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## Public Health in the Opioid Litigation

Dr. Daniel G. Aaron

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## Public Health in the Opioid Litigation

*Dr. Daniel G. Aaron\**

*Today, the opioid crisis is playing out in the nation's courts. Litigants have taken a microscope to defendant opioid companies whose misconduct ignited and exacerbated the opioid crisis. As the litigation continues, one could imagine numerous ways its resolution could contribute to the end of a multi-decade overdose crisis and prevent future ones. Options include holding defendant companies accountable, releasing previously secret information for research on root causes of the epidemic, and prohibiting future misconduct through injunctive relief. Unfortunately, to date, the litigation has not been so capacious. Rather, the participants—judge included—have been preoccupied with rapid monetary settlement. Though understandable, attempts to obtain rapid monetary relief take a narrow view of public health. That is, we help the most readily identifiable victims, with less regard for structural factors that led to the crisis in the first place. This avoidance of structural change is at odds with public health and fails to meet this moment, defined by the most urgent public health crisis in modern history: the COVID-19 pandemic.*

*To explain why the litigation participants have pursued rapid monetary settlement, this paper uses the lens of agency. As will be shown, the opioid litigation is an agent of public health. That is, given the litigation's tight connections with public health, it must represent the broad health of the populace. This paper then identifies numerous incentive problems that create misalignment with public health. Viewed in this light, the pursuit of rapid monetary settlement becomes more understandable—though not justifiable. This paper offers solutions for curing these agency problems and ensuring that public health is properly represented in future public health litigation.*

*If there is any time to be capacious as to the scope of public health, that time is now. While corporate misconduct plays a significant role in the spread of COVID-19, it is even more relevant to the opioid crisis, a public health emergency initiated and exacerbated by defendants in the litigation. Therefore, relief must consider not only how to help opioid victims, but how to release as much information as possible about root causes and to discourage the misconduct that helped precipitate the epidemic. In other words, the court can and must take a deeper look at broader relief that benefits more people on a longer time scale. Expanding the scope of public*

health in the opioid litigation could yield more robust public health benefits for current and future generations. It could also create lasting precedent by expressing the norm that sales revenue and economic growth must not come at the expense of human life. Such a norm, operationalized through law, could offer significantly more enduring value than a one-shot bolus of money.

*This paper, together with its companion,<sup>1</sup> offers a new way to conceive of public health litigation and its benefits. This conception is grounded in a broad definition of public health. It is too soon to forsake public health for feasibility or realism; in fact, this paper suggests practical ways the judge and litigants can improve the impact of the opioid litigation within civil procedure's bounds.*

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1. Daniel G. Aaron, *Opioid Accountability*, 89 TENN. L. REV. (forthcoming 2022).

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INTRODUCTION

Litigation seems like a strange place to address a public health crisis. With federal courts insisting they need to cabin their own authority,<sup>2</sup> it may feel odd they are now overseeing claims against opioid companies about a twenty-year wave of addiction that has cost untold lives and shaken the country’s health and medical infrastructure to its core—what some scholars have called the “juggernaut” of public health emergencies.<sup>3</sup>

And yet it is hard to think of anything invoking public health more clearly than litigation touching a historic health epidemic, in which nearly every city, county, and state in the country is participating. References to public health pepper court documents.<sup>4</sup> Judge Daniel Aaron Polster has openly expressed his dismay that we have allowed such a massive loss of life to take place—“we’re losing more than 50,000 of our citizens every year.”<sup>5</sup> He has stated openly that his “objective is to do something meaningful to abate this

2. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (citing *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015)) (ruling partisan gerrymandering is beyond the scope of judicial review); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (asserting that a confined judicial role is fundamental to separation of powers).

3. James G. Hodge, Jr. et al., *Exploring Legal and Policy Responses to Opioids: America’s Worst Public Health Emergency*, 70 S.C. L. REV. 481, 483 (2019).

4. See, e.g., Plaintiffs’ Renewed Motion to Approve Co-Leads, Co-Liaisons & Executive Comm. at 6, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Jan. 3, 2018), ECF No. 34 (“We recognize that this is uniquely demanding litigation, with the health and safety of hundreds of thousands of Americans, and the governmental and private entities dedicated to their care, at stake in a crisis that advances daily.”); Ord. Regarding ARCOS Data at 16, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Apr. 11, 2018), ECF No. 233 (noting opioid crisis affects “health and safety of the entire country”); Op. & Ord. at 1, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio July 26, 2018), ECF No. 800 (“public health crisis”); Fifth Amended Complaint at 16, *City of Chicago v. Purdue Pharma*, *In re Nat’l Prescription Opiate Litig.*, No. 1:14-cv-4361 (N.D. Ill. Feb. 19, 2020), ECF No. 715 (“public health epidemic”); see generally Complaint, *Pell City v. Purdue Pharma*, Case No. 4:20-cv-00203 (N.D. Ala. Feb. 14, 2020), ECF No. 1 (invoking public health twenty-seven times).

5. Transcript of Proc. at 4, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Jan. 9, 2018), ECF No. 58.

crisis.”<sup>6</sup> These admissions of the relevance of public health to Article III litigation are remarkable. One can understand, then, why Judge Polster might promote early settlement and the associated expedited relief to opioid victims.<sup>7</sup> The other litigation participants have, for the most part, supported the prospect of early settlement.<sup>8</sup>

However, the grand irony is that efforts to quickly and globally settle opioid claims may be inconsistent with public health and, indeed, may be replicating an individualized model of health, with little attention to the superseding structures and derivative problems that brought us here.<sup>9</sup> Public health, at its core, “focuses on health at a population, rather than individual, level.”<sup>10</sup> One can imagine a spate of public health outcomes from the opioid litigation, including the release of documents for research on the root causes of the crisis, injunctive relief blocking future opioid company misconduct, and the prospect of holding defendants accountable for conduct that most scholars agree was foundational to the crisis.<sup>11</sup> Can rapid monetary settlement achieve the same goals?<sup>12</sup> The dissonance becomes even larger as

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6. *Id.*

7. *See id.* at 4–5 (stating that “[w]e’ve just got to plow through this” and recognizing that people are not interested in “finger-pointing” but rather in solutions to the opioid crisis).

8. *See infra* Section IV.A. (discussing the support for quick monetary settlements).

9. For discussion of this dichotomy, *see generally* Lindsay F. Wiley & Samuel R. Bagenstos, *How the Law Harms Public Health*, DEMOCRACY (June 16, 2020, 4:59 PM), <https://democracyjournal.org/magazine/how-the-law-harms-public-health/> [<https://perma.cc/U5MJ-Y6NT>] (explaining that laws controlling the spread of infectious disease result in restrictions that center on individual responsibility); Lindsay F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE L. REV. 207, 212–14 (2012) (describing the expanding scope of public health and critiques of public-health law, including personal responsibility in public health).

10. Wiley, *supra* note 9, at 214.

11. *See, e.g.*, Andrew Kolodny et al., *The Prescription Opioid and Heroin Crisis: A Public Health Approach to an Epidemic of Addiction*, 18 ANN. REV. PUB. HEALTH 559, 562–63 (2015) (explaining the role that pharmaceutical companies and other stakeholders played in the opioid crisis, such as pushing to overcome physicians’ reluctance to prescribe opioids for pain); Rebecca L. Haffajee & Michael R. Abrams, *Settling the Score: Maximizing the Public Health Impact of Opioid Litigation*, 80 OHIO ST. L.J. 701, 735 (2019) (stating that settlement funds and requirements to change behavior are two critical steps toward holding opioid manufacturers, distributors, and pharmacies accountable for their roles in the opioid crisis); Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 225 (2009) (suggesting strategies for reducing the over- and mis-prescribing of opioids, including limiting marketing of such controlled substances, interactions between physicians and pharmaceutical sales representatives, and influence of pharmaceutical companies in medical education); Ameet Sarpatwari et al., *The Opioid Epidemic: Fixing a Broken Pharmaceutical Market*, 11 HARV. L. & POL’Y REV. 463, 466–72 (2017) (describing Purdue Pharma’s contributing role in the opioid crisis, including applying for and receiving patent for extended-release oxycodone, providing the company with exclusive marketing and promotion capabilities); *see also infra* Section I.A. (reviewing opioid manufacturers’ trial verdicts, criminal settlements, and criminal sentences).

12. For discussion of how quick monetary settlements disserve larger public health goals, *see infra* Section IV.B.

one considers that many litigation participants have expressly claimed to bear the mantle of public health. The very scope of public health, and its inclusion of people beyond those immediately identifiable, is at stake. Should the litigation serve only a limited population of opioid victims with modest settlement funds, then public health will be public in name only. A true public-health approach would aim to protect the public from future mass losses of life by illuminating root causes and undoing perverse incentive structures.

The settlement approach favored by the players in the opioid litigation has implications far beyond opioids. Collectively, the United States is experiencing a public-health “moment” due to the novel coronavirus; unprecedented numbers of people are reckoning with the importance of public health.<sup>13</sup> And yet, too often, COVID-19 debates have stressed monetary relief and individual action, such as mask-wearing and social distancing, instead of larger legal structures and public health mechanisms, such as liability for corporations that have exacerbated the pandemic. In one well-known case, a South Dakota meatpacking plant that neither practiced social distancing among employees nor exercised other protective controls experienced an outbreak of 929 cases, or 25.6 percent of the plant’s workforce.<sup>14</sup> A worker and a nonprofit sued, arguing workers and community members “may die—all because Smithfield refused to change its practices in the face of this pandemic.”<sup>15</sup> Instead of incentivizing corporations to protect their workers and avoid outbreaks, Congress has heavily considered financial relief packages with coronavirus liability protections for employers.<sup>16</sup> These packages bear significant similarity to the

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13. See *infra* Section II.B. (discussing impact COVID-19 has had on attention to public-health concerns). According to a 2021 report, 71 percent of adults favor substantial increases in public-health funding, and 72 percent believe public-health agencies play important roles in the nation’s health. ROBERT WOOD JOHNSON FOUND. & HARV. T.H. CHAN SCH. OF PUB. HEALTH, *THE PUBLIC’S PERSPECTIVE ON THE UNITED STATES PUBLIC HEALTH SYSTEM 2* (2021).

14. Jonathan Steinberg et al., *COVID-19 Outbreak Among Employees at a Meat Processing Facility—South Dakota, March–April 2020*, 69 *MORBIDITY & MORTALITY WKLY. REP.* 1015, 1015–16 (2020).

15. Sebastian Martinez Valdivia & Dan Margolies, *Workers Sue Smithfield Foods, Allege Conditions Put Them at Risk for COVID-19*, NPR (Apr. 24, 2020, 4:29 PM), <https://www.npr.org/2020/04/24/844644200/workers-sue-smithfield-foods-allege-conditions-put-them-at-risk-for-covid-19> [<https://perma.cc/LWD6-Z2EB>].

16. See Erica Werner & Tom Hamburger, *White House and Congress Clash over Liability Protections for Businesses as Firms Cautiously Weigh Virus Reopening Plans*, WASH. POST (May 3, 2020), <https://www.washingtonpost.com/us-policy/2020/05/03/congress-coronavirus-legal-liability> [<https://perma.cc/X2DN-GFTB>] (discussing debate within Congress during early stages of the coronavirus pandemic on whether to provide businesses with liability protections against employees contracting the virus). As of June 2021, about thirty states enacted broad COVID-19 liability protections for businesses. See Chris Marr, *Covid-19 Shield Laws Proliferate Even As Liability Suits Do Not*, BLOOMBERG LAW (June 8, 2021, 5:31 AM),

settlement of opioid claims for a modest sum of money. Both government responses suggest that legal incentives can be purchased and neutralized, and that lawmakers fail to realize the full potential of tort law to redress public-health harms. This paper and its companion<sup>17</sup> lay out a contrasting vision of tort law—one that maximizes public health consistent with the litigation’s agency obligations. How we resolve the opioid litigation will forge precedent for how we treat future public-health emergencies appearing on the doorstep of Article III courts. It also could potentially prevent a future public-health emergency, as did asbestos litigation.<sup>18</sup>

Part I will introduce the opioid crisis and related litigation. Part II will discuss the implicit battle over the scope of public health. Part III will argue that the opioid litigation is inextricably linked to broad public health. That is, the litigation is public health’s agent. Part IV will examine the agency problems. Prior scholarship has emphasized the disconnect between plaintiffs in mass litigation and their attorneys, the judges, and the system more generally—that is, agency problems that hurt plaintiffs.<sup>19</sup> However,

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<https://news.bloomberglaw.com/health-law-and-business/covid-19-shield-laws-proliferate-even-as-liability-suits-do-not>.

17. Aaron, *supra* note 0.

18. *See id.* at 29–30 (describing the impact of asbestos litigation in providing accountability).

19. *See, e.g.*, ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 16 (2019) [hereinafter BURCH, MASS TORT DEALS] (discussing the attorney-client “agency problem” that exists in class-action lawsuits because plaintiffs cannot watch over their attorney and ensure their best interest is represented as they could if individually represented); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 73–74 (2017) [hereinafter Burch, *MDL Monopolies*] (examining how principles of the market and agency factor into litigation); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73–75 (2015) (describing three practices by judges that impact plaintiffs: appointing lead lawyers, implementing non-uniform ways of compensating lead lawyers, and presiding over settlements without a legal basis); Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699, 702 (2013) (describing issues raised in class-action lawsuits, including the faithfulness of the agent, issues related to the collective nature of one entity, and the need for individual autonomy despite the collective entity); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 12, (1991) (“Yet attorneys do not always fulfill this responsibility, because their interests are rarely perfectly aligned with those of the client.”); Abbe R. Gluck et al., *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J. L. MED. & ETHICS 351, 358–59 (2018) (arguing that elected officials and attorneys might be incentivized to quickly settle cases rather than remedy the larger health crisis); John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 628 (1987) (describing conflicts of interest between attorneys and clients as an “agency cost” problem”); Bruce Hay & David Rosenberg, *Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377–78, 1389–92 (2000) (describing “sweetheart” and “blackmail” settlements, which are deals that provide class members with either too little or too much); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104 (2006) (describing lawyers as “independent entrepreneurs driven by the desire to maximize their

this paper articulates a higher-level agency problem, namely the representation of public health by the litigation. Part V will offer solutions. The companion article will offer a more detailed account of how to maximize public health in the litigation.<sup>20</sup>

## I. BACKGROUND ON THE OPIOID CRISIS<sup>21</sup> AND RELATED LITIGATION

Since the current opioid crisis began in the 1990s,<sup>22</sup> it has led to more than 500,000 American deaths.<sup>23</sup> Recognizing that the crisis was largely caused by aggressive and often illegal corporate misconduct, plaintiffs have sued opioid manufacturers, distributors, and pharmacies in federal and state courts across the country.

### A. *The Opioid Crisis*

The opioid crisis arguably began in 1996 with the commercial introduction of controlled-release oxycodone, or OxyContin.<sup>24</sup> Oxycodone had been invented in 1916 and was used in clinical practice in 1917, but it was not until 1996 that Purdue Pharmaceuticals (Purdue) combined

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gain” and further articulating the conventional viewpoint that class-action decisions may be determined by lawyers’ economic interests, not the interests of the class).

20. Aaron, *supra* note 1.

21. For simplicity, this paper will use the term “the opioid crisis” even though there have been prior opioid crises. See Kolodny et al., *supra* note 11, at 561–62 (discussing previous opioid crises that began as early as the second half of the nineteenth century, became an increasing problem that reached its peak in the 1890s, continued into the twentieth century, and largely impacted minority populations by the 1960s); see also DAVID T. COURTWRIGHT, DARK PARADISE: A HISTORY OF OPIOID ADDICTION IN AMERICA 2 (Harv. Univ. Press enl. ed., 2001) (“[O]piate addiction increased throughout the nineteenth century, peaked in the 1890s, and thereafter began a sustained decline.”).

22. Hodge et al., *supra* note 3, at 485.

23. Recent research has indicated that national data surveillance has underestimated the death toll of the opioid crisis. See Olga Khazan, *The Opioid Epidemic Might Be Much Worse Than We Thought*, ATL. (Feb. 27, 2020), <https://www.theatlantic.com/health/archive/2020/02/more-people-have-died-opioids-us-thought/607165> [https://perma.cc/7MLT-BZHU]. Between 1999 and 2016, there were about 453,300 opioid deaths in the U.S. *Id.* In 2020, the U.S. suffered 69,710 deaths from opioids. Bill Chappell, *Drug Overdoses Killed a Record Number of Americans in 2020, Jumping by Nearly 30%*, NPR (July 14, 2021, 6:53 PM), <https://www.npr.org/2021/07/14/1016029270/drug-overdoses-killed-a-record-number-of-americans-in-2020-jumping-by-nearly-30> [https://perma.cc/A8ZF-LNQU]. Therefore, when one adds in 2017–19 and 2021, a more likely figure for the death toll of the opioid crisis is 700,000.

24. See Hodge et al., *supra* note 3, at 486 (memorializing 1996 as the year Purdue Pharma released its opioid-based pain reliever OxyContin); Theodore J. Cicero & Matthew S. Ellis, *The Prescription Opioid Epidemic: A Review of Qualitative Studies on the Progression from Initial Use to Abuse*, 19 DIALOGUES IN CLINICAL NEUROSCI. 259, 263 (2017) (explaining that the introduction of OxyContin was a major factor in growing opioid abuse because crushing or dissolving pills defeated the purpose of the slow-release capsule, originally designed to dissuade abuse, and provided an available source of the drug); Van Zee, *supra* note 11, at 221 (stating that the 1996, highly marketed, release of OxyContin resulted in OxyContin becoming the leading drug of abuse by 2004).



oxycodone with the controlled-release system Contin.<sup>25</sup> A controlled-release drug allows for a slower trickle of drug into the bloodstream. Thus, OxyContin was born. With new technology in hand, Purdue pushed the idea that the controlled release provided smoother, more consistent pain relief for longer periods of time with less risk of addiction.<sup>26</sup> The U.S. Patent and Trademark Office originally denied Purdue's patent application because the combination of any pain reliever with Contin was too obvious.<sup>27</sup> However, Purdue eventually won its appeal to the Federal Circuit, in part because it marshalled fraudulent evidence of the drug's efficacy and novelty.<sup>28</sup> With a broad period of market exclusivity,<sup>29</sup> Purdue aggressively marketed OxyContin to physicians, and simultaneously promoted concepts that would increase opioid prescribing more generally.<sup>30</sup> For example, Purdue funded the American Pain Society, whose "Pain is the fifth vital sign" campaign aimed to convince providers that pain must be treated as aggressively as perturbations in basic vital signs like blood pressure and breathing rate.<sup>31</sup> By 2000, there were widespread reports of OxyContin misuse, and the drug quickly became the most widely misused opioid.<sup>32</sup> However, opioid

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25. Sarpatwari et al., *supra* note 11, at 468. Prior to OxyContin's release, Purdue sold the opioid MS Contin, a combination of Contin with morphine sulphate. *Id.* at 469.

26. See Harriet Ryan et al., 'You Want a Description of Hell?' OxyContin's 12-Hour Problem, L.A. TIMES (May 5, 2016), <https://www.latimes.com/projects/oxycontin-part1> [<https://perma.cc/7DRU-NG8K>] (displaying a press release from Purdue Pharma advertising "smooth and sustained pain control all day").

27. Sarpatwari et al., *supra* note 11, at 469–70 (explaining that to obtain a patent, the material must be novel, useful, and non-obvious, where obviousness is determined "from the perspective of a person possessing ordinary skill in the relevant field").

28. See *id.* at 470. ("Purdue's claim that extended-release oxycodone provided pain relief for 90 percent of patients within [a] narrower dosage range was false, and it would later emerge that Purdue was aware of this falsehood."); see also *Purdue Pharma L.P. v. Endo Pharms. Inc.*, 438 F.3d 1123, 1131 (Fed. Cir. 2006) ("In light of Purdue's consistent representations of the four-fold dosage range for controlled release oxycodone as a 'surprising discovery' and the context in which that statement was repeatedly made, we cannot say the trial court's finding that Purdue failed to disclose material information was clearly erroneous.").

29. Sarpatwari et al., *supra* note 11, at 471.

30. See Van Zee, *supra* note 11, at 221 (stating that Purdue led an aggressive campaign, focusing on the use of OxyContin to promote the use of opioids).

31. See Kolodny et al., *supra* note 11, at 562 (indicating Purdue Pharma provided financial grants to over 20,000 educational programs focused on pain, including the American Pain Society and its "Pain is the Fifth Vital Sign" campaign); Cicero & Ellis, *supra* note 24, at 262–63 (discussing the "fifth vital sign" campaign and the Joint Commission on the Accreditation of Healthcare Organization's release of a report concluding doctors were not properly managing patients' pain due to an "irrational fear of addiction," which led to doctors prescribing narcotics); Sarpatwari et al., *supra* note 11, at 465–66 (explaining that the campaign led many experts to downplay the opioids' addictiveness and encouraged opioid use for chronic pain).

32. See Theodore J. Cicero et al., *Trends in Abuse of OxyContin® and Other Opioid Analgesics in the United States: 2002–2004*, 6 J. PAIN 662, 662, 670 (2005) (explaining that hydrocodone products were previously the most abused analgesic but that by 2005 OxyContin ranked the same

company marketing was a tide that lifted all boats:

Prior to the introduction of OxyContin, many physicians were reluctant to prescribe OPRs [opioid pain relievers] on a long-term basis for common chronic conditions because of their concerns about addiction, tolerance, and physiological dependence. To overcome what they claimed to be “opiophobia,” physician-spokespersons for opioid manufacturers published papers and gave lectures in which they claimed that the medical community had been confusing addiction with “physical dependence.” They described addiction as rare and completely distinct from so-called “physical dependence,” which was said to be “clinically unimportant.” They cited studies with serious methodological flaws to highlight the claim that the risk of addiction was less than 1%.<sup>33</sup>

Opioid companies were enormously successful in their marketing and played a critical role in the rise in opioid prescriptions that ignited the opioid epidemic.<sup>34</sup>

It is worth highlighting some of the misconduct that occurred around this time, as various court proceedings revealed. Purdue is likely the most infamous wrongdoer. In 2007, amidst criminal and civil charges by the Department of Justice (DOJ) asserting that Purdue engaged in misleading marketing by downplaying OxyContin’s risks, Purdue Pharmaceuticals and three executives settled for \$634.5 million.<sup>35</sup> Between 2017 and 2019, the DOJ and several U.S. Attorneys’ offices commenced fresh investigations of Purdue on the grounds that Purdue failed to properly monitor opioid sales and failed to report doctors illegally prescribing its opioids.<sup>36</sup>

Insys Therapeutics admitted to bribing doctors to prescribe its opioid product Subsys (fentanyl mouth spray).<sup>37</sup> Insys’s founder, John Kapoor, was

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as hydrocodone, or higher). Increases in prescription drug abuse were driven by OxyContin and hydrocodone from 2000–02. *Id.* at 671.

33. Kolodny et al., *supra* note 11, at 562.

34. *Id.* at 560–61 (discussing significant rise in hydrocodone and oxycodone consumption from 1999–2011 and noting that use of opioid pain relievers also led to an increase in heroin use); Van Zee, *supra* note 11, at 223–24 (explaining that Purdue Pharma’s marketing campaign was successful in downplaying the addictive nature of opioids, which increased rates of opioid abuse and addiction, leading to more illicit drug abuse of prescription opioids than of cocaine and heroin); Expert Rep. of Professor Meredith Rosenthal at 10, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio July 19, 2019), ECF No. 1899-20.

35. See Sara Randazzo, *Purdue Pharma in Talks with Justice Department to Resolve Criminal, Civil Probes*, WALL ST. J. (Sept. 6, 2019, 1:50 PM), <https://www.wsj.com/articles/purdue-pharma-in-talks-with-justice-department-to-resolve-criminal-civil-probes-11567792243?mod=rsswn&page=1&pos=1> [<https://perma.cc/KE58-J6MQ>] (explaining that three of Purdue Pharma’s executives pled guilty to producing misleading information about OxyContin, including information about the risk of addiction).

36. *Id.*

37. Gabrielle Emanuel, *Opioid-Maker Insys Admits to Bribing Doctors, Agrees to Pay \$225*

sentenced to sixty-six months in prison.<sup>38</sup> In 2008, McKesson Corp. settled for \$13 million with the DOJ for failing to report, as required by the Controlled Substances Act,<sup>39</sup> suspiciously high sales of prescription opioids.<sup>40</sup> In 2017, McKesson Corp. settled again with the DOJ for \$150 million after the company “did not fully implement or adhere to its own program.”<sup>41</sup> Practice Fusion, Inc., an electronic health records developer, settled with the DOJ for \$145 million on claims it received kickbacks from Purdue in exchange for creating software alerts that nudged doctors to prescribe more opioids.<sup>42</sup> In 2019, Oklahoma State Judge Thad Balkman concluded, after a thirty-three-day trial, that Johnson & Johnson engaged in “false, misleading, and dangerous marketing campaigns” that “caused exponentially increasing rates of addiction, overdose deaths, and Neonatal Abstinence Syndrome [addiction in newborns].”<sup>43</sup> Judge Balkman also determined that Johnson & Johnson sought to neutralize public health

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*Million Settlement*, NPR (June 5, 2019, 10:12 PM), <https://www.npr.org/2019/06/05/730173846/opioid-maker-insys-admits-to-bribing-doctors-agrees-to-pay-225-million-settlement> [<https://perma.cc/T98Q-M26Q>] (“[T]he drugmaker admitted orchestrating a nationwide scheme in which it set up a sham ‘speaker program.’ Participating doctors were not paid to give speeches, but to write prescriptions of Insys Therapeutics’ fentanyl-based medication, Subsys.”).

38. Tim McLaughlin, *Insys Founder Kapoor Sentenced to 66 Months in Prison for Opioid Scheme*, REUTERS (Jan. 23, 2020, 6:42 AM), <https://www.reuters.com/article/us-insys-opioids/insys-founder-kapoor-sentenced-to-66-months-in-prison-for-opioid-scheme-idUSKBN1ZM1QB> [<https://perma.cc/TS28-FU87>] (explaining that Kapoor’s sentence was much longer than those of other pharmaceutical representatives charged with contribution to the opioid crisis but that other members of the company were also convicted as a part of the conspiracy).

