DEBUNKING THE STANDARDIZED NATURE OF INSURANCE POLICIES

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ABSTRACT

This article discredits the conventional view of insurance policies as standardized contracts that do not vary across insurance companies and policyholders. Contrary to this view, there are wide variations in policy language in both the admitted and non-admitted insurance markets. These deviations reduce the perceived benefit of insurance policies as standardized contracts intended to promote predictability and lower transaction costs for policyholders by focusing only on the most salient terms. Nowhere is this deviation more apparent than with Commercial General Liability (CGL) policies defendants are turning to in the current opioid litigation.

The opioid epidemic has been plaguing the United States for the last several years and, in its wake, many state and local government entities have sued those involved in the manufacture, sale, distribution, and prescription of opioid products. Naturally these defendants have looked to their insurance policies for defense expenses and coverage, given the exorbitant potential liability they face. Depending on the specific allegations and complaints, different insurance policies can apply.

The CGL policy is the primary policy that defendants have turned to. The principal coverage disputes between policyholders and insurance companies are whether the complaint alleges "bodily injury," "property damage," or "occurrence." These terms are defined in an insurance policy and many CGL policies utilize standardized language and definitions. Despite the uniformity in language, courts decisions in multiple jurisdictions have been incredibly inconsistent

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in whether the CGL policy should respond and if insurers have a duty to defend in these opioid lawsuits. As a result, policyholders lose the benefit of predictability and lower transaction costs that legal scholarship has historically assigned to insurance policies as standardized contracts.

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INTRODUCTION

Insurance is misunderstood and its importance realized too late–primarily only after a loss occurs. The essential value of insurance lies in the terms and conditions of the policy. The misunderstanding of insurance policies comes from the longstanding view that insurance policies are boilerplate contracts. This Note argues that there is an overgeneralization in the conventional understanding of insurance policies as standardized contracts. The majority of legal scholarship in the insurance sector focuses on the standardized nature of insurance policies as contracts between the insurer and the insured.[1]

While there are certain coverage lines that employ Insurance Services Office (ISO) standardized language, like property and casualty coverage for commercial buyers or homeowners and auto insurance for individual buyers, there are several exceptions to this rule.[2] Indeed, niche or specialty lines like marine, aviation, and product liability for life science companies, while often drafted based on policy forms, are also written by individual insurance companies with input from broker partners as well as clients.[3] Moreover, even ISO standardized forms contain variations that prevent them from qualifying as boilerplate language.[4]

There are two primary criticisms against the conventional view of insurance policies as standardized contracts. First, there are variations in policy language in both admitted and non-admitted insurance policies, which discredits the view that insurance policies contain standardized wording.[5] Variations in terms and conditions are more apparent in

1. *See, e.g.*, Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075, 1091 (2010) (describing the "hyperstandardization" of insurance policies); James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation? Text versus Context*, 24 ARIZ. ST. L.J. 995, 996 (1992) ("The only part of the standard policy that is generally customized to the consumer-insured is the Declarations Sheet . . . . [T]here is little, if any, freedom to negotiate the standardized language of the insurance contract that determines the scope of coverage."); Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107,125 (2007) ("[I]n some lines of insurance, all insurance companies provide identical coverage on the same take-it-or-leave-it basis.").

2. *See infra* Part II.

3. *See infra* Section II.C.

4. *See infra* Section II.B.

5. *See infra* Sections II.A, II.C.

specialty lines, which are typically considered non-admitted placements, and allow for greater flexibility of manuscripting, the ability to customize and tailor coverage to meet the unique needs of a policyholder.[6] Second, in instances where standardized or boilerplate language is used, courts are inconsistent in how they interpret the language, which leads to non-uniform and mixed outcomes.[7] This inconsistency among insurers surrounding the interpretation of policy language can be damaging to both the insurer and the insured when engaged in complex litigation. This is best exemplified by the current opioid lawsuits plaguing pharmaceutical defendants and the corresponding insurance coverage disputes that have ensued.[8]

Part I of this Note provides an overview of insurance underwriting as a sophisticated mechanism of risk transfer that reduces financial uncertainty for policyholders, while serving an important public policy role. It then explores how courts interpret policy in coverage disputes in light of the incomplete and often incomprehensible nature of how insurance policies are drafted. Part II outlines the conventional view that insurance policies are contracts of adhesion that are offered on a take-it-or-leave-it basis because of the boilerplate language so often used, which is intended to reduce transaction costs and the need to negotiate among parties. This Part further argues, however, that the conventional view is disrupted due to inconsistencies in personal and commercial lines and the existence of specialty lines, within the non-admitted marketplace.

Part III then debunks the notion that insurance policies are standardized through the lens of the current opioid litigation facing pharmaceutical defendants and the ensuing insurance coverage disputes that have resulted by focusing on commercial general liability ("CGL") policies purchased by sophisticated policyholders. In these disputes, the courts have had to evaluate standard ISO CGL policies to determine whether a policy has been triggered and if the insurer has a duty to defend in two main coverage issues: (1) public nuisance claims and (2) whether an occurrence, as defined in the policy, took place.[9] While courts have

6. *See generally* Kenneth Wollner, *A Vote Against Broker-Drafted Manuscript Policies (in Most Cases)*, IRMI (Apr. 2003), https://www.irmi.com/articles/expert-commentary/a-vote-against-broker-drafted-manuscript-policies-in-most-cases?msclkid=daee0f01c16d11eca1aa6400dab5b15f [https://perma.cc/F93V-YWNJ].

7. *See infra* Part III.

8. *Id.*

9. *See infra* Section III.B.

interpreted standardized provisions in the CGL policies covering virtually the same allegations, their decisions have varied as to both coverage issues.[10] This creates uncertainty and unpredictability for insurers using the standardized CGL policy in assessing whether carriers have an affirmative duty to defend.[11] Moreover, the mixed outcomes in judicial decisions could have greater impacts for policyholders who obtain product liability coverage not from a CGL policy, but rather a specialized policy from the non-admitted market.

PART I. WHAT IS INSURANCE?

A. GENERAL OVERVIEW

It is hard to imagine a society and economy without insurance–an integral backdrop in the personal and commercial life of many. Insurance is designed to cover life's unexpected what-if events and is necessary in certain instances.[12] It is a principal tool that enables individuals and businesses to reduce the financial impact of a risk event occurring, and simultaneously provides a sense of security.[13] Insurance plays an important role in individuals' lives; for example, most Americans are required to purchase health and auto insurance.[14] Moreover, insurance is the cornerstone of any successful company, as it enables organizations to conduct their business, meet contractual obligations, and obtain financial security without worrying about the corresponding risk.[15]

10. *Id.*

11. *See infra* Section III.C.

12. *See Insurance 101*, INS. INFO. INST., https://www.iii.org/article/insurance-101 [https://perma.cc/2RKR-7UES] (last accessed Apr. 16, 2021).

13. *See generally* JEFFREY W. STEMPEL ET AL., PRINCIPLES OF INSURANCE LAW 1-9 (4th ed. 2011).

14. *See, e.g.*, Christopher C. French, *Understanding Insurance Policies as Noncontracts: An Alternative Approach to Drafting and Construing These Unique Financial Instruments*, 89 TEMP. L. REV. 535, 539-40 (2017) (discussing the important role insurance has played for both individuals and businesses since the 1750s. For example, individuals that want to purchase a house via a bank loan must obtain homeowners insurance, and companies in all states except Texas are required to obtain workers' compensation insurance).

15. *Id.*

In its most basic form, insurance is a contract between a policyholder and an insurance company.[16] As part of this contract, the insurance company agrees to assume the policyholder's risk and, in the event of a future loss, pay the corresponding costs in exchange for a premium paid by the policyholder.[17] Insurance provides a safety net for policyholders and is advantageous because it can pay for defense, settlement, and verdict costs, as well as indemnifying the policyholder or a third party against any legal repercussions of a loss.[18] Today, there are insurance solutions for a broad array of perils, ranging from traditional homeowners and auto liability to property and casualty coverage lines for commercial buyers, to niche coverage offerings such as product liability for life science companies, as well as emerging coverage lines like cyber insurance.[19] Almost anything is insurable.[20]

Legal scholars have promulgated various conceptions of insurance. For example, Kenneth Abraham, a well-known insurance law professor at the University of Virginia Law School, highlighted four conceptions of insurance, including as a: (1) contract; (2) public utility/industry; (3) product; and, (4) surrogate government for regulating policyholder

16. Jay M. Feinman, *Contract and Claim in Insurance Law*, 25 CONN. INS. L.J. 153, 154 (2018).

17. INS. INFO. INST., *supra* note 12.

18. *See, e.g.*, Julie Kagan, *Directors and Officers Liability Insurance*, INVESTOPEDIA (Nov. 7, 2019), https://www.investopedia.com/terms/d/directors-and-officers-liability-insurance.asp [https://perma.cc/NKM5-8SUF] (discussing benefits of Directors & Officers insurance).

19. *See, e.g.*, *Chubb: Everything You Need to Know*, INS. BUS. AM., https://www.insurancebusinessmag.com/us/companies/chubb/67002/ [https://perma.cc/ZF2U-V76T] (last visited Mar. 26, 2021) (discussing commercial lines of coverage offered by leading international insurance company Chubb); *Life Sciences*, MARSH, https://www.marsh.com/us/industries/life-sciences.html [https://perma.cc/LZB9-WRBR] (last visited Mar. 26, 2021) (providing an overview of product liability coverage solutions for pharmaceutical, biopharmaceutical, medical device, and research organizations); *Insurance Marketplace Realities 2021 – Cyber Risk*, WILLIS TOWERS WATSON (Nov. 18, 2020), https://www.willistowerswatson.com/en-US/Insights/2020/11/insurance-marketplace-realities-2021-cyber-risk [https://perma.cc/Q7RT-VV8A] (discussing the increase in cyber threats in light of the current remote environment and how cyber insurance is a solution).

