University of Miami Law Review

Volume 79 | Number 2 Article 4

1-22-2025

Prescription for Failure: Public Nuisance Claims Against the Opioid Industry

Francis A. Citera
Greenberg Traurig

Julia Steiner
University of Miami School of Law

ARTICLES

Prescription for Failure: Public Nuisance Claims Against the Opioid Industry

FRANCIS A. CITERA* AND JULIA STEINER**

Opioids have been used both medicinally and recreationally since ancient times. While their recreational functions have long since been denounced, their medicinal value remains legitimate. Yet, since the pain management revolution began in the mid-1990s, many Americans have become opioid-dependent—fueling an illicit drug market and costing many lives. The tragedy that is today's opioid epidemic has prompted robust federal and state legislative and regulatory interventions in both the legal and illicit opioid markets—albeit with mixed success. As these initiatives have been slow to quell the opioid crisis, public nuisance claims have taken center stage. After the Big Tobacco litigation invoked the common law doctrine and ultimately resulted in the historic

* Francis A. "Frank" Citera is a shareholder at Greenberg Traurig and a nationally-recognized trial lawyer representing clients in product liability, toxic torts, class actions, and other complex litigation matters in federal and state courts. Frank is co-chair of the firm's Product Liability and Mass Torts Litigation Practice and co-chair of the Chicago Litigation Practice. An experienced architect of litigation strategies, Frank defends companies in various industries and business sectors, including retailers, technology, and electronics companies. He has achieved success in defeating class certification, disputing alleged claims in court, and obtaining summary judgments and dismissals prior to trial. Recognized as a thought leader in the area of toxic torts, he serves as an adjunct professor at the University of Miami School of Law teaching toxic torts to the next generation of lawyers.

** Article and Comments Editor, *University of Miami Law Review*, Volume 79; J.D. Candidate 2025, University of Miami School of Law; B.S. 2019, University of Miami.

Master Settlement Agreement, public nuisance captured the attention of state governmental entities in the firearm and lead paint industries. Those litigations produced varying results among the states. While some courts properly rejected the novel application of public nuisance to the manufacture, sale, and distribution of lawful products, others permitted claims to survive past the motion to dismiss stage, prompting product manufacturers, distributors, and retailers to agree to exorbitant settlements. Perhaps unsurprisingly then, the legal theory has gained popularity in claims against deep-pocketed opioid industry actors. However, like the tobacco, firearm, and lead paint industries, public nuisance does not fit within the historically recognized definition of public nuisance, which has long been understood as being limited to unlawful activities and real property contexts.

In addition to being, at best, unorthodox and novel, and at worst, legally deficient and unsupported by history and precedent, public nuisance is a poor vehicle to address a national, highly political problem—particularly in the legal prescription drug market, which touts many benefits and is already heavily regulated by the duly elected members of the legislative and executive branches of government.

INTRODUCTION

Overdose deaths related to opioid use in the United States have steeply risen over the last two decades.[1] So much so that the U.S. now leads the world in opioid-related deaths per capita.[2] All agree—the crisis represents an immense tragedy affecting millions of American families. Most would agree that federal and state initiatives, though extensive, have spurred lackluster results. And when legislative and executive actions leave more to be desired, the impulse is to turn to the courts for immediate change. Thus, over the last decade, state and governmental entities have taken their frustration with the growing national opioid crisis to the bench.[3]

Modeling their claims after lawsuits brought against other manufacturers, distributors, and retailers of products, plaintiffs claim that the entire prescription opioid supply chain has created a public nuisance by contributing to the opioid epidemic.[4] It is unclear whether their public nuisance claims rest on a good faith belief that products (especially those that are heavily regulated, like opioids) are properly within the tort's ambit beyond the application of traditional products liability, regulations, and statutes at the federal and state level. But because each of those other legal theories fail as a matter of law, governmental entities have tried their hands at public

---

[1] *See U.S. Overdose Deaths Involving Prescription Opioids, 1999-2022*, Part of *Drug Overdose Deaths: Facts and Figures*, NAT'L INST. ON DRUG ABUSE (Aug. 21, 2024), https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates#Fig4 (3,442 deaths in 1999 to 17,029 in 2017).

[2] CONG. BUDGET OFF., 58221, THE OPIOID CRISIS AND RECENT FEDERAL POLICY RESPONSES 6 (2022), https://www.cbo.gov/system/files/2022-09/58221-opioid-crisis.pdf ("More than 500,000 opioid-involved deaths have occurred since 2000. The United States has the world's highest number of opioid-involved deaths per capita . . . .").

[3] *See* discussion *infra* Part III.

[4] *See* discussion *infra* Part III.

nuisance—either resulting in large settlements against opioid manufacturers, distributors, and retailers or receiving their rightful fate of dismissal. The legal theory upon which these public nuisance claims rest, however, are unprincipled, impractical, and unworkable.

This Article begins by framing the problem of the opioid crisis in the United States. Part I outlines the history of opioids, describes the epidemic as it exists today, and considers federal legislative and executive responses to the crisis.[5] Section II.A provides an overview of the history of the tort of public nuisance at common law.[6] Section II.B explains the revolution of public nuisance claims against product manufacturers, distributors, and retailers, beginning with the landmark Big Tobacco litigations.[7] Part III discusses public nuisance as applied to opioids, focusing on the Oklahoma Supreme Court's decision in *State ex rel. Hunter v. Johnson & Johnson*,[8] the first state supreme court to rule on the issue.[9] Finally, Part IV explains precisely why public nuisance claims are incompatible with lawful opioid operations.[10]

I. FRAMING THE PROBLEM

A. *History of Opioid Use in the United States*

Opium, a natural substance contained in the poppy plant, has been used both medicinally and recreationally since ancient times.[11]

---

[5] *See* discussion *infra* Part I.

[6] *See* discussion *infra* Section II.A.

[7] *See* discussion *infra* Section II.B.

[8] 499 P.3d 719, 723–31 (Okla. 2021).

[9] *See* discussion *infra* Part III.

[10] *See* discussion *infra* Part IV.

[11] *See Opium Poppy*, DEA MUSEUM, https://museum.dea.gov/exhibits/online-exhibits/cannabis-coca-and-poppy-natures-addictive-plants/opium-poppy (last visited Nov. 19, 2024) ("The earliest reference to opium growth and use is in 3,400 B.C. when the opium poppy was cultivated in lower Mesopotamia (Southwest Asia). The Sumerians referred to it as *Hul Gil*, the 'joy plant.' The Sumerians soon passed it on to the Assyrians, who in turn passed it on to the Egyptians.").

