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Opioid Lawsuits: Is There Any End in Sight?

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I. INTRODUCTION

Numerous lawsuits have been filed since 2014 against opioid manufacturers, distributors and retail pharmacies by state and local governments and other plaintiffs.[1] Unfortunately, although some settlements with some defendants have been negotiated, a comprehensive "global" resolution of the opioid controversy remains elusive. This article traces the history of opioid litigation and considers whether there is a better way to deal such a massive problem.

Part II of the article discusses the chemical nature of opioids, the marketing practices of Purdue Pharma and others, and the nature and extent of the current opioid addiction crisis. Part III describes the largely unsuccessful personal injury cases brought against Purdue by private individuals prior to 2014. Part IV examines the public nuisance doctrine—the most popular liability theory invoked by government plaintiffs. Parts V, VI and VII, analyze three of the most important litigation pathways: (1) suits by individual government entities, usually states; (2) multidistrict litigation (MDL); and (3) bankruptcy proceedings. Part VIII considers some of the problems associated with the adjudication and settlement of mass tort cases such as opioid litigation. Part IX identifies three issues that should be resolved in mass tort cases: liability, apportionment of damages, and the distribution of the damage award among various plaintiffs. Part X concludes that none of the litigation pathways described above are capable of resolving the complex issues that are associated with opioid litigation.

1. Paul J. Geller, Aelish Baig, & Mathew S. Melamed, *Planning for Aggressive Multiparty Discovery in a Fast-Moving, Complex MDL: An Example from the Opioids Litigation*, 89 U.M.K.C. L. REV. 897, 901 (2021) (stating that more than 2700 lawsuits against opioid sellers and distributors had been transferred to the Northern District of Ohio MDL).

II. OPIOIDS

A. The Chemistry of Opioids

Opioids include various chemical substances such as morphine, oxycodone, and hydrocodone.[2] Originally, most opioids were derived from the poppy plant, but some, such as fentanyl and methadone, are now produced synthetically.[3] Opioids are valuable for medical uses because they bind to receptors in the brain and reduce the perception of pain. [4] Long-acting opioids are typically prescribed to provide continuous pain relief for up to twelve hours, while shorter-acting opioids are only effective for four to six hours.[5]

Unfortunately, serious side effects may occur when opioids are used to treat long-term or chronic pain.[6] For example, patients may develop a tolerance for opioids after repeated administration so that dosage levels must be increased over time to achieve the same degree of pain relief.[7] In addition, many patients become dependent on opioids and experience withdrawal symptoms when

2. Addison Hollis, *A Wanted Opioid-Addiction Challenged: How Should Louisiana Allocate Proceeds from Opioid Litigation*, 81 LA. L. REV. 319, 326 (2020). Heroin is produced from morphine. Edgar Aliferov, *The Role of Direct-Injury Government Entity Lawsuits in the Opioid Litigation*, 87 FORDHAM L. REV. 1141, 1143 (2018).

3. Mariano-Florentino Cuellar & Keith Humphreys, *The Political Economy of the Opioid Epidemic*, 38 YALE L. & POL'Y REV. 1, 10 (2019).

4. Alyssa M. McClure, *Illegitimate Overprescription: How Burrage v. United States Is Hindering Punishment of Physicians and Bolstering the Opioid Epidemic*, 93 NOTRE DAME L. REV. 1747, 1750 (2018).

5. Ameet Sarpatwari et al., *The Opioid Epidemic: Fixing a Broken Pharmaceutical Market*, 11 HARV. L. & POL'Y REV. 463, 472 (2017).

6. Chronic pain is defined as pain that lasts over six months. Jacob C. Hanley, *Illegitimate Medical Purpose: Resolving the Fundamental Flaw in Criminal Prosecutions Involving Physicians Charged with Overprescribing Prescription Opioids*, 58 DUQ. L. REV. 229, 232 (2020).

7. Cueller & Humphreys, *supra* note 3, at 10.

usage is discontinued.[8] Finally, opioid users risk serious injuries or even death from drug overdoses.[9]

B. Marketing Practices

OxyContin, whose active ingredient is oxycodone hydrochloride,[10] was first developed and marketed by Purdue Pharma in 1996.[11] Purdue claimed that OxyContin was superior to other prescription pain relievers because it contained a patented time-release mechanism that enabled a larger dose to be released over a longer period than was possible with other pain relieving drugs.[12] Not content with the traditional way of

8. Aliferov, *supra* note 2, at 1143. According to one commentator, these withdrawal symptoms include anxiety, restlessness, muscle aches, insomnia, runny nose, excessive sweating, diarrhea, nausea and vomiting, cramping, blurred vision, rapid heart rate, and high blood pressure. Lauren Rousseau & I. Eric Nordan, *Tug v. Mingo: Let the Plaintiffs Sue—Opioid Addiction, the Wrongful Conduct Rule, and Culpability Exception*, 34 W. MICH. U. T.M. COOLEY L. REV. 33, 44 (2017).

9. Paul L. Keenan, *Death by 1000 Lawsuits: The Public Litigation in Response to the Opioid Crisis Will Mirror the Global Tobacco Settlement of the 1990s*, 52 NEW ENG. L. REV. 69, 69 (2017). More than one hundred persons a day die of a drug overdose in the United States. Samantha T. Pannier, *Litigating an Epidemic: California Plaintiffs in the National Opioid Litigation*, 54 LOY. L.A. L. REV. 275, 277 (2020).

10. Huang Yuguang et al., *Oxycodone hydrochloride controlled-release tablets (OxyContin®): post-marketing surveillance (PMS) study for relieving moderate to severe non-cancer pain*, 1 EUROPEAN J. PAIN SUPPLEMENTS 41, 42 (2007). Oxycodone was first synthesized by scientists in Germany in 1916 from thebaine, an opium derivative. Mohammad Moradi et al., *Use of Oxycodone in Pain Management*, 1 ANESTHESIOLOGY & PAIN MED. 1 (2012).

11. Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221 (2009). Purdue its patented time release mechanism, in 1972 for use in MS Contin, a prescription pain reliever that introduced morphine into a patient's bloodstream over a period of several hours. Paul Frederickson, *Criminal Marketing: Corporate and Managerial Liability in the Prescription Drug Industry*, 22 MIDWEST L.J. 115, 132 (2008). Later, it applied it to oxycodone. The resulting product was called OxyContin.

12. Joseph B. Prater, *West Virginia's Painful Settlement: How the OxyContin Phenomenon and Unconventional Theories of Tort Liability May Make Pharmaceutical Companies Liable for Black Markets*, 100 NW. U. L. REV. 1409, 1413 (2006). Prior to the

prescribing opioids to treat only severe and acute pain, Purdue expanded the market by persuading doctors to prescribe OxyContin to treat moderate, chronic pain.[13]

Prior to the 1990s, the accepted practice among physicians was to avoid prescribing opioids for pain unless the patient was near death.[14] However, this practice began to change as a growing number of doctors and patients' advocates contended that pain was a "fifth vital sign" that was being seriously undertreated.[15] Thus, a legitimate concern for the problem of untreated pain provided the necessary predicate for Purdue's effort to increase the market for its own opioids.[16]

Purdue's claim that OxyContin could be safely prescribed to treat chronic pain was communicated to health care professionals in various ways. One method was to advertise in medical journals and other professional publications.[17] In addition, Purdue and other companies funded seemingly independent key opinion

introduction of OxyContin, which was supposed to release small amounts of oxycodone continuously over a twelve-hour period, other prescription opioids released a smaller dose of oxycodone all at once, providing only four hours of pain relief until another dose was required. Purdue also claimed that this extended-release mechanism made OxyContin less attractive to potential drug abusers. Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 308 (2021).

13. Lars Noah, *Federal Regulatory Responses to the Prescription Opioid Crisis: Too Little, Too Late?,* UTAH L. REV. 757, 766 (2019). The market for pain relief medicines is immense. An estimated 100 million persons suffer from pain related to from injuries, illnesses or medical procedures. Michael A. Malinowski, *The U.S. Science and Technology "Triple Threat": A Regulatory Treatment Plan for the Nation's Addiction to Opioids*, 48 U. MEM. L. REV. 1027, 1030 (2018).

14. Roseann B. Termini & Rachel Malloy-Good, *50 Years Post-Controlled Substances Act: The War on Drugs Rages on with Opioids at the Forefront*, 46 OHIO N. U. L. REV. 1, 5–6 (2020).

15. Michael R. Abrams, *Renovations Needed: The FDA's Floor/Ceiling Framework, Preemption, and the Opioid Epidemic*, 117 MICH. L. REV. 143, 145 (2018).

16. Sarpatwari et al., *supra* note 5, at 466. Other opioid manufacturers, such as Johnson & Johnson and Teva Pharmaceuticals, have also been accused of employing similar tactics to market their products. Keenan, *supra* note 9, at 73.

17. Rousseau & Nordan, *supra* note 8, at 36.

leaders and organizations to reinforce the claim that opioids could be safely used to treat chronic pain.[18] Purdue also doubled its sales force and encouraged its representatives to promote OxyContin by providing large bonuses to those who were successful.[19]

Another marketing tactic was for sales representatives to promote OxyContin to doctors directly during office visits.[20] These sales personnel urged doctors to prescribe opioids for moderate, chronic pain by claiming that the risks associated with its use were minimal.[21] Purdue also coined the term "pseudoaddiction" to argue that symptoms of addiction were merely indications that greater doses of opioids were needed to treat the patient's condition.[22]

In addition, the company targeted primary care physicians who were unlikely to be familiar with using opioids to treat chronic pain.[23] Purdue also encouraged physicians to increase their prescriptions of OxyContin by sponsoring all expense pain treatment conferences at high-class resorts and by giving away OxyContin-themed articles.[24] Additionally, in some cases, Purdue cultivated relationships with hospitals and clinics by providing financial support.[25]

Moreover, Purdue and other opioid manufacturers sought to influence patients directly by sponsoring pain-oriented websites, producing pain-related videos, and distributing brochures that promoted the use of opioids for the relief of pain.[26] Purdue also provided doctors with coupons that would allow patients to

18. Taylor Giancarlo, *Pharmaceutical Advertising Disclosures: Is Less Really More?*, 22 QUINNIPIAC HEALTH L. J. 449, 467–68 (2019).

19. Sarpatwari et al., *supra* note 5, at 467.

20. Elizabeth Weeks & Paula Sanford, *Financial Impact of the Opioid Crisis on Local Government: Quantifying Costs for Litigation and Policymaking*, 67 KAN. L. REV. 1061, 1065 (2019).

21. Termini & Mallory-Good, *supra* note 14, at 13.

22. Hollis, *supra* note 2, at 330.

23. Keenan, *supra* note 9, at 72.

24. Ashley Duckworth, *Fighting America's Best-Selling Product: An Analysis of and Solution to the Opioid Crisis*, 26 WASH. & LEE J. CIV. RTS. & SOC. JUST. 237, 257–58 (2019).

25. Termini & Mallory-Good, *supra* note 14, at 14–15.

26. *Id.* at 14.

obtain a week's supply of OxyContin for free.[27] Finally, Purdue targeted vulnerable consumers such as veterans and the nursing home residents.

This marketing campaign was incredibly successful.[28] Within a few years of its introduction, OxyContin became the most highly prescribed Schedule II prescription drug in the United States.[29] Sales of the drug rose from a modest $45 million in 1996 to almost $3 billion in 2009.[30] Other pharmaceutical companies, such as Johnson & Johnson and Teva also touted the benefits of prescription opioids and downplayed the risks of addiction when opioids were used to treat chronic pain.[31]

Distributors and Retail Pharmacies

Distributors and pharmacies are also responsible for much of the harm caused by opioid addiction. Distributors and pharmacies are regulated by the federal Drug Enforcement Administration ("DEA") a branch of the Department of Justice ("DOJ"), pursuant to the Controlled Substances Act ("CSA").[32] Pursuant to the CSA, the DEA requires distributors to register with the agency and to report and stop any suspicious orders.[33] A suspicious order might involve an abnormally large order or frequent orders that are shipped to a particular location.[34]

27. *Id.* at 13.

28. Sarpatwari et al., *supra* note 5, at 467.

29. Dianne E. Hoffmann, *Treating Pain v. Reducing Drug Diversion and Abuse: Recalibrating the Balance in Our Drug Control Laws and Policies*, 1 ST. LOUIS U. J. HEALTH L. & POL'Y 231, 273 (2008).

30. Engstrom & Rabin, *supra* note 12, at 309.

31. Keenan, *supra* note 9, at 73.

32. Hanley, *supra* note 6, at 241–42.

33. 21 U.S.C. § 832(a)-(b). Under the Controlled Substances Act, drugs are divided into five schedules, ranging from Schedule I to Schedule V, according to their medical utility and potential for abuse and addiction. McClure, *supra* note 4, at 1753. The drugs listed in Schedule I are illegal because they have no accepted medical value. They include heroin, LSD, marijuana, peyote, ecstasy, GHB, methamphetamine, Quaaludes and similar street drugs. Rebecca A. Delfino, *The Prescription Abuse Prevention Act: A New Federal Statute to Criminalize Overprescribing Opioids*, 39 YALE L. & POL'Y REV. 347, 373 (2021).

34. Termini & Mallory-Good, *supra* note 14, at 20.

However, distributors contributed to the opioid addiction problem by shipping millions of prescription opioids to pharmacies and pain clinics throughout the United States and by failing to report diversions or suspicious orders to state and federal drug enforcement agencies.[35]

The CSA also required employees of retail pharmacies to look for and report suspicious sales of opioids to the DEA. In addition, the CSA requires pharmacists to provide "effective controls and procedures to guard against theft and diversion of controlled substances."[36] Despite these federal requirements, government complaints have alleged that pharmacies regularly filled opioid prescriptions where red flags were present.[37] In addition, pharmacies failed to adequately train and supervise employees to investigate or report suspicious prescriptions or take other measure to prevent theft by employees or others.[38]

C. The Current Opioid Addiction Epidemic

The current opioid epidemic is undoubtedly one of the greatest public health problems of the twenty-first century in the U.S.[39] It began with the introduction of OxyContin in the mid-1990s.[40] As opioid prescribing in the United States increased,[41] so

35. Keenan, *supra* note 9, at 73; Pannier, *supra* note 9, at 279–80. For example, 780 million pills were sent to West Virginia over a six year period, or 433 pills for every man, woman, and child. "Eleven million doses ended up in Mingo County, West Virginia, population 25,000, and one pharmacy received 258,000 pills in a single month." Nino C. Monea, *Cities v. Big Pharma, Municipal Affirmative Litigation and the Opioid Crisis*, 50 URB. LAW. 87, 109–10 (2019).

