

Congress Should Step In To Solve The Opioid Crisis

By **Peter Kelso and Kristen Knorn** (June 11, 2021)

Over the last decade, the opioid crisis has claimed the lives of over 360,000 Americans. Historically, the steady rise in opioid-related overdoses and deaths has been attributed to prescription opiates, such as OxyContin and other painkillers.

While those addictive drugs fueled the crisis, most recently the rise in overdoses has shifted to drugs such as fentanyl and other synthetic opioids. As a result, opioid overdoses have contributed to a downward trend of life expectancy in America due to premature deaths of young people.

Parallel to this ongoing public health crisis has been an epidemic of litigation. More than 2,000 states, cities, municipalities and Native American tribes seek to hold opioid defendants responsible for conspiring or playing an independent role in infiltrating the market with addictive drugs.

The litigation is fractured with myriad of competing suits against classes of opioid manufacturers, distributors, pharmacies and doctors. Some plaintiff experts in these lawsuits have opined that it will take \$1 trillion dollars or more to abate the epidemic.

Most recently, in the West Virginia multidistrict litigation, the plaintiffs — the city of Huntington and Cabell County — are demanding \$2.6 billion in damages, which also extrapolates to more than \$1 trillion for an equivalent nationwide global settlement.

In addition to the large range of damages, the types of damages sought in these cases are not common across plaintiffs and include a wide range of past and future costs, with some abatement plans calling for over 25 distinct forms of remedy that could be in place for as long as 30 years.

Thus far, after over 7 years of opioid litigation, there has been about \$14 billion in settlements and verdicts from defendant companies — \$8 billion of which is tied up in the bankruptcy of OxyContin maker Purdue Pharma LP.

The complex legal landscape has led to consolidation in a multidistrict court in Ohio as well as parallel trials in state and federal courts. As a result, the litigation has moved in fits and starts producing sporadic trials and very few awards and settlements against the opioid defendants.

Further complicating the various legal actions are the assertions by opioid defendants that the federal government, by way of the U.S. Drug Enforcement Administration and U.S. Food and Drug Administration, must bear a substantial level of culpability for the unabated rise in the prescription opioid market over the past two decades.

This alleged regulatory failure permitted the import of raw opiates on a massive scale and enabled the overmanufacture and distribution of highly addictive prescription drugs to the public.



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The release of the DEA's Automated Reports and Consolidated Ordering System, or ARCOS, data in 2019 illustrates just how much information the government collects. During the crisis itself, in which 76 billion opioid pills reached the U.S. markets during 2006-2012, the DEA was aware of how many pills were being distributed to each county and even each individual pharmacy.

In addition to the lack of regulatory oversight, critics have questioned the federal government's response to the opioid public health crisis as slow, disorganized and inefficient.

As of the end of 2020, the federal government has provided states with a total of \$18 billion in funding across two presidential administrations to help manage the ongoing problem, but for the most part, the federal government's response can be seen as underwhelming in comparison to the historical costs for opioid-related health care, criminal justice and social services that states, counties and municipalities have claimed.

This begs the question: Will litigation and a piecemeal government response solve this problem?

Litigation can be a useful *ex post* tool when *ex ante* solutions fail. However, when situations like the opioid crisis result from regulatory failure; affect a large portion of the population causing an epidemic; create fractured plaintiff and defendant groups with competing interests; and cause a problem that cannot be solved with an on/off solution, litigation does not often offer the best remedy.

One solution is for Congress to exert its oversight authority and step in to broker a global settlement. This same type of congressional pressure in the 1990s is ultimately what prompted parties to push past stalled litigation and reach a global settlement in tobacco litigation.

Despite the rancor that exists in the 2021 Congress, 70,000 annual opioid deaths should not be a partisan issue. Members on both sides of the aisle have tremendous power to convene investigative committees, hold hearings to make parties accountable and raise public awareness to the ongoing issue.

More importantly, Congress can define an abatement strategy and develop the state and national legislative framework necessary to stop the infiltration of addictive opioids and provide treatment to the current exposed population.

Congress is in a unique position to put an end to the U.S. opioid crisis.

At its disposal, the U.S. federal government has all the tools necessary to provide the architecture for a national opioid solution. With the ARCOS DEA data and the Centers for Disease Control and Prevention Wide-Ranging Online Data for Epidemiologic Research death data, Congress has a road map of how to apportion culpability among the parties, and then also how to allocate these funds on a county-by-county basis to the areas most impacted.

This detailed data provides the information to distribute resources responsibly and provide the parties with an effective, comprehensive solution. Without congressional intervention, the alternative is a continued piecemeal government approach and years of meandering trials, appeals and settlements as thousands more American lives are lost.

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