20. *See* Brian Marx, *Iconic Lloyd's of London Insurance Policies*, PSA (Jan. 2, 2013), https://www.psafinancial.com/2013/01/iconic-lloyds-of-london-insurance-policies/ [https://perma.cc/2MSK-D8JN] (describing unique insurance policies offered by Lloyd's of London syndicates to insure Gene Simmons' tongue, Heidi Klum's legs, and even a policy offering a reward for the capture of the Loch Ness Monster).

behavior.[21] Other scholars and experts have emphasized the societal role that insurance policies play and focused on the underlying public policy concerns, like compensating injured parties and reducing moral hazard risks.[22] Furthermore, another scholar has argued that insurance policies should not be treated as contracts because they do not qualify as contracts under the traditional rules of contract formation.[23] Thus, insurance policies should be interpreted in a manner beyond just contract law.

B. INTERPRETING POLICIES THAT ARE COMPLEX AND LACK CLARITY

Overwhelmingly, insurance policies are complex and lengthy contracts that are purposely left incomplete. This is true for both personal and commercial policies (even though the latter is typically purchased by sophisticated buyers), as it is virtually impossible for the parties to conceive of all potential scenarios that may give rise to a future claim.[24] Some of the gaps in these contracts will be due to cognitive limitations since a contract cannot adapt to every contingency, while others will be strategic considerations, or, most importantly, carved out around transaction costs (otherwise associated with arguing ambiguities in court).[25] Furthermore, parties may actively choose to draft incomplete contracts by using vague terms or deliberately failing to include (or preclude) coverage for every possible event within the base policy form, as doing so would increase the costs of the contract negotiation.[26] Instead, the courts clarify this incompleteness of the contract when a dispute arises.[27]

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21. Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 657 (2013).

22. *See* Jeffrey W. Stempel, *The Insurance Policy as Social Instrument*, 51 WM. & MARY L. REV. 1489, 1495-1513 (2010); French, *supra* note 14, at 540.

23. *See, e.g.*, French, *supra* note 14, at 536-37 (arguing that in the insurance policy there is no meeting of the minds between the policyholder and insurance company regarding the terms and conditions, and there is arms-length bargaining).

24. Feinman, *supra* note 16, at 158.

25. *See generally* Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 44 (2003).

26. Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 816 (2006).

27. *Id.* at 835.

The meaning of vague terms in insurance policies are often derived from common industry understanding and judicial interpretation.[28] Without a doubt, insurance companies have an advantage here, especially over non-sophisticated buyers who may not have working knowledge of the terms' meanings.[29] Insurers expect to pay exactly what is covered or "owed" as defined by the terms of the policy as understood by "industry, regulatory and legal norms."[30] Many non-sophisticated policyholders, primarily in personal lines, do not read their insurance policies and therefore do not have a working understanding of what is covered within their purchased policy.[31] Indeed, policies are often not read until after a loss occurs.[32]

The possibility that the insurance policy is incomplete means that the insured and the Insurer could have very different understandings as to what they believe the purpose of the policy is, and what it is designed to cover.[33] These differences often lead to two particular disputes.[34] First, coverage disputes arise out of disagreements over the interpretation of policy language, the facts of the claim, or controlling law.[35] Second, disputes arise about one of the parties' performance obligations under the claim, such as an insurer's obligation in processing a claim or a policyholder's duty of cooperation.[36] Unsurprisingly, in disputes where coverage is being denied by the Insurer, they point to the language of their policy form and how it does not fit the circumstances of the claim.[37] For example, insurers will often point to their purposefully vague policy form language and argue that they have no obligation to cover the claim, because the policy does not include the specific set of circumstances at issue in the claim.[38]

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28. Feinman, *supra* note 16, at 158.
29. *Id.*
30. *Id.*
31. Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075, 1077 (2010).
32. *Id.* at 1080-81.
33. Feinman, *supra* note 16, at 61.
34. *Id.* at 160-61.
35. *Id.* at 160.
36. *Id.* at 160-61.
37. Abraham, *supra* note 21, at 658.
38. *Id.*

The interpretation of insurance policies is a question of law.[39] When construing insurance policies, courts will review the provisions of the contract and will apply the ordinary rules of contract interpretation.[40] This involves determining what the parties intended to cover under the policy based on the language used in the contract.[41] Furthermore, any ambiguities in the policy language, are construed in favor of the insured.[42] However, a court's holding regarding the ambiguous language is binding on everyone that has that particular provision in their policy form, not just the parties involved in that particular lawsuit.[43]

Additionally, there are two key canons of contract interpretation that courts typically use in insurance coverage dispute litigations: *contra proferentem* and reasonable expectations doctrine.[44] "Contra proferentem requires courts to interpret ambiguous [language] against the drafter."[45] Under the reasonable expectation doctrine, however, courts try to determine the parties' intent instead of placing a thumb on the scale for the non-drafting party.[46] Both of these canons favor the insured and help level the playing field for the less sophisticated party, which makes sense given the longstanding view that insurance policies are standardized

39. *See* Sonson v. United Servs. Auto. Ass'n, 100 A.3d. 1, 2, 5 (Conn. App. Ct. 2014) (noting that "standardized contracts of insurance continue to be prime examples of contracts of adhesion . . ." and that "[t]he interpretation of a contract presents a question of law subject to de novo review").

40. San Diego v. Ace Prop. & Cas. Ins. Co., 33 Cal. Rptr. 3d 583, 589 (Cal. Ct. App., 2005) (noting that the fundamental goal of contract interpretation is to give effect to the mutual intent of the parties, which is inferred by the written language). Further, in determining the intent of the parties a court must decide whether the language of the contract is clear or ambiguous. *Id.*

41. Jang v. Liberty Mut. Fire Ins. Co., No. 3:15-CV-1243, 2018 U.S. Dist. LEXIS 52023, at *7 (D. Conn. Feb. 22, 2018).

42. *See* Salem Grp. v. Oliver, 607 A.2d 138,139 (N.J. 1992) ("When a policy fairly supports an interpretation favorable to both the insured and the Insurer, the policy should be interpreted in favor of the insured.").

43. Abraham, *supra* note 21, at 66. *See also* Christopher C. French, *The Butterfly Effect in Interpreting Insurance Policies*, 82 L. & CONTEMP. PROBS. 47, 48-49 (2019) (describing the butterfly effect where a court's interpretation of standardized contract language, which becomes binding on other users of the same language, results in Insurers reacting and redrafting their policy language or adding exclusions to avoid that court's interpretation of the language).

44. Hazel Glenn Beh, *Reassessing the Sophisticated Insured Exception*, 39 TORTS & INS. L.J. 85, 90 (2003).

45. *Id.*

46. *Id.* at 90-91.

contracts of adhesion drafted by the Insurer.[47] Further, both canons contain a public policy preference in favor of requiring coverage for the insured in order to compensate for the injured party's unequal bargaining power.[48] However, not all insureds are equal and, therefore, exceptions to traditional contract interpretation doctrines should be made by the courts should a dispute arise.

In certain instances, insurance companies have been able to invoke the sophisticated insured exception in policy interpretation disputes. A sophisticated insured is generally a large commercial buyer, not an individual, that tends to have a better understanding of the insurance world, purchases a significant limit (and therefore pay substantially more in premiums), and has greater involvement in the negotiation process.[49] Additionally, sophisticated insureds often have dedicated risk management departments and work closely with insurance brokers and attorneys.[50] Because of their understanding of insurance, commercial buyers are able to canvas the marketplace when seeking insurance coverage and, consequently, can obtain the best pricing and terms and conditions available.[51] Therefore, the insured in this scenario has a greater degree of oversight in defining the purchased policy, as well as the terms and conditions included.[52] These buyers are not helpless or uninformed like the typical individual consumer may be.[53] As a result, courts tend to abandon contra proferentem where sophisticated insureds are involved in the negotiation process of the policy terms.[54]

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47. *See infra* Part II.

48. Beh, *supra* note 44.

49. *See* Jeffrey W. Stempel, *Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation*, 42 DRAKE L. REV., 807, 833 (1993).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. MetPath, Inc., 38 F. Supp. 2d 1087, 1092 (D. Minn. 1999) (observing that under New Jersey law, the sophisticated insured exception is applicable only where the insurance contract is negotiated, jointly drafted or drafted by the insured and that Minnesota law is unsettled as to whether the exception is viable). *See generally* New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162 (3d Cir. 1991) (holding under Delaware law that the sophisticated insured exception is inapplicable where the insured did not participate in drafting or negotiation of standard insurance contract terms).

PART II. STANDARDIZATION

A. ARE INSURANCE POLICES TRULY STANDARDIZED?

Insurance policies are traditionally viewed as standardized adhesion contracts or even "super-adhesion" contracts.[55] These policies contain boilerplate language that reduces the need for negotiation, so parties can focus on the most salient terms: limits, deductibles, and premiums.[56] Moreover, standardized insurance policies are intended to reduce transaction costs for both parties and create contract certainty for insurance companies, whose goal is to spread risk among numerous policyholders.[57] Since the policies are largely one-sided, the Insurers are able to avoid negotiation, discussion, or explanation of the terms, especially since policies are not usually provided until after the coverage has been purchased.[58] Given the take-it-or-leave-it basis that insurance policies are offered under, policyholders have very little incentive to review and understand the terms and conditions within the policy form.[59]

The standardized nature of insurance policies is largely a result of the fact that the insurance industry is highly regulated.[60] In an effort to protect the consumer, licensed insurers must receive approval from the state insurance commissioner as to the terms of a policy before they can

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55. *See* Stempel, *supra* note 49, at 829; Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075, 1091 (2010) (describing the "hyperstandardization" of insurance policies).

