Healthcare Insights Podcast

Episode 2

Risks Impacting Healthcare Today

Nicole Francis:

Hi, I'm Nicole Francis, the FINPRO Healthcare Leader for the Financial Lines Practice at Marsh. Today I am joined by Kristen Mielert, who leads TDC Specialty for healthcare underwriting.

I'm excited for our conversation today as we'll be discussing the emerging risks and trends for healthcare financial lines in 2024. We'll be providing a high-level overview of the key themes we've seen throughout the year so far. With that, welcome Kristen and thank you for joining me today!

Kristen Mielert:

Yes, thank you for organizing this. I think we have a lot of really interesting topics to touch on today.

Nicole Francis:

Agree. So, with that, I'll just right in. You know, I think that one of the themes that we continue to see are just high, you know, raising, or continuing, to see trends and escalating, defense costs. Both from an underwriting side, I'm, I'm sure you know that more than anyone. but then, you know, our, our clients also are seeing, their own, council rates continue to escalate. And so, when we think about the increasing costs, we think about, some of the, the areas that we see these in specifically. And I think that that drives a lot of the retention need that we are seeing as well.

So, we just kind of want to jump into talking about those single provider claims and, and what that looks like, because those, you know, the costs associated with the defense of the single plaintiff cases continues to rise. I don't think that, that counsel rate, and costs are, are without the, you know, the, the, the inflationary, increases that we're seeing, we're seeing across, in all of our lives right now. So just kind of looking at, these increases and these retentions, because right now we're seeing the retentions for single provider claims a little north of $2 million, for our very large health system clients.

So, just wanted to take a minute to talk about, these increased retentions and your perspective as an underwriter. Can you provide a little bit more underwriting, underwriting insight on these increased, retention needs for these specific cases?

Kristen Mielert:

Yeah, absolutely. yeah, physician claims, they just continue to be the most concerning type of EPL matter that we see. occasionally they will hit the DNO under the provider selection coverage that we offer on DNO, but, but it makes sense, right? You've got these physicians who have a reputation to protect. They've got deep pockets to fund the litigation. they may not have alternative facilities locally that offer their specialty, so they could have trouble finding another job. And, and because these are typically going to be really high wage earners, the potential damages for front and back pay are really significant. we've certainly seen these claims hit on our management liability book. I actually spoke with our head of ML claims this morning. And he certainly believes that the claims are ticking up infrequency as well as severity. they're typically going to be some kind of a discrimination and wrongful termination claim, and they're brought by an employed physician. And because of the potential severity for these matters, like you say, Nicole, the defense counsel is gonna, garner a higher hourly wage than you might need on a typical EEOC charge for a low wage earner. And, and that's on top of the already increasing standard rates that we're seeing, employment defense firms charging, over the last probably year to two years. you'll also have more work that's performed by partners or associates rather than paralegals just because of the potential severity associated with the claim. So, so the overall, the

defense costs are going to be high on top of a potentially very high settlement value.

We do typically, we'll see these settle before trial and the settlement value will vary, obviously based on the nature of the allegations and the defensibility of the claim. But we've certainly seen some of these, in the seven figures, as far as settlement value even before you're talking about the cost of defense. So, absolutely, I think the healthcare DNO EPL market as a whole, has really had to make some adjustments to these specific retentions that are being applied to physician claims, to provider selection claims, and to high wage earners. kind of more broadly, just to insulate ourselves a little bit from the changes that we're seeing in defense costs, and general severity of physician claims.

Nicole Francis:

I think that's a great overview. It's something too that we are, we're talking about with our clients a lot more than ever before, especially because there are high wage earner, you know, qualifiers under, a lot of our policy terms and conditions right now. And so, one thing that we talk about with our clients specifically is kind of understanding what that wage band looks like, to determine who might fall within those bands so that it helps us as your broker, look to, you know, have further discussion with our underwriters about what a more appropriate band could look like, in terms of what, you know, who would be classified as a high wage earner as opposed to, a straight a, you know, single, a provider claim. Right.