36. 21 C.F.R. § 1301.71(a) (2014).

37. Rebecca L. Haffajeed & Michael R. Abrams, *Settling the Score: Maximizing the Public Health Impact of Opioid Litigation*, 80 OHIO ST. L.J. 701, 705 (2019).

38. *Id.* at 720.

39. Wellesley Anna Dubois, *Healthcare's Biggest Little Lie: Rampant Hospital Drug Diversion Hidden Behind Stethoscopes and White Coats*, 18 RUTGERS J. L. & POL'Y 1, 2 (2020).

40. Daniel C. Aaron, *Opioid Accountability*, 89 TENN. L. REV. 611, 619 (2022).

41. Michelle M. Kwon, *Pulling the Wrong Levers Opens a Trap Door: Using Taxes to Fight the Opioid Epidemic*, 93 TEMP. L. REV. 343, 350 (2021) ("Between 1999 and 2010, the number of opioid prescriptions written in the United States quadrupled."). Another

did the addiction rate, as many addicts were forced to obtain their drugs from pain clinics and pill mills.[42] The increase in opioid addiction had devastating social and economic effects on many communities as crime rates rose and health care facilities were overwhelmed.[43]

Even today, opioid addiction continues to be a serious public health problem. An estimated 2 million Americans are dependent on opioids,[44] and nearly 200,000 people have died in the U.S. from opioid overdoses since 1999.[45] The death rate for opioids in 2021 was estimated to be more than 100,000.[46] Furthermore, for every death that occurs, there are ten admissions to a drug abuse treatment center and 32 emergency room visits.[47] In addition to these personal tragedies, opioid addiction has imposed huge financial costs for such things as medical treatment and law enforcement.

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source put the number of opioid prescriptions per year at 250 million. Cuellar & Humphreys, *supra* note 3, at 17.

42. *Id.* at 16. A "pill mill" is a doctor, plain management clinic, or pharmacy that prescribes or dispenses narcotics for nonmedical purposes. Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV, 1117, 1119 (2014).

43. Rebecca A. Delfino, *The Prescription Drug Abuse Prevention Act: A New Federal Statute to Criminalize Overprescribing Opioids*, 39 YALE L. & POL'Y REV. 349, 350 (2021).

44. Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opioid Litigation*, 69 AM. UNIV. L. REV. 175, 178 (2019).

45. Monea, *supra* note 35, at 110. The actual figure may be much higher. *See* In re Nat'l Prescription Opiate Litig., 976 F.3d 664, 667 (6th Cir. 2020) (citing a claim by the plaintiffs that approximately 350,000 persons died in the United States between 1999 and 2016).

46. *Drug Overdose Death Rates*, NAT'L INST. DRUG ABUSE (Feb. 9, 2023), https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates#:~:text=Opioid%2Dinvolved%20overdose%20deaths%20rose,with%2080%2C411%20reported%20overdose%20deaths [https://perma.cc/NF8A-LPT3].

47. *Id.* It should be noted that not all of these deaths and emergency room visits are caused by prescription opioids. NAT'L INST. DRUG ABUSE, *supra* note 46.

III. LITIGATION PRIOR TO 2014

Beginning around the year 2000, private individuals began to bring personal injury actions against Purdue and other opioid manufacturers.[48] These plaintiffs invoked a number of liability theories, including negligence, strict products liability, breach of warranty, violation of state consumer protection laws, negligent marketing, fraud, civil conspiracy, and "malicious conduct."[49] In response, Purdue countered with powerful defenses such as lack of causation,[50] product misuse,[51] wrongful conduct on the part of the plaintiff,[52] and running of the statute of limitations.[53] Ultimately, most of these lawsuits were unsuccessful.[54] While some of these lawsuits were apparently settled, none ever resulted in a judicial determination of liability.[55]

State and local governments also brought lawsuits against opioid manufacturers, most of which were settled for relatively modest amounts.[56] Finally, the federal government initiated successful criminal prosecutions against Purdue for

48. Sheryl Calabro, *Breaking the Shield of the Learned Intermediary Doctrine: Placing the Blame Where It Belongs*, 23 CARDOZO L. REV. 2241, 2246 (2004).

49. Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1122–23 (2014).

50. Koenig v. Purdue Pharma Co., 435 F.Supp. 2d 551, 553 (N.D. Tex. 2006) (failure to prove cause-in-fact); Foister v. Purdue Pharma, L.P., 295 F. Supp. 2d 693, 703 (E.D. Ky. 2003) (failure to prove proximate cause).

51. Labzda v. Purdue Pharma L.P., 292 F. Supp. 2d 1346, 1356 (S.D. Fla. 2003).

52. Price v. Purdue Pharma Co., 920 So. 2d 479, 486 (Miss. 2006).

53. Freund v. Purdue Pharma Co., No. 04-C-611, 2006 WL 482382 at *7–8 (E.D. Wis. 2006); *but see* Bayless v. Purdue Frederick Co., 2011 Conn. Super. LEXIS 2916 (2011) (concluding that the discovery doctrine tolled the statute of limitations).

54. Lance Gable, *Preemption and Privatization in the Opioid Litigation*, 13 NE. U.L. REV. 297, 311 (2021).

55. Edgar Aliferov, *The Role of Direct-Injury Government-Entity Lawsuits in the Opioid Litigation*, 87 FORDHAM L. REV. 1141, 1160–61 (2018).

56. Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 315 (2021).

"misbranding"[57] and against a number of doctors for violating various provisions of the CSA.[58]

IV. THE LAW OF PUBLIC NUISANCE

In response to the failure of the earlier personal injury lawsuits, numerous state and local governments have brought suits against opioid manufacturers, distributors, and retail pharmacy chains.[59] These suits sought reimbursement for the cost of public services such as medical care for addicts and law enforcement.[60] Although government entities relied on a variety of liability theories in those opioid cases,[61] public nuisance has proved to be both the most popular and the most controversial.[62]

To constitute a public nuisance, the activity or condition must: (1) substantially interfere with a right held in common by the public; (2) be unreasonable; (3) be within the defendant's control and be capable of abatement by the defendant; and (4)

57. United States v. Purdue Frederick Co., Inc., 495 F. Supp. 2d 569, 570 (W.D. Va. 2007).

58. *See, e.g.,* United States v. Ignasiak, 667 F.3d 1217 (11th Cir. 2012); United States v. Rosenberg, 585 F.3d 355 (7th Cir. 2009); United States v. Chube, 538 F.3d 693 (7th Cir. 2008); United States v. McIver, 470 F.3d 550 (4th Cir. 2006); United States v. Hurwitz, 459 F.3d 463 (4th Cir. 2006); United States v. Feingold, 454 F.3d 1051 (9th Cir. 2006); United States v. Williams, 445 F.3d 1302 (11th Cir. 2006); United States v. Alerre, 430 F.3d 681 (6th Cir. 2005); United States v. Sawaf, 129 Fed. App'x 136 (6th Cir. 2005); United States v. Valdivieso Rodriguez, 532 F. Supp. 2d 316 (D.P.R. 2007).

59. Nora Freeman Engstrom & Robert L. Rabin, Pursuing Public Health Through Litigation: Lessons from tobacco and Opioids, 73 Stan. L. Rev. 285, 317–19 (2021). In addition to Purdue, opioid manufacturers included Endo International, Janssen Pharmaceuticals (controlled by Johnson & Johnson), Teva Pharmaceuticals, and Allergen. The primary distributors were AmerisourceBergen, Cardinal Health and McKesson. Paul L. Keenan, Note. Death by 1000 Lawsuits: The Public Litigation in Response to the Opioid Crisis Will Mirror the Global Tobacco Settlement of the 1990s, 52 NEW ENG. L. REV. 69, 74–75 (2017).

60. Morgan A. McCollum, *Local Government Plaintiffs and the Opioid Multi-District Litigation*, 94 N.Y.U. L. REV. 938, 941 (2019).

61. *Id.* at 567–94.

62. *Id.* at 567–74.

proximately cause the injury in question.[63] Public nuisance was traditionally limited to minor criminal violations and environmental harms such as air or water pollution.[64] However, more recently, government entities have sought to expand the scope of traditional public nuisance law by bringing claims against the manufacturers and sellers of such products as tobacco, firearms, lead-based paint, and prescription opioids.[65]

Interference with a public right is a prerequisite for any public nuisance claim.[66] The interference must be both substantial and unreasonable.[67] An interference is substantial if it causes significant harm and it is unreasonable if the gravity of the harm inflicted outweighs the social utility of the activity.[68] A public right is one that is common to all members of the general public and not merely one that is enjoyed by a large number of people.[69] Furthermore, because this right is collective in nature, it is distinguishable from individual rights, including the right not to be assaulted, defamed, defrauded, or negligently injured.[70] In the past, courts have sometimes invoked the public right requirement to dismiss public nuisance claims in cases involving firearms and

63. Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External risks? The "No Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 940 (2009).

64. David A. Dana, *Public Nuisance When Politics Fails*, 83 OHIO ST. L.J. 61, 70–71 (2022).

65. *Id.* at 97.

66. Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950, 958 (R.I. 1994).

67. People ex rel. Gallo v. Acuna, 929 P.2d 596 (Cal. 1997).

68. *See* RESTATEMENT (SECOND) OF TORTS § 821B (2) (AM. L. INST. 1979) (giving three examples of unreasonable conduct: (1) conduct that involves a significant interference with the public health, safety, comfort or convenience; (2) conduct that is proscribed by statute, ordinance or administrative regulation; and (3) conduct that is of a continuing nature or has produced a permanent or long-lasting effect which the actor knows, or has reason to know, will have a significant effect upon the public right).

69. Ganim v. Smith & Wesson Corp., 780 A.2d 98, 132 (Conn. 2001).

70. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. L. INST. 1979).

lead-based paints.[71] However, one court concluded that state statutes were broad enough allow public nuisance claims against product manufacturers for unreasonable marketing practices.[72]

In addition, to be held liable for maintaining a public nuisance, the defendant must be able to exercise control over the activity or condition in question. There are two aspects to this control requirement. The first is whether the defendant can exercise control over the instrumentality or condition at the time that it causes harm to the public. The second is whether the defendant has maintained sufficient control over the instrumentality or condition so that he or she can abate it when ordered to do so.[73] The control requirement rests on causation principles. As the Third Circuit Court of Appeals pointed out, "[because] the gun manufacturers do not exercise significant control over the source of the interference with the public right . . . the causal chain is too attenuated to make out a public nuisance claim."[74] However, not every court has agreed with this reasoning.[75]

Lack of control may also be relevant when a government entity seeks to compel the defendants to abate the nuisance. In *City of Manchester v. National Gypsum Co.*,[76] when the City sought to recover the costs of asbestos removal from certain public buildings, the United States District Court for the District of Rhode Island pointed out that the City, not the defendants, was now in possession of the affected property. According to the court, "[t]he defendants, after the time of manufacture and sale,

71. *See Ganim*, 780 A.2d at 133 (firearms); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2f 1099, 1115–16 (Ill. 2004) (firearms); In re Lead Paint Litig., 924 A.2d 484, 505 (N.J. 2007) (lead-based paint); State v. Lead, 951 A.2d 428, 448 (R.I. 2008) (lead-based paint).

72. City of Gary ex rel. King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1229–30 (Ind. 2003).

73. Camden City Bd. v. Beretta U.S.A. Corp., 273 F.3d 536, 541 (3d Cir. 2011) (firearms); State v. Lead, 951 A.2d 428, 449–50 (R.I. 2008) (lead-based paint).

74. City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 422 (3d Cir. 2002).

75. City of Chicago v. Beretta U.S.A. Corp., 821 N.E. 2d 1099, 1128 (Ill. 2004); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1141 (Ohio 2002).

76. City of Manchester v. National Gypsum Co., 637 F. Supp. 646 (D.R.I. 1986).

no longer had the power to abate the nuisance."[77] On the other hand, this argument was rejected by a California appellate court in *Santa Clara I*.[78] In that case, the defendants contended that the plaintiffs' public nuisance action must fail "because defendants lacked the ability to abate the alleged nuisance, and abatement was the only remedy that [the plaintiffs] could seek."[79] In response, the court ruled that the complaint was not defective for failure to affirmatively allege that the defendants had the ability to abate the nuisance.[80] The same court reiterated this conclusion in *People v. ConAgra Grocery Products Co.*[81]

Some courts also restrict public nuisance claims to those that either affect real property or to cases that involve an illegal act.[82] For example, in *Texas v. American Tobacco Co.,*[83] the state brought a public nuisance action against the defendants in order to recover the costs of providing medical care to its citizens for illnesses related to the consumption of tobacco products.[84] Ruling on the defendants' motion to dismiss, the court concluded that the public nuisance claim was defective because the state failed to allege either that the defendants improperly used their own property or that the plaintiff had been injured in the use of its own property.[85]

A federal district court reached a similar conclusion in *Independence County v. Pfizer, Inc.,* a case that was factually

77. *Id.* at 656; *see also* Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 522 (Mich. Ct. App. 1992).

78. County of Santa Clara v. Atlantic Richfield Co., 40 Cal. Rptr. 3d 313, 330 (Ct. App. 2006).

79. *Id.* at 310.

80. *Id.* at 311.

81. People v. ConAgra Grocery Prods. Co., 17 Cal. App. 5th 51, 227 Cal. Rptr. 3d 499 (Ct. App. 2017).

82. City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 426 (3d. Cir. 2002); Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997); Indep. Cnty. v. Pfizer, Inc., 534 F. Supp. 2d 882, 891 (E.D. Ark. 2008); In re Lead Paint Litig., 924 A.2d 494, 422 (N.J. 2007).

