

# The Opioid Epidemic and Insurance



BATESCAREY<sup>LLP</sup>



Kevin Harris:

Associate, BatesCarey LLP  
[kharris@BatesCarey.com](mailto:kharris@BatesCarey.com)

Mark Pew:

Senior VP, Preferred Medical  
[Mark.Pew@ThePreferredMedical.com](mailto:Mark.Pew@ThePreferredMedical.com)

# Our discussion roadmap

1. The Opioid Epidemic: Origins and Trends
2. Opioid Litigation: Who Will Fund Solutions to the Opioid Epidemic?
3. Insurance Issues: Liability Insurance
4. An Example: Workers' Compensation



# The Opioid Epidemic: Origins and Trends

# AUDIENCE POLL

- Q: Do you know somebody that has been impacted by opioid abuse?
- A:
  - Yes, family or friends
  - Yes, acquaintances (e.g., neighbor, coworker)
  - No

# Opioid definitions

- **Opioid:** Any compound that acts on opioid receptors (mu, delta, and kappa) in the body
- **Opium:** From the poppy plant
- **Opiate:** The natural compounds in opium
- **Opium alkaloids:** Chemicals that produce the medicinal and recreational effects
  - Morphine, codeine, thebaine
- **Narcotic:** A DEA term for opioids from the Greek word for “stupor”

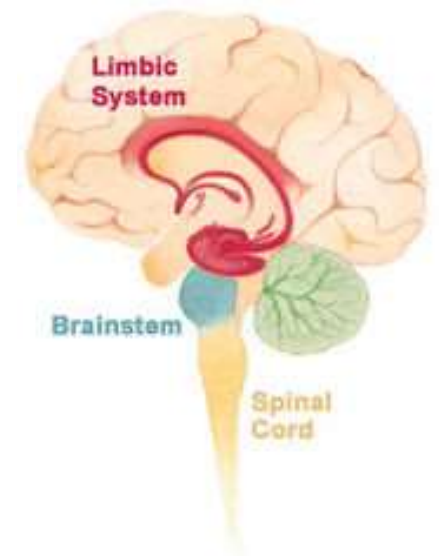
[www.altamirarecovery.com/opiates/difference-opiates-opioids](http://www.altamirarecovery.com/opiates/difference-opiates-opioids)

# Opioid types

- **Endogenous:** Endorphins
- **Natural:** Morphine, codeine
- **Semi-synthetic:** Oxycodone, hydrocodone, heroin
- **Synthetic:** Fentanyl, methadone

# Opioid effects

- Opioids act on many places in the brain and nervous system, including:
  - the **limbic system**, which controls emotions. Here, opioids can create feelings of pleasure, relaxation, and contentment.
  - the **brainstem**, which controls things your body does automatically, like breathing. Here, opioids can slow breathing, stop coughing, and reduce feelings of pain.
  - the **spinal cord**, which receives sensations from the body before sending them to the brain. Here too, opioids decrease feelings of pain, even after serious injuries.