Which is ultimately what you're trying to capture, in terms of those deep pockets that might, for those individuals that might be in a better position to fund very expensive, litigation. Right?

Kristen Mielert:

Absolutely. And that's a, that's a great point, from you as a broker, advocating for your client, where an underwriter may not have a great idea based on the submission information, where those pay bans lie. And just getting the information can instill a level of comfort with an underwriter to maybe shift that threshold up a little bit so that we're only covering those really high wage earners or the administrative team, the executive leadership team. So, that's, that's a really great point. And sometimes just having that information and being able to provide that information to your underwriter, really does a great service for your client.

Nicole Francis:

Yeah for sure. And I think too, it's important to note that we all sit in different states and different cost of living, requirements. So that also too has a big impact on what would be deemed a high wage earner. So, again, I think it's really important to have that partnership with your, with your underwriters, that they understand all the nuances of a particular organization and, geography that might determine what those, what those pay bans might look like.

Kristen Mielert:

Absolutely.

Nicole Francis:

So, to kind of pivot in talking about states, you know, I think that we would be, remiss if we didn't talk about some of the new statutes and laws, that continue to garner a lot of attention. we're talking, you know, in, in this next section we're going to talk a little bit about BIPA, GIPA and GINA, we love these phrases, (laughs) So for those that don't know, as we said, we, we love our acronyms in insurance. BIPA stands for the Biometric Information Protection Act. And then GIPA stands for the Genetic Information Protection Act. and then GINA stands for the Genetic Information Non-Discrimination Act and, in insurance and all of, the abbreviations that, you know, that represent, litigation that we're continuing to see, emerge.

So, in talking about BIPA has been, you know, I think, really hotly discussed, in the, in, in the most recent, you know, couple of months especially, because as of now, at least 12 states have proposed or passed, biometric information protection litigation. And, you know, I think most notably Illinois kind of serves as a front rudder, and passing this, their BIPA, Biome- Biometric Information Protection Act, which was passed in 2008, and even one city at this point, New York City has a similar, statute, that has followed suit and followed kind of Illinois' lead.

I think it is also important to note that, you know, violations of BIPA are private right of action, claims and are largely, you know, excluded within DNO policies. So, I think that kind of, it, it's important to note like what all of these buckets of information in the statutes passed around, these, pieces of statutes that have been passed, what they represent. And so going into, GIPA, which is the Genetic Information Protection Act,

again, kind of leading the charge on the passage of statutes designed to protect information of state residents. Illinois once again was the front-runner in passing, GIPA, which, was enacted in 1998. and so really it adopts, GIPA adopts genetic information, that is defined by HIPAA, to protect another, another, quite a right of action, legislation that was passed, for genetic information protection. And then lastly, genetic information, the GINA Act was passed as a federal law, that helps protect employees, specifically from employment related discrimination, on the basis of genetic information specifically. it's also important to note too, that GINA does not preempt, state laws that might have stricter, regulations and statute requirements, which I think is really important to, to note.

I think, you know, when we talk about, you know, all of these statutes and the protection of, employee information, you know, one of the things that I'm most worried about Kristen, as a broker is making sure that there's adequate coverage where there needs to be coverage, right? We understand private right of action and, and, and what the DNO is de- designed not to cover. But as it relates to, employee, rights and what we're, what we're most concerned of is, is, resulting employment practices, litigation arising from those, from these regulations and, and statutes, is really what I'm most concerned, you know, around.

So, so just want to kind of get your perspective as an underwriter, as we kind of juggle all of these, similarly situated, you know, protections around information, genetic information, and, biometric information and your perspective as an underwriter to kind of help preserve some of the coverage where we would expect under the employment practices liability.

