

Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic

MICHAEL J. PURCELL*

As legislatures and administrative agencies have struggled to successfully address the ongoing opioid crisis, many state attorneys general have stepped in and filed suit against major pharmaceutical manufacturers and distributors. Among the claims being made in such suits is one of “public nuisance.” Though these types of parens patriae claims have historically been a controversial means of dealing with major social issues, they also have the potential to serve an invaluable role in getting defendants to the settlement table. In order for such settlements to prove valuable, however, state attorneys general must think critically about how to structure them to ensure that they work in conjunction with ongoing legislative and administrative policies to address the full scope of the opioid epidemic.

By analyzing the strengths and weaknesses of past settlements in public health litigation, state attorneys general can structure a settlement which builds on these strengths and supports an effective response to the largely unique issues posed by the opioid crisis. Specifically, this Note argues that states should continue to pursue public nuisance causes of action against opioid manufacturers in an effort to get them to negotiate large-scale settlements that could then be used to finance immediate and ongoing legislative responses to the opioid epidemic. Part II discusses the background of the opioid crisis, explores how state and federal governments have unsuccessfully responded to it, and argues that the greatest impediment to the success of such legislative and administrative efforts has been a lack of financial resources. Part III then explores public nuisance law as it has been used in dealing with public health issues and how it might serve an invaluable role in incentivizing high settlement in the context of opioid manufacturers. Finally, Part IV draws on previous

* Executive Editor, *Colum. J.L. & Soc. Probs.*, 2018–2019. J.D. Candidate 2019, Columbia Law School. The author would like to thank Professor Kristen Underhill, the staff of the *Columbia Journal of Law and Social Problems*, and his family for their constant insight and support.

settlements to create a template for how state attorneys general in settlement negotiations with opioid manufacturers ought to structure settlements moving forward. Ultimately, the Note posits that they should turn their attention away from viewing settlements as a means to establish new substantive regulations for the industry and should instead focus their efforts on maximizing financial returns from these settlements such that they may fill the resource gap that has crippled the state's ability to fully combat the opioid crisis.

I. INTRODUCTION

In recent years, plaintiff states have used public nuisance claims against manufacturers of products associated with a variety of major public health crises. Throughout the 1980s, 1990s, and early 2000s, various states attempted to use the tort of public nuisance to serve as a catch-all solution for novel public health concerns which some attributed to a failure to regulate goods like lead paint, tobacco, and firearms.¹ Yet, public nuisance is a cause of action “whose boundaries are extremely indeterminate and whose use against product manufacturers is not well grounded historically.”² Even so, it was at the heart of litigation against tobacco companies in the 1990s, resulting in what is known as the Master Settlement Agreement — one of the most significant settlement agreements in American product liability jurisprudence.³ As such, states have continued to invoke it as a cause of action in the face of public health crises; most recently, a number of state⁴ attorneys general have included this

1. See *In re Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007) (twenty-six New Jersey municipalities and counties brought suit alleging that manufacturers and sellers of lead pigments from decades prior should be held to have caused a public nuisance in the form of childhood lead exposure and its resultant health hazards); *People v. Sturm, Ruger & Co.*, 309 A.D.2d 91 (2003) (Attorney General of New York State invoked *parens patriae* power to claim public nuisance against gun manufacturers); Complaint, *Moore ex rel. State v. American Tobacco Co.*, No. 1994CV01429, 1994 WL 17112350 (Miss. Ch. 1994) (No. 1994CV01429) (Mississippi Attorney General Mike Moore is the first of many state attorneys general to assert *parens patriae* interests in filing suit against tobacco manufacturers).

2. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 939 (2008).

3. See Master Settlement Agreement (1998), <http://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf> [<https://perma.cc/6NXX-9C8U>].

4. A number of smaller localities and municipalities have filed their own lawsuits against pharmaceutical manufacturers and distributors on similar bases. See, e.g., Complaint, *Cty. of Erie v. Purdue Pharma. L.P.*, No. 0801671/2017 (N.Y. Super. Ct. Erie County filed May 19, 2017); Complaint, *Staubus v. Purdue Pharma. L.P.*, No. 2:17-CV-122, 2017 WL 4767688 (Tenn. Dist. Ct. Eastern District Tenn. 2017) (No. 2:17-CV-122); Complaint, *City of Everett v. Purdue Pharma*, No. C17-209RSM, 2017 WL 4236062 (W.D.

claim as a cause of action against pharmaceutical manufacturers for the role that they have played in creating and maintaining the ongoing opioid crisis.⁵

This Note unpacks the role of public nuisance in public health-based products liability litigation and argues that by encouraging settlement, public nuisance actions may serve an invaluable role in filling the resource gap that has crippled the state's ability to combat the opioid crisis. Specifically, using public nuisance as a cause of action may encourage settlement as the potential remedy from such claims could be significant, and the lack of clear precedent makes it extremely difficult for either party to predict their likelihood of success. Many states have already adopted this approach; state officials simply need to restructure their perspectives regarding how these types of claims can create substantive improvements. The modern opioid crisis is unique, in that it is heavily driven by illicit non-prescription drugs.⁶ Accordingly, pharmaceutical regulation alone is unlikely to fully address the crisis. If state attorneys general pivot from focusing on injunctive relief and making policy recommendations to using these broad claims to obtain large financial settlements from manufacturers and distributors, they will be able to more effectively finance new programs, as well as existing legislative and regulatory efforts, and thus bring about positive change.

Part II of this Note discusses the background of the opioid crisis, and how state and federal legislatures and executives have responded to it. It then analyzes the high costs of dealing with the opioid crisis and explores how a lack of financial resources has stymied these legislative and regulatory responses. Part III explores public nuisance law, especially in the context of public health issues. It discusses the history of public nuisance suits in the public health and opioid contexts, explores concerns with the use of public nuisance as a litigation tool, and considers potential

Wash. 2017) (No. C17-209RSM); Complaint, *California v. Purdue Pharma*, No. 30-2014-00725287-CU-BT-CXC (Cal. Super. Ct. County of Orange filed Jul. 7, 2017). While these lawsuits raise their own interesting questions and may create issues regarding double-recovery or otherwise affect the strength of suits by states, this Note focuses exclusively on actions brought by state attorneys general.

5. For a discussion on the background of the opioid crisis, see *infra* Part II.

6. *Prescription Opioid Overdose Data*, CTR. FOR DISEASE CONTROL & PREVENTION (Aug. 1, 2017), <https://www.cdc.gov/drugoverdose/data/overdose.html> [https://perma.cc/88CJ-4NWK].

remedies that public nuisance causes of action enable. Part IV draws on previous settlements to create a template for how state attorneys general in settlement negotiations with opioid manufacturers ought to structure their settlements moving forward. It discusses the strengths and weaknesses of a number of notable settlement agreements and makes the case that attorneys general should view their role in this context as somewhat corrective, seeking to maximize the financial settlement while turning their focus away from attempts to create new regulations.⁷

II. THE OPIOID EPIDEMIC

Opioids are a class of drugs that interact with opioid receptors on nerve cells in the body and brain to help control acute pain.⁸ This class is broad, and includes both legal painkillers such as oxycodone, morphine, or hydrocodone, which are regulated by the Food and Drug Administration (FDA) and prescribable by doctors, as well as synthetic drugs like fentanyl,⁹ and the illegal drug, heroin.¹⁰ Opioids have historically served a valuable purpose for medical pain management, but have a great potential for abuse once opioid-based treatment is initiated.¹¹ As licit opioids have become more heavily regulated over time, many users have migrated towards opioids and opium-derivatives that are outside of the legal and regulable market.¹² Because much of

7. The Note does not speak to the merits of or likelihood of success for public nuisance claims. Assessing the merits of a public nuisance claim in any given state is a separate and fact-intensive inquiry. Rather, this Note sets settlement priorities for state attorneys general who take on this cause of action in order to address the opioid crisis.

8. *Opioids*, NAT'L INST. ON DRUG ABUSE (Mar. 2018), <https://www.drugabuse.gov/drugs-abuse/opioids> [<https://perma.cc/JU83-AAMT>].

9. Fentanyl is a synthetic opioid, as opposed to a naturally occurring opium derivative. It is approved by the FDA for use as an analgesic (pain reliever) and anesthetic. It is heavily regulated as a Schedule II narcotic under the Controlled Substances Act of 1970. It is approximately one hundred times more potent than morphine and fifty times more potent than heroin, creating significant demand for the drug in illicit secondary markets. Though it is able to be legally administered for particular purposes, licit fentanyl products are also diverted via theft, fraudulent prescriptions, and illicit distribution by patients, physicians, and pharmacists. *Drugs of Abuse | 2017 Edition: A DEA Resource Guide*, DRUG ENF'T ADMIN. 40–41 (June 15, 2017), https://www.dea.gov/sites/default/files/2018-06/drug_of_abuse.pdf [<https://perma.cc/NM2C-7GJH>].

10. *Opioids*, *supra* note 8.

11. *See id.*

12. CTR. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUM. SERV., 2018 ANNUAL SURVEILLANCE REPORT OF DRUG-RELATED RISKS AND OUTCOMES 7–8 (2018); *see*

the epidemic is no longer practically regulable, further regulations will fail to fully address the modern American opioid crisis if treatment and abuse prevention resources are not also provided.

A. A HISTORY OF OPIOID USE IN THE UNITED STATES

Opioids were commonly used for pain relief throughout the 19th and early 20th centuries, when there was limited knowledge as to the addictive effects of their use.¹³ The 1914 Harrison Narcotics Tax Act, however, made the importation, manufacture, and sale of opioids and opium derivatives far more difficult and expensive.¹⁴ The Act responded to increasing recognition of the addictive nature of opioids, their transition into more common street use, and the emergence of non-opioid substitutes like aspirin to treat mild to moderate pain.¹⁵ A continually expanding understanding of the addictive nature of opioids into the 1920s led doctors to avoid using opioids in treating patients and to the ultimate outlawing of heroin in 1924.¹⁶

Opioids became increasingly unpopular as legitimately prescribed pain relievers within the medical standard of care until the late 1970s and the early 1980s, when a string of studies published in newspapers and medical journals attempted to undercut the notion that opioids are addictive. First, in 1980, the *New England Journal of Medicine* published a letter by two researchers that purported to analyze 11,882 patients who were

also 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> [<https://perma.cc/GH5Z-KYVZ>]; *Prescription Opioid Overdose Data*, *supra* note 6.

13. Marcia L. Meldrum, *A Capsule History of Pain Management*, 290 JAMA 2470, 2471 (2003).

14. The Act defines itself as “[a]n Act To provide for the registration of, with collectors of internal revenue, and to impose a special tax on all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes.” 38 Stat. 785 (1914). Though the statute on its face seemed to merely regulate trade and collect a tax, House representative Thomas Sisson stated that “[t]he purpose of this bill — and we are all in sympathy with it — is to prevent the use of opium in the United States, destructive as it is to human happiness and human life.” Thomas Rowe, *FEDERAL NARCOTICS LAWS AND THE WAR ON DRUGS: MONEY DOWN A RAT HOLE* 14–15 (2012).

15. Meldrum, *supra* note 13, at 2471.

16. See Moghe, *Opioid history: From ‘Wonder Drug’ to Abuse Epidemic*, *supra* note 12.

treated with narcotics.¹⁷ That study found that “the development of addiction is rare in medical patients with no history of addiction.”¹⁸ Then, in 1986, another researcher conducted a study in which he treated thirty-eight patients with opioids as pain relievers for their non-cancer pain.¹⁹ Ultimately, the study concluded that “opioid maintenance therapy can be a safe, salutary and more humane alternative to the options of surgery or no treatment.”²⁰ These studies reinvigorated the prescription opioid industry, as doctors became more comfortable prescribing opioids as relief for acute pain and large pharmaceutical companies began marketing new opioid-based long-term painkillers.²¹

During the mid- and late-1990s, large pharmaceutical manufacturers like Purdue Pharma, which produces OxyContin, marketed their painkillers aggressively, targeting both prescribers and patients alike.²² As a result, the number of painkiller prescriptions filled at U.S. pharmacies increased exponentially.²³ In 2007, Purdue Pharma and three of the

17. Jane Porter & Hershel Jick, *Addiction Rare in Patients Treated with Narcotics*, 302 N. ENGL. J. MED. 123 (1980).

18. *Id.*

19. The study was intended to analyze the effectiveness and safety of opioid use in these types of patients. The thirty-eight patients were retrospectively evaluated to determine the indications, course, safety and efficacy of their respective opioid-based therapies. Ultimately, the study concluded that “no toxicity was reported and management became a problem in only 2 patients, both with a history of prior drug abuse.” Russell K. Portenoy & Kathleen M. Foley, *Chronic Use of Opioid Analgesics in Non-malignant Pain: Report of 38 Cases*, 25 PAIN 171, 171 (1986).