56. *See* Stempel, *supra* note 49, at 816-17; Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1153 (1990) ("Property owner's liability insurance contracts are standardized across Insurers in a form few insureds have the power or experience to bargain around."). *See also* Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1264 n.4 (2011) ("The only part of the standard policy that is generally customized to the consumer-insured is the Declarations Sheet . . . . [T]here is little if any, freedom to negotiate the standardized language of the insurance contract that determines the scope of coverage.") (citing James M. Fischer, *Why are Insurance Contracts Subject to Special Rules of Interpretation? Text versus Context*, 24 ARIZ. ST. L.J. 995, 996 (1992)).

57. Stempel, *supra* note 49, at 829-30.

58. *Id.* at 816-17.

59. Abraham, *supra* note 21, at 660.

60. *See* Jared Wilkerson, *Adjudicating Insurance Policy Disputes: A Critique of Professor Randall's Proposal to Abandon Contract Law*, 23 LOY. CONSUMER L. REV. 294, 298 (2011) (describing that the insurance industry is primarily regulated at the state level because of insurance's importance to the individual policyholder as well as the public in general).

sell it.[61] Additionally, the insurance companies themselves are regulated by the state insurance departments. State departments investigate the financial solvency of insurance companies by reviewing their books and records, assure the quality of products offered by the companies, and guarantee fairness in dealings between the big players in the industry and policyholders.[62] These are particularly important regulatory controls, since the contractual relationship between the parties involved in these transactions are usually not equal.[63]

Insurance companies that are licensed to do business in a state are referred to as "admitted insurers" and are also regulated by the state's insurance department.[64] This means that the state's insurance commissioner must approve the rates and forms the insurance company is using and providing to policyholders for a premium.[65] Additionally, admitted Insurers have financial support from the state's guarantee fund, should they become insolvent.[66] Because of this regulatory oversight, insurance policies are generally standardized contracts that are drafted by the insurance industry, specifically by the ISO.[67] The ISO is an advisory organization that focuses on property and casualty insurance and provides actuarial and underwriting support, and other services to member insurance organizations.[68] One important service that ISO provides for Insurers is policy writing.[69]

Insurance companies pay a membership fee to belong to the ISO and, as a result, are able to use policy forms drafted by ISO.[70] The organization

61. Abraham, *supra* note 21, at 662-63.

62. *See generally* 1 BUSINESS INSURANCE LAW AND PRACTICE GUIDE § 1.02 (2020).

63. *Id.*

64. *See Regulation*, INS. INFO. INST., https://www.iii.org/publications/commercial-insurance/how-it-functions/regulation [https://perma.cc/3SEM-RAXX] (last visited Apr. 1, 2021).

65. *Id.*

66. Richard F. Hull, *Using the Excess and Surplus Lines Market*, INS. J. (July 2, 2002), https://www.insurancejournal.com/magazines/mag-features/2002/07/22/22900.htm [https://perma.cc/3Y8E-P89K].

67. Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 MCGEORGE L. REV. 203, 206 (2010).

68. *See* Marianne Bonner, *Insurance Services Office (ISO)*, BALANCE SMALL BUS., https://www.thebalancesmb.com/insurance-services-office-iso-462706 [https://perma.cc/R6DV-MFU5] (last updated May 16, 2019).

69. *Id.*

70. *See* French, *supra* note 14, at 547. ISO has over 1,400 property and casualty Insurers that are members. *Id.* at 547 n.71.

drafts the majority of property and general liability policies that are offered in the market.[71] For example, the ISO CGL coverage form is the industry standard for general liability coverage and is designed to provide broad protection for certain losses sustained by third parties arising out of an insured's business operations.[72]

The ISO works in tandem with insurance companies to design and amend policy forms.[73] For example, war is a common exclusion found in insurance policies and has historically been interpreted to only apply to hostile action between sovereign states, but not to terrorist actions.[74] However, in the wake of the September 11, 2001 terrorist attacks by non-state actors, there was a public policy push for insurance coverage for victims of the attacks; consequently, insurance companies realized that war and terrorism risks were transforming and becoming more catastrophic than in the past.[75] As a result, they worked closely with the ISO to draft a broad terrorism exclusion that would be included in standard policies.[76] The ISO contends that consumers "benefit from the clarity that the standard coverage language achieves."[77] However, this may not necessarily be the case, as courts have arrived at mixed decisions in lawsuits using ISO-based policy language.[78]

B. CHALLENGES AGAINST STANDARDIZATION

Although carriers may use ISO-based policy forms, many alter their policies by drafting their own endorsements that are then attached to the contract.[79] Modifications to the ISO policy form were common during the

71. Stempel, *supra* note 67, at 206.

72. *See generally* David Goodwin et al., *Commercial General Liability (CGL) Insurance*, COVINGTON & BURLINGTON LLP, https://www.lexisnexis.com/supp/LargeLaw/no-index/coronavirus/insurance/insurance-commercial-general-liability-insurance.pdf [https://perma.cc/RL7V-LSE4] (last visited Mar. 31, 2021).

73. Stempel, *supra* note 67, at 206.

74. *Id.* at 207.

75. *Id.* at 207-08.

76. *Id.* at 208.

77. Ins. Servs. Office Inc., *ISO: Enhancing Competition in the World's Insurance Markets* (1999), *reprinted in* KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 33 (3d ed. 2000).

78. *See* discussion *infra* Part III.

79. *See* Patrick Wright, *You Can't Just Say "Yes, There's Coverage"*, INS. J. (May 16, 2018), https://www.insurancejournal.com/blogs/academy-journal/2018/05/16/489281.htm [https://perma.cc/6W7S-KPDD].

soft insurance market,[80] when the market was saturated with capacity and competition and carriers needed to find new ways to compete beyond price.[81] Many added insured-specific endorsements to fit the unique coverage needs of a company, or endorsements that clarified a vague provision of the base policy form.[82] This practice of modification shows that the conventional view of insurance policies as truly standardized forms is not entirely accurate.

In recent years, courts and legal scholars have commented on the discrepancy in policy forms and their deviation from the standard language.[83] In particular, one legal commentator posed that we should reconsider the idea of insurance as standardized contracts following the result of his research on homeowners' policies.[84] Daniel Schwarcz reviewed Homeowners 3 Special Form ("HO3") policies,[85] in six states from 24 insurance companies.[86] His findings highlighted that homeowner policies are not standardized, neither within nor among the states, as conventional theory suggests.[87]

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80. *See* Bethan Moorcraft, *What is a Hard Insurance Market?*, INS. BUS. MAG. (Oct. 11, 2019), https://www.insurancebusinessmag.com/us/guides/what-is-a-hard-insurance-market-180382.aspx [https://perma.cc/9J5K-Q7LU] (describing how the insurance market is cyclical and fluctuates between a soft and hard market). A soft market is characterized by aggressive competition, low premium charges, high limit offerings and flexibility of coverage. *Id. See generally Commercial Insurance Buyers Can Expect Hard Market Conditions to Continue Throughout 2021*, WILLIS TOWERS WATSON (Nov. 19, 2020), https://www.willistowerswatson.com/en-US/News/2020/11/commercial-insurance-buyers-can-expect-hard-market-conditions-to-continue-throughout-2021 [https://perma.cc/4Y27-MK8J] (describing how the insurance market is currently in a hard market and the COVID-19 pandemic has exacerbated this already challenging market, and conditions of high premium rates and reductions in capacity are expected to continue).

81. *See generally* Jamie Glanz, *Why Policy Language Matters*, ASSURANCE (Feb. 4, 2019), https://www.assuranceagency.com/blog-post/why-policy-language-matters [https://perma.cc/9WTC-J5M3].

82. *Id.*

83. *See* Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1274-75 n.40 (citing legal scholars who noted discrepancies in policy language dealing with concurrent causation and criminal-act exclusions).

84. *Id.*

85. *Id.* at 1281 (describing the HO3 form, which covers a policyholder's home and other structures on an all-risk basis, which means that coverage is provided for all perils unless they are specifically excluded).

86. *Id.*

87. *Id.* at 1278-1300.

Typically, HO3 policies include both property and liability coverage grants, and Schwarcz's research noted variations in both types of coverage among Insurer's forms.[88] First, his findings showed that, concerning the property coverage offered in the HO3 policy, carriers differed in how they handled concurrent causation,[89] affirmative coverage grants for "all-risk" perils,[90] mold and fungi exclusions,[91] and pollution exclusions.[92] Second, there were stark contrasts in the policy language for the liability coverage parts of the HO3 policies including: bodily injury definitions,[93] occurrence definitions,[94] and expected or intended injury

88. *Id.* at 1280-82.

89.

> In most states, about half of the carriers followed the HO3 approach by opting out of only the default rule [efficient proximate cause ("EPC")] for policy exclusions. The remaining insurers generally decreased coverage by expanding the scope of the EPC opt out, thus increasing the number of perils that cannot contribute in any way to a covered loss.

Id. at 1280-81.

90. *Id.* at 1281-82 n.81 (commenting on how policy forms vary in what they agree to cover under the affirmative "all-risk" coverage grant).

91. *Id.* at 1285 (commenting that the standard "HO3 form excludes coverage for mold or fungus unless it is (i) hidden within the walls, floors, or ceilings and (ii) caused by an accidental discharge or overflow of water or steam"). Of the policies surveyed by Schwarcz some policies exclude all mold and fungus property damage and that few carriers utilize the standard HO3 mold exclusion with a limited carveback offering. *Id.*

92. *Id.* at 1287.