Kristen Mielert:

Sure. Yeah, and I, I think it's important to kind of remember that the EPL policy was never intended to, to pick up something like BIPA. You know, I mean, EPL's been around longer than BIPA. this was never something that necessarily carriers would look to, to cover. their just coverage sort of fell to the EPL, and until carriers began to address the exposure, there were claims that were picked up under the EPL for BIPA violations, and some of these claims included, defense coverage and then potentially coverage of the, the penalties that are assessed, which can be huge. The penalties under BIPA are assessed per violation and can be thousands of dollars per violation.

So, as you can imagine, the amount of biometric data that is collected by an organization that might use biometrics for time clocks or for accessing a medicine cabinet or accessing a locked door, there, there's plenty of opportunities for individual violations to, to add up quite quickly. carriers started, excluding BIPA or sub limiting BIPA to defense coverage only, you know, probably within the last, I want to say, five to seven years as these class action lawsuits, began to pick up. we do include an exclusion for BIPA. we don't intend to pick up the statutory violation piece of, of a BIPA violation. However, on our endorsement, we do carve back for an otherwise covered EPL claim.

So essentially, you know, if, if a wrongful termination claim is filed and within that claim, there's a reference to a thbprint time clock, that, that, made its way into the wrongful termination claim, the use of the biometric data isn't necessarily going to trigger the exclusion. Our intent is to cover a, an otherwise covered EPL matter, and not try to utilize the existence of biometric data, within the allegations, to exclude a claim. So, different carriers handle this differently, the, GIPA exposure, I don't think is broadly handled at this point. I haven't seen a lot of carriers adding any broad exclusions there. So, it'll be interesting to see as more of those types of claims come in, if markets decide to, provide any kind of defense coverage or supplements or to fully exclude, those types of claims as well.

Nicole Francis:

Yeah, and I think that that's, you know, GIPA or GIPA and GINA, what I think is really important, you know, as, as we look through, a healthcare lens for those particular, statutes and laws, is that, you know, healthcare entities have historically relied on, you know, outside and third parties, to look to those third parties for, you know, help with staffing, right, especially during COVID. And so, I think it's just always a really good takeaway to, to really, make sure that you, even if you haven't relied on outside staffing, firms to, to, to, you know, create that additional kind of workforce need. And again, especially during COVID, we saw a lot of our health systems, you know, rely on outside staffing firms, and even internally just to make sure that you're vetting the information that you're requesting of third-party applicants.

I think that's really, really important because again, these, you know, statute violations, are on a per recurrence basis, and even under GIPA, I believe those, those, those penalties are even higher than BIPA. So, it's just really important to kind of vet, you know, what you're requiring and requesting, in terms of genetic information from potential, higher, you know, for potential, employees and vet that with outside counsel and internally, because you just don't want to make sure that you're inadvertently violating, any statutes that have been, that have been passed. And again, we see, you know, healthcare staffing more in healthcare than in many other industries. So, just important to note.

Kristen Mielert:

Yeah, and that's a great point, Nicole, especially because a lot of our large health system, clients, they have facilities in various states, and so-they may have just a small, exposure to Illinois, but they still need to be up to date on everything that is happening within, within the state of Illinois and meet any requirements and, you know, regulations and rules that the state of Illinois, expects them to even in that one facility.

Nicole Francis:

Yes. Because many other states have kind of jumped on the BIPA bandwagon, as we know, at least up to 12, in counting. So, you're right. That's a great point, is that there's, there's different requirements in different states, and just to make sure that you're complying with all the state, statutes are, is really important for those larger health systems.

I do want to, to highlight a very positive, case that we have seen recently. And it is a huge victory, in Illinois, for a healthcare entity. it's, the case is Moss, Mosby versus Ingalls Memorial. the Illinois Supreme Court established that, the healthcare exclusion under BIPA applies to healthcare workers and patients. So I'm hoping that with that healthcare exclusion being established, in that it doesn't apply to healthcare workers and patients, that'll hopefully curtail other plaintiff, plaintiff bars in different states to kind of bring similar action, that hopefully won't tie up very precious resources, and costs around defense of, of those similar, of sim- similarly brought, claims in other states.

