

SECOND OPINION

SMALL DOSES OF HEALTHCARE INSIGHT



The Opioid Epidemic and Medical Malpractice

From pop icon Prince's overdose of Fentanyl in April 2016, 3 Doors Down lead guitarist's death in August 2016, and the recent shocking \$17.6M verdict in St. Louis against a St. Louis physician and hospital, physicians and medical facilities are on the hot seat when it comes to blame from opioid deaths. This article will focus on the opioid problem from a professional liability perspective, specifically the exposures and issues clients should consider when securing coverage.

The Problem

An estimated 100 million people suffer from chronic pain in the U.S.¹ Opioids are a class of drugs which include heroin – but also the prescription pain relievers oxycodone, hydrocodone, codeine, morphine, fentanyl, and others. In 2015, opioid addiction alone accounted for 20,101 deaths from prescription pain relievers.²

It is now estimated that one out of every three opioid prescriptions are being abused.³ In addition to little provider training and oversight (most patients go to their family physician and not to a pain specialist for relief), abuse has escalated, in part, due to aggressive marketing by Pharmaceutical manufacturers, physician shopping, theft, forgery, illicit prescribing and patients' own medicine cabinets. Over prescription of opioids has led to addiction and subsequent deaths resulting in an increased frequency of claims and lawsuits. Plaintiffs and families of victims have successfully sued physicians and medical facilities – sometimes with damages and settlements soaring into the millions.

The most "infamous" example occurred in 2016, when a jury awarded \$17.6M in damages – \$15M of which was for punitive damages against the physician and his employer, St. Louis University. This case put the country's opioid epidemic on trial, and focused on the extreme over-prescription of pain medication during the course of several years. Other recent cases around overprescribing and improper monitoring have generated millions in damages. Due to sympathy for the patient, excessive injuries and tragic circumstances surrounding most overdoses, it appears that the majority of lawsuits settle.

Physicians and their affiliated hospitals are not the only targets

Pharmacies, clinics, surgery centers, pain management entities, substance abuse treatment centers and other classes of medical facilities are also at risk. A pharmacy paid \$4.1M because opioids were stolen from their facility and taken to a party where someone overdosed. That pharmacy was held liable because it did not have proper inventory safeguards in place. There are also numerous instances of employees stealing drugs while working at medical facilities. In these situations, medical care can be compromised, exposing the facility to allegations such as negligent treatment, lack of supervision, lack of proper procedures, and possibly even physical or sexual abuse, depending on individual circumstances of the situation and how claims allegations are presented.

Large pharmacy chains / manufacturers have been in litigation for some time now, due to allegations of aggressive marketing and easy availability of these addictive drugs. These claims are now beginning to settle, often for significant sums. Some believe that these settlements could stir up more claim activity at the medical provider and facility levels.

Coverage Considerations

When discussing the opioid crisis with clients, you may want to review examples of opioid claims in the media and explore the extent of their physician and allied health employee medical risks. As professionals working with medical liability insurance, we need to be knowledgeable of the exposures when reviewing risks and offer insights around the impact this crisis has on medical liability.

Providers are undoubtedly challenged between balancing patient risk versus comfort on a daily basis. Some physicians feel they are not helping their patients deal with chronic pain by reducing prescriptions. They feel more liability could come about from the Center of Disease Control (CDC) recommendations because patients won't be treated as individuals. Guidelines established as part of the July 2016 Comprehensive Addiction and Recovery Act have some physicians questioning a cookie cutter approach to opioid treatment. They are concerned that the (potentially false) assumption that everyone will have an addiction to opioids will limit the ability to provide necessary comfort to patient pain and suffering. These and other challenges add to the confusion about how we should be counseling our insureds on avoiding medical liability claims.

Some questions to ask:

- **Do the practitioners have pain management credentials and do credentialing practices address prescribing concerns?** Pain management entities and substance abuse facilities are particularly vulnerable to increased opioid risks. Not only do patients at these types of facilities have a higher propensity to suffer from addiction and mental health challenges, staffers are sometimes former drug and alcohol abusers.
- Has your client had an **opioid related claim, complaint or physician sanctions?** If so, how was that handled?
- Are they familiar with the **Center of Disease Control (CDC) guidelines** and other national initiatives?
- **Where is the client / facility located, and are they compliant with local Prescription Drug Monitoring programs (PDMPs)?** PDMPs help identify when a patient obtains multiple prescriptions from different practitioners. These programs also help physicians recognize signs and symptoms of abuse and find alternatives to opioids. Many states have their own processes and regulations in place. It's important to know what these are and verify that the facility is following all necessary protocols.

- **In securing coverage for your clients, do you have the clarity of punitive damage cover?** Is it legally insurable in the state in which your insured operates? If not, can you get it off shore? Given the increasingly heightened exposures, should you recommend purchasing off-shore coverage to safeguard against catastrophic loss?

Other Considerations

The opioid epidemic is a national crisis that has medical liability implications for physicians, hospitals and medical facilities. From a medical malpractice perspective, there will be uncertainty, as the initiatives developed to combat this epidemic are just starting to take hold. We recommend that brokers and clients actively engage with their risk management departments to stay abreast of this quickly developing exposure and implement aggressive protocols for protecting both patients and their organization.

For risk management insight on this issue, please check out the July 2017 Risk Advisory on "The Opioid Epidemic" prepared by our Risk Consultants.

End Notes:

All online articles were last accessed on August 7, 2017

¹ Search and Rescue website. "Facts about Prescription Opioid Abuse" [http://www.searchandrescueusa.org/opioid-abuse-facts/?utm_source=google&utm_medium=ppc&utm_campaign=\[*Campaign*\)&utm_term=opioid%20epidemic](http://www.searchandrescueusa.org/opioid-abuse-facts/?utm_source=google&utm_medium=ppc&utm_campaign=[*Campaign*)&utm_term=opioid%20epidemic)

² American Society of Addiction Medicine website. "Opioid Addiction 2016 Facts & Figures." <https://www.asam.org/docs/default-source/advocacy/opioid-addiction-disease-facts-figures.pdf>

³ Castlight Health website. "New Study Reveals 32 Percent of Total Opioid Prescriptions Are Being Abused" <http://www.marketwired.com/press-release/new-study-reveals-32-percent-of-total-opioid-prescriptions-are-being-abused-nyse-cslt-2116575.htm>

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