

# Lessons From Asbestos Can Help Resolve Opioid Liabilities

By **Jessica Horewitz, Marc Scoppettone and Holland Sullivan**

The opioid crisis in the U.S. has turned our attention not just to those individuals who have struggled with addiction as a result of the overprescription of opioids, but also toward the societal costs associated with those struggles. These costs can be attributed to several stages in the supply chain — the unintended consequences of the questionable marketing, prescribing, distribution and dispensing of opioids.

In fact, it is possible that if all costs of the crisis were monetized and all damages paid, the total would be much more than the profits earned, or possibly even the revenue generated, throughout the supply chain. Some higher estimates have penned the financial effects at more than \$1 trillion.[1]

Should those damages be paid, would we, as a society, lose pharmaceutical companies? Distributors? Pharmacies? Doctors? We have already seen INSYS Therapeutics Inc. and Purdue Pharma LP declare bankruptcy — and in recent weeks, Mallinckrodt PLC has publicly considered taking that same step.[2]

The litigation surrounding the opioid crisis began as more than 2,000 separate lawsuits, comprising more than 2,500 cities and counties, Native American tribes, and individual claimants. These lawsuits targeted opioid manufacturers, pharmaceutical distributors, pharmacy benefits managers, pharmacies and medical care providers.

The lawsuits were consolidated into a single multidistrict litigation overseen by a federal judge at the U.S. District Court for the Northern District of Ohio. The court scheduled bellwether trials for Summit and Cuyahoga counties in Ohio, with all defendants except pharmacy defendants settling on the eve of trial. All the remaining suits are pending.[3]

The litigation has resulted in the bankruptcies of multiple opioid manufacturers, with the potential for additional bankruptcies in the future. But what if a different, holistic strategy were available?

Some of the longest-lasting litigation in U.S. history has been that related to asbestos. In 1969, the first personal injury lawsuit alleging asbestos related disease was filed. By the late 1970s, claim filings had picked up speed, and the first asbestos-related bankruptcy was filed in 1982, by the Johns Manville Corporation.



Jessica Horewitz



Marc Scoppettone



Holland Sullivan

Since then, more than 600,000 individuals have filed personal injury lawsuits due to asbestos exposure, more than 75 companies have declared bankruptcy, and dozens of insurance companies have become insolvent. Many lawyers, economists and conference organizers have focused their entire careers on asbestos litigation. While there were early attempts to remove asbestos from the traditional individualized tort system,[4] it has mostly been left up to individuals, law firms, corporations and insurance companies to litigate and settle claims as they arise.

Management of asbestos liability has become a significant source of activity for some defendant companies. In-house counsel specialists are often needed to manage the litigation — which can range from a few claims a year to thousands — as well as outside counsel coordination, claims management and insurance negotiations.

Litigation can impact day-to-day operations, and may pose significant expenses, impact acquisitions and divestitures, distract management and depress company value. While many defendants have used bankruptcy to mitigate the impact of asbestos liability, others have remained in the tort system intending to manage the liability. However, other asbestos defendant companies have sought solutions outside the courts.

A few asbestos defendants have attempted corporate restructuring, as a method to wall off the ongoing operations of the company from the legacy of asbestos. In order to do so, a new corporate entity is created, and the liability is assigned to the new entity.

The value of the asset depends on expected future liability, estimated by an economist or actuary; an estimate of any expected insurance asset that can offset the liability, estimated by an insurance coverage expert, taking into account the solvency of the insurance program; a possible infusion of cash or other assets by the original parent; and an ability to leverage timing and smart investments to maximize the asset value.

This new runoff company can be a wholly owned subsidiary — or, better yet, an independent entity, so the parent is free from the asbestos overhang. Under ideal circumstances, the liability, asset and investment estimates are reasonable and close to the actual experience, and the new entity can run off the asbestos liabilities through their end, expected in the 2050s.

If the estimates are too conservative, the runoff entity could complete the asbestos claim lifecycle and have assets remaining. If the estimates are too aggressive, the runoff entity could become insolvent.[5]

### **How Corporate Restructuring Can Be a Solution for Companies in the Opioid Supply Chain**

At first glance, it seems that the supply chain for opioids is more complex than that of asbestos, but that is not necessarily the case. Even in the asbestos framework, there were manufacturers, distributors, designers and installers — somewhat parallel to pharmaceutical manufacturers, distributors, retailers and prescribers.

In the asbestos litigation, however, each entity in each step in the supply/exposure chain became a defendant without distinction as to their role — a distributor was sued for the same asbestos fibers as the company that specified or produced the final asbestos-containing-product — while damages, other than punitive, were limited to the number of individuals diagnosed with asbestos-related disease.