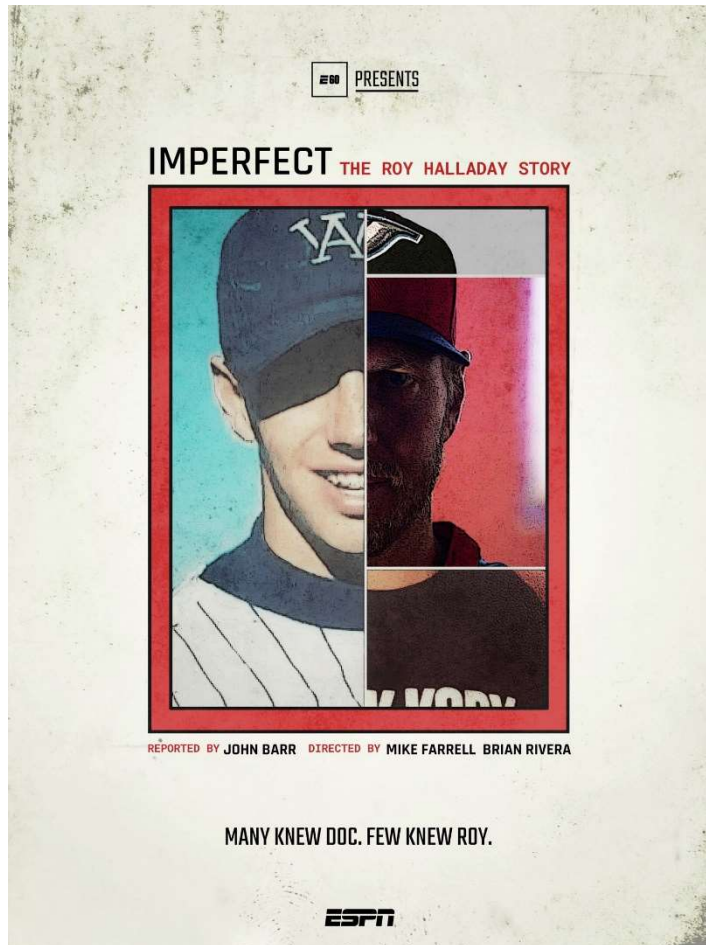
[www.drugabuse.gov/sites/default/files/mom\\_opioids.pdf](http://www.drugabuse.gov/sites/default/files/mom_opioids.pdf)



# Starting in the mid-1990s

- Doctors accused of under-treating pain
- Big Opioid Pharma launched products (e.g. OxyContin)
- “Pain” was added as the Fifth Vital Sign
- Press-Gainey patient satisfaction surveys