83. Texas v. Am. Tobacco Co., No. 5-96CV-91, 1997 U.S. Dist. LEXIS 22580 (E.D. Tex. Sep. 8, 1997).

84. *Id.* at 960.

85. *Id.* at 973.

similar to many of the nuisance-based opioid cases.[86] *In Independence County*, a number of local government entities in Arkansas brought suit against the producers and sellers of certain over-the-counter cold remedies which contained ephedrine and pseudoephedrine.[87] The plaintiffs alleged that defendants knew that their products were being used by criminals to make methamphetamine but resisted efforts to regulate their sale.[88] As a result, illegal "meth labs" caused explosions, fires, chemical burns, chemical spills, and toxic fires.[89] Furthermore, the plaintiffs claimed that they had incurred substantial costs as a result of widespread addiction among their residents.[90] Nevertheless, the court dismissed the plaintiffs' public nuisance claim quoting an Arkansas Supreme Court opinion which defined a nuisance as "conduct by one landowner which unreasonably interferes the use and enjoyment of the lands of another."[91]

However, other courts have ruled that ownership of real property is not necessarily required in a public nuisance suit.[92] For example, in *City of Chicago v. Beretta*,[93] the Illinois Supreme Court held that the trial court should not have dismissed plaintiffs' public nuisance claim and instead concluded "that neither the use or misuse of land nor the invasion of the property rights of another is required for a public nuisance to be found" and, consequently, "plaintiffs' theory of liability is not absolutely foreclosed by the existing common law of public nuisance."[94]

86. Indep. Cnty. v. Pfizer, Inc., 534 F. Supp. 2d 882 (E.D. Ark. 2008).

87. *Id.* at 884.

88. *Id.* at 884–85.

89. *Id.* at 885.

90. *Id.*

91. *Id.* at 890 (quoting Milligan v. General Oil Co., 738 S.W.2d 401, 404 (Ark. 1987)).

92. City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1111 (Ill. 2004); Young v. Bryco Arms, 821 N.E.2d 1078, 1089 (Ill. 2004); City of Gary ex rel. King v. Smith & Wesson Corp., 801 N.E.2d 1222, 456 (Ind. 2003); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 419 (Ohio 2002).

93. City of Chicago v. Beretta U.S.A. Corp., 213 Ill. 2d 351, 290 Ill. Dec. 525, 821 N.E.2d 1099 (2004).

94. *Id.* at 367.

Finally, in some states, governments plaintiffs are not allowed to sue for prospective damages in public nuisance actions, but instead are limited to non-monetary claims for abatement and possibly for recoupment of the costs incurred by them in connection with past abatement efforts.[95] For example, in the *Lead Paint Litigation case*,[96] the New Jersey Supreme Court distinguished between a public nuisance lawsuit brought by an injured private party and a suit, brought by the government, for injuries suffered by the general public.[97] The court observed that when a private individual sued, he or she could seek damages, but when a government entity sued, it could only request abatement or recoupment of past abatement expenses as a remedy.[98]

In contrast, in *People v. ConAgra Grocery Products Co.*,[99] where the State of California brought suit against various manufacturers and sellers of lead paint to compel them to contribute to a fund created for the purpose of removing lead paint from residential houses, the appeals court upheld a lower court award of $1.15 billion for this purpose.[100] The court acknowledged that a public entity could not recover any funds that it had already spent to remediate a public nuisance, but it rejected the defendants' characterization of the required payment of money to a state abatement fund as a "thinly-disguised" damage award.[101]

As the foregoing analysis suggests, the law of public nuisance is far from uniform. In particular, courts differ over the definition of public rights, whether the defendant must be able to exercise control over the instrumentality that causes harm, whether liability is restricted to conditions or activities on land, and whether government entities can recover damages in a public

95. County of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 330 (Ct. App. 2006); Smith & Wesson Corp., 801 N.E.2d 1222, 1232–33 (Ind. 2003); In re Lead Paint Litig., 924 A.2d 484, 447 (N.J. 2007).

96. In re Lead Paint Litig., 924 A.2d 484 (N.J. 2007).

97. *Id.* at 498.

98. *Id.* at 498–49.

99. People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499 (Ct. App. 2017).

100. *Id.* at 569.

101. *Id.*

nuisance action. To the extent that courts adhere to these requirements, public nuisance may prove to be ineffective as a means of imposing liability on opioid producers and sellers.

V. STAND-ALONE LAWSUITS BY STATES AND LOCAL GOVERNMENT ENTITIES

A number of opioid-related cases are currently underway in various state and federal courts.[102] These courts have typically relied on the public nuisance theory to rule in favor of the plaintiffs.

A. City and County of San Francisco v. Purdue Pharma L.P.

City and County of San Francisco v. Purdue Pharma L.P.[103] is one such case. In *San Francisco*, the City brought suit against a group of opioid manufacturers, distributors and retail pharmacies, alleging that they contributed to the creation of a public nuisance by their inappropriate marketing, distribution and dispensing practices.[104] The case was transferred as a bellwether trial to federal district court in California which refused to dismiss the complaint.[105]

In a bellwether trial, a sample case (or a number of such cases) which involves issues that are common to other cases in the MDL, is chosen by the transferee judge, with the consent of the parties, to be tried in order to provide other litigants in the MDL with information about the strength or weakness of their

102. *See* City & County of San Francisco v. Purdue Pharma L.P., 491 F.Supp.3d 610 (N.D. Cal. 2020); *Id.* at 629 (this was a bellwether case remanded for trial to a federal district court in California); *Id.* at 628–29 (in this case, San Francisco, among other things, accused various opioid manufacturers, distributors and retail pharmacies of creating a public nuisance); *Id.* at 669 (the court denied the defendants' motion to dismiss the public nuisance claim).

103. Purdue Pharma L.P., 491 F.Supp.3d 610 (N.D. Cal. 2020).

104. *Id.* at 628. The complaint distinguished between "marketing defendants" and "distributor defendants." *Id.* In addition to the public nuisance claim, the complaint also alleged that the defendants violated RICO, as well as California's Unfair Competition (UCL) and False Advertising (FAL) laws. *Id.*

105. *Id.* at 629.

cases.[106] Although the result in a bellwether trial is binding on the immediate parties unless appealed, it is not binding on the other parties in the MDL.[107]

To support its public nuisance claim, the City alleged that some of the defendants employed false and deceptive advertising in order to increase the demand for its products.[108] In addition, the City accused the defendants of manufacturing, distributing, and dispensing opioids in excess of legitimate medical needs; failing to implement effective controls over opioid distribution; and failing to prevent suspicious orders from being diverted to illegal secondary markets.[109] In response, the defendants contended that complaint did not allege that they engaged in affirmative acts knowing that their conduct would create a public health crisis.[110] In addition, the defendants claimed that complaint failed to allege causation.[111]

While the parties agreed that the plaintiff must show that the defendant engaged in affirmative conduct that interfered with a public right, they disagreed over whether the defendant must have actual knowledge that the conduct in question would cause a public health hazard.[112] However, the court declared that it did not have to decide whether actual knowledge was required under California law because the complaint alleged sufficient facts to satisfy this requirement.[113] The complaint alleged that the marketing defendants promoted prescription opioids knowing that they were being abused and diverted, thereby fueling the

106. Amir Seyedfarshi, *Binding Bellwether Trials in Multdistrict Litigation and the Right to Jury Trial*, 17 W. MICH. U. T.M. COOLEY J. PRAC. & CLINICAL L. 295, 296 (2016).

107. Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2337 (2008). However, plaintiffs can sometimes use the results of a bellwether trial as the basis for a claim of collateral estoppel. Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109. 126–27 (2015).

108. *Id.*

109. *Id.* at 630.

110. *Id.* at 669.

111. *Id.*

112. *Id.* at 672–73.

113. *Id.* at 673.

opioid epidemic.[114] Likewise, the complaint pointed out that the distributor defendants were also aware of the opioid epidemic but failed to identify and stop suspicious orders as required under the CSA.[115]

The court also concluded that the City satisfied the requirements of both actual cause[116] and legal or proximate cause.[117] The court began its analysis of the actual cause by declaring that this requirement would be satisfied in a public nuisance case if the defendant's conduct was a "substantial factor" in causing the harm in question.[118] Unlike the more demanding "but for" standard, the substantial factor test required only that the defendants' contribution of the cause in question "be more than negligible or theoretical."[119] In this case, the substantial factor test was satisfied as far as the marketing defendants were concerned if their deceptive marketing of opioids "was one of the main drivers of the opioid epidemic."[120] Likewise, the City's claim against the distributor defendants satisfied the substantial factor test if contributed to the oversupply of prescription opioids because they failed to implement measures to identify and halt the distribution and dispensing of suspicious orders.[121]

Addressing the issue of proximate cause, the court stated that a public nuisance claim would satisfy the proximate cause requirement if the defendant's actions were likely to result in a substantial invasion of a public right.[122] The marketing defendants argued that the City's harm largely resulted from intervening acts by others such as prescribers, patients, distributors, pharmacies and criminals.[123] However, the court

114. *Id.*

115. *Id.* at 674.

116. *Id.* at 678.

117. *Id.* at 684.

118. *Id.* at 677 (citing People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 538 (Ct. App. 2017)).

119. *Id.*

120. *Id.*

121. *Id.* at 678.

122. *Id.* at 679.

123. *Id.*

responded that intervening acts by others would not cut off liability if such acts were foreseeable.[124] In this case, the defendants' fraudulent marketing violated laws intended to prevent foreseeable tragedies such as opioid-related addiction, overdoses and deaths.[125] The court also rejected the distributors' argument that San Francisco's addiction problem was not caused by increased shipments of opioids, but rather it resulted from a new standard of prescribing by doctors created by the marketing defendants' promotion of prescription opioids.[126] Furthermore, the distributors argued that they were not responsible for the diversion of opioids once they had been delivered to a pharmacy.[127] However, the court responded by declaring that the causal chain was not broken at that time, and it instead continued to remain "operative" as long as the defendants' distributive practices continued to be part of a chain of distribution by which opioids were diverted to illegal non-medical uses.[128]

B. Lake County, Ohio v. Purdue Pharma

In *Lake County, Ohio v. Purdue Pharma*,[129] Lake and Trumbull Counties brought suit against three retail pharmacies operated by CVS, Walgreens, and Walmart, alleging that the defendants' dispensing activities contributed to the creation of a public nuisance within their jurisdictions.[130] The case, which was also a bellwether trial, was tried before Judge Dan Polster and a jury. At the end of an eight-week trial, the jury found for the plaintiffs on the liability issue.[131]

The case was tried on a theory of "absolute nuisance."[132] Ohio law distinguished between absolute and qualified public nuisances. According to the court, to be liable under the absolute

124. *Id.*

125. *Id.*

126. *Id.* at 683.

127. *Id.*

128. *Id.* at 683–84.

129. In re Nat'l Prescription Opiate Litig., 589 F.Supp.3d 790 (N.D.Ohio 2022).

130. *Id.* at 795.

131. *Id.*

132. *Id.*

nuisance theory, the defendant must have engaged in intentional or unlawful conduct "that caused a significant and ongoing interference with a public right to health or safety."[133] This unlawful or intentional conduct must be a substantial factor in creating the nuisance.[134] In contrast, qualified public nuisance involved only negligent conduct.

The first issue involved the requirement of unlawful conduct and intent. Rejecting the argument that the plaintiffs were required to provide specific examples of pharmacists filling illegitimate prescriptions in Lake and Trumbull Counties, the court allowed the plaintiffs to establish unlawful conduct by showing that the defendants had knowingly failed to take measures to prevent the diversion of prescription opioids.[135] As far as the knowledge requirement was concerned, the court authorized the jury to consider settlements between the defendants and the DEA as evidence that the defendants had knowingly engaged in illegal dispensing.[136] The court also cited evidence by the plaintiffs' expert witnesses that the defendant pharmacies failed to resolve a high percentage of "red flag" prescriptions.[137]

The second issue was causation. The defendants maintained that their dispensing practices were not a "substantial factor" in causing the opioid epidemic because their market share was relatively small in the area.[138] However, the court rejected this claim and pointed out that the defendant's conduct need not be sufficient by itself to cause a public nuisance when other parties are contributing to it.[139] The court also concluded that the existence of other wrongdoing by manufacturers, distributors, and prescribing doctors, was not sufficient to relieve the defendants of the responsibility to implement effective measures to prevent diversion.[140]

133. *Id.* at 796.

134. *Id.*

135. *Id.*

136. *Id.* at 797.

137. *Id.* at 797–800 (CVS); *Id.* at 803 (Walgreens); *Id.* at 805 (Walmart).

138. *Id.* at 809.

139. *Id.* at 811.

140. *Id.* at 810.

Turning to the public nuisance issue, the court rejected the claim that Ohio's Product Liability Act (OPLA) precluded public nuisance suits against opioid sellers.[141] In the court's view, OPLA was concerned with personal injury and property damage claims against product sellers, and not with abatement suits filed by states and local governments based on public nuisance.[142]

The court also disagreed with a number of other arguments offered by the defendants. First, the court rejected the claim that "extending public nuisance to the opioid crisis would allow consumers to convert almost every products liability action into a public nuisance claim."[143] The defendants relied on the Oklahoma Supreme Court's decision in *Hunter v. Johnson & Johnson*[144] for this proposition. However, the court concluded that Oklahoma's public nuisance law was narrower than Ohio's and was not persuasive in this case.[145] Instead, the court looked to the Ohio Supreme Court's decision in *Cincinnati v. Beretta U.S.A. Corporation*[146] to conclude that Ohio public nuisance law was broad enough to include marketing and dispensing activities.[147]

The defendants also claimed that the plaintiffs had failed to prove that they had interfered with a public right.[148] According to the defendants, the counties' public nuisance claim was based on an aggregation of individual injuries rather than an interference with a public right.[149] However, the court declared that there was "a commonly held public right to be free from negative consequences of the opioid crisis that interfere with public health and safety."[150]

In addition, the defendants argued that they could not be held liable for undertaking dispensing activities because these

141. *Id.* at 814.