39. 21 U.S.C. § 832(a)(3).

40. Press Release, U.S. Dep’t of Just., McKesson Corporation Agrees to Pay More than \$13 Million to Settle Claims That It Failed to Report Suspicious Sales of Prescription Medications (May 2, 2008), <https://www.justice.gov/archive/opa/pr/2008/May/08-opa-374.html> [<https://perma.cc/LW3Q-K76V>] (explaining McKesson had violated the Controlled Substances Act by failing to report suspicious sales of controlled substances and suspicious orders received from other pharmacies, leading to settlement of \$13,250,000 with the Department of Justice).

41. Press Release, U.S. Dep’t of Just., McKesson Agrees to Pay Record \$150 Million Settlement for Failure to Report Suspicious Orders of Pharmaceutical Drugs (Jan. 17, 2017), <https://www.justice.gov/opa/pr/mckesson-agrees-pay-record-150-million-settlement-failure-report-suspicious-orders> [<https://perma.cc/XRV9-EGPB>].

42. Press Release, U.S. Dep’t of Just., Electronic Health Records Vendor to Pay \$145 Million to Resolve Criminal and Civil Investigations (Jan. 27, 2020), <https://www.justice.gov/opa/pr/electronic-health-records-vendor-pay-145-million-resolve-criminal-and-civil-investigations-0> [<https://perma.cc/5P35-JNBH>] (explaining the settlement amount and Practice Fusion’s admission to receiving kickbacks); Mike Spector & Tom Hals, *Exclusive: OxyContin Maker Purdue Is ‘Pharma Co X’ in U.S. Opioid Kickback Probe—Sources*, REUTERS (Jan. 28, 2020, 3:46 PM), <https://www.reuters.com/article/us-purdue-pharma-investigation-opioids-e/exclusive-oxycontin-maker-purdue-is-pharma-co-x-in-us-opioid-kickback-probe-sources-idUSKBN1ZR2RY> [<https://perma.cc/U3Q2-HPWB>] (discussing the settlement and the illegal kickbacks).

43. State *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486, at \*2, \*37–38 (Okla. Dist. Aug. 26, 2019).

regulations of opioids using an anti-regulatory “swat team.”<sup>44</sup> As a result, he delivered a \$572 million judgment against Johnson & Johnson.<sup>45</sup> This, and other misconduct,<sup>46</sup> was essential to the establishment of the opioid epidemic.

Between 1999 and 2010, opioid sales, addiction, treatment admissions, and deaths climbed in proportion.<sup>47</sup> Drug overdose deaths, largely opioid-related, increased from 16,849 in 1999 to 70,237 in 2017, a 417 percent increase.<sup>48</sup> The total quantity of opioids sold in the United States (in morphine milligram equivalents) peaked in 2010, then began to decrease gradually.<sup>49</sup>

In 2010, the nature of the epidemic somewhat shifted when Purdue introduced an abuse-deterrent version of OxyContin that, when crushed, turned into a gummy substance rather than a powder that could be snorted or injected.<sup>50</sup> While the reformulation appeared to reduce OxyContin-related poisonings and mortality, heroin became a substitute,<sup>51</sup> leading to a rapid

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44. *Id.* at \*24.

45. *Id.* at \*44, \*61; see also Jan Hoffman, *Johnson & Johnson Ordered to Pay \$572 Million in Landmark Opioid Trial*, N.Y. TIMES (Aug. 26, 2019), <https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html> [https://perma.cc/AU4T-YP5Y] (discussing the judgement entered against Johnson & Johnson). This sum was later reduced to \$465 million due to a math error. Lenny Bernstein, *Oklahoma Judge Lowers Johnson & Johnson Payment in Opioid Verdict*, WASH. POST (Nov. 15, 2019), [https://www.washingtonpost.com/health/oklahoma-judge-lowers-johnson-and-johnson-payment-in-opioid-verdict/2019/11/15/e5b8fce2-07d4-11ea-818c-fcc65139e8c2\\_story.html](https://www.washingtonpost.com/health/oklahoma-judge-lowers-johnson-and-johnson-payment-in-opioid-verdict/2019/11/15/e5b8fce2-07d4-11ea-818c-fcc65139e8c2_story.html) [https://perma.cc/3MXL-DJKT].

46. Many of the allegations and resulting settlements have been catalogued in Rebecca L. Haffajee & Michelle M. Mello, *Drug Companies’ Liability for the Opioid Epidemic*, 377 NEW ENG. J. MED. 2301, 2302–03 (2017).

47. See COMM. ON PAIN MGMT. & REGUL. STRATEGIES TO ADDRESS PRESCRIPTION OPIOID ABUSE & NAT’L ACADS. OF SCIS., ENG’G, & MED., PAIN MANAGEMENT AND THE OPIOID EPIDEMIC: BALANCING SOCIETAL AND INDIVIDUAL BENEFITS AND RISKS OF PRESCRIPTION OPIOID USE 51 (2017) (explaining that increase in opioid prescriptions that began in the late 1990s was associated with increases in opioid-related deaths and substance use disorders); *Overdose Death Rates*, NAT’L INSTS. OF HEALTH: NAT’L INST. ON DRUG ABUSE (Jan. 29, 2021), <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates> [https://perma.cc/3RXM-UAFJ] (outlining overdose death rates and opioid involvement).

48. NAT’L INSTS. OF HEALTH: NAT’L INST. ON DRUG ABUSE, *supra* note 47 (depicting the national drug-involved overdose deaths between the years 1999 and 2017).

49. See U.S. FOOD & DRUG ADMIN., FDA ANALYSIS OF LONG-TERM TRENDS IN PRESCRIPTION OPIOID ANALGESIC PRODUCTS: QUANTITY, SALES, AND PRICE TRENDS 2 (2018), <https://www.fda.gov/media/111695/download> [https://perma.cc/ZK46-YJJU] (noting the total MMEs sold in aggregate opioid analgesic market between the years 1992 and 2016).

50. See William N. Evans et al., *How the Reformulation of OxyContin Ignited the Heroin Epidemic*, 101 REV. ECON. & STAT. 1, 4 (2019) (explaining Purdue Pharma’s reformulation of Oxycontin to prevent abuse).

51. *Id.* at 13 (“We provide quantitative evidence that the switch to the ADF OxyContin in August 2010 led to the increase in the heroin death rate . . .”); see Theodore J. Cicero & Matthew S. Ellis, *Abuse-Deterrent Formulations and the Prescription Opioid Abuse Epidemic in the United*

increase in heroin-related overdose deaths often called Wave Two of the epidemic.<sup>52</sup> Wave Three of the epidemic began in 2013 when fentanyl, a highly potent synthetic opioid, began to be mixed with heroin, cocaine, and other drugs.<sup>53</sup> Synthetic opioids rapidly overtook other opioid subtypes as the leading cause of opioid-related death,<sup>54</sup> and government seizures of fentanyl increased by nearly seven times between 2012 and 2014.<sup>55</sup>

Because overdose deaths involving prescription opioids have fallen, some commentators have argued the prescription opioid component of the epidemic has waned, and other types of opioids (i.e., illicit heroin, fentanyl, and fentanyl analogs) now drive the epidemic.<sup>56</sup> While this carries some truth,<sup>57</sup> death rates paint a partial story. Prescription opioids remain involved in a sizeable fraction of opioid-related deaths, as shown in **Figure 1**.

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*States: Lessons Learned from OxyContin*, 72 JAMA PSYCHIATRY 424, 426–27 (2015) (finding that of those opioid users who switched opioids after the introduction of ADF OxyContin, 70 percent switched to heroin, and most said heroin was the practical alternative). Interestingly, it is still not clear if abuse-deterrent OxyContin has reduced misuse, as neither Purdue nor FDA has allowed experts to view the data. See Matthew Perrone, *Revamped OxyContin Was Supposed to Reduce Abuse, but Has It?*, AP NEWS (July 22, 2019), <https://apnews.com/938234589fae4c7187344b35dec8ddff> [<https://perma.cc/2NWU-NPZU>] (citing mixed evidence on whether ADF OxyContin fights abuse). The new formulation also extended Purdue's patent from 2013 to 2030; therefore, the drug has been exclusive for twenty-four years so far—since 1996. *Id.*

52. *Opioid Basics: Understanding the Epidemic*, CTNS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/epidemic/index.html> [<https://perma.cc/G8SS-DUS8>] (last updated Mar. 17, 2021) (explaining how the second wave of opioid overdose deaths began in 2010 and involved rapid increases in heroin-related deaths).

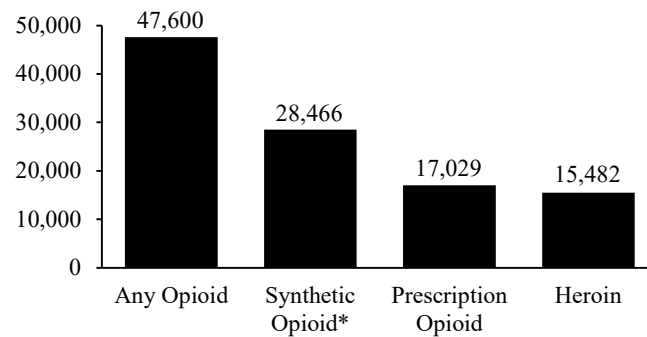
53. *Id.*

54. *Id.*

55. Wilson R. Palacios, *Our Response to Opioid Overdose Deaths Must Be As Nimble As Illicit Opioid Markets*, 2 JAMA NETWORK OPEN 1, 2 (2019), doi:10.1001/jamanetworkopen.2019.14634.

56. See, e.g., Nicolas P. Terry, *The Opioid Litigation Unicorn*, 70 S.C. L. REV. 637, 652–54 (2019) (arguing that individuals suffering from opioid use disorder frequently move to illicit synthetics, and people who find it difficult to obtain prescription drugs also move to street drugs like fentanyl); Hodge et al., *supra* note 3, at 488–89 (explaining that the primary causes of opioid-related deaths in 2010 and 2013 were illicit drugs and synthetic opioids).

57. See, e.g., NAT'L INSTS. OF HEALTH: NAT'L INST. ON DRUG ABUSE, *supra* note 47 (illustrating rising heroin overdose deaths between 1999 and 2019).

**Figure 1: Deaths in 2017 involving particular opioid subtypes.<sup>58</sup>**

\*does not include deaths related to methadone use

Furthermore, prescription opioid misuse remains remarkably common and far exceeds heroin use, as shown in **Table 1**.

**Table 1: Opioid addiction and misuse among over age 12 during the past year by self-report, 2017.<sup>59</sup>**

Type of Opioid Use	Frequency Among Over Age 12 (2017)
Opioid use disorder	0.8 %
Opioid use disorder involving prescription opioids	0.6 %
Prescription opioid misuse	4.1 %
Initiation of prescription opioid misuse	0.7 %
Heroin use	0.3 %

58. *Id.*

59. The data are drawn from CTRS. FOR DISEASE CONTROL & PREVENTION, ANNUAL SURVEILLANCE REPORT OF DRUG-RELATED RISKS AND OUTCOMES: UNITED STATES, 2019, at 16–19 (2019), <https://www.cdc.gov/drugoverdose/pdf/pubs/2019-cdc-drug-surveillance-report.pdf> [<https://perma.cc/6YPA-CZSV>]. Data on the use of illicit fentanyl is difficult to obtain. Theodore J. Cicero et al., *Increases in Self-Reported Fentanyl Use Among a Population Entering Drug Treatment: The Need for Systematic Surveillance of Illicitly Manufactured Opioids*, 177 *DRUG & ALCOHOL DEPENDENCE* 101, 101 (2017) (“Most large scale, national surveillance systems do not track or inquire about illicitly manufactured synthetic opioids . . . . More importantly, there is no practical way to distinguish between authentic and illicitly manufactured fentanyl, or whether illicit fentanyl was used in counterfeit drugs sold as oxycodone, hydrocodone or alprazolam, without chemically analyzing these products—a formidable and nearly impossible task on a nationally representative level.”). Prescription fentanyl misuse from 2015 to 2016 was 0.1 percent. Ty S. Schepis et al., *The Epidemiology of Prescription Fentanyl Misuse in the United States*, 96 *ADDICTIVE BEHAVS.* 89, 91 (2019). However, illicit use is likely much more common.

The 4.1 percent of the U.S. population (over twelve years old) who misused a prescription opioid in the past year is equivalent to one in twenty-five Americans. Further, 0.7 percent of the over-twelve population initiated prescription opioid misuse in the past year. Perhaps these numbers are not surprising given that a full third of the U.S. population used a prescription pain reliever in 2017,<sup>60</sup> and addiction is proportional to exposure.<sup>61</sup> In any event, given that prescription opioids appear to be a strong locus of misuse, claims that the opioid crisis has evolved beyond prescription opioids<sup>62</sup> are premature. Furthermore, research has found that opioid addiction generally begins with prescription opioids.<sup>63</sup>

Because of the lives it has touched and extensive reporting by the press,

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60. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 59, at 71.

61. See COURTWRIGHT *supra* note 21, at 6 (discussing how addiction is an “illness of exposure”).

62. See, e.g., Terry, *supra* note 56, at 654 (“[T]hose who find it harder to acquire prescription drugs will turn to street drugs such as fentanyl.”); Nabarun Dasgupta et al., Commentary, *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 AM. J. PUB. HEALTH 182, 182–83 (2018) (claiming that a second phase of the opioid crisis began when some prescription opioid users transitioned to heroin as “a more potent and cheaper alternative”); cf. Michael J. Purcell, *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, 52 COLUM. J. L. & SOC. PROBS. 135, 142–43 (2018) (stating that the context of the opioid epidemic is “rapidly changing” and the primary driver is no longer prescription abuse).

63. Cicero & Ellis, *supra* note 51, at 425–427 (describing users’ shift from prescription opioids to heroin); Haffajee & Mello, *supra* note 46, at 2301 (“[T]he majority of persons with opioid addiction started with prescribed painkillers.”); Laura B. Monico & Shannon Gwin Mitchell, *Patient Perspectives of Transitioning from Prescription Opioids to Heroin and the Role of Route of Administration*, 13 SUBSTANCE ABUSE TREATMENT, PREVENTION & POL’Y 1, 1 (2018) (“Research during the last decade has established that individuals who abuse prescription opioids, especially those with a physiological dependence, may shift to heroin use, particularly when they already inhale or inject prescription opioids. Several of these studies have found remarkably high likelihoods of heroin abuse after NMPO [non-medical use of prescription opioids] than without NMPO, as high as nineteen times using data from 2011, to nearly forty times using data from 2013.” (citations omitted)); Michael Fendrich & Jessica Becker, *Prior Prescription Opioid Misuse in a Cohort of Heroin Users in a Treatment Study*, 8 ADDICTIVE BEHAVS. REPS. 8, 8 (2018) (“[R]esearch suggests that many heroin users started with opioid-related pain medications and then, once they became dependent, transitioned to heroin, which is less expensive, more accessible, and more potent.”); Kyle Simon et al., *Abuse-Deterrent Formulations: Transitioning the Pharmaceutical Market to Improve Public Health and Safety*, 6 THERAPEUTIC ADVANCES IN DRUG SAFETY 67, 69 (2015) (“The prescription drug abuse epidemic is evolving. As a result of recent successes in reducing the supply of opioids available for abuse, data suggest that many people who abuse substances have switched from prescription drugs to illicit drugs, particularly heroin . . . . This progression may have occurred because heroin is cheaper and easier to obtain in some locations.” (citations omitted)); Christopher M. Jones, *Heroin Use and Heroin Use Risk Behaviors Among Nonmedical Users of Prescription Opioid Pain Relievers—United States, 2002–2004 and 2008–2010*, 132 DRUG & ALCOHOL DEPENDENCE 95, 95 (2013) (finding that from 2008–10, people who frequently misused prescription opioids had more than four times the risk of injecting heroin, and 82.6 percent of people who frequently misused prescription opioids and used heroin in the past year reported initiating prescription opioid misuse first).

the opioid crisis has received broad public recognition. As of 2018, 71 percent of Americans said that opioid addiction is a very serious problem,<sup>64</sup> and 57 percent of Americans said pharmaceutical companies should be held responsible for playing a role in the opioid epidemic.<sup>65</sup>

### B. The Opioid Litigation

The initial wave of opioid litigation began in the early 2000s and mostly involved Purdue Pharmaceuticals' OxyContin.<sup>66</sup> Claims were varied, requested relatively low damages, and largely failed, arguably due to the stigmatization of individual opioid victims.<sup>67</sup> This wave had one major success: a \$634.5 million criminal settlement between Purdue and the DOJ.<sup>68</sup>

The current wave of litigation started in 2014, with increasing public recognition of the opioid crisis.<sup>69</sup> Almost every state has sued.<sup>70</sup> Local governments, fearful they might be left out as they were in the big tobacco settlement, have joined the litigation.<sup>71</sup> In addition, the defendants are broader in the newer wave of opioid litigation, including manufacturers, distributors, and pharmacies, as well as some physicians.<sup>72</sup> Most plaintiffs assert false and misleading marketing or failure to monitor or report suspiciously high sales of opioids.<sup>73</sup> Other claims are predicated on Racketeer Influenced and Corrupt Organizations (RICO) statutes, consumer-protection statutes, negligence, fraud, unjust enrichment, and public nuisance.<sup>74</sup>

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64. Jennifer De Pinto et al., *Opioid Addiction in U.S.: 7 in 10 Say It's a Very Serious Problem*—*CBS News Poll*, CBS NEWS (May 8, 2018, 7:00 AM), <https://www.cbsnews.com/news/opioid-addiction-in-u-s-7-in-10-say-its-a-very-serious-problem-cbs-news-poll> [<https://perma.cc/3XDX-JTH7>].

65. Brian Mann, *Majority of Americans Say Drug Companies Should Be Held Responsible for Opioid Crisis*, NPR (Apr. 25, 2019, 5:12 AM), <https://www.npr.org/2019/04/25/716691823/majority-of-americans-say-drug-companies-should-be-held-responsible-for-opioid-c> [<https://perma.cc/53WQ-C5D2>].

66. Gluck et al., *supra* note 19, at 353.

67. *Id.*

68. Randazzo, *supra* note 35. Funds went mostly to law enforcement and Medicaid programs, rather than broad public health efforts. See Associated Press, *Purdue Pharma, Execs to Pay \$634.5 Million Fine in OxyContin Case*, CNBC (Aug. 5, 2010, 4:38 PM), <https://www.cnbc.com/id/18591525> [<https://perma.cc/QQY9-WUTZ>] (noting settlement beneficiaries).

69. Gluck et al., *supra* note 19, at 354.

70. Joanna Walters, *Purdue Pharma: Oxycontin Maker Faces Lawsuits from Nearly Every U.S. State*, GUARDIAN (June 4, 2019, 1:00 PM), <https://www.theguardian.com/us-news/2019/jun/03/purdue-opioids-lawsuit-oxycontin-california-maine-hawaii> [<https://perma.cc/D3X6-59HH>].

71. Gluck et al., *supra* note 19, at 355.

72. *Id.* at 354.

73. Terry, *supra* note 56, at 639.

74. Haffajee & Abrams, *supra* note 11, at 707–08.



In December 2017, the Judicial Panel on Multidistrict Litigation (JPML) consolidated sixty-four lawsuits into multidistrict litigation in the Northern District of Ohio under Judge Daniel Aaron Polster.<sup>75</sup> As claims continued to be transferred, the number of centralized claims grew to more than 2,000.<sup>76</sup> Judge Polster has admitted his overarching desire for global settlement.<sup>77</sup> In parallel with settlement efforts, he established a litigation track starting with three bellwether trials brought by Ohio municipalities.<sup>78</sup> These trials were avoided by settlements valued at more than \$300 million.<sup>79</sup> The JPML has since remanded several other lawsuits,<sup>80</sup> although almost all remain consolidated.

Notably, a new civil procedure device was invented in the opioid multidistrict litigation (MDL), as oft happens in MDLs.<sup>81</sup> In September 2019, after Professors Francis McGovern and William Rubenstein published a draft article suggesting the innovation,<sup>82</sup> Judge Polster agreed and certified

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75. See *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804, 290 F. Supp. 3d 1375, 1380–82 (J.P.M.L. 2017) (ordering transfer of all matters listed in Schedule A to the Northern District of Ohio); see also Eric Heisig, *Cleveland Federal Judge to Hear Dozens of Lawsuits Filed Against Big Pharma Nationwide*, CLEVELAND.COM (Jan. 11, 2019), [https://www.cleveland.com/court-justice/2017/12/cleveland\\_federal\\_judge\\_to\\_hear\\_1.html](https://www.cleveland.com/court-justice/2017/12/cleveland_federal_judge_to_hear_1.html) [https://perma.cc/3HAT-VVH4] (discussing the consolidation and transfer to U.S. District Judge Polster).

76. Colin Dwyer, *Your Guide to the Massive (and Massively Complex) Opioid Litigation*, NPR (Oct. 15, 2019, 9:05 AM), <https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation> [https://perma.cc/RU3E-6FHW].

77. See *infra* Section IV.A.1 (stating that Judge Polster urged settlement as other methods, including trial, would accomplish nothing).

78. Case Mgmt. Ord. One at 6, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Apr. 11, 2018), ECF No. 232 (outlining the “Case Tracks” for three of the consolidated cases).

79. Eric Heisig, *Cuyahoga, Summit Counties Received Millions of Dollars Through Opioid Litigation. See the Breakdown of the Settlements*, CLEVELAND.COM (Oct. 23, 2019), <https://www.cleveland.com/court-justice/2019/10/cuyahoga-summit-counties-received-millions-of-dollars-through-opioid-litigation-see-the-breakdown.html> [https://perma.cc/6F5J-47TE] (explaining the nine settlements between different drug companies and Cuyahoga and Summit counties).

80. See Ken Miller, *Two Federal Opioid Lawsuits Go Back to Oklahoma, California*, AP NEWS (Feb. 10, 2020), <https://apnews.com/32057372facdaf8446664182d2d4bda3> [https://perma.cc/ZC4Q-ULX6] (noting remand of cases back to California and Oklahoma); Jeff Jenkins, *Trial Date Set in Cabell-Huntington Opioid Trial; Parties Disagree on Discovery Issues*, METRONews (Mar. 5, 2020, 3:30 PM), <http://wvmetronews.com/2020/03/05/trial-date-set-in-cabell-huntington-opioid-trial-parties-disagree-on-discovery-issues> [https://perma.cc/85WF-XC3H] (noting developments in West Virginia lawsuit).

81. Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PENN. L. REV. 1669, 1671 (2017) (describing the unorthodoxy of multidistrict litigation).

82. Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders* (June 20, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3403834](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403834) [https://perma.cc/7V9X-F2HT]. The Texas Law Review later published the article. Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73 (2020).

a “class action” strictly for settlement purposes: a Rule 23(b)(3)<sup>83</sup> “Negotiation Class” encompassing all cities and counties in the United States, except those which opted out.<sup>84</sup> The negotiation class was invalidated by the Sixth Circuit for being beyond the scope of Rule 23,<sup>85</sup> but it may be resurrected in en banc review. The class had forty-nine city and county representatives and operated against thirteen defendants.<sup>86</sup> The negotiation class allowed coordinated negotiation by all cities and counties in the U.S., thereby providing defendants an opportunity to settle and obtain global peace. (Without the prospect of global peace, defendants worried that settling with municipalities would only attract more claims.<sup>87</sup>) The negotiation class could not litigate, as the certified claims and issues extended only to settlement discussions.<sup>88</sup> In its opinion, the Sixth Circuit declared that the new device “fundamentally alter[ed] the nature of the MDL” and unfairly coerced municipalities to settle.<sup>89</sup>

Ongoing attempts at global settlement have been unsuccessful.

## II. THE BATTLE OVER THE SCOPE OF PUBLIC HEALTH

The opioid litigation is an unprecedented mammoth whose outcome will affect millions of lives for years to come. And yet, as this paper will show, the opioid litigation stands for something more. The way this litigation is resolved bears implications for the future handling of public-health crises and mass losses of life. Embedded in the final resolution will be a determination about the scope of public health we are pursuing. Will we obtain modest monetary relief for opioid victims, or will we pursue something more?

To date, the litigation has been near-obsessed with speedy monetary returns for opioid victims. The judge of the multidistrict proceedings has disavowed other goals that would promote public health, such as trials, transparency, injunctive relief, and accountability.<sup>90</sup> Reactions from public

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83. Fed. R. Civ. P. 23(b)(3).

84. Ord. Certifying Negot. Class & Approving Notice at 1–3, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Sept. 11, 2019), ECF No. 2591.

85. *In re Nat’l Prescription Opioid Litig.*, 976 F.3d 664, 677 (6th Cir. 2020).

86. *Id.* at 664.

87. See Alison Frankel, *State AGs Pose Big Obstacle for Novel Opioids Negotiating Class Proposal*, REUTERS (June 26, 2019, 11:31 PM), <https://www.reuters.com/article/us-otc-opioids/state-ags-pose-big-obstacle-for-novel-opioids-negotiating-class-proposal-idUSKCN1TR35R> [<https://perma.cc/7HMQ-76NZ>] (discussing how defendants are hesitant to settle with plaintiffs because that would just lead to more claims).

88. Memorandum Op. Certifying Negot. Class at 2–4, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Sept. 11, 2019), ECF No. 2590.

89. *In re Nat’l Prescription Opiate Litig.*, 976 F.3d at 670.

90. See *infra* Section IV.A.1 (describing Judge Polster’s promotion of settlements); Aaron,

health legal scholars have ranged from uncertain to furious.<sup>91</sup> The sidelining and relegation of important public health goals implies that the scope of public health is narrow and that we will focus solely on redressing the harms to people with opioid addiction. But public health litigation can and must achieve more.

This Part will aim to bring previously disguised conversations to light, rendering explicit the battle over the scope of public health. The opioid litigation is a large participant in that conversation.