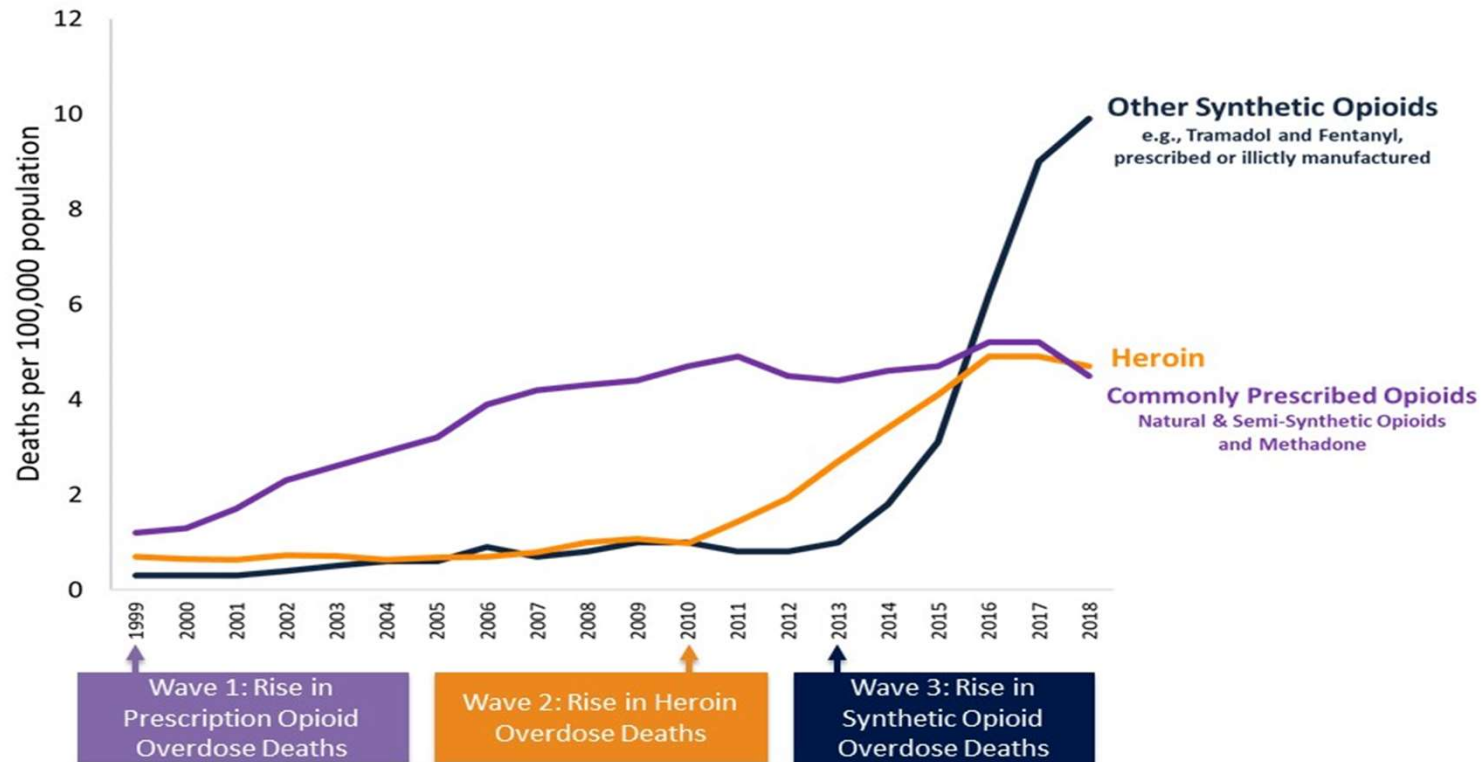
# Famous faces



- Baseball Hall of Fame
- Public figure with severe anxiety
- Pitching thru pain introduced him to opioids
- Crashed his plane on 11/7/17 with a muscle relaxer, an opioid, a sleep aid, morphine and an antidepressant in his system

# The three waves

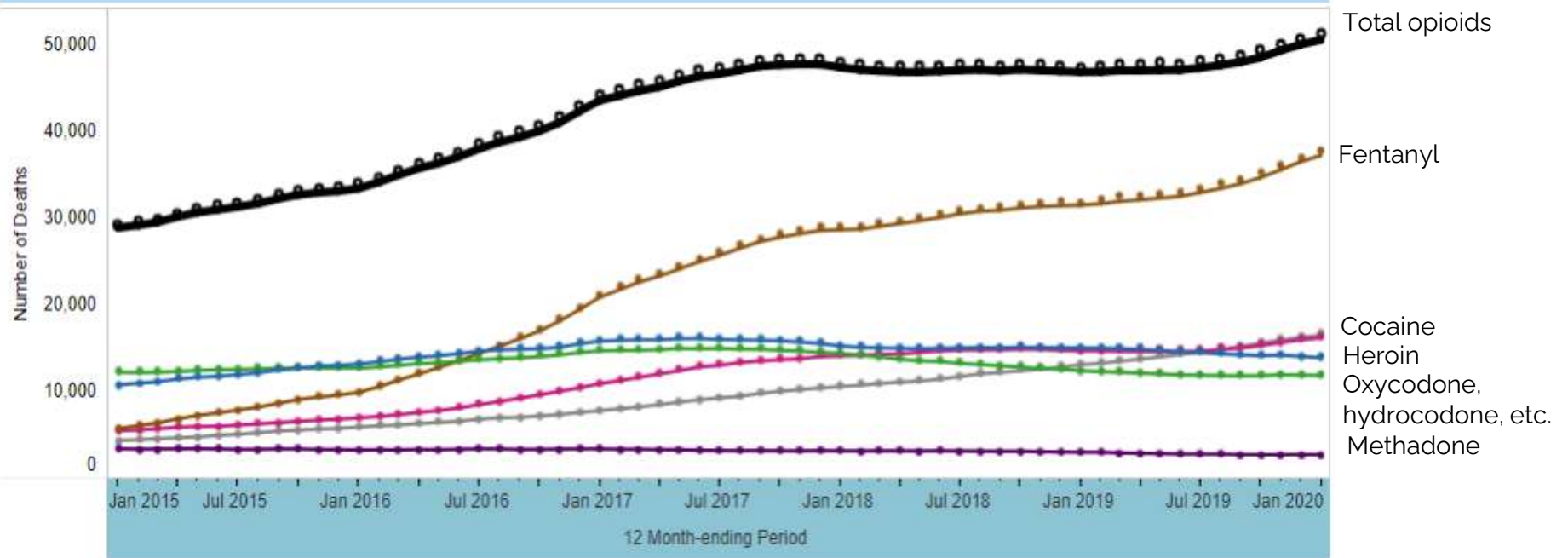
## 3 Waves of the Rise in Opioid Overdose Deaths



SOURCE: National Vital Statistics System Mortality File.