Kristen Mielert:

And one important thing to note about that too is that the ruling is that the exemption applies to, information gathered in healthcare treatment and healthcare operations. So, I think they want to make sure that no one is assuming that this is broadly applying to any biometrics that are collected in a healthcare setting, but it will potentially apply to any, information that is collected in the, the rendering of healthcare or healthcare operations. So, it'll definitely be interesting to see if this decision is applied to future BIPA lawsuits, if the biometric information is determined to be collected and used in the rendering of care.

Nicole Francis:

A lot that we'll be watching for sure. you know, with all of the discussion around, protection for, employee rights and information, I think it's probably a good and natural time to, to pivot and talk about the big topic that we're, we've all been discussing for a couple of years now. that's impacted many different industries, that has, you know, really placing a huge emphasis on, creating and creating task forces around. But really, to, to kind of highlight ESG and DEI efforts, especially again in the past couple of years.

I think as you know, I look back on all of my years of working with health systems, I can't think of another industry that I feel is better positioned, as community resource and serving populations. And really as a centric mission statement for a lot of our health systems, and provider groups that are probably the best positioned of any industry to kind of tell their story around diverse, diversity, equity, inclusion, and their ESG efforts, and, and their initiative. So, Kristen, do you mind just kind of tell, talking to us about, you know, what you're looking for from an underwriting perspective when you're looking at healthcare clients and their specific ESG and DEI initiatives?

Kristen Mielert:

Yeah, absolutely. So, I think ESG is certainly a hot topic within healthcare. It's something that usually comes up when I'm speaking with my hospital clients, and particularly, the social component of ESG.

Many of our hospitals and health systems, they're trying to provide solutions to inequity in healthcare, and specifically around access to care. So, there's a huge focus to bring access to care to areas that have historically not had really readily available services. So, a lot of the growth that we see in our health systems is in the ambulatory space. They're bringing clinics and small health centers to rural areas. they're sending

mobile, mobile services into urban areas to really just provide care within the community. So, the other thing that we're seeing kind of internally within the organizations are DEI initiatives within the organization, really ensuring that the staff in a hospital, and especially the leadership teams, are representative of the patient population that they serve. And so, you know, from an, an employment perspective and, and an employment practices perspective, we certainly, we like to see that, the, the board of directors and the senior leadership team is as diverse as the community, where the, the facility is located. And then certainly as part of many of these initiatives, these social focused initiatives, hospitals have a focus on charity care. And there've been some instances lately where hospitals and health systems are being questioned about, or they're being challenged about their levels of charity care and whether or not the value of the charity care that they're providing is sufficient to warrant the tax exemptions that they receive as a nonprofit organization. So, I think that the scrutiny of, of charity care will continue to kind of lead health systems to focus on their social and community impact numbers, and all of these, all of these things, all of these, , things that could impact the financial success of an organization or the diversity within an organization, or the, the, reputational, issues around being a, a health system that's out there doing good for local communities, those are all kinds of things that we think about in the underwriting process for management liability coverages.

Nicole Francis:

For sure. And I think especially, you know, in the past, you know, couple of years, there's even more scrutiny and focus because, you know, bond issuers and credit rate, rating agencies like Moody's have paid even more closer, close attention to, these specific initiatives, which, always I think is helpful from an underwriting perspective too. because obviously there's a financial impact, right, for these healthcare, yeah, for these healthcare entities too, and what they're doing and how they're serving their communities, as well. you know, I think at, as we talk about, community benefit and we talk about, you know, we talk about access to care, I think that, that really does lend itself to the next topic that I think we're going to discuss, which is, you know, the increased antitrust activity and enforcement, that we've seen in the healthcare space, with so much focus around, you know, serving the community and, and how you do that, it has, it has some of the acquisitions that have happened, have been to do just that.