#### A. Public Health, Defined

Although we could dive right into what litigation outcomes would best promote public health, it helps to be clear about what public health *is*.<sup>92</sup> To the author's knowledge, no article has systematically attempted to consider the scope of public health as applied to the opioid litigation, nor how the scope of public health affects the relief sought.

Public health is a slippery concept. Its meaning and parameters differ by country.<sup>93</sup> Perhaps the most famous definition was offered by the Institute of Medicine in a 1988 report:

Public health is what we, as a society, do collectively to assure the conditions in which people can be healthy. This requires that continuing and emerging threats to the health of the public be successfully countered. These threats include immediate crises, such as the AIDS epidemic; enduring problems, such as injuries and chronic illness; and impending crises foreshadowed by such developments as the toxic by-products of a modern economy.<sup>94</sup>

Public health appears to have two properties important for the purposes of this article. First, it is broad and population based.<sup>95</sup> Over time, public health

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*supra* note 1, at 33 (stating that the opioid litigation focused on settlements but that another method is necessary).

91. Compare Jennifer D. Oliva, *Opioid Multidistrict Litigation Secrecy*, 80 OHIO ST. L.J. 663, 688–89 (2020) (discussing the importance of transparency and the public being informed of MDL proceedings), with Gluck et al., *supra* note 19, at 362 (analyzing the role of the courts in the opioid pandemic).

92. According to the well-known 1988 Institute of Medicine report on public health, one of the largest barriers to achieving public health is “lack of consensus on the content of the public health mission.” See COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, INST. OF MED., THE FUTURE OF PUBLIC HEALTH 107 (1988).

93. See INST. OF MED., FOR THE PUBLIC'S HEALTH: INVESTING IN A HEALTHIER FUTURE 121 (2012) (“[E]ach country has its own definition of public health.”).

94. COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, *supra* note 92, at 1.

95. See Onyebuchi A. Arah, *On the Relationship Between Individual and Population Health*, 12 MED., HEALTH CARE & PHIL. 235, 235 (2009) (“[A] person's health cannot be seen in isolation but must be placed in [a] rich contextual web.”); cf. Thomas R. Frieden, *The Future of Public Health*, 373 NEW ENG. J. MED. 1748, 1748 (2015) (“The field of public health aims to improve the health of as many people as possible as rapidly as possible.”).

has moved from a concern over high-risk groups to acknowledging that most, and perhaps all, people are at risk and may require public-health interventions.<sup>96</sup> Corollary to the population focus of public health is an attunement not just to individuals, but to people's broad situations, a concept often referred to as the "ecological" view of public health.<sup>97</sup>

Second, it is future oriented.<sup>98</sup> The actions, the laws, and the systems of today "are irreversibly shaping the environments on which the survival of future generations depend."<sup>99</sup> The future orientation of public health is visible in the sheer fact that risks now lead to future harms.<sup>100</sup> A rise in the frequency of car accidents will cause more deaths not in seconds, but over time in the future. Similarly, broad dissemination of cigarettes in the 1920s and 1930s increased smoking but would only increase lung cancer rates decades later.<sup>101</sup> Public health is concerned with action now to improve health later.<sup>102</sup>

Public health is generally considered a public good; that is, it is non-

96. See COMM. ON ASSURING THE HEALTH OF THE PUB. IN THE 21ST CENTURY, INST. OF MED., THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY 46-48, 50 (2002) (addressing moderate risks across an entire population may create greater public-health gains than addressing only high-risk individuals).

97. See Wiley, *supra* note 9, at 222 ("The development of the now-dominant 'ecological' model of health has been heavily influenced by epidemiology, which demonstrates that socially, culturally, and materially disadvantaged people live shorter, less healthy lives.").

98. See Hilary Graham, *Where Is the Future in Public Health?*, 88 MILBANK Q. 149, 151 (2010) (outlining public health's future-oriented activities of preventing, prolonging, and promoting); COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, *supra* note 92, at 6, 18 (1988) ("The committee has concluded that effective public health activities are essential to the health and well-being of the American people, now and in the future."). Of note, the future orientation of public health does not bar it from inquiry into the past. Understanding the past, including prior handling of mass tort litigation, can assist in securing a healthy future. See Gabriel Scally & Justine Womack, *The Importance of the Past in Public Health*, 58 J. EPIDEMIOLOGY & CMTY. HEALTH 751, 755 (2004) (concluding that how we record contemporary events can impact students' understanding of public health history in the future); Micah L. Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience*, 67 KAN. L. REV. 1029, 1029-30 (2019) (explaining how some efforts to ensure specific spending of MSA funds were successful in the short term but not sustained in the long term).

99. Graham, *supra* note 98, at 153.

100. *Id.* at 151.

101. See Prabhat Jha, *Avoidable Global Cancer Deaths and Total Deaths from Smoking*, 9 NATURE REV. CANCER 655, 658 (2009) (discussing global trends between increased smoking rates and lung cancer deaths decades later).

102. Arguably, this could be conceived as improving health now. A person who quits smoking immediately enjoys greater life expectancy even though their health is no different from the day before. However, this article will consider such gains to be in "the future" because of the inherent delayed payoff, which is a hallmark of prevention. See Rebecca Masters et al., *Return on Investment of Public Health Interventions: A Systematic Review*, 71 J. EPIDEMIOLOGY & CMTY. HEALTH 827, 833 (2017) ("[P]ublic health interventions can offer surprisingly rapid returns, which may increase further over the longer term.").

excludable and non-rivalrous.<sup>103</sup> A person cannot be intentionally excluded from a true public-health measure, and one person's use of public health does not reduce the benefit to others.

*B. Battle over the Scope of Public Health: COVID-19*

The opioid litigation is not taking place in a vacuum, but rather during one of the most important public health moments in history.

Perhaps never in American history has the impact of public health been felt so deeply, personally, and universally. The novel coronavirus has killed hundreds of thousands of Americans and relegated many of us to our homes.<sup>104</sup> It is hard to spend one single day without remembering how life used to be: grabbing a bite to eat with friends, social gatherings, church, sports, dating. Behind our loss of a way of life is a recognition that our actions affect others. One's level of social distancing, mask-wearing tendencies, and use of hand sanitizer can increase or decrease the local infection rate. As a result, the idea that everyone is interconnected by public health appears to be attaining a new collective significance. Public-health analysis has become ubiquitous in media and popular discourse. In August 2020, more than eight in ten Americans reported that they regularly wore masks in stores<sup>105</sup>—an action largely taken to protect others<sup>106</sup>—and are thus participating in the collective effort of public health. Its economic importance, too, has come into stark relief, as coronavirus-related unemployment surged from 3.5 percent in February 2020 to 14.7 percent in April 2020.<sup>107</sup>

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103. See Sandro Galea, *Public Health as a Public Good*, B.U. SCH. OF PUB. HEALTH (Jan. 10, 2016), <https://www.bu.edu/sph/news/articles/2016/public-health-as-a-public-good> [<https://perma.cc/J3XB-K8U2>] (“The classic understanding of a public good in economics . . . is a good that is non-excludable and non-rivalrous, where no one can be excluded from its use and where the use by one does not diminish the availability of the good to others.”).

104. See Holly Yan, *More People Have Died from COVID-19 Than in the Past Five Flu Seasons Combined. And Coronavirus Is Much More Contagious*, CNN (Oct. 6, 2020), <https://www.cnn.com/2020/10/06/health/flu-covid-19-deaths-comparison-trnd/index.html> [<https://perma.cc/P89Y-689S>] (explaining the high rates of contagion and COVID-19 deaths); see also *COVID Data Tracker*, CTR. FOR DISEASE CONTROL & PREVENTION, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) [<https://perma.cc/4UXD-DPE8>] (last visited Aug. 18, 2021) (providing the current number of COVID-19 deaths in the U.S.).

105. See Stephanie Kramer, *More Americans Say They Are Regularly Wearing Masks in Stores and Other Businesses*, PEW RSCH. CTR. (Aug. 27, 2020), <https://www.pewresearch.org/fact-tank/2020/08/27/more-americans-say-they-are-regularly-wearing-masks-in-stores-and-other-businesses> [<https://perma.cc/HS65-N4YY>] (describing mask-wearing trends throughout the United States).

106. Angel N. Desai & David M. Aronoff, *Masks and Coronavirus Disease 2019 (COVID-19)*, 323 JAMA 2103, 2103 (2020).

107. *Civilian Unemployment Rate*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm> [<https://perma.cc/3XPH-YDB9>] (last visited Aug. 17, 2020).

And yet COVID-19 is only the latest of several recent reminders of the importance of public health that have left an imprint on the American populace. From gun violence to lead-contaminated water to the affordable-housing crisis to the opioid epidemic and other addiction crises, there is no shortage of reminders. COVID-19 may be the strongest, however, for its near-universal impact on the American populace. This year, “public health” broke records for the number of times it was searched in Google.<sup>108</sup> Many have described our current point in history as a “public health moment.”<sup>109</sup>

Concomitant with the rise of the salience of public health, there has been increasing recognition of the roles played by structural forces and the law.<sup>110</sup> Several months into the novel coronavirus’s arrival in the United States, more than 80 percent of the populace supported social distancing, bans on groups of more than ten people, and stay-at-home orders,<sup>111</sup> despite the inherent self-sacrifice. There have been sustained lawmaking efforts to restrict guns and tax sugar-sweetened beverages.<sup>112</sup> Recent research showed that the return-on-investment of public-health interventions is 14.3 to 1, and for nationwide interventions, the ratio is 27.2 to 1.<sup>113</sup> Broad and future-looking public-health policies are increasingly understood as basic necessities.

However, as much progress as has been made, many continue to resist public health, and conversations have not always encompassed the characteristic depth or breadth of public health. COVID-19 measures provoked protests and movement-organizing by right-wing groups.<sup>114</sup> Mask-

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108. GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=all&geo=US&q=public%20health> [<https://perma.cc/64LA-JLY4>] (last visited Sept. 26, 2021).

109. Michelle A. Williams, *When Public Health Means Business*, HARV. T.H. CHAN SCH. OF PUB. HEALTH (Aug. 5, 2020), <https://theforum.sph.harvard.edu/events/when-public-health-means-business-4> [<https://perma.cc/NXS5-63PB>].

110. Wiley, *supra* note 9, at 210.

111. Mark É. Czeisler et al., *Public Attitudes, Behaviors, and Beliefs Related to COVID-19, Stay-at-Home Orders, Nonessential Business Closures, and Public Health Guidance—United States, New York City, and Los Angeles, May 5–12, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 751, 753 (2020). Thus, while COVID-19 laws and policies have at times drawn protests and criticism, a majority of Americans appear to support them. *See id.* (“Overall, 79.5% of respondents in the U.S. cohort supported government-issued stay-at-home orders and nonessential business closures . . .”).

112. *See* Melissa Block, *2018 Brought a ‘Tectonic Shift’ in the Gun Control Movement, Advocates Say*, NPR (Dec. 26, 2018, 7:13 AM), <https://www.npr.org/2018/12/26/678248648/2018-brought-a-tectonic-shift-in-the-gun-control-movement-advocates-say> [<https://perma.cc/GX8Z-AFP4>] (discussing gun control movement and potential restrictions on buying and owning guns); David A. Dana & Janice Nadler, *Soda Taxes as a Legal and Social Movement*, 13 NW. J. L. & SOC. POL’Y 84, 106 (2018) (explaining why soda tax is a social movement that could better public health).

113. Masters et al., *supra* note 102, at 827.

114. *See* Jason Wilson, *The Rightwing Groups behind Wave of Protests against Covid-19*

wearing became politicized.<sup>115</sup> Commentators of all political stripes have weighed in on mask-wearing, often with acerbic language.<sup>116</sup> With an increasing number of people becoming absorbed in conversations about masks and distancing, there has been even less attention dedicated to the structural determinants of health that exacerbate our death tolls and cause them to fall heavily on racial minorities.<sup>117</sup> What is more, the root causes of COVID-19 have received minimal media attention.

Dr. Anthony Fauci, who has been called the “world’s leading authority on infectious disease”<sup>118</sup> and who, from his seat in government, has advised the public during the most uncertain moments of the COVID-19 pandemic, has been invested in a larger conversation about the root causes of COVID-19. Although Dr. Fauci is less well known for these broader considerations, it is not for lack of trying. Our collective inattention reveals the shallowness of the mainstream conception of public health. In a thirteen-page article in *Cell* published in September 2020, Dr. Fauci proffered his view of the foundational causes of COVID-19 and other emerging pandemic diseases.<sup>119</sup> By connecting COVID-19 with other “emergences” (not *emergencies*), he suggested these diseases “reflect our increasing inability to live in harmony with nature.”<sup>120</sup> He argued modern social features such as overcrowding, urbanization, intensive farming, burning of forests, and global poverty have

*Restrictions*, GUARDIAN (Apr. 17, 2020, 9:00 AM), <https://www.theguardian.com/world/2020/apr/17/far-right-coronavirus-protests-restrictions> [<https://perma.cc/UJ4U-MQFH>] (discussing right-wing protests throughout the country against COVID-19 restrictions).

115. Ryan Lizza & Daniel Lippman, *Wearing a Mask Is for Smug Liberals. Refusing to Is for Reckless Republicans.*, POLITICO (May 1, 2020, 4:30 AM), <https://www.politico.com/news/2020/05/01/masks-politics-coronavirus-227765> [<https://perma.cc/QT4B-B3DY>].

116. *Compare* Catherine Pearlman, Opinion, *Hey. Wear the Damn Mask*, CNN, <https://www.cnn.com/2020/05/06/opinions/wear-the-damn-mask-pearlman/index.html> [<https://perma.cc/ESC9-2792>] (last updated May 27, 2020) (“Wearing a mask in public is an act of respect for your fellow humans.”), with Scott Morefield, *8 Reasons Why I Don’t Wear a Mask and You Probably Shouldn’t Either*, TOWNHALL (June 1, 2020, 12:01 AM), <https://townhall.com/columnists/scottmorefield/2020/06/01/8-reasons-why-i-dont-wear-a-mask-and-you-probably-shouldnt-either-n2569786> [<https://perma.cc/5MAB-SU4C>] (stating that even if wearing a mask can protect against coronavirus, other factors outweigh the risk).

117. See Ruqaiyah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 J. L. & BIOSCIENCES 1, 2 (2020) (analyzing racial and ethnic minorities are disproportionately affected by pandemics and specifically by the COVID-19 pandemic).

118. See Anthony Fauci & John Whyte, *Dr. Fauci: Not Caring Means You Are Propagating a Pandemic*, WEBMD (July 17, 2020), <https://www.webmd.com/coronavirus-in-context/video/anthony-fauci> [<https://perma.cc/MC35-CJAJ>] (discussing the importance of preventing COVID-19 exposure and spread to avoid extending the pandemic).

119. See David M. Morens & Anthony S. Fauci, *Emerging Pandemic Diseases: How We Got to COVID-19*, 182 CELL 1077, 1077 (2020) (explaining the causes and processes that lead to pandemics, including the potential cause of the COVID-19 pandemic).

120. *Id.* at 1089.

increased our susceptibility to rapidly spreading disease.<sup>121</sup> According to Dr. Fauci, “The COVID-19 pandemic is yet another reminder . . . that in a human-dominated world, in which our human activities represent aggressive, damaging, and unbalanced interactions with nature, we will increasingly provoke new disease emergences.”<sup>122</sup>

That these “environmental determinants of human health,” as Dr. Fauci called them,<sup>123</sup> have scarcely entered the popular vocabulary suggests the superficiality with which we as a nation have considered broad public health aspects of the COVID-19 pandemic. Experts have been warning about the possibility of new *zoonoses*—diseases that jump from animals to humans—for more than a decade.<sup>124</sup> Another recent example is HIV, which led to a global pandemic that killed millions and scarred the LGBTQ community, all originating from a chimpanzee.<sup>125</sup>

A broad view of public health would also consider corporate financial incentives. Corporations hold enormous sway over the U.S. population, including over the workplace environment—the amount of ventilation, testing, spacing between employees, provision of personal-protective equipment (“PPE”), healthcare benefits,<sup>126</sup> the quantity of sick leave, whether employees receive time to isolate after falling ill, and so forth. In the absence of universal government standards, corporate liability can incentivize corporations to protect their workers, and by extension the public, from local outbreaks. Outbreaks at meat-processing plants are instructive, as these plants remained open throughout the pandemic.<sup>127</sup> One South Dakota meatpacking plant experienced an outbreak of 929 cases, or 25.6 percent of the plant’s workforce, after failing to exercise protective controls such as social distancing.<sup>128</sup> Multiple Centers for Disease Control

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121. *Id.*

122. *Id.*

123. *Id.*

124. See Anderson Cooper, *Tracking Deadly Viruses’ Spread from Animals to Humans*, CNN (Dec. 9, 2008, 4:56 PM), <http://edition.cnn.com/2008/WORLD/africa/12/08/pip.zoonotics/index.html> [<http://perma.cc/5LPA-EWHV>] (explaining that although transfer has happened historically, humans’ global travel has accelerated disease transfer).

125. *Id.*

126. About 55 percent of the U.S. population receives employer-sponsored healthcare. KATHERINE KEISLER-STARKEY & LISA N. BUNCH, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2019, at 4 (2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-271.pdf> [<https://perma.cc/K26H-A5FM>].

127. Jonathan W. Dyal et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities—19 States, April 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 557, 557 (2020).

128. See Jonathan Steinberg et al., *COVID-19 Outbreak Among Employees at a Meat Processing Facility—South Dakota, March–April 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1015, 1016 (2020) (describing outbreak at a South Dakota meat-processing facility and its likely causes).



(CDC) reports on meatpacking plants found a 9.1 percent infection rate, with 87 percent of cases among minority workers.<sup>129</sup> Journalists decried meatpacking plants as “hot spots” and “hotbeds.”<sup>130</sup> A Bloomberg Businessweek report attributed these outcomes in part to regulatory inaction at the Occupational Safety and Health Administration (OSHA), disempowered by the Trump Administration and under siege from the meat industry.<sup>131</sup> In this low-regulation environment, tort incentives to protect workers are essential. Members of Congress who propose legislation removing financial incentives that protect workers are arguably harming public health,<sup>132</sup> even when the legislation also contains financial relief. A broad view of public health would recognize that powerful financial incentives to protect public health must not be sold for quick dollars.

COVID-19 has measurably increased public appreciation for public health, which is an incremental success. But individual measures such as masks and distancing are not enough to protect public health, and they never will be. Our collective obsession with individual contributions to the pandemic, combined with ongoing efforts to erase corporate liability and general ignorance of the environmental determinants of health, suggest a narrowing of the possible scope of public health. True public health must be capacious in scope, aiming to protect all Americans now and into the future.

It is in this new public-health era, superimposed over a battle for the scope of public health, that attorneys and judges in the opioid litigation are making decisions that touch the lives of the American people.

### C. *Battle over the Scope of Public Health: Opioid Litigation*

The opioid litigation is one venue for debates about the scope of public health. To date, the opioid litigation has emphasized quick monetary relief

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129. Michelle A. Waltenburg et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities—United States, April–May 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 887, 887 (2020).

130. Amelia Lucas, *CDC Says 9% of Meatpacking Plant Workers Have Been Diagnosed with Covid-19*, CNBC (July 7, 2020, 7:07 PM), <https://www.cnbc.com/2020/07/07/cdc-says-9percent-of-meatpacking-plant-workers-have-been-diagnosed-with-covid-19.html> [http://perma.cc/86AQ-QMLS]; Anna Stewart et al., *Why Meat Processing Plants Have Become Covid-19 Hotbeds*, CNN (June 27, 2020, 3:32 PM), <https://edition.cnn.com/2020/06/27/health/meat-processing-plants-coronavirus-intl/index.html> [http://perma.cc/B8SM-SUEB].

131. See Polly Mosendz et al., *U.S. Meat Plants Are Deadly as Ever, with No Incentive to Change*, BLOOMBERG BUSINESSWEEK (June 18, 2020, 3:00 AM), <https://www.bloomberg.com/news/features/2020-06-18/how-meat-plants-were-allowed-to-become-coronavirus-hot-spots> [http://perma.cc/TE92-VSQT] (explaining how OSHA ordered its staff to inspect only front-line facilities during the pandemic, which did not include meat plants).

132. See Werner & Hamburger, *supra* note 16 (discussing how worker advocates have argued Republican-proposed liability-shield legislation would give immunity to businesses that operate unreasonably and unsafely, which would cause returning workers and consumers to risk COVID-19 infection).

for opioid victims (**Figure 2**). Judge Daniel Polster has expressed his fear that discovery and hearings on the merits would forestall relief, and “another 50- or 60,000 people are going to die . . . .”<sup>133</sup> Similarly, most literature has focused on people with opioid addiction.<sup>134</sup> One can see here the “identifiable victim effect,” in which people ascribe more value to saving identifiable lives as opposed to statistical or theoretical ones.<sup>135</sup>

**Figure 2: The most agreed-upon beneficiaries of the opioid litigation are people with opioid addiction.**



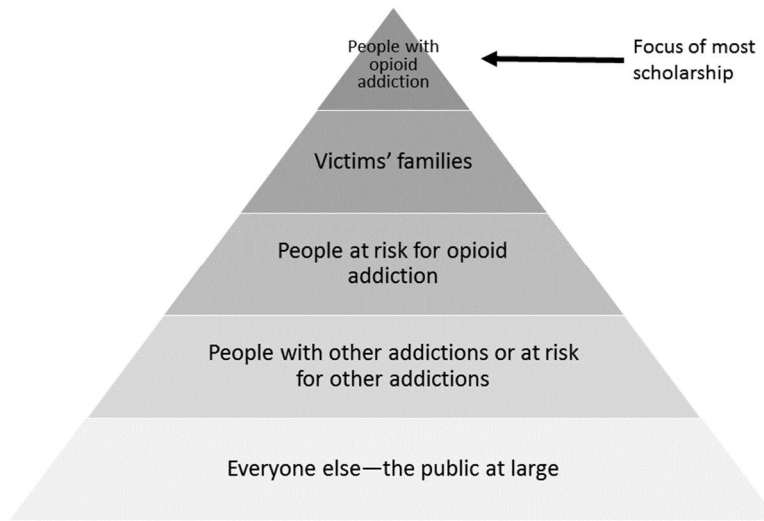
Nobody would contest the importance of providing addiction treatment and related services, but it is worth considering what is lost in the rush for funding, and whether we must cast away our hopes for the release of documents, injunctive relief, accountability, and the like. The broad version of public health would include these goals, even if they stand to help different types of beneficiaries (**Figure 3**).

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133. Transcript of Proc., *supra* note 5, at 12–13.

134. See, e.g., Cheryl Heaton et al., *The Opioid Crisis, Corporate Responsibility, and Lessons From the Tobacco Master Settlement Agreement*, 322 JAMA 2071, 2072 (2019) (“[O]pioid settlement and judgment resources should be dedicated, virtually in their entirety, to ameliorate the opioid epidemic.”); James G. Hodge Jr. & Lawrence O. Gostin, *Guiding Industry Settlements of Opioid Litigation*, 45 AM. J. DRUG & ALCOHOL ABUSE 432, 435 (2019) (discussing the recent \$270 million settlement Purdue Pharma agreed to pay the State of Oklahoma to treat drug use and addiction); Gluck et al., *supra* note 19, at 361 (explaining how monetary damages remain paramount because of the overwhelming medical costs); Abdullah Shhipar & Brandon D.L. Marshall, Opinion, *What the Opioid Epidemic Can Learn from Tobacco Settlement*, WASH. POST (July 17, 2019), <https://www.washingtonpost.com/opinions/2019/07/17/opioids-settlements-roll-money-must-go-where-its-needed-most> [<http://perma.cc/T5NB-VR5X>] (arguing that opioid agreements should be directed to remediation and not states’ general revenue); see also Derek Carr et al., *Reducing Harm Through Litigation Against Opioid Manufacturers? Lessons from the Tobacco Wars*, 133 PUB. HEALTH REPS. 207, 209–10 (2018) (comparing opioid litigation’s prospective damages with those of tobacco litigation’s master settlement agreement (MSA), and noting the MSA’s “mixed results” from a public health perspective); Berman, *supra* note 98, at 1058–59 (“[A] global opioid settlement agreement may be a once in-a-generation opportunity to secure funds needed to rebuild the country’s decimated public health infrastructure.”).

135. Karen E. Jenni & George Loewenstein, *Explaining the “Identifiable Victim Effect”*, 14 J. RISK & UNCERTAINTY 235, 236 (1997).

**Figure 3: Possible beneficiaries of the opioid litigation.**

Similarly, despite public health's concern with the future, scholarly opinions on the time axis have varied. Some commentators have encouraged opioid addiction prevention, an extremely important goal.<sup>136</sup> Few have broadened their scope to include future addiction crises.<sup>137</sup> Most authors are not explicit about the time component of public health (**Figure 4**).

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136. See, e.g., Cheryl Heaton, *The Tobacco Master Settlement Agreement—Strategic Lessons for Addressing Public Health Problems*, 379 *NEW ENG. J. MED.* 997, 999 (2018) (advocating preventative interventions beyond litigation to achieve public-health goals); see also Brief of Amici Curiae in Support of Settlement with Favorable Pub. Health Outcomes at 21–23, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio May 3, 2019), ECF No. 1626 (recommending improvements in pain management and addressing root causes of problematic substance use and overdose).

137. See Terry, *supra* note 56, at 667 (“[A]ny settlement must address the negative social determinants of health that lie at the root of the opioid epidemic and build healthier environments that will reduce the likelihood of future addiction crises.”); see also Berman, *supra* note 98, at 1058–59 (discussing an opportunity to rebuild the public-health infrastructure).

**Figure 4: Possible beneficiaries of the opioid litigation across time.**

These models raise fundamental questions about the scope of the opioid litigation. Do we want to release industry documents that facilitate research into how the opioid crisis arose, so that future babies might enter a world that is safer and healthier? Do we want to establish accountability for companies that contribute to a massive loss of life, so that future companies that sell addicting products will be on notice of the consequences? Or, from a financial perspective, how much of the funds will we invest in treatment of people with addiction now, and how much will we allocate to research and prevention? These questions are not easy, but if we want to protect public health, we must ask them.