# The trends

Figure 2. 12 Month-ending Provisional Number of Drug Overdose Deaths by Drug or Drug Class: United States



50,704 opioid deaths thru Jan 2020 (139/day)

[www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm](http://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm)

# COVID's deaths of despair

- “The COVID pandemic could lead to 75,000 additional deaths from alcohol and drug misuse and suicide” from the Well Being Trust
  - <https://wellbeingtrust.org/areas-of-focus/policy-and-advocacy/reports/projected-deaths-of-despair-during-covid-19>
- “Reports of increases in opioid related overdose and other concerns during COVID pandemic” from the AMA
  - [www.ama-assn.org/system/files/2020-08/issue-brief-increases-in-opioid-related-overdose.pdf](http://www.ama-assn.org/system/files/2020-08/issue-brief-increases-in-opioid-related-overdose.pdf)

# AUDIENCE POLL

- Q: Who is responsible for the opioid epidemic?
- A:
  - Pharma
  - Prescribers
  - Pharmacists
  - Pushers
  - Payers / Insurance Companies
  - Politicians / Policy-makers / Regulators
  - Plaintiff Attorneys
  - Patients
  - All of the above

# Who is responsible?

- Pharma
  - Manufacturers, Distributors, Retailers, Industry Trade Groups
- Prescribers
- Pharmacists
- Pushers
  - Drug cartels, dealers
- Payers / Insurance Companies
- Politicians / Policy-makers / Regulators
- Plaintiff Attorneys
- Patients



# Opioid Litigation: Who Will Fund Solutions to the Opioid Epidemic?



# The lawsuits

- Who is being sued?
- Who is suing?
- What is alleged?
- How will plaintiffs prove their claims?
- What are the liability defenses?
- Where is the litigation going?

# The three main defendant groups

BLAME

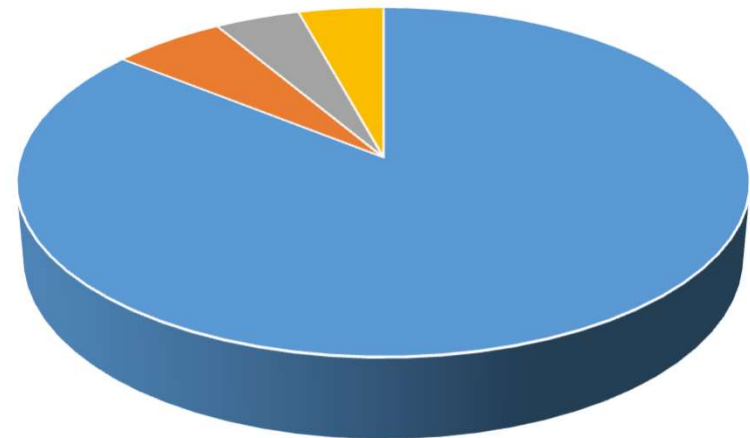
BLAME

- **Manufacturers:** Make and market drugs. Sued for falsely marketing prescriptions opioids as safe/effective for chronic, long-term pain (e.g., Purdue Pharma, J&J, Endo).
- **Wholesale Distributors:** Buy drugs from manufacturers, ship to pharmacies, clinics, hospitals. The “Big Three” are Cardinal Health, McKesson, and AmerisourceBergen, sued for shipping excessive amounts of drugs, failing to recognize “suspicious” orders of unusual size, frequency.
- **Pharmacies/Retailers:** Sued for insufficient safeguards against diversion at “wholesale” and “retail” levels (e.g., CVS, Walmart, Walgreens, Rite Aid).