The Egyptians used opium to soothe restless babies.[12] Traveling the Silk Road, it was traded in countries across the globe.[13] The United States has seen several waves of opioid use throughout its history.[14] Morphine use skyrocketed in the Civil War era, as battle injuries and diseases plagued the nation.[15] Thereafter, opioids became ubiquitous pain relievers in the U.S.—used to treat everything from "diarrhea to toothache[s]."[16] In 1898, Bayer began marketing heroin as a cough suppressant.[17]

However, at the turn of the century, a shift occurred in the public attitude towards opiates. National concern over pervasive use and lack of regulation led to the passage of the 1914 Harrison Narcotic Act, which required prescribers and retailers to register and report to the federal government.[18] By 1924, heroin was outlawed.[19] The following decades saw even greater federal regulations with the creation of the Federal Bureau of Narcotics in 1930 (antecedent to the Drug Enforcement Agency);[20] the passage of the Narcotics Control Act in 1957;[21] and the passage of the Controlled Substances Act of

---

[12] *See* Luke Pomeroy & Kristin Hussey, *The Addictive History of Medicine: Opium, the Poor Child's Nurse*, SCI. MUSEUM (Apr. 25, 2012), https://blog.sciencemuseum.org.uk/the-addictive-history-of-medicine-opium-the-poor-childs-nurse/.

[13] *See Opium Poppy*, *supra* note 11.

[14] *See* Kellie Schmitt, *A Brief History of Opioids in the U.S.*, HOPKINS BLOOMBERG PUB. HEALTH (Nov. 8, 2023), https://magazine.publichealth.jhu.edu/2023/brief-history-opioids-us.

[15] *See id.*

[16] Mark R. Jones et al., *A Brief History of the Opioid Epidemic and Strategies for Pain Medicine*, 7 PAIN & THERAPY 13, 15 (2018).

[17] *See* Schmitt, *supra* note 14.

[18] *See id.*; Dennis McCarty et al., *The Evolution of Federal Drug Control Policy and Its Impacts on Treatment for Opioid Use Disorder: A Brief History*, ATTC (Mar. 2018), https://attcnetwork.org/attc-messenger-march-2018-the-evolution-of-federal-drug-policy-and-its-impacts-on-treatment-for-opioid-use-disorder/.

[19] Sonia Moghe, *Opioid History: From 'Wonder Drug' to Abuse Epidemic*, CNN (Oct. 14, 2016, 6:41 AM), https://www.cnn.com/2016/05/12/health/opioid-addiction-history/index.html.

[20] Schmitt, *supra* note 14.

[21] *See A Life of Service: Harry Jacob Anslinger: Cold War Narcotics Control*, DEA MUSEUM, https://museum.dea.gov/exhibits/online-exhibits/anslinger/cold-war-narcotics-control (last visited Nov. 19, 2024) ("The Narcotics Control Act, passed in 1957, was developed after hearings involving more than 340 witnesses,

1970.[22] These regulations began to raise a new concern by the 1980s: The legitimate use of opioids for pain management became increasingly taboo as the federal crackdown continued.[23] To quell concerns over legitimate opioid therapy, doctors began studying the relationship between opioid use and addiction.[24] Two of these studies concluded that addiction was "rare" and opioids were overall "safe."[25] Thereafter, the pain management revolution ensued. In 1996, the American Pain Society "pushed the concept of pain as the fifth vital sign," citing concerns of inadequate treatment due to physicians' failures to assess pain levels during health visits.[26] That same year, Purdue Pharma launched OxyContin—one of the highest dosage and longest lasting opioids on the market.[27] After engaging

---

including [Federal Bureau of Narcotics Commissioner, Harry] Anslinger. Hearings took place across [thirteen] cities and gathered 8,600 pages of testimony. The Act significantly increased penalties for drug trafficking. These included mandatory sentences for certain offences and the death penalty for selling heroin to a minor. The [A]ct also provided for greater enforcement activities for the FBN, and created the first narcotics training school.").

[22] *See The Controlled Substances Act*, U.S. DRUG ENF'T. ADMIN., https://www.dea.gov/drug-information/csa (last visited Nov. 19, 2024) ("The Controlled Substances Act (CSA) places all substances which were in some manner regulated under existing federal law into one of five schedules. This placement is based upon the substance's medical use, potential for abuse, and safety or dependence liability.").

[23] *See, e.g.*, Schmitt, *supra* note 14; Moghe, *supra* note 19 ("By the mid- and late-1970s, when Percocet and Vicodin came on the market, doctors had long been taught to avoid prescribing highly addictive opioids to patients.").

[24] *See* Moghe, *supra* note 19.

[25] *Id.*

[26] Brian F. Mandell, *The Fifth Vital Sign: A Complex Story of Politics and Patient Care*, 83 CLEV. CLINIC J. MED. 400, 400 (2016).

[27] *See OxyContin Diversion and Abuse*, NAT'L DRUG INTEL. CTR. (Jan. 2001), https://www.justice.gov/archive/ndic/pubs/651/backgrnd.htm ("OxyContin . . . acts for [twelve] hours, making it the longest lasting oxycodone on the market . . . . [It] was developed and patented in 1996 by Purdue Pharma L.P. and was originally available in 10 milligram (mg), 20 mg, 40 mg, and 80 mg tablets. A 160 mg tablet became available in July 2000. By comparison, Percocet and Tylox contain 5 mg of oxycodone and Percodan-Demi contains just 2.25 mg. The strength, duration, and known dosage of OxyContin are the primary reasons the drug is attractive to both abusers and legitimate users.").

in aggressive marketing tactics,[28] opioid prescriptions rose by eight million from 1995 to 1996.[29]

Into the twenty-first century, the problems only snowballed. Opioid sales "quadrupled from 1999 to 2010."[30] By 2012, 259 million opioid prescriptions were written—"enough for every adult in the United States to have a bottle of pills."[31] In this same time period, illicit drug dealers continued to find ways to make illicit opioids in the form of counterfeit opioid pills, heroin, and fentanyl, making the drugs increasingly cheaper and widely accessible.[32] Today, the United States is the leading country in opioid-related deaths per capita.[33]

Based on the foregoing, government agencies, including the Centers for Disease Control (CDC) and the Congressional Budget Office (CBO), characterize the present opioid crisis as having undergone at least three waves.[34] The first, beginning in 1996, is the prescription opioid wave, which saw a dramatic increase in prescriptions compared to earlier years.[35] In 2010, the second wave began, which was characterized by an uptick in heroin use and related overdoses.[36] And in 2013, the third wave began, marked by "significant

---

[28] Purdue paid physicians to "tout the benefits of [O]xyContin" and "instructed its pharmaceutical representatives all over the country to tell physicians that oxycontin was not addictive . . . ." Arthur Gale, *Sacklers Sacked But Purdue Still Caused Opioid Epidemic*, 119 MO. MED. 109, 109 (2022). "In 2007, Purdue and its top executives pleaded guilty to misleading the public about OxyContin's risks and paid more than $600 million." Schmitt, *supra* note 14.

[29] Moghe, *supra* note 19.

[30] CONG. RSCH. SERV., IF12260, THE OPIOID CRISIS IN THE UNITED STATES: A BRIEF HISTORY (2022), https://crsreports.congress.gov/product/pdf/IF/IF12260.

