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## With Trump MIA on Opioids, Here Come the Lawyers

The plaintiff's bar is filling a policy vacuum. Maybe it can fix what the government won't.

By [Joe Nocera](#)

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Who will stop it? *Photographer: John Moore/Getty Images*

How is the U.S. going to end its opioid crisis?

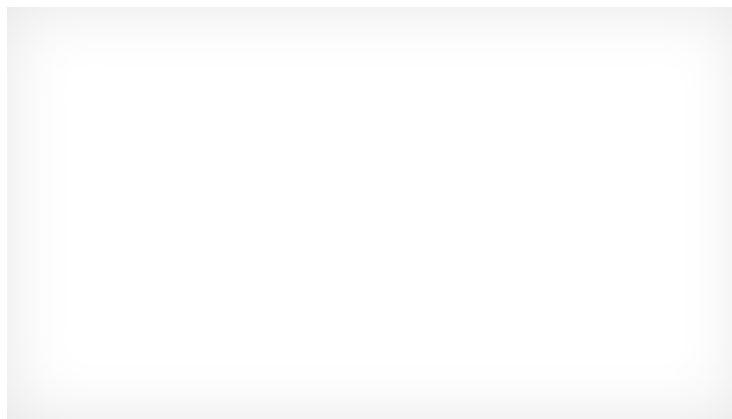
[QuickTake](#)

## Heroin and Opioids

<https://www.bloomberg.com/quicktake/heroin>

The answer really shouldn't be that difficult. The president goes on TV to declare a national emergency. He increases the budget of the Substance Abuse and Mental Health Services Administration by several billion dollars, with the money earmarked for curbing opioid addiction. The Department of Health and Human Services cracks down on excessive opioid distribution, while the Justice Department goes after opioid manufacturers like Purdue Pharma Inc., distributors like McKesson Corp. [1](#) and egregious overprescribing doctors. At the same time, the government underwrites therapies that block opioid cravings and takes other steps to help addicts break the habit. As the number of opioid-related deaths declines, the president takes a victory lap as his re-election nears.

- [Read Michael R. Bloomberg's seven-step action plan](https://www.bloomberg.com/view/articles/2018-01-10/a-seven-step-plan-for-ending-the-opioid-crisis) <https://www.bloomberg.com/view/articles/2018-01-10/a-seven-step-plan-for-ending-the-opioid-crisis>



Inexplicably, President Donald Trump seems uninterested in taking these obvious steps. Yes, he created an opioid commission, whose recommendations he has ignored, and declared a “national health emergency.” [https://www.nytimes.com/2017/10/26/us/politics/trump-opioid-crisis.html?\\_r=0](https://www.nytimes.com/2017/10/26/us/politics/trump-opioid-crisis.html?_r=0) But instead of adding funding, he actually proposed cutting the substance abuse budget <http://www.thecannabist.co/2017/12/21/opioid-overdose-deaths-2016-trump-kennedy/95071/> by \$400 million. And of course nothing signaled Trump's lack of seriousness than the person he named to be his “opioid czar”: [Kellyanne Conway](https://www.statnews.com/2017/12/14/kellyanne-conway-opioids/) <https://www.statnews.com/2017/12/14/kellyanne-conway-opioids/>, the spinmeister best known for rebranding Trump's fantasies as “alternative facts.”

One unique aspect of American culture is that when the government won't stop corporate wrongdoing, the plaintiff's bar rushes in to fill the void. Without question, plaintiff's lawyers have made a difference — many products are safer, and many corporate behaviors have changed because of lawsuits or the threat of lawsuits.

But using litigation to effect change also has its critics, who say that Congress, not the legal system, should do that kind of work; that the lawyers are motivated more by the fees than the problem; and that there are far too many lawsuits where the evidence of wrongdoing is thin. And yes, I've been one of those critics.

I remember in particular the tobacco litigation of the mid-1990s, in which plaintiff's lawyers teamed up with states to sue Big Tobacco, vowing to eradicate smoking. Instead, the tobacco companies settled for \$246 billion, enriching both the states and the lawyers. Although the settlement included some changes in how companies could market cigarettes, few in the anti-tobacco community [believe](https://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go) <https://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go> that the settlement has made much of a difference. Though smoking rates have declined, there are still 400,000 Americans who die each year from cigarettes.

And who else is there to tackle opioids? Who else has the resources, the skill, the stamina and the financial incentive to go toe-to-toe with a powerful company like McKesson, which, with \$192 billion in revenue, ranks fifth on the Fortune 500? Only the plaintiff's lawyers.

Thus it was that starting about a year and a half ago, prominent plaintiff's firms began filing lawsuits against opioid manufacturers and distributors. Marie Napoli, a partner in the New York firm of Napoli Shkolnik, had several friends whose children had died because of opioids. The firm threw together a TV ad asking people suffering from opioid addiction to get in touch.