20. *Id.* In 2011, Dr. Portenoy, who was behind the 1986 study, spoke out about his study: “What I was trying to do was create a narrative so that the primary care audience would . . . feel more comfortable about opioids in a way they hadn’t before. In essence, this was education to destigmatize, and because the primary goal was to destigmatize, we often left evidence behind Clearly if I had an inkling of what I know now then, I wouldn’t have spoken in the way that I spoke. It was clearly the wrong thing to do.” Moghe, *supra* note 16.

21. Moghe, *supra* note 16.

22. *Id.*; see generally Patrick Radden Keefe, *The Family that Built an Empire of Pain*, THE NEW YORKER, Oct. 30, 2017 (“Purdue launched OxyContin with a marketing campaign that attempted to counter this attitude and change the prescribing habits of doctors. The company funded research and paid doctors to make the case that concerns about opioid addiction were overblown, and that OxyContin could safely treat an ever-wider range of maladies. Sales representatives marketed OxyContin as a product ‘to start with and to stay with.’”).

23. Keefe, *supra* note 22 (“[Andrew Kolodny, the co-director of the Opioid Policy Research Collaborative, at Brandeis University . . . [said] that, though many fatal overdoses have resulted from opioids other than OxyContin, the crisis was initially precipitated by a shift in the culture of prescribing — a shift carefully engineered by Purdue. ‘If you look at the prescribing trends for all the different opioids, it’s in 1996 that

company's top executives all pled guilty to criminal and civil charges brought by the United States regarding drug misbranding and the fact that they misled regulators, doctors, and patients about the likelihood of addiction to OxyContin.²⁴ The result of these pleas totaled near \$600 million in fines and other payments.²⁵

Still, instances of opioid prescription, addiction, and overdose have all continued to rise in recent years. In 2010, sales of prescription pain relievers were four times those in 1999, and in 2012, 259 million prescriptions were written for opioids.^{26,27} As Figure 1 shows, instances of addiction and overdose attributable to the broad category of opioid drugs continues to climb despite the number of prescriptions having fallen since its peak in 2012.

This increase in opioid use and abuse has correlated with an increase in deaths attributable to such use as well. This is especially frightening, as drug overdose has become the leading cause of accidental death in the United States, with 52,404 lethal drug overdoses in 2015. Since 2000, more than 300,000

prescribing really takes off,' Kolodny said. 'It's not a coincidence. That was the year Purdue launched a multifaceted campaign that misinformed the medical community about the risks.'").

24. A settlement was approved in the case in the Western District of Virginia, Abingdon Division. Settlement Agreement, *United States of America v. The Purdue Frederick Company, Inc.*, 2007 WL 1423895 (W.D.Va.). In the suit, the United States brought suit against the Purdue Frederick Company as well as three individual executive defendants for misbranding OxyContin with the intent to defraud or mislead under the federal Food, Drug, and Cosmetic Act (FDCA).

25. Barry Meier, *In Guilty Plea, OxyContin Maker to Pay \$600 Million*, N.Y. TIMES (May 10, 2007), <https://www.nytimes.com/2007/05/10/business/11drug-web.html> [<https://perma.cc/3PUP-TGZD>].

Ultimately, the \$600 million settlement was granted to include the following: (1) \$100,615,797.25 payable to federal government health care agencies under a Civil Settlement Agreement; (2) \$59,384,202.75 in escrow for those states that elect to settle their claims against Purdue; (3) \$3,471,220.68 to Medicaid programs for improperly calculated rebates; (4) \$500,000 fine to the United States; (5) \$20 million in trust to the Commonwealth of Virginia for operating the Virginia Prescription Monitoring Program; (6) \$5.3 million to the Virginia Medicaid Fraud Control Unit's Program Income Fund; (7) \$276.1 million forfeiture to the United States; (8) \$130 million to settle private civil claims related to OxyContin; and (9) \$4,628,779.32 to be expended by Purdue for monitoring costs in connection with a Corporate Integrity Agreement with the U.S. Department of Health and Human Services. Opinion and Order at 5–6, *United States v. The Purdue Frederick Company, Inc.*, 1:07-CR-00029.

26. *Opioid Painkiller Prescribing, Where You Live Makes a Difference*, CTR. FOR DISEASE CONTROL & PREVENTION (July 1, 2014), <https://www.cdc.gov/vitalsigns/opioid-prescribing/index.html> [<https://perma.cc/C6ZL-N4CQ>].

27. This number is enough to give every American adult their own bottle of prescription opioid pills. *Id.*

Americans have died of an opioid overdose, specifically.²⁸ Figure 2 depicts the increasing number of overdose deaths attributable to opioids in recent years.

Over 33,000 of those were related to opioids, many of which were caused by illicitly manufactured fentanyl and heroin, popular alternatives to prescription opioids.²⁹ Not only did 2.1 million people misuse prescription opioids for the first time in 2016, but 948,000 people also used heroin during that year alone.³⁰ Given these statistics, the number of heroin users is likely to grow given that about 80% of people who use heroin first misused prescription opioids.³¹ This is unsurprising, given that roughly 21–29% of patients prescribed opioids for chronic pain misuse them, and between 8–12% develop an opioid use disorder that could involve heroin.³² The fact that these illicit substances have become such a significant force in the cost of the crisis makes the necessary response to the opioid crisis largely unique. This stark increase in the number of deaths related to heroin and other illicit opioids makes it clear that the context of the opioid epidemic is rapidly changing, as prescription narcotic abuse is no

28. *The Federal Response to the Opioid Crisis*, NAT'L INST. ON DRUG ABUSE (Oct. 5, 2017), <https://www.drugabuse.gov/about-nida/legislative-activities/testimony-to-congress/2017/federal-response-to-opioid-crisis> [<https://perma.cc/MLM8-GGX3>].

29. Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths — United States, 2010–2015*, 65 MORB. MORTAL WKLY. REP. 1445 (2016). See *Prescription Opioid Overdose Data*, *supra* note 6.

30. *About the U.S. Opioid Epidemic*, U.S. DEP'T. OF HEALTH & HUM. SERV. (Mar. 6, 2018), <https://www.hhs.gov/opioids/about-the-epidemic/index.html> [<https://perma.cc/AY9E-WQ5Y>].

31. Pradip K. Muhuri et al., *Associations of Nonmedical Pain Reliever Use and Initiation of Heroin Use in the United States*, CBHSQ DATA REV. (Aug. 2013), <https://www.samhsa.gov/data/sites/default/files/DR006/DR006/nonmedical-pain-reliever-use-2013.htm> [<https://perma.cc/G3QK-VT2X>].

This trend is important for the purpose of lawsuits because it speaks to a potential causal connection between the use of prescription pharmaceuticals and subsequent illicit heroin use. Moving forward, however, opioid abuse, addiction, and overdose statistics in this Note do not distinguish between instances referring to heroin use and prescription opioid use. This is because heroin statistics remain relevant to any litigation against pharmaceutical manufacturers, despite the fact that they do not manufacture and distribute illicit heroin. Specifically, many states and localities are citing the creation of a “new secondary market for opioids” as an element of their public nuisance claims against these groups because there is a notable correlation between heroin use and prior use of prescription opioids. As such, both heroin-based and prescription-based overdoses are important to state claims, though they speak to different aspects of the “nuisance” which the states claim results from pharmaceutical manufacturers’ actions. See *Complaint, Ohio v. Purdue Pharma*, 70.

32. *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (Mar. 2018), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis#seven> [<https://perma.cc/6BYM-SW7C>].

longer necessarily the primary driver. As such, a fully effective response to the opioid crisis will require not only continuing to engage in regulatory action for prescription narcotics, but also providing treatment and abuse prevention resources to quell the spread of nonregulable and illicit opioid abuse.

B. EXISTING LEGISLATIVE AND REGULATORY ACTIONS HAVE BEEN LARGELY UNSUCCESSFUL IN CURBING THE GROWTH OF THE EPIDEMIC

Legislatures and executives have not been blind to the epidemic, and in recent years federal and state governments have become much more active in attempting to combat the effects of the growing opioid market. Regulatory agencies like the FDA, the Centers for Disease Control (CDC), the Substance Abuse and Mental Health Services Administration (SAMHSA), and countless others have attempted to enact policies to curb the effects of opioid use and abuse and to support state actions to do the same. On October 26, 2017, President Donald J. Trump directed the Department of Health and Human Services (HHS) to declare the opioid crisis a public health emergency, emphasizing the need to address the crisis before it escalates further.³³ However, a failure to adequately allocate a sufficient amount of funding has caused many of these legislative, administrative, and executive actions to fall short.

The federal regulatory efforts have been widespread and varied. In April 2017, HHS outlined a five-point “Opioid Strategy” that provided an overarching framework for the steps that HHS hoped to take to eradicate the epidemic.³⁴ This strategy aimed to improve access to prevention, treatment, and recovery support services; increase the availability and

33. Julie Hirschfeld Davis, *Trump Declares Opioid Crisis a ‘Health Emergency’ but Requests No Funds*, N.Y. TIMES (Oct. 26, 2017) <https://www.nytimes.com/2017/10/26/us/politics/trump-opioid-crisis.html> [<https://perma.cc/VYU9-5DCN>] (“President Trump on Thursday directed the Department of Health and Human Services to declare the opioid crisis a public health emergency, taking long-anticipated action to address a rapidly escalating epidemic of drug use. But even as he vowed to alleviate the scourge of drug addiction and abuse that has swept the country . . . Mr. Trump fell short of fulfilling his promise in August to declare ‘a national emergency’ on opioids, which would have prompted the rapid allocation of federal funding to address the issue.”).

34. *Testimony on the Federal Response to the Opioid Crisis*, NAT’L INST. OF HEALTH (Oct. 5, 2017), <https://www.nih.gov/about-nih/who-we-are/nih-director/testimony-federal-response-opioid-crisis> [<https://perma.cc/QVD9-U3QB>].

distribution of overdose-reversing drugs such as naloxone; strengthen public health data reporting and collecting; and support research regarding pain and addiction.³⁵ Within HHS, the work of SAMHSA is among the most notable because it supports community-based substance abuse treatment and prevention services through grants to the states and communities.³⁶ However, other agencies within HHS have also been actively working to finance substance abuse treatment services, support access to care, and provide training and access to naloxone, a medication designed to rapidly reverse opioid overdose.³⁷ Likewise, the CDC has implemented a program that supports state health departments in advancing their overdose prevention efforts by making the best use of state prescription drug monitoring programs,³⁸ improving relevant practices of health systems and insurers, evaluating their policies, and responding rapidly to emerging situations.³⁹ The CDC has also taken an active role in attempting to address the opioid crisis through data collection and dissemination by supporting state efforts to increase their capacity to collect and analyze data about opioid use disorder and overdose.⁴⁰

Federal legislation has supplemented these regulatory efforts, also focusing on finding public health solutions for addressing the crisis. Both the Comprehensive Addiction and Recovery Act (CARA)⁴¹ and the 21st Century Cures Act (Cures Act)⁴² were enacted in 2016 during the 114th congressional session. CARA

35. *Id.*

36. Lisa N. Sacco & Erin Bagalman, *The Opioid Epidemic and Federal Efforts to Address It: Frequently Asked Questions*, CONG. RESEARCH SERV. 7-5700, 9 (Oct. 18, 2017), <https://www.hsdl.org/?view&did=805271> [<https://perma.cc/V86A-R4B6>].

37. *Id.* at 9–10.

38. A prescription drug monitoring program is an electronic database that tracks controlled substance prescriptions in a state. These can provide authorities with timely information about prescription trends and patient behaviors in the context of prescription drug use. *What States Need to Know about PDMPs*, CTR. FOR DISEASE CONTROL & PREVENTION (OCT. 3, 2017) <https://www.cdc.gov/drugoverdose/pdmp/states.html> [<https://perma.cc/P6MQ-GXCU>].

39. *Prevention for States*, CTR. FOR DISEASE CONTROL & PREVENTION (Oct. 23, 2017), https://www.cdc.gov/drugoverdose/states/state_prevention.html [<https://perma.cc/3G9R-BFP5>].

40. CTR. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUM. SERV., FY 2018 JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES, 330–333 (2018).

41. Comprehensive Addiction and Recovery Act of 2016, Pub. L. 114-198, 130 Stat. 695 (2016) (codified in scattered sections of 21 U.S.C.A., 34 U.S.C.A., 38 U.S.C.A., and 42 U.S.C.A.).

42. 21st Century Cures Act, Pub. L. 114-255, 130 Stat. 1033 (2016) (codified in scattered sections of 21 U.S.C.A., 34 U.S.C.A., 38 U.S.C.A., and 42 U.S.C.A.).

authorizes appropriations of federal funds for a number of opioid and substance use disorder responses.⁴³ The Cures Act allocates annual funding to the National Institute of Health (NIH) to alleviate financial and administrative burdens and promote research and data sharing.⁴⁴ Most of these federal actions are merely meant to supplement or promote existing state initiatives.