[31] Deborah Dowell et al., *CDC Guideline for Prescribing Opioids for Chronic Pain — United States, 2016*, 65 MORBIDITY & MORTALITY WKLY. REP. 1, 1 (2016).

[32] *See* Schmitt *supra* note 14; *see also* CONG. BUDGET OFF., *supra* note 2, at 8–9.

[33] CONG. BUDGET OFF., *supra* note 2, at 6.

[34] *See id.* at 1; *Understanding the Opioid Overdose Epidemic*, CDC (Nov. 1, 2024), https://www.cdc.gov/overdose-prevention/about/understanding-the-opioid-overdose-epidemic.html.

[35] CONG. BUDGET OFF., *supra* note 2, at 1; *Understanding the Opioid Overdose Epidemic*, *supra* note 34.

[36] CONG. BUDGET OFF., *supra* note 2, at 1; *Understanding the Opioid Overdose Epidemic*, *supra* note 34.

increases in overdose deaths involving . . . illegally made fentanyl."[37] Currently, the CBO suggests that a fourth wave has emerged, "one characterized by the use of illegally manufactured opioids in combination with psychostimulants such as cocaine and methamphetamine."[38]

B. *Legislative & Executive Actions*

The federal government has responded in a swift and bipartisan manner. In 2016, the FDA announced several policy changes.[39] These included: reexamining the "risk–benefit paradigm" of opioid prescribing practices; expanding access to abuse-deterrent opioids (e.g., anti-crush pills); increasing access to naloxone and other medications used to treat opioid use disorder (OUD); and requiring prescribing doctors to complete continuing education on opioids.[40] Similarly, the CDC stated that it has increased efforts to monitor trends, advance research, provide funding to states, engage and support healthcare workers, and raise public awareness.[41]

During the Obama Administration, the Affordable Care Act and the Mental Health Parity and Addiction Equity Act were passed.[42] Both of these laws increased access to treatment by reducing the number of uninsured patients and removing restrictions on substance abuse treatment.[43] Early in its tenure, the Trump Administration officially declared the opioid epidemic a public health emergency.[44] This enabled federal agencies to access special funds, like the Public Health Emergency Fund, and temporarily waived administrative formalities that tend to slow response.[45] Between 2016 and 2021, Congress passed several laws to limit overprescribing, control

---

[37] *Understanding the Opioid Overdose Epidemic*, *supra* note 34.

[38] CONG. BUDGET OFF., *supra* note 2, at 1.

[39] *See* Jones et al., *supra* note 16, at 17.

[40] *Id.*

[41] *See Understanding the Opioid Overdose Epidemic*, *supra* note 34.

[42] *See* Jones et al., *supra* note 16, at 18.

[43] *See id.*

[44] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-685R, OPIOID CRISIS: STATUS OF PUBLIC HEALTH EMERGENCY AUTHORITIES 1 (2018), https://www.gao.gov/assets/gao-18-685r.pdf. "The October [26,] 2017 declaration was the first time that a public health emergency declaration was made for the opioid crisis." *Id.*

[45] *See id.*

misuse, enhance illegal drug interdiction at the border, increase sanctions on noncompliant countries, and bolster treatment programs.[46] Most recently, the Biden Administration increased funding for substance use disorder treatment by 40.6 percent and drug control funding by 20.6 percent.[47]

Yet, despite extensive federal initiatives implemented over the course of multiple congresses and presidencies, the problems have persisted.[48] As a result, states and municipalities have turned to the courts, levying public nuisance claims against opioid manufacturers, distributors, and retailers. Plaintiffs allege that the entirety of the opioid supply chain has created a public nuisance by manufacturing, prescribing, distributing, and dispensing legal prescription opioids, which has increased addiction, encouraged illicit drug use, and harmed the public health.[49] Part II provides a brief history of the public nuisance cause of action and its use in the tobacco, firearm, and lead paint industries.

---

[46] Among these laws are "[(1)] the Comprehensive Addiction and Recovery Act of 2016 (CARA, P.L. 114-198); [(2)] the 21st Century Cures Act (P.L. 114-255); [(3)] the Substance Use–Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT Act, P.L. 115-271); [(4)] the Fentanyl Sanctions Act (Title LXXII of P.L. 116-92); and [(5)] the Blocking Deadly Fentanyl Imports Act (P.L. 117-81, §6610)." CONG. RSCH. SERV., *supra* note 30.

[47] Press Release, *Biden-Harris Administration Actions to Address the Overdose Epidemic*, WHITE HOUSE (Aug. 28, 2024), https://www.whitehouse.gov/ondcp/briefing-room/2024/08/28/biden-harris-administration-actions-to-address-the-overdose-epidemic/.

[48] *See, e.g.*, CONG. BUDGET OFF., *supra* note 2 ("Opioid-involved deaths continued to increase after the [CARA, 21st Century Cures Act, and SUPPORT Act] were enacted—initially more slowly than in preceding years but then more rapidly during the pandemic[,] . . . [which has] made it difficult to isolate the effect of the laws on the opioid crisis.").

[49] *See* discussion *infra* Part III.

II. PUBLIC NUISANCE CAUSES OF ACTION

A. *Historical Background*

The tort of nuisance originated in twelfth century England, where it was understood as: (1) a common law crime, and (2) relating to real property.[50] Originally, it was recognized only as a right of the Crown, but later, the tort was extended to individuals if they could prove a particularized injury not common to the public—whether different in degree or kind.[51] If the government brought suit, the only available remedy was abatement of the nuisance.[52] If a private plaintiff sued (after demonstrating a special injury), she could recover damages.[53]

Early American courts adopted these English common law nuisance principles.[54] Like in England, the tort nearly exclusively involved "invasions of the public use and enjoyment of land."[55] U.S. courts heard a greater number of public nuisance cases during the Industrial Revolution—when legislation and regulations had yet to address the issues of the day.[56] Over time, the courts developed a four-part test to determine whether something constituted a public nuisance: (1) the existence of a public right; (2) unlawful interference with that public right; (3) proximate causation of the public nuisance; and (4) control over the nuisance.[57] However, by the New Deal era—a period marked by increased government regulation—public nuisance "largely faded from American jurisprudence."[58]

---

[50] *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV., 741, 792 (2003).

[51] *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L. J. 541, 543–45 (2006).

[52] *See id.* at 570.

[53] *See id.*

[54] *See id.* at 545.

[55] *Id.*

[56] *See id.* at 545–46 ("For example, water pollution suits against companies for industrial run-off often succeeded because polluting a river was akin to the obstruction of a public waterway. By contrast, claims filed against railroads for noise and air pollution affecting the communities near the tracks often failed.").

[57] Philip S. Goldberg, *Is Today's Attempt at a Public Nuisance "Super Tort" the Emperor's New Clothes of Modern Litigation?*, 37 MEALEY'S PERS. INJ. REP. 1, 2 (2022).

[58] Schwartz & Goldberg, *supra* note 51, at 546.