142. *Id.* at 812–13.

143. *Id.* at 815.

144. Hunter v. Johnson & Johnson, 499 P.3d 719, 731 (Okla. 2021).

145. *In re Nat'l Prescription Opiate Litig.*, 589 F.Supp.3d at 815.

146. Cincinnati v. Beretta U.S.A. Corporation, 768 N.E.2d 1136, 1144 (Ohio 2002).

147. *In re Nat'l Prescription Opiate Litig.*, 589 F.Supp.3d at 815.

148. *Id.*

149. *Id.*

150. *Id.* at 815–16.

activities were heavily regulated under state and federal law.[151] However, the court declared that this immunity from liability only applied to those who complied with applicable licensing and regulatory requirements.[152] In this case, there was ample evidence that the defendants had not complied with their regulatory obligations under state and federal law.[153]

Lastly, the defendants maintained that they had no control over the instrumentality that caused the nuisance.[154] According to the defendants, once they dispensed opioid pills, they no longer had physical control over them and, therefore, were unable to prevent them from causing harm.[155] The court responded to this argument by stating that the cause of the nuisance was not the pills themselves, but rather it was the conduct of the defendants which created and sustained an illicit market for opioids.[156]

Having upheld the plaintiffs' *prima facie* public nuisance claim, the court then addressed several potential defenses raised by the defendants. First, the court rejected the claim that the CSA only imposed duties on individual pharmacists and not on their corporate employers.[157] The court observed that the DEA had expressly and consistently ruled that the responsibility to ensure the dispensing of valid prescriptions extended to the pharmacy itself as well as to individual pharmacists.[158]

The defendants also contended that the economic loss rule barred recovery in a public nuisance action for the plaintiffs' economic losses.[159] This doctrine prevents plaintiffs in negligence or strict liability cases from recovering when they suffer purely economic losses.[160] However, the court ruled that the economic

151. *Id.* at 816.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 817.

157. *Id.* at 817–18.

158. *Id.* at 818.

159. *Id.* at 824.

160. Catherine M. Sharkey, *In Search of the Cheapest Cost Avoider: Another View of the Economic Loss Rule*, 85 U. CIN. L. REV. 1017, 1017 (2017).

loss rule was limited to qualified public nuisance claims and did not apply to an intentional tort such as absolute public nuisance.[161]

In addition, the defendants invoked the municipal cost recovery rule.[162] This rule provides that a government entity cannot recover the cost of services from a tortfeasor that resulted from the tortfeasor's negligence.[163] However, citing *Cincinnati v. Beretta U.S.A. Corporation*,[164] the court declared that the municipal cost recovery rule does not apply when "an ongoing and persistent course of intentional misconduct creates an unprecedented man-made crisis that a governmental entity plaintiff could not have reasonably anticipated as part of its normal operating budget."[165] Consequently, it refused to apply the rule.[166]

C. In re Opioid Litigation

In another case, the New York Attorney General and Nassau and Suffolk counties sued a number of pharmaceutical companies including Johnson & Johnson, McKesson and CVS Health.[167] The plaintiffs alleged that the defendants engaged in reckless business practices with the respect to the marketing of opioid products. The New York case was tried before a jury, which found in favor of the plaintiffs in December 2021.

D. California v. Purdue Pharma LP

Other courts have rejected the public nuisance theory. For example, in *People of the State of California v. Purdue Pharma LP*, Santa Clara and Orange Counties brought suit on behalf of the State of California against opioid manufacturers Johnson &

161. *In re Nat'l Prescription Opiate Litig.*, 589 F.Supp.3d at 824.

162. *Id.* at *825.

163. Richard C. Ausness, *The Current State of Opioid Litigation*, 70 S.C. L. REV. 565, 603 (2019).

164. City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002).

165. *In re Nat'l Prescription Opiate Litig.*, 589 F.Supp.3d at 825.

166. *Id.*

167. In re Opioid Litig., 2018 N.Y. Misc. LEXIS 2428 (2017); County of Suffolk v. Purdue Pharma LP, 2017 N.Y. Misc. LEXIS 7793 (2017); County of Nassau v. Purdue Pharma LP, 2017 NYLJ LEXIS 3071 (2017).

Johnson, Endo, Teva and AbbVie (Allergen), claiming public nuisance, false advertising, and unfair competition.[168] Los Angeles and the City of Oakland later joined litigation as plaintiffs in 2018. The plaintiffs sought $50 billion from the defendants. A bench trial before Judge Peter J. Wilson lasted from April 19 to July 27, 2021.[169] At the conclusion of the trial, Judge Wilson ruled in favor of the defendants.[170]

E. Oklahoma ex rel. Hunter v. Johnson & Johnson

Another case involved the State of Oklahoma and Johnson & Johnson. The State initially sued Purdue Pharma, Teva Pharmaceuticals and Johnson & Johnson. However, the State reached a settlement with Purdue and Teva shortly before the trial was about to begin, leaving Johnson & Johnson as the sole remaining defendant.[171] The State contended that unbranded marketing by Johnson & Johnson minimized the risks of opioids and exaggerated their safety and efficacy.[172] According to the State, this deceptive marketing caused increased rates of opioid addiction and overdose deaths in the State.[173]

The lower court relied upon a state statute, enacted in 1910, which declared that:

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: first, annoys, injures or endangers the comfort, repose, health, or safety of others; or second, offends decency; or third, unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street, or highway; or fourth, in any way renders other

168. People v. Purdue Pharma LP, 2021 Cal. Super. LEXIS 31743 (2021).

169. *Id.* at 3.

170. *Id.* at 63.

171. Jonathan Fitzmaurice, *Opioid Litigation: Welcome to the Nuisance Jungle*, 19 AVE MARIA L. REV. 210, 229 (2021).

172. Addison Hollis, *A Wanted Opioid-Addiction Challenge: How Should Louisiana Allocate Proceeds from Opioid Litigation?*, 91 LA. L. REV. 319, 330 (2020).

173. Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 320 (2021).

> persons insecure in life, or in the use of property, provided this section shall not apply to preexisting agricultural activities.[174]

After a lengthy bench trial, a lower court judge ruled that Johnson & Johnson was liable for causing a public nuisance, as defined by this statute, and awarded the State $465 million to pay for the first year of its nuisance abatement program.[175]

The case was appealed to the Oklahoma Supreme Court, which reversed the lower court on November 9, 2021.[176] The court first discussed the appropriate standard of review as well as the origins and history of Oklahoma public nuisance law. It then determined that Oklahoma's public nuisance law did not cover the state's alleged harm. This conclusion was based on three findings: (1) the production and distribution of a product rarely interferes with a public right; (2) a manufacturer usually ceases to have any control over a product once it has been sold; and (3) if a public nuisance theory was applied to product sales, the manufacturer of such products might be subject to liability in perpetuity.[177]

The Oklahoma Supreme Court first identified the general standard to apply in its review of the trial court's determination that Johnson & Johnson had created a public nuisance in the state. As the court observed, an action to abate a nuisance has traditionally been considered to be equitable in nature.[178] Accordingly, the court held that it was not bound by the lower court's findings but instead should review the entire record and

174. 50 OK Stat. § 50-1 (2021).

175. The State originally sought $17 billion over 30 years to pay for cost of a 30-year abatement program. Colin Dwyer & Jackie Fortier, *Oklahoma Judge Shaves $107 Off Opioid Decision Against Johnson & Johnson*, NPR (Nov. 21, 2019), https://www.kcur.org/2019-11-21/oklahoma-judge-shaves-107-million-off-opioid-decision-against-johnson-johnson [https://perma.cc/2WC7-DXUN]. The $465 million award only covers the first year of the abatement program. Therefore, Johnson & Johnson's ultimate liability could have been much greater if it had been required to pay for the entire proposed multi-year abatement program. *Id.*

176. State of Oklahoma ex rel. Hunter v. Johnson & Johnson, 499 P.3d 719 (Okla. 2021).

177. *Id.* at 726.

178. *Id.* at 723.

independently weigh the evidence. Furthermore, insofar as the Oklahoma public nuisance statute was concerned, the court declared that statutory construction was an issue of law and should be reviewed *de novo*.[179] In other words, the Oklahoma Supreme Court felt that it had a free hand to review factual and legal issues independently of any findings by the lower court.[180]

The court then examined the law of public nuisance.[181] As a preliminary matter, it observed that public nuisance had generally focused on harmful activities on the defendant's land.[182] The court also noted that abatement was the sole remedy available to a public entity in a public nuisance case.[183] Turning to the Oklahoma statute,[184] the court declared that it merely codified the traditional common law of public nuisance rather than expanding its scope.[185]

Furthermore, the court pointed out that judicial decisions over the past 100 years had limited statutory liability for public nuisance to crimes that were declared to be a public nuisance and acts which caused physical damage to property or rendered the property uninhabitable.[186] According to the court, the public nuisance statute did not apply to Johnson & Johnson's promotion and sale of opioids because its conduct was not unlawful and did not involve a property-based conflict.[187] Instead, the court characterized Johnson & Johnson's conduct as a failure to warn about the risks of opioid abuse and addiction when it marketed its products.[188]

The Oklahoma Supreme Court in the *Johnson & Johnson* case took the position that failure-to-warn issues were aspects of

179. *Id.*

180. *Id.*

181. *Id.* at 723–25.

182. *Id.* at 724.

183. *Id.*

184. OKLA. STAT. tit. 50, § 1-2 (2011).

185. *Johnson & Johnson*, 499 P.3d at 724 (citing Nichols v. Mid-Continent Pipe Line Co., 933 P.2d 272, 278 (Okla. 1996)).

186. *Id.* at 724.

187. *Id.* at 725.

188. *Id.*

products liability law, not public nuisance.[189] In the court's view, products liability and public nuisance law did not overlap.[190] Quoting from the Third Restatement of Torts, the court declared that "the common law of public nuisance is an inapt vehicle for addressing the conduct [of product sellers]."[191]

The court also relied on the reasoning of a federal appeals court in *Tioga Public School District No. 15 of Williams County, State of North Dakota v. United States Gypsum Co.*[192] to support the distinction between public nuisance and products liability.[193] The *Tioga* case involved a claim by a local school district against an asbestos insulation manufacturer under North Dakota's public nuisance statute.[194] In *Tioga*, the court examined the state statute, which was identical to Oklahoma's, and concluded that it should be limited to situations where one in control of property conducted an activity in such a way as to interfere with the property rights of a neighboring landowner.[195] In reaching this decision, the court declared that extending public nuisance to the sale of products would cause it "to become a monster that would devour in one gulp the entire law of tort, a development we cannot imagine the North Dakota legislature intended when it enacted the nuisance statute.[196]

In addition to endorsing the *Tioga* court's conclusion that public nuisance was poorly suited to resolve product liability claims, the *Johnson & Johnson* court identified three reasons for concluding that the production and marketing of opioids did not fall within the purview of the Oklahoma public nuisance statute.[197]

189. *Id.*

190. *Id.* (citing State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 456 (R.I. 2008)).

191. *Id.*

192. Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915 (8th Cir. 1993).

193. *Johnson & Johnson*, 449 P.3d at 726.

194. *Tioga*, 984 F.2d at 917.

195. *Id.* at 920.

196. *Id.* at 921.

197. *Johnson & Johnson*, 449 P.3d at 726.

First, the court concluded that neither the manufacture nor distribution of opioids by Johnson & Johnson resulted in a violation of a public right.[198] The court noted that a public right involves an indivisible resource shared by the public such as air, water or a public right-of-way.[199] In contrast, the manufacture and distribution of products rarely violates a public right, even if the defendant's conduct is unreasonable or the injuries are widespread, because the products are purchased and used by individuals, not the public at large.[200] Furthermore, the court stated that the sheer number of violations would not transform harm to individuals into an injury to the public.[201]

The court relied on *City of Chicago v. Beretta U.S.A. Corp.*[202] to support this conclusion.[203] In that case, the City of Chicago and Cook County brought a public nuisance claim against various manufacturers, distributors and retail sellers of handguns, alleging that they knowingly flooded the market with handguns and marketed them to criminals.[204] Affirming the lower court's dismissal of the public nuisance claim, the Illinois Supreme Court held that the plaintiffs had failed to prove that the defendants' conduct unreasonably interfered with a public right.[205] Finally, the court in *Beretta* declared recognizing a public right to be free from injuries caused by the criminal acts of others would result in liability under public nuisance to be imposed on all sorts of product manufacturers and sellers.[206] The Oklahoma court agreed with the *Beretta* court's reasoning and concluded that protecting the public's right to be free from the abuse or misuse of prescription opioids under public nuisance would result in potential liability for the manufacturers, sellers, and prescribers of these products.[207]

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. City of Chicago v. Beretta U.S.A. Corp, 821 N.E.2d 1099 (Ill. 2005).

203. *Johnson & Johnson*, 499 P.3d at 727.

204. *Beretta*, 821 N.E.2d at 1108.

205. *Beretta*, 821 N.E.2d at 1108.

206. *Id.* at 1116.

207. *Johnson & Johnson*, 499 P.3d at 727.

The Oklahoma court also ruled against holding Johnson & Johnson liable because it did not have control over its products once they were sold.[208] Without this control, the company had no ability to abate the nuisance, which was the remedy that the State sought in this case.[209] As the court pointed out, the Illinois Supreme Court found the lack of control argument to be persuasive in the *Beretta* case.[210] As in *Beretta*, the Oklahoma court observed that the alleged public nuisance was several times removed from the manufacture and distribution of its products.[211] As a consequence, Johnson & Johnson could not control how wholesalers distributed the opioids that it manufactured, how government agencies regulated the distribution of opioids by prescribing doctors or pharmacies, how doctors prescribed opioids to their patients, how pharmacies sold prescription drugs, or how individual patients used or abused the opioids that were prescribed to them.[212]

In addition, the court felt that it would be unjust to hold Johnson & Johnson responsible for the entire opioid epidemic in Oklahoma when it only produced 3% of the prescription opioids sold statewide.[213] In the court's view, expanding the scope of liability for public nuisance in the manner advocated by the State would result in Johnson & Johnson being held responsible for harm caused by products that it did not produce.[214]

Finally, the court concluded that opioid use and addiction, the alleged nuisance, would not cease to exist even if Johnson & Johnson contributed to the State's Abatement Plan.[215] According to the court, the purpose of the Abatement Plan was not to control the production and marketing of prescription opioids (which Johnson & Johnson had ceased doing), but rather it was designed to fund various governmental programs for the treatment of opioid addiction and for the enforcement of criminal

208. *Id.* at 727–28.