As with COVID-19, the scope of public health reflected in the opioid litigation carries enormous consequences for law, ethics, and human life. From a legal and ethical perspective, the opioid litigation carries duties to broad public health.<sup>138</sup> Failure to achieve these duties indicates the litigation is not aligned with fundamental tenets of justice, equality, and a well society. The opioid litigation holds great promise to change incentive structures and alter the operation of markets for addicting products. According to several prominent opioid experts, our systems and lawyers have “ignor[ed] the underlying drivers of drug consumption,” such as the social determinants of health.<sup>139</sup> “Until we adopt this framework,” they stated, “we will continue to

138. See *infra* Part III (discussing public-health duties).

139. Dasgupta et al., *supra* note 62, at 182.

fail in our efforts to turn the tide of the opioid crisis.”<sup>140</sup> The opioid litigation presents an opportunity to fight for the properly expanded scope of public health that incorporates root-cause analysis. Superficial pots of money that do not address root causes are insufficient to solve our country’s serious public-health emergencies. Further, a pot of money is excludable and rivalrous—suggesting private health as opposed to public health.<sup>141</sup>

As will be shown, the opioid litigation’s players have the duty to pursue broad public health beyond monetary relief.<sup>142</sup> These actors’ conduct will create lasting precedent and law that will be cited for years to come. In unprecedented litigation over a public-health emergency of mammoth proportion, this paper will argue we must pursue broad public health.

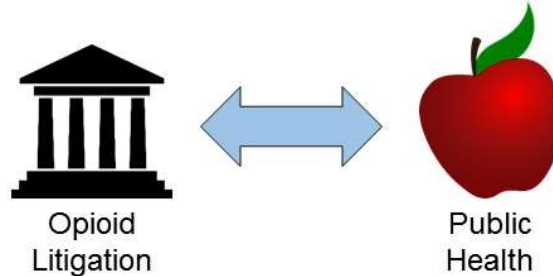
### III. PUBLIC HEALTH DUTIES

This Part will explore the litigation’s duty to promote broad public health. It will proffer three arguments that such a duty exists and refute two possible concerns surrounding those arguments. In Part IV, this paper will assess whether the litigation is meeting its duty to public health.

#### A. *The Duty to Public Health*

This section will articulate three mutually reinforcing arguments that establish tight links between the litigation and a broad conception of public health across people and time (**Figure 5**).

**Figure 5: This section seeks to demonstrate the tight connection between the opioid litigation and broad public health.**



One argument is grounded in a public health understanding of the opioid crisis, the second is based on the connection between the litigation’s players

140. *Id.*

141. *See supra* Section II.A (explaining that public health is a public good).

142. *Infra* Part III.

and public health, and the third involves showing that tort law is more than private.

### 1. A Public-Health Understanding of the Opioid Crisis

While it may initially seem plausible that the opioid litigation is most intimately tied to the set of people who have or had a prescription opioid addiction, this conception does not stand up to scrutiny. The opioid MDL is called *In Re: National Prescription Opiate Litigation*. So, why is it readily acknowledged that people whose addiction involved *illicit use* should benefit from litigation proceeds?<sup>143</sup> Should we not confine relief to people who used prescription opioids and, in delegating relief, consider which company created, which company distributed, and which pharmacy dispensed the drug that hooked each victim? Such a fine-grained analysis is unnecessary because a larger view of public health indicates that the funds can be used to ameliorate the opioid crisis holistically, including patients who not once used a prescription opioid.

Now consider an extension: Would giving relief to people with stimulant addiction be acceptable? (Stimulants include Adderall and Ritalin—drugs for attention-deficit/hyperactivity disorder (ADHD)—as well as cocaine and methamphetamines.) The arguments to do so are more compelling than they may seem at first glance. Imagine one person who has used stimulants only and one person who has used heroin only. Neither has used prescription opioids, yet only the person who has used heroin will benefit from the prescription-opioid litigation under prevailing norms. Ultimately, they both suffer from addiction and arguably hold an equally strong (or weak) claim. And from a public health lens, the two cases are not so dissimilar. Stimulants are currently experiencing rising prescriptions amidst aggressive marketing, are frequently diverted,<sup>144</sup> and are causing death at a rapidly increasing rate.<sup>145</sup> Between 2016 and 2017, cocaine deaths rose 34.4 percent and other stimulant deaths rose 33.3 percent.<sup>146</sup> And just in February 2020, the Food and Drug Administration (FDA) submitted a warning letter to the maker of the stimulant PROCENTRA (dextroamphetamine sulfate), asserting the manufacturer failed in its promotion “to include *any* risk information about

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143. See, e.g., Hodge & Gostin, *supra* note 134, at 435 (arguing that settlement funds should be used to mitigate the opioid epidemic generally).

144. Scott E. Hadland et al., *Analysis of Pharmaceutical Industry Marketing of Stimulants, 2014 Through 2018*, 174 JAMA PEDIATRICS 385, 385 (2020).

145. BROOKE HOOTS ET AL., ADDICTION, THE RISE IN NON-FATAL AND FATAL OVERDOSES INVOLVING STIMULANTS WITH AND WITHOUT OPIOIDS IN THE UNITED STATES 1 (2020), <https://www.ncbi.nlm.nih.gov/pubmed/?term=31912625> [http://perma.cc/9EUE-G2GJ].

146. *Id.*

the drug.”<sup>147</sup> Similarly, misrepresenting the risks of opioids was a major contributor to the opioid crisis.<sup>148</sup>

Further, there is substantial overlap between opioid and stimulant users. Most overdose deaths involve multiple drugs.<sup>149</sup> Of the more than 13,000 cocaine-related deaths in 2017, 72.7 percent involved an opioid.<sup>150</sup> Conversely, only 17 percent of overdoses involve only opioids, whereas 36 percent involve opioids with stimulants in studies conducted between 2014 and 2015.<sup>151</sup> As written by two psychiatrists, “Viewing opioid addiction as a stand-alone disease without consideration of other substance use or comorbid psychiatric pathology provides only a limited perspective. Rather, dual disorders are the rule and not the exception . . . .”<sup>152</sup> Because stimulant deaths have risen in the wake of the opioid epidemic, some scholars have named stimulants as the next wave of an overarching, multi-decade drug overdose epidemic.<sup>153</sup>

Given this substantial overlap, it is well within the scope of litigation relief to establish addiction medicine centers that broadly facilitate the treatment and study of addiction and its regulation. For comparison, consider that, in the sugar and obesity context, it would make sense to use sugar litigation funds (assuming they existed) to create farmers’ markets, which do not directly reduce sugar intake. Not providing funding for stimulant addiction may lead to the odd situation of a person with dual addiction seeing a physician and only receiving treatment for opioid addiction, leaving

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147. Letter from Andrew S.T. Haffer, Director, Off. of Prescription Drug Promotion, U.S. Food & Drug Admin., to Stefan Antonsson, CEO, Outlook Pharmaceuticals, Inc. (Feb. 21, 2020), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/outlook-pharmaceuticals-inc-605071-02212020> [<http://perma.cc/UQM8-LU6D>].

148. Kolodny et al., *supra* note 11, at 562.

149. Christopher M. Jones et al., *Vital Signs: Demographic and Substance Use Trends Among Heroin Users—United States, 2002–2013*, 64 MORBIDITY & MORTALITY WKLY. REP 719, 722 (2015); Bobbi Jo H. Yarborough et al., *Understanding Opioid Overdose Characteristics Involving Prescription and Illicit Opioids: A Mixed Methods Analysis*, 167 DRUG & ALCOHOL DEPENDENCE 49, 54 (2016).

150. HOOTS ET AL., *supra* note 145, at 3, 7.

151. Joshua A. Barocas et al., *Sociodemographic Factors and Social Determinants Associated with Toxicology Confirmed Polysubstance Opioid-Related Deaths*, 200 DRUG & ALCOHOL DEPENDENCE 59, 60 (2019).

152. A. Benjamin Srivastava & Mark S. Gold, *Beyond Supply: How We Must Tackle the Opioid Epidemic*, 93 MAYO CLINIC PROC. 269, 270 (2018).

153. See F. Scott Hall & Klaus A. Miczek, *Emerging Threats in Addiction: Will Novel Psychoactive Substances Contribute to Exacerbating the Ongoing Drug Overdose Epidemic?*, 236 PSYCHOPHARMACOLOGY 839, 842 (2019) (“[O]ne of the ways in which the drug epidemic may continue to worsen is through the combined use of illicit drugs, particularly stimulants and opioids.”); see also Christine Vestal, *It’s Not Just Opioids. Deaths from Cocaine and Meth Are Surging*, PBS (May 16, 2019, 10:00 AM), <https://www.pbs.org/newshour/health/its-not-just-opioids-deaths-from-cocaine-and-meth-are-surging> [<http://perma.cc/2GRC-WQQ4>] (“It turns out that the same lethal drug that has been driving the nation’s spiraling opioid epidemic is also causing an historic surge in overdose deaths among cocaine users.”).

stimulant addiction unaddressed. More likely, however, a physician would (and should) treat both problems at an office visit as part of comprehensive addiction care. Oklahoma has implemented this idea by spending \$100 million of its opioid litigation returns to endow a new addiction treatment and research center at Oklahoma State University.<sup>154</sup>

More generally, a broad view would recognize that public health and medical practice are essential goods that must be protected from undue influence. Any American could be in the hospital tomorrow receiving surgery for an inflamed appendix, breast cancer, an aortic aneurysm, or any number of illnesses. Those surgeries could require the use of opioids, and the way they are prescribed affects the patient's risk. Larger post-surgical opioid prescriptions are associated with greater frequency of addiction,<sup>155</sup> and prescriptions generally provide far more pills than patients use.<sup>156</sup> One systematic review of post-surgical opioid use estimated 42% to 71% of opioid pills go unused.<sup>157</sup> As mentioned, much of this overprescription is due to overzealous marketing, which led doctors to believe opioids were more effective and less dangerous than they truly are.<sup>158</sup> Tort law can protect patients by enforcing the rule of law with regard to safe marketing of addicting substances.<sup>159</sup> The resulting disincentives could discourage future deceptive marketing of opioids and shield medical practice from undue influence. Therefore, accountability and deterrence, which fall within the purview of tort law,<sup>160</sup> could help address derivative problems that helped produce the opioid crisis. The opioid litigation is tied not just to individual opioid victims, but to broader public-health outcomes and the integrity of

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154. Jan Hoffman, *Purdue Pharma and Sacklers Reach \$270 Million Settlement in Opioid Lawsuit*, N.Y. TIMES (Mar. 26, 2019), <https://www.nytimes.com/2019/03/26/health/opioids-purdue-pharma-oklahoma.html> [http://perma.cc/VJ3N-YT6J].

155. Jennifer H. Kuo, *Use and Misuse of Opioids After Endocrine Surgery Operations*, ANNALS SURGERY 7–8 (Jan. 14, 2020) doi: 10.1097/SLA.0000000000003777; Alexander A. Brescia et al., *Impact of Prescribing on New Persistent Opioid Use After Cardiothoracic Surgery*, 108 ANNALS THORACIC SURGERY 1107, 1107 (2019).

156. E.g., Ryan Howard et al., *Association of Opioid Prescribing with Opioid Consumption After Surgery in Michigan*, 154 JAMA SURGERY 1, 4 (2019); Jeffrey Rodgers, *Opioid Consumption Following Outpatient Upper Extremity Surgery*, 37A J. HAND SURGERY 645, 646–47 (2012); Pamela Wendel et al., *More Than Half of Opioids Prescribed to Pediatric Patients After Ambulatory Knee Surgery Are Unused*, 17 J. OPIOID MGM'T 311, 311 (2021).

157. Mark C. Bicket, Jane J. Long & Peter J. Provonost, *Prescription Opioid Analgesics Commonly Unused After Surgery A Systematic Review*, 152 JAMA SURGERY 1066, 1066 (2017).

158. See Kolodny et al., *supra* note 11, at 566 (“Unfortunately, the campaign to encourage OPR [opioid pain reliever] prescribing has left many health care providers with a poor appreciation of opioid risks, especially the risk of addiction, and an overestimation of opioid benefits.”).

159. The companion article discusses the rule of law in greater detail. Aaron, *supra* note 1.

160. See generally Aaron, *supra* note 1; see also Andrew Popper, *In Defense of Deterrence*, 75 ALBANY L. REV. 181, 184–85 (2011) (Though “there is no single comprehensive juried study that looks broadly at the deterrent effect of tort law,” the literature does conclude that the tort system is fully defensible as a primary deterrent mechanism).



modern medicine.

## 2. The Litigation's Players Are Connected to Public Health

This paper will argue that all parties to the opioid litigation possess some ethical duty<sup>161</sup> to consider public health, either in the litigation or their prior capacities (the conduct for which they are brought to court). These arguments may appear more or less persuasive to different readers. The easiest cases are government actors and public-facing attorneys. However, this section will aim to show that defendants and private plaintiffs, too, owe a duty to public health. In any event, the larger point is that one must grapple with the litigation's fundamental connection to public health, which persists even if one believes that one or more parties have no duty to further it.

### i. Government Actors

Governmental entities adjudicating a mass-health harm inherently have strong ties to public health. State and local attorneys have become some of the most powerful voices in the litigation due to their sheer numbers, as well as their special standing with courts.<sup>162</sup>

State attorneys general have played an important historical role in public health for decades. In the 1980s, state attorneys general moved from being fairly docile and reactive to quite muscular government actors.<sup>163</sup> Because of the Reagan administration's "New Federalism" philosophy, many authorities previously exercised by federal agencies fell to the states.<sup>164</sup> State attorneys general saw their powers grow as they filled in numerous regulatory holes,<sup>165</sup> blooming into a diverse jurisdiction across environmental issues, consumer protection, civil rights, antitrust,<sup>166</sup> health,<sup>167</sup>

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161. A legal duty is likely present for many parties as well, exemplified by the very laws and claims at play in the opioid MDL.

162. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (holding that Massachusetts has a "special solicitude" in federal courts to protect its state interests); Edgar Aliferov, Note, *The Role of Direct-Injury Government-Entity Lawsuits in the Opioid Litigation*, 87 *FORDHAM L. REV.* 1141, 1173 (2018) ("Direct-injury government-entity claims circumvent the obstacles that have hindered other forms of litigation against opioid companies.").

163. Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 *TEX. L. REV.* 43, 67 (2018).

164. *Id.*; RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 10 (2007).

165. Lemos & Young, *supra* note 163, at 67–68.

166. See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *YALE L.J.* 2446, 2452 (2006) ("In some states . . . the Attorney General has statutory authority to bring consumer protection, environmental, civil rights, civil fraud, securities, and antitrust actions . . .").

167. E.g., Lacy H. Thornburg, *Changes in the State's Law Firm: The Powers, Duties and Operations of the Office of the Attorney General*, 12 *CAMPBELL L. REV.* 343, 363 (1990) (explaining that the North Carolina Attorney General's duty to protect public health is encompassed by its duty for environmental protection).

and much more. In parallel, state attorney-general lawsuits have waxed in importance amidst rising procedural barriers to other forms of aggregate litigation.<sup>168</sup> As part of their expanding responsibilities across multiple areas, attorneys general have pursued lawsuits aimed at mitigating many public-health problems, including alcohol, tobacco, prescription drug misuse, and health-care fraud.<sup>169</sup> In 1982, the Supreme Court blessed the pursuit of public health by attorneys general.<sup>170</sup> All in all, state attorneys general have a direct connection to public health, both historically and as constructed by the modern regulatory state. This connection was solidified in the opioid context when almost every state attorney general sued opioid companies.<sup>171</sup> Collectively, they represented almost the entire American public.

Local governments, too, have a strong connection to public health. Although they have seen a rise and fall in power with fluctuations in funding, they have historically played an important, and perhaps essential, role in public health.<sup>172</sup> However, the last two decades have seen a troubling rise in what has been coined “the New Preemption,” in which state legislatures pass sweeping and sometimes punitive restrictions of local governments and officials.<sup>173</sup> Many of these preemptive laws block public-health regulation of lucrative industries, such as tobacco products, soda, and factory farms.<sup>174</sup>

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168. Lemos & Young, *supra* note 163, at 72; Aliferov, *supra* note 162, 1152–56.

169. Lainie Rutkow & Stephen P. Teret, *The Potential for State Attorneys General to Promote the Public’s Health: Theory, Evidence, and Practice*, 30 ST. LOUIS U. PUB. L. REV. 267, 269 (2011); see Jennifer L. Pomeranz & Kelly D. Brownell, *Advancing Public Health Obesity Policy Through State Attorneys General*, 101 AM. J. PUB. HEALTH 425, 426 (2011) (explaining that attorneys general were major contributors in litigation around the U.S. tobacco industry and other public-health matters); see also Steven K. Berenson, *Government Lawyer as Cause Lawyer: A Study of Three High Profile Government Lawsuits*, 86 DENVER U. L. REV. 457, 458 (2009) (“[G]overnment lawyers may invoke their public authority to initiate their own legal campaigns designed to alter some aspect of the social, economic, or political status quo.”).

170. Alfred L. Snapp & Son, Inc., v. Puerto Rico, 458 U.S. 592, 607 (1982) (“[A] State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.”).

171. Walters, *supra* note 70.

172. See Drew E. Altman & Douglas H. Morgan, *The Role of State and Local Government in Health*, 2 HEALTH AFFS. 7, 19–20 (1983) (showing that 3,071 local health departments operated in forty-six states and spent \$2.438 billion in 1981 to provide services typically including “public health nursing, sanitation, communicable disease control, epidemiology, health statistics and records, school health services, and home health care”).

173. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018).

174. *Id.* at 2000; Jennifer L. Pomeranz & Mark Pertschuk, *State Preemption: A Significant and Quiet Threat to Public Health in the United States*, 107 AM. J. PUB. HEALTH 900, 900 (2017) (“[M]ultiple industries are working on a 50-state strategy to enact state laws preempting local regulation.”); see generally Eric Crosby et al. *State Preemption: An Emerging Threat to Local Sugar-Sweetened Beverage Taxation*, 111 AM. J. PUB. HEALTH 677 (2021); see also Eric Gorovitz et al., *Preemption or Prevention?: Lessons from Efforts to Control Firearms, Alcohol, and*

The pattern of deregulation stands in remarkable similarity to the reasons for the rise of the state attorney general, and it helps explain why local governments are turning to litigation.

Just as every state is represented in the opioid litigation, so has been almost every city. In September 2019, Judge Polster certified a nationwide Rule 23(b)(3)<sup>175</sup> “Negotiation Class,” encompassing all cities and counties in the United States.<sup>176</sup> Except for the 541 cities that opted out, the remaining 98 percent of 34,000 local governments became engaged in the opioid litigation.<sup>177</sup> Collectively, these local governments, like the state governments, represented almost the entire American public. The final fate of the negotiation class remains tied up in judicial review,<sup>178</sup> but, remarkably, it inducted nearly every American municipality into the opioid litigation.

Beyond state and local governments, individual government employees are participants in the litigation. Judges are government employees with duties to the public. All federal judges take an oath to administer justice.<sup>179</sup> Judge Polster himself has acknowledged the public-health role of the litigation,<sup>180</sup> even if his conception of public health is more confined to the current opioid crisis than the broad conception generally characterizing public health. Judge Polster has also commissioned several special masters who serve the litigation, wield considerable judicial power (including the authority to issue rulings),<sup>181</sup> and share in the governmental duty to justice.

The strongest counterargument to public-health duties is that the litigation’s government actors have strictly defined roles. Under this logic,

*Tobacco*, 19 J. PUB. HEALTH POL’Y 36, 37 (1998).

Recent advances in community-based public health policy have created a surge in the politics of preemption. Recognizing the power of local public health regulation to restrict use or possession of, or access to, their products, advocates for the tobacco, firearms and alcohol industries have put tremendous resources into state and federal campaigns to preempt local regulatory authority and erode the foundation of community-based prevention on which public health has traditionally stood.

*Id.*

175. FED. R. CIV. P. 23(b)(3).

176. Ord. Certifying Negot. Class & Approving Notice, *supra* note 84, at 1–3. For further details on the negotiation class, see *supra* Section I.B.

177. Tom Hals, *U.S. Regions Hard Hit by Opioids to Ditch Class Action, Pursue Own Lawsuits*, REUTERS (Dec. 3, 2019, 1:34 PM), <https://www.reuters.com/article/us-usa-opioids-litigation/u-s-regions-hard-hit-by-opioids-to-ditch-class-action-pursue-own-lawsuits-idUSKBN1Y72C6> [<https://perma.cc/N4AQ-F6G7>]. Given the invalidation of the negotiation class, it is unclear whether these governments will continue to hold an informal role in the litigation, or whether the negotiation class will be revived on appeal.

178. See *supra* Section I.B (explaining that the negotiation class may be resurrected in en banc review even though the Sixth Circuit invalidated it).

179. 28 U.S.C. § 453.

180. Transcript of Proc., *supra* note 5, at 4.

181. Appointment Ord. at 1, 4, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Jan. 11, 2018), ECF No. 69.

the federal courts' role is established by Article III (to be discussed later),<sup>182</sup> and state and local governments should recoup their costs from the opioid crisis in so-called direct-injury or proprietary claims.<sup>183</sup> Public-health-oriented causes of action, like public nuisance, step on legislative terrain.<sup>184</sup> Therefore, government litigants must support intrinsic government interests rather than public health.<sup>185</sup>

This critique is asking a deeper question about the role of government and its attorneys. Is it plausible that an individual whose city and state governments are participating in the litigation is represented by neither? What is government for? According to James Madison, “[T]he public good, the real welfare of the great body of the people, is the supreme object to be pursued; and . . . no form of government whatever has any other value than as it may be fitted for the attainment of this object.”<sup>186</sup> This fundamental duty of governments to serve the public does not exempt their attorneys. These attorneys are not necessarily subservient to the governments they serve; rather, government attorneys have historically been thought of as the people’s attorneys.<sup>187</sup> And while recouping funds lost during the crisis is one role of government litigation, another role is filing claims on behalf of the health of the people.<sup>188</sup> The role of government litigation in pursuing public health is historically established.<sup>189</sup> Less formally, most people would believe that if their state and local governments are participating in litigation, their interests must be considered.

It is difficult to escape the conclusion that multiple government actors in the opioid litigation possess intimate connections with public health.

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182. *Infra* Section III.B.2.

183. *See* Aliferov, *supra* note 162, at 1156 (“Government-entity lawsuits against opioid companies are reactive responses that seek to recover damages incurred from the opioid epidemic.”).

184. Luther J. Strange III, *A Prescription for Disaster: How Local Governments’ Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into a Policy-Making Role and Subverts the Equitable Administration of Justice*, 70 S.C. L. REV. 517, 518 (2019).

185. Generally, government claims can be “proprietary,” i.e., pertaining to the government’s own interest, or *parens patriae*, i.e., made on behalf of the people. Morgan A. McCollum, *Local Government Plaintiffs and the Opioid Multi-District Litigation*, 94 N.Y.U. L. REV. 938, 961–62 (2019). However, the distinction may be more legal than principled. *See* Aliferov, *supra* note 162, at 1178 (arguing direct-injury government claims are nonetheless representative).

186. THE FEDERALIST NO. 45, at 235 (James Madison) (Ian Shapiro ed., 2009).

187. Note, *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1429 (2008).

188. *Cf.* McCollum, *supra* note 185, at 961–62 (acting to recoup lost funds vindicates government interests while acting on the public’s behalf and in its interest).

189. Rutkow & Teret, *supra* note 169, at 270; *cf.* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982) (holding that a state must express a quasi-sovereign interest in the action, such as the health and well-being of its residents or not being discriminatorily denied its rightful status within the federal system).

## ii. Private Plaintiffs and Their Attorneys

In addition to government plaintiffs, private plaintiffs and their attorneys have a relationship with public health. So-called private attorneys general, or private attorneys who sue for damages, have been defended on the basis that their conduct is socially beneficial—not merely to their clients, but to the public as a whole (e.g., deterrence).<sup>190</sup> It may be difficult for plaintiffs to receive significant financial returns without creating at least a mild public-health deterrent effect.<sup>191</sup> In other words, there is no clean separation between private plaintiffs and the policy impact of the litigation.<sup>192</sup> Therefore, “private” actors are already operating in a quasi-public capacity.

Further, many claims asserted by “private” plaintiffs are public health-oriented. Public nuisance claims, for example, require interference with a public right, i.e., a right common to the general public and enjoyed by many people.<sup>193</sup> Claims under the RICO Act have a history in public health, notably in the federal government’s litigation against tobacco companies.<sup>194</sup> But RICO also leverages *private* parties to investigate, illuminate, and deter organizational misconduct.<sup>195</sup> Claims under the Controlled Substances Act are grounded in violations of public-health laws stipulating how addictive substances are to be handled and sold.<sup>196</sup> Plaintiffs leveraged these causes of action, then specifically invoked the importance of public health in their complaints. For example, Rush Health Systems of Mississippi asserted defendants caused the “deaths and health ruination of hundreds of thousands of citizens” and thereby “foreseeably caused damages to RUSH” through unreimbursed medical costs.<sup>197</sup> Medical Mutual of Ohio argued defendants’ conduct caused “economic, social and emotional damage to virtually every

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190. See William B. Rubenstein, *On What A “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2151 (2004) (claiming that private attorneys general perform a supplemental function by multiplying damages).

191. Popper, *supra* note 160, at 200.

192. Michelle L. Richards, *Pills, Public Nuisance, and Parens Patriae: Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. RICH. L. REV. 405, 459 (2020). See *supra* Section II.A for further critique of the public-private distinction.

193. Richard C. Ausness, *The Current State of Opioid Litigation*, 70 S.C. L. REV. 565, 567–68 (2019).

194. See *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 430, 903 (D.D.C. 2006), *aff’d in part, vacated in part*, 566 F.3d 1095 (D.D.C. 2009) (showing that the government successfully brought RICO action against cigarette manufacturers and tobacco-related trade organizations for defrauding the public by making inaccurate statements regarding the health effects of smoking).