And I think there have, because of this increased scrutiny, I think that we're gonna continue to see, you know, challenges in this space, especially, with the continued promise of the DOJ and the FTC, to continue to review all of the healthcare mergers a little bit more closely, than they have before. And last year we did see, you know, more restrictive, hot, Hart-Scott-Rodino Act requirements that, are requiring the addition, the additional notice and costs, requirements associated with these acquisitions. Which, you know, I think temporarily paused some of the - kind of temporarily paused some of the acquisition, activity that we've seen, but continues to still be, you know, a concern from a regulatory perspective, that, that underwriters might have. You know, so as an underwriter, you know, what are you looking at? What, what are you most concerned at when you are looking at and analyzing a health system from an antitrust perspective?

Kristen Mielert:

So, you're right. I mean, we do see, even in our own book, we've seen lots of mergers, and it does not appear to be slowing despite the fact that there is some, some clear in- increased interest from FTC and DOJ. So, you know, when we're looking at a piece of new business or, one of our renewals, the antitrust considerations that we're kind of looking at is, you know, what is their, what is their current market share? what are their growth plans? Are they in, organic growth mode, or are they looking to merge or acquire, another system?

and, and if that's the case, are we looking at overlapping geographies or are they operating in different markets? what's the due diligence process like? Are, do they retain outside antitrust counsel to, to review the potential transaction? Are they rendering an opinion, on the potential for the transaction to draw attention from a regulator? so, you know, we, we like to see positive answers to all of these, all of these things, but even the best laid plans can and do go awry. And when we, we look at the cost to defend an antitrust claim similar to the, the physician claims, you've got really high hourly rates for antitrust council. Sometimes multiple defense firms are involved. You might have a local council and a national council, and some of these, these claims can take a long time to resolve. So, it's really, it's easy to see why antitrust claims are, are kind of the most concerning type of, of DNO matter that we see in healthcare. And, and you're right, Nicole, I think, you know, that the scrutiny's not going to stop, the, the,

a- an, a process for the general public to directly submit commentary or concerns, on healthcare consolidation and how it's impacting them was, was recently put into place by, the FTC. So, regulators are using all avenues to get any information that they can on negative impacts, that are being felt by consumers.

Nicole Francis:

For sure. And you bring up a really good point around, council rates, because I think that's one thing that we really try to do, as brokers, is to really understand exactly, you know, what these potential costs look like. And then, you know, making sure that our clients, when we're going into renewal cycle, that they're still work, that they're working with council, especially council with rates that might be a bit higher or trend a bit higher, that we predetermine and pre-negotiate, those firms, you know, with and vet those firms with our underwriter partners. Because I think one of the things no one wants to be surprised with in a claim is, our costs, or requests to add or amend, council, requirements.

So I think going in and leading into our re- renewal strategy discussions, it's always important just to kind of talk to, to check with, to, for risk management, to check with legal, make sure that the, expert outside counsel that they like to work with, that they're appropriately addressed and that everyone's on board, with the required counsel rates and what that looks like from both an underwriting, perspective and, and client kind of setting expectations of what those costs might be and what might be, reimbursed by, by, by their underwriters for that, for, you know, I would say more expensive type of claims that, that we see in healthcare, which absolutely are antitrust and employed physician claims.

You know, in talking about, you know, I think, again, when we're talking about healthcare and antitrust, one of the things that we've seen most recently discussed, and additional, you know, concern, has been, healthcare and private equity. , right. I think that private equity has had a renewed interest in healthcare, in the most recent, you know, couple of years. I think, you know, post-COVID, we saw, more interest than ever before from the private equity side. it's es- it's estimated that over 400 hospitals are now owned by private equity. That's 30% of for pro- profit, health systems are owned by private equity, which is a pretty, stunning number.