209. *Id.* at 728.

210. *Id.*

211. *Id.*

212. *Id.* at 728.

213. *Id.* at 729.

214. *Id.*

215. *Id.*

activities associated with the illegal sale and distribution of opioid drugs.[216] In the court's words: "Our Court, over the past 100 years in deciding nuisance cases, has never allowed the State to collect a cash payment from a defendant that the district court line-item apportionment to address social, health, and criminal issues arising from conduct alleged to be a nuisance."[217]

The last factor that led the Oklahoma court to reject the State's public nuisance claim was that it might cause Johnson & Johnson to be perpetually liable for the harm caused by its products.[218] The court cited *Detroit Board of Education v. Celotex Corporation*,[219] a case involving asbestos insulation products, as an example of potential long-term liability. Moreover, in the present case, the lower court had imposed liability on Johnson & Johnson for products that had been produced and sold more than twenty years ago by ascribing the current opioid epidemic to the continuing presence of the defendant's products in the marketplace.[220]

The Oklahoma court concluded by warning that extending public nuisance to the manufacturing, marketing or selling of products would allow consumers and governmental entities to "convert almost every products liability action into a [public] nuisance claim."[221] The court noted that other jurisdictions had refused to recognize public nuisance claims against the sellers of non-defective products.[222]

F. City of Huntington v. AmerisourceBergen Drug Corporation

A federal district court reached a similar result in *City of Huntington v. AmerisourceBergen Drug Corporation*.[223] This case was brought on a public nuisance theory by the City of

216. *Id.*

217. *Id.*

218. *Id.*

219. Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513 (Mich. Ct. App. 1992).

220. *Johnson & Johnson*, 499 P.3d at 729.

221. *Id.*

222. *Id.*

223. City of Huntington v. AmerisourceBergen Drug Corp., 2022 U.S. Dist. LEXIS 117322 (S.D. W. Va.).

Huntington, West Virginia and Cabell County, West Virginia against three opioid distributors, AmerisourceBergen Drug Corporation (ABDC), Cardinal Health, Inc., and McKesson Corporation.[224] The case was one of the bellwether trials ordered by the MDL court and was tried without a jury by Judge Faber between May 3, 2021 and July 28, 2021. [225] Seventy witnesses testified at the trial, either in person or by designation.[226] The bulk of the opinion described the effects of opioid addiction in Huntington and Cabell County,[227] the nature of DEA regulation of opioid distribution under the Controlled Substances Act (CSA),[228] the question of whether the defendants substantially complied with their duties under the CSA,[229] and whether the plaintiffs had proved that the defendants failed to maintain effective controls against diversion.[230]

The opinion also concluded that the volume of prescription opioids distributed in Huntington and Cabell County was not proof of unreasonable conduct on the part of the defendants.[231] This part of the opinion suggested that many factors contributed to the opioid epidemic including changes in the medical standard of care with respect to the prescribing of opioids to treat chronic pain.[232] Furthermore, the opinion noted that manufacturers, rather than the defendants, engaged in aggressive marketing practices to encourage doctors to prescribe opioids more frequently.[233] The opinion declared that good faith prescribing by doctors, rather than marketing by the distributors, caused the increase in opioid use in the area. This finding supported the court's conclusion that the distributors were not primarily

224. *Id.* at 19–20.

225. *Id.* at 18–19.

226. *Id.* at 23.

227. *Id.* at 36–41.

228. *Id.* at 41–44.

229. *Id.* at 51–89.

230. *Id.* at 89–118.

231. *Id.* at 118–19. The court acknowledged that the defendants distributed 51,349,150 dosage units to retail pharmacies in the area between 2006 and 2014. *Id.* at 119.

232. *Id.* at 121–55.

233. *Id.* at 155–59.

responsible for the opioid epidemic in Huntington and Cabell County.[234]

In addition, Judge Faber also criticized the plaintiffs' proposed "abatement plan."[235] As a preliminary matter, he noted that the abatement plan, which was written by one of the plaintiffs' expert witnesses, contemplated a program that would last for fifteen years and cost more than $2.5 billion.[236] However, the plan had not yet been enacted or funded by any governmental entity.[237] In addition, the court had two substantive problems with the proposed plan.[238] First, the plan was too broad in the sense that it purported to treat opioid addiction in general and not just addiction caused by the abuse of prescription drugs. In effect, the plaintiffs wanted to hold the defendants responsible for all opioid-related costs instead of limiting their liability to drugs distributed by the defendants that were diverted into the black market.

Second, pointing out that abatement was supposed to be directed at the conduct that caused the public nuisance to occur, the court observed that virtually nothing in the proposed abatement plan was directed at reducing the diversion of prescription opioids.[239] For example, the proposed plan did not have any provisions that required the defendants to improve their existing anti-diversion practices.[240] As the court observed, the plan's author admitted that it (1) did "not recommend any new licensing requirements for distributors;" (2) "propose any new reporting requirements for distributors;" or (3) "propose any new

234. *Id.* at 159, 178–79. *Id.* at 181. The opinion also stated that there was no evidence that the defendants distributed opioids to "pill mill" pharmacies in the area. *Id.* at 172.

235. *Id.* at 180.

236. *Id.* at 179.

237. *See id.* at 215. This may be contrasted with the situation in People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 598 (Ct. App. 2017), where the court required the defendants to contribute to an existing state asbestos abatement program.

238. Later in the opinion, Judge Faber also concluded that the proper remedy for equitable abatement was injunctive relief, not the payment of damages. *Id.* at 213–14.

239. *See id.* at 180.

240. *Id.* at 179–80.

physical security requirements for distributors."[241] In other words, the case was a damage claim masquerading as an action for abatement.

The remainder of the opinion addressed some of the legal questions involved with public nuisance. These included: (1) whether negligent distribution of a dangerous product fell within the purview of public nuisance; (2) whether the defendants' conduct unreasonably interfered with a public right; (3) whether the defendants' distribution of prescription opioids caused a public nuisance; and (4) whether compelling the defendants to pay for an abatement plan fell within the equitable remedy of abatement.[242]

First, the court considered whether the common law doctrine of public nuisance was broad enough to impose liability for the actions of the defendants. Unlike Oklahoma, West Virginia apparently had no statute defining public nuisance and so the court focused instead on the state's common law doctrine.[243] Since West Virginia's highest court had not ruled on whether inadequate diversion control practices could result in liability for causing a public nuisance, the court declared that it must predict how the highest state court would rule on this issue if it arose in the future.[244] In doing so, the court stated that it would look to such sources as the Restatement of Torts, decisions from other states and lower state court decisions from West Virginia[245]

Turning to the Restatement of Torts,[246] the court observed that the drafters of the Restatement had declared that "public nuisance based on the sale and distribution of a product has been rejected by most courts because the common law of public nuisance is an inept vehicle for addressing such conduct."[247] The court also discussed two lower court cases that refused to dismiss public nuisance claims against opioid manufacturers and

241. *Id.*

242. *Id.* at 151–83.

243. *Id.* at 60.

244. *Id.* at 56.

245. *Id.* at 56–57.

246. RESTATEMENT (THIRD) OF TORTS, 83 (AM. L. INST. 3d ed. 2020).

247. City of Huntington v. AmerisourceBergen Drug Corp., 2022 U.S. Dist. LEXIS 117322, at 57 (S.D. W. Va.).

distributors.[248] The court rejected the holdings in the cases because it found that they were not consistent with the Restatement.[249] Instead, the court cited several decisions from other jurisdictions to support its conclusion that public nuisance was not an appropriate liability theory in opioid-related cases.[250] The first case was *State ex rel. Attorney General of Oklahoma*.[251] As discussed above, in that case, the Oklahoma Supreme Court rejected the state's public nuisance claim and reversed a lower court judgment its favor.[252] The court also relied on *Tioga Public School District v. United States Gypsum Co.*, which also refused to impose liability on an asbestos manufacturer on the basis of public nuisance.[253] Finally, the court mentioned two unpublished out-of-state lower court opinions. The first was *City of New Haven v. Purdue Pharma, L.P.*, a decision by a Connecticut Superior Court which dismissed a public nuisance claim against certain opioid manufacturers.[254] The court also cited *State* ex rel. *Stenehjem v. Purdue Pharma L.P.* for the proposition that allowing public nuisance claims against opioid sellers would "open the floodgates of litigation."[255]

In an excess of caution, the court then went on to consider whether the plaintiffs' claim would fail even if liability for public nuisance were to be extended to product sales. The first issue was whether the defendants' distribution practices constituted an unreasonable interference with a right common to the general

248. *Id.* at 155, citing Brooke County Comm'n v. Purdue Pharma, No. 17-c-248 (Marshall County Cir. Ct., Dec. 28, 2018) and State ex rel. Morrisey v. AmerisourceBergen, No. 12-c-141 (Boone County Cir. Ct., Dec. 12, 2014).

249. *Id.*

250. *Id.* at 58.

251. State ex rel. Attorney General of Oklahoma, 499 P.3d 719 (Okla. 2021).

252. *Id.* at 731.

253. *Tioga*, 984 F.2d at 920.

254. City of New Haven v. Purdue Pharma, L.P., No. XotHHDCV176086132S, 2019 WL 423990, at *2 (Conn. Super. Ct. Jan. 8, 2019).

255. State ex rel. Stenehjem v. Purdue Pharma L.P., No. 08-2018-CV-01300, 2019 WL 2245743, at *13 (N.D.) May 10, 2019).

public.[256] Adopting the Restatement's balancing approach, the court declared that the volume of opioids distributed to pharmacies in the Huntington-Cabell County area was "determined by the good faith prescribing decisions of doctors in accordance with established medical standards."[257] Consequently, the court concluded that the distribution of prescription drugs to meet the legitimate medical needs of patients would not constitute an unreasonable interference with a public right.[258]

The court then addressed the causation issue.[259] Causation involves both cause-in-fact and proximate cause. The traditional test for cause-in-fact is the "but for" or "*sine qua non*" formula.[260] Applying this test, the court concluded that no culpable act of the defendants caused the opioid epidemic.[261] According to the court, the plaintiffs failed to prove that the defendants' SOM programs did not prevent the diversion of opioids to pill mills.[262] In addition, the court found that the plaintiffs had failed establish proximate cause. In the court's view, the opioid epidemic was largely caused by diversion at the pharmacy level rather than at the distributor level.[263] Finally, the court concluded that the connection between the defendants' conduct and the harm suffered by the community from opioid addiction was too remote to satisfy the proximate cause requirement.[264] According to the court, the oversupply and diversion of opioids was not caused by the defendants but by "overprescribing by doctors, dispensing by pharmacists of the excessive prescriptions and diversion of the

256. City of Huntington v. AmerisourceBergen Drug Corp., 2022 U.S. Dist. LEXIS 117322, at 60 (S.D. W. Va.).

257. *Id.*

258. *Id.*

259. *Id.*

260. Ausness, *supra* note 163, at 595. Some states have adopted the substantial factor test under which the causation requirement is satisfied if the defendant's act is a substantial factor in causing the plaintiff's harm.

261. City of Huntington v. AmerisourceBergen Drug Corp., 2022 U.S. Dist. LEXIS 117322, at 61 (S.D. W. Va.).

262. *Id.* at 53.

263. *Id.* at 65.

264. *Id.*

drugs to illegal usage—all effective intervening causes beyond the control of the defendants."[265]

The last issue addressed by the court was whether abatement was an appropriate remedy for the plaintiffs' claim.[266] As the court pointed out, in public nuisance cases, the plaintiff's remedy was traditionally limited an injunction requiring the defendant to stop doing something that causes harm to the plaintiff or his property.[267] In contrast, the plaintiffs' proposed abatement plan was not directed at preventing the diversion of opioids by the defendant; rather, it was intended to pay for the costs of treating the consequences of opioid use and abuse.[268] Thus, the court concluded that the monetary award that the plaintiffs were seeking, whether described as damages or abatement damages, was "not properly an element of equitable abatement relief."

G. Tentative Conclusions

So far, five cases have been decided by federal or state trial courts and one case has been decided by a state supreme court. Three of these cases, *City and County of San Francisco v. Purdue Pharma L.P.*,[269] decided by a federal district court in 2020, *Lake County, Ohio v. Purdue Pharma*,[270] decided by a federal district court in 2022, and *In re Opioid Litigation*,[271] decided by a state trial court in 2021, have upheld a public nuisance claim. On the other hand, three other cases, People of the *State of California v. Purdue Pharma LP*,[272] decided by a state trial court in 2021, *State of Oklahoma ex rel. Hunter v. Johnson & Johnson*,[273] decided by the Oklahoma Supreme Court in 2021, and *City of Huntington v.*

265. *Id.* at 67.

266. *Id.*

267. *Id.*

268. *Id.* at 68.

269. City & Cty. San Francisco v. Purdue Pharma, L.P., 491 F. Supp. 3d 610 (N.D. Cal. 2020).

270. In re Nat'l Prescription Opiate Litig., 589 F. Supp. 3d 790 (N.D. Ohio 2022).

271. In re Opioid Litig., 2021 NYLJ LEXIS 102 (N.Y. Sup. Ct.).

272. People v. Purdue Pharma, L.P., 2021 Cal. Super. LEXIS 31743 (Orange Cnty. Super. Ct.).

273. State ex rel. Hunter v. Johnson & Johnson, 499 P.3d 719 (Okla. 2021).

AmerisourceBergen Drug Corporation,[274] decided by a federal district court in 2022, all rejected public nuisance claims.