That is, until the *Restatement (Second) of Torts* expanded its traditional definition.[59]

In 1965, perhaps in response to pressure from environmental groups,[60] the *Restatement* defined public nuisance as "an unreasonable interference with a right common to the general public,"[61] removing any notion of criminal conduct[62] and excluding from its definition a specific nexus to land.[63] While the *Restatement*'s definition signified a departure from historic uses of the tort, it still solidified the principle that public nuisance is largely negatively defined.[64] In other words, the tort exists as a "last resort" of sorts—if no legislature, administrative agency, or other common law doctrine has spoken on the conduct at issue, the tort of public nuisance may bridge the gap to allow courts to enjoin unreasonable conduct.[65] Where, however, there already exists a legislative enactment or administrative regulation applicable to the conduct, the *Restatement* contemplates judicial restraint towards political questions:

> The variety and complexity of a problem and of the interests involved and the feeling that the particular decision should be a part of an overall plan prepared with a knowledge of matters not presented to the court and of interests not represented before it, may also promote judicial restraint and a readiness to leave the question to an administrative agency if there is one capable of handling it appropriately.[66]

---

[59] *See* RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. L. INST. 1979).

[60] *See, e.g.*, Gifford, *supra* note 50, at 806–09; Michelle L. Richards, *Pills, Public Nuisance, and Parens Patriae: Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. RICH. L. REV. 405, 419–21 (2020).

[61] RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. L. INST. 1979).

[62] *See* Richards, *supra* note 60, at 419.

[63] RESTATEMENT (SECOND) OF TORTS § 821B cmt. h (AM. L. INST. 1979).

[64] *See id*. cmt. f. ("[I]f there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance . . . .").

[65] *See id*. § 821B(2)(b).

[66] *Id*. § 821B cmt. f.

These principles were followed in a 1971 case that is thought to be the first public nuisance claim against a product manufacturer.[67] In *Diamond v. General Motors Corp.*,[68] plaintiffs, a class of more than seven million, sued hundreds of manufacturers across various industries for increasing air pollution.[69] The plaintiffs claimed that the "system of statutes and administrative rules [governing industrial processes was] inadequate."[70] In rejecting the plaintiffs' public nuisance theory, the court reasoned that disputes over the adequacy of duly implemented regulations "are debated in the political arena and are being resolved by the action of those elected to serve in the legislative and executive branches of government."[71] It was not the province of the courts to interfere in these policy debates.[72] To be sure, this sentiment did not last long—Big Tobacco was right around the corner.

B. *As Applied to Product Manufacturers, Distributors, and Retailers*

1. TOBACCO

Beginning in the late 1990s, the Big Tobacco litigations were the impetus for the modern public nuisance lawsuits against deep-pocketed product manufacturers.[73] Ironically, of the many lawsuits filed across the nation, only one court actually ruled on the cognizability of the public nuisance claim.[74] In *Texas v. American Tobacco Co.*, the state sued to recover medical costs incurred from providing care to its citizens, alleging that the defendants' manufacture, advertising, distribution, and sale of tobacco products constituted a public nuisance.[75] Although the lawsuit contained several other theories of liability, the court dismissed the public nuisance count, stating that

---

67 *See* Gifford, *supra* note 50, at 750.

68 97 Cal. Rptr. 639, 641 (Cal. Ct. App. 1971).

69 *Id.*

70 *Id.* at 645.

71 *Id.*

72 *See id.*

73 *See* Richards, *supra* note 60, at 422.

74 *See id.*

75 Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 960–61, 972 (E.D. Tex. 1997).

it was "unwilling to accept the state's invitation to expand a claim for public nuisance beyond its ground in real property."[76]

This victory for the defense bar was quickly overshadowed by the Big Tobacco settlement the very next year.[77] In what is known as the Master Settlement Agreement (MSA), fifty-two states and territories settled with the four Big Tobacco companies for $246 billion—the largest settlement to date in U.S. history.[78]

2. FIREARMS

Public nuisance claims against gun manufacturers began shortly thereafter.[79] Most courts rejected the application of public nuisance to the firearm industry, but "a few maverick courts" accepted it.[80] Four cases reached the supreme courts of four different states.[81] In Connecticut, a municipality sued gun manufacturers for selling guns "in a manner that foreseeably leads to the guns flowing into an illegal market that, in turn, supplies guns to criminals and other unauthorized users."[82] The court rejected the public nuisance claim on remoteness grounds: The alleged nuisance—flooding the city with guns through lawful sales, which ultimately facilitated an illegal market—harmed only individuals directly, while the public at large was harmed, at most, only derivatively.[83] The court thus upheld the principle that the existence of a public right—common to all members of society, irrespective of the number of people directly affected—is the crux of a public nuisance claim.[84]

---

[76] *Id.* at 973.

[77] *See* Schwartz & Goldberg, *supra* note 51, at 554.

[78] *Id.* at 554–55; *See The Master Settlement Agreement*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement/ (last visited Nov. 20, 2024).

[79] *See* Schwartz & Goldberg, *supra* note 51, at 555–56.

[80] *Id.* at 556; *id.* at n.89 (collecting cases rejecting and allowing public nuisance against gun manufacturers and distributors).

[81] *See* Ganim v. Smith & Wesson Corp., 780 A.2d 98, 113 (Conn. 2001); City of Chicago v. Beretta U.S.A. Corp. (*Chicago v. Beretta*), 821 N.E.2d 1099, 1105–06 (Ill. 2004); City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1227 (Ind. 2003); City of Cincinnati v. Beretta U.S.A. Corp. (*Cincinnati v. Beretta*), 768 N.E.2d 1136, 1140 (Ohio 2002).

[82] *Ganim*, 780 A.2d at 109.

[83] *See id.* at 132–33.

[84] *See id.*

In Illinois, the City of Chicago and Cook County sued several gun manufacturers, distributors, and dealers on the same theory.[85] Like Connecticut, the Illinois Supreme Court declined to extend public nuisance to the gun industry.[86] Although the court did not accept the notion that public nuisance must *strictly* relate to real property,[87] it "question[ed] whether there is a public right, as opposed to an individual right, to be free from the threat of illegal conduct by others."[88] The court expressed its reluctance to recognize such a broad public right as the right not to be assaulted, noting that there was no Illinois precedent on the issue, and declined to "break new ground by creating such a precedent."[89] As for unreasonable interference and proximate cause, two other essential elements to a public nuisance claim, the court expressed doubt as to their legal sufficiency as well, and ultimately stated: "Any change of this magnitude in the law affecting a highly regulated industry must be the work of the legislature, brought about by the political process, not the work of the courts."[90]

Conversely, the Ohio and Indiana Supreme Courts came out differently.[91] In *City of Cincinnati v. Beretta*, the Ohio Supreme Court rejected the contention that public nuisance only relates to real property because "[t]he definition of 'public nuisance' . . . is couched in broad language."[92] The court reversed dismissal, stating that it would "be remiss" to dismiss at the pleading stage because "litigation may have an important role to play, complementing other interventions available to cities and states."[93] The Indiana Supreme Court

---

[85] *Chicago v. Beretta*, 821 N.E.2d at 1105–06.