You know, I will say that, you know, while I understand some of the concerns around private equity and healthcare in, in this topic, I think that often the infusion of capital can provide a much needed lifeline to some of these struggling critical access health systems, hospitals, provider groups, especially post-COVID where we have seen margins so, so strained. you know, but I think that the infusion of capital, for these hospitals and physician groups when they're serving a community, can be, you know, the lifeline that they might need. but again, you know, I understand some of the concerns as well.

So, you know, Kristen, I wanted to get your thoughts, you know, from the perspective as an underwriter, when you're reviewing these submissions that might have a private equity component or ownership structure, you know, what are you looking at? You know, what are some of the things that you, that you want to, that you highlight as an underwriter, or that might give you some concerns that you might review as an underwriter when you see these submissions come in?

Kristen Mielert:

Well, I mean, I think o- one of the first things that we look at is really how are they growing when we see some of the, the, the large PE organizations that are rolling up, kind of physician specialty practices, that's, that's what's most recently been targeted by the FTC. So, we know that that's something that's kind of on their radar. But I think the most important thing that we look at when we're underwriting a PE portfolio company, we want to know the PE firm, because I think the, the PE, private equity kind of already faces a, a reputational challenge with some of the issues that have happened of late, particularly in the, the private for-profit hospital space - and so, we want to see that the private equity firm has a dedication to healthcare, that they have a good track record, that they've done this before, that they know what they're doing, and they care about doing it correctly. So, I think a- as much as we certainly look at individual operations that, you know, we might be covering under a DNO policy, we want to know who's, who's kind of behind the scenes, making some of the important choices about how the organizations are going to be run going forward.

And we want to know that they are, are dedicated to providing, you know, quality and consistent care, because ultimately that's what, particularly, like you say, Nicole, some of these rural hospitals, there's not a lot of

access to healthcare in these areas. And so, we would hate to see someone become involved and not have them be successful. So, we want, we want a, a track record of, of success when we're looking at PE firms.

Nicole Francis:

For sure. And I think one of the common themes that I continue to hear as I listen to, you know, other podcasts and read articles around, private, private equity backed healthcare is just really, ensuring that, there's appropriate compliance, you know, individuals in place and that those, you know, compliance departments and, and, and, and staff levels are, are at a, are at a point in which they can, you know, look at all the regulatory implications and all the requirements that come with, you know, Medicare, Medicaid, and, and, and, and, and, and how they serve those, those patients, specifically. So, I think that's also something to note that is really important that, you know, as an underwriter, I would also have a lot of questions around the regulatory compliance piece, and what that might mean for, for the organization.

You know, I think too when we're, when we're thinking about private equity and healthcare, you know, making sure that, that these, that the balance sheets are strong of the private equity entities, right? and that, you know, I guess we're, we're talking a lot and thinking a lot about balance sheets always because these margins are so razor-thin in healthcare, especially now. but that making sure too, as a broker, that when, when we're looking at these deals that there's pro- appropriate Side A, directors and officers, insurance in place, and Side A DIC coverage in place for these private equity backed, health systems, and entities.

Because we are, you know, obviously, you know, looking at the financial health of an organization and making sure that there are assets, that those assets are protected for the individual board, board of directors that are, are overseeing these, these healthcare backed, entities with private equity involvement.

And I think too, and you, you brought this up to Kristen, I believe earlier, but making sure too that it's important as a broker that I understand the structure, of the private equity, equity, other private equity entities, in the, because it can be very confusing at times to read some of these corporate structures, right? So, making sure that we understand who the named insured should be, where the subsidiaries fall within the organization that are actually involved in the delivery of medical services is also really, really important. because I think also too, you know, that can get a little bit confusing when we're looking at, brokering, and probably underwriting, these, these entities as well.