195. Pamela Bucy Pierson, *RICO, Corruption and White-Collar Crime*, 85 TEMP. L. REV. 523, 532–33 (2013).

196. Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 10–12 (2013).

197. Complaint at 3, *Rush Health Sys., Inc. v. McKesson Corp.*, No. 3:17-cv-1012 (S.D. Miss. Dec. 13, 2017), ECF No. 1.

community in Ohio and in the United States,” then leapt into a discussion of tortious behavior damaging the company.<sup>198</sup> Implicitly, these plaintiffs were leveraging the public-health harms of the opioid crisis to justify their lawsuits.

From a procedural perspective, MDLs place some private plaintiffs and their attorneys into a supervisory role, with responsibility for decisions that affect other people’s claims.<sup>199</sup> In 2017, Judge Polster approved an Executive Committee, a group of lawyers that manages the litigation for all MDL plaintiffs and is intended to be representative of the MDL’s diversity.<sup>200</sup> Similarly, in the ongoing bankruptcy proceeding for Purdue Pharmaceuticals, four members of the nine-member bankruptcy creditor committee are victims of the opioid crisis, including a man in recovery and a mother who lost a son to overdose.<sup>201</sup> Again, private actors have entered quasi-public roles.

In sum, plaintiffs and their attorneys inevitably set deterrence policy. Many of their claims lie in public health. And they frequently serve in public-facing roles. Their connection with public health is substantial.

### iii. Defendants

There is increasing recognition that corporations owe the public a duty. In 2018, Laurence Fink, CEO of the investment firm BlackRock, sent a historic letter to the world’s biggest corporate executives.<sup>202</sup> Fink’s letter exhorted companies to contribute to the common good if they sought continued investment from BlackRock.<sup>203</sup> Fink referenced a popular demand for “a positive contribution to society”—a line that sparked months of conversation.<sup>204</sup> More than a year and one-half after this letter was penned,

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198. Complaint at 2, 245–252, *Medical Mut. of Ohio v. Purdue Pharma L.P.*, No. 1:18-cv-716 (N.D. Ohio Mar. 28, 2018), ECF No. 1.

199. BURCH, *MASS TORT DEALS*, *supra* note 19, at 17–19; McCollum, *supra* note 185, at 946.

200. See Plaintiffs’ Renewed Motion to Approve Co-Leads, Co-Liaisons, & Exec. Comm. at 6–22, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Jan. 3, 2018), ECF No. 34 (providing list of proposed attorneys with extensive experience in MDL litigation to fill the roles); Marginal Entry Ord. Granting Plaintiffs’ Renewed Motion to Approve Co-Leads, Co-Liaisons, & Exec. Comm. at 1, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Jan. 4, 2018), ECF No. 37.

201. Carla K. Johnson & Geoff Mulvihill, *Victims Gain a Voice to Help Guide Purdue Pharma Bankruptcy*, AP NEWS (Oct. 6, 2019), <https://apnews.com/03c831fe7bd94f02b0fea51d2e9f81ed> [<https://perma.cc/XDM7-QTM5>].

202. Andrew Ross Sorkin, *BlackRock’s Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html> [<https://perma.cc/9Y6Y-CRZV>].

203. *Id.*

204. *Id.*; Andrew Ross Sorkin, *World’s Biggest Investor Tells C.E.O.s Purpose Is the ‘Animating Force’ for Profits*, N.Y. TIMES (Jan. 17, 2019),

nearly two hundred chief executives issued a statement agreeing to support “good jobs, a strong and sustainable economy, innovation, a *healthy environment* and economic opportunity for all.”<sup>205</sup> Several defendants in the opioid litigation signed this statement (**Figure 6**).

**Figure 6: Defendants’ signatures on the 2019 Business Roundtable statement<sup>206</sup>**



Alex Gorsky  
Chairman of the Board and  
Chief Executive Officer  
Johnson & Johnson



Brian Tyler  
Chief Executive Officer  
McKesson Corporation



Mark Trudeau  
President and CEO  
Mallinckrodt Pharmaceuticals



Larry Merlo  
President & CEO  
CVS Health

By self-admission, many companies agree they must support the public good. More generally, there appears to be rising recognition of a

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<https://www.nytimes.com/2019/01/17/business/dealbook/blackrock-larry-fink-letter.html> [<https://perma.cc/ZC64-SETB>]. Some disagreed strongly with Fink, but the statement reverberated throughout the business community. See Mark R. Kramer, *The Backlash to Larry Fink’s Letter Shows How Far Business Has to Go on Social Responsibility*, HARV. BUS. REV. (Jan. 31, 2019), <https://hbr.org/2019/01/the-backlash-to-larry-finks-letter-shows-how-far-business-has-to-go-on-social-responsibility> [<https://perma.cc/7WWP-PTH8>] (“[H]aving a positive social impact is increasingly central to good management and shareholder value.”).

205. BUSINESS ROUNDTABLE, STATEMENT ON THE PURPOSE OF A CORPORATION 1 (Aug. 19, 2019), <https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf> [<https://perma.cc/DJC6-6MNB>] (emphasis added); see David Gelles & David Yaffe-Bellany, *Shareholder Value Is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html> [<https://perma.cc/B2BE-3HSM>] (discussing executives’ statement that companies should focus not only on advancing the interests of shareholders, but also invest in their employees, protect the environment, and foster diversity).

206. BUSINESS ROUNDTABLE, *supra* note 205, at 5, 8–10.

corporation's public duty.<sup>207</sup> This duty seems particularly important in the marketing of chemical substances people ingest in good faith reliance on proper testing and evaluation by the pharmaceutical company.<sup>208</sup> As the Supreme Court has explained, American society imposes the "requirements of foresight and vigilance on responsible corporate agents . . . who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public . . ." <sup>209</sup> Those who argue corporations should only consider the "bottom line" tend to use one of two arguments.

First, they argue corporations' near-exclusive purpose is to pursue profits for shareholders.<sup>210</sup> However, it has come increasingly under question that corporations possess solely the profit motive and need not consider the interests of others (in fact, this view is rather novel in history).<sup>211</sup> A strict

207. See David Millon, *Theories of the Corporation*, 39 DUKE L.J. 201, 201 (1990) (discussing the development of corporations and the nature of corporate activity); Peter Nobel, *Social Responsibility of Corporations*, 84 CORNELL L. REV. 1255, 1255–59 (1999) (discussing corporations' obligations to the public); David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253, 255 (2009) ("[C]orporations should be made to serve the interests of society generally . . ."); Joseph L. Bower & Lynn S. Paine, *The Error at the Heart of Corporate Leadership*, HARV. BUS. REV. (May–June 2017), at 50, 58 ("Corporations must have ethical standards to guide interactions with all their constituencies, including . . . society at large.").

208. PETER BARTON HUTT ET AL., FOOD AND DRUG LAW 644 (4th ed., 2014) (noting that pharmaceutical companies have a responsibility to demonstrate a drug is safe and effective).

209. *United States v. Park*, 421 U.S. 658, 672 (1975).

210. E.g., SANJAI BHAGAT & GLENN HUBBARD, SHOULD THE MODERN CORPORATION MAXIMIZE SHAREHOLDER VALUE? 1 (Sept. 10, 2020) <https://www.aei.org/wp-content/uploads/2020/09/Should-the-Modern-Corporation-Maximize-Shareholder-Value.pdf?x91208> [<https://perma.cc/542T-LFYC>] (suggesting the success of long-term shareholder value maximization relies on aligning shareholder wealth maximization with stakeholder interests); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32–33.

211. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 711–12 (2014) ("[M]odern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so."); Millon, *supra* note 207, at 203 ("[M]anagement ought to be able to take the corporation's public responsibilities into account, even if corporate profitability (and shareholder welfare) would suffer as a result."); Nobel, *supra* note 207, at 1255–59 (discussing various perspectives of the corporation's role in society); see also Steven L. Schwarcz, *Misalignment: Corporate Risk-Taking and Public Duty*, 92 NOTRE DAME L. REV. 1, 5–6 (2016) ("[I]mposing a public governance duty to help align the firm's interests with the public's interests would fit within corporate governance legal theory."); Lynn S. Paine & Suraj Srinivasan, *A Guide to the Big Ideas and Debates in Corporate Governance*, HARV. BUS. REV. (Oct. 14, 2019), <https://hbr.org/2019/10/a-guide-to-the-big-ideas-and-debates-in-corporate-governance> [<https://perma.cc/5GAK-SPJ8>].

Following the adoption of general incorporation statutes in many jurisdictions in the late nineteenth century, those wishing to create a corporation no longer had to petition the state



shareholder view does not comport with U.S. law, which explicitly recognizes a public role of corporations.<sup>212</sup> Further, it would be odd to say that having a profit incentive to engage in particular conduct absolves responsibility for engaging in that conduct. An employee who manages corporate bank accounts has an incentive to steal money for personal gain. But the employee is still ethically (and legally) responsible for stealing. Similarly, the incentive to sell large quantities of opioids and to expand the range of their therapeutic use does not justify this conduct. It may make it understandable, but it does not provide ethical justification. Some may distinguish the employee case by highlighting the unique profit-seeking role of the corporation. That is, pharmaceutical companies have an incentive, even a duty, to market aggressively. However, the outcome of the opioid litigation will determine retroactively what conduct was profitable. This sounds counterintuitive because the conduct has already occurred, but it is true that if liability is high, the corporations misunderstood the incentives. Does this make their conduct unethical? The predication of corporations' ethical responsibility on profit becomes nonsensical when we are establishing profit post hoc through tort liability. Imagine a light settlement amount proving that, indeed, opioid manufacturers and distributors *were* maximizing profit, and therefore their conduct was ethical. Further, pharmaceutical companies possess the wealth to recruit large teams of

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for a charter. Instead, they could form a corporation simply by filing the requisite forms and paying the associated fees with the relevant government authorities. The ease with which corporations could be formed thus reinforced the sense that incorporation was largely a matter of private agreement among shareholders. However, the subsequent rise of the giant railroad and manufacturing corporations and oil trusts of that era led to widespread concern about these increasingly large concentrations of capital and their impacts on society. . . .

By the 1930s an institutional view of the corporation moved into the mainstream and the notion that corporations are influential actors in society with responsibilities not just to shareholders, but also to employees, customers, and the general public gained credence with some respected business leaders and academics. But the debate shifted again with the emergence of neo-classical economics and a stagnant economy in the 1970s. A view of the corporation as the property of shareholders once again took hold, and was soon developed into a full-blown theory of corporate governance based on the idea that managers are the agents of shareholders who own the corporation and expect it to be run for their benefit. . . .

Today, the debate continues but with a new sense of urgency. . . . While some academics and many in the financial community continue to hold that the purpose of the corporation is to maximize the wealth of its shareholders, and should be governed to that end, others call for a more robust definition of corporate purpose.

*Id.*

212. See Millon, *supra* note 207, at 201 (discussing the view that corporate activities are deliberately responsive to public interest concerns); Nobel, *supra* note 207, at 1255–59 (comparing American shareholder approach with European stakeholder approach).

lawyers who work diligently to shape the law and minimize liability,<sup>213</sup> thereby rendering their conduct “ethical” under the profit-motive rationale. Altogether, profits are a poor substitute for more traditional metrics of ethical conduct. But any ethical metric besides financial incentives likely assigns ethical responsibility to opioid companies—such metrics could include harm to public health, harm to autonomy, and harm to considerations of justice. The profit motive does not supply ethical justification for mass harms, and opioid companies carry basic duties to public health.

Second, proponents of the shareholder-profit view might argue that regulations should be outsourced to experts, such as government agencies, thereby absolving opioid companies of responsibility and preempting tort claims.<sup>214</sup> Companion to this view is the argument that federal agencies that regulate opioids—not pharmaceutical companies—made the key approval, labeling, monitoring, and enforcement decisions.<sup>215</sup> However, to place all responsibility on a single federal agency is predicated on a simplistic view of regulation that ignores the roles of other federal agencies, state law, state agencies, and tort law—all of which serve important roles in public health. The argument is also strained under the facts, which tend to show opioid companies as bearing significant responsibility for the developing crisis.<sup>216</sup> An agency-centric view ignores whether pharmaceutical companies misrepresented a drug’s safety or efficacy,<sup>217</sup> and whether they actually complied with regulations. For example, in an action Purdue later admitted

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213. See Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 220–21 (2003) (emphasizing how corporations have access to valuable resources because they have the greatest ability to pay).

214. See, e.g., Strange, *supra* note 184, at 537 (“[I]n the case of opioid drugs, Congress and the various state legislatures have already enacted a comprehensive statutory scheme . . . controlling the development, testing, production, manufacturing, distribution, labeling, advertising, prescribing, sale, possession, use, misuse, abuse, theft, resale, and inter-state transportation of opioid drugs.”).

215. See Gluck et al., *supra* note 19, at 351 (“Some courts, for instance, already have refused to impose liability on drug manufacturers for these products, which were approved by the Food and Drug Administration (FDA) and then prescribed by doctors, often for labeled indications.”); see also Bethany McLean, “*We Didn’t Cause the Crisis*”: David Sackler Pleads His Case on the Opioid Epidemic, VANITY FAIR (June 19, 2019), <https://www.vanityfair.com/news/2019/06/david-sackler-pleads-his-case-on-the-opioid-epidemic> [<https://perma.cc/MFH5-MZB5>] (discussing the FDA’s culpability in creating and fueling the opioid crisis).

216. See *supra* Section I.A (explaining pharmaceutical companies’ responsibility for the opioid crisis).

217. See, e.g., Harriet et al., *supra* note 26 (explaining that Purdue Pharma’s marketing practices could be considered deceptive for failing to test OxyContin’s safety and efficacy at eight hours and for failing to change their label); Caitlin Esch, *How One Sentence Helped Set Off the Opioid Crisis*, MARKETPLACE (Dec. 13, 2017), <https://www.marketplace.org/2017/12/13/opioid> [<https://perma.cc/AK3S-2YYZ>] (describing the impact of adding the “delayed absorption” sentence to the label and arguing fault lies with Purdue Pharma).

was wrongful, the company distributed 15,000 OxyContin promotional videos to physicians without review by FDA.<sup>218</sup> Ultimately, no agency has the resources to comprehensively police all pharmaceutical promotion.<sup>219</sup> An agency-centric view also ignores determined lobbying to hamper federal agencies, as opioid companies did to the Drug Enforcement Agency through lobbying Congress, according to a Washington Post exposé.<sup>220</sup> Even the Supreme Court is skeptical that federal regulatory decisions preempt state tort liability for pharmaceuticals, absent clear evidence.<sup>221</sup> And, ultimately, placing responsibility on agencies for regulated products provides an odd incentive for pharmaceutical companies to push for a regulator's blessing for immunity, then engage in misconduct. Pharmaceutical companies and distributors are the closest to their products. In the legendary case *United States v. Dotterweich*,<sup>222</sup> the Supreme Court highlighted the sensibility of applying strict liability to pharmaceutical companies, which stand "in responsible relation to a public danger."<sup>223</sup> Companies that deal in pharmaceuticals could be seen as an important set of eyes ensuring their products are not harming the public.<sup>224</sup> Pharmaceutical and other companies have at times endorsed this type of thinking by supporting self-regulation over government regulation, suggesting they are best equipped to tackle regulatory issues.<sup>225</sup> Indeed, some tort scholars have suggested a system of

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218. Van Zee, *supra* note 11, at 224.

219. *Id.*; see also Carl Wiersum, *No Longer Business as Usual: FDA Exceptionalism, Commercial Speech, and the First Amendment*, 73 FOOD & DRUG L.J. 486, 487 (2018) (discussing FDA's limitations in protecting and promoting public health).

220. Scott Higham & Lenny Bernstein, *The Drug Industry's Triumph over the DEA*, WASH. POST (Oct. 15, 2017), <https://www.washingtonpost.com/graphics/2017/investigations/dea-drug-industry-congress/> [https://perma.cc/GN3S-DMWB] ("A handful of members of Congress, allied with the nation's major drug distributors, prevailed upon the DEA and the Justice Department to agree to a more industry-friendly law, undermining efforts to stanch the flow of pain pills . . . . The DEA had opposed the effort for years."). See also Gluck et al., *supra* note 19, at 362 ("[S]cholars have pointed out that litigation against powerful companies may also have the benefit of bringing about regulatory change that legislators often cannot accomplish due to the influence of industry lobbyists.").

221. See *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1672 (2019) (maintaining a high standard of "clear evidence" in state failure-to-warn cases for pharmaceutical companies to prove that FDA would not have approved a change); *Wyeth v. Levine*, 555 U.S. 555, 571 (2009) ("[A]bsent clear evidence that the FDA would not have approved a change to Phenergan's label, we will not conclude that it was impossible for Wyeth to comply with both federal and state requirements.").

222. *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

223. *Id.* at 280–81.

224. See Wendy E. Parmet & Richard A. Daynard, *The New Public Health Litigation*, 21 ANN. REV. PUB. HEALTH 437, 447 (2000) ("[P]roduct manufacturers are typically in a better position to anticipate and internalize the costs of accidents than is the consumer who may be harmed.").

225. See, e.g., Denis G. Arnold & James L. Oakley, *The Politics and Strategy of Industry Self-Regulation: The Pharmaceutical Industry's Principles for Ethical Direct-to-Consumer Advertising*

predominant self-regulation supplemented by strict, full liability in tort.<sup>226</sup> While such a scheme would present other issues,<sup>227</sup> the point remains that opioid companies hold a close view of their products and should be expected to participate in avoiding mass harms caused by the items they sell.

Even if opioid companies possess a duty to the public's health, it may further be argued that such a duty does not extend to adversarial litigation, in which the parties present their strongest one-sided arguments. However, duties do not flicker on and off depending on the forum. If A has a legal or ethical duty to B, for example in the context of a mother-daughter or attorney-client relationship, the existence of a legal controversy does not vitiate the duty. The mother could still be responsible for child support, and an attorney remains bound by professional rules, such as the confidentiality rule.<sup>228</sup> In the same way, corporate duties remain in litigation. For instance, if a defendant company received new adverse event reports showing that its drug was more harmful than previously thought—to the point that it should be removed from the market—it would be difficult for the company to argue it held no ethical obligation to inform the public or the FDA about this development,<sup>229</sup> even if it was prejudicial to the company's likelihood of success in litigation. Drug companies are legally required to report certain categories of adverse events,<sup>230</sup> and the importance of pharmacovigilance to public health is well-recognized.<sup>231</sup>

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as a Deceptive Blocking Strategy, 38 J. HEALTH POL., POL'Y & L. 505, 505–06 (2013) (“Self-regulation is one potential industry strategy for protecting patient well-being while minimizing the inefficiencies that can arise with the introduction of new regulations.”).

226. See, e.g., Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1263–81 (1998) (discussing an ex post incentive-based approach in the cigarette context and why it is preferable to other regulatory alternatives).

227. For example, where a plaintiff has used multiple brands of harmful products, responsibility among manufacturers would have to be allocated. See Frank J. Vandall, *Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers*, 52 OHIO ST. L.J. 405, 433 (1991) (detailing the different approaches a plaintiff suffering from cancer could take against the manufacturers of the numerous brands of cigarettes he smoked).

228. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2007). While an attorney may disclose some confidential information in a controversy with a client, *id.*, the attorney remains bound by professional ethics rules.

229. See Gardiner Harris & Eric Koli, *Lucrative Drug, Danger Signals and the F.D.A.*, N.Y. TIMES (June 10, 2005), <https://www.nytimes.com/2005/06/10/business/lucrative-drug-danger-signals-and-the-fda.html> [<https://perma.cc/86D6-ZR2D>] (describing Johnson & Johnson's inaction in the face of mounting evidence of harm caused by one of its drugs).

230. 21 C.F.R. § 314.80(c)(1)(i) (2016) (“The applicant must report each adverse drug experience that is both serious and unexpected, whether foreign or domestic, as soon as possible but no later than 15 calendar days from initial receipt of the information by the applicant.”).

231. See U.S. DEP'T OF HEALTH & HUM. SERV. ET AL., GUIDANCE FOR INDUSTRY: GOOD PHARMACOVIGILANCE PRACTICES AND PHARMACOEPIDEMIOLOGIC ASSESSMENT 3 (2005),

Similar arguments can be made for opioid distributors and pharmacies. In toto, there is a strong link between corporate defendants and public health.

### 3. Tort Law as More than Private: Erosion of the Public-Private Distinction

Although tort law is frequently referred to as “private law,”<sup>232</sup> the last century has seen the erosion of the public-private distinction. The public-private distinction is important because it has been used to delegitimize the opioid litigation’s public health dimension by arguing the litigation offers a fabricated connection between private lawsuits and a public crisis.<sup>233</sup> The conclusion may be that public health is an inappropriate goal of private litigation<sup>234</sup> or that relief should be limited to compensation only (no deterrence).<sup>235</sup> However, claims that the litigation is or should be purely “private” do not stand up to scrutiny; indeed, the link to broad public health is quite strong.

The first sign that arguments about the publicness and privateness of the litigation have lost their principled basis is the prevalence of basic

<https://www.fda.gov/media/71546/download> [<https://perma.cc/3HRJ-55XR>] (“[P]ostmarketing safety data collection and risk assessment based on observational data are critical . . . .”); *see also* Jesse A. Berlin et al., *Adverse Event Detection in Drug Development: Recommendations and Obligations Beyond Phase 3*, 98 AM. J. PUB. HEALTH 1366, 1370 (2008) (providing recommendations for addressing the challenges of postmarketing evaluation of drug safety).

232. John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012).

233. *See* Richards, *supra* note 192, at 455 (“[T]he question becomes whether governmental entities, such as state attorneys general and local governments, are attempting to ‘obscure the individual nature’ of injuries allegedly suffered by individuals in their jurisdictions and attributed to opioid manufacturers by ‘focusing on the widespread use of the product or its potential to cause harm.’” (internal citations omitted)); *see also* Strange, *supra* note 184, at 537 (discussing how public-nuisance claims introduce courts and litigants into a policy-making decision that courts and litigants are unfit to make); Peggy Little, *Opioid Litigation Is Not the Cure for the Disease*, LAW & LIBERTY (Feb. 26, 2020), <https://lawliberty.org/opioid-litigation-is-not-the-cure-for-the-disease> [<https://perma.cc/P2TG-TA84>] (expressing disdain for the public-nuisance theory of liability in opioid liability as overstressing tort law and leading to such unintended consequences as interference with physician judgment and reduced patient access to legal pain medications).

234. *See, e.g.*, Gluck et al., *supra* note 19, at 357 (showing opioid companies commonly argue that governmental entities, not private litigants, should enforce Controlled Substances Act and related statutes); Strange, *supra* note 184, at 537 (“[Local governments’ public nuisance claims] inject courts and litigants into what is, at bottom, a democratic policy-making decision that courts and litigants are ill-suited to make.”); *see also* Spencer Bokak-Lindell, Opinion, *Making Drug Companies Pay for the Opioid Epidemic*, N.Y. TIMES (Oct. 22, 2019), <https://www.nytimes.com/2019/10/22/opinion/opioid-epidemic-companies.html> [<https://perma.cc/V4V4-PANZ>] (arguing that the opioid epidemic is insoluble through litigation because the opioid crisis is really a problem of depression and despair, and lawsuits do not address the underlying problem).

235. Purcell, *supra* note 62, at 158; *cf.* Rubenstein, *supra* note 190, at 2140 (describing a common but unwarranted belief that private lawyers pursue cases almost exclusively for compensation).

disagreements about where the litigation currently stands. Professor Nicolas Terry sees the litigation as too private: in his words, the result “is more likely to enrich the plaintiffs (politically) and their attorneys (financially) than make a major impact.”<sup>236</sup> He described this as an unavoidable consequence of the structure of litigation, making it “best suited to well prescribed, narrow claims” and “not a good tool for remedying mass social ills.”<sup>237</sup> On the other hand, Professor Rebecca Haffajee and Michael Abrams have framed the opioid litigation as having “significant public health potential,” especially if steps are taken to maximize public impact.<sup>238</sup> Terry, Haffajee, and Abrams see a public health component to the opioid litigation as beneficial, even if Terry believes the litigation is too private.

On the other hand, former Alabama Attorney General Luther J. Strange has criticized opioid lawsuits as “regulatory lawsuits,” encroaching on the public realm of legislation and regulation.<sup>239</sup> But he deemed monetary relief as problematic, too, because “few corporations have the ability . . . to risk trial when the plaintiff is an entire state asserting billions of dollars in damages . . . .”<sup>240</sup> Therefore, claims for high damages act as public coercion that can force private parties into settlements with unfavorable terms. Interestingly, this view implicitly cleanses the conduct at issue, aiming to paint defendants as victims of an illegitimate court strategy. Similarly, David Bernick, partner at Paul Weiss and counsel for part of the Sackler family, has questioned “whether the solution to th[e] crisis really lies in the private litigation system . . . . The issue is, is civil litigation the solution to a public health crisis and I don’t think it is.”<sup>241</sup> The Strange-Bernick account sees the opioid litigation as too public.

Given that commentators disagree as to whether the litigation is predominantly public or private, and whether this determination serves the public good (however defined), there appears to be some indeterminacy to these terms. If scholars cannot even agree if the litigation is public or private, how are we even to begin such an analysis? Indeed, critical legal studies

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236. Terry, *supra* note 56, at 638.

237. *Id.* at 667.

238. Haffajee & Abrams, *supra* note 11, at 734–35.

239. Strange, *supra* note 184, at 540–43.

240. *Id.* at 541 (citing *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–1300 (7th Cir. 1995)).