Moreover, states have also been taking active measures to attempt to curb the expansion of the problem. Namely, many states have enacted laws to increase access to naloxone, establish “Good Samaritan” laws to provide immunity from prosecution for those who seek assistance related to an overdose, enhance prescription drug monitoring programs, and broaden access to substance abuse treatment.⁴⁵ Likewise, some states have instituted prescribing limits,⁴⁶ passed legislation requiring continuing education in prescribing controlled substances, approved the regulation of pain clinics, and created public education programs.⁴⁷

The value of these regulatory and legislative efforts should not be undersold, as they are a good starting point in working toward the abatement of the modern opioid crisis. However, the continually high rates of opioid abuse and first-time misuse, as well as the statistics indicating an ever-increasing transition to cheaper, illicit opiates like heroin indicate that these efforts alone have proven insufficient and that something more is needed.

43. An amended version of CARA was introduced in the Senate on February 27, 2018, which seeks to expand CARA and increase funding for the projects established under the Act. H.R. 5311, 115th Cong. (2018).

44. See Cures Act, *supra* note 42.

45. Sacco & Bagalman, *supra* note 36, at 23–24.

46. Massachusetts passed the first law limiting opioid prescriptions in 2016. In this legislation, the State set a seven-day supply limit for first-time opioid prescriptions. According to tracking efforts by the National Conference of State Legislatures (NCSL), twenty-eight states had enacted legislation with some type of limit, guidance or requirement related to opioid prescribing by early April 2018, most of which limit first-time opioid prescriptions to a certain number of days’ supply. *Prescribing Policies: States Confront Opioid Overdose Epidemic*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 5, 2018), <http://www.ncsl.org/research/health/prescribing-policies-states-confront-opioid-overdose-epidemic.aspx> [https://perma.cc/6YRY-JQ3S].

47. Kate Blackman, *Preventing Opioid Misuse: Legislative Trends and Predictions*, NAT’L CONF. OF STATE LEGISLATURES BLOG (Jan. 31, 2018), <http://www.ncsl.org/blog/2017/01/31/preventing-opioid-misuse-legislative-trends-and-predictions.aspx> [https://perma.cc/2QGW-HK9C].

C. INSUFFICIENT FUNDING FOR COSTLY TREATMENT
INFRASTRUCTURE AND SERVICES CREATES THE NEED FOR NEW
FINANCING MECHANISMS

Though there has been no shortage of legislative and regulatory ideas aimed at rectifying the opioid crisis, the ideas alone have been unable to slow the continued expansion of opioid abuse. A lack of sufficient financing for treatment programs and preventative services has been a significant impediment to realizing the aims of the legislative and regulatory action.⁴⁸

1. *Current Funding and its Shortcomings*

CARA and the Cures Act⁴⁹ — the most recent federal attempts at appropriations directed toward promoting prevention and treatment by the states — indicate Congress’s awareness of the need to allocate resources toward opioid abuse prevention in order to successfully combat the epidemic.⁵⁰ CARA authorizes appropriations to administrative agencies for the purpose of combating opioid and broader drug abuse.⁵¹ Specifically, the funding provisions for this purpose include, but are not limited to, \$5 million for the period FY2017–FY2021 to “reduc[e] overdose deaths”;⁵² \$10 million annually for FY2017–FY2021 to reauthorize the National All Schedules Prescription Electronic Reporting⁵³ program;⁵⁴ \$5 million for the period FY2017–FY2019 to promote access to overdose reversal medications like naloxone;⁵⁵ \$12 million annually for FY2017–FY2021 to fund first responder training for emergency treatment of opioid overdose;⁵⁶

48. Maggie Hassan, *Trump Has Been All Talk, Little Action on the Opioid Crisis*, TIME (Feb. 1, 2018), <http://time.com/5128938/trump-opioid-crisis-epidemic-congress-funding/> [<https://perma.cc/BJN8-NLV7>].

49. Introduced *supra* Part II.B.

50. See Sacco & Bagalman, *supra* note 36, at 20.

51. *Id.*

52. 42 U.S.C. § 290dd-3 (2018).

53. National All Schedules Prescription Electronic Reporting, known as NASPER, is an informational tool used to aid physicians in prescribing controlled substances that is also useful for tracking and identifying illicit use and abuse of opioid medications. National All Schedules Prescription Electronic Reporting Act, NATIONAL ALL SCHEDULES PRESCRIPTION REPORTING ACT (NASPER), <https://www.nasper.org/> (last visited Sep. 7, 2018).

54. 42 U.S.C. § 280g-3 (2018).

55. 42 U.S.C. § 290ee (2018).

56. 42 U.S.C. § 290ee-1 (2018).

building communities for substance abuse recovery,^{57,58} and \$103 million annually for FY2017–FY2021 for a Department of Justice program aimed at “comprehensive opioid abuse,” among others. Likewise, the Cures Act is a continuing resolution that appropriated full-year FY2017 funding in the amount of \$500 million for an opioid-specific program that offers grants to the states.⁵⁹ States have also attempted to redirect an increasing amount of funding toward this issue. For example, Ohio’s budget presentation indicates it invests nearly \$1 billion each year to help fight drug abuse and addiction by supporting access to health care, treatment, and recovery.⁶⁰

These existing sources of funding only stretch so far, however. Even the most conservative assessments of the cost of the epidemic on government and society find that these costs surpass the levels of funding that governments at both the federal and state levels have devoted to its rectification.⁶¹ These assessments often divide costs into various categories, attempting to quantify social costs such as lost productivity in addition to the more easily quantifiable real costs resulting from things like required health care, law enforcement expenditures, and the like.⁶² For example, in November 2017, the White House Council of Economic Advisors put forth a report estimating the aggregate cost of the opioid crisis — \$504 billion dollars in 2015 alone.⁶³ This estimate is significantly larger than those in other studies, as it attempts to quantify the cost of fatalities and near fatalities resulting from overdoses involving opioids by assessing the “value

57. 42 U.S.C. § 290ee-2 (2018).

58. It should be noted that only \$1 million was appropriated to this purpose annually between FY2017–FY2021. 42 U.S.C. § 290ee-2 (2016).

59. See Sacco & Bagalman, *supra* note 36, at 22.

60. *Building for Ohio’s Next Generation: FY2018–19 Budget Overview*, OHIO OFF. OF BUDGET & MGMT., <http://budget.ohio.gov/doc/factsheets/BudgetOverview.pdf>.

61. See, e.g., Curtis S. Florence et al., *The Economic Burden of Prescription Opioid Overdose, Abuse, and Dependence in the United States, 2013*, 54 MED. CARE. 901 (2016); Howard G. Birnbaum et al., *Societal Costs of Prescription Opioid Abuse, Dependence, and Misuse in the United States*, 12 PAIN MED. 657 (2011).

62. See Birnbaum, *supra* note 61.

63. THE UNDERESTIMATED COST OF THE OPIOID CRISIS, COUNCIL OF ECON. ADVISORS 8 (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf> [https://perma.cc/9U7X-262H]. It should be noted that the report offers a number of estimates as to total cost, ranging from a low of \$293.9 billion to a high of \$622.1 billion. The \$504 billion estimate is the Council’s preferred estimate, because the fatality costs were calculated using an existing age-adjusted approach. *Id.* at 7–8.

of a statistical life” (VSL).^{64,65} Other studies that did not utilize these VSLs in calculating their cost estimations, focusing only on costs such as health care costs, costs to the criminal justice system, and costs incurred as a result of decreased productivity, found annual costs of \$61.5 billion⁶⁶ and \$79.9 billion.⁶⁷ Even excluding these productivity and fatality costs, however, the costs incurred as a result of rampant opioid overuse and abuse greatly exceed the resources currently available to the government for the purposes of dealing with the epidemic. That is to say, the government lacks the funds necessary for the purposes of both bearing the costs of the epidemic and meaningfully working towards prevention.⁶⁸

2. *Illustrations of Current Funding Shortcomings*

Exploring cost projections for a number of methods for tackling opioid use and abuse helpfully illustrates the conclusion above.⁶⁹ The cost of rehabilitative treatment for opioid overdose is high. Dr. Jennifer Stevens of the Center for Healthcare Delivery Science published a study in 2017 that examined acute care hospital inpatient admissions for opioid overdoses in patients eighteen years or older.⁷⁰ The study considered admissions in 162 hospitals in 44 states between the years of

64. *Id.* at 1–3.

65. VSLs are routinely used by federal agencies in health and safety settings when estimating the expected fatality risk-reduction benefits of a proposed regulation, policy, or program. “Such valuations are typically based on how individuals trade off wealth for reduced mortality risks. As an example, wage differentials between occupations with different fatality risks can be used to infer how much greater occupational risk on the job would be accepted for greater compensation.” *Id.* at 3.

66. See Birnbaum et al., *supra* note 61.

67. See Florence et al., *supra* note 61.

68. This Note does not operate under the assumption that the government should incur all of the costs of dealing with the opioid epidemic. However, because the government is already expending significant financial resources on the social costs brought on by the crisis, the more resources that the government has to address the issue, the more likely that attempts at staying the growth of opioid use and abuse will be successful.

69. These projections are intended to display the incredibly high cost that would be incurred if universal treatment or prevention could be attained and should not be held to be realistic projections of real cost. They operate under the presumptions that existing statistics accurately display the number of opioid users and abusers, that all opioid users and abusers can be identified, treated and treated with a 0% mortality rate once services or treatment are rendered, and that all users are perfectly compliant with treatment once services are initiated.

70. Jennifer P. Stevens et al., *The Critical Care Crisis of Opioid Overdoses in the United States*, 14 ANNALS OF THE AM. THORACIC SOC’Y 1803, 1804 (Dec. 2017).

2009 and 2015 to gauge the trajectory of cost for overdose treatment.⁷¹ The study found that the average cost of care per opioid admission increased from \$58,500 to \$92,400 during the six year period considered.⁷² Given that over 33,000 individuals died of opioid overdoses in 2015,⁷³ critical care costs for saving all of those who died of an opioid-related overdose that year would have amounted to nearly \$3.05 billion.

An alternative defensive mechanism for preventing opioid deaths — one both federal and state legislatures have pursued — is expanding access to naloxone^{74,75} In the United States, naloxone is obtained through contractual agreements, with programs traditionally paying approximately \$6 per dose, \$15 per kit of injectable naloxone, and \$30 per kit of intranasal naloxone.⁷⁶ Based on these statistics, one study that attempted to assess the cost-effectiveness of distributing naloxone to heroin users estimated a baseline cost of \$25 per kit to be distributed.⁷⁷

71. *Id.*

72. *Id.* at 1807. For the sake of this projection, this Note assumes that the cost of care per opioid overdose admission has remained constant since 2015.

73. See Rudd, *supra* note 29, at 1445–46.

74. Naloxone is a medication designed to rapidly reverse opioid overdose. *Opioid Overdose Reversal with Naloxone (Narcan, Evzio)*, NAT'L INST. OF HEALTH. (Apr. 2018), <https://www.drugabuse.gov/related-topics/opioid-overdose-reversal-naloxone-narcan-evzio> [<https://perma.cc/FAJ5-HEJC>]. It is an opioid antagonist that binds to opioid receptors, blocking the effects of other opioids in the system. *Id.* This allows naloxone to restore normal respiration to someone whose breathing has slowed or stopped because of an opioid overdose. *Id.* There are three FDA-approved formulations of naloxone: injectable, autoinjectable, and nasal spray. *Id.* Injectable naloxone requires training, and is typically used by paramedics and other first responders. *Id.* However, both autoinjectable and nasally-delivered naloxone can be distributed more widely. *Id.* The prefilled auto-injection device, known more commonly as EVZIO, provides verbal instruction to the user describing how to deliver the medication, similarly to a talking Epi-Pen. *Id.* The prepackaged nasal spray, known more commonly as NARCAN, is sprayed into one nostril while the patient lays on their back. *Id.* Both NARCAN and EVZIO are packaged in cartons containing two doses to allow for repeat dosing if needed. *Id.*

75. See Sacco & Bagalman, *supra* note 36 at 11, 23–24; see also *Governor Deal Signs Naloxone Bill into Law — Expanding Access to an Emergency Tool to Parents to Help Fight Opioid Epidemic*, GA. DRUGS & NARCOTICS AGENCY (Apr. 18, 2017), <https://gdna.georgia.gov/press-releases/2017-06-26/governor-deal-signs-naloxone-bill-law-expanding-access-emergency-tool> [<https://perma.cc/Y6QD-V2LH>] (describing legislation passed in Georgia to expand access to Naloxone); Tony Newman & Roseanne Scotti, *Governor Christie Signs Life-Saving Legislation into Law, Expands Access to Naloxone*, DRUG POLICY ALLIANCE (June 12, 2017), <http://www.drugpolicy.org/news/2017/06/governor-christie-signs-life-saving-legislation-law-expands-access-naloxone> [<https://perma.cc/AB5H-9J67>] (describing legislation passed in New Jersey to expand access to Naloxone).