Obviously, six cases are not enough to constitute a clear trend, particularly when their results are evenly split. However, they do provide support for a few tentative conclusions. First, the public nuisance theory may not be as strong as plaintiffs' lawyers and some legal scholars originally thought. Several of the judicial opinions discussed above are unabashedly hostile to the idea of expanding the traditional law of public nuisance to impose liability on product sellers no matter how reprehensible their conduct might be. This suggests that plaintiffs' lawyers may want to invoke other liability theories instead of relying so heavily on public nuisance.

Second, courts may be concerned with the fact that government plaintiffs have tried to use litigation to shift the entire cost of treating opioid addiction on to the prescription opioid industry when other actors who have also contributed to the problem escape liability.

Finally, some courts doubt that abatement is an appropriate remedy when it appears to be nothing more than a disguised damage award—something that is not usually permitted when the plaintiff is limited to equitable relief.

V. MDL AND THE PROSPECT OF A "GLOBAL" SETTLEMENT

A. MDL

In 1968, Congress enacted the Multidistrict Litigation Act,[275] which declares that: "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."[276] The statute also provides for the creation of a Judicial Panel on Multidistrict Litigation (JPML) which consists of seven federal judges appointed by the

274. City of Huntington v. AmerisourceBergen Drug Corp., 2022 U.S. Dist. LEXIS 117322 (S.D. W. Va.).

275. Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 371 (2014).

276. 28 U.S.C. § 1407.

Chief Justice of the United States.[277] The Panel must be selected from federal appellate and district court judges.[278] Any party to an action that might be transferred may petition the Panel to initiate proceedings to create an MDL or the Panel may do so on its own initiative.[279]

A number of requirements must be met in order for the Panel to order a transfer. First, the pending civil actions must involve one or more common questions of fact. Second, the transfer must one for the convenience of the parties and witnesses.[280] Third, the transfer must promote the just and efficient conduct of the actions.[281] Approximately one-third of all pending federal civil cases have been consolidated into MDL proceedings and over 90% of these cases involve product liability claims.[282] It should be noted that only cases that have been filed in a federal court or transferred to it are subject to consolidation under the MDL statute.[283] After the Panel has initiated an MDL proceeding, other plaintiffs can file their cases directly in the transferee court.[284] Finally, unless the cases have been settled or otherwise resolved by the parties, they must be remanded back to the transferor

277. Andrew D. Bradt, *"A Radical Proposal:" The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 842 (2017).

278. Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 50 (2007).

279. Bradt, *supra* note 277, at 842.

280. This requirement does not carry as much weight as the other two requirements. Ostolaza & Hartmann, *supra* note 278, at 51.

281. Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 620 (2011).

282. Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 762 (2012).

283. Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 416 (2000).

284. Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 345 (2014).

courts for trial.[285] However, in reality, 96% of these cases are settled or terminated by the transferee court.[286]

There are numerous benefits to MDL. For example, the MDL process can reduce legal costs that defendants would otherwise incur if they had to litigate multiple cases throughout the country.[287] The MDL procedure also improves judicial efficiency by enabling a single judge to become familiar with the facts and legal issues of the case instead of requiring multiple judges to do so.[288] Finally, the MDL process also eliminates the problem of inconsistent rulings by multiple judges.[289]

B. The Opioid MDL

Beginning in 2014, a number of cities, counties, Indian tribes, hospitals and a variety of other parties began to bring lawsuits against opioid producers, distributors and pharmacies.[290] On December 12, 2017, the JPML ordered these cases to be transferred to a federal district court in the Northern District of Ohio presided over by Judge Dan Polster.[291] Since then, other cases have also been transferred to Judge Polster's court and the number of these cases now exceeds 2700.[292]

Judge Polster has made no secret that he wants the MDL process to produce a global settlement between the government plaintiffs and opioid manufacturers, distributors and large

285. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

286. Jonathan Steinberg, *The False Promise of MDL Bellwether Reform: How Mandatory Bellwether Trial Consent Would Further Mire Multidistrict Litigation*, 96 N.Y.U. L. REV. 809, 813 (2021).

287. Danielle Oakley, *Is Multidistrict Litigation a Just and Efficient Consolidation Technique? Using Diet Drug Litigation as a Model to Answer This Question*, 6 NEV. L.J. 494, 506 (2005).

288. Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1667 (2011).

289. Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2270 (2008).

290. Hollis, *supra* note 2, at 332.

291. Engstrom & Rabin, *supra* note 12, at 319.

292. *Id.*

pharmacy chains.[293] With that goal in mind, Judge Polster took a number of steps to encourage the parties to reach a settlement, including appointing special masters and a leadership council, committee, scheduling a series of bellwether trials, and approving a settlement class action proposed by the Special Master.[294]

Shortly after the opioid cases were transferred to Judge Polster's court, he appointed three Special Masters to resolve discovery disputes and other pre-trial matters.[295] Judge Polster also appointed a number of leadership counsel members to oversee a negotiated settlement, including seven members to represent the plaintiffs, seven to represent the opioid manufacturers, four to represent the distributors and two to represent the state attorneys general.[296] During the discovery process, the parties took more than 450 depositions and produced 160 million pages of documents.[297] Nevertheless, it soon became clear that a global settlement would not be reached at such an early stage and, consequently, Judge Polster agreed to authorize a limited litigation tracts involving discovery, motion practice, and bellwether trials.[298]

At this stage of the proceeding, although there were some settlement discussions, the parties largely shifted their attention to the question of whether data from the DEA's Automation of Reports and Consolidated Orders System (ARCOS) should be made available to plaintiffs in bellwether trials scheduled for trial in Northern Ohio and West Virginia federal district courts.[299] Judge Polster ordered the DEA and DOJ to release this information, but issued a protective order restricting its release to the general public.[300] However, the Washington Post and HD

293. Howard M. Erichson, *MDL and the Allure of Sidestepping Litigation*, 53 GA. L. REV. 1287, 1289–90 (2019).

294. *Id.* at 1296–97.

295. *Id.* at 1296–97.

296. *Id.* at 1294.

297. In re Purdue Pharma, L.P., 635 B.R. 26, 50 (S.D.N.Y. 2021).

298. Howard M. Erichson, *MDL and the Allure of Sidestepping Litigation*, 53 GA. L. REV. 1287, 1296 (2019).

299. Jennifer D. Oliva, *Opioid Multidistrict Litigation Secrecy*, 80 OHIO STATE L.J. 663, 676–77 (2019).

300. In re Nat'l Prescription Opiate Litig., 325 F. Supp. 3d 833, 840 (N.D. Ohio 2018).

Media Company, which owned the Charleston (W. Va.) Gazette Mail, filed public records requests seeking disclosure from several of the local government litigants.[301] When this request was denied,[302] the Washington Post and HD Media appealed to the Sixth Circuit Court of Appeals, which vacated the protective order.[303]

Once it became clear that it would not be possible for the parties to reach a global settlement, Judge Poster selected a number of bellwether cases that in the aggregate would involve a large number of defendants and a wide range of claims.[304] The first bellwether trial was set commence in October 2019 between Summit and Cuyahoga counties and a host of opioid manufacturers and distributors.[305] However, the trial never took place because the parties settled the case for $260 million at the last minute.[306]

C. The Negotiation Class Action

Meanwhile, Johnson & Johnson, AmerisourceBergen, Cardinal Health and McKesson and the Plaintiffs' Executive Committee entered into serious settlement negotiations. In order to simplify the potentially overwhelming task of obtaining the consent of numerous parties to the MDL (and possibly others), the proposed a novel procedure known as a negotiation class action. The concept of a negotiation class action was first proposed for use in mass tort litigation by Professor Francis McGovern, who served as a special master in the opioid MDL litigation.[307] Professor McGovern and his colleague, Professor Rubenstein, divided this approach into five stages: First, members of a class would develop a formula for allocating a

301. Oliva, *supra* note 299, at 676–77.

302. In re Nat'l Prescription Opiate Litig., 325 F. Supp. 3d at 840.

303. In re Nat'l Prescription Opiate Litig., 927 F.3d 919, 939–40 (6th Cir. 2019).

304. Paul J. Geller et al., *Planning for Aggressive Multiparty Discovery in a Fast-Moving, Complex MDL: An Example from the Opioids Litigation*, 89 UMKC L. REV. 897, 909 (2021).

305. Engstrom & Rabin, *supra* note 12, at 320.

306. *Id.*

307. Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73, 73 (2020).

potential lump sum payment form the defendants among them and would also formulate a voting scheme for accepting or rejecting any settlement offer.[308] Second, the class counsel would petition the court to certify the plaintiffs as an opt-out class under Rule 23(b)(3) with the certification limited to negotiating a lump-sum settlement with the defendants.[309] Third, if a class was certified for this purpose, class members would be notified of the allocation formula and supermajority voting scheme and given a one-time chance to opt out of the class.[310] Fourth, once the opt-out period had passed and the class size could be determined, class counsel and other representatives could then attempt to negotiate a lump-sum settlement with the defendants.[311] Finally, if the parties agreed upon a potential lump-sum settlement amount, the class would vote on whether to accept it or not.[312] Although a supermajority would be required, the entire class would be bound by that vote.[313]

The negotiation class action was a response to a settlement offer proposed in 2019 by Johnson & Johnson and three opioid distributors. Under the proposal, Johnson & Johnson would pay $5 billion over nine years and the distributors would pay $21 billion over eighteen years. The agreements also required that 85% of these funds be allocated to addiction treatment, education and prevention programs. Several distributors and pharmacies, as well as six cities, 37 state attorneys general and attorneys general from the District of Columbia and Guam, objected to the negotiation class.[314] Nevertheless, Judge Polster agreed to certify the class.[315]

However, in 2020, a divided panel of the Sixth Circuit overturned the lower court's certification of the negotiation

308. *Id.* at 90.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 90–91.

313. *Id.* at 79.

314. In re Nat'l Prescription Opiate Litig., 332 F.R.D. 532, 537–38 (N.D. Ohio 2019).

315. *Id.* at 556.

class.[316] The court observed that class actions must comply with the requirements of the Federal Rules of Civil Procedure, particularly Rule 23.[317] In addition, the court pointed out that while Rule 23 expressly referred to settlement class actions, it did not mention negotiation class actions.[318] Proponents of the negotiation settlement contended that it should be allowed because Rule 23 did not expressly prohibit such class actions and that district courts had substantial discretion in determining whether or not to certify a class.[319] However, the appellate court rejected this reasoning, concluding that the lower court could not employ a new form of class action "wholly untethered from Rule 23."[320]

The court also rejected the proponents' attempt to compare a negotiation class with a settlement class.[321] However, the court declared that when the Supreme Court in *Amchem Products, Inc. v. Windsor*[322] concluded that because Rule 23(e) required judicial approval for a proposed settlement of a class action, it implicitly authorized a court to certify a class action for settlement purposes as well.[323] However, this would not be the case in a negotiated settlement proposal.

The court also observed that the policies that support a traditional litigation class did not authorize a court to certify a negotiation class.[324] While the certification of a litigation class could lead to a settlement, unlike a negotiation class action, its principal purpose is to resolve the common issues of a class order to more efficiently address claims of class members by means of a single lawsuit.[325] Thus, the court concluded that the proposed

316. In re Nat'l Prescription Opiate Litig., 976 F.3d 664, 667 (6th Cir. 2020).

317. *Id.* at 671–72.

318. *Id.* at 672.

319. *Id.*

320. *Id.*

321. *Id.*

322. Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

323. In re Nat'l Prescription Opiate Litig., 976 F.3d at 673 (citing Achem Products, Inc. v. Windsor, 521 U.S. at 620).

324. *Id.*

325. *Id.* at 674.

negotiation class did not resemble either a litigation class or a settlement class.[326]

D. The Limited Global Settlement

After the negotiation class action was rejected, Johnson & Johnson, AmerisourceBergen Corporation, Cardinal Health, Inc. and McKesson Corporation offered to settle with the states and the MDL plaintiffs for $26 billion. The proposed class would include every city and county in the United States.[327]

On February 25, 2022, the Committee announced that more than 90% of the local government litigants had approved new proposed settlement. This settlement would allocate funds to state and local government entities and Indian tribes based on population and the proportionate share of the opioid epidemic's impact. This allocation would be determined by national data, including the quantity of opioid products distributed to each state, the number of opioid-related deaths in the state, and the number of persons who suffered opioid-related injuries in the state. Finally, the settlement would require the defendants to introduce detailed corporate practices to protect health and welfare of consumers. Not all of the parties have agreed to abide by the terms of the settlement. Some plaintiffs may choose to continue to litigate on their own and a number of opioid manufacturers and retail pharmacy chains are not yet parties to the settlement.

VI. BANKRUPTCY PROCEEDINGS

In June 2019, Insys Therapeutics, Inc. became the first opioid manufacturer to file for chapter 11 bankruptcy.[328] The company manufactured Subsys, a highly-addictive fentanyl-based sublingual spray that was approved by the FDA for opioid-tolerant cancer patients.[329] In May 2019, the founder of Insys,

326. *Id.*

327. In re Nat'l Prescription Opiate Litig., 976 F.3d 664, 667 (6th Cir. 2020).

328. Jeff Montgomery, *Insys OK for Ch. 11 Plan with Opioid Recovery Trust*, LEXIS LAW360 (Jan. 16, 2020) [https://perma.cc/9AKV-6HF9].