[86] *See id.* at 1111 (citing RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979)).

[87] *See id*.

[88] *Id.* at 1114.

[89] *Id.* at 1116.

[90] *Id.* at 1148.

[91] *See Cincinnati v. Beretta*, 768 N.E.2d 1136, 1151 (Ohio 2002); City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1249 (Ind. 2003).

[92] *Cincinnati v. Beretta*, 768 N.E.2d at 1142.

[93] *Id.* at 1151 (quoting Jon S. Vernick & Stephen P. Teret, *New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufacturers and Constitutional Challenges to Gun Laws*, 36 HOUS. L. REV. 1713, 1754 (1999)).

agreed with the Ohio Supreme Court that public nuisance is not limited to only unlawful activities or conduct involving the use of property.[94] However, the Indiana Supreme Court "recognized that it was acting without precedent,"[95] since no binding authority had ever accepted a public nuisance claim in a context other than unlawful activities or conduct involving land use.[96] Notably, neither of these decisions addressed the antecedent question of whether there was a public right to be free from harms stemming from the lawful sale of firearms.[97]

3. LEAD PAINT

The next category of products targeted for public nuisance was lead paint.[98] The courts spoke with greater uniformity than in the gun cases: The Missouri, New Jersey, and Rhode Island Supreme Courts each rejected claims against lead paint manufacturers.[99] Missouri did so on the ground that the state failed to adequately demonstrate causation.[100] New Jersey did so on the basis that the state did not demonstrate the existence of a public right.[101] And Rhode Island rejected liability on both those grounds.[102]

Notably, the New Jersey high court, like the Ohio court in *Cincinnati v. Beretta*, acknowledged that the Restatement's definition

---

[94] *See King*, 801 N.E.2d at 1233 (citing *Cincinnati v. Beretta*, 768 N.E.2d at 1142).

[95] Schwartz & Goldberg, *supra* note 51, at 556.

[96] *See King*, 801 N.E.2d at 1231.

[97] *See id.* at 1248; *Cincinnati v. Beretta*, 768 N.E.2d at 1151.

[98] Schwartz & Goldberg, *supra* note 51, at 557.

[99] *See* City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 116 (Mo. 2007); *In re* Lead Paint Litig., 924 A.2d 484, 494 (N.J. 2007); Rhode Island v. Lead Indus. Ass'n, 951 A.2d 428, 455 (R.I. 2008). *But see, e.g.*, California v. ConAgra Grocery Prod. Co., 227 Cal. Rptr. 3d 499, 552 (Cal. Dist. Ct. App. 2017) (rejecting the contention that "interior residential lead paint" cannot "interfere with a public right").

[100] *See Benjamin Moore & Co.*, 226 S.W.3d at 116.

[101] *See In re Lead Paint*, 924 A.2d at 502.

[102] *See Lead Indus.*, 951 A.2d at 455 ("Even had the state adequately alleged an interference with a right common to the general public, which we conclude it did not, the state's complaint also fails to allege any facts that would support a conclusion that defendants were in control of the lead pigment at the time it harmed Rhode Island's children.").

of public nuisance is broad.[103] However, instead of taking the ambiguous phrase to its logical extreme (like the court did in *Beretta*[104]), the New Jersey Supreme Court stated:

> Although it might appear that the tort is expressed in rather general terms, those terms are not without meaning. In particular, the right with which the actor has interfered must be a public right, in the sense of a right 'common to all members of the general public,' rather than a right merely enjoyed by a number, even a large number, of people.[105]
>
> . . .
>
> [W]ere we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance.[106]

III. PUBLIC NUISANCE IN THE OPIOID CONTEXT

Public nuisance lawsuits in the tobacco, firearms, and lead paint contexts set the stage for similar claims against manufacturers, distributors, retailers, and Pharmacy Benefit Managers. States and municipalities have sued across the nation, alleging that the entire opioid industry is interfering with the public health by manufacturing, marketing, selling, and overprescribing opioids.[107]

The first state supreme court to rule directly on a public nuisance claim in the opioid context is Oklahoma.[108] In *State ex rel. Hunter v. Johnson & Johnson*, the Oklahoma Supreme Court reversed a

---

[103] *See In re Lead Paint*, 924 A.2d at 497; *Cincinnati v. Beretta*, 768 N.E.2d 1136, 1142 (Ohio 2002).

[104] *See Cincinnati v. Beretta*, 768 N.E.2d at 1151.

[105] *In re Lead Paint*, 924 A.2d at 497.

[106] *Id.* at 494.

[107] *See* State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719, 723 (Okla. 2021).

[108] *See id.* at 731.

$465 million judgment against Johnson & Johnson (J&J) for "creating a public nuisance in the marketing and selling of its opioid products."[109] The decision was handed down on November 9, 2021, more than four years after the state sued three opioid manufacturers—J&J, Purdue Pharma, and Teva Pharmaceuticals.[110] Purdue and Teva settled for $270 million and $85 million, respectively,[111] while J&J chose to go to trial.[112]

In its opinion, the Oklahoma Supreme Court acknowledged the tragic circumstances of the opioid epidemic from the outset.[113] But, despite the gravity of the problem, the court held that public nuisance simply does not provide a remedy.[114]

Describing the history of public nuisance at common law generally and its application in Oklahoma, the court confirmed that public nuisance liability has traditionally been limited to criminal activity or conduct linked to the use and enjoyment of property.[115] In declining to extend the cause of action to the opioid industry, the court stated that "[a]pplying . . . nuisance . . . to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers."[116] It gave three principal reasons for why "[p]ublic nuisance is fundamentally ill-suited" for lawful products: "(1) the manufacture and distribution of products rarely cause a violation of a public right, (2) a manufacturer does not generally have control of its product once it is sold, and (3) a manufacturer could be held perpetually liable for its products under a nuisance theory."[117] Reaffirming separation of powers principles, the court reasoned that public nuisance is used "to address discrete, localized problems, not policy problems."[118] The opioid epidemic represents

---

109 *See id.* at 722.
110 *See id.*
111 *See id.* at 722 n.11.
112 *Hunter*, 499 P.3d at 722.
113 *See id.* at 720–21.
114 *See id.* at 723.
115 *See id.* at 724.
116 *Id.* at 725.
117 *Hunter*, 499 P.3d at 726.
118 *Id.* at 731.

a major social and public policy problem that the legislative and executive branches are "more capable than courts to balance the competing interests at play."[119]

Another case is currently pending before the Alaska Supreme Court.[120] In *Alaska v. Walgreen Co.*, the trial court sided with the Oklahoma Supreme Court in rejecting the state's public nuisance claim against pharmacies dispensing opioids.[121] While the court acknowledged that other courts have reached different conclusions on the issue, it opted not to "liberally expand on a legal definition of public nuisance without some inkling of precedent from the Alaska Supreme Court or state legislature."[122] Citing the *Restatement (Third) of Torts*[123] and *Chicago v. Beretta*,[124] the court agreed with both authorities that "the threat of misuse of an otherwise legal product is not a violation of a public right even if there has been damage to the public."[125]

Most recently, the Ohio Supreme Court answered a certified question of state law from the Sixth Circuit related to the ongoing multidistrict opioid litigation.[126] Specifically, the federal appellate court asked the state's highest court to answer whether the Ohio Product Liability Act (OPLA) abrogated all common law public nuisance claims concerning the sale of products.[127] Notwithstanding the fact that a 2006 amendment to OPLA stated that public nuisance claims surrounding *inter alia* the manufacture, distribution, or sale of a product were included within OPLA's definition of a "product liability claim," and thus abrogated by the statute, the federal district

---

119 *Id.*

120 *See* Alaska v. Walgreen Co., No. 3AN-22-06675CI, slip op. (Alaska Superior Court Mar. 1, 2024), *cert. granted*, State v. Albertsons Co., (Alaska No. S-19048).