# The plaintiff groups

- **Gov'ts:** Incurred costs responding to epidemic (e.g., anti-overdose meds, social services) (Appx. 3,000)
- **Healthcare Providers:** Hospitals, clinics, incurred costs treating patients, other budgetary issues (Appx. 200)
- **Healthcare Funders:** Labor unions, employers, paid for drugs, addiction treatment (Appx. 150)
- **Individuals:** Wrongful death, babies born addicted to opioids (Appx. 150)

**Breakdown of Claims by Plaintiff Type**  
(Appx. 3,500 Total)



■ Government ■ Healthcare Provider ■ Healthcare Funder ■ Individuals

# The opioid litigation

- **December 2017:** Multidistrict litigation (“MDL”) established in Ohio federal court, Judge Dan Polster presiding.
- **“Bellwether” Cases:**
  - “Track 1”: Summit Cty. and Cuyahoga Cty., OH, settled on the eve of trial in October 2019.
  - “Track 1B”: Same plaintiffs, claims against “retailers”
  - “Track 2”: Cabell Cty. and City of Huntington, WV, remanded to WV federal court. Trial against the “Big Three” distributors scheduled for Jan. 2021.
  - “Track 3”: Trumbull Cty. and Lake Cty., OH. Trial against “retailers” (as dispensers) before Judge Polster.
  - “Other”: City of Chicago (manufacturers), Cherokee Nation, San Francisco.
- **“State Court” MDLs:** in WV, NY, MA, SC, AZ, UT, IL, PA, TX.
- **Shareholder Suits:** Suing board and executives for failing to comply with controlled substances laws.

# Theories of liability

- Public nuisance
- RICO/conspiracy
- Deceptive trade practices
- Fraud
- Negligence

# Proving damages in “Track One”

- **Causation:** “Aggregate data”
- **Premises:**
  - All marketing unlawful, led to 41%-67% increase in sales from 1995-2011
  - % of orders were “suspicious,” should not have been shipped
  - Increased sales caused increased social harm, including heroin, etc.
  - Social harm due to opioid marketing and sales quantifiable
- **Damages:** Appx. \$195M-\$225M (2006-2018)
- **Abatement:** Appx. \$5.7B (Next 15 Years)

# Narrowing claims to avoid causation issues

- Connecticut Judge: Absent proof of specific causation, “junk justice”
- Focus on public nuisance, conspiracy, and collective liability
- Seeking “prospective equitable abatement” to fund future drug treatment, education, anti-overdose drugs

# Settlements and judgments

- **State of West Virginia:** Appx. \$84M from defendants to 2012 suit, \$37M from McKesson in later suit
- **“Track One”:** Settlements totaling approximately \$280M in cash and free anti-overdose drugs.
- **State of Oklahoma:** \$465M judgment against J&J in 2019, \$355M in settlements from Purdue, Teva.
- **Potential “Global” Settlement:** WSJ reporting State AGs seeking \$26.4B from “Big Three” (\$21B) and J&J





# Insurance Issues: Liability Insurance

# Commercial general liability

- Amounts insured pays “as damages because of ‘bodily injury’” during the policy period; duty to defend (broad) v. duty to indemnify (narrow).
- **Remedy-based:** Economic damages not “damages because of ‘bodily injury’” during the policy period; prospective equitable abatement not covered
- **Conduct-based:** “Bodily injury” must be caused by an “occurrence” or “accident,” no coverage for “expected or intended” “bodily injury”(Conduct based)
- **Knowledge-based:** No coverage for previously known “bodily injury”

# Remedy defense: No “damages because of ‘bodily injury’”

- Public harm/governments’ economic damages not “because of ‘bodily injury’” to specific individuals
- **No “BI,” No Duty to Defend:**
  - Travelers v. Anda (S.D. Florida)
  - Cincinnati Ins. v. Ritchie (W.D. Kentucky)
  - Acuity v. Masters (OH Trial Ct.)
- **“BI,” Duty to Defend:**
  - Cincinnati Ins. v. H.D. Smith (7<sup>th</sup> Circuit)
  - Acuity v. Masters (OH Appellate Ct.)
  - Cincinnati Ins. v. Discount Drug (OH Trial Ct.)
  - Rite Aid v. ACE, et al. (PA Trial Ct.)