241. N.Y.U. School of Law, *Panel 1: The Opioid Epidemic*, YOUTUBE (Oct. 11, 2019), <https://www.youtube.com/watch?v=Iwbnd9EWVYc> [<https://perma.cc/VZF8-FEB5>] (showing David Bernick speaking as a part of a four-member panel discussing the opioid epidemic); *see also* Richards, *supra* note 192, at 459 (questioning the propriety of public-health-oriented causes of action in the opioid litigation).

scholars have eroded the cleanness of a private-public separation.<sup>242</sup>

Professor Morton J. Horwitz has provided a thorough historical account of the public-private distinction. According to his research, there was no conceptualized private realm separate from the public realm until the nineteenth century, when the emergence of the market as a centerpiece of society led legal doctrine to reduce its interference in contractual affairs, which were considered to be between private actors and therefore lacking a cognizable state interest.<sup>243</sup> During the same time period, scholars sought to eliminate the tort law doctrine of punitive damages, which was thought to mix public functions with private law.<sup>244</sup> Judges thought that new limitations on their discretion in private law served a greater (arguably public-minded) desire to make law apolitical.<sup>245</sup> Elevation of the public-private distinction culminated in *Lochner v. New York*,<sup>246</sup> notable for constitutionally protecting private freedom of contract, thereby creating an awkward public-private blend by giving private law constitutional imprimatur, whose contradiction is self-evident. The decades-long pushback against the *Lochner* strand of cases led not only to the famous battle between Franklin D. Roosevelt and the Supreme Court, but to a paradigm shift in legal thinking among judges and the academy. Horwitz noted,

For the next thirty years, the most brilliant and original legal thinkers America has ever had devoted their energies to exposing the conservative ideological foundations of the public/private distinction. Culminating in the Legal Realist Movement of the 1920's and 1930's, judges such as Holmes, Brandeis, and Cardozo and legal theorists such as Roscoe Pound, Walter Wheeler Cook, Wesley Hohfeld, Robert Lee Hale, Arthur Corbin, Warren Seavey, Morris Cohen, and Karl Llewelyn devoted themselves to attacking the premises behind the public/private distinction. Paralleling arguments then current in political economy, they ridiculed the invisible-hand premise behind any assumption that private law could

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242. Some scholars believe there is still some utility to using the terms “public” and “private” to describe particular features of lawyering, even though the distinction, as used, is frequently problematic. See Rubenstein, *supra* note 190, at 2137 (“[The] claim that the private attorney general mixes aspects of public and private lawyering rests upon an assumption that there are, at least, these two pure forms of lawyering.”).

243. See Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424–25 (1982) (describing the evolution of public and private legal realms).

244. See *id.* at 1425 (“Several states abolished punitive damages on the grounds that combining public and private law functions was an unhealthy and dangerous business.”).

245. See *id.* (“By creating a neutral and apolitical system of legal doctrine and legal reasoning free from what was thought to be the dangerous and unstable redistributive tendencies of democratic politics, legal thinkers hoped to temper the problem of ‘tyranny of the majority.’”).

246. 198 U.S. 45 (1905).

be neutral and apolitical. All law was coercive and had distributive consequences, they argued.<sup>247</sup>

The Supreme Court took these criticisms to heart, evident in its 1948 decision *Shelley v. Kraemer*,<sup>248</sup> which, in the context of a racially restrictive covenant, held that a state court's enforcement constitutes state action for analysis of discrimination under the Equal Protection Clause of the Fourteenth Amendment.<sup>249</sup> That is, even "private" contracting requires public enforcement.<sup>250</sup>

Whether or not one finds it persuasive that contract law is largely public, tort law is even more so.<sup>251</sup> Tort is adjudicated by public actors—a judge, a jury, perhaps some special masters, all within a courthouse. The elements of committing a tort are determined by government—in modern times, legislatures, and occasionally judges through the common law. The standards of conduct set in tort law benefit the public. And tort suits have inter-case effects; for example, tort law's treatment of a water polluter may cause the air polluter to take precautions.<sup>252</sup> In these ways, tort law clearly benefits both public and private.<sup>253</sup>

In the same vein, Professor William Rubenstein famously compared lawyering to sex.<sup>254</sup> Just as sexual orientation is more than homosexual and

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247. Horwitz, *supra* note 243, at 1426 (citations omitted).

248. 334 U.S. 1 (1948).

249. *Id.* at 20.

250. Scholarly arguments against the public-private distinction also draw on the prevailing notion that corporations became so powerful during the 1920s that the distinction became blurred. See Horwitz, *supra* note 243, at 1428 ("The attack on the public/private distinction was the result of a widespread perception that so-called private institutions were acquiring coercive power that had formerly been reserved to governments."). Therefore, the public-private distinction was being eroded on multiple fronts.

251. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918 (2010) ("[T]ort law is in many ways public. It sets generally applicable standards of conduct. It is developed and applied by officials who may have in mind various policy concerns as they render judgments in particular cases. And its operation can advance or interfere with the operation of other public institutions.").

252. See Popper, *supra* note 160, at 183–84 (arguing deterrence extends to similarly situated entities).

253. See Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 184 (1997).

Although various efforts have been made to draw principled distinctions between private and public litigation in terms of objectives or remedies, such distinctions break down both as a historical matter and in modern litigation practice. As Harold Krent has described, the use of private litigation to supplement government law enforcement efforts dates from the eighteenth century in both the United States and England. Today, civil fines and punitive damages blur the line between compensation to victims and the punishment of wrongdoers. *Id.* (citations omitted).

254. Rubenstein, *supra* note 190, at 2132.



heterosexual, so is lawyering more than public and private.<sup>255</sup>

Applying these criticisms of the public-private distinction to the opioid litigation, we can derive two insights. First, we must be cautious applying the terms public and private in discussing the opioid litigation, in particular using either term to disparage the litigation, as the terms are vague and have limited utility. Instead, critiques should be directly levied at specific aspects of the litigation and the disadvantages of those aspects. Second, the opioid litigation has a quintessentially public function, inseparable from the underlying causes of action, state statutes, state tort machinery, and federal statutes that allow these claims in court. The circumstances of the opioid litigation appear to establish that public health must be considered. A failure to consider public health would be the greatest failure of a legal mechanism that exists to benefit the public and serve the administration of justice.

### B. Article III Implications of the Opioid Litigation

Article III of the Constitution, at first glance, may appear to present problems for the opioid litigation. Several critics have voiced concerns that opioid lawsuits exceed the proper authority and expertise of courts.<sup>256</sup> However, this section will defend the broader public-health goals of the opioid litigation.

One notable subject of attack has been the public-nuisance cause of action, which allows redress for injuries to public health. For example, Professor Michelle Richards has asserted that courts “must examine whether a public nuisance claim is the most appropriate vehicle for remedying what is really a public policy problem.”<sup>257</sup> Attorney Luther Strange has used his critique of public nuisance to launch a broader attack against the opioid litigation, criticizing state pursuit of “regulatory lawsuits,” which may “regulate” and “tax” defendants through settlement provisions without the legislature’s

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255. *Id.* (“Lawyering . . . is like sex. There are not just two pure forms—the private attorney on the one hand and the government attorney on the other—but rather an array of mixes of the public and private.”); see Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 16 (2000) (describing the blend of public and private lawyering in government litigation).

256. See JOSHUA K. PAYNE & JESS R. NIX, U.S. CHAMBER INST. FOR LEGAL REFORM, *WAKING THE LITIGATION MONSTER: THE MISUSE OF PUBLIC NUISANCE* 22 (2019) (explaining that expert agencies are qualified to make public-policy decisions in their areas of expertise, while judges are limited in their knowledge and confined by the evidentiary record); Strange, *supra* note 184, at 547 (“The issues raised by the opioid litigation . . . [require] expertise beyond the purview of the judiciary.”); cf. Michael L. Rustad & Thomas H. Koenig, *Reforming Public Interest Tort Law to Redress Public Health Epidemics*, 14 J. HEALTH CARE L. & POL’Y 331, 346–47 (2011) (identifying other scholars’ claims that the expansion of public nuisance threatens democracy, but arguing case studies “suggest the opposite conclusion”).

257. Richards, *supra* note 192, at 455. See also Strange, *supra* note 184, at 537 (attacking public-nuisance claims because they improperly force “democratic policy-making decision[s]” into the courtroom).

consent.<sup>258</sup> In this way, litigation can lead to “higher requirements than those established by the legislature or the agencies vested with responsibility for regulating . . . .”<sup>259</sup> At the core, Richards and Strange seem to argue that courts exist to offer humble compensation to injured plaintiffs, not to violate the separation of powers by serving public policy objectives.

Under existing law, Article III provides for the “proper—and properly limited—role of the courts in a democratic society.”<sup>260</sup> Article III’s “case” or “controversy” requirement has been interpreted to require that federal courts hear cases capable of resolution by the judiciary, consistent with the separation of powers.<sup>261</sup> Modern Article III jurisprudence largely centers around standing, i.e., requiring that plaintiffs possess a concrete injury caused by defendants that is redressable by a favorable court decision.<sup>262</sup> Standing requirements generally favor the litigation of concrete harms to individuals, rather than more generalized harms,<sup>263</sup> and injuries that are actual or imminent, rather than those which are abstract and in the future.<sup>264</sup> Given that the opioid crisis and the larger addiction crisis pose a threat to all Americans, some skeptics believe they belong in the realm of legislation rather than adjudication.<sup>265</sup> In addition, courts may lack the expertise to resolve important policy questions implicating multiple competing

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258. Strange, *supra* note 184, at 543. See also Rustad & Koenig, *supra* note 256, at 346 (noting that public-nuisance torts can be criticized as “back-door regulation”).

259. Strange, *supra* note 184, at 538. See also Purcell, *supra* note 62, at 169 (“[S]tate 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.”).

260. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

261. *Id.* at 752; see also *Whitmore v. Arkansas*, 495 U.S. 149, 154–55 (1990) (“[T]he doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process.”); U.S. CONST. art. III, § 2, cl. 1.

262. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

263. *Id.* at 575; *United States v. Richardson*, 418 U.S. 166, 175–77 (1974).

264. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983); *Lujan*, 505 U.S. at 564.

265. See Richards, *supra* note 192, at 448 (“[C]ourts must make a determination of . . . [numerous complex factors before] consider[ing] whether they should manage these types of public policy concerns through public-nuisance litigation.”); Gluck et al., *supra* note 19, at 361–62 (detailing advantages of legislation over litigation); Strange, *supra* note 184, at 537–38 (arguing statutory and regulatory schemes are strongest public policy tools); Bernick, *supra* note 241 (offering a critique of private litigation); cf. Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy—Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493, 498 (2002) (posing the new style of tort action as an “end-run” around the legislative process). This critique implicitly invokes the political question doctrine. See *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”); see *Political Questions, Public Rights, and Sovereign Immunity*, 130 HARV. L. REV. 723, 723–24 (2016) (describing six categories of the political question doctrine, including cases insusceptible to judicial standards, those requiring policy discretion beyond the judicial pale, or those which imply disrespect toward a coordinate branch of government).

interests.<sup>266</sup>

Therefore, Article III appears to lay out requirements for adjudication that oppose a broad conception of public health across people and time. As Professors Wendy Parmet and Dick Daynard have noted, standing and similar justiciability doctrines, by zooming in on concrete harms to individuals, seem to overlook the most important matters of public health.<sup>267</sup> That is, large risks that threaten the entire U.S. population seem beyond the pale of Article III. Put another way, courts address private harms, not public ones.

In essence, these arguments rehash the private-public distinction arguments discussed above<sup>268</sup> but add a constitutional gloss about the proper scope of an Article III court. These critiques can be rebutted from an Article III perspective.

Before the most recent wave of opioid litigation, many plaintiffs brought claims against opioid companies and received hundreds of millions of dollars in settlements as well as settlement provisions restricting future marketing, releasing confidential corporate information, and admitting fault.<sup>269</sup> Since these lawsuits, the opioid litigation has greatly expanded to include more and different types of plaintiffs including almost every state and municipality in the United States.<sup>270</sup> But, fundamentally, many of the claims are based on the same types of conduct, including deceptive marketing, failure to report suspicious shipments, fraud, and so forth. Admittedly, there is an appearance that Article III courts are allowing “litigation of a public-health crisis,” but it is not surprising, in a crisis that generates mass death, that the plaintiffs are broad in scope and the litigation is large and complex. Individual plaintiffs have suffered concrete health injuries, and governments have incurred large financial expenses, totaling around \$57 million in 2019 alone.<sup>271</sup> Far from an abstract, future injury that would be barred for lack of Article III standing, the opioid litigation is replete with death, despair, and financial burdens that should never have been borne. And these harms are directly tied to defendants’ conduct. For example, Purdue Pharmaceuticals, in a \$634

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266. See *Strange*, *supra* note 184, at 547 (suggesting that the political branches are better suited to balance competing interests of harm reduction and economic development because these are “complex policy judgments” (citations omitted)); *PAYNE & NIX*, *supra* note 256, at 32 (“[L]arge-scale societal challenges are better dealt with by the legislative and executive branches, which, unlike courts, are uniquely capable of balancing all of the competing needs and interests in play.”).

267. Parmet & Daynard, *supra* note 224, at 450.

268. *Supra* Section III.A.3.

269. See Haffajee & Mello, *supra* note 46, at 2302–03 (detailing major government and class-action settlements against opioid companies from 2004 to 2017).

270. *Supra* Section III.A.2.

271. STODDARD DAVENPORT ET AL., SOCIETY OF ACTUARIES, ECONOMIC IMPACT OF NON-MEDICAL OPIOID USE IN THE UNITED STATES 11 (2019).

million settlement with the DOJ in 2007, admitted that it misled physicians and patients about OxyContin's safety and misbranded it as abuse-resistant.<sup>272</sup>

And yet, despite concrete injuries, the opioid litigation has an intangible public feel to it. Does this fact delegitimize the litigation? As Parmet and Daynard have written, "[T]he law's individualist perspective is not often at odds with the interests of the community. More often than not, the two are intertwined."<sup>273</sup> Inevitably, as opioid claims have grown in number, the litigation has become a public vindication of mass death. The opioid litigation, then, stretches our notion of Article III by reminding us that the sum of all Americans constitutes the public. The opioid litigation framed as assemblage of "cases" and "controversies" helps alleviate Article III concerns. Ultimately, the litigation cannot be said to be either private or public; it is quite literally both.

Rather than step on legislative terrain, litigants bringing public nuisance and other public-minded rights of action may actually be exercising legislative will. Most of the causes of action at play in the opioid litigation involve statutory violations. For example, Indiana's statute for public nuisance states:

Sec. 6.

Whatever is:

- (1) injurious to health;
- (2) indecent;
- (3) offensive to the senses; or
- (4) an obstruction to the free use of property;

so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action.<sup>274</sup>

So, when the Indiana attorney general asserted in a complaint that three opioid companies violated a public right to be "free from injury to the public health" by creating a public nuisance through tortiously disseminating opioids they knew were harmful,<sup>275</sup> it was carrying out Indiana's legislative policy. The improper sale and distribution of opioids seem to fit the statutory language like a glove, even if this approach to public nuisance is innovative.<sup>276</sup> Filing lawsuits as set by legislative policy hardly raises

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272. Haffajee & Mello, *supra* note 46, at 2303.

273. Parmet & Daynard, *supra* note 224, at 451.

274. IND. CODE § 32-30-6-6 (2017).

275. Complaint at 207–08, *Indiana v. Cardinal Health, Inc.*, No. 49D07-1910-PL-044323 (Ind. Sup. Ct. Oct. 22, 2019), [https://content.govdelivery.com/attachments/INAG/2019/10/22/file\\_attachments/1309313/Distributors%20Complaint%20-%20REDACTED.PDF](https://content.govdelivery.com/attachments/INAG/2019/10/22/file_attachments/1309313/Distributors%20Complaint%20-%20REDACTED.PDF)

[<https://perma.cc/2WCX-GGZD>]. 870-872

276. The counterargument is that public-nuisance lawsuits should be confined to historical

separation of powers concerns. Indeed, there may be inherent value in allowing injured people and governments to identify their own injuries and seek vindication in court, as opposed to an ex-ante regulatory approach.<sup>277</sup>

Although some public-health remedies may require judges to resolve public-health-related questions, courts can promote public health without implicating policy-making expertise. Judges and other decision makers have numerous options for how to handle claims within mass tort litigation—whether to dismiss certain claims, which ones to adjudicate, how to facilitate settlement, whether to recommend remand, whether to disaggregate, and so forth. Therefore, many of the decisions judges can make, though intertwined with public health, are fully within their Article III authority. This paper will argue later that the best option to resolve the opioid litigation in a manner consistent with public health is mass disaggregation of claims outside the MDL.<sup>278</sup> This recommendation is clearly consistent with Article III.

That said, resolution of the opioid litigation may implicate some policy considerations. Most clearly, judgments and settlements may restrict defendants' future conduct. But some policy consideration is well within judges' historical bounds. Judicial policy discretion is most obvious in the common law. Despite post-*Erie*<sup>279</sup> skepticism of federal common law,<sup>280</sup> state and even federal common law retain an important presence today.<sup>281</sup> Common law may invalidate contracts on public policy grounds, find

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traditions. Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMPLE L. REV. 825, 870–72 (2004); Ausness, *supra* note 193, at 568–69 (explaining cases where courts declined to expand public-nuisance lawsuits to broad-based public-health concerns such as firearms or lead paint). However, many courts have accepted modern public-nuisance claims for products causing large harms. *Id.* at 569 (noting an Indiana court's holding that scope of public-nuisance claim included gun manufacturers' and distributors' marketing practices). Indiana's public-nuisance statute, cited above, was last updated in 2017, see IND. CODE § 32-30-6-6 (2017), and so it is not entirely clear why public-nuisance law should be limited to a particular historical account. Indeed, tort law was previously, in some regards, more encompassing than it is today, with strict liability as the default, see Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 481 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)), and so perhaps these claims would have fallen under traditional common-law liability. Given the modern distaste for common law, it seems state statutes fitting the conduct in question are proper sources of claims.

277. See Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 381 (2007) (“[T]here are strong arguments that can be made for decentralized enforcement . . .”).

278. *Infra* Section IV.B.1; see Aaron, *supra* note 1 (referencing the companion piece to this paper, forthcoming in 2022, which will further discuss strategies to improve public-health litigation).

279. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

280. See Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 755 (2013) (“[T]he creation of federal common law remains discouraged, thanks to *Erie*'s continuing vitality . . .”).

281. For a discussion of the continuing importance of federal common law, see Curtis A. Bradley et al., *SOSA, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 878–79 (2007).

implied procedural rights in contracts,<sup>282</sup> immunize federal contractors from state tort law,<sup>283</sup> alter the scope of informed consent in medical care,<sup>284</sup> change which claims surpass various legal hurdles such as a 12(b)(6) motion to dismiss,<sup>285</sup> and decide many other issues of importance. Within statutory and constitutional bounds, judges retain some residual discretion, which is probably important to use when adjudicating cases around mass death.

Historically, judicial oversight of deterrence and accountability has solid footing. In the early-to-mid-1800s, tort law was conceived mainly to benefit victims through compensation.<sup>286</sup> Consistent with the goal of compensation, tort law held tortfeasors strictly liable, and the character of the defendant's act had little import.<sup>287</sup> However, the late 1800s saw a broad move toward negligence,<sup>288</sup> and courts became more concerned with the desirability of defendants' conduct.<sup>289</sup> By the 1920s, the role of deterrence in tort law was solidified.<sup>290</sup> This change catalyzed a new public role for tort law, grounded in deterring misconduct,<sup>291</sup> even in litigation between private parties.<sup>292</sup>

Deterrence is an inevitable question for judges adjudicating tort disputes. While it may seem discretion can be avoided by providing humble compensation, this minimalistic view is difficult to square with the insight

282. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 589 (2000) ("Courts have applied due process and fairness requirements in two areas of contract law: cases involving private associations' interference with members' economic interests, and employment cases involving wrongful termination." (citations omitted)).

283. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (concluding that certain matters concerning "uniquely federal interests" fall within federal control and that state law is preempted by federal common law in these cases (citations omitted)).

284. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 483 (Cal. 1990) (holding that physicians must disclose any personal interests unrelated to the patient's health, including fiduciary interests, as a prerequisite to informed consent).

285. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (dismissing plaintiffs' action because the claim to relief was facially implausible under the heightened pleading standard for factual allegations); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (ruling allegations consisting of "mere conclusory statements" cannot sufficiently withstand a motion to dismiss).

286. See John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 517 (2003) (explaining how tort actions typically empowered individuals to seek personal, monetary redress).

287. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 85 (1977) ("[V]irtually all injuries were still conceived of as nuisances, thereby invoking a standard of strict liability which tended to ignore the specific character of the defendant's act.").

288. See *id.* ("By the time of the Civil War . . . many types of injuries had been reclassified under a 'negligence' heading . . .").

289. Goldberg, *supra* note 286, at 523–24.

290. See Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019, 1021 (2001) (stating that one of the common "purposes" of tort law is deterrence).

291. See Goldberg, *supra* note 286, at 524 ("[T]ort had transformed itself from private to 'public' law, whereby it functioned to achieve collective, not corrective, justice.").

292. See Issacharoff, *supra* note 277, at 382 ("[P]rivate enforcement is so central to our system of ex post accountability that the idea that a sufficient level of state or federal regulation could effectively displace private litigation is almost inconceivable.").

that setting the compensation amount heavily influences the deterrence amount. More generally, tort law discourages certain types of conduct by setting social standards.<sup>293</sup> Legal standards, mens rea requirements, available defenses, compensatory damages, punitive damages, the threat of release of documents, and other doctrinal features of tort law inevitably affect the *future* conduct of defendants. Imposing on defendants the full cost of the opioid epidemic, for example, could be framed as compensatory, but would doubtless affect future behavior. The only way to avoid affecting defendants' conduct is to greatly constrain compensatory relief and offer no other relief, which would allow defendants to continue their conduct without restraint. However, this option is still making a policy choice: that of minimal relief. And any set of relief provided will affect public health.<sup>294</sup> As critics have admitted, mass tort cases have "an enormous impact on public policy."<sup>295</sup> Rather than pretend tort law does not affect future conduct, courts and judges who have experience adjudicating tort cases should pursue appropriate relief and properly consider the impact of this relief on public health. Deficits in knowledge should be supplemented with experts, special masters, and in-depth study.

### C. *Litigation Is an Important Public Health Tool.*

The prior sections aimed to demonstrate that public health must be represented in the opioid litigation, and that this representation is consistent with Article III. This Section will argue that, although some legal scholars have criticized litigation as an ill-suited venue for promoting public health,<sup>296</sup> litigation serves important public-health roles despite its limitations.

Dr. Thomas Frieden wrote that one of the key roles of government in public health is to "implement societal interventions when individuals cannot efficiently or effectively protect their own health . . . ."<sup>297</sup> In 2017, opioids were involved in more than forty-seven thousand overdose deaths in the United States.<sup>298</sup> In the same year, more than eleven million people misused prescription opioids—totaling 4.1 percent of Americans twelve or older.<sup>299</sup>

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293. See Goldberg & Zipursky, *supra* note 251, at 918 ("[Tort law] sets generally applicable standards of conduct.").

294. See Galligan, Jr., *supra* note 290, at 1022 ("[A]ll tort suits might be viewed as public tort suits because they affect the broader public.").

295. Richards, *supra* note 192, at 459.

296. See, e.g., *id.* at 407 (arguing that although litigation frequently addresses public-health concerns, whether litigation actually improves public health is unclear); see also Rustad & Koenig, *supra* note 256, at 346–47 (highlighting Professor Goldberg's claim that tort principles have been stretched beyond their capacity in the name of social justice); Terry, *supra* note 56, at 638–39 (asserting that litigation likely cannot solve issues surrounding pharmaceutical misconduct).

297. Frieden, *supra* note 95, at 1752.

298. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 59, at 7.

299. *Id.* at 18.

With these numbers, it appears individuals are unable to protect themselves from opioid addiction.

In 2013, Dr. John Millar coined the term “corporate determinants of health,” acknowledging that corporations had such a large impact on Americans’ health that a new phrase was needed.<sup>300</sup> The corporate determinants of health are a useful concept to describe dynamics at play in junk food, cigarettes, e-cigarettes, alcohol, guns, and opioids. These and other social determinants of health are increasingly the drivers of disease in the United States<sup>301</sup> as well as health inequity.<sup>302</sup> Lack of systemic attention to the social determinants has arguably led to recent declines in American life expectancy.<sup>303</sup>

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300. John S. Millar, *The Corporate Determinants of Health: How Big Business Affects Our Health, and the Need for Government Action!*, 104 CAN. J. PUB. HEALTH e327, e327 (2013). See also Ilona Kickbusch et al., *The Commercial Determinants of Health*, 4 LANCET e895, e895 (2016).

Corporate influence is exerted through four channels: marketing, which enhances the desirability and acceptability of unhealthy commodities; lobbying, which can impede policy barriers such as plain packaging and minimum drinking ages; corporate social responsibility strategies, which can deflect attention and whitewash tarnished reputations; and extensive supply chains, which amplify company influence around the globe. *Id.* See also Gerard Hastings, *Why Corporate Power Is a Public Health Priority*, 345 BRIT. MED. J. e5124, e5126 (2012) <https://doi.org/10.1136/bmj.e5124> [<https://perma.cc/HD7T-KBY9>] (“[F]ocus on the social determinants of ill health needs to be matched with an equal concern for the commercial determinants of ill health.”); Ilona Kickbusch, Editorial, *Addressing the Interface of the Political and Commercial Determinants of Health*, 27 HEALTH PROMOTION INT’L 427, 427 (2012) (illustrating that many challenges arise when health issues are negotiated against political and economic interests).

301. See Scott Burris, *From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective*, 159 U. PA. L. REV. 1649, 1651 (2011) (“Health care is a huge part of the American economy and undeniably a public good, but the stakes are too high for the public—and health law scholars—to continue neglecting the robust social structures that are shaping America’s well-being.”).