121 *See id.* at 6.

122 *Id.*

123 RESTATEMENT (THIRD) OF TORTS § 8 cmt. g (AM. L. INST. 2020).

124 *Chicago v. Beretta*, 821 N.E.2d 1099, 1116 (Ill. 2004).

125 *Walgreen Co.*, slip op. at 7.

126 *See In re* Nat'l Prescription Opiate Litig., No. 2024-Ohio-5744, slip op. at 5 (Ohio Dec. 10, 2024).

127 *Id.*

court, relying on extraneous legislative history, thought public nuisance claims seeking equitable remedies were unscathed by OPLA.[128]

After losing in the district court, the pharmacies reiterated their OPLA-abrogation argument on appeal to the Sixth Circuit, which "recogniz[ed] that [the Ohio Supreme Court] ha[d] not yet spoken on the proper interpretation of the OPLA in the aftermath of [multiple] [a]mendments" to the statute, and certified the question to that court.[129] The Ohio Supreme Court answered the certified question in the affirmative—OPLA indeed abrogated all common law public nuisance claims arising from the sale of products.[130] The court reasoned that the amendments to OPLA were the state legislature's "response to . . . *Beretta*," which "endors[ed] an unorthodox use of the tort of public nuisance . . . based on the manufacture, marketing, distribution, and sale of firearms."[131] The court held that the amendments were unambiguous, obviating the need to turn to legislative history[132]: "[T]he statutory definition of 'product liability claim' includes public nuisance causes of action regardless of the kind of relief requested."[133] The court found it unsurprising that the legislature meant to abrogate public nuisance claims related to the sale of products with OPLA because they were really products liability claims in "disguise[]."[134] Finally, and perhaps most importantly, the court, while acknowledging the devastating effects of the opioid crisis, recognized that "[c]reating a solution . . . out of whole cloth" was "beyond [its] authority."[135] Instead, the court acknowledged that it

---

[128] *Id.* at 3–5; The 2006 amendment reads in full: "'Product liability claim' also includes any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public." *Id.* at 7–8.

[129] *Id.* at 5.

[130] *Id.* at 2.

[131] *Id.* at 7.

[132] *In re Nat'l Prescription Opiate Litig.*, slip op. at 14.

[133] *Id.* at 8.

[134] *Id.* at 13.

[135] *Id.* at 15.

"must yield to the branch of government with the constitutional authority to weigh policy considerations and craft an appropriate remedy."[136]

While the Ohio Supreme Court's recent decision is unique in that it concerns the inaptness of public nuisance claims applied to opioids *because of an express legislative enactment abrogating them*, the court's opinion underscores the pitfalls of expansive and unconventional uses of public nuisance and exemplifies the proper limited scope of judicial authority once the legislature has spoken.[137]

IV. THE NUISANCE OF PUBLIC NUISANCE: WHY THESE CLAIMS SHOULD FAIL

"Public nuisance theory was not developed to allow private citizens the power to stop or abate conduct, to allow government to grow its coffers, to spread the risk of an enterprise, or to punish defendants."[138]

Public nuisance claims are ill-suited for the opioid epidemic because they are unprincipled, impractical, and unworkable. First, even a cursory review of the history of public nuisance at common law reveals that the manufacture and sale of legal opioids fails each of the elements that constitute the tort.[139] Moreover, these claims contravene the established products liability and regulatory regimes to which the opioid supply chain is answerable.[140] Second, the judicial forum is ineffective for the crisis. Third, remedies paid to the state are not within the bounds of traditional public nuisance remedies, and settlement funds are unlikely to redress the injuries of those directly affected by opioid addiction. We address each of these points in turn below.

A. *Unprincipled*

Gun violence, exposure to lead-based paint, and addiction are issues that have afflicted our society, past and present. But they are

---

136 *Id.*

137 *See id.*

138 Schwartz & Goldberg, *supra* note 51, at 542 (emphasis added).

139 *See* Schwartz & Goldberg, *supra* note 51 and accompanying text.

140 *See, e.g.*, RESTATEMENT (THIRD) OF TORTS § 8 cmt. g (AM. L. INST. 2020).

just that: social issues. Each of these subjects fall outside the traditional bounds of public nuisance.[141] Yet, perhaps none more than the lawful opioid market. From the outset, there is no public right to be free from health hazards stemming from the legal sale of opioids.[142] Even though some courts have extended the public nuisance doctrine beyond the traditional binary of either quasi-criminal acts or unreasonable conduct involving real property,[143] public rights do not arise from the sheer quantity of people affected.[144]

Like opioids, guns are highly regulated both federally and by the states. Yet, despite the "tragic personal consequences"[145] and "[t]he burdens imposed upon society as a whole"[146] as a result of gun violence, the court in *Chicago v. Beretta* properly showed restraint by declining to "[g]iv[e] a green light to a common-law public nuisance cause of action" that would "likely open the courthouse doors to a flood of limitless, similar theories . . . against a wide and varied array of other commercial and manufacturing enterprises and activities."[147]

Moreover, even if there existed a public right within the meaning of public nuisance, the alleged nuisance—the manufacture and sale of lawful and medically useful opioids—is reasonable as a matter of law.[148] To be "unreasonable" under the law, the alleged interference with a public right must outweigh the social utility of the conduct.[149] In the case of lawful prescription opioids, the federal government, through FDA and DEA regulations, "made a determination that the 'social utility' of appropriately prescribed opioids outweighed the 'gravity of the harm inflicted' by them."[150] Courts

---

[141] *See* discussion *supra* Section II.B.

[142] *See* State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719, 726 (Okla. 2021).

[143] *See, e.g.*, *Cincinnati v. Beretta*, 768 N.E.2d 1136, 1142 (Ohio 2002); City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1233 (Ind. 2003)

[144] *See, e.g.*, Ganim v. Smith & Wesson Corp., 780 A.2d 98, 132 (Conn. 2001); *In re* Lead Paint Litig., 924 A.2d 484, 497 (N.J. 2007).

[145] *Chicago v Beretta*, 821 N.E.2d 1099, 1105 (Ill. 2004).