76. Phillip O. Coffin & Sean D. Sullivan, *Cost-Effectiveness of Distributing Naloxone to Heroin Users for Lay Overdose Reversal*, 158 ANNALS OF INTERNAL MED. 1, 3 (2013).

77. *Id.*

In order to truly maximize the effectiveness of naloxone as a defensive strategy to reverse opioid overdose and prevent overdose deaths, it would be necessary to ensure that every individual who suffers from opioid abuse and is therefore at a heightened risk of overdose has access to naloxone. Given recent data that indicates that around 2.5 million Americans aged twelve and older suffer from an abuse disorder involving an opioid,⁷⁸ the cost of providing a single naloxone kit to every opioid abuser in the country would amount to \$62.5 million. Even this strategy would fail to truly address the epidemic, however. While naloxone is a valuable means of curbing overdose deaths, it does not prevent future overdoses and is not a sustainable treatment for existing substance use disorders. Naloxone merely serves to inhibit the effects of a single instance of overdose by blocking opioid receptors for no more than an hour and a half⁷⁹ — it is not a long-term treatment that gets at the root of addiction and abuse.⁸⁰

By contrast, it is widely recognized that narcotic agonist maintenance treatments are safe and effective means of treating opiate addicts.⁸¹ Among the most common, safe, and effective of such medication-assisted treatment programs as recognized by the National Institute on Drug Abuse are those that utilize the

78. See SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, U.S. DEP'T OF HEALTH AND HUM. SERV., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2015 NATIONAL SURVEY ON DRUG USE AND HEALTH (2016).

79. *Understanding Naloxone*, HARM REDUCTION COALITION, <http://harmreduction.org/issues/overdose-prevention/overview/overdose-basics/understanding-naloxone/> [<https://perma.cc/4TWD-K9GR>].

80. A singular focus on defensive measures is insufficient because of the very nature of addiction. The American Psychiatric Association defines addiction as “a brain disease that is manifested by compulsive substance use *despite harmful consequence*.” Rana Parekh, *What Is Addiction?*, AM. PSYCHIATRIC ASS'N (Jan. 2017), <https://www.psychiatry.org/patients-families/addiction/what-is-addiction> [<https://perma.cc/7B8Z-5BTC>] (emphasis added). Thus, continually saving opioid abusers from the effects of overdose will not lead them to stop seeking out and abusing opioids in the future. Because of this, rehabilitative and preventative measures must be undertaken as well in order to truly curb the growth of the opioid epidemic.

81. The National Institutes of Health put together a twelve-member panel representing the fields of psychology, psychiatry, behavioral medicine, family medicine, drug abuse, epidemiology, and the public to consider scientific evidence regarding opiate dependence and make conclusions and recommendations regarding safe and effective treatments. Ultimately, the panel concluded that persons dependent on opiates should have access to methadone maintenance therapy and other long-acting opiate agonist treatment programs. NAT'L CONSENSUS DEV. PANEL ON EFFECTIVE MED. TREATMENT OF OPIATE ADDICTION, *Effective Medical Treatment of Opiate Addiction*, 280 JAMA 1936, 1937 (1998).

drugs methadone, buprenorphine, and naltrexone.⁸² The Department of Defense, in a final rule modifying TRICARE⁸³ regulations to reduce administrative barriers to accessing substance use disorder treatment, calculated preliminary cost estimates for each of these types of outpatient medication assisted treatments.⁸⁴ According to these estimates, standard outpatient methadone-based treatment, which includes medication and daily visits for integrated psychosocial and medical support services, would cost \$126 per week per individual.⁸⁵ The Department further estimates that standard buprenorphine-based treatment provided in a certified opioid treatment program, which includes medication and twice-weekly visits, would cost \$115 per week per individual⁸⁶ and that naltrexone-based treatment, which includes the drug, the drug administration, and related services, would cost about \$270 per week per individual.⁸⁷ Because methadone is the most common medication used in opioid treatment programs,⁸⁸ this Note bases a projected total cost on methadone-based treatment. At a rate of \$126 per week, a year of methadone-based treatment would cost \$6,552. Assuming this treatment could be provided to all 2.5 million opioid abusers in the country, the total cost to provide medication-assisted rehabilitative treatment would amount to \$16.38 billion per year.

3. *Continued Challenges*

These assessments, while intended to show the high costs inherent in attempting to provide rehabilitative treatments universally, ignore other significant administrative and infrastructural costs that would emerge as a result of such widespread rehabilitative action. For example, the Narcotic

82. *Effective Treatments for Opioid Addiction*, NAT'L INST. ON DRUG ABUSE (Nov. 2016), <https://www.drugabuse.gov/publications/effective-treatments-opioid-addiction/effective-treatments-opioid-addiction> [<https://perma.cc/GT85-DS3D>].

83. TRICARE is a health care program run by the Department of Defense to provide civilian health benefits for military personnel, retirees, and family members around the world. *About Us*, TRICARE PRIME COSTS | TRICARE, <https://www.tricare.mil/About> [<https://perma.cc/2HBY-WXB8>] (last visited Aug. 23 2018).

84. *See generally*, U.S. DEP'T OF DEF., TRICARE; MENTAL HEALTH AND SUBSTANCE USE DISORDER TREATMENT, 81 F.R. 61,067 (2016).

85. *Id.* at 61,079.

86. *Id.* at 61,080.

87. *Id.*

88. *Id.* at 61,079.

Addiction Treatment Act of 1974 and the Drug Addiction Treatment Act of 2000 are amendments to the Controlled Substances Act which “establish procedures for the approval and licensing of practitioners involved in the treatment of opioid addiction.”⁸⁹ Practitioners wishing to administer and dispense approved Schedule II controlled substances such as methadone or Schedule III, IV, or V controlled substances such as buprenorphine for detoxification purposes must obtain DEA registration as a Narcotic Treatment Program and approval from the Center for Substance Abuse Treatment (CSAT).⁹⁰ This necessarily creates added costs for expanding treatment availability. Likewise, expanded demand would require the creation of numerous new inpatient and outpatient facilities to provide the necessary care, creating further infrastructural, licensing, and training costs. The costs explored here do not even cover preventative measures to stanch continued growth of the opioid market or various other social costs. Yet even the costs enumerated here exceed the funding that the federal government currently appropriates by billions of dollars. As such, many of the states hit most aggressively by the costs of the opioid crisis have sought new and innovative ways of obtaining funding and allocating resources effectively; utilizing the judicial system to compel settlement can serve as another invaluable means of collecting further resources for treatment and prevention.⁹¹

89. OFF. OF DIVERSION CONTROL, DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, PRACTITIONER'S MANUAL: AN INFORMATIONAL OUTLINE OF THE CONTROLLED SUBSTANCES ACT 23 (2006); *see also* MAT Legislation, Regulations, and Guidelines, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (2018), <https://www.samhsa.gov/programs-campaigns/medication-assisted-treatment/legislation-regulations-guidelines> (last visited Sept. 25, 2018).

90. Controlled substances under the Controlled Substances Act are divided into five “schedules,” a complete list of which is published annually based on DEA regulations. Substances are placed in their respective schedules based on whether they have a currently accepted medical use in treatment in the United States and their relative abuse potential and likelihood of causing dependence when abused. OFF. OF DIVERSION CONTROL, PRACTITIONER'S MANUAL: AN INFORMATIONAL OUTLINE OF THE CONTROLLED SUBSTANCES ACT 23 (2006).

91. *See, e.g.,* Jim Nelson, *New Funding for Agencies Fighting Opioid Epidemic in Ohio*, NBC24 NEWS (July 11, 2017), <https://nbc24.com/news/local/new-funding-for-agencies-fighting-opioid-epidemic-in-ohio> [<https://perma.cc/JQ2F-TLPU>]; Julie Carr Smyth, *Ohio Awards \$10M to Boost Opioid, Addiction Breakthroughs*, U.S. NEWS & WORLD REPORT (Dec. 7, 2017), <https://www.usnews.com/news/business/articles/2017-12-07/ohio-to-name-winners-of-up-to-12m-in-opioid-science-grants> [<https://perma.cc/LK5K-TTPU>].

III. PUBLIC NUISANCE IN THE CONTEXT OF PUBLIC HEALTH

Given the relative ineffectiveness of existing legislative and regulatory responses, a number of state attorneys general and individual counties have begun filing lawsuits against major opioid manufacturers and distributors to combat the epidemic through the judicial process.⁹² Among the most common causes of action across these complaints are claims of public nuisance on the basis of infringement on the health and welfare of the general public.⁹³

A. THE BASIS OF PUBLIC NUISANCE CLAIMS

The common conception of common law public nuisance in modern doctrine arises from the sovereign's *parens patriae* power and sounds in tort. The phrase "*parens patriae*" roughly translates into "parent of the country" and has come to mean that the State has an inherent authority to protect quasi-sovereign interests in pursuit of maintaining the welfare of its citizenry.⁹⁴ *Parens patriae* authority does not necessarily allow a state to sue in place of a harmed individual; there still must be some particular injury to the State itself that can be recognized as affecting a "quasi-sovereign" interest at common law.⁹⁵

The Supreme Court first addressed the meaning of the "quasi-sovereign interest" requirement in 1982. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, Puerto Rico sought to sue in its *parens patriae* capacity for discrimination against Puerto Rican migrants, which Puerto Rico claimed was harming the

92. As of August 2018, the most significant state-based opioid litigation is the multidistrict litigation taking place in the Northern District of Ohio, which remains in settlement negotiations. *In re National Prescription Opiate Litigation*, MDL No. 2804, Case No. 1:17-cv-2804. See also Complaint, Ohio v. Purdue Pharma, L.P., No. CV-17 CI 00261 (O.H. Ct. Com. Pl. Ross County filed May 31, 2017); Complaint, Illinois v. Purdue Pharma L.P., No. 2017-L-013180 (Ill. Cir. Ct. Cook County filed Dec. 27, 2017); Complaint, New Hampshire v. Purdue Pharma, No. 17-cv-427-PB, 2018 WL 333824 (N.H. Super. Ct. 2018) (No. 17-cv-427-PB); Complaint, Cty. of Erie v. Purdue Pharma, L.P., No. 0801671/2017 (N.Y. Super. Ct. Erie County filed May 19, 2017).

93. See, e.g., Ohio Complaint, *supra* note 92 at ¶ 171; Illinois Complaint, *supra* note 92 at ¶¶ 289–295; New Hampshire Complaint, *supra* note 92 at ¶¶ 259–267; Erie Complaint, *supra* note 92 at ¶¶ 231–237.

94. See Richard P. Leyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1863 (2000).

95. *Id.* at 1865 (citing *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 601–602 (1982)).

Puerto Rican economy.⁹⁶ The Court held that an action under the *parens patriae* power required the state to articulate an interest apart from the interests of the private parties affected.⁹⁷ The Court considered what might qualify as a “quasi-sovereign” interest for the purposes of this standing requirement, and held that “a State has a quasi-sovereign interest in the health and well-being — both physical and economic — of its residents in general.”⁹⁸ The Court also recognized, however, that “[a] quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant,” implying that the validity of an asserted quasi-sovereign interest must be considered on a case-by-case basis.⁹⁹ Thus, in the context of public health nuisance claims, the State must point to the effects of the alleged nuisance: the harm to the public health as well as to the harm felt by the State itself as a result of its attempts to rectify the nuisance. In this way, both the physical and economic welfare of the state might be invoked as the interests at issue.¹⁰⁰

B. CONCERNS REGARDING PUBLIC NUISANCE AS A LITIGATION TOOL

Since public nuisance gives states a cognizable cause of action when affected individuals might lack one, it is a powerful tool by which states have come to address and rectify wrongs committed against the public.¹⁰¹ However, legitimate concerns exist regarding states’ expansive use of public nuisance claims to deal with public issues.¹⁰² Some academics not only take issue with the possibility that the targeted parties may not deserve to be held to account and so should not have their duties expanded, but

96. *Alfred L. Snapp & Son*, 458 U.S. at 607.

97. *Id.*

98. *Id.*

99. *Id.*

100. *See generally* *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 204 (N.Y. App. Div. 2003) (Attorney General of New York State invoked *parens patriae* power to claim public nuisance against gun manufacturers); Complaint, *Moore ex rel. State v. American Tobacco Co.*, No. 1994CV01429, 1994 WL 17112350 (Miss. Ch. 1994) (No. 1994CV01429) (Mississippi Attorney General Moore is the first of many states attorneys general to file suit against tobacco manufacturers citing *parens patriae* interests).