# Remedy defense: Prospective equitable relief not covered

- Coverage for “damages because of ‘bodily injury’” during the policy period
- Past damages difficult to prove, plaintiffs focused on **prospective equitable abatement** for **future** education, drug treatment, other preventative measures
- Abatement not compensating past “bodily injury,” not “damages because of ‘bodily injury’” during the period

# Conduct and knowledge defenses

- Allege conspiracy, fraudulent misrepresentations, and long-standing knowledge of the opioid epidemic
- “BI” must be caused by an “occurrence” (*i.e.*, an “accident”)
- No coverage for “expected or intended” or previously known harm
- If public harm is “because of ‘bodily injury,’” prior knowledge of public harm precludes coverage

# Prior lawsuits, investigations, and settlements

- **Purdue:** Criminal charges in 2007, paid \$600M
- **McKesson:** \$13.25M in 2008, \$150M in 2017
- **Walgreens:** \$80M in 2013
- **AmeriSource:** Suspended in 2007; \$16M to WV in 2016
- **Cardinal Health:** \$34M in 2008, \$44M in 2016, \$20M to WV in 2016
- **Mallinckrodt:** \$35M in 2017
- **Endo:** 2016 settlement with NY, Opana ER w/drawn in 2017

# No claiming ignorance: Purdue Pharma



a. Trained PURDUE sales representatives and told some health care providers that it was more difficult to extract the oxycodone from an OxyContin tablet for the purpose of intravenous abuse, although PURDUE's own study showed that a drug abuser could extract approximately 68% of the oxycodone from a single 10 mg OxyContin tablet by crushing the tablet, stirring it in water, and drawing the solution through cotton into a syringe;

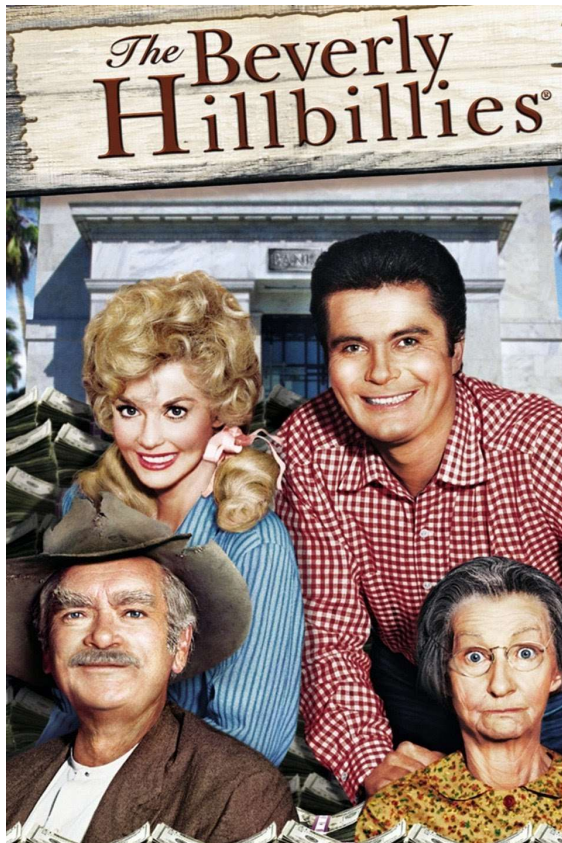
b. Told PURDUE sales representatives they could tell health care providers that OxyContin potentially creates less chance for addiction than immediate-release opioids;

c. Sponsored training that taught PURDUE sales supervisors that OxyContin had fewer "peak and trough" blood level effects than immediate-release opioids resulting in less euphoria and less potential for abuse than short-acting opioids;

d. Told certain health care providers that patients could stop therapy abruptly without experiencing withdrawal symptoms and that patients who took OxyContin would not develop tolerance to the drug; and

e. Told certain health care providers that OxyContin did not cause a "buzz" or euphoria, caused less euphoria, had less addiction potential, had less abuse potential, was less likely to be diverted than immediate-release opioids, and could be used to "weed out" addicts and drug seekers.