[146] *Id.*

[147] *Id.* at 1119 (quoting People *ex rel.* Spitzer v. Sturm, Ruger & Co., 309 A.D.2d 91, 96 (N.Y. App. Div. 2003)).

[148] *See, e.g.*, California v. Purdue Pharma L.P., No. 30-2014-00725287-CU-BT-CXC, 2021 WL 5227329, at *5 (Cal. Super. Ct. Nov. 1, 2021).

[149] *Id.* at *7.

[150] *Id.* at *10.

generally accept this principle in other areas of tort law.[151] And the *Restatement (Second) of Torts* captures that overall uniformity:

> [I]f there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations.[152]

Finally, even if courts were inclined to find that the sale of lawful opioids articulated the existence of a public right *and* the unreasonable interference of that right, a public nuisance claim should *still* fail on proximate cause. Take, for example, an illegal gambling ring—a prototypical public nuisance.[153] The manufacturers, distributors, and sellers of playing cards that are used in the creation of the public nuisance would not be liable—no one would argue differently.[154] The reason is simple: The cards, once they left the factory or store, were out of their control.[155] The same should be true for actors in the prescription opioid industry.[156] If it were not, holding members of the supply chain liable—regardless of their degree of removal from the harm—for risks beyond their control presents due process issues.[157] "It would 'violate[] the most elemental aspect of

---

[151] *See* Schwartz & Goldberg, *supra* note 51, at 566 ("[W]hen the field of conduct is well regulated, conduct that might be categorized as unreasonable under common law may become non-tortious. In these instances, courts accept that the legislative or regulatory body has determined that such conduct is acceptable to society and is therefore not unreasonable.").

[152] RESTATEMENT (SECOND) OF TORTS § 821B cmt. f (AM. L. INST. 1979).

[153] *See* The Federalist Society, *Opioid Litigations and Public Nuisance: Updates from California, Oklahoma, and Ohio*, YOUTUBE (Mar. 8, 2022), https://www.youtube.com/watch?v=xu2tDGhYtAI.

[154] *See id.*

[155] *See id.*

[156] *See id.*

[157] *See id*; Amici Curiae Brief of the Prod. Liab. Advisory Council, Inc. & the Chamber of Com. of the U.S. as Amici Curiae Supporting Appellees at 9, Alaska v. Albertsons Co., No. S-19048 (Alaska filed on Apr. 2, 2024) [hereinafter Prod. Liab. Advisory Council & U.S. Chamber of Com. Amici Curiae Brief] ("[T]his approach [would] cast[] aside key notions of wrongdoing and causation that permit predictability and compliance planning.").

the rule of law: that legal duties be sufficiently predictable to guide those to whom they apply.'"[158]

Public nuisance is also inappropriate for products, particularly heavily regulated opioids, because other legal regimes hold industry players accountable.[159] The *Restatement (Third) of Torts* teaches as much:

> [T]he common law of public nuisance is an inapt vehicle for addressing the conduct at issue. Mass harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake. Claims for reimbursement of expenses made necessary by a defendant's products might also be addressed by the law of warranty or restitution. If those bodies of law do not supply adequate remedies or deterrence, the best response is to address the problems at issue through legislation that can account for all the affected interests.[160]

Of course, if plaintiffs could prevail on other legal theories, they wouldn't resort to the ill-defined, nebulous concept of public nuisance. But since they cannot state a claim for products liability (because plaintiffs do not claim that the opioids are defective), they urge courts to "devour in one gulp the entire law of tort"[161] by extending public nuisance. The defense bar often warns against a "parade of horribles" when urging courts to exercise restraint when asked to expand legal doctrines. Sometimes, these suggested "horribles" may be hyperbolic and overexaggerated—unlikely to occur in practice. The same cannot be said for opioid litigation. Indeed, in

---

158 *Id.* at 9 (quoting Thomas W. Merrill, *The New Public Nuisance: Illegitimate and Dysfunctional*, 132 YALE L.J. FORUM 985, 987–88 (2023)).

159 *See* Gifford, *supra* note 50, at 744 ("By the close of the twentieth century, well-developed bodies of law covering strict products liability, negligence, and warranty theories governed products liability."). Other claims, like fraudulent misrepresentation, are also available where manufacturers make false claims or do not label their products correctly. *Id.* at 745.

160 RESTATEMENT (THIRD) OF TORTS § 8 cmt. g (AM. L. INST. 2020).

161 Tioga Pub. Sch. Dist. v. U.S. Gypsum, 984 F.2d 915, 921 (8th Cir. 1993).

declining to extend public nuisance to opioids, the Oklahoma Supreme Court recognized as much:

> All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.[162]

Thus, although the common law definition of public nuisance may be "capacious enough"[163] to encompass these claims, "the task of the judge is to interpret and apply the law as a reasonable and reasonably well-informed citizen might have done . . . not to amend or revise the law in some novel way."[164] Judicial restraint is particularly appropriate in a space where, as here, the legislative *and* executive branches have already extensively spoken on opioids.[165] Despite the mixed results from federal initiatives to solve the opioid crisis, separation of powers principles demand that "contested issues of social policy . . . be resolved by democratically accountable institutions."[166] If the people choose to expand liability beyond that which products liability law already allows, they can do so through their elected representatives in accordance with the democratic process.

B. *Impractical*

Not only would judges be usurping the legislative function by accepting these novel public nuisance claims, but also, the courts are

---

[162] State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719, 730 (Okla. 2021) (quoting People *ex rel.* Spitzer v. Sturm, Ruger & Co., 309 A.D.2d 91, 96 (2003)).

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

[164] Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RSRV. L. REV. 905, 910 (2016).

[165] *See* discussion *supra* Part I; *see also* Merrill, *supra* note 158, at 991 n.31 (describing the FDA's policy decision not to ban cigarettes because it feared "serious problems of withdrawal and the use of black-market cigarettes, which would be more harmful to consumers").

[166] *See* Merrill, *supra* note 158, at 991.

simply ineffective and ill-equipped to handle the present opioid crisis. The crisis involves careful policy choices by our elected representatives—solutions that have been evolving in real time with the problem over the course of our nation's entire history.[167] By contrast, litigation is a time-consuming endeavor.[168] These cases have taken many years to resolve.[169] And even when they do reach a final judgment, it is only on an individual basis.[170] State laws will inevitably vary, which will decrease "predictability and compliance planning" for companies and produce inequitable outcomes for victims of opioid addiction.[171] Thus, keeping these political questions outside the courts encourages uniform, national standards with which companies can comply and upon which consumers can rely.[172]

Moreover, civil litigation against lawful opioid producers and sellers targets the wrong alleged "bad actor."[173] The epidemic has largely evolved to one characterized by a rampant illicit drug market.[174] Subjecting pharmaceutical companies that comply with the law to incessant litigation would seem to do little to solve the illegal fentanyl crisis.[175] But it certainly might bring us back to the days where pain management was taboo and physicians were afraid to prescribe opioids for legitimate medical purposes.[176] Indeed, doctors are pushing back on the current hurdles to prescribing analgesics, asking provocative questions like:

---

167 *See* discussion *supra* Part I.