329. Stacey A. Tovino, *Fraud, Abuse, and Opioids*, 67 U. KAN. L. REV. 901, 909 (2019).

John Kapoor, and four of the company's executives were convicted of criminal racketeering changes in a federal district court.[330]

The company's proposed reorganization plan was approved by Bankruptcy Judge Kevin Gross in January 2020.[331] The principal feature of the Insys Bankruptcy Plan was the creation of a Victims Restitution Fund (VRT) to compensate individuals for opioid-related personal injuries and wrongful deaths.[332] States, cities, and Indian tribes were also eligible to seek compensation from the VRT.[333] It has been estimated that the VRT would initially receive about $160 million for this purpose.[334] Once the VRT is funded, the VRT Claims Administrator would evaluate claims that had been filed in the Insys bankruptcy proceeding pursuant to the Claims Analysis Protocol that was set forth in the Bankruptcy Plan.[335]

Later that month, Mallinckrodt and its affiliates filed a proposed reorganization plan with the bankruptcy court for the district of Delaware.[336] Under this plan, Mallinckrodt agreed to pay $1.75 billion to settle all of the lawsuits pending against it.[337] After creditors of the company overwhelmingly voted in favor of the final reorganization plan, it was approved by Bankruptcy Judge John Dorsey in February 2022.[338] Under this plan, opioid claims by state and local governments and Indian tribes, as well

330. Leah Creathorn & Randi Thompson, Down the Drain: The Bankruptcy of Insys Therapeutics, Inc., 13 Chapter 11 Bankruptcy Case Studies 1, 65 (2022) (Legal Scholarship Repository: A Service of the Joel A. Katz Law Library, University of Tennessee College of Law).

331. In re Insys Therapeutics Inc., No. 19-11292 (Bankr. D. Del. Jan. 14, 2020) (Chapter 11 plan of liquidation).

332. *Id.*

333. *Id.*

334. Montgomery, *supra* note 328.

335. In re Insys Therapeutics Inc., No. 19-11292 (Bankr. D. Del. Jan. 14, 2020).

336. In re Mllinckrodt PLC, 639 B.R. 837, 851 (2022).

337. *Id.* at 853.

338. *Id.* at 854–55.

as other claims by unsecured creditors would be paid by various trusts funded by Mallinckrodt.[339]

The Purdue bankruptcy case proved to be more complicated. Purdue filed for bankruptcy under chapter 11 of the Bankruptcy Code in September, 2019.[340] In that case, the automatic stay order not only stopped all civil litigation against Purdue, but a court ordered stay order also halted more than a thousand lawsuits against members of the Sackler family who were the owners of the company.[341] Purdue's original Reorganization Plan provided that claimants would be eligible to receive compensation from one of the nine trusts that would be established pursuant to the Plan.[342] Although the Sackler family would no longer have any ownership interest or control over Purdue, they agreed to contribute $4.275 billion to these trusts in order to resolve all civil claims against them.[343] Furthermore, the Plan also proposed to transfer most of Purdue's assets to a new nonprofit company owned by the National Opioid Abatement Trust and the Tribe Trust.[344] The company would act in the public interest and produce distribute various treatment and overdose reversal medicines as well as other drugs.

More than 95% of Purdue's creditors voted to approve the plan, but eight states, the District of Columbia, the City of Seattle, four Canadian municipalities and two Canadian First Nations, as well as more than 2,600 personal injury claimants, voted against approving the Plan.[345] The United States Trustee in Bankruptcy and the U.S. Attorney also opposed the Plan.[346] The objectors contended that a Shareholder Release in favor of the Sacklers violated their right to due process, violated the objector states' sovereignty and police power and was not permitted under the Bankruptcy Code.[347] The objectors also

339. *Id.* at 877.

340. In re Purdue Pharma, L.P., 635 B.R. 26, 51 (S.D.N.Y. 2021).

341. *Id.*

342. *Id.* at 66.

343. *Id.* at 67–70 (This was later raised to later raised to $4.325 billion).

344. *Id.* at 66.

345. *Id.* at 70.

346. *Id.* at 69.

347. *Id.* at 68.

claimed that the Bankruptcy court did not have the constitutional, statutory or equitable authority to approve the Shareholder Release.[348] Nevertheless, after a lengthy hearing, the proposed Reorganization Plan was confirmed by the bankruptcy judge, Robert Drain, on September 17, 2021.[349]

Judge Drain approved the Reorganization Plan, including the Shareholder Release Agreement, because he found that: (1) the Sackler settlements resulted from arms-length bargaining by experienced counsel; (2) the vast majority of Purdue's creditors supported the settlement; (3) failure to approve the settlement would lead to protected litigation while approval would produce immediate benefits to the bankruptcy estate and its creditors; (4) it would be difficult for individual creditors to enforce any judgments against the Sacklers; (5) unraveling the Plan would lead to liquidation of Purdue under Chapter 7; and it would also be difficult for the bankruptcy estate to prevail against the Sacklers.[350]

However, a number of creditors then appealed and on December 16, 2021, District Judge Colleen McMahon ruled that the Bankruptcy Court did not have the authority to grant immunity to third parties such as the Sackler family.[351] In her lengthy 142-page opinion, Judge McMahon discussed a wide range of topics, including the history and structure of Purdue Pharma, the involvement of various members of the Sackler family in the management of Purdue Pharma, the chemical nature of OxyContin, Purdue's marketing of OxyContin, the resulting opioid epidemic, pre-bankruptcy litigation, the transfer of Purdue's assets by the Sacklers to offshore asset protection trusts, the Bankruptcy Plan and the issues on appeal. [352]

The court first concluded that it would apply a *de novo* the standard of review with respect to both findings of fact and conclusions of law.[353] Next, it determined that the Bankruptcy Court had subject matter jurisdiction to impose a release of non-

348. *Id.*

349. *Id.* at 69.

350. *Id.* at 71–72.

351. *Id.* at 118.

352. *Id.* at 34–82.

353. *Id.* at 79–82.

debtor claims.[354] Although the court declared that the release of most third-party claims against a non-debtor "touches the outer limit of the Bankruptcy court's jurisdiction,"[355] it ultimately concluded that the Bankruptcy Court had subject matter jurisdiction over non-derivative third-party claims against the Sacklers under the "related to" aspect of bankruptcy jurisdiction.[356]

The court then addressed the question of whether a bankruptcy court had the statutory authority to prohibit third parties from asserting non-derivative claims against a non-debtor.[357] The court's analysis focused on 11 U.S.C. sections 1129(a)(1), 1123 (a)(5), 1123(b), 105 and 524(e) and (g).[358] In its opinion, the court distinguished between derivative and direct claims.[359] According to the court, the issue on appeal in this case was whether a bankruptcy court had the power "to release on a non-consensual basis, *direct/particularized* claims asserted *by third parties* against *non-debtors*" (emphasis in original).[360] The court observed that derivative claims were claims that sought to recover from the bankruptcy estate indirectly on the basis of the debtor's conduct in contrast to a non-debtor's conduct.[361] In other words, a claim would be considered derivative if the bankruptcy trustee could bring it on behalf of the bankruptcy estate.[362] On the other hand, direct or particularized claims were claims that were based upon particularized injury to a third party that could be directly traced to a non-debtor's conduct.[363] The court concluded that section 10.7 of the Shareholder Release purported to release direct or particularized claims against the Sacklers

354. *Id.* at 83–89.

355. In re Johns-Manville Corp., 517 F.3d 52, 55 (2d Cir. 2008).

356. SPV Osus Ltd. v. UBS AG, 882 F.3d 333, 339–40 (2d Cir. 2018).

357. In re Purdue Pharma, L.P., 635 B.R. 26, 89–115 (S.D.N.Y. 2021).

358. *Id.* at 91–112.

359. *Id.* at 90–91.

360. *Id.* at 90.

361. In re Johns-Manville Corp., 517 F.3d 52, 62 (2d Cir. 2008).

362. In re Bernard L. Madoff Inv. Securities LLC, 740 F.3d 81, 90 (2d Cir. 2014).

363. *In re Purdue Pharma*, 635 B.R. at 90.

based on their own conduct as corporate officers of Purdue.[364] The court then addressed the question of whether any provision of the Bankruptcy Code authorized a bankruptcy court to enjoin third-party lawsuits against non-debtors as part of a bankruptcy proceeding.[365] The court's discussion focused sections 524(g), 105(a), 1123(a)(5), 1123(b)(6) and 1129(a)(1) of the bankruptcy Code.[366]

As a preliminary matter, the court noted that the United States Supreme Court on many occasions had ruled that a bankruptcy court did not have the power to do anything that was not allowed by the Code.[367] Turning to the text of the Bankruptcy Code itself, the court observed that only one section, 11 U.S.C. § 524(g), expressly authorized a bankruptcy court to enjoin third party claims against non-debtors without the consent of these third parties.[368] Furthermore, this provision was limited to cases involving asbestos claims and specified that certain conditions must be satisfied before an injunction could be issued.[369] *In MacArthur Co. v. Johns-Manville Corporation*, the Second Circuit Court of Appeals held that a bankruptcy court could enjoin and channel lawsuits against Manville's insurer because those insurance policies were "property of the debtor's estate."[370] Congress enacted § 524(g) to affirm that such injunctions should be allowed in asbestos cases.[371]

364. *Id.* at 90–91.

365. *Id.* at 91–92.

366. *Id.* at 89–115.

367. Czyzewski v. Jevic Holdings Corp., 137 S. Ct. 973, 984 (2017); Law v. Siegel, 571 U.S. 415, 425 (2014); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012).

368. *In re Purdue Pharma*, 635 B.R. at 91.

369. *Id.*

370. MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 90 (2d Cir. 1988).

371. *In re Purdue Pharma*, 635 B.R. at 91.

The court then reviewed a number of court decisions from the Second Circuit,[372] as well as from other circuits,[373] that discussed the effect of § 105(a) on the validity of non-consensual releases of third-party claims against non-debtors. It concluded that a majority of circuit courts, including the Second Circuit, had determined that § 105(a) did not allow a bankruptcy court to release third-party claim against non-debtors.[374]

The court also considered whether § 1123(a)(5) authorized a non-consensual release of non-debtor liability to a third-party claimant.[375] This provision declared that a bankruptcy plan of reorganization must provide "adequate means" for its implementation.[376] It also provided an extensive list of things that a plan could include to ensure that adequate resources would be available to implement the plan.[377] Purdue had argued that this provision might authorize a bankruptcy court to enjoin claims against a non-debtor in order to induce the non-debtor to contribute funds to the bankruptcy estate as a means of providing resources to implement the reorganization plan.[378] However, the court rejected this contention, pointing out, all of the examples in § 1123(a)(5) were concerned with the debtor's assets only.[379]

372. Lynch v. Lapidem, 792 Fed. App'x 99 (2d Cir. 2019); United States v. Wrensford, 866 F.3d 76 (3d Cir. 2017); In re Bernard L. Madoff Inv. Securities LLC, 740 F.3d 81 (2d Cir. 2014); In re Quigley Co., 676 F.3d 45 (2d Cir. 2012); In re Metromedia Fiber Network, Inc., 416 F.3d 136 (2d Cir. 2005); New England Dairies, Inc. v. Dairy Mart Convenience stores, Inc., 351 F.3d 86 (2d Cir. 2003); In re Drexel Burnham Lambert Grp, Inc., 960 F.2d 285 (2d Cir. 1992).

373. In re Seaside Eng'g & Surveying, 780 F.3d 1070 (11th Cir. 2015); Nat'l Heritage Found., Inc. v. Highbourne Found., Inc., 760 F.3d 344 (4th Cir. 2014); In re Pacific Lumber Co., 584 F.3d 229 (5th Cir. 2009); In re Combustion Engineering. Inc., 391 F.3d 190 (3d Cir. 2004); In re Continental Airlines, 203 F.3d 203 (3d Cir. 2000); In re Lowenschuss, 67 F.3d 1394 (9th Cir. 1995); In re W. Real Estate Fund, 922 F.2d 592 (10th Cir. 1990).

374. *In re Purdue Pharma*, 635 B.R. at 105.

375. *Id.* at 108.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.* at 109.

Furthermore, the court also concluded that § 1129 (a)(1) did not provide any statutory authority for a bankruptcy court to issue a § 105(a) injunction or a release of liability for a non-debtor.[380] Instead, the court concluded that this provision merely declared that a bankruptcy court could confirm a reorganization plan only if it complied "with the applicable provisions of this title" and did not confer any substantive authority for the court to grant of release of non-debtor liability.[381]

In addition, the court found that § 1123(b)(6) did not provide a statutory basis for a § 105(a) injunction or for court approval of a release.[382] As Judge McMahon observed, § 1123(a)-(b) describes what a plan of reorganization must and may have in order to be confirmed.[383] § 1123(b)(6) declares that such a plan may "include any other appropriate provision not inconsistent with the applicable provision of this title."[384] However, the court found that the Section 10.7 Shareholder Release was inconsistent with the Bankruptcy Code because it purported to release claims for fraud or willful and malicious conduct which could not be discharged by Purdue through bankruptcy.[385] According to the court, the same restriction should apply to non-debtors like the Sacklers.[386] In addition, the court pointed out that a bankruptcy court did not have the power to discharge fines, civil penalties or forfeitures payable to a governmental unit.[387]

Having concluded that no statutory provision expressly authorized a bankruptcy court to issue an injunction or release to protect a non-debtor from liability to third-parties, the court went on to consider whether such power could be implied from the fact that it was not expressly prohibited by the Bankruptcy Code.[388] It rejected that assumption for a variety of reasons. First, the court concluded that it was inconsistent with the fact that

380. *Id.*

381. *Id.*

382. *Id.* at 106.

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* at 109.

Congress intended the Bankruptcy Code to provide "a comprehensive federal system to govern the orderly conduct of debtors' affairs and creditors' rights."[389] Second, the court declared that is was difficult to assume that silence meant consent when one would have expected Congress to have spoken.[390] Thus, if Congress intended "to free the debtor of his personal obligations while ensuring that no one else reaps a similar benefit,"[391] there would be no reason to include language that expressly prohibited any actions that were inconsistent with that policy. Third, the court pointed out that in § 524(g) and §524 (h), Congress had expressly limited the power of bankruptcy courts to release third-party claims against non-debtors to asbestos litigation. Fourth, citing the Supreme Court's opinion in *RadLAX Gateway Hotel*,[392] the court noted that the specific governs the general in matters of statutory construction. Thus, the fact that Congress deliberately limited the release of third-party claims against non-debtors to asbestos bankruptcies strongly suggested that the specific interpretation should prevail over a more general one.