93. *Id.* at 1295-96 (noting that bodily injury is defined in an HO3 standard policy as: "bodily harm, sickness or disease, including required care, loss of services and death that results"). Litigation is often focused on whether this standard definition encompasses mental anguish or psychological injury. Of the polices surveyed, Schwarcz found that many continue to use the ISO definition, but some do redefine it to specifically exclude "mental, emotional, or psychological harm that does not itself arise out of physical harm to one's body." *Id.*

94. *Id.* at 1297. Only injuries from an occurrence are covered in an HO3 policy, which is defined as: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in (a) 'bodily injury' or (b) 'property damage.'" Thus, any condition prior to the start of the policy period where the injury occurred would be covered according to this definition. However, of the carriers surveyed, some redefined occurrence to specifically exclude covering an injury for any condition that began prior to the start of the policy period.

exclusions.[95] The variations amongst the surveyed policies effectively challenge the belief that all personal-line policies are uniform. Moreover, Schwarcz's research is a particularly interesting finding in light of the significant scholarship and research focused on the standardized nature of personal lines policies, such as homeowners insurance.

C. THE NON-ADMITTED MARKET AND SPECIALTY COVERAGE LINES

Not only are there wording variances in the admitted market, but there is an entire subset of the insurance marketplace that is not based on standardized policy forms, such as specialty lines.[96] Specialty lines cover unique or unusual risks that would be challenging to underwrite in the traditional market.[97] Common specialty lines include: Marine, Aviation, Professional Liability, Umbrella/Excess, and Product Liability.[98] Typically, policies for these types of coverage are written on a non-admitted basis,[99] and are also referred to as Excess and Surplus lines (E&S).[100] This means that the insurance company is not licensed as an insurance provider in a state but can still conduct business in the state via an insurance broker or agent.[101] Most importantly, a non-admitted Insurer is not regulated by a state's insurance department and subsequently has more flexibility in drafting forms and policy language, which allows them

95. *Id.* at 1298 (noting that the standard HO3 policy does not provide coverage for bodily injury or property damage that was expected or intended, and the exclusion is broad). Some carriers surveyed included a more restrictive expected or intended injury exclusion in their HO3 form. *Id.*

96. *See generally* Denise Johnson, *Understanding the Differences Between Standard and Excess/Surplus Lines*, CLAIMS J. (July 31, 2014), https://www.claimsjournal.com/news/national/2014/07/31/252642.htm [https://perma.cc/WZ32-HAVR] (last visited April 18, 2022); *Specialty Lines*, INS. INFO. INST. https://www.iii.org/publications/commercial-insurance/what-it-does/lines-of-business/specialty-lines [https://perma.cc/7KL2-GWU2] (last visited Apr. 18, 2022).

97. *See Specialty Lines v Standard Lines*, SPECIALTY INS. BLOG (Apr. 15, 2005, 4:31 AM), https://specialtyinsurance.typepad.com/specialty_insurance_blog/2005/04/specialty_lines.html [https://perma.cc/QQF6-75WD].

98. *Id. See also What Is Specialty Insurance and Why Is It Important?*, MCMAHON AGENCY (Apr. 2, 2020), https://mcmahonagency.com/what-is-specialty-insurance-and-why-is-it-important/ [https://perma.cc/3HDV-6LUM].

99. Worldwide Facilities, *supra* note 97.

100. *See What is E&S Insurance?*, NATIONWIDE, https://nationwideexcessandsurplus.com/public/about-us/what-is-es-insurance.jsp [https://perma.cc/QE8A-6E4Z] (last visited Mar. 31, 2021).

101. *Id.*

to be more responsive to the market and clients' needs.[102] The E&S market is unequivocally an essential segment of the insurance industry.

A principal benefit of having non-admitted coverage is the ability to manuscript.[103] Non-admitted policy forms can be created by brokers for corporate policyholders[104] or can be solely drafted by the Insurer.[105] While some scholarship suggests that the policyholder has no role in drafting the manuscripted terms,[106] that is not actually the case.[107] In practice, corporate policyholders, especially those that are Fortune 500 companies, are directly involved in the placement of their insurance programs. Many Fortune 500 companies have well-established risk management departments that work in tandem with in-house and outside counsel, and partner with an insurance brokerage service team that specialized in a particular area of coverage.[108] Through this coordinated effort, the Fortune 500 company has the opportunity to actively draft and manuscript proposed policy wording or review its policy forms and insurance program structures, and many take advantage of this.[109] Manuscripting

102. *See generally* Richard F. Hull, *Using the Excess and Surplus Lines Market*, INS. J. (July 2, 2002), https://www.insurancejournal.com/magazines/mag-features/2002/07/22/22900.htm [https://perma.cc/RM7G-KKXL].

103. *See Excess and Surplus Insurance | E&S Insurance*, ZURICH, https://www.zurichna.com/insurance/excess [https://perma.cc/68PE-S9QP] (last visited Apr. 16, 2022).

104. *See, e.g.*, *Global Rail Liability Insurance Facility*, MARSH, https://www.marsh.com/uk/industries/transportation/products/global-rail-liability-insurance-facility.html [https://perma.cc/53X8-UTFF] (last viewed Feb. 4, 2022) (describing a leading commercial insurance broker's manuscript property policy ("Marsh Global Rail Form"), for the unique exposure that railway organizations present); Rodd Zolkos, '*Wilprop' Case Changes the Industry*, BUS. INS. (Sept. 11, 2011), https://www.businessinsurance.com/article/00010101/NEWS06/309119984/Wilprop-case-changes-the-industry [https://perma.cc/VHV9-YTBB] (describing the 'Wilprop' property policy that was created by leading broker Willis and how it had a much broader definition of "occurrence" compared to standard property policies).

105. *See* French, *supra* note 14, at 547.

106. *Id.*

107. *See Marsh Broker Leigh Ann Rodgers Recognized as a 2020 Hospitality Broker*, RISK & INS., https://riskandinsurance.com/award-profile/marsh-broker-leigh-ann-rodgers-recognized-as-a-2020-hospitality-power-broker/ [https://perma.cc/S3Y6-3QGV] (last visited Apr. 2, 2021) (suggesting client involvement or, at least, awareness in the manuscriptal policy form that the broker had prepared on their behalf to obtain favorable coverage).

108. *Id.*

109. *Id.*

coverage involves greater involvement of the policyholder and/or the broker; however, such involvement puts the policyholder at risk of having the sophisticated policyholder exception apply against them, should there be a coverage dispute.[110] This could result in a court precluding the coverage, and the policyholder losing the protections a standard insured would receive.[111]

Corporate policyholders do play a role in coverage negotiation and are likely more aware of what risks are and are not covered in their policy form compared to individuals or small businesses. Plus, they likely better understand the terminology used within the form. They have a greater degree of expertise, resources, and sophistication that they leverage towards their insurance programs. Therefore, there are not only variances among Insurers in policy wording for certain lines of coverage in the non-admitted market, but there are also further variances in language within one coverage line for an array of policyholders because of the ability to manuscript coverage.

PART III. THE OPIOID EPIDEMIC LAWSUITS

Thus far, it has been established that there are policy variations among the admitted and non-admitted markets, which cut against the common perception of standardization. An additional cut against the conventional view is the inconsistency in courts' interpretations of standard policy language. Nowhere is this more apparent than in current coverage litigation surrounding the opioid epidemic.

A. THE EPIDEMIC

The opioid epidemic (the "Epidemic") is a serious health crises afflicting the United States.[112] The perpetrators of the Epidemic are a

110. *See infra* Part II; New Castle Cnty. v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1182 (3d Cir. 1991) (holding under Delaware law that the sophisticated insured exception is inapplicable where the insured did not participate in drafting or negotiating the standard insurance contract terms); St. Paul Fire & Marine Ins. Co. v. MetPath, Inc., 38 F. Supp. 2d 1087, 1092 (D. Minn. 1999) (noting that the sophisticated insured exception under New Jersey law only applies where the "insurance contract is negotiated, jointly drafted or drafted by the insured").

111. *See supra* Part I.

112. *See What is the U.S. Opioid Epidemic?*, U.S. DEP'T HEALTH & HUM. SERV., https ://www.hhs.gov/opioids/about-the-epidemic/index.html [https://perma.cc/9JFB-R2M9]

diverse group of actors ranging from multi-million-dollar pharmaceutical companies to small town physicians.[113] As a result, lawsuits are piling up against pharmaceutical manufacturers, distributors, and pharmacies, as they face allegations that they are to blame for the alarming increase of opioid addiction and overdose in the United States.[114] There are four main categories of the opioid litigation: (1) civil lawsuits by governments (city and county) and tribal sovereign nations against pharmaceutical manufacturers, distributors, wholesalers, retailers;[115] (2) civil lawsuits by state attorneys general against pharmaceutical defendants;[116] (3) civil bankruptcy cases against opioid manufacturers;[117] and (4) criminal prosecutions against pharmaceutical defendants.[118]

(last visited Feb. 19, 2021) (stating that 70,630 people died from drug overdose in 2019 and 10.1 million people misused prescription opioids in 2019).

113. Katy Baum, *Opioid Epidemic Trends and Insights: Law Enforcers are Expanding and Transforming Their Toolbelts to Hold Anyone and Everyone Accountable for this National Emergency*, AM. BAR ASS'N (Mar. 5, 2020), https://www.americanbar.org/groups/health_law/publications/aba_health_esource/2019-2020/march-2020/oipioid-epidemic/ [https://perma.cc/9ZK9-4XUH].

114. *See* Dana A. Elfin, *Insurers Seek to Avoid Being Drawn Into Opioid Litigation*, BLOOMBERG L. (Jan. 17, 2019), https://news.bloomberglaw.com/health-law-and-business/insurers-seek-to-avoid-being-drawn-into-opioid-litigation [https://perma.cc/H4U2-3PAK].

115. *See generally* Sara Randazzo, *In the Opioid Litigation, It's States vs. Cities*, WALL ST. J. (Aug. 6, 2019), https://www.wsj.com/articles/in-the-opioid-litigation-its-now-states-v-cities-11565123075 [https://perma.cc/42FZ-9LPL].