Kristen Mielert:

That's a great point. , and, you know, we see a lot of these, and it seems like the structure is a little bit different on every single one that we look at. So, it's certainly important, especially when you have, management service organizations involved. If there's management contracts, if there's, some physician ownership that remains, you really want to make sure you have a great handle on who's supposed to be covered, who's being covered, and, and, and make sure that all parties are, are comfortable and fully understand, the, the coverage piece there.

Nicole Francis:

Right. And as I think about, you know, management service org- organizations or, or MSOs as we call them in the managed care world, when I put on my managed care, placement leader hat, I think about appropriate coverage too for those types of entities, because I think sometimes that might get lost, in the need for additional, insurance, you know, that, that, that might be beneficial for, for some of these entities as well. So, making sure too that we all understand the structure of these organizations, and just ad- additional insurance, coverage and requirements that, that might be beneficial as well.

So, I think we're, I think we're gonna, you know, talk really quickly about fiduciary, which has been also a very hot topic in the last couple of years. you know, I think that when we talk about fiduciary, the next, you know, thing that comes out of our mouth are excessive fees, what's happening with excessive fee retentions because we continue to see our clients, you know, have to take on significant retentions as it relates to excessive fee. So just kind of want to step back and talk about, you know, from an underwriting perspective, you know, what you're looking at, what you're looking for when you're evaluating, you know these plans, assets - because I think that's something that we continue to kind of struggle with our health, our clients continue to struggle with.

You know, premi has been at a level for so long that has been pretty low, I would say, for a very long time.

And then to kind of be faced with these increased, costs around excessive fee cases has been pretty dramatic from an underwriting perspective. So, you know, just wanted to take a minute, just kind of focus on, you know, excessive fee cases, the costs around those, and what you look for as an underwriter when evaluating, when you know, the fiduciary specifically, for health systems.

Kristen Mielert:

Yeah. and health systems are, are certainly targets for these types of large class action claims. for a few reasons. , going back to the, the church plan class actions in the fiduciary liability space, you had a lot of, of, hospitals and health systems that were affiliated with a church. So, we had those kind of class actions hitting, the healthcare space. But just based on the size of some of these plans, you know, we have health systems, huge health systems that have, plan asset sides in, you know, five to $10 billion. So, anything that's that size is going to be a target, by a plaintiff attorney looking to find a, a class action lawsuit to pursue.

It's really interesting, the litigation, continues to just evolve around, the, the class action litigation around, the excessive fee stuff, the standard excessive fee allegations, which really are just alleging that the, the plan sponsors breach their fiduciary duty to the plan by not adequately negotiating, the fees paid to record keepers or to, to service providers. It, it then kind of shifted to allegations of failure to monitor investments. So, you, you did a great job getting these fees down, but the investment returns suffered because of that then we have some suits that are focused on the types of investment funds that are offered and, and claims that it's impudent to utilize ESG criteria in choosing funds for a retirement plan. So, it's certainly, it's evolving litigation. when, when these types of claims initially came out, I think many carriers began adding an excessive fee retention very specific to excessive fee, types of claims. But as, as the litigation has evolved, most carriers have now moved to a class action approach, for separate retention around fiduciary. And it's really, you know, it's really just kind of to insulate us from these claims that, there just doesn't seem to be an end to them and the, and there's always something new.

They're really costly to defend just because of the specialization that's needed by a defense firm. They have to be specialists in ERISA litigation. the discovery is lengthy. Many of these claims will survive the motion to dismiss. So, plaintiff firms just see all of these factors really as a pathway to a quick settlement. And, and so the, the separate retentions that are being applied are, are really just a, a direct result of, the, the fact that this type of litigation, keeps evolving and, it doesn't, it doesn't appear that it's going away.

Some of the things that we look at from an underwriting perspective, we look at the size of the plan, we look at, an excessive fee questionnaire, which asks some questions around, the, the fees that are being charged to the plans. it asks questions about the investment lineup, record keepers, RFPs. So, there's a lot of criteria that we look at when determining, one, if it's a fiduciary liability risk that we want to add to our portfolio. And, and two, what is an appropriate retention to apply for class action claims for that particular risk.