168 *See* Francis A. Citera, Shareholder, Greenberg Traurig, LLP, *University of Miami Law Review Symposium, Reflections on the War on Drugs, Panel II: Civil Litigation* (Feb. 9, 2024), https://umiami.mediaspace.kaltura.com/playlist/dedicated/1_gi88xdr3/1_2h30hn9q.

169 *See id.*

170 *See* Prod. Liab. Advisory Council & U.S. Chamber of Com. Amici Curiae Brief at 8–9.

171 *See id.* at 9.

172 *See id.* at 8–10.

173 *See* Merrill, *supra* note 158, at 1005.

174 *See Understanding the Opioid Overdose Epidemic*, *supra* note 34.

175 *See* Merrill, *supra* note 158, at 1005–07.

176 *See id.* at 1007 ("[L]arge diversified pharmaceutical firms and pharmacy chains may simply stop selling opioids because of the liability risk. But opioids are indispensable forms of pain relief for persons suffering from cancer, serious accidents, or major surgery."); *see also* Moghe, *supra* note 19.

> [I]s the link really so strong between thoughtful prescribing of short- or even long-term opioids and the escalating "epidemic" of opioid complications that we should not prescribe these drugs? Does the fact that we don't have good data demonstrating long-term efficacy mean that these drugs are not effective in appropriately selected patients? Is it warranted to require regular database reviews of all patients who are prescribed these medications? Is it warranted, as one patient said to me, that she be treated like a potential criminal begging for drugs when her prescriptions are up, and that she be "looked at funny" by the pharmacist when she fills them?[177]

C. *Unworkable*

Another reason why public nuisance suits brought by state and local governments fall outside the scope of the doctrine is the remedies problem. Recall that when the government is the plaintiff—and they exclusively have been in public nuisance opioid litigations—the only appropriate remedies are injunctions and abatement.[178] Both of these are forward-looking remedies.[179] But in the opioid litigations, states seek to recover costs related to furnishing emergency medical services, law enforcement, and substance use treatment. Though the states style their prayers for relief as abatement, and some courts authorize "abatement funds," the payment of monetary reimbursement for past costs boils down to damages—not equitable relief.[180] Even if the courts are inclined to agree with the states that their costs are related to abating the nuisance, scholars point out that "the public services doctrine prevents the costs associated with the performance of governmental functions from being recoverable in

---

177 Mandell, *supra* note 26, at 401.

178 *See* Schwartz & Goldberg, *supra* note 51, at 570.

179 *See* Goldberg, *supra* note 57, at 5.

180 *See* Schwartz & Goldberg, *supra* note 51, at 570; Goldberg, *supra* note 57, at 6.

tort."[181] Thus, either way, the remedies sought by the states are unavailable under the law.[182]

To be sure, many of these cases have settled, so the abatement/damages distinction may not come into play. But settlements, too, present serious concerns. First, the mere fact that courts are hesitant to dismiss these legally insufficient cases at early stages forces defendants' hands.[183] There is currently enough erroneous caselaw in the ether to convince some judges to delay squashing these "deep pocket"[184] and "vigilante"[185] suits. Few companies are willing to gamble with their public reputation, continue paying attorneys' fees to defend suits all across the nation, and risk a disadvantageous judgment on the merits.[186] So, they settle instead of "see[ing] these cases to their rightful conclusions."[187] This "deep pocket jurisprudence" is not the sort of (in)justice our system contemplates.[188]

Second, it is unclear to what extent these massive settlements paid to state and local governments will actually redress the injuries of private citizens most directly affected by the opioid crisis. The Big Tobacco settlement provides an example.[189] This year alone, states will reportedly "collect $25.9 billion from the settlement and taxes."[190] Yet, a mere 2.8 percent of that will be spent on programs

---

[181] Schwartz & Goldberg, *supra* note 51, at 570; *see also* City of Chicago v. Beretta, 821 N.E.2d 1099, 1144 (Ill. 2004) (citing City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co., 719 F.2d 322, 324 (9th Cir. 1983) as the "seminal case" on the free public services doctrine).

[182] *See* Goldberg, *supra* note 57, at 6 ("[G]overnment public nuisance claims are solely about abating the nuisance, not paying governments to mitigate the impact of the alleged nuisance on its citizens.").

[183] *See id.*

[184] *Id.* at 1.

[185] *Id.* at 6.

[186] *See id.*

[187] *Id.*

[188] *See id.* at 1; *see also* Merrill, *supra* note 158, at 1003–04 (calling the opioid litigations "joint ventures between public prosecutors and personal-injury firms" and lamenting the successes they've achieved via settlements to "keep the business model going").

[189] *A State-by-State Look at the 1998 Tobacco Settlement 25 Years Later*, TOBACCO FREE KIDS, https://www.tobaccofreekids.org/what-we-do/us/statereport (Jan. 10, 2024).

[190] *Id.*

related to tobacco prevention and cessation.[191] The rest will be spent on various other state projects wholly unrelated to tobacco.[192]

Opioid settlement agreements seem to fare no better.[193] Unfortunately, most of the agreements do not require public reporting of opioid remediation expenditures.[194] Presently, only twenty-one states have committed to sharing 100 percent of their settlement expenditures with the public.[195] Six states publicly report zero percent.[196] One concern is that states will fund nonprofits and special interest groups to assist with abatement.[197] This is problematic, as there are seemingly no restrictions against these groups using some of the funds to lobby elected officials in the future.[198] Another concern is that states may use the funds to close budget gaps.[199] These allocations are clearly not the intended purpose of the funds, and would do little to remedy the consequences of opioid addiction in communities that need it most.[200]

---

191 *Id.*

192 *See* Spencer Chretien, *Up in Smoke: What Happened to the Tobacco Master Settlement Agreement Money?*, CITIZENS AGAINST GOV'T WASTE (Dec. 12, 2017), https://www.cagw.org/thewastewatcher/smoke-what-happened-tobacco-master-settlement-agreement-money.

193 *See* OPIOID SETTLEMENT TRACKER, https://www.opioidsettlementtracker.com/publicreporting/#promises (last visited Oct. 2, 2024).

194 *See id.*

195 *See id.*

196 *See id.*

197 *See* The Federalist Society, *supra* note 153.

198 *See id.*

199 *See* Citera, *supra* note 168.

200 *See id.*

CONCLUSION

The opioid epidemic represents a tragedy for all Americans. It is a crisis that urgently needs intervention. However, litigation based on claims of public nuisance is not the proper avenue for change. If these suits are allowed to survive, it is difficult to imagine a scenario that would not be viable under public nuisance. Limitations in the law exist for good reason. Notions of fundamental fairness counsel judges to swiftly reject public nuisance claims in the context of the lawful opioid industry as soon as the complaints arrive at their benches. If they do not, "deep pocket jurisprudence" and "vigilante litigation" will continue—unchecked by the political process.