116. *Id.*

117. *See, e.g.*, Mike Spector, *Purdue Pharma's Sacklers Increase Opioid Settlement to $4.3B*, INS. J. (Mar. 12, 2021), https://www.insurancejournal.com/news/national/2021/03/12/605038.htm [https://perma.cc/2ZSQ-KEAA] (describing the $10 billion settlement proposal that Purdue submitted to bankruptcy court and members of the Sacklers family who own Purdue Pharma, agreed to put up $4.275 billion towards the settlement); Shelia Kaplan & Jan Hoffman, *Mallinckrodt Reaches $1.6 Billion Deal to Settle Opioid Lawsuits*, N.Y. TIMES (Feb. 25, 2020), https://www.nytimes.com/2020/02/25/health/mallinckrodt-opioid-settlement.html [https://perma.cc/G3RK-5PJD] (describing the former largest generic opioid manufacturer Mallinckrodt's settlement offer to the bankruptcy court of $1.6 Billion to resolve claims by 47 state attorneys general).

118. Baum, *supra* note 113 (noting that the Drug Enforcement Administration (DEA) is pursuing aggressive criminal actions against drug distributors, individual providers and pharmacies). Specifically the DEA has targeted Rochester Drug Co-Operative and its executives, for unlawful distribution of controlled substances and conspiracy to defraud the DEA. *Id.* The DEA has also targeted providers and pharmacies for participating in

Many of the lawsuits have been consolidated into an extremely large and complex multidistrict litigation (MDL) in the U.S. District Court for the Northern District of Ohio, with Judge Daniel Polster at the helm.[119] Judge Polster's strategy in the MDL is to conduct bellwether trials in order to encourage settlement.[120] Moreover, in addition to Judge Polster's MDL strategy, his overall goal is to reach a global settlement for the opioid litigation.[121]

To date two bellwether trials have occurred. The first took place in 2019, resulting in a $355 million dollar pre-trial settlement with only most of the defendants, and left Johnson & Johnson (J&J) as the sole defendant proceeding to trial.[122] In 2019, the Oklahoma court ordered J&J to pay

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"pill mill" schemes which involve dispensing an absorbingly high amount of prescription drugs, generally for cash. *Id.*

119. *See* Michelle Llamas, *Opioid Lawsuits*, DRUGWATCH, https://www.drugwatch.com/opioids/lawsuits/ [https://perma.cc/6KU9-5YUC] (last visited Mar. 31, 2021) (noting that as of August 17, 2020, 2,872 lawsuits were pending in the MDL). *But see* Lorelie S. Masters, Michael S. Levine & Michelle M. Spaz, *Insurance Coverage for Claims Stemming From the National Opioid Crisis*, HUNTON ANDREWS KURTH (Jan. 25, 2020), https://www.huntoninsurancerecoveryblog.com/2020/02/articles/d-and-o/insurance-coverage-for-claims-stemming-from-the-national-opioid-crisis/ [https://perma.cc/5Z35-Q3T4] (describing how the number of opioid related cases in the MDL 2017 was 200). *See generally In re National Prescription Opiate Litigation*, No. 1:17-MD-2804 (N.D. Ohio 2017), https://www.ohnd.uscourts.gov/mdl-2804 [https://perma.cc/A7XH-F6G4].

120. *See generally* Stephen M. *Copehnhaver, Why Bellwethers Matter in the Opioid MDL*, ARENTFOX SCHIFF (June 10, 2019), https://www.afslaw.com/perspectives/news/why-bellwethers-matter-in-the-opioid-mdl [https://perma.cc/W96A-4DDZ] (last visited Apr. 16, 2022); Jeff Overley, *Opioid MDL Judge Polster Plots New Bellwether Trials Across the US*, LAW360 (Nov. 19, 2019), https://www.law360.com/articles/1221570/opioid-mdl-judge-plots-new-bellwether-trials-across-us [https://perma.cc/23DW-4SCD].

121. The global settlement is intended to end all of the opioid litigation by all three types of government plaintiffs (state, local, tribal sovereignty) against all three types of opioid defendants (manufacturers, distributors, and retailers). The global settlement for opioids is thought to be similar to the big tobacco Master Settlement Agreement (MSA) of 1998 which totaled more than $200 billion following litigation through the 1990s over surrounding smoking-related deaths. *See Opioid Litigation: Insurance and Risk Management Considerations*, MARSH LLC (May 2018), https://www.marsh.com/us/insights/research/opioid-litigation-insurance-and-risk-management-considerations.html [https://perma.cc/XS47-PC37].

122. *See* Jan Hoffman, *Johnson & Johnson Ordered to Pay $572 Million in Landmark Opioid Trial*, N.Y. TIMES (Aug. 29, 2019), https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html [https://perma.cc/2F4Q-5NQ6]

$572 million in damages.[123] The second bellwether trial is currently underway in Federal Court in Cleveland, Ohio, and involves four national pharmacy chains and their alleged roles in fueling the epidemic.[124] These are just two examples of cases in a massive web of litigation and they pale in comparison to the global settlement value, which is currently estimated to be $50 billion.[125]

The availability of insurance coverage is critical in the current opioid lawsuits facing pharmaceutical companies[126] because of the alarming

(commenting that in pre-trial settlements, Purdue Pharma and Teva Pharmaceuticals agreed to pay $270 million and $85 million respectively whereas Johnson & Johnson decided to proceed to trial). The Oklahoma court ruled that Johnson & Johnson had created a public nuisance by exaggerating the benefits of opioid products and minimizing their addiction risks. *Id.* Oklahoma initially sought J&J to fund a $17 billion "Abatement Plan" that would provide a remedy for the impacts of the opioid crisis in Oklahoma. *Id.* In 2019 the Oklahoma court ordered J&J to pay $572 million in damages and J&J is currently appealing this judgment to the Oklahoma Supreme Court. *Id.*

123. *Id.*

124. *See* Jan Hoffman, *CVS, Walgreens and Walmart Fueled Opioid Crisis, Jury Finds*, N.Y. TIMES (Nov. 23, 2021), https://www.nytimes.com/2021/11/23/health/walmart-cvs-opioid-lawsuit-verdict.html [https://perma.cc/4Z8P-N5PU] (informing that the federal jury in this bellwether case found that CVS Health, Walgreens, and Walmart substantially contributed to the opioid epidemic). Hearings are expected to begin in the spring of 2022 to determine the amount in damages each pharmacy owes. *Id.*

125. *See* Jan Hoffman, *Drug Giants Close in on a $50 Billion Settlement of Opioid Cases*, N.Y. TIMES (Oct. 16, 2019), https://www.nytimes.com/2019/10/16/health/opioids-settlement-distributors.html [https://perma.cc/ZN7F-QYCX]; Jeff Feely, *Cardinal Health, AmerisourceBergen See $13 Billion Opioid Deal*, BLOOMBERG (Nov. 5, 2020), https://www.bloomberg.com/news/articles/2020-11-05/cardinal-health-amerisourcebergen-see-13-billion-opioid-deal [https://perma.cc/MMD4-3NG6]; Nate Raymond, *J&J to Pay $5 Billion in Potential Opioid Settlement with States*, INS. J. (Oct. 14, 2020), https://www.insurancejournal.com/news/national/2020/10/14/586398.htm [https://perma.cc/EP9J-KY72]; Charley Grant, *Teva's Benign Opioid Settlement Isn't in the Bag Yet*, WALL ST. J. (July 26, 2020), https://www.wsj.com/articles/tevas-benign-opioid-settlement-isnt-in-the-bag-yet-11595772000 [https://perma.cc/43ZJ-PXXV] (describing that the settlement figure to date involves the three largest drug distributors Amerisource Bergen, Cardinal Health and McKesson, who are on the hook for $21 billion, and two pharmaceutical manufacturers, Johnson & Johnson who is on the hook for $5 Billion and Teva who is on the hook for $23 billion). Surprisingly, Teva's settlement contribution is primarily comprised of the pharmaceutical manufacturer's offer to supply $23 billion dollars' worth of their buprenorphine naloxone or anti-addiction tablets. *Id.*

126. Elfin, *supra* note 114 (quoting Barry Buchman, an attorney at Haynes & Boone: "[T]he amount of coverage will affect when and whether and for how much these kinds

defense costs and expected settlement values.[127] Furthermore, affirmative insurance coverage will likely impact the settlement value.[128] There are three types of insurance coverages that are relevant for opioid lawsuits: CGL (including Product Liability), Errors & Omissions (E&O), and Directors and Officers (D&O).[129] The focus of this Note is solely on CGL because these policies frequently use ISO standardized language. To date, there has only been a handful of decisions involving insurance coverage for opioid related claims, as the federal trials in the landmark opioid MDL have been delayed.[130]

Most of the opioid suits filed thus far have alleged negligence, false advertising, gross negligence, and unfair and deceptive practices, among others.[131] In light of the lawsuits, many of the major pharmaceutical defendants, distributors, and retailers have attempted to report the claims made against them and obtain coverage through their CGL policies.[132] Unsurprisingly, many casualty Insurers have refused to defend these defendants or contribute to their settlements, which has resulted in significant insurance coverage litigation.[133]

To date, suits have only been litigated in state court,[134] but suits filed in both state and federal courts focus on two primary insurance coverage issues. First, whether the public nuisance claims are "because" of "bodily

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of cases settle. You can't completely separate the settlement analysis from the coverage").

127. *See, e.g.*, Joel Achenbach et al., *Johnson & Johnson, Three Other Companies Close in $26 Billion Deal on Opioid Litigation*, WASH. POST (Nov. 6, 2020), https://www.washingtonpost.com/health/opioid-settlement-drug-distributors/2020/11/05/6a8da214-1fc7-11eb-b532-05c751cd5dc2_story.html [https://perma.cc/Q9NP-KQ6Y] (describing the tentative $26 billion settlement that four of the largest manufacturers or distributors of opioids agreed to in the wake of the voluminous opioid lawsuits).