101. Gifford, *supra* note 2, at 931–932.

102. *See generally* Gifford, *supra* note 2; M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000).

are also concerned that doing so would upend both the world of tort law and the entire political system.¹⁰³

Most pressingly, many academics have accused those parties who employ public nuisance doctrine as engaging in judicial overreach.¹⁰⁴ This concern comes from the fact that attorneys general can use these claims to attempt to enact new social policies and regulations by means of targeting industry actors without going through the proper political channels.¹⁰⁵ For example, Donald Gifford has argued against the use of public nuisance actions for defective products, advocating instead for stronger statutory and regulatory solutions to ongoing social problems.¹⁰⁶ Gifford discusses in depth the role that state litigation of this sort plays in establishing new regulatory systems in controversial industries.¹⁰⁷ He argues that a structure in which actors like state attorneys general are dictating regulatory schemes goes against the accepted American political structure and gives state attorneys general an unprecedented level of pseudo-legislative power by allowing them to use an

103. Gifford, *supra* note 2, at 920–921.

104. See generally John C.P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501 (2002); Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C.L. REV. 913 (2008); Richard O. Faulk, *Uncommon Law: Ruminations on Public Nuisance*, 18 Mo. Envtl. L. & Pol’y Rev. 1 (2010).

105. Gifford, *Impersonating the Legislature*, 49 B.C.L. REV. at 961–64.

106. Gifford, *supra* note 2, at 920; see also Faulk, *supra* note 104, at 12 (“Unlike courts, the legislative and executive branches can consider all pertinent issues in their entirety, rather than being limited to the issues raised by the parties involved in litigation. As a result, their ‘policy choices are likely to strike a fairer and more effective balance between competing interests [because] they are based on a broad perspective and ample information.’ Moreover, in contrast to courts, which lose jurisdiction upon rendition of final judgment, political branches have ‘evergreen’ opportunities to revisit statutes and rules to create better tailored provisions. Political branches are also better equipped to deal with broad issues because they represent a quorum of the people, unlike trial and appellate courts. While the ‘process of enacting a statute’ is ‘perhaps not always perfect, [it] includes deliberation and an opportunity for compromise and amendment and usually committee studies and hearing.”); Goldberg, *Unloved: Tort in the Modern Legal Academy* at 1519 (“[W]e may have to wean ourselves from the habit of treating tort as a means of devising ad hoc solutions to perceived social ills. By this I do not mean to say that tort ought not to address contemporary problems — it does and it should. Rather, I am suggesting that we must recapture the idea that tort cases are concerned with the focused task of identifying and remedying instances in which an actor has wronged another, as opposed to providing localized compensation or insurance schemes, regulating antisocial conduct for the good of society, or the like.”).

107. Gifford, *supra* note 2, at 920–21.

exceptionally broad cause of action to litigate what might otherwise be seen as non-justiciable political questions.¹⁰⁸

This view raises interesting and complex questions regarding the constitutional separation of powers and its role in this type of action. In his piece, Gifford addresses these questions with particular incisiveness in the context of public health-based nuisance claims. Using the example of the tobacco litigation in the early 1990s, he argues that public nuisance claims are only nominally or superficially motivated by money — he asserts that “[the] most important goal in filing the state actions, however, was to change the conduct of the tobacco companies, either by imposing an alternative regulatory system through judicial action, bankrupting the companies, or imposing sufficiently severe penalties for tobacco company practices.”¹⁰⁹ Public nuisance claims, he argues, are a style of regulatory litigation. He cites the Master Settlement Agreement¹¹⁰ reached at the conclusion of the tobacco litigation as evidence of the fact that the goal of the litigation was regulatory reform and asserts that the claims were pursued because “the regulatory schemes adopted by the federal and state legislative branches did not go as far as [some attorneys general] would have liked.”¹¹¹

In the same vein, Gifford criticizes the extent to which the power of state attorneys general will be aggrandized if this type of substantive litigation is accepted. He points to the fact that vague causes of action like public nuisance enable attorneys general to “wield unprecedented discretion and power in selecting industries to target,”¹¹² and presents the State’s superior bargaining power as compared to the defendant in this context as evidence that such claims are problematic.¹¹³ This significant bargaining leverage, which results from the extreme amount of potential liability facing defendants, allows attorneys general an otherwise largely unexpected amount of leeway in making regulatory and financial demands in the context of a settlement.

108. *Id.*

109. Gifford, *supra* note 2, at 922.

110. *See infra* Part IV.

111. Gifford, *supra* note 2, at 923. Gifford finds this constitutionally vexing, arguing this “[conscious intention] to regulate industries through detailed regulatory frameworks” amounts to an intrusion upon the legislative sphere by the state attorney general, who thus violates the constitutional separation of powers. *Id.* at 946.

112. *Id.* at 939.

113. *Id.* at 930–31.

Gifford, along with a number of other academics, finds this to be troubling and a problematic overreach beyond the boundaries of the role of litigation.

Various academics have taken an alternative view, however, and have countered Gifford's perspectives with practical perspectives of their own. Tort law, these academics argue, struggles to deal with the "complexities of modern injury such as multiple causation, latent injury, the indeterminate plaintiff, and the indeterminate defendant."¹¹⁴ This failure of the common law not only leaves those affected by harmful conduct without redress, but also might grant de facto immunity to reprehensible behavior. Now, as Gifford has argued, the legislative and administrative states are typically those best suited to deal with these issues of regulation. However, some academics argue, "the public law model of torts developed in large part because of Congress' refusal to regulate . . ., coupled with the failure of individual litigants to prevail in products liability."¹¹⁵ That is to say, litigation has never been, nor should it be, a primary solution — claims like public nuisance ought only to be sought where there has been a systematic failure to act or, more to the point, to act *effectively*. Thus, public health torts function as a gap filler where the traditional mechanisms of the legislative branch and the administrative agencies have been incapable of quickly and effectively preventing public health crises.¹¹⁶

The opioid crisis illustrates how *parens patriae* litigation might be reconciled with these dual concerns of prosecutorial overreach and legislative inaction. The legislative branch and administrative agencies like the FDA and the CDC have been working toward solutions to stymie the further expansion of the opioid epidemic. However, these efforts have been largely unsuccessful and fairly inefficient in the face of such a rapidly growing and inherently self-perpetuating crisis.¹¹⁷ This is true for a number of reasons, not the least of which is the fact that

114. Michael L. Rustad & Thomas H. Koenig, *Reforming Public Interest Tort Law to Redress Public Health Epidemics*, 331, 353 (2011).

115. *Id.* at 360.

116. *Id.* at 351.

117. Ellen Meara et al., *State Legal Restrictions and Prescription-Opioid Use Among Disabled Adults*, 375 NEW ENG. J. MED. 44, 50 (Jul. 7, 2016) ("The estimated rate of death due to prescription-opioid overdose in our sample [was] 46.6 per 100,000[.] . . . The scale of this estimate, combined with our finding of no significant association between legislative activity and nonfatal prescription-opioid overdose, should motivate renewed innovation to address misuse of prescription opioids.").

much of the modern opioid crisis involves illegal and illicitly produced and distributed opioids like heroin, so the problem is harder to detect.¹¹⁸ Thus, the role of *parens patriae* litigation should not necessarily be focused on establishing a lasting regulatory scheme. Instead, attorneys general should reconsider their role in responding to the opioid crisis and view themselves as strict enforcers rather than using broad claims like public nuisance to step into the regulatory sphere. State attorneys general can use public nuisance claims and the significant bargaining power which Gifford sees as inherent in such a cause of action to incentivize parties to negotiate settlements. Money damages from these settlements can then be used to kick-start remedial measures such as making medication-assisted treatment programs more accessible and affordable for an epidemic no longer driven by prescription pharmaceuticals alone.

While it is important that legislative and regulatory actions funded by these financial returns incentivize alternative behavior by pharmaceutical manufacturers and distributors, these pharmaceutical companies are not making the products that are now among the biggest killers: heroin and fentanyl.¹¹⁹ Thus, while these parties ought to be held accountable for their role in laying the foundation for widespread opioid abuse, injunctive relief in the form of pharmaceutical regulation will fail to strike at the core of the modern opioid epidemic. Increased spending on treatment and preventative measures will be far more effective. In this way, ex post public health *parens patriae* actions can “bridge the [financial] gap left by inadequate ex ante regulation at the state and federal level.”¹²⁰ Viewing the role of public nuisance causes of action in this way would also alleviate any discomfort which might come from concerns that attorneys general could use these claims as vehicles by which they undertake quasi-legislative roles.

118. See Puja Seth et al., *Quantifying the Epidemic of Prescription Opioid Overdose Deaths*, 108 AM. J. PUB. HEALTH 500 (Apr. 2018).

119. Margaret Warner et al., *Drugs Most Frequently Involved in Drug Overdose Deaths: United States, 2010–2014*, 65 NAT'L VITAL STAT. REP. Dec. 20, 2016, at 1.

120. Rustad, *supra* note 114, at 366–67.

C. HISTORY AND CONTEXT OF OPIOID PUBLIC NUISANCE SUITS

Lawsuits against opioid manufacturers and distributors commenced in the early 2000s but have become far more frequent and more high profile in recent years.¹²¹ The earliest suits against large manufacturers tended to be personal injury claims brought on behalf of addicted overdose victims.¹²² Localities, states, and the federal government also sued on other grounds such as deceptive marketing, misbranding, and fraud.¹²³ These suits tended to assert that opioid manufacturers omitted safety mechanisms, failed to adequately warn about addiction risks on packaging and advertising materials, and marketed products for off-label uses, among other claims.¹²⁴

These suits were difficult to bring as the opioids distributed were regulated by the FDA and were not defective, and intermediate actors separated the manufacturers from the actual harm caused to the individuals.¹²⁵ In contexts not limited to opioid litigation, courts have tended to find that a manufacturer does not have a duty “to refrain from the lawful distribution of a non-defective product” and have hesitated to “hold a manufacturer liable for the criminal conduct of a third party over which it had no control.”¹²⁶ In the case of opioids, the rigorous regulatory process imposed by the FDA makes it difficult to prove that the products were, in fact, defective. Likewise, opioid abuse, by its very nature, requires that the individual victims use the opioid products in illicit or unapproved ways. When these realities are combined with the fact that medical professionals serve as intermediaries between manufacturers and patients, the legal basis for suit is significantly weakened.¹²⁷

121. Rebecca L. Haffajee & Michelle M. Mello, *Drug Companies' Liability for the Opioid Epidemic*, 377 N. ENGL. J. MED. 2301, 2301 (2017).

122. *Id.*; see also Alana Semuels, *Are Pharmaceutical Companies to Blame for the Opioid Epidemic?*, THE ATLANTIC (June 2, 2017), <https://www.theatlantic.com/business/archive/2017/06/lawsuit-pharmaceutical-companies-opioids/529020/> [https://perma.cc/LHA3-G3MX].

123. Haffajee *supra* note 121, at 2304.

124. *Id.*

125. See, e.g., *Malone v. County of Suffolk*, 2012 WL 6629763 at *2-*3 (N.Y. Supp. Ct. 2012) (citing *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001) (overturned on other grounds by *Malone v. County of Suffolk*, 8 N.Y.S. 3d 408 (2015)).

126. *Id.* at *2.

127. See Haffajee, *supra* note 121, at 2301.

Regardless, state attorneys general and representatives for other localities — following the model of previous public health litigation in other industries — began asserting public nuisance as one of the legal causes of action against opioid manufacturers.¹²⁸ Since 2012, they have filed suits across the country, including in Ohio, Illinois, New Hampshire, and numerous counties and cities in New York and California, all of which cite public nuisance as a cause of action.¹²⁹ In support of these types of claims, states assert a variety of harms, including, but not limited to: the high rates of opioid use, the emotional and financial burdens of residents caring for addicted loved ones, lost companionship and wages, increased health care costs, lost productivity value, the creation of an illicit secondary market for both prescription and illegal opioids, and the number of lives lost and addictions endured.¹³⁰ State complaints then generally attempt to tie the mass production, alleged misrepresentation, and other actions of manufacturers to poor health outcomes by asserting that “[manufacturers’] actions were, at the least, a substantial factor in opioids becoming widely available and widely used . . . [and] a substantial factor in doctors and patients not accurately assessing and weighing the risks and benefits of opioids for chronic pain.”¹³¹ They go on, asserting that “[w]ithout [manufacturers’] actions, opioid use would not have become so widespread and the enormous public health hazard of opioid overuse, abuse, and addiction that now exists would have been averted.”¹³² While many of these lawsuits are ongoing, a number of them have resulted in small settlements with the manufacturers and distributors in question.¹³³ These settlements have allowed defendants to avoid expensive litigation which could lead to findings of fault on the part of the companies and to unpredictable damage awards.