302. See Michelle L. Frisco et al., *Would the Elimination of Obesity and Smoking Reduce U.S. Racial/Ethnic/Nativity Disparities in Total and Healthy Life Expectancy?*, 7 SSM—POPULATION HEALTH 1, 1 (Apr. 2019) <https://doi.org/10.1016/j.ssmph.2019.100374> [<https://perma.cc/S982-3BHX>] (“Obesity and smoking are the two leading causes of preventable death and disability in the United States. Both of these health risks are socially patterned in ways that likely produce racial/ethnic/nativity disparities in total and healthy life expectancy.”); see also Gopal K. Singh et al., *Social Determinants of Health in the United States: Addressing Major Health Inequality Trends for the Nation, 1935–2016*, 6 INT’L J. MATERNAL & CHILD HEALTH & AIDS 139, 139 (2017) (“Marked disparities in various health outcomes indicate the underlying significance of social determinants in disease prevention and health promotion and necessitate systematic and continued monitoring of health inequalities according to social factors.”); BRENNAN RAMIREZ ET AL., CTRES. FOR DISEASE CONTROL & PREVENTION, PROMOTING HEALTH EQUITY: A RESOURCE TO HELP COMMUNITIES ADDRESS SOCIAL DETERMINANTS OF HEALTH 4 (2008), <https://www.cdc.gov/nccdphp/dch/programs/healthycommunitiesprogram/tools/pdf/SDOH-workbook.pdf> [<https://perma.cc/RWB9-8CCG>] (“The link between social determinants of health, including social, economic, and environmental conditions, and health outcomes is widely recognized in the public health literature.”).

303. See Steven H. Woolf & Heidi Schoemaker, *Life Expectancy and Mortality Rates in the*



However, the corporate determinants of health are particularly difficult to address. Part of the modern corporate enterprise is protecting a free market for selling one's products; to this end, corporations engage in lobbying, philanthropy, and economic influence.<sup>304</sup> Compared with this concerted economic interest,<sup>305</sup> public health is a collective good and therefore a collective action problem.<sup>306</sup> That is, everyone benefits from public health,<sup>307</sup> but few have a strong individual incentive to support it. Although rational humans might work together to solve diffuse collective action problems, they often fail to do so.<sup>308</sup>

And while an apparent crisis may awaken the public to an unaddressed problem, public health is complex. Public-health problems are often unidentifiable at the individual level but clear on the population level, hence the accelerating use of epidemiology in public health.<sup>309</sup> For example, epidemiology was critical to the identification of lead as harming children's brains.<sup>310</sup> In addition, public-health problems may present complex chains of causation; in the words of public health scholar Dr. Sandro Galea, "[A]n understanding of health requires an understanding of the complex causal architecture that creates health in the first place and structured thinking about how we can grapple with these complex causes to improv[e] health."<sup>311</sup> When the problem itself requires complex data analysis and chains of causation, it is no surprise that corporations selling harmful products may conduct their business for decades before society reckons with the resultant

*United States, 1959–2017*, 322 JAMA 1996, 2009–11 (2019) (explaining that fatal drug overdoses, among other issues such as liver disease and suicide, accounted for a decline in life expectancy in the late 1990s).

304. Kickbusch et al., *supra* note 300, at e895; *see also* Gluck et al., *supra* note 19, at 362 (noting influence of corporate lobbying). Corporate wealth has also been used to control the narrative through public relations and marketing. *See* Hanson & Yosifon, *supra* note 213, at 219–21 (“[C]orporations are—in part because of market processes—profoundly effective at uncovering and exploiting the most efficient and reliable means of influencing people and institutions . . .”). Psychological phenomena are also likely at play. *See* Gil Siegal et al., *An Account of Collective Actions in Public Health*, 99 AM. J. PUB. HEALTH 1583, 1586 (2009) (“[B]ehavioral economics seeks to describe, predict, and sometimes direct people’s choices in a predetermined direction on the basis of [social norms].”).

305. *See* Hanson & Yosifon, *supra* note 213, at 220 (“[Corporations] enjoy a common single interest and thus an advantage in the competition to influence.”).

306. *See* Wiley, *supra* note 9, at 215 (explaining that public health is a shared value and collective interest).

307. *See* Frieden, *supra* note 95, at 1753 (“Everyone benefits when people are healthier.”).

308. *See* Siegal et al., *supra* note 304, at 1586 (“[A]lthough rational individuals would choose to work together to create and maintain public goods, they often fail to do so and collective action problems persist.”).

309. Wiley, *supra* note 9, at 261–62.

310. *Id.* at 243–44.

311. Sandro Galea & Roger D. Vaughan, *Making the Invisible Causes of Population Health Visible: A Public Health of Consequence*, August 2018, 108 AM. J. PUB. HEALTH 985, 985 (2018).

damage.

The collective action lens helps us understand why litigation has become a dominant force in public-health regulation. Presidents of both parties have met little resistance as they deliberately hampered the administrative state, which facilitated the sale of risky products.<sup>312</sup> Ex-post litigation has emerged as a natural response to resulting public-health harms.<sup>313</sup> While some commentators have suggested health-harming products should be managed ex ante,<sup>314</sup> appropriate regulation is often not present or deliberately undermined, and it would be counterproductive to avoid litigation once ex-ante regulation has failed.<sup>315</sup> Even Judge Polster recognized litigation may be an important ex-post backstop: “The federal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government, federal and state, have punted. So it’s here.”<sup>316</sup> Litigation surrounding other public-health crises, such as obesity, impure water, and guns, has served important public-health gains even when unsuccessful on the merits.<sup>317</sup>

The public-health goals of the litigation will be discussed later in this piece<sup>318</sup> and in the companion article.<sup>319</sup> Ultimately, the opioid litigation presents a golden opportunity to change the way that pharmaceutical companies market and sell addicting products. Other branches and levels of government, too, could have intervened earlier. However, because of the unique adjudicative function of courts, the litigation may examine in detail

312. See NAGAREDA, *supra* note 164, at 10.

Upon entering office in 1981, President Ronald Reagan famously declared that “[g]overnment is not the solution to our problem; government is the problem.” Less than two decades later, President Bill Clinton observed that “[t]he era of big Government is over.” Notwithstanding their considerable policy differences, both the Reagan and the Clinton administrations embraced measures that called for close examination of the costs and benefits of regulatory initiatives. Ambitious regulatory programs, in short, would be harder to obtain through the ordinary channels of public legislation and administrative regulation.

In such an environment, tort litigation . . . emerged as an alternative means to address the human costs of risk-taking by product manufacturers.

*Id.*

313. *Id.*

314. Strange, *supra* note 184, at 537; see Gluck et al., *supra* note 19, at 361–62 (describing various scholarly critiques of court-derived solutions to public-health issues); see also Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1213 (1984) (emphasizing regulatory agencies’ importance in markets where consumers are poorly organized or lack information).

315. See Haffajee & Abrams, *supra* note 11, at 734–35 (concluding litigation has potential to redress failures of regulatory oversight); see also Gluck et al., *supra* note 19, at 362 (“Litigation, in the end, may be a second-best but necessary effort to catalyze broader change.”).

316. Transcript of Proc., *supra* note 5, at 4.

317. Gluck et al., *supra* note 19, at 351–52.

318. *Infra* Section IV.B.

319. Aaron, *supra* note 1.

past conduct with an eye to preventing recurrence. If done properly, the litigation could address an important corporate determinant of health.

*D. The Opioid Litigation Is Deeply Intertwined with Public Health.*

The opioid litigation has surpassed adversarial disputes and become a public forum to address a large crisis in our nation's history.<sup>320</sup> As the size of the harm increases, so rises the public nature of the dispute. Plaintiffs do include individuals harmed by prescription opioids. But they go beyond the level of the individual, many of them representing entire territories, states, cities, and tribes around the country. Collectively, almost every American is represented.

All this said, the opioid litigation remains a dispute among parties, even if the plaintiffs collectively represent the entire public. The opioid litigation therefore represents a paradox in that it is both adversarial and public. However, the paradox resolves if one accepts that litigation often has a public function. The opioid MDL is a public reckoning with mass harm, and the public's health will be affected by the final result. Any failure to represent public health creates profound problems of agency.

#### IV. PUBLIC HEALTH AS AN AGENCY PROBLEM

Much scholarship has elaborated on agency problems in mass tort litigation—who should further the interests of whom, how far those interests should be furthered, and how incentives should be structured.<sup>321</sup> However, these critiques have not been extended to public health.

Public health is a superseding agency problem. Law already contains agency problems between lawyer and client.<sup>322</sup> Therefore, public-health law, when it involves attorneys, presents a double agency problem. It is this second level of agency—the representation of public health—that is the predominant concern of this paper (**Figure 7**).

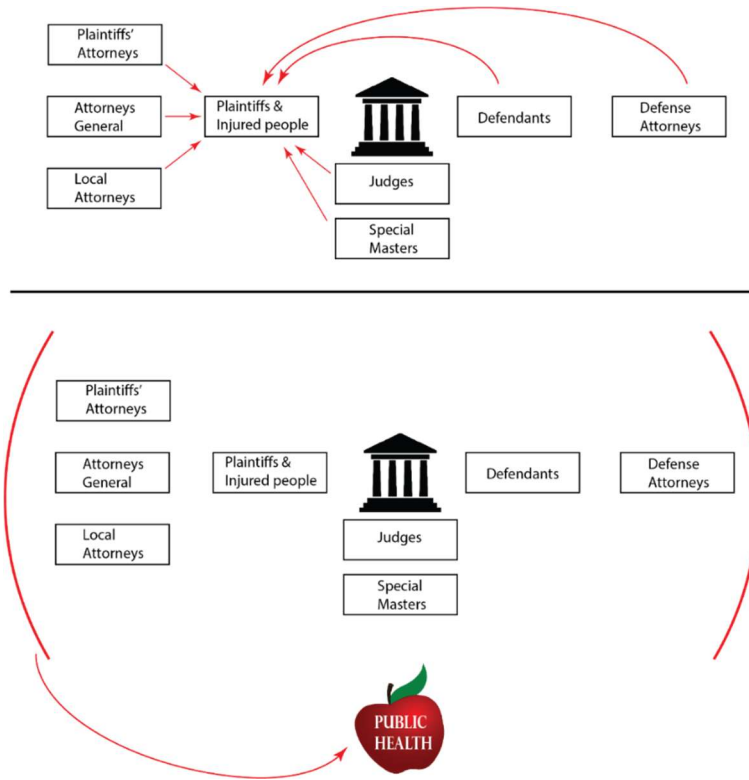
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320. See *supra* Sections III.A–B (explaining the opioid litigation's duty to support public health, and that Article III of the Constitution does not restrict judges' authority to oversee such litigation).

321. See sources cited *supra* note 19 and accompanying text (elaborating on agency and procedural issues that harm plaintiffs in mass tort litigation).

322. See Scott Burris et al., *Making the Case for Laws That Improve Health: A Framework for Public Health Law Research*, 88 MILBANK Q. 169, 175 (2010) ("Law is fundamentally a social practice embedded in institutions and implemented by agents.").

**Figure 7: Most scholarship discussing agency problems has focused on misaligned incentives that prejudice plaintiffs. This paper seeks to elaborate on a higher-level agency problem: that of public health.**



This Part will discuss agency problems between public health and the opioid litigation's participants, who have generally favored quick, unmaximized settlement. It will then discuss why fast settlement is misaligned with public health.

#### *A. Public Health Is Insufficiently Represented in the Opioid Litigation.*

The litigation's participants have supported rapid monetary settlement to the exclusion of many important public-health goals.

##### 1. Judge Daniel Aaron Polster

From the MDL's inception, Judge Polster has dedicated himself to

obtaining a settlement sans litigation.<sup>323</sup> At a pretrial conference in January 2018, Judge Polster nixed the idea of litigation, hinting at the importance of rapid resolution to help opioid victims:

Since we're losing more than 50,000 of our citizens every year, about 150 Americans are going to die today, just today, while we're meeting. . . . I don't think anyone in the country is interested in a whole lot of finger-pointing at this point, and I'm not either. People aren't interested in depositions, and discovery, and trials. People aren't interested in figuring out the answer to interesting legal questions . . . . [M]y objective is to do something meaningful to abate this crisis and to do it in 2018.<sup>324</sup>

Professor Howard Erichson, in an aptly named article, “MDL and the Allure of Sidestepping Litigation,”<sup>325</sup> described Judge Polster’s sentiments as “understandable” but “stunning.”<sup>326</sup> Later in 2018, Judge Polster urged the same goals, stating that we need to quickly “come up with some amount of money” and that “all this discovery and depositions and whatever, and a trial, will accomplish zero.”<sup>327</sup> The judge did oversee discovery, but has kept it “shrouded in secrecy,”<sup>328</sup> and has mainly concerned himself with fostering settlement. On one occasion, he divided the parties into two rooms and “shuttled between them” for ten hours.<sup>329</sup>

Judge Polster also certified the historic 23(b)(3) “negotiation class” (now invalidated by the Sixth Circuit<sup>330</sup>) consisting of every municipal government in the United States.<sup>331</sup> The claims and issues were not certified for trial, only for settlement, hence the name “negotiation class.”<sup>332</sup> Although Judge Polster correctly stated that he did not force plaintiffs or defendants to use the negotiation class—in his words, it was only “an option”<sup>333</sup>—he greatly privileged a monetary settlement. There is no parallel mechanism to

323. See Oliva, *supra* note 91, at 674–76 (noting Judge Polster’s statements about his unwillingness to pursue a litigation track because it led to lengthy wait times for parties’ relief).

324. Transcript of Proc., *supra* note 5, at 4.

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

326. *Id.* at 1291.

327. Transcript of Status Conf. Proc. at 25, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Aug. 7, 2018), ECF No. 854.

328. Oliva, *supra* note 91, at 698.

329. Sara Randazzo, *More Money Demanded in Opioid Settlement Talks*, WALL ST. J. (Oct. 18, 2019, 10:18 PM), <https://www.wsj.com/articles/more-money-demanded-in-opioid-settlement-talks-11571441254?mod=rsswn> [<https://perma.cc/BZ5B-BX9C>].

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

331. Memorandum Op. Certifying Negot. Class, *supra* note 88, at 15–16.

332. *Id.* at 32.

333. *Id.* at 4.

establish transparency,<sup>334</sup> substantive provisions regulating defendants' future marketing, or accountability for defendants' misconduct, among other public-health goals.<sup>335</sup> Constructing the negotiation class is like fixing all the potholes in Road A (settlement), repaving it with asphalt, adding freshly painted lines, and then asserting people can still take Road B if they wish. Who would ever intentionally take Road B?<sup>336</sup> Given that Judge Polster sees settlement as the path to public health, it makes sense that settlement is his goal. Yet one must ask if he has privileged monetary settlement too much.

Furthermore, most settlement provisions would cost defendants money. Marketing restrictions, the release of documents, compliance programs, and other public-health provisions are not free. Once the monetary amount is already set, cities and counties may have to relinquish part of the settlement amount to obtain these provisions. Not building them into the negotiation class mechanism increases the likelihood that these goals will not be secured. Admittedly, settlement discussions encompass private, local, state, and tribal lawsuits, and to aggregate multiple types of relief may be asking too much of a novel procedural mechanism. But one must ask whether it is wise to pursue aggregate settlement without a plan for important public-health provisions.<sup>337</sup>

The measures Judge Polster has taken to facilitate trials are comparatively weak. Although he says he has pursued both settlement and litigation "vigorously,"<sup>338</sup> his under-prioritization of litigation left a weakness that defendants arguably exploited. Five months into the MDL, Judge Polster established a litigation track comprising three bellwether cases brought by Ohio municipal plaintiffs.<sup>339</sup> After bankruptcy stays, the remaining bellwethers were pared down and settled for a total of \$325 million accruing to two Ohio counties.<sup>340</sup> While the funds will surely be of use to the two counties in mitigating the crisis, the settlement of the bellwethers does not

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334. See Terry, *supra* note 56, at 659 ("The pressure to settle also comes at the cost of transparency.").

335. For a discussion of public-health goals, see Aaron, *supra* note 1.

336. Advantages of "Road B" are described *infra* in Section IV.B.

337. See *infra* Section IV.B (asserting that unmaximized rapid settlements can be detrimental to public-health outcomes).

338. Op. & Ord. at 3, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Sept. 26, 2019), ECF No. 2676.

339. Case Mgmt. Ord. One, *supra* note 78, at 6.

340. See Sara Randazzo, *Opioid-Addiction Litigation Heads to Complex Trial*, WALL ST. J. (Oct. 20, 2019, 6:16 PM), <https://www.wsj.com/articles/opioid-addiction-litigation-heads-for-complex-trial-11571609814?mod=rsswn> [<https://perma.cc/K4ZB-2NXC>] (explaining that while some companies reached settlement agreements with Cuyahoga and Summit Counties, others such as Purdue Pharma filed for bankruptcy before the trial was scheduled); see also Heisig, *supra* note 79 ("To date, nine companies have reached settlements with both counties worth more than \$325 million.").

offer much to other plaintiffs, other than the knowledge that their claims, if similar, may be viable. Each defendant, by offering a relatively small pot of money, managed to avoid a large verdict and forestall the litigation. For example, Johnson & Johnson paid \$20.4 million to settle with the Ohio counties,<sup>341</sup> but its 2018 revenue was \$81.6 billion (and its profits were \$15.3 billion).<sup>342</sup> From a financial standpoint, it appears desirable for defendants to settle the bellwethers and delay the bulk of the MDL claims in order to pressure plaintiffs and their attorneys—who desire money to alleviate the opioid crisis and to compensate contingent-fee attorneys<sup>343</sup>—to settle for less.

The next round of bellwethers has been scheduled: these include claims by the same two Ohio counties against pharmacies,<sup>344</sup> as well as claims by the City of San Francisco and by the Cherokee Nation in Oklahoma.<sup>345</sup> This small number of cases can likely be settled to relieve litigation pressure on defendants. And given this, it is unclear why Judge Polster believes that a public-health-supporting settlement would be in reach without more litigation pressure.<sup>346</sup> The fall of the negotiation class has removed the bargaining chip of global peace from municipal suits. If many more cases were remanded, there would be a higher likelihood of defendants feeling pressure to settle, and of some cases going to trial.

One caveat is that Judge Polster cannot *himself* transfer or remand cases for trial.<sup>347</sup> Remand is statutorily assigned to the MDL Panel.<sup>348</sup> Therefore, it

341. Heisig, *supra* note 79.

342. JOHNSON & JOHNSON, ANNUAL REPORT 41 (2018), <http://www.investor.jnj.com/annual-meeting-materials/2018-annual-report> [<https://perma.cc/B9Z3-QTAZ>].

343. See Ausness, *supra* note 193, at 608 (“[T]he plaintiffs would start receiving their money much sooner if they settled than if they took each case to trial.”).

344. See Eric Heisig, *Federal Judge over Opioid Lawsuits Sets October 2020 Trial for Cuyahoga, Summit Counties’ Claims Against Pharmacies*, CLEVELAND.COM (Nov. 19, 2019), <https://www.cleveland.com/court-justice/2019/11/federal-judge-in-opioid-lawsuits-sets-october-2020-trial-for-cuyahoga-summit-counties-claims-against-pharmacies.html> [<https://perma.cc/B4TM-E6TW>] (“[Judge Polster] will preside over a trial against CVS, Walgreens, Rite Aid, Discount Drug Mart and HBC, which is part of Giant Eagle.”).

345. See Miller, *supra* note 80 (stating that lawsuits filed by the City of San Francisco and the Cherokee Nation in Oklahoma would be heard in federal court following a recommendation by Judge Polster).

346. See Howard M. Erichson, *Settlement in the Absence of Anticipated Adjudication*, 85 FORDHAM L. REV. 2017, 2023 (2017) (“The threat of legal compulsion to force a defendant to pay damages or alter its conduct—that is, the threat of adjudication—is the only thing that gives plaintiffs meaningful leverage in settlement.”).

347. See MANUAL FOR COMPLEX LITIGATION, FOURTH § 20.132–33 (2004) (“[An MDL] court has no independent authority to order section 1407 remand.”); see also *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998) (“The issue here is whether a district court conducting such [MDL] ‘pretrial proceedings’ may invoke § 1404(a) to assign a transferred case to itself for trial. We hold it has no such authority.” (quoting 28 U.S.C. § 1407(a))).

348. 28 U.S.C. § 1407.

is possible the MDL Panel played a role in nixing additional trials. Nonetheless, Judge Polster has favored expeditious monetary settlement to the detriment of public health.

## 2. MDLs

The strong bent toward settlement transcends Judge Polster; it is ingrained into the MDL system itself. In fact, Judge Polster has expressed his belief that he was chosen by the MDL Panel expressly because “[a]ddressing settlement early and often is my standard operating procedure.”<sup>349</sup> The strong push to settle is one of the not-so-quiet secrets of the MDL world. The MDL Panel is known to prefer judges who settle cases quickly.<sup>350</sup> And it has leverage: MDL cases have been described as the “dessert” of judging, and 80 percent of judges who receive an MDL assignment would like another, as they present interesting legal issues.<sup>351</sup> Even beyond MDLs, judges enjoy clearing their crowded dockets.<sup>352</sup> Federal judges are tracked for their efficiency: the “six-month report” is a judicial report card that tracks how many disputes have lasted longer than three years.<sup>353</sup> In addition, settlements are unlikely to be successfully appealed,<sup>354</sup> therefore sparing judges from an embarrassing reversal. If there remains any doubt, the Manual for Complex Litigation, a document intended to help federal judges resolve mass tort cases,<sup>355</sup> explicitly favors global settlement:

One of the values of multidistrict proceedings is that they bring before a single judge all of the federal cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.<sup>356</sup>

It is instructive that the Manual for Complex Litigation seems to prioritize efficiency, as opposed to other goals such as justice or public health.<sup>357</sup>

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349. Op. & Ord., *supra* note 338, at 3.

350. See BURCH, MASS TORT DEALS, *supra* note 19, at 30 (“As one judge remarked . . . ‘I am doing a good job in my MDL so people will come back to me. Some judges are notoriously slow. This leads to repeat players. You need to assign cases to judges who understand how to move this along.’”).

351. *Id.*

352. See Macey & Miller, *supra* note 19, at 45–46 (explaining that settlement declutters judges’ crowded dockets).

353. BURCH, MASS TORT DEALS, *supra* note 19, at 29.

354. See Macey & Miller, *supra* note 19, at 46 (“A judge faces virtually no prospect of reversal for approving a settlement, whereas a decision rejecting a settlement might well be appealed.”).

355. MANUAL FOR COMPLEX LITIGATION, FOURTH, *Introduction* (2004).

356. *Id.* § 20.132.

357. *Id.* § 20.133.



As a result of these pressures and incentives, MDLs have developed a “settlement culture”: 92 percent of MDL judges in settling cases took steps to further the deal, and only 3 percent of cases are remanded to the courts of origin, even though MDLs exist ostensibly for pretrial proceedings.<sup>358</sup> While it is understandable that the MDL Panel values efficiency, such a strong desire for efficient settlement may prejudice public-health goals.<sup>359</sup> Article III courts may exist to resolve disputes, but the ways they resolve disputes raise concerns about misalignment with public health.

### 3. Plaintiffs’ and Defendants’ Private Attorneys

No doubt, it would be impossible for so many MDL cases to settle were it not consistent with the wishes of plaintiffs’ and defendants’ attorneys. Settling is the best method for plaintiffs’ attorneys to earn rapid returns on their investments in the litigation (given contingent-fee arrangements),<sup>360</sup> and for defendants’ attorneys to obtain global closure for their clients. Plaintiffs’ attorneys are notoriously unsupervised by their clients in MDL cases, and generally they have control over the course of the litigation.<sup>361</sup> These agency costs favor a “sweetheart” settlement, in which plaintiffs’ attorneys trade a low settlement amount for a high fee.<sup>362</sup> Professor Burch described such a sweetheart settlement in the MDL on Propulsid (Cisapride), a gastric motility drug that was used for heartburn in children and was later found to have caused heart arrhythmias and killed at least eighty people:<sup>363</sup>

[I]n litigation over the acid-reflux medicine Propulsid, only 37 of 6,012 plaintiffs (0.6%) recovered anything through the strict settlement program. Their collective recoveries totaled no more than \$6.5 million. Yet, defendant Johnson & Johnson agreed to pay lead lawyers more than \$27 million in common-benefit attorneys’ fees. In return, what was left of the fund (some \$45 million) would go

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358. BURCH, MASS TORT DEALS, *supra* note 19, at 24, 29, 119 (citations omitted).

359. *See id.* at 29 (explaining that the settlement culture of MDL practice promotes efficiency as paramount importance that may outweigh fairness or other goals).

360. Macey & Miller, *supra* note 19, at 17–18, 44; Ausness, *supra* note 193, at 608.

361. *See* Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigation*, 79 FORDHAM L. REV. 1985, 1986 (2011) (“Lead attorneys enjoy plenary and, in many respects, exclusive control of the litigation.”); *see also* S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 394–95 (2013) (“[T]he quasi-class multidistrict tort model also strips plaintiffs of the means of protecting their own interests from overreaching repeat players.”); *cf.* Macey & Miller, *supra* note 19, at 3 (arguing the same for class actions).

362. *See* Coffee, *supra* note 19, at 633 (“At its simplest, the classic form of opportunism in class actions is the ‘sweetheart’ settlement, namely one in which the plaintiff’s attorney trades a high fee award for a low recovery.”).

363. *See* Harris & Koli, *supra* note 229 (explaining that by the time the drug was pulled from the market, there were eighty deaths reported to the federal government, and that children were most at risk for cardiac problems and death caused by taking Propulsid).

back to Johnson & Johnson. So, it appears that plaintiffs' lawyers profited, Johnson & Johnson paid the equivalent of a regulatory fine, and most plaintiffs were left to puzzle over why they were left empty-handed.<sup>364</sup>

Although one might hope judges select lead plaintiffs' attorneys who do not design settlements that harm their own clients, judges, in fact, may prefer lawyers who rapidly resolve claims, at least from an incentive standpoint. Indeed, the same lawyers tend to be appointed again and again to direct the plaintiffs' case in MDLs,<sup>365</sup> leading to an ongoing cycle of plaintiff harm, which Professor S. Todd Brown has dubbed "plaintiff control and domination,"<sup>366</sup> and Professor Burch has named MDL "monopolies."<sup>367</sup>

It is an odd situation when adversarial litigation invokes cooperation between plaintiffs' and defendants' counsel, but it appears that MDLs provide precisely the type of incentive for such teamwork to occur.<sup>368</sup> The concern here is that the status quo favors fast, unmaximized settlements that cater to the interests of the attorneys. Such settlements are likely to neglect plaintiffs' interests and those of public health.