128. Elfin, *supra* note 114.

129. *See* Jenna A. Hudson, *The Opioid Crisis Costs Billions. Will Insurance Pay for It? (Part 1)*, NAT'L L. REV. (May 21, 2019), https://www.natlawreview.com/article/opioid-crisis-costs-billions-will-insurance-pay-it-part-1./ [https://perma.cc/2XH3-NBRQ].

130. *See* Meryl Kornfield, *Coronavirus Stalls Long-Awaited Day in Court for Historic Opioid Lawsuit*, WASH. POST (Dec. 26, 2020), https://www.washingtonpost.com/health/2020/12/26/coronavirus-opioid-trials/ [https://perma.cc/9VAP-MGTK] (noting that trials have been delayed to later in 2021 due to the COVID-19 pandemic).

131. *See Opioid Litigation: Insurance and Risk Management Considerations*, *supra* note 121.

132. *Id.*

133. *See infra* Sections III.B, III.C.

134. *Id.*

injury."[135] Second, whether the claims and injuries sustained constitute an "occurrence" resulting in bodily injury, as defined under the policy.[136] Moreover, other coverage issues presented by the opioid litigation include:

- whether the Insurer has a duty to defend;
- does the products-completed operations hazard ("PCOH") exclusion preclude coverage;
- is the complainant seeking economic damages rather than damages for "bodily injury" as covered by the policy; and
- whether the allegations involve a known loss.[137]

There have been mixed outcomes in decisions held to date addressing the applicability of insurance coverage for the opioid suits.[138] These conflicting results by the courts when reviewing standard policy provisions and applying them to a set of similar facts and circumstances[139] negate the perceived benefit of the standardized insurance policy language. The CGL forms are predominately based on ISO language, and the standardized language is intended to reduce transaction costs and increase predictability for policyholders. However, predictability for CGL policyholders who are entangled in the opioid litigation is virtually non-existent, and presents a similar situation akin to the asbestos litigation throughout the 1990s.[140] The Sections that follow delve into the state court decisions on the two primary coverage issues in the opioid suits.

135. *See* Hudson, *supra* note 129.

136. *Id.*

137. *See* Lorelie S. Masters et al., *Insurance Coverage for Claims Stemming From the National Opioid Crisis*, HUNTON ANDREWS KURTH (Feb. 25, 2020), https://www.huntoninsurancerecoveryblog.com/2020/02/articles/d-and-o/insurance-coverage-for-claims-stemming-from-the-national-opioid-crisis/ [https://perma.cc/6X42-N3YX].

138. *See infra* Sections III.B, III.C.

139. *Id.*

140. *See* French, *supra* note 14, at 569 n.196 (describing the asbestos litigation in the 1990s and the debate over "sudden and accidental" language in the CGL policy). *See also*, Michelle Llamas, *Opioid Lawsuits*, DRUGWATCH, https://www.drugwatch.com/opioids/lawsuits/ [https://perma.cc/W655-Y6K8] (last visited Mar. 31, 2021).

B. COVERAGE ISSUE #1: PUBLIC NUISANCE "BECAUSE" OF "BODILY INJURY"

At least 42 states have sued opioid manufacturers, attempting to hold them liable under state nuisance law.[141] Oklahoma specifically, is the first state to go to trial.[142] In an attempt to encourage settlements, these states allege that manufacturers exaggerated the effectiveness of opioid products in treating pain management while understating their addictive qualities.[143] These allegedly intentional and deceptive marketing practices interfered with the "public right against unwarranted illness and addiction."[144] The difficulty with these public nuisance allegations is that they are not seeking compensation for bodily injuries of individuals.[145] Instead, they are pursuing economic damages or funding for future governmental services to abate the public health crisis that opioids created.[146] CGL policies, however, are designed to only defend the policyholder against suits seeking damages for or because of the specific bodily injury that is covered by the policy.[147] Moreover, these policies are not intended to cover foreseeable generalized public harm that is to be expected,[148] and many have argued that it was foreseeable that an epidemic could ensue, given the addictive nature of opioids.[149]

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141. *See* Jeff Feeley, *Opioid Litigation Tests Public Nuisance Claim Theory*, INS. J. (May 27, 2019), https://www.insurancejournal.com/news/national/2019/05/27/527539.htm [https://perma.cc/Q3VQ-BUF8].

142. *Id.*

143. Jennifer Skinner, *Trending in Tort Law: Transforming Product Liability Claims into Public Nuisance Actions*, NAT'L. L. REV. (Feb. 25, 2020), https://www.natlawreview.com/article/trending-tort-law-transforming-product-liability-claims-public-nuisance-actions [https://perma.cc/3ZLB-PGEC].

144. *Id.*

145. *See* Adam Fleischer, *Courts Shouldn't Consider Bodily Injury Claims in Opioid Suits*, LAW360 (Oct. 28, 2020), https://www.law360.com/articles/1323537/courts-shouldn-t-consider-bodily-injury-claims-in-opioid-suits [https://perma.cc/C9JP-CB2K].

146. *Id.*

147. *Id.*

148. Patrick Bedell & Allyson Spacht, *Liability Insurance Outlook for Opioid Public Nuisance Claims*, LAW360 (Apr. 22, 2020), https://www.law360.com/articles/1265219/liability-insurance-outlook-for-opioid-public-nuisance-claims [https://perma.cc/X4HE-ZVHV].

149. Associated Press & Corky Siemaszko, *First it Sold Oxycontin, then Pharma Company Saw Market for Anti-Addiction Drug, Suit Says*, NBC NEWS (Feb. 1, 2019, 8:01 AM), https://www.nbcnews.com/news/us-news/unredacted-lawsuit-against-oxycontin-maker-reveals-they-pushed-opioid-low-n965721 [https://perma.cc/YSA6-VDDM];

This section will examine five state lawsuits: *Giant Eagle, Inc. v. Am. Guarantee & Liab. Ins. Co.*, *Acuity v. Masters Pharm., Inc.*, *Cincinnati Ins. Co. v. Richie Enterprises LLC*, *Steadfast Ins. Co. v. Purdue Frederick Co.*, and *Ace Am. Ins. Co. v. Rite Aid Corp*. In these lawsuits, Insurers have taken the position that the CGL policy is not intended to cover a public nuisance claim made by a local government because the government itself did not suffer bodily injury, just economic damages.[150] There is however, an argument that such economic damages can be covered by the standard ISO coverage grant: "we[] will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage.'[151] In this regard, the courts in *Giant Eagle* and *Acuity Masters* rejected the Insurers' argument because the coverage grant included in CGL policies extends to damages *because* of bodily injury.[152] It is not solely limited to damages *for* bodily injuries as the court in *Giant Eagle* explained:

> The plaintiffs in the County lawsuits seek to recover damages for losses, and specifically costs related to emergency medical treatment, detoxification and addiction treatment, and recovery services, that they allegedly sustained treating and addressing *bodily injuries* such as opioid abuse, addiction, overdose, and death suffered by the County plaintiffs' citizens, and allege that these injuries resulted from Giant

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Berry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abuse*, N.Y. TIMES (May 29, 2018), https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html [https://perma.cc/R2LE-7CYU]. *See generally*, German Lopez, *The Thousands of Lawsuits Against Opioid Companies, Explained*, VOX (Oct. 17, 2019), https://www.vox.com/policy-and-politics/2017/6/7/15724054/opioid-epidemic-lawsuits-purdue-oxycontin [https://perma.cc/D6Y7-74XP].

150. *See generally* Giant Eagle, Inc. v. Am. Guarantee & Liab. Ins. Co., No. 2:19-cv-00904-RJC, 2020 U.S. Dist. LEXIS 208951(W.D. Pa. Nov. 9, 2020); Acuity v. Masters Pharm., Inc., 2020-Ohio-3440, LEXIS 2381 (Ohio App. Ct. June 24, 2020); Cincinnati Ins. Co. v. Richie Enter., LLC, No. 1:12-CV-00186-JHM-HBB, 2014 U.S. Dist. LEXIS 96510 (W.D. Ky. July 16, 2014); Steadfast Ins. Co. v. Purdue Frederick Co., No. X08CV020191697S, 2006 Conn. Super. LEXIS 1970 (Conn. Super. Ct. May 18, 2006); Ace Am. Ins. Co. v. Rite Aid Corp., No. 339, 2020, 2022 Del. LEXIS 9 (Sup. Ct. Jan. 10, 2022).

151. *See*, *Coverage for an American Epidemic: Insurance Coverage Issues Stemming from Opioid Litigation*, CONNECTICUT BAR ASS'N (Sept. 14, 2020), https://www.ctbar.org/docs/default-source/education/clc/2020-materials/monday-september-14-morning-sessions/ht01-coverage-for-an-american-epidemic-insurance-coverage-issues-stemming-from-opioid-litigation.pdf?sfvrsn=d251c20f_4 [https://perma.cc/PPT6-PQ 6Q].