128. See, e.g., Ohio Complaint, *supra* note 92, at 69.

129. Semuels, *supra* note 122; see also Haffajee, *supra* note 121.

130. See Ohio Complaint, *supra* note 92 at ¶ 171. See also, Illinois Complaint, *supra* note 92 at ¶¶ 289–295; New Hampshire Complaint, *supra* note 92 at ¶¶ 259–267; Erie Complaint, *supra* note 92 at ¶¶ 231–237.

131. *Id.*, at ¶¶ 172–173.

132. *Id.*, at ¶¶ 172–173.

133. For a discussion of one such instance of a small settlement, see *infra* Part IV.A.2.

D. FORMS OF RELIEF IN PUBLIC NUISANCE LITIGATION AND THE
NEED TO PRIORITIZE DAMAGES OVER INJUNCTIVE RELIEF

The Restatement (Second) of Torts¹³⁴ serves as an authority for courts in assessing public nuisance claims and damages issues. Section 821C lays out “Who Can Recover for Public Nuisance.” That section reads:

(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.

(2) In order to maintain a proceeding to enjoin a public nuisance, one must

(a) have the right to recover damages, as indicated in Subsection (1), or

(b) have authority as a public official or public agency to represent the state or a political subdivision in the matter, or

(c) have standing to sue as a representative of the general public, as a citizen in a citizen’s action or as a member of a class in a class action.¹³⁵

Given that subsection (1), the “special injury rule,” only addresses damage recovery in the context of private *individual* actions, the Restatement fails to give clear guidance to courts on the question of whether or not *states* can obtain public nuisance damages in litigation. However, the standard prayer for relief in a public nuisance cause of action, dating back to the earliest uses of public nuisance, is abatement¹³⁶ of the condition deemed to be a public nuisance, rather than damages, and this seems to be reinforced in subsection (2), which gives public officials and representatives

134. Restatement (Second) of Torts § 821C (Am. Law Inst. 1965).

135. *Id.*

136. “Abatement” is defined by the Bouvier Law Dictionary as, “Cessation, interruption, or reduction. Abatement describes a form of interference with some process. The term can describe any one of many varying degrees of interference, and the term relates the level of interference to the action that interferes with the underlying process. *For instance, abatement of a nuisance ends or pauses it . . .* Abatement may result in a change to some degree less than total abolition, often meaning a significant reduction of some process or effect, as with abatement of contamination from pollution.” *Abatement (Abate)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012) (emphasis added).

of the general public the right to maintain a proceeding to enjoin a public nuisance.¹³⁷

Abatement of the nuisance seems to require, at the very least, injunctive relief, as it requires offending actors to discontinue the actions that led to the emergence and maintenance of the crisis. However, there is precedent in some courts for allowing a state to seek a damage remedy as well, especially in cases where abatement would involve significant expense, in cases that involve concurrent causes of action, such as statutory and regulatory violations, or in cases where the offensive conduct has already been discontinued.¹³⁸ This is so in the context of the opioid crisis, where abatement would require significant rehabilitative and preventative services, as well as efforts to recoup the value of lost productivity and increased health care costs, which fall within the effect of the public nuisance as per the complaints.¹³⁹

Notably, most complaints simply use the generic language of abatement in their prayer for relief for public nuisance claims without any greater specificity.¹⁴⁰ State attorneys general make their public nuisance claims all the more powerful when they spurn specificity. Not only does this allow them flexibility over the course of litigation and in the context of settlement to negotiate and decide what relief would be fair and necessary for truly effective abatement, but it also incentivizes manufacturers to settle because their potential liability in the context of litigation remains imprecisely defined. It seems only natural that, in the context of such a widespread and expensive epidemic, manufacturers would be all the more hesitant to roll the dice with litigation without clear knowledge of the extent of their potential

137. Thomas Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. [ii] at 17 (2011); see also Ohio Complaint, *supra* note 92 at ¶ G.

138. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1037 (2d Cir. 1985) (basing injunctive award solely on state public nuisance law while relying, at least in significant part, on CERCLA for holding defendant liable for the state's "response costs"); *City of New York v. Milhelm Attea & Bros., Inc.*, 550 F. Supp. 2d 332, 332 (E.D.N.Y. 2008) (city seeking abatement of the nuisance and an award for lost tax revenue); *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 304 (E.D.N.Y. 2007) (city seeking abatement of the nuisance as well as an award for costs incurred in abatement); *Missouri ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 793 (Mo. 1980) (leaving to the discretion of the trial court whether damages were appropriate as a remedy in a public nuisance case for past injuries).

139. Ohio Complaint, *supra* note 92 at ¶¶ 171(c)–(e).

140. "That Defendants be ordered to abate the public nuisance that they created in violation of Ohio common law." *Id.*, at ¶ G.

financial exposure were they to be found liable to entirely abate the public nuisance.

Settlement, then, is likely the best option for both parties when public nuisance causes of action have been brought forth.¹⁴¹ Defendants' liability is uncertain in the context of these claims, as is the potential for states to succeed in ultimate litigation.¹⁴² However, when engaging in settlement negotiations with opioid manufacturers, state attorneys general should forgo attempting to substantively change the regulatory landscape of the opioid manufacturing and distribution industries. They should focus their efforts on maximizing substantial financial settlements.

As Gifford notes, one of the major concerns with the use of public nuisance as a litigation strategy is that it can create an uncomfortable separation of powers issue by allowing state attorneys general to step into a regulatory role for which they have no constitutional authority.¹⁴³ Eliminating the focus on creating new regulatory schemes as a form of injunctive relief would negate these concerns and allow for a more democratic solution. Rather than imposing regulatory regimes created by attorneys general outside of the realm of traditional political accountability, regulatory and legislative actions can proceed in their normal courses, more reactive to the will of the public and

141. The unpredictability of success on the merits of a public nuisance claim in a context such as this makes settlement extremely advantageous for attorneys general as well. Though there is nearly no precedent in the specific context of opioid manufacturers, claims attempting to hold manufacturers and retailers liable for the nuisance caused by guns, prescription drugs, and tobacco have been dismissed. *See generally* *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (N.Y. App. Div. 2003); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001). This is not to say that public nuisance claims have never succeeded, *see, e.g.*, *City of New York v. B250 Holding LLC*, 932 N.Y.S.2d 759 (N.Y. Sup. Ct. 2011); *City of New York v. Miller*, 867 N.Y.S.2d 15 (N.Y. Sup. Ct. 2008), but merely speaks to the uncertainty of the strength of the claim over the full course of litigation. Given this uncertainty, attorneys general ought to prefer the prospect of settlement, not only to ensure recovery in this instance, but also so as to not create precedent foreclosing the use of such a potentially powerful cause of action in the future.

142. The law of public nuisance is still largely unsettled, as courts have gone back and forth with regards to their willingness to find liability for this cause of action. *See, e.g.*, *N.Y. Trap Rock Corp. v. Clarkstown*, 85 N.E.2d 873 (N.Y. 1948) (allowing local officials to sue on public nuisance on the basis that a corporation's blasting and quarrying operations caused damage and depreciation to nearby properties, injured the health of citizens, and interfered with reasonable and orderly residential development); *B250 Holding LLC*, 932 N.Y.S.2d at 759 (allowing officials to bring a public nuisance suit against defendants who were allegedly using a storefront to distribute drug paraphernalia); *but see People v. Sturm*, 309 A.D.2d at 91 (refusing to find gun manufacturers liable for public nuisance); *Hamilton*, 750 N.E.2d at 1055.

143. Gifford, *supra* note 2, at 946.

supported by the increased financial resources necessary to achieve their ends. Attorneys general can also feel that public nuisance is invaluable in its own right, given that the context of the opioid epidemic is not one where simply seeking money damages without attempting to create a new regulatory scheme through a settlement amounts to simply putting a Band-Aid on the problem. The issue with the current response to the opioid epidemic is not a lack of regulatory and legislative ideas. Rather, as Senator Maggie Hassan and other legislators have recognized, “to make [existing] recommendations more than just words on a page requires follow-through, and critically, a substantial increase in federal resources.”¹⁴⁴ It is also possible that by choosing not to pursue regulatory schemes in settlement negotiations, state attorneys general might earn goodwill with opioid manufacturers and be able to parlay this concession of regulatory clauses into an increase in financial payout from the manufacturers.

Finally, the opioid epidemic as it currently exists is one where new regulations on prescription opioid manufacturers would be largely ineffective at combating the crisis. A large percentage of opioid abusers are not abusing prescription opioids but have instead moved into an illicit drug market, consuming cheaper opioids like heroin.¹⁴⁵ Further regulating the actions of prescription opioid manufacturers will do nothing to reduce or contain the growth of this population. In fact, it is possible that more restrictions on prescription drugs may push more people with existing substance abuse disorders into heroin as an alternative, making funding and resources for treatment and preventative action all the more necessary. As such, focusing on regulatory injunctive relief in the context of a settlement would not only be largely ineffective at abating the larger crisis, but could also shift the balance of power in negotiations. By expending their negotiating capital on the implementation of new

144. Hassan, *supra* note 48; see also Rachel Roubein, Warren, Cummings seek \$100B to fight opioid epidemic, *The Hill* (Apr. 18, 2018), <http://thehill.com/business-a-lobbying/383787-warren-cummings-seek-100b-to-fight-opioid-epidemic> [https://perma.cc/BT25-SV4Q] Rep. Elijah Cummings (D-Md.) said that “It is time for Congress to come together, put politics aside, and *get to the heart of the problem — providing adequate and stable funding for states and local communities*” and Sen. Elizabeth Warren (D-Mass.) has said that “[w]e can’t defeat the opioid crisis with empty words and half measures.” *Id.* (emphasis added).

145. Muhuri et al., *supra* note 31.

rules and regulations that manufacturers and distributors see as unnecessary and burdensome, attorneys general may impel these entities to decrease their financial offers in response.

IV. USING PUBLIC NUISANCE TO IMPEL AND STRUCTURE AN EFFECTIVE SETTLEMENT

Pharmaceuticals are not the first industry to face the challenge of public nuisance suits by state attorneys general, nor will they likely be the last. To ensure that these suits serve a valuable and effective purpose, attorneys general need to use these causes of action to push manufacturers toward settlement and think carefully about the way in which they hope to structure the settlements that they seek.¹⁴⁶ A look at similar past suits demonstrates some of the difficulties in structuring these settlements, and how state attorneys general should focus on settling high.

A. PAST SETTLEMENT STRUCTURES ILLUSTRATE SETTLEMENT PITFALLS

State attorneys general have failed to make the most of public nuisance actions in the past. Though many previous settlements in different industries, such as the Master Settlement Agreement in the tobacco industry, have been recognized as largely successful in the abstract, they have fallen short of their potential in practice. State attorneys general ought to take time to reflect on the successes and shortcomings of prior settlement agreements and consider the ways in which these settlement structures can be improved in the context of the opioid crisis. Given the unique nature of the current epidemic, which forces society to grapple with the costs of abuse of both regulable and illicit, non-regulable substances, attorneys general ought to devote themselves to using settlement to address the crisis as a whole. In order to do this, they should focus on maximizing their financial payout rather than using their bargaining capital to establish new regulatory regimes and ensure a payment

146. This Note makes no attempt to explore or recommend prayers for relief should the case continue to the litigation phase. Instead it seeks to offer a perspective on how attorneys general should structure their thinking at the stage of settlement negotiations with opioid manufacturers.

structure that creates a reliable revenue stream far into the future to deal with lingering and ongoing social costs.

1. *The Master Settlement Agreement and a Focus on General Funding and Future Payment Structures*

The high-water mark of successful government action in this field was the 1998 Master Settlement Agreement (MSA) between the tobacco industry and forty-six states (excluding Florida, Minnesota, Mississippi, and Texas).¹⁴⁷ In this settlement agreement, the state attorneys general sought indemnification for major expenses that the states had incurred such as taxpayer spending toward health care for tobacco-related illness, but also required that the tobacco industry implement substantive marketing changes, effectively establishing a new regulatory regime.¹⁴⁸ Each of the settling states gave up any future legal claims they might have based on the tobacco companies' actions. In exchange, the tobacco companies agreed to make annual payments in perpetuity to the settling states as compensation for health care and other tobacco-related costs and also acquiesced to a number of regulatory changes.¹⁴⁹ An independent auditor annually calculates the settlement payment to be made by each manufacturer and to be received by each settling state.¹⁵⁰ These calculations are based on base amounts, but take into account a variety of adjustments and offsets, considering factors such as the rate of inflation, the shares of national cigarette sales and shipments made by each manufacturer, and the actual costs to any given state.¹⁵¹ As of the end of 2015, manufacturers who were party to the MSA had paid \$106 billion to settling states and are expected to pay billions more in perpetuity.¹⁵²

While this concept of filling the state coffers through settlement with a substantial payout proportionate to the impact

147. Master Settlement Agreement, *supra* note 3.

148. For a discussion of these marketing changes, *see infra* Part VI.A.3.

149. The Master Settlement Agreement: An Overview, TOBACCO CONTROL LEGAL CONSORTIUM (2015), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-msa-overview-2015.pdf> [<https://perma.cc/EE8Q-TET4>].