Finally, the court addressed the residual authority concept which Judge Drain relied upon when he confirmed Purdue's Reorganization Plan. Under this theory, a bankruptcy court has "residual authority," not based on the provisions of the Bankruptcy Code, to approve reorganization plans that include all "necessary and appropriate" provisions as long as they are not inconsistent with the Code.[393] However, the court concluded that the Bankruptcy Court had no residual authority to approve non-debtor release provision of the Purdue Reorganization Plan because it was inconsistent with the provisions of the Bankruptcy Code. For these reasons, the district court vacated the Bankruptcy Court's approval of the Purdue Reorganization Plan.[394]

389. E. Equip. & Servs. Corp. v. Factory Point Nat'l Bank, Bennington, 236 F.3d 117, 120 (2d Cir. 2001).

390. In re Purdue Pharma, L.P., 635 B.R. 26, 110 (S.D.N.Y. 2021).

391. Green v. Welsh, 956 F.2d 30, 33 (2d Cir. 1992).

392. RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012).

393. United States v. Energy Resources Co., 495 U.S. 545, 549 (1990).

394. *In re Purdue Pharma*, 635 B.R. at 115.

VIII. RESOLVING THE OPIOID LITIGATION PROBLEM

A. Requirements for the Resolution of Mass Tort Claims

Ideally, any process for the resolving complex mass tort claims, such as those involving opioids, should include: (1) a mechanism for determining liability; (2) a formula for allocating responsibility among defendants if there are more than one of them; and (3) a method for distributing damage awards among plaintiffs given the fact that the resources available for distribution will typically be far less than the size of the aggregate claims of the plaintiffs.

1. Determining Liability

It is desirable to develop a procedure identify the potential liability theories available to the plaintiffs as well as the possible defenses available to the defendants. Unless these liability issues are established *ex ante* by statute, it usually must be determined by litigation. To be sure, there have been cases, such as the tobacco litigation, where the parties reached a "global" settlement without explicitly determining the legal basis for liability.[395] Indeed, one of the possible benefits of such a settlement, at least as far as the parties are concerned, is that it sidesteps the question of liability and, thereby, helps to protect the defendant's reputation. Nevertheless, some authoritative finding of legal and moral responsibility is necessary to provide the basis for recovering damages.

The traditional method of reaching a consensus on the liability issue is to have numerous courts independently hold the defendant liable. Even if their determinations conclusions are not unanimous, they will reveal what the weight of authority is on the liability issue. However, this process is expensive because it necessarily involves bringing a number of separate lawsuits in various courts as was true in the asbestos, handgun and lead paint cases.

Another way to determine liability is through a class action. While this is more efficient, and probably cheaper, than a series of separate trial and appeals court cases, it seems to work best

395. Richard A. Daynard et al., *Implications for Tobacco Control of Multistate Tobacco Settlement,* 91 AM. J. PUB. HEALTH 1967, 1967 (2001).

when there is only a single defendant or a small group of defendants engaged in similar tortious of conduct.

Unfortunately, a conclusive determination of liability is more difficult when a diverse group of defendants or plaintiffs is involved in such litigation. This is a problem with opioid litigation. There are at least three principal groups of defendants, manufacturers, distributors, and retail pharmacies, each engaged in different activities and each of whom may be subject to different liability theories and defenses. Likewise, various groups of plaintiffs, such as states, local governmental entities, Indian tribes, and individual victims, have different types of liability claims and may be subject to different defenses.

All of this suggests that a large number of individual cases may have to be tried before liability issues can be resolved once and for all. Unfortunately, this process will certainly be both time consuming and expensive. After more than eight years of opioid litigation, only a few cases have actually gone to trial and only one has been decided at the appellate level. If individual lawsuits are the only option, it may take many more years to conclusively determine which, if any, opioid defendants can be held liable for the current opioid epidemic.

A possible alternative is the use of bellwether trials in connection with a MDL proceeding. Once discovery and other pretrial measures have been completed, one would expect liability issues and defenses to be resolved in bellwether trials fairly quickly. However, in at least the opioid litigation context, only a few bellwether cases have actually been tried and the results of these trials have been decidedly mixed.

2. Apportioning Liability Among Defendants

Once the total amount of damages is determined, the next step is to apportion it among defendants, assuming there are more than one. However, before liability can be apportioned, it must be determined how much money is actually available to pay the outstanding claims. While this is relatively easy to do in a bankruptcy proceeding where there is only one debtor whose assets must be fully disclosed, this issue is much more complex in mass tort litigation where there are multiple defendants with varying amounts of wealth. In litigation, apportionment of liability is determined on a case-by-case basis in numerous trials. A better option is for the parties to negotiate some sort of global

settlement in which liability can be allocated in a fair and rational way.

3. Distributing Proceeds Among Plaintiffs

A similar problem arises in connection with the distribution of a damage award or the proceeds of a settlement among the plaintiffs. As in the case of apportionment of liability among defendants, determining the amounts each plaintiff should receive is complicated by the fact that these plaintiffs may have suffered different injuries. Another problem with apportionment is that the defendants' total assets are likely to be much less than the plaintiffs' aggregate claims. If plaintiffs are allowed to pursue their claims on an individual basis, the defendants will eventually run out of money and those who have not obtained a final judgment may end up with nothing. Once again, distribution of proceeds among plaintiffs, can probably best be achieved pursuant one or more global settlements.

B. Problems with Current Litigation Options

(1) provide a process for determining liability (2) provide a formula for allocating responsibility among multiple defendants, if necessary; and (3) provide a method for distributing damage awards among plaintiffs. To summarize, opioid litigation has taken three distinct litigation pathways: (1) individual lawsuits, mostly brought by state attorneys general; (2) multidistrict litigation and (3) section 11 bankruptcy proceedings. Unfortunately, each of the three litigation paths discussed above, at least in the case of opioids, fails to fully satisfy these requirements.

1. Individual Lawsuits

An individual lawsuit is a good method for determining liability in an individual case. However, it is less helpful when, as in opioid litigation, other parties have filed lawsuits to resolve the same issue. If most of these cases do not reach the same result, there will be no clear answer to the liability issue. This occurred several decades ago when a number of cities and states sued handgun manufacturers and distributors alleging negligent marketing and public nuisance.[396] Although the defendants won

396. *See* Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 840–53 (2004) (discussing some of these cases).

most of these cases, they did not win them all so no final resolution occurred.[397] So far, this has been the outcome in the opioid cases where court decisions are also split.

An individual lawsuit may allocate responsibility among multiple defendants in certain circumstances. For example, a court may apportion liability among various tortfeasors, such as polluters, if it determines that their liability is individual and not joint. On the other hand, if the defendants are treated as joint tortfeasors, they will be held jointly and severally liable. In such cases, the plaintiffs may recover damages from any or all of the defendants up to the amount of the damage award. Thus, any apportionment of liability among the defendants will not necessarily result from consideration of fairness or relative culpability.

Finally, an individual lawsuit should provide a method for distributing a damage award among multiple plaintiffs. Of course, this will not happen in a case where there is only one plaintiff. On the other hand, some sort of aggregate distribution of damage awards will result if lawsuits filed by numerous individual plaintiffs against multiple defendants either go to trial or are settled.

2. MDL

MDL is another potential pathway. However, because it only designed to deal with pretrial issues, it is not to be useful as a means of determining liability, allocating responsibility among multiple defendants, or allocating damage awards among plaintiffs. However, these goals may be accomplished as part of an MDL if it leads to a settlement. However, as the recent experience shows, this will occur only when most of parties are willing to settle.

Nevertheless, cumbersome though it may be, MDL may still be the most promising avenue among the available alternatives for resolving multiparty tort case such as the current opioid litigation. First, the use of bellwether trials can provide the parties with information about liability, defenses and potential damages. Second, the MDL process can facilitate a global settlement agreement among all or most of the parties by which a fund along with each defendant's contribution to it, can be determined. Likewise, the settlement agreement can create a

397. *Id.*

formula for distributing the fund to plaintiffs through a trust fund or other means. When the plaintiffs are government entities, the settlement agreement can also direct that the money be spent for particular purposes such as remediation. Finally, such an agreement can regulate the conduct of the defendants to ensure that they do not engage in fraud or other misconduct in the future.

3. Bankruptcy

In many respects, a chapter 11 bankruptcy proceeding may be the most effective mechanism for resolving complex tort cases. In the first place, the bankruptcy estate constitutes a fixed amount that is available for distribution to creditors. Moreover, creditors only have a limited time to file claims and the court can set aside some of the bankruptcy estate for the payment of future claims. In addition, all creditors must take part in the bankruptcy proceeding and are bound by any bankruptcy plan that is approved by the court. Furthermore, if the parties can negotiate a settlement agreement, its terms can be incorporated into the final reorganization plan.

On the other hand, bankruptcy proceedings are usually not concerned with making moral judgments about the debtor's behavior although the right of a creditor to receive compensation depends on establishing a legal claim against the debtor's estate. However, bankruptcy's greatest limitation is that it usually involves only one defendant who is insolvent and who is seeking relief from creditors. Consequently, it is less useful when more than one defendant is involved or when the defendant is solvent.

VII. Settlement

In most mass tort cases traditional litigation is only the first part of a long and arduous process by which numerous claims can be ultimately resolved. Even when the defendants' liability is indisputable, the parties must still deal with apportionment and distribution issues. This is normally done through the settlement process, regardless of whether the case originates as individual litigation, consolidated litigation (i.e., a class action or MDL) or in a chapter 11 bankruptcy proceeding.

Once the parties decide to settle, the actual settlement process may be completed fairly expeditiously. For example, in the case of the tobacco litigation, the parties negotiated a Master Settlement Agreement which specified the amount each

defendant would pay and the amount that each state would receive.[398]

Settlements have also been employed to resolve class actions and MDL cases. For example, when a large number of plaintiffs sued Merck for personal injuries resulting from their use of its prescription drug, Vioxx, the claims in federal courts were transferred to an MDL in the Eastern District of Louisiana.[399] With the help of the MDL judge, the parties negotiated an agreement under which Merck placed $485 million in a fund to pay heart attack and stroke victims according to an agreed compensation formula.[400]

Settlements can also be used in bankruptcy cases to compensate present and future personal injury victims. An early example of this practice involved a large number many of the lawsuits brought against asbestos manufacturers such as the Johns-Manville Company.[401] A similar approach was used to resolve tort claims against A.H. Robins Company, the manufacturer of the Dalkon Shield intrauterine device.[402]

Although a settlement agreement is perhaps the best way to resolve apportionment and distribution issues, it tends to work best when there is only one defendant (or a small number of defendants engaged in the same conduct) along with a group of plaintiffs that have suffered similar injuries. Unfortunately, as the current opioid litigation suggests, a settlement is much harder to reach when a diverse group of plaintiffs or defendants is involved in the litigation. As mentioned earlier, it has been difficult to reach a global settlement in the current opioid litigation because the defendants include opioid manufacturers, distributors, and

398. Andrew J. Haile & Matthew W. Krueger-Andes, *Landmark Settlements and Unintended Consequences,* 44 U. TOL. L. REV. 145, 145–46 (2012).

399. In re Vioxx Prods. Liab. Litig., 239 F.D.R. 450, 452 (E.D. La. 2006).

400. Howard M. Erichson & Benjamin C. Zipursky, *Consent Verus Closure,* 96 CORNELL L. REV. 265, 279 (2011).

401. Robert Jones, Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings,* 96 HARV. L. REV. 1121, 1121–22 (1983).

402. C. Gavin Shepherd, *Transvaginal Mesh Litigation: A New Opportunity to Resolve Mass Medical Device Failure Claims,* 80 TENN. L. REV. 477, 485 (2013).

retail pharmacies and the plaintiffs include government entities as well as individuals who have suffered various kinds of personal injuries from their exposure to opioids.

How can such a diverse group of plaintiffs and defendants reach a consensus on apportionment of liability and payment of claims? One possibility to employ a negotiation class action. In the opioid MDL proceeding Judge Polster certified the class and a supermajority of the litigants approved of the settlement terms.[403] However, a few plaintiffs argued that the district court did not have the authority to approve a negotiation class. On appeal, the Sixth Circuit Court held that the district court did not have the authority to approve a negotiation class.[404]

Nevertheless, the concept of a negotiation class action is a promising one provided that most of the litigants are willing to accept the proposed terms. Its most useful feature is that it provides a mechanism for binding most of the plaintiffs to the agreement and, thus, provides closure for the defendants and compensation for the plaintiffs. However, if the Sixth Circuit Court's analysis is correct, Congress will have to amend the current class action rules to expressly authorize negotiation class actions. Despite these obstacles, it appears that a significant settlement agreement has bee negotiated and will be accepted by most of the parties to the litigation. Furthermore, this settlement will probably serve as a template for separate settlements with parties who have not participated in the global settlement process.

VIII. CONCLUSION

What is the takeaway from all of this? First, the existing system works fairly well when there is only one defendant or a few defendants engaged in the same sort of conduct. If liability is fairly clear, the defendant will frequently want to settle the damages issue as soon as possible so that it can move on. This seems to be the pattern in many of the drug cases. The settlement process may take much longer if there is a genuine disagreement about the defendant's legal liability. In such cases, it may be

403. In re Nat'l Prescription Opiate Litig., 976 F.3d 664, 669 (6th Cir. 2020).

404. *Id.* at 677.

necessary to bring a number of cases to trial before meaningful settlement negotiations can begin.

In other cases, exemplified by the current opioid litigation, there may be no easy way to resolve liability, allocation, and distribution issues. Of course, this may not be a concern if opioid litigation is *sui generis*. Unfortunately, similar litigation is already looming on the horizon. Almost any industry which markets dangerous products is likely to be targeted by both state and local governments as well as private parties. This includes producers and sellers of handguns, videogames, electronic cigarettes, lawn care products, fast food, and certain over-the-counter drugs. Like the opioid industry, these industries are characterized by different actors engaged in different conduct. The situation in these cases is complicated by the fact that other plaintiffs besides state and local governments may be seeking compensation for different injuries.

When such litigation occurs, the best approach may be that taken in the opioid litigation, that is, consolidation in a MDL for discovery and decisions regarding pretrial motions, bellwether trials, and the formation of a negotiation class. While this process is both time-consuming and expensive, it may still be the best way to ultimately reach a settlement that is fair to all parties.