152. *Id.*

> Eagle's allegedly wrongful conduct in distributing and dispensing prescription opioids. *Despite the fact that the plaintiffs in the County lawsuits do not allege that they suffered bodily injury or property damage, they do seek damages because of bodily injury*.[153]

Therefore, Giant Eagle was successful in obtaining a victory over their Insurer who, according to the court, had a duty to defend.[154]

The First District Court of Appeals in *Acuity v. Masters Pharm., Inc.*, echoed the sentiment that an Insurer has a duty to defend a policyholder for claims brought by governmental entities seeking economic damages, arguably because of bodily injury.[155] Ultimately the court reversed the trial court's judgement and held that there is a causal connection between bodily injury suffered by individuals who become addicted to opioids and the subsequent economic damages incurred on state governments to combat the crisis and provide assistance to their impacted residents.[156] The case was subsequently remanded to the Supreme Court of Ohio, which agreed with the lower court and held that Acuity had a duty to defend Masters Pharmaceuticals because of the causal connection in the Counties' claims, triggering the insurance policy's coverage grant.[157]

However, courts in other jurisdictions have reached different interpretations of the "because" of "bodily injury" language in the CGL form and therefore declined to find coverage for opioid-related claims alleging public nuisance.[158] For example, in *Cincinnati Ins. Co. v. Richie Enterprises LLC*, West Virginia's Attorney General sued Richie Enterprises LLC ("Richie"), a drug manufacturer, alleging that it illegally distributed controlled substances in excess of legitimate medical need.[159]

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153. Giant Eagle, Inc. v. Am. Guarantee & Liab. Ins. Co., No. 2:19-cv-00904-RJC, 2020 U.S. Dist. LEXIS 208951, at *46 (W.D. Pa. Nov. 9, 2020) (emphasis added).

154. *Id.* at 175.

155. *See* Acuity v. Masters Pharm., Inc., 2020-Ohio-3440, LEXIS 2381, at *16-18 (Ohio App. Ct. June 24, 2020).

156. *Id.* at *1, *17-18.

157. *See* Courtney Horrigan & Kateri Persinger, *2 Cases Will Help Shape Opioid Litigation Insurance Coverage*, LAW360 (Oct. 8, 2021), https://www.law360.com/articles/1429602/2-cases-will-help-shape-opioid-litigation-insurance-coverage [https://perma.cc/UW6Z-LL4R].

158. *See, e.g.*, State *ex. rel.* Hunter v. Johnson & Johnson, 499 P3d 719, ¶ 43(Okla. 2021); California v. Purdue Pharma LP, No. 30-2014-00725287-CU-BT-CXC, ¶ 41 (Cal App. Supp. Nov. 1, 2021).

159. Cincinnati Ins. Co. v. Richie Enter., LLC, No. 1:12-CV-00186-JHM-HBB, 2014 U.S. Dist. LEXIS 96510, at *1 (W.D. Ky. July 16, 2014).

The Attorney General further alleged that Richie created a public nuisance by intentionally flooding the state with highly addictive controlled substances.[160] Here, the U.S. District Court for the Western District of Kentucky held that the claims did not trigger Cincinnati Insurance Company's ("Cincinnati") duty to defend because the suit did not seek damages "because" of "bodily injury."[161] Instead, the state sought economic damages to reimburse public expenditures made to combat the impact of the opioid epidemic among residents.[162] Similarly, prior to *Cincinnati v. Richie*, a Connecticut court held that Steadfast Insurance had no duty to defend Purdue in connection with suits alleging inappropriate marketing of OxyContin because the claims did not seek damages because of bodily injury.[163]

Most recently, on appeal, the Delaware Supreme Court in *Ace American Insurance Company* held that Ace American Insurance Company ("Ace"), as the Insurer, did not have a duty to defend Rite Aid in claims made against it by two Ohio counties seeking to recover opioid-epidemic related damages.[164] The Superior Court had previously held that Ace did have a duty to defend.[165] The insurance policy at issue in the appeal involved a CGL ISO policy.[166] However, and the policy had a slightly different coverage grant that required the Insurer to provide coverage for damages because of "personal injury" or "property damage," with personal injury being defined to include bodily injury.[167] Based on this grant, Ace argued that damages require a showing of personal injury suffered by an individual, a standard that the counties would be unable to reach.[168] Here, the Supreme Court of Delaware agreed with Ace that the claim by the counties only sought to recover their own economic damages, and that the policy is triggered only for damages for "bodily

160. *Id.*

161. *Id.*

162. *Id.* at *5, *8 (West Virginia amended its complaint to seek "medical monitoring" expenses as opposed to damages "because" of "bodily injury" and therefore the Insurer had no duty to defend).

163. Steadfast Ins. Co. v. Purdue Frederick Co., No. X08CV020191697S, 2006 Conn. Super. LEXIS 1970, at *10, *20 (Conn. Super. Ct. May 18, 2006).

164. Ace Am. Ins. Co. v. Rite Aid Corp., No. 339, 2020, 2022 Del. LEXIS 9, at *23-24 (Sup. Ct. Jan. 10, 2022).

165. *Id.* at *2.

166. *Id.* at *3-4.

167. *Id.*

168. *Id.* at *7.

injury" when asserted by the person injured, persons recovering on behalf of the person injured, or people or organizations that treated the person injured.[169] Moreover, the complaints brought against Rite Aid by the counties did not include personal injury claims on behalf of individuals who suffered or died because of Rite Aid's opioid dispensing practices.[170] This outcome is interesting, considering the similarities in the claim made by the five Ohio counties against Master Pharmaceutical referenced above. The inconsistency in the court decisions despite the similarities in the claim and policy language, supports reevaluating the rhetoric around insurance contracts as being standardized.

This circuit split surrounding public nuisance allegations by the states against pharmaceutical defendants is noteworthy, especially since, in all five cases, the states were seeking some form of economic damages to assist with substance abuse and medical treatment costs incurred because of the bodily injuries suffered by individual opioid users.[171] While all of the cases involved an Insurer's ISO CGL policy form that was intended to be standardized, there were slight variations in the coverage grant for when the policy would respond. Moreover, in those cases that included the same standardized coverage grant for damages because of the "bodily injury" clause, the courts were inconsistent in finding whether the Insurer had a duty to defend.

169. *Id.* at *12.

170. *Id.* at *10.

171. *See* Jodi Green et al., *Ohio Ruling Adds to Insurance Uncertainty for Opioid Suits*, LAW360 (July 8, 2020), https://www.law360.com/articles/1289244/ohio-ruling-adds-to-insurance-uncertainty-for-opioid-suits [https://perma.cc/KZ4T-UH7S] (noting that the opioid epidemic has cost the United States upwards of $214 billion for public services). *See generally Opioid Overdose Crisis*, NAT'L. INST. ON DRUG ABUSE (May 27, 2020), https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis [https://perma.cc/4K76-DRU6]; *Economic Impact of Non-Medical Opioid Use in the United States*, SOC'Y ACTUARIES (Oct. 2019), https://www.soa.org/globalassets/assets/files/resources/research-report/2019/econ-impact-non-medical-opioid-use.pdf [https://perma.cc/VEK3-MDJ6] (describing the alarming national health care costs for treating and addressing opioid addiction in the United States).

C. COVERAGE ISSUE #2: ISO OCCURRENCE DEFINITION AND THE DUTY TO DEFEND

Generally, "occurrence" is a standard ISO definition within CGL policies and is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" that was neither expected nor intended by the policyholder.[172] This Section reviews three cases where the ISO definition of occurrence was used in the CGL policy and discusses how the courts interpreted the provisions to determine whether the insured had a duty to defend. In *Cincinnati Ins. Co. v. H.D. Smith, LLC*, the Seventh Circuit evaluated West Virginia's complaint against H.D. Smith ("H.D."), a pharmaceutical distributor. The state alleged that H.D. knowingly provided citizens with controlled substances even though H.D. knew that the citizens were not using them for legitimate medical purposes.[173] Cincinnati argued that there was no "occurrence" because there was not an "accident" that would trigger this provision under its policy and, therefore, Cincinnati had no duty to defend.[174] However, the court held that the Insurer was required to defend and pay defense costs for H.D. because the complaint alleged negligent misconduct, which was considered to be an "occurrence."[175] Ultimately, Cincinnati's CGL policy provided coverage for the $3.5 million settlement between H.D. Smith and the state of West Virginia.[176]

Similarly, in *Liberty Mutual v. JM Smith Corp*, the Fourth Circuit evaluated whether the West Virginia Attorney General's allegation that JM Smith, a pharmaceutical distributor, had "substantially contribut[ed] to" the epidemic by failing to maintain sufficient controls that would flag suspicious orders of prescription drugs, even though they were on notice

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172. *See* Cathleen Cinella Tylis & Dennis J. Artese, *Securing Insurance Coverage for Construction Defect Claims, Anderson Kill & Ollick, P.C. Summer 2004 Reconstruction*, 3 ANDERSON KILL & OLRICK 1, 2 (2004); R. Steven Rawls, *CGL Insurance and the Question of Intent*, IRMI (Feb. 2009), https://www.irmi.com/articles/expert-commentary/cgl-insurance-and-the-question-ofintent?msclkid=406e3232c17611ecb971278bf4ce4673 [https://perma.cc/YF8Q-GWGK] (last visited May 18, 2022).

173. 829 F. 3d. 771 (7th Cir. 2016).

174. *Id.*

175. *Id. See also* Hudson, *supra* note 129.

176. Bernard Bell et al., *United States: $3.5 Million Opioid Insurance Settlement Is Covered by CGL Insurance, Says Federal Court*, MILLER FRIEL (Nov. 5, 2019), https://www.mondaq.com/unitedstates/insurance-laws-and-products/860718/35-million-opioid-insurance-settlement-is-covered-by-cgl-insurance-says-federal-court [https://perma.cc/G26D-B3BA].

about the opioid epidemic.[177] The coverage dispute here between the Insurer and insured was whether this alleged failure constituted an "occurrence" under the distributor's CGL policy with Liberty Mutual.[178] Here, Liberty Mutual contended that it had no duty to defend because the complaint did not allege an "occurrence" within the definition of its policy, since the complaint alleged intentional misconduct, which would not be considered an accident under the policy.[179] The Fourth Circuit affirmed the district court's ruling that Liberty had a duty to defend JM Smith in the lawsuit because the claim created a possibility of coverage under the CGL policy as an accident, since JM Smith was negligent by breaching its duty of care in marketing, promoting, and distributing controlled substances.[180]

However, in *Traveler's Property Casualty Co. of Am. v. Actavis, Inc.*, a California appellate court ruled that the insurance company, Travelers, did not have a duty to defend.[181] Here, Santa Clara and Orange counties brought a lawsuit against various pharmaceutical manufacturers and distributors, including Actavis.[182] The counties alleged that the pharma entities engaged in deceptive marketing campaigns promoting controlled substances, which led to an increase in sales for opioids, thus fueling the opioid epidemic.[183] Actavis sought to obtain coverage under its CGL policy from Travelers, who denied having a duty to defend.[184] Similar to the cases referenced above, Travelers argued that the complaint did not allege an accident and therefore did not constitute an "occurrence" under its policy, since the policyholders were acting intentionally by

177. 602 F. App'x. 115, 117 (4th Cir. 2015).