Nicole Francis:

Yeah, and I think, I, I think in looking at too the excessive fee questionnaires and just kind of the evolving kind of best practices, that our clients are, are undertaking, has been really interesting because a lot of the, excessive fee questionnaires, questionnaires that we've seen really have lent, lent themselves to really valuable discussions for, committees to also then just kind of start to think about and what they could too to incorporate, you know, to, to make themselves a better risk, right?

And so, I think that's something that we've, that we've continued to see as well, is really we want to arm our clients with the ability to, to defend themselves against these claims. And I think that, with all the guidance that we've seen from, you know, in discussions around these cases have only, you know, helped our clients to kind of look at what the issues are, as identified in some of these excessive fee questionnaires. And to, again, to kind of, create best practices to, to defend themselves against, these many, many frivolous, at times lawsuits that they can find themselves to be, you know, involved with. So, appreciate that insight too, as we, as we look at these excessive fee and class action retentions as they continue to kind of develop.

You know, one last topic that I think is so interesting because we just never know what, how things will kind of tend to, to shape, to take shape, but is really looking at artificial intelligence and generative AI and how that

might impact, our healthcare entities and clients. You know, I think that, would love your perspective too, Kristen, but you know, when I look at where I think that we'll see the most impact will absolutely be kind of focus on the employment practices liability space, in looking at, you know, biased artificial intelligence, whether it's, you know, over-reliance, on, you know, generative AI in terms of making, you know, decisions around hiring, firing. And I think all of the, the additional kind of, claims that that might arise because, because of discrimination.

Pre-employment screening, we talked a little bit about, you know, genetic information that can be, you know, captured with, pre, employment screening, screening that can be undertaken. but, you know, looking at what generative AI and what software that might, you know, look at, artificial intelligence as being, bias that might make inherent biases within a database that could create potential third-party employment practices discrimination, for, for, for job applicants. So, I think that's something that we're kind of continuing to watch. So would love to hear your feedback and kind of perspective as an underwriter and how you think this kind of might take shape, and evolve as we look at artificial intelligence, because it's certainly not going away anytime soon.

Kristen Mielert:

No, and it's really interesting because when, when we at TDC initially started talking about AI, we talked about it more in, in terms of providers and, and the use of AI, in the provision of care, and no one really thought about the EPL aspect and how it might be used in other ways within an organization. So, I agree with you, Nicole. It's where, where I see the, the probably most imminent impact, that we could have been on the EPL, from a prescreening perspective for applicants, if there are any built in or learned biases that are part of that prescreening. And there's also potential for, for the ADA to take issue with some of the, the prescreening tools, if whatever algorithms being used isn't able to reflect the impact of an accommodation that might be available to a disabled applicant, they may be eliminated from consideration from a position that they actually would be qualified for, were they to have the accommodation in place. So, so it's interesting, I think, I think the potential claimants on these types of claims, they could be individuals, they could be class actions if, if the AI software is screening out entire groups of similar people. And we could even see claims brought by, by governmental bodies. And we are seeing some legislation around the use of AI in various states as well. So, it'll be, certainly, it'll be, be interesting to see how those laws develop and how they impact the way that employers and organizations use AI in different ways.

Nicole Francis:

Yeah, agree. It's, I think that we can both agree that, there's always something new in healthcare, and it's really interesting to watch and, to kind of monitor all these emerging risks and trends, and to be able, you know, to have these discussions with our underwriters like yourself, to kind of get your perspective. So, we really appreciate your time today, Kristen, and we look forward to doing this again soon.

Kristen Mielert:

Absolutely. Thanks for having me, Nicole.

Nicole Francis:

Thank you everyone for listening. We really hope that you found, this, this session to be informative and helpful. Should you have any questions, please reach out to myself, Nicole Francis, or Kristen Mielert with TDC Specialty. Thank you.