# No claiming ignorance: The Beverly "Pillbillies" email



*Come and listen to a story about a man named Jed  
A poor mountaineer, barely kept his habit fed,  
Then one day he was lookin at some tube,  
And saw that Florida had a lax attitude.  
About pills that is, Hillbilly Heroin, "OC"*

*Well the first thing you know ol' Jed's a drivin South,  
Kinfolk said Jed don't put too many in your mouth,  
Said Sunny Florida is the place you ought to be  
So they loaded up the truck and drove speedily.  
South, that is. Pain Clinics, cash 'n carry.  
A Bery of Pillbillies!*

*Well now its time to say Howdy to Jed and all his kin.  
And they would like to thank Rick Scott fer kindly inviting them.  
They're all invited back again to this locality  
To have a heapin helpin of Florida hospitality  
Pill Mills that is. Buy some pills. Take a load home.  
Y'all come back now, y'bear?*



# No claiming ignorance: The “Doritos” email



In January 2009, Borelli told Cochrane in another e-Mail that 1,200 bottles of oxycodone 30 mg tablets had been shipped.

“Keep ‘em comin!” Cochrane responded. “Flyin’ out of there. It’s like people are addicted to these things or something. Oh, wait, people are...”

Borelli responded: “Just like Doritos keep eating. We’ll make more.”

# Errors & Omissions, professional liability


- “Claims made,” covering negligent acts, errors, omissions in the course of your “professional services”
- Opioid claims may “relate back” to prior year, “existing claim or circumstance” exclusions
- Criminal acts (pill mill doctors)
- Opioid epidemic may pre-date the “retroactive date”

# Directors & Officers

- Shareholders suing executives, directors for failing to ensure compliance with controlled substances laws
- **Coverage Defenses**
  - Claims may “relate back” to prior policy period
  - Prior notice under earlier policies
  - Prior acts / “retroactive date” exclusions
  - Criminal/fraudulent conduct exclusion
  - Bodily injury exclusions
  - Entity v. individual coverage
- McKesson reached \$175M settlement, funded by insurers

# An Attorney's Perspective

- Litigation will not solve the opioid epidemic; legislation needed.
- Opioid litigation as template for claims regarding obesity, social media?
- Underwriters must look forward, not just backward.
- Review SEC filings, news reports for potential risks and ask questions.



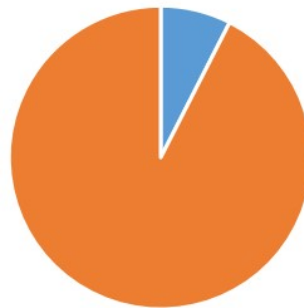
# An Example: Workers' Compensation

# The history

- Ur-Nammu, king and founder of the Sumerian Third Dynasty of Ur in southern Mesopotamia, in 2050 B.C.
- **US:** Employers' Liability Acts of 1906 and 1908
- **First state:** Wisconsin in 1911
- **Last state:** Mississippi in 1948
- <https://pieinsurance.com/blog/workers-comp/the-fascinating-history-of-workers-compensation-insurance/>

# The role

- Part of the P&C (**casualty**) insurance industry
- It's (relatively) small
  - Work Comp = \$56.4B market size
    - [www.ibisworld.com/industry-statistics/market-size/workers-compensation-insurance-united-states](http://www.ibisworld.com/industry-statistics/market-size/workers-compensation-insurance-united-states)
  - P&C - \$694.27B market size
    - [www.statista.com/statistics/1040495/property-casualty-direct-insurance-market-size-usa](http://www.statista.com/statistics/1040495/property-casualty-direct-insurance-market-size-usa)



# On the Rx opioids front lines

- Lifetime (or until claim settlement) medical benefits
- The opioid wake-up call
  - Mark Pew: 2003
  - Industry: 2014 (WCMSA)
- But it's not just opioids
  - Benzodiazepine
  - Gabapentinoid
  - Muscle relaxant
  - Antidepressant
  - Anticonvulsant
  - Compounds, topicals