178. *Id.* at 117-19.

179. *Id.* at 117 (noting that occurrence under Liberty's CGL policy used the standard ISO language as follows occurrence means an "accident, including continuous or repeated exposure to substantially the same harmful conditions").

180. *Id.* at 121 (noting that "though the defendants here may have known generally that prescription drug abuse was a problem in West Virginia, the complaint does not allege knowledge of harm directly attributable to any one distributor such that further violations must necessarily be done with intent to harm. Surely the attenuated chain of causation here creates at least a possibility of coverage in this case." The court also focused on how South Carolina law should be applied to this diversity suit, which imposes a broad duty to defend on Insurers).

181. 225 Cal. Rptr. 3d 5, 1033 (Cal. Ct. App. 2017).

182. *Id.* at 1030, 1033-34.

183. *Id.*

184. *Id.* at 1030.

engaging in deceptive marketing campaigns.[185] Travelers used the ISO standard occurrence definition within its policy form.[186] The court agreed, and held that there was no accident because the claims were based on misrepresentations, which are considered intentional for the purposes of insurance under California law.[187] Thus, because the conduct was intentional and not negligent, the court found no accident and, therefore, no "occurrence" that would trigger a defense obligation from Travelers.[188]

Despite the uniformity in the "occurrence" definition contained in CGL policies, state courts have come out differently in the handful of cases that have been litigated to date. It is perplexing, and even unexpected, how the court came out in *Travelers* for the alleged misconduct, given the similarities to the allegations the respective plaintiffs pled in *Cincinnati* and *Liberty Mutual*, and the fact that all policies used the ISO definition of "occurrence."[189] An alternative explanation is that the different outcomes could perhaps be a factor of the governing state law for insurance coverage, specifics on the underlying complaint, or even the method of interpretation and canon used by the court.

D. INSURANCE MARKETS RESPONSE

Case law to date is somewhat encouraging for policyholders, but Insurers will continue to aggressively challenge coverage for opioid-related claims. In response to the volume of lawsuits and astronomical defense and settlement figures, Insurers have taken several actions, such as containing limit losses to specific policy periods and imposing prior knowledge exclusions where possible.[190] Additionally, Insurers have removed coverage for opioid products via exclusions on a go-forward basis.[191] In theory, this seems like an appropriate response by insurance companies to protect themselves, but future litigation will be complicated because of the lack of standard exclusionary language used.[192] There is

185. *Id.* at 1040.
186. *Id.* at 1031.
187. *Id.* at 1043.
188. *Id.* at 1030.
189. *See supra* Section III.C.
190. *See Coverage for An American Epidemic: Insurance Coverage Issues Stemming from Opioid Litigation*, *supra* note 151.
191. *Id.*
192. *Id.*

not a uniform opioid exclusion in the marketplace, as each market has generally drafted its own exclusion or relied on others in part.[193] As such, some use "opioids," whereas others refer to "narcotics," or take a much broader exclusionary approach and reference the entire Controlled Substance's Act.[194] Furthermore, many insurance companies are excluding opioid products in their entirety, while others are tailoring the exclusion to the kinds of actions being brought or the entities bringing the suits.[195] Others have taken a more favorable approach for policholders, by implementing a broad opioid and/or epidemic exclusions, but offer coverage carvebacks for specific kinds of activity like manufacturing defects or opioids used in clinical trials.[196] These exclusions may be added to all policies irrespective of actual exposure.[197]

The variations in opioid exclusions may be especially challenging for pharmaceutical defendants who purchase large towers of insurance,[198] with several different Insurers providing limits.[199] They could easily find themselves in a predicament where their insurance program will not be uniform as to whether Insurers have a duty to defend for opioid related matters, even though their policies are all standard ISO CGL forms. Additionally, not only are Insurers amending their policies by adding exclusions that provide deficient coverage, but they are also increasing the premium charged for insureds with pharmaceutical exposure, especially those with opioid or controlled substances.[200] Thus,

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *See Opioid Crisis: Insurers on the Defense*, SWISS RE, https://www.swissre.com/dam/jcr:e115d42b-dd51-4339-9c74-e2a60cf468ef/ARM-18-01329-P1-Trend_Spotlight-Opioids-6-27USletter-web.pdf [https://perma.cc/NJ2E-HXBU] (last visited Apr. 14, 2022).

198. A tower of insurance is the total amount of insurance limits that a policyholder purchases for any particular coverage line of insurance. *See generally* Dr. Patrick Conroy and Dr. Jordan Miller, *Insurance Coverage Terms and Predicted Settlements*, NERA (Febr. 12, 2012), https://www.nera.com/content/dam/nera/publications/archive2/PUB_Insurance_Coverage_Towers_0212.pdf [https://perma.cc/LKG8-T45Y].

199. *See generally* Scott M. Seaman and Charlene Kittredge, *Excess Liability Insurance: Law and Litigation*, 32 TORT & INS. L.J. 653, 653-55 (1997) (describing excess liability insurance purchased for catastrophic protection and are built in layers above a primary policy, such as a CGL policy).

200. *See generally* Mark Waterkeyn, *Global Insurance Market Heavily Exposed to US Opioid Crisis*, LOCKTON (Nov. 20, 2019), https://www.locktoninternational.com/

policyholders are paying more and, in most cases, have little to no coverage on a go-forward basis for their opioid related products.

PART IV. CONCLUSION

Insurance policies have been overgeneralized as standardized contracts, especially for commercial policyholders, for two main reasons. First, while insurance is regulated in the admitted market in an effort to reduce transaction and search costs on the part of the policyholder, there are inconsistencies in ISO standardized wording both in personal and commercial lines.[201] Additionally, there is an entire subset of the insurance marketplace for specialty lines coverages on a non-admitted basis, where policies are not drafted with standardized language.[202] Therefore, vast variances in policy language exist among Insurers.[203] Second, boilerplate language is intended to ensure consistent application and interpretation by courts, but this is not being achieved with insurance policies, and, more specifically CGL policies.[204]

Nowhere is this more apparent than in the current opioid litigation and resulting coverage disputes. The few court decisions to date have not been consistent—some have favored the insured, whereas others have favored the Insurer.[205] The lack of uniformity in case outcomes is depleting the perceived value behind insurance as standardized contracts. Moreover, the outlook is just as grim regarding inconsistent opioid exclusions that Insurers are imposing on a go-forward basis, as we can expect case law to continue to be irreconcilable where varying exclusions are used. For these reasons, we should alter our conception of insurance as a standardized contract.

Perhaps one solution is for ISO to craft a standard opioid exclusion to be used by any admitted Insurer offering CGL coverage. However, it will be challenging to convince Insurers to adopt such wording, as many have been impacted differently by the opioid litigation. Due to the lack of uniformity, some have had to pay significant defense and settlements

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gb/articles/global-insurance-market-heavily-exposed-us-opioid-crisis [https://perma.cc/DLZ3-FD7D].

201. *See supra* Part I.
202. *See supra* Section II.C.
203. *See supra* Section II.C.
204. *See supra* Part III.
205. *See supra* Sections III.B., III.C.

costs for insureds, whereas others have no losses on their book to date, but perhaps are entangled in the MDL or are involved with D&O suits.[206] Therefore, Insurers will be less likely to cede their ability to revise and amend their policy language. Instead, many Insurers prefer the flexibility they currently have in being able to amend language as they see fit, which may be increasingly valuable as the opioid litigation evolves and progresses in the long-run.

Finally, while the opioid coverage disputes litigated to date have predominately entailed ISO standardized CGL policies, many pharmaceutical policyholders choose to procure coverage from the non-admitted marketplace, where policy forms are not based on standardized language.[207] Given the number of defendants in the MDL, it is plausible that not all obtain product liability coverage through a CGL policy form, but rather a specialized policy form like the life sciences product liability form.[208] Therefore, we can expect courts to diverge even more in their decisions on whether insurance coverage applies in disputes involving non-admitted policy forms. Overall, there will be a continued ripple effect of uncertainty as case law continues to diverge on whether coverage applies for both admitted and non-admitted policies involved in the opioid epidemic litigation.

The opioid epidemic is incredibly complex and the litigation is far from over. Insurance companies have accepted this view and responded by attaching inconsistent opioid exclusions to their policies, thus moving further away from the notion that insurance policies are standardized contracts. These variances will continue to propel mixed decisions by the courts. The outlook for the insurance industry and policyholders involved is unclear with no readily apparent solution. However, policyholders of all degrees of sophistication should heed the warnings from the court decisions to date, and carefully review their policies. The opioid epidemic highlights how CGL policies are labeled as standardized contracts, but this is really a misnomer. There is no such thing as predictability when it

206. *See generally Liability Limit Benchmarks & Large Loss Profile by Industry Sector*, CHUBB BERMUDA, https://www.chubb.com/content/dam/chubb-sites/chubb-com/au-en/business/large-multinational-businesses-insurance/documents/pdf/chubb-bermuda-2020-large-loss-limit-benchmark-report.pdf [https://perma.cc/WCH6-AUN5] (last visited May 18, 2022).

207. *See supra* Section II.C.

208. *See supra* Section III.C.

comes to insurance policies and the rhetoric around insurance policies as standardized contracts needs to change.