150. *See* Master Settlement Agreement, *supra* note 3, at § IX.

151. Master Settlement Agreement, *supra* note 3, at §§ XI(i), XII(a)(4)(B), and XII(a)(8).

152. *Payments to Date as of May 13, 2015*, NAT'L ASS'N ATT'YS GEN. (June 2, 2015), http://www.naag.org/assets/redesign/files/Tabacco/2015-06-02-Payments_to_States_Inception_thru_May_13_2015.pdf [<https://perma.cc/284Y-UWQZ>].

of the crisis is one that any opioid settlement moving forward ought to emulate, the MSA also illustrates what state attorneys general should avoid in structuring a large-scale monetary settlement moving forward. Perhaps most important are the issues raised by the payment structure that underlies the financial aspect of the MSA. Certainly, structuring the payment plan to include both initial payments and subsequent annual payment requirements is an effective way of ensuring that immediate needs are met while also establishing a continual stream of revenue to go towards ongoing costs. However, tying the future payments to market share and annual sales creates a protected market for the good and, counterintuitively, ties the ability to successfully counter the opioid epidemic with the continued large-scale sale of the goods that initiated and perpetuated the epidemic. If attorneys general in opioid litigation follow this strategy, it may cripple the ability of the states to continue to combat the ongoing crisis and ultimately undermine the purpose for which settlement was sought.

2. *Prior Opioid Lawsuits and a Willingness to Settle for Less*

Though many states still have ongoing litigation, West Virginia, which had filed a similar lawsuit against various large opioid distributors in 2012, settled with two of those suppliers in January of 2017.¹⁵³ The two settling suppliers, Cardinal Health and AmerisourceBergen, agreed to pay a combined \$36 million to the State.¹⁵⁴ The West Virginia Attorney General had also entered previous settlements with nine smaller pharmaceutical

153. Eric Eyre, *2 Drug Distributors to Pay \$36M to Settle WV Painkiller Lawsuits*, CHARLESTON GAZETTE-MAIL (Jan. 9, 2017), https://www.wvgazette.com/news/health/drug-distributors-to-pay-m-to-settle-wv-painkiller-lawsuits/article_b43534bd-b020-5f56-b9f3-f74270a54c07.html [https://perma.cc/62WJ-985Z].

It is unclear how West Virginia's settlement will affect the bargaining power of state attorneys general moving forward, if at all. During the negotiation of the tobacco MSA, the four states who were not party to the agreement were excluded because they, like West Virginia in this case, had already reached settlements prior to the agreement. As such, it is entirely possible that West Virginia's settlement will prove largely irrelevant to negotiations with other states.

West Virginia had also reached a settlement with Purdue Pharma in 2004 in a suit that focused on Purdue's aggressive marketing tactics, which led to addiction. Purdue admitted no wrongdoing in the settlement. Landon Thomas Jr., *Maker of OxyContin Reaches Settlement With West Virginia*, N.Y. TIMES (Nov. 6, 2004), <https://www.nytimes.com/2004/11/06/business/maker-of-oxycotin-reaches-settlement-with-west-virginia.html> [http://perma.cc/2XV3-669A].

154. Eyre, *supra* note 153.

wholesalers, netting more than \$11 million.¹⁵⁵ Much of the settlement funding from the earlier 2004 settlement with Purdue Pharma, from which the state received \$10 million, went toward building a new gym and training facility for the state police; this payment largely failed to address the opioid crisis at all.¹⁵⁶

Because West Virginia has been among the states most severely impacted by the opioid crisis,¹⁵⁷ the State should have been well-situated to demand significant financial relief from pharmaceutical companies during the course of their settlement negotiations in order to fully abate the nuisance. However, \$36 million is a pittance in context, especially when considering the reality that true abatement of the opioid crisis will require a multi-faceted approach and significant financial support for each unique preventative and rehabilitative measure. In fact, as of late 2017, West Virginia lawmakers had set aside \$20.8 million from the settlements to fund additional treatment beds in nine drug treatment programs across the state.¹⁵⁸ Though the expansion of treatment programs is necessary to increase access to rehabilitative treatment, this solution alone is unlikely to make a significant impact on the crisis writ large, and the state now has relatively little money left from its settlement funds.

155. *Id.*

156. According to statistics by the CDC, West Virginia was the state with the highest rate of deaths due to drug overdose in 2016, with data suggesting that there were 52.0 drug overdose deaths per 100,000 people that year alone. Studies also indicate that the opioid crisis in West Virginia has continued to rapidly worsen, with statistically significant increases in the number of deaths from 2014 to 2015 and from 2015 to 2016. Curtis Johnson, *State Police Showcase New Training Center*, HERALD-DISPATCH (Apr. 25, 2012), http://www.herald-dispatch.com/news/recent_news/state-police-showcase-new-training-center/article_812bc06e-9174-5406-a9d0-940e7464bc89.html [https://perma.cc/589W-WGEA]. Further, West Virginia is the home to the town of Williamson, which has emerged in recent years as perhaps the most pronounced illustration of the intensity of the opioid crisis. Home to fewer than 3200 residents according to the most recent Census figures, the town has received nearly 21 million prescription painkillers in shipments over the past decade, amounting to more than 6500 pills per person. Lindsey Bever, *A Town of 3,200 Was Flooded with Nearly 21 Million Pain Pills as Addiction Crisis Worsened, Lawmakers Say*, WASH. POST (Jan. 31, 2017), <http://www.post-gazette.com/news/overdosed/2018/01/31/A-town-of-3-200-was-flooded-with-nearly-21-million-pain-pills-as-the-opioid-crisis-worsened-lawmakers-say/stories/201801310251> [https://perma.cc/XQ6H-PFW2].

157. *Drug Overdose Death Data*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/statedeaths.html> [https://perma.cc/N2JN-GNA7].

158. Eric Eyre, *\$20.8M from Opioid Settlement Distributed for Treatment Beds in WV*, CHARLESTON GAZETTE-MAIL (Dec. 4, 2017), https://www.wvgazette.com/news/health/wv_drug_abuse/m-from-opioid-settlement-distributed-for-treatment-beds-in-wv/article_6f80c18a-565a-5b07-b5fa-a33bba045b43.html [https://perma.cc/29KT-6EZS].

It is certainly possible that, given the intensity of the epidemic in West Virginia and the highly publicized nature of the litigation, the Attorney General hoped to gain political goodwill from reaching a settlement at all. However, moving forward, state attorneys general need to focus on securing much higher sums rather than attempting to achieve fast settlements for the purpose of public relations or spending some of their negotiating capital on injunctive relief if their states want to fund the necessary expansion of treatment and services on a broader level. If settlements are to fill the financial resource gap that has been limiting the success and effectiveness of proposed and existing preventative and rehabilitative strategies, then the size of the settlement must mirror the intensity of the crisis. State attorneys general must push for significantly higher settlements in their negotiations if the settlements themselves are to have any real value or effect.

3. *The MSA and a Focus on Injunctive Relief*

To maximize potential payouts, state attorneys general should refrain from establishing new regulatory regimes in order to avoid raising constitutional concerns and to keep the focus of the negotiations on maximizing financial resource allocations. Certainly, the MSA cannot be fairly criticized for failing to place sufficient focus on financial repayment. The MSA was structured in such a way that a significant revenue stream would continue to exist, and it has brought in over \$106 billion as of 2015.¹⁵⁹ But the state attorneys general also spent some of their bargaining power advocating for regulatory reforms through the MSA. Specifically, the agreement imposed prohibitions and restrictions on tobacco marketing by prohibiting the direct and indirect targeting of young smokers by outlawing the use of cartoon characters in advertising, disallowing free tobacco product samples except in adult-only facilities, and restricting product placements in entertainment media, among other restrictions.¹⁶⁰ It also prohibited lobbying against particular kinds of tobacco control legislation, agreements to suppress health-related research, and material misrepresentations about health consequences of using tobacco. Finally, it created a tobacco

159. See NAT'L ASS'N ATT'YS GEN., *supra* note 152.

160. Master Settlement Agreement, *supra* note 3, at § III.

prevention foundation and disbanded tobacco-industry initiatives.¹⁶¹

While all of these regulatory features of the MSA are well-intentioned, their inclusion in the settlement is the type of action that gives rise to constitutional concerns regarding separation of powers and creates concerns about the use of public nuisance as a legitimate legal strategy. Likewise, it is largely unclear what the state attorneys general had to give up in their negotiations in order ensure the inclusion of these regulations. As such, and given the context of the opioid epidemic, state attorneys general should forego the creation of settlement regulatory schemes and attempt to use that concession to further increase financial gains.

This is especially so since the nature of the current opioid epidemic makes it such that injunctive relief in the form of new regulatory schemes that might be implemented as part of a settlement deal unlikely to have any real valuable effect. The state complaints themselves recognize that a large portion of the public nuisance at issue now emerges from an illicit secondary market.¹⁶² This does not mean that pharmaceutical manufacturers should not be held to account for generating customers for the secondary market, as it was their “scheme [which] created both ends of [the] new secondary market for opioids — providing both the supply of narcotics to sell and the demand of addicts to buy them”¹⁶³ As such, there is possible cause for holding manufacturers accountable for the full extent of the opioid crisis, including the expanding use of heroin. However, attempting to use a settlement deal to create new regulatory schemes with regard to marketing, advertising, distribution, recollection, or other practices will not sufficiently serve to combat the use of illicit heroin that is not produced or sold by these parties. Though most heroin users first misused prescription opioids,¹⁶⁴ such that their hardship can be traced back to prescription opioid manufacturers, their migration to heroin means that any change in the behavior of opioid manufacturers now will be ineffective in altering the behavior of these abusers. The most effective role that these manufacturers can play for the greatest number of individuals in need, then, is

161. *Id.* at §§ III, VI.

162. *See* Ohio complaint, *supra* note 92 at ¶¶ 171(f)–(h).

163. *Id.*

164. Muhuri et al., *supra* note 31.

to serve as a means by which treatment and preventative measures can become more readily available.

B. STATE ATTORNEYS GENERAL SHOULD FOCUS ON SETTTLING HIGH AND ATTAINING SIGNIFICANT MONETARY RELIEF

State attorneys general can learn a lot about how to structure an effective financial settlement from the tobacco MSA, but should steer clear of its injunctive approach. The level of financial relief that state attorneys general received from that settlement was unprecedented, and the basic structure of the repayment plan is valuable. Opting to embrace a multi-pronged approach that includes initial and subsequent payments has notable benefits. Not only will the system of subsequent payments ultimately provide for a greater amount of financing over time than any manufacturer would be willing to pay in a single, initial lump sum, but that structure might actually allow for a more well-reasoned division of financing among different services and programs. The initial payments can be put towards immediate needs, such as expanding access to inpatient and medicine-assisted outpatient treatment, creating new inpatient treatment options, training first responders in overdose revival, and expanding access to naloxone. The subsequent annual payments could then go toward incrementally reimbursing the state for its expenditures through programs like Medicaid and toward ongoing costs, such as drug monitoring programs, educational programs, research for pain-relief alternatives to opioids, and continuing rehabilitative services.

Attorneys general seeking to settle opioid suits can also learn from the problematic way in which the MSA calculates subsequent payments. Tying payments to market share in any given year, as the MSA does, seems to create a perverse incentive that protects the continued sale of the product at issue.¹⁶⁵ Instead, state attorneys general should push to establish set amounts to be paid in subsequent years and divide the payments equally amongst the settling manufacturers and distributors. Alternatively, the market share adjustments for all subsequent years could also be based on the market share of the

165. That is to say, once state attorneys general begin receiving money on the basis of market shares they have an interest in keeping these companies profitable and avoiding regulations that would be unduly burdensome.

manufacturers and distributors at the time of settlement, as this fails to create the same incentives while still serving the corrective purpose of holding manufacturers and distributors financially responsible for their portion of the costs incurred.¹⁶⁶

Finally, state attorneys general can learn from the mistakes made under the MSA which led to some states receiving less money than they had initially anticipated. Some states also chose to mortgage their future MSA payments as collateral by issuing capital appreciation bonds in order to maximize their income in the short-term.¹⁶⁷ Because of the high probability that these bonds will not ever be repaid, the issuing states were forced to significantly undervalue their potential long-term income from the MSA.¹⁶⁸ Ultimately among the twelve issuing states, \$22.6 billion in bonds were issued in exchange for a mere \$573.2 million in cash.¹⁶⁹ This has resulted in these states receiving significantly less from the MSA than they might otherwise have, hampering their ability to fund tobacco control programs (and the funding would be insufficient even if they were devoting all of their MSA funding to those efforts). Any opioid settlement must include provisions disallowing this sort of action, as it undermines the value of the settlement as a means of filling the financial gap plaguing the effectiveness of existing and proposed regulation and legislation, and it can also make funds more difficult to track and hinder efforts to monitor their usage.