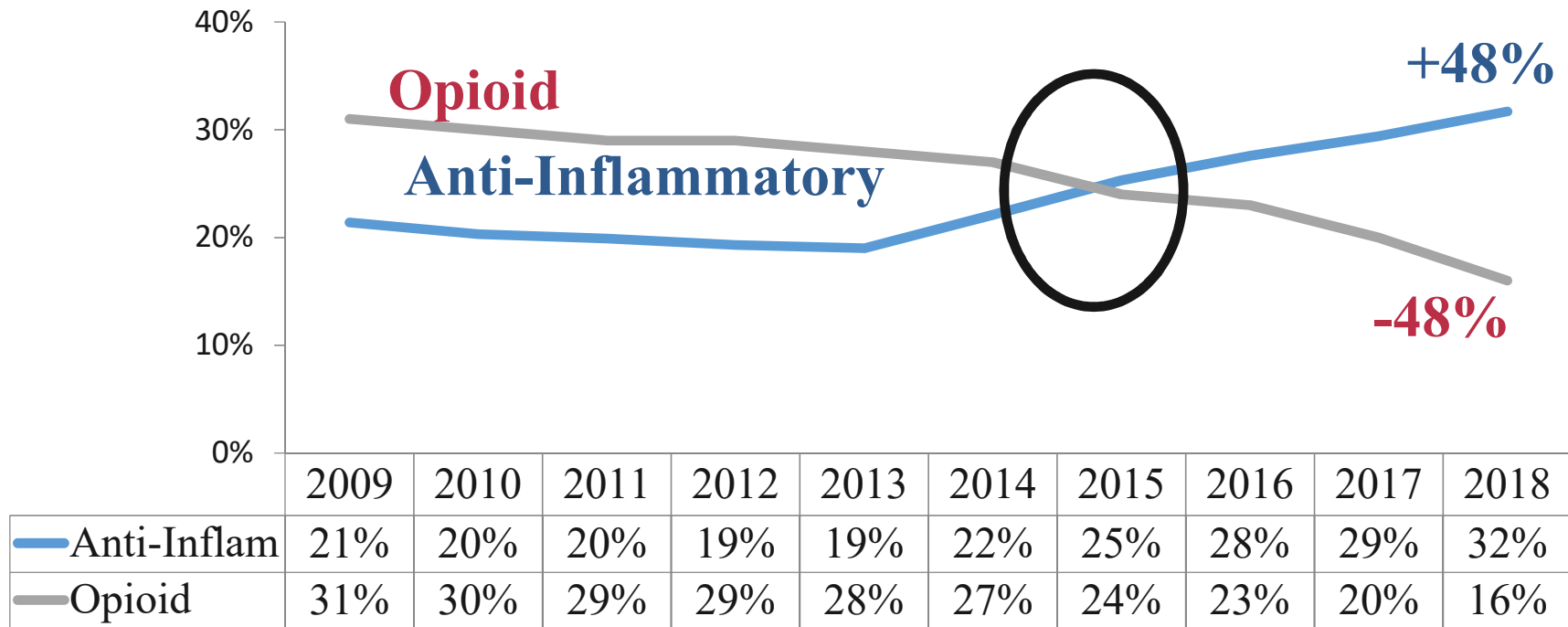
# Risk mitigation tactics

- Regulatory reform
- Treatment guidelines
- Utilization Review
- Drug formularies
- Stakeholder education
- Predictive analytics
- Focused legacy claim management

# AUDIENCE POLL

- Q: Which risk mitigation tactic is most effective?
- A:
  - Regulatory reform
  - Treatment guidelines
  - Utilization Review
  - Drug formularies
  - Stakeholder education
  - Predictive analytics
  - Focused legacy claim management

# The transition



Data from CY 2007 – Dec 2018

Source: CWCI 2019

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# The way forward

- Other trends
  - Alternative non-pharma treatment
  - Psychotherapy
  - Virtual reality
  - Medical marijuana
  - Interdisciplinary pain management
  - Tele-medicine
  - Advocacy claims model
  - BioPsychoSocial treatment approach