Not all MDLs end in collusive or weak settlements. However, in the opioid context, expeditious monetary settlement has been the goal since the opioid MDL's inception, even evidenced by admission of the judge. This is not to say these arguments apply to all lawyers participating in the litigation, but many of the troubling incentives are present.

#### 4. Government Attorneys

Government attorneys have arguably been the strongest proponents of a pro-public-health outcome so far in the litigation<sup>369</sup> (other than amici), but

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364. BURCH, MASS TORT DEALS, *supra* note 19, at 2.

365. *See id.* at 77 (finding in MDL dataset that 63 percent of plaintiffs' lead attorneys and 82 percent of defense firms are repeat players).

366. Brown, *supra* note 361, at 391.

367. Burch, *MDL Monopolies*, *supra* note 19, at 67.

368. BURCH, MASS TORT DEALS, *supra* note 19, at 63 ("The status quo consistently benefits the same insiders: lead plaintiffs' lawyers broker deals that increase their own common-benefit fees and corporations end lawsuits."); *but see* Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 88 (2019) ("[A]lthough aggregation in the hands of repeat-player lawyers inevitably carries risks, it also presents one-shotter plaintiffs with important opportunities to level the playing field with repeat-player defendants.").

369. *See* Catherine Thorbecke, *State Attorneys General Call Purdue Pharma Settlement a "Slap in the Face" for Victims of Opioid Crisis*, ABC NEWS (Sept. 11, 2019, 4:23 PM), <https://abcnews.go.com/Business/state-attorneys-general-call-purdue-pharma-settlement-slap/story?id=65546325> [<https://perma.cc/W6JV-J2H5>] (describing critiques from attorneys general on low monetary settlement with Purdue Pharma); *see also* The States' Coordinated Opposition to the Debtors' Motion for Preliminary Injunction of States' Law Enforcement Actions

not all of them have been, and the incentives at play deserve analysis. First, to the extent that governments are outsourcing their litigation to private attorneys,<sup>370</sup> some of the same agency problems arise as for private attorneys. In addition, attorneys general have grown more political in recent years.<sup>371</sup>

These dynamics played out in dramatic fashion in opioid settlement discussions. In September 2019, Purdue offered to settle all its claims for about \$10 billion, including just \$4.4 billion in cash.<sup>372</sup> This amount of cash is less than half what the Sackler family withdrew from Purdue and stashed in trusts and offshore accounts over the last decade.<sup>373</sup> While attorneys

Against the Sacklers at 9, *Purdue Pharma, L.P. v. Massachusetts*, No. 19-23649 (Bankr. S.D.N.Y. Oct. 4, 2019), ECF No. 41 (writing on behalf of a coalition of states).

The offer that Purdue describes does not include any admission of wrongdoing; it does not require public disclosure of all the evidence; and does not enjoin the Sacklers from future misconduct. . . . *If the States accepted the offer, there would never be a trial to determine the Sacklers' liability for one of the greatest public health crises of our time.* The 25 Attorneys General signing and joining this brief determined that the right way to meet their responsibilities at the present time was to reject the offer and continue their actions to enforce the law.

*Id.* (emphasis added).

370. See Karen Kidd, *Attorney: Private Lawyers Hired by Local Governments Are the "Single Greatest Threat to Attorneys General"*, LEGAL NEWSLINE (Dec. 11, 2019), <https://legalnewsline.com/stories/520833705-attorney-private-lawyers-hired-by-local-governments-are-the-single-greatest-threat-to-attorneys-general> [<https://perma.cc/A4NM-5JZL>] (noting that governments are hiring private lawyers to handle opioid and other litigation); see also Jan Hoffman, *Opioid Settlement Offer Provokes Clash Between States and Cities*, N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/health/opioids-settlement.html> [<https://perma.cc/HU4Y-XVBC>] (pointing out that some private counsel hired by state simultaneously represent cities and counties, creating appearance of conflicts of interest); Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. TIMES (Dec. 18, 2014), <https://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue-.html> [<https://perma.cc/TT58-8WF6>] (describing how private attorneys get hired by state attorneys general and work on contingency fees to support regulatory enforcement).

371. See Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2103–04 (2015) (“[A]lmost all state attorneys general are elected politicians, and many seek higher office. Because they generally are not long-term players before the courts, they are less likely to genuflect before them. They would rather curry favor with those who might back their aspirations for higher elected office.” (citation omitted)); see also Lemos & Young, *supra* note 163, at 45–46 (providing examples of partisan public lawsuits by state governments); Paul Nolette, *State Attorneys General Have Taken Off as a Partisan Force in National Politics*, WASH. POST (Oct. 23, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/23/state-attorneys-general-have-taken-off-as-a-partisan-force-in-national-politics> [<https://perma.cc/UF36-KWLJ>] (“Today, almost every time there’s a major federal policy change, partisan groups of AGs will bring a challenge—and often an opposing group of AGs will intervene to defend the administration.”).

372. Julia Lurie, *The Purdue Settlement Is a Great Deal—for the Sacklers*, MOTHER JONES (Sept. 23, 2019), <https://www.motherjones.com/politics/2019/09/the-purdue-settlement-is-a-great-deal-for-the-sacklers> [<https://perma.cc/ENF3-8WBM>].

373. Jan Hoffman & Danny Hakim, *Purdue Pharma Payments to Sackler Family Soared Amid Opioid Crisis*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2019/12/16/health/sacklers-purdue-payments-opioids-.html> [<https://perma.cc/2QXY-T7NZ>].

general were split over the deal, there was substantial overlap between attorneys general represented by private counsel and those supporting the deal,<sup>374</sup> suggesting a sweetheart settlement.<sup>375</sup>

The Purdue proposal was notable, too, for attorneys general being split nearly down party lines, with Democratic attorneys general tending to refuse the deal and Republican ones tending to accept it.<sup>376</sup> The question arises why they largely voted with their party, rather than on the merits of the agreement. Perhaps obviously, they are attempting to curry political favor for reelection. Opioid companies have spent large sums of money lobbying federal and state government. According to one analysis, pharmaceutical companies and associated groups spent \$880 million over ten years on opioid-related lobbying, compared to \$4 million spent by those advocating to limit opioids.<sup>377</sup> Lobbying of attorneys general groups has ramped up during the opioid litigation.<sup>378</sup> The politicization of attorneys general implicitly disfavors public health by reducing the importance of a strong and just settlement, tilting some actors toward the interests of opioid companies. Unfortunately, elections will not cure this agency problem, as attorneys general may depend on contributions to be reelected. And voters generally lack the expertise to appreciate the public-health value of a settlement.<sup>379</sup>

Not all government attorneys fall prey to such incentives, and many government attorneys have looked beyond quick, low settlement offers.<sup>380</sup> However, other government attorneys suffer from agency problems that threaten to weaken the public-health impact of the opioid litigation.

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374. Lurie, *supra* note 372.

375. A fair deal would have had more support among attorneys general without private representation.

376. Lurie, *supra* note 372; Laura Strickler, *At Least 20 States and D.C. Reject Settlement with OxyContin Maker Purdue Pharma*, NBC NEWS (Sept. 12, 2019, 11:22 AM), <https://www.nbcnews.com/news/us-news/least-16-states-reject-settlement-oxycontin-maker-purdue-pharma-n1052601> [<https://perma.cc/P7JW-8GKJ>].

377. *Pharma Lobbying Held Deep Influence over Opioid Policies*, CTR. FOR PUB. INTEGRITY (Sept. 18, 2016), <https://publicintegrity.org/politics/state-politics/pharma-lobbying-held-deep-influence-over-opioid-policies> [<https://perma.cc/6SXC-MFZX>].

378. See Lurie, *supra* note 372 (“The AP recently noted Purdue’s historic support of Republican Attorneys General Association: \$680,000 to the group between 2014 and 2018, compared to \$210,000 to the group’s democratic counterpart.”).

379. See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 521 (2012) (“Absent a fairly detailed and nuanced understanding of the law and facts of each case, it may be impossible to determine whether each settlement publicized by the attorney general signifies a meaningful victory for the represented citizens.” (citing Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1266–86 (1995))).

380. See Thorbecke, *supra* note 369 (showing several state attorneys general critiquing quick, low settlement offers).

### 5. Special Masters

Judge Polster has commissioned three special masters, who were initially suggested by attorneys for plaintiffs and defendants.<sup>381</sup> Special masters serve federal judges in resolving complex civil litigation, particularly with pretrial issues and settlement negotiations.<sup>382</sup> The opioid special masters have numerous powers, including communicating with parties *ex parte*, mediation, providing legal analysis of a party's submission, setting conference agendas, interpreting parties' agreements, supervising the implementation of and compliance with court orders, finding facts, and issuing orders and rulings.<sup>383</sup> It may seem important to appoint special masters who will utilize these powers to pursue goals associated with the litigation, including public health. However, because they are chosen by counsel and the judge, there is an immediate suspicion they replicate the same agency problems with public health. That is, these special masters were likely hired for their knowledge about dispute resolution, not their alignment with public health.

The first special master is David R. Cohen, a professional special master and mediator who has served in at least seven prior MDLs.<sup>384</sup> On the front page of his website, he lists "Life Hacks for Judges," defining life hack as a "strategy or technique that makes some aspect of one's life easier or more efficient."<sup>385</sup> The first life hack describes a 300 percent increase in the use of special masters by federal judges:

More and more judges are recognizing the valuable service and attention Special Masters provide to the Court and the parties, leading to more *efficient*, cost effective and *faster case resolution*. . . . Because of heavy caseloads and judicial vacancies, many Federal judges simply *do not have sufficient time for full oversight* of complex cases. . . . Simply, judges increasingly recognize they need good help. And, with *expanding dockets*, this need is expected to increase.<sup>386</sup>

David Cohen is clearly appealing to the judicial desire for efficiency, which is baked into the MDL process. Rapid resolution is the goal.

381. Appointment Ord., *supra* note 181, at 1.

382. See MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 347, at § 11.52 (outlining the authority of special masters and their functions).

383. See Appointment Ord., *supra* note 181, at 2–5 (describing special masters' duties, how they may communicate with the parties and the court, and how their rulings are reviewed).

384. *David R. Cohen Resume*, DAVID R. COHEN, <https://www.specialmaster.law/resume> [<https://perma.cc/DV5E-46BL>] (last visited Aug. 19, 2021).

385. *David R. Cohen: Federal Special Master*, DAVID R. COHEN, <https://www.specialmaster.law> [<https://perma.cc/5KUA-6K22>] (last visited Sept. 26, 2021).

386. *300% Increase in Use of Special Masters by Federal Judges*, DAVID R. COHEN (emphasis added), <https://www.specialmaster.law/2016/12/13/300-increase-in-use-of-special-masters-by-federal-judges> [<https://perma.cc/K2BJ-D35U>] (last visited Aug. 19, 2021).

The second special master was Professor Francis McGovern,<sup>387</sup> one of the two inventors of the negotiation class, a settlement device. The third special master is Cathy Yanni, an employee of JAMS,<sup>388</sup> the largest private company for alternative dispute resolution.<sup>389</sup> The second sentence in her online bio is “Since joining JAMS in 1998, she has settled thousands of cases.”<sup>390</sup> Professor Elizabeth Burch described Cathy Yanni as one of a cadre of insiders favored by MDL repeat players.<sup>391</sup>

All three special masters were appointed with consent of the judge and plaintiffs’ and defendants’ counsel, and so it is not surprising they possess a similar pro-settlement bent.<sup>392</sup> Special masters are compensated handsomely for their settlement abilities: in the words of Professors Elizabeth Burch and Margaret Williams, the “entire industry . . . thrives upon mass-tort settlements.”<sup>393</sup> In and of itself, the goal of rapid dispute resolution is not problematic. The problem exists because rapid resolution through settlement may be misaligned with public health. Without ensuring that other goals are considered, there is a risk that public health—what should perhaps be the most important goal of the opioid litigation—falls by the wayside.

### B. Why Rapid Settlement Disserves Public Health

Rapid settlement generally disserves public health because it makes important public-health goals harder to achieve—in the opioid litigation and beyond.

#### 1. The Opioid Litigation

From a process perspective, if one finds persuasive the agency problems between the opioid litigation’s players and public health, then it is difficult

387. Sadly, he passed away in February 2020. *Duke Law Mourns Francis McGovern, Preeminent Expert in ADR, Resolving Mass Tort Claims*, DUKE LAW (Feb. 19, 2020), <https://law.duke.edu/news/duke-law-mourns-francis-mcgovern-preeminent-expert-adr-resolving-mass-tort-claims/> [<https://perma.cc/Z7JA-UPGR>].

388. *Cathy Yanni*, JAMS, <https://www.jamsadr.com/yanni> [<https://perma.cc/A7QR-65XR>] (last visited Aug. 19, 2021).

389. *About Us*, JAMS, <https://www.jamsadr.com/about> [<https://perma.cc/C623-AEJ7>] (last visited Aug. 19, 2021).

390. JAMS, *supra* note 388.

391. See BURCH, *MASS TORT DEALS*, *supra* note 19, at 145–46 (explaining that Cathy Yanni has long been accepted by the elite group of repeat players involved in mass tort settlement and complex multidistrict litigation).

392. See Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA ST. U. L. REV. 927, 939 (2002) (“[E]vidence shows that a relatively few individuals gain the vast majority of the business of court-referred mediation and contractual arbitration. These must be people acceptable to the parties who are repeat players . . .”).

393. Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129, 2224 (2020).

to understand why a private settlement agreement, largely orchestrated by plaintiffs' and defendants' attorneys, would maximize public health. These attorneys have incentives to create a deal beneficial to themselves. Who is to guard the public health given the agency problems? Unlike a class action, in which Rule 23(e) requires judges to ensure settlements are fair, reasonable, and adequate, MDL settlements are private agreements, and plaintiffs may withdraw their actions without court order under Rule 41(a).<sup>394</sup> A private deal is orchestrated largely outside the court's influence, with few checks and balances or opportunities for public participation.<sup>395</sup> Judge Polster retains some informal oversight over the negotiation process, but probably could not disapprove a settlement,<sup>396</sup> and even if he could,<sup>397</sup> he and the larger MDL apparatus mainly seek efficient resolution. This is not how a public-health-affecting settlement should operate. The settlement process should be transparent, participatory, and checked by public-health mechanisms.

More substantively, the litigation could pursue an imaginative array of public-health goals beyond mere efficiency. The companion article to this one offers a deeper dive into public-health goals,<sup>398</sup> but I will highlight them here. First and foremost, accountability of defendants should be prioritized. Accountability is the application of sanctions when a standard of conduct is breached.<sup>399</sup> Accountability ensures that tort standards of conduct carry weight in product markets.<sup>400</sup> A failure to achieve accountability weakens the rule of law.<sup>401</sup> And given that pharmaceutical marketing is arguably underregulated *ex ante*,<sup>402</sup> *ex-post* litigation becomes the principal way of

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394. BURCH, MASS TORT DEALS, *supra* note 19, at 105.

395. There is no adversarial hearing on the benefits and harms of a proposed MDL settlement. *Id.* at 117.

396. Judge Polster would have had such authority over the Rule 23(b)(3) negotiation class, at least with respect to participating municipalities. However, the negotiation class is now invalid. *See In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 667 (6th Cir. 2020) (holding that certification of negotiation class was impermissible).

397. In about half of MDLs, judges do "approve settlements," but usually their involvement pushes parties to settle, and the parties determine the terms. *See* BURCH, MASS TORT DEALS, *supra* note 19, at 104–05 (describing MDL settlement process).

398. *See generally* Aaron, *supra* note 1.

399. *See* James E. Swiss, *Holding Agencies Accountable for Efficiency: Learning from Past Failures*, 15 ADMIN. & SOC'Y 75, 78 (1983) ("[Accountability] necessarily ha[s] three components: (1) the setting of an initial standard; (2) the monitoring of governmental actors or activities against that standard; and (3) the application of sanctions if the actors fall short of achieving the standards.").

400. Aaron, *supra* note 1.

401. *Id.*

402. *See* Lisa M. Schwartz & Steven Woloshin, *Medical Marketing in the United States, 1997–2016*, 321 JAMA 80, 89 (2019) (detailing insufficient FDA regulatory oversight); *see also* Joshua Weiss, Note, *Medical Marketing in the United States: A Prescription for Reform*, 79 GEO. WASH. L. REV. 260, 263–65 (2010) (describing the impact aggressive marketing techniques have on doctors' prescribing habits).

ensuring pharmaceutical companies comply. Achieving accountability requires changing the incentives; substantial tort liability *now* discourages *future* risky conduct.<sup>403</sup> To prevent addiction epidemics from continuing to repeat themselves,<sup>404</sup> the misbehavior of corporate actors requires accountability.

Second, rather than rush settlement, plaintiffs could build bargaining power through trials and thereby seek more money for addiction treatment and services (which also promotes accountability). Third, transparency is fundamental. As Professor Jennifer Oliva wrote in her amicus brief, ensuring public access to opioid documents is “an indispensable element of any comprehensive strategy to ameliorate the country’s ongoing drug use and overdose crisis and to prevent similar crises from occurring in the future.”<sup>405</sup> Transparency would benefit research, prevention,<sup>406</sup> and potentially accountability of defendants, as released documents could bolster other tort lawsuits and investigations into the misconduct of opioid company directors and officers.<sup>407</sup> Fourth, public-health provisions, obtained through settlement or injunctive relief, could restrict defendants’ future marketing, curtail lobbying expenditures and other corruptive corporate spending,<sup>408</sup> and prevent opioid companies from manipulating health-insurance markets.<sup>409</sup>

403. See Popper, *supra* note 160, at 181–82, 188 (“[D]amage awards modify future behavior indirectly by providing disincentives for future conduct that is unduly risky.” (quoting Robert L. Fischman, *The Divides of Environment Law and the Problem of Harm in the Endangered Species Act*, 83 IND. L.J. 661, 685 (2008))).

404. The U.S. has suffered multiple opioid crises and multiple other addiction crises. Aaron, *supra* note 1.

405. Brief of Amici Curiae in Support of a Settlement Agreement Including Broad Transparency Provisions in the Interest of Future Research at 18, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Sept. 12, 2019), ECF No. 2593-1.

406. *Id.* at 1, 8.

407. *Cf.* Oliva, *supra* note 91, at 687 (noting that transparency can serve accountability functions); Ronald J. Krotoszynski, Jr., *Transparency, Accountability, and Competency: An Essay on the Obama Administration, Google Government, and the Difficulties of Securing Effective Governance*, 65 U. MIAMI L. REV. 449, 478 (2011) (“It is true that transparency facilitates accountability . . .”). In the words of then-President Barack Obama, “A democracy requires accountability, and accountability requires transparency.” Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 26, 2009).

408. See U.S. SENATE HOMELAND SEC. & GOV’T AFFS. COMM., FUELING AN EPIDEMIC: EXPOSING THE FINANCIAL TIES BETWEEN OPIOID MANUFACTURERS AND THIRD PARTY ADVOCACY GROUPS 1 (2018), <https://www.hsgac.senate.gov/imo/media/doc/REPORT-Fueling%20an%20Epidemic-Exposing%20the%20Financial%20Ties%20Between%20Opioid%20Manufacturers%20and%20Third%20Party%20Advocacy%20Groups.pdf> [https://perma.cc/WM8W-LK77] (claiming that close ties between corporate donations and positive opioid messaging enabled the U.S. opioids epidemic).

409. See SENATE U.S. HOMELAND SEC. & GOV’T AFFS. COMM., FUELING AN EPIDEMIC: INSYS THERAPEUTICS AND THE SYSTEMIC MANIPULATION OF PRIOR AUTHORIZATION 3–4 (2018),



Again, the companion article illuminates these goals to greater depths,<sup>410</sup> but public health offers nothing less than a dazzling array of options beyond modest monetary relief.

These goals are not pipe dreams; they are readily achievable. How? The answer is holding actual trials. Unlike settlement, which is largely voluntary for defendants (especially without a path to adjudication<sup>411</sup>), trials offer a compulsory aspect, in which defendants are forced into court, and the judgment may include more funds than defendants wish to pay or more injunctive relief than they wish to bear. This is not surprising: serving someone with a complaint begins a coercive process of adjudication. However, resolving claims through settlement allows defendants to largely set the terms of litigation relief. Trying, at minimum, a large fraction of cases offers a public forum in which to scrutinize defendants' conduct and judge it based on the law of torts. Trial documents are public by default,<sup>412</sup> and there may be greater access to defendants' funds through coercive judgments, piercing the corporate veil, and punitive damages. Within this nonvoluntary process is the prospect for true accountability.

Settlements do provide one other possible advantage: control over funds. The prospect of disparate trials suggests that not every plaintiff will receive compensation, and government plaintiffs who win monetary judgments may see money enter government coffers without significant public-health investment. A settlement could attempt to stipulate how to distribute money among plaintiffs and how plaintiffs are to spend litigation returns.

However, as the 1990s tobacco settlement showed, controlling the use of settlement funds is no easy task.<sup>413</sup> States have spent a mere 3 percent of tobacco settlement funds on tobacco control.<sup>414</sup> Individual judges and juries, in allocating judgment resources and fashioning specific relief, may do a better job supporting public health. For example, an Oklahoma state court

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<https://www.hsgac.senate.gov/imo/media/doc/REPORT%20-%20Fueling%20an%20Epidemic%20-%20Insys%20Therapeutics%20and%20the%20Systemic%20Manipulation%20of%20Prior%20Authorization.pdf> [<https://perma.cc/Z5NB-L6TT>] (detailing how the Insys Reimbursement Center misled and abused their power by incentivizing insurers and PBMs to increase authorization rates).

410. Aaron, *supra* note 1.

411. See Erichson, *supra* note 325, at 1288–89 (“Disputants do not need *adjudication* to resolve their disputes, but they need a *path to adjudication* if they are to achieve settlements that reflect the merits of their claims and defenses.”).

412. See Oliva, *supra* note 91, at 670 (describing protective orders and the publication of trial documents); see also FED. R. CIV. P. 26(c) (providing the procedural rules for obtaining protective orders).

413. See Berman, *supra* note 98, at 1058 (discussing the use of MSA funds as a “tragedy” for failing to build a sustainable tobacco control infrastructure).

414. *Id.* at 1038 n.39 (citing Walter J. Jones & Gerard Silvestri, *The Master Settlement Agreement and Its Impact on Tobacco Use 10 Years Later*, 137 CHEST 692, 695 (2010)).

judgment against Johnson & Johnson contained a comprehensive plan for how the hundreds of millions of dollars were to be used, including various treatment and prevention services.<sup>415</sup> The court relied on the state commissioner for the Department of Mental Health and Substance Abuse Services for the plan's details.<sup>416</sup> In addition, judges may enjoin an existing public nuisance, as has occurred with environmental pollution.<sup>417</sup> With help, a group of trial judges may be better able to support public health than a one-shot settlement with little public-health oversight. Further, the prospect of obtaining more funds through coercive process (as opposed to settlement) is worth the investment.

In brief, rapid settlement offers an unmaximized amount of money on defendants' terms while giving short shrift to public-health goals. If we believe that public health is an essential goal of litigation surrounding mass death, then we should be troubled by agency problems that push toward an unmaximized settlement.

## 2. Beyond the Opioid Litigation

Rapid settlement sends the message that, faced with one of the largest public-health crises in American history, we will take a narrow view of public health. The quick settlement approach selects a group of people in a moment in time to receive relief—those who are currently suffering from opioid addiction. This approach leaves behind many people who would otherwise stand to benefit from the public-health impact of the litigation, such as the unconceived baby who will be born into a historic and intractable overdose crisis. Protecting the next generation is simply not the purpose of rapid settlement. Although a focus on those with the most pressing needs may feel righteous and proper, it ultimately reflects a narrow view of public health. This paper has repeated the refrain that public health is broad across people and time. It might be said, therefore, that attempts to obtain rapid funding for a limited group of people are simply not oriented toward public health.

Litigants' implicit determination of the scope of public health carries powerful expressive weight. No matter the outcome, litigants are likely to tout it as a public-health victory. The populace may even buy this narrative. Such an outcome would further the narrow conception that health is obtained

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415. See *State ex rel. Hunter v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486, at \*44–62 (Okla. Dist. Aug. 26, 2019) (ordering court-imposed Abatement Plan for allocating judgment funds toward achieving public-health objectives).

416. *Id.* at \*44.

417. See Anthony Z. Roisman & Alexander Wolff, *Trespass by Pollution: Remedy by Mandatory Injunction*, 21 *FORDHAM ENV'T L. REV.* 157, 164–66 (2010) (explaining how public nuisance and trespass law can be used to address pollution).

through post-hoc medical treatment of disease, and public health is merely the funding of medicine. Essentially, it would relegate public health to being the glossy wrapping paper of medicine.

Public health, by nature, is capacious. It looks to address root causes and prevent big social harms. Put another way, public health is far more than healthcare, despite the fact they are often conflated. As two public-health experts have argued, “The conflation of health and healthcare has resulted in a one-sided, indefatigable investment in healthcare. Yet this focus on curative medicine is not improving our health. We should be focusing on health, on keeping us healthy to begin with.”<sup>418</sup>

A rapid settlement would help some people, no doubt, but too few scholars and litigants have considered the bad that comes with the good. Rapid settlement continues American overinvestment in healthcare to the exclusion of preventive public-health mechanisms. It underutilizes the accountability mechanisms within tort law that are capable of holding corporate defendants to standards of conduct. It reinforces the idea that we can raise money for people who are suffering without thinking about why they are sick to begin with. Ultimately, rapid settlement recapitulates the status quo, but with slight improvement. It is a failure of vision, it is shallow, and its expressive force could sway other courts to accept similarly narrow public-health outcomes.

#### V. REFORMING PUBLIC-HEALTH LITIGATION