In order for any of this to have meaningful effect, however, state attorneys general cannot follow the lead of states like West Virginia in accepting low-ball financial settlements. Certainly, the allure of gaining political goodwill by publicizing any settlement is powerful. However, statistics show the astronomical annual cost of the opioid epidemic, and those costs

166. This could be further rationalized by the recognition that by the very nature of addiction, many of the costs that will continue into subsequent years are the proximate result of actions already taken.

167. Jim Estes, *How the Big Tobacco Deal Went Bad*, N.Y. TIMES (Oct. 6, 2014), <https://www.nytimes.com/2014/10/07/opinion/how-the-big-tobacco-deal-went-bad.html> [<http://perma.cc/LZ2J-D22D>].

168. “A typical bond is like an interest-only loan with a balloon payment in 30 years. But to avoid having to pay yearly interest payments, these 12 chose to issue capital appreciation bonds, deferring all interest payments and repayment for up to 50 years. Then the entire amount is due — with no plans made as to how it will be repaid. By the time these bonds come due, the legislators who approved them will be retired or dead.” *Id.*

169. *Id.*

continue to rise.¹⁷⁰ If any real value is to come from these types of settlements, state attorneys general must push to receive financing that can cover at least a meaningful portion of that cost — for pragmatic reasons, they must settle high. Fortunately, as evidenced by the MSA, this task is possible when a large number of state attorneys general work together.

C. STATE OFFICIALS SHOULD STRUCTURE THEIR RESPONSES TO TRACK THE NEEDS OF THE PEOPLE

Significant financial settlements are only valuable when the funding received actually goes toward abatement of the issue. The MSA is illustrative in this regard. The MSA's stated primary purpose is decreasing youth smoking and promoting public health.¹⁷¹ Despite this and the perception that reaching the MSA was a great success for the states in the fight against tobacco-related health consequences, the failure of the MSA to impose provisional limits on how states could spend the ultimate payments allowed them vast flexibility in choosing how and where to allocate the funding.¹⁷² As such, the outcomes resulting from the MSA have been largely disappointing. Since the passage of the MSA, state legislatures have chosen to appropriate many of these funds for unrelated purposes, leaving very little of the funding to go toward actual tobacco control, prevention, and cessation programs.¹⁷³ Notably, the Government Accountability Office found that tobacco control programs received the least MSA funds of any of the categories of government spending during the period between 2000 and 2007, receiving only 3.5% of the funds.¹⁷⁴

This is problematic for a number of reasons. Despite the continued existence of tobacco-related issues, the financial resources that were attained for the explicit purpose of minimizing these harms are being used for entirely unrelated issues. The MSA therefore teaches that any settlement must

170. See COUNCIL OF ECON. ADVISORS, *supra* note 63.

171. See Master Settlement Agreement, *supra* note 3 at § 1.

172. Lisa Shames, *Tobacco Settlement: States' Allocations of Payments from Tobacco Companies for Fiscal Years from 2000 to 2007*, U.S. GAO 6 tbl.2 (Feb. 27, 2007), <https://www.gao.gov/assets/120/115580.pdf> [<https://perma.cc/62AG-X8YK>].

173. See Shames, *supra* note 172.

174. *Id.*

include the creation of some sort of accountability mechanism.¹⁷⁵ Attempting to earmark the funding during settlement negotiations could be of significant political value for state attorneys general, as it displays commitment to rectifying an issue of significant public concern. The parties to the settlement could also explore alternative payment structures to more easily control the funds, such as setting up a public foundation to which all payments will go that is dedicated to responding to the opioid crisis. Likewise, the manufacturers might directly finance particular services provided by legislation without paying the money to the government for appropriation.

In fact, ensuring this level of accountability might actually be understood as a necessary element of the civic responsibility of state attorneys general. State attorneys general only have standing to sue on public nuisance by nature of the states' role as *parens patriae*, or "parent of the country."¹⁷⁶ Because this power requires that they protect the quasi-sovereign interests of the people, it might be argued that once the State has established the violation of a quasi-sovereign interest and attained the means to rectify this violation, it has a civic responsibility to use its resources to work toward this rectification. It is also possible that state attorneys general can undertake to involve the public in decisions regarding the use of funds prior to engaging in settlement negotiations at all. As the protectors of the public, these state officials should have a powerful grasp on what needs the public finds most pressing and should take pains to represent the desires of the public in these negotiations. As such, state attorneys general might seek out *ex ante* public participation and comment on the amount of settlement money needed, best uses for which it could be earmarked, and any other terms of settlement. Alternatively, state legislatures could attempt to do the same in deciding where to ultimately appropriate settlement funding. In this way, the protection of the public's interests — which serves as the entire foundation for the causes of action that

175. However, going about this might be difficult as it may implicate the legislative spending power. U.S. Const. art. I, § 8, cl. 1. Under this constitutional power, the legislature is the governmental body granted the power to decide how money is to be allocated and spent. This Note does not discuss whether state attorneys general have the power to limit or create restrictions on Congress' spending of government funds for the "general welfare."

176. See Gifford, *supra* note 2, at 939.

make these settlements possible — might be more effectively served.

V. CONCLUSION

The opioid epidemic has created a public health crisis of a unique nature and has claimed the lives of over 300,000 Americans in less than twenty years. While federal and state legislatures and administrative agencies have begun to make positive change in fighting against the spread of the epidemic, legislative and administrative efforts have struggled due to significant funding gaps. This is, in large part, because the breadth of the crisis has made it nearly economically impossible for the state and federal governments to shoulder the burden alone. Public nuisance causes of action are a legitimate and effective means to incentivize the parties responsible for the widespread harm to enter into negotiations regarding how they might provide financial assistance to ensure that treatment becomes accessible for those already in the throes of addiction and that the spread of opioid misuse does not continue. The ideal outcome from this sort of litigation would be a large-scale settlement agreement in which the pharmaceutical manufacturers shoulder some of the financial responsibility and the state attorneys general do not overstep their constitutional roles in an attempt to leverage the negotiations into increased regulation.

At the current stage in the litigation process for states, settlement is a strong possibility. Major pharmaceutical manufacturers like Johnson & Johnson, Teva Pharmaceutical Industries Ltd.,¹⁷⁷ and Purdue Pharma¹⁷⁸ have indicated a willingness to open negotiations. Much of the litigation has been consolidated into a multidistrict litigation (MDL) in the Northern District of Ohio.¹⁷⁹ Further, the presiding judge in that MDL,

177. Jeanne Whalen & Sara Randazzo, *Ohio Takes Steps Toward Resolution of Opioid Litigation*, WALL STREET J. (Jan. 11, 2018), Jeanne Whalen & Sara Randazzo, *Ohio Takes Steps Toward Resolution of Opioid Litigation*, WALL STREET J., (Jan. 11, 2018), <https://www.wsj.com/articles/ohio-in-talks-to-settle-opioid-suit-state-attorney-general-says-1515698528> [<https://perma.cc/QVX2-JYM5>].

178. Jef Feeley & Jared S. Hopkins, *Purdue Approaches States in Bid to Settle Opioid Claims*, BLOOMBERG (Nov. 17, 2017), <https://www.bloomberg.com/news/articles/2017-11-17/purdue-is-said-to-approach-states-in-bid-to-settle-opioid-claims>.

179. *In re National Prescription Opiate Litigation*, *supra* note 92.

U.S. District Judge Dan Polster, has expressly advocated for settlement in the case.¹⁸⁰ While this, as well as the breadth of claims like public nuisance, provides strong incentives to stay at the settlement table, there is also always a chance that settlement negotiations might go poorly — a possibility that could set the stage for a fascinating set of new challenges and questions for state attorneys general. If that is the case, how likely are states to actually succeed on the merits of a public nuisance claim, since that is likely from where the bulk of any damages would come? Is it worth rolling the dice on this in litigation and potentially losing it as a bargaining chip in future contexts? Are there other forms of leverage that the State could use in conjunction to keep these pharmaceutical companies at the table? All of these quandaries are highly relevant and could certainly change the way that states approach using litigation as a means of enacting change on these public nuisance issues. But until the potential for settlement is entirely off the table, these questions — however interesting — are questions for another day.

180. Judge Polster, in a hearing regarding the MDL in early March 2018, explicitly said that if settlement cannot be reached, “I’ll turn the plaintiffs loose on the defendants; I’ll turn the defendants loose on the plaintiffs. You’ll, you know, tear each other up way down . . . for discovery. You can go after the federal government, full discovery there, too. You know, FDA, DEA, have at it, and in 2019, I’ll try the Ohio case myself and see what happens, after dealing with whatever motions, and I’m sure some of the claims and theories are going to be knocked out and some will survive . . . What that will accomplish, I don’t know. *But I’d rather not do that.*” Eric Heisig, *Here’s Why A Federal Judge Presiding Over Opioid Lawsuits Thinks Settling Them Is Important*, CLEVELAND.COM (Jan. 9, 2018) https://www.cleveland.com/court-justice/index.ssf/2018/01/heres_why_a_federal_judge_pres.html [<https://perma.cc/9Z22-27S9>] (emphasis added).

APPENDIX

FIGURE 1: OPIOIDS ON THE RISE¹⁸¹

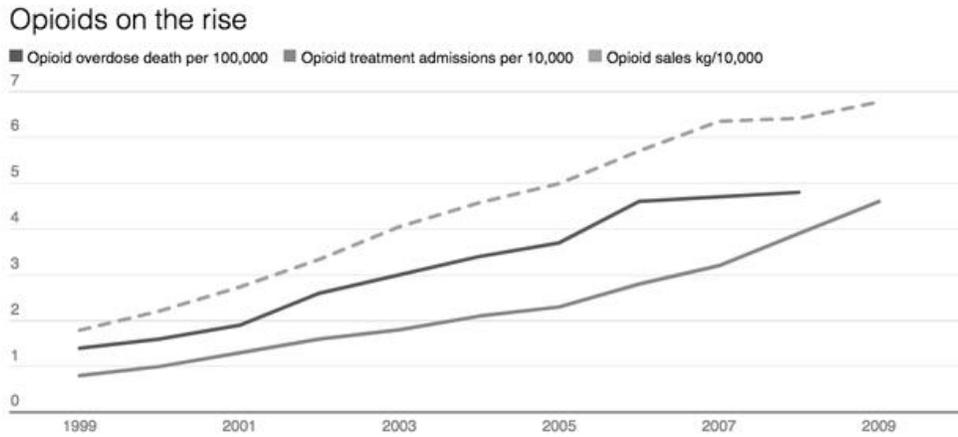
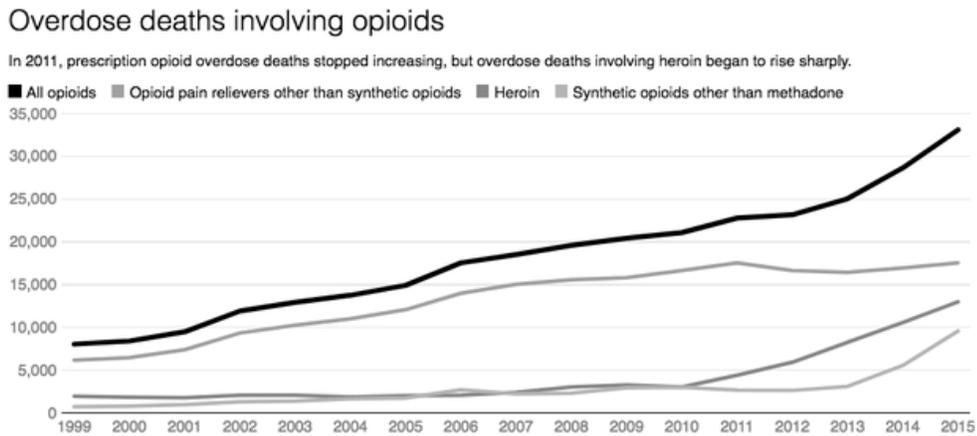


FIGURE 2: OVERDOSE DEATHS INVOLVING OPIOIDS¹⁸²



181. Andrew Kolodny, *The opioid epidemic as seen in 6 charts*, CBS NEWS (Oct. 16, 2017), <https://www.cbsnews.com/news/opioid-addiction-epidemic-in-6-charts/> [https://perma.cc/6RXL-M6ZW].

182. *See id.*