"We were inundated with calls," Napoli said. "I've never seen anything like it. It gave us insight into the depth of the problem."

What she and her partners soon discovered, however, was that suing on behalf of individuals was not a winning strategy.

"In a lot of states, you had to sue the doctor for medical malpractice," Napoli told me. "You were prevented from suing the manufacturer or the distributor." In addition, because the plaintiffs were addicts, they had often committed crimes of one sort or another to get their fix. A jury was unlikely to find them sympathetic. The question became, Napoli said, "How do we overcome this?"

The way was by shifting to a different kind of client: cities and counties. By now, Napoli Shkolnik has 120 clients, including cities and counties in Ohio, New York, Florida and elsewhere. And they are hardly alone. Paul Farrell, a plaintiff's lawyer in Huntington, West Virginia, has some 200 clients. Motley Rice, a South Carolina firm that was a big player in the tobacco litigation, has dozens of clients. And so on.

Mike Moore, who helped drive the tobacco litigation when he was Mississippi's attorney general, has joined forces with Mississippi and Ohio to sue the opioid manufacturers. Dozens of other states have filed their own suits or are considering it. But while Moore's efforts have gotten [the most publicity](https://www.bloomberg.com/news/features/2017-10-05/the-lawyer-who-beat-big-tobacco-takes-on-the-opioid-industry), the suits by the cities and counties probably matter more. For one thing, there will probably be thousands of them by the time they're all filed, so they have the potential to bury the drug companies in lawsuits. For another, it matters more to them. Much more than state governments, it's the cities and counties that are bearing the brunt of opioid abuse.

The suits target manufacturers, distributors and a handful of doctors who were known within the industry as "key opinion leaders," and who spread the gospel that opioid pain-killers weren't addictive. (They were usually paid for their work by the manufacturers.)

The cities and counties are charging that the manufacturers made claims about their products that they knew were false, and that distributors handed out opioids like they were candy and ignored federal mandates to report suspicious purchases.

"This is a town of 100,000 people," said Farrell, the Huntington, West Virginia lawyer. "And yet 6.5 million opioids came in here in a decade."

In addition, the suits allege that the makers and distributors of opioids created "a public nuisance" by forcing cities and counties to hire more first-responders and deal with higher crime and overburdened health-care facilities. The cities and counties want the defendants to reimburse them for the financial burden they have imposed; first-responders alone can consume as much as one-third of a municipal budget in hard-hit areas, according to Paul Napoli, another partner at Napoli Shkolnik (and Marie Napoli's husband).

There's another reason cities and counties prefer to bring their own lawsuits: they don't want a replay of the tobacco settlement. Back then, they left matters to the states, expecting that some of the settlement money would trickle down to them. That didn't happen. Although the funds were supposed to be used on anti-tobacco efforts, that mostly didn't happen either. Most states used the money to fill holes in their budgets.

These lawsuits won't be easy for the localities to win. Richard Ausness, a professor at the University of Kentucky College of Law, told me that one problem was that opioids all came with an addiction warning mandated by the U.S. Food and Drug Administration. That would potentially serve as a shield for the manufacturers. Many of the opioids are generics, and thanks to [a 2013 Supreme Court ruling](http://www.nytimes.com/2013/06/25/business/justices-rule-generic-makers-not-liable-for-drugs-design.html), generic drugmakers can't be sued for making a defective product when they simply copy a brand-name drug.

Ausness said that there are states that bar damage claims for economic losses caused by a public nuisance. And he raised an issue about plaintiff's lawyers: Because the lawyers work on a contingency-fee basis, "They're going to want a quick settlement," Ausness said.

The lawyers I spoke to say otherwise. "Nobody has ever accused me of giving up for a little bit of money," said Paul Napoli. He insisted that the goal isn't just to force a financial settlement on the drug companies, but to force them to make "substantial changes." Previous government penalties for regulatory violations — McKesson paid a \$150 million fine <<https://www.justice.gov/opa/pr/mckesson-agrees-pay-record-150-million-settlement-failure-report-suspicious-orders>> last year for failing to report suspicious orders of "controlled substances" — haven't done the trick, he added; the only thing that's likely to work is unrelenting litigation.

Farrell was even more adamant. "We've had 10 shootings in the past 10 days," he told me. "We now have drug gangs in Huntington, West Virginia — and drug hits. We are laying off police because we don't have enough money."

I wish the Trump administration was willing to put in the effort to come up with an abatement plan, and then to fund it. I worry that the nice-sounding vows of the lawyers will be forgotten in a global settlement like the one involving tobacco. I fear that the cases will end and the crisis won't.

The plaintiffs' bar can be a force for good. Let's hope this is one of those times.

*This column does not necessarily reflect the opinion of the editorial board or Bloomberg LP and its owners.*

**1.** Both companies insist that they are trying to solve the crisis, not exacerbate it.

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