Over time, as mesothelioma gained visibility with only one known cause,[7] claims have grown to a level far higher than originally anticipated. Plaintiffs law firms responded by establishing infrastructure to support ongoing asbestos litigation efforts, and defendant companies matched plaintiffs firm efforts with comparable defense strategy and spend.

A litigation that was expected to be relatively short-lived has persisted and even flourished for decades. Depending upon the length of time over which opioid litigation persists, a similar pattern may emerge, i.e., diminishing claim numbers offset by increasing claim values.

Asbestos litigation has been further complicated by joint and several liability. A total award made to an individual would ideally be divided among all responsible parties, but if any entity in the chain were insolvent, the remaining parties would take on the share of those unable to pay.

This same situation is applicable in the case of opioids: Damages can arise from many sources, with any remaining solvent entity in the supply chain taking on the responsibility of those exiting the tort system — a domino effect that could be devastating to the health care sector.

If our goal, as a society, is to continue to have functional and innovative pharmaceutical companies — especially during COVID-19 — we will need any resolution to the opioid crisis to preserve the solvency and functionality of the companies in the supply chain, lest we risk losing the firms most skilled at drug research, innovation, treatment development, and efficient and functioning systems for drug distribution and dispensation.

The corporate restructure technique could be a means to attain that goal, in the face of a tsunami of litigation. But in order to restructure opioid-involved companies, a methodology for estimating their liabilities must be available. There are many potential sources of damages arising from opioids:

- Municipality claims;
- State attorney general claims;
- Individual claims;
- Insurance company claims (for reimbursement of unwarranted opioid prescriptions);
- Securities claims;
- U.S. Department of Justice contingency claims;
- Hospital claims (arising from the undue allocation of hospital resources toward opioid patients);
- Future claimants (babies born to addicted mothers);

- Insurance claimants (those who purchased insurance at rates above what they would have been but for the cost of caring for addicts and covering unnecessary opioid prescriptions);
- U.S. Securities and Exchange Commission investigations;
- Investigations of healthcare professionals;
- Congressional and other inquiries; and
- Derivative lawsuits against directors of companies.

While this list seems daunting, there have been some estimates and estimation methodologies for many of these potential sources of damage in the opioid litigation that has proceeded to date. Marketwide estimates could be parsed to each entity involved in the supply chain — possibly by market share.[6]

Other estimates may be based on statutory provisions and company-specific data. Thus, there are reliable methods upon which to compute damages by a particular company.

If claims could be adequately quantified, it seems that opioid companies could take advantage of a restructuring that separated opioid businesses from nonopioid businesses. Through a properly structured transaction with a third party, an opioid company could achieve finality from contingent liabilities through a true sale.

Just as in the context of asbestos-related transactions, the seller and purchaser will both require legal and actuarial opinions from their respective advisors. While every transaction requires bespoke structuring, typically the selling entity can sell either a legacy subsidiary or ringfenced vehicle containing both funding and liabilities to a third party.

After such a transaction, the selling company no longer retains any exposure to the described contingent liabilities on its balance sheet, and maintains no control or ongoing involvement in any litigation, settlement or other resolution of claims going forward. This approach is the only alternative to bankruptcy that achieves complete finality from exposure to contingent liabilities.

By allowing companies a clean separation of past liabilities from ongoing operations, a fair and equitable resolution to opioid liabilities can be achieved, while maintaining the innovation and dynamism of America's pharmaceutical industry.

---

*Jessica Horewitz is a senior vice president and Marc Scoppettone is a vice president at Nathan Associates Inc.*

*Holland Sullivan is chief strategy officer at Financial Asset Recovery Analytics LLC.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] NPR, "Your Guide to the Massive (and Massively Complex) Opioid Litigation," Oct. 15, 2019, available at <https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation>.

[2] <https://www.fiercepharma.com/pharma/mallinckrodt-considering-bankruptcy-for-its-troubled-u-s-generics-unit-report>.

[3] A separate state public nuisance claim by the state of Oklahoma against Johnson and Johnson resulted in a nine-figure judgment against Johnson and Johnson. Separately, the U.S. Department of Justice has also pursued individual parties for civil and criminal penalties.

[4] The Georgine case would have turned asbestos personal injury cases for a group of large defendants into a class action, but was decertified by the U.S. Supreme Court in 1997. The FAIR Act would have prohibited asbestos personal injury claims from being brought against individual defendants and created a centralized (national) fund to compensate victims.

[5] Absent an arms-length transaction with both parties' legal and actuarial representatives offering defensible opinion letters, the risk of additional liability exposure does exist.

[6] Market share in opioids is thoughtfully computed as morphine milligram equivalent rather than unit sales, to control for the varying potency of different products.

[7] Idiopathic mesothelioma is observed, but rarely identified when even a tangential link to asbestos exposure can be made.