Moot Court Competition and completed a legal internship in the U.S. House of Representatives. He also worked as a summer associate at Greene LLP, a complex civil litigation firm in Boston that specializes in healthcare fraud cases, and as a Rule 3:03 attorney with Greater Boston Legal Services, where he represented indigent defendants in employment and discrimination cases in state court. Prior to law school, he worked as a mediator for the Massachusetts Attorney General's Office and for the National Defense University in Washington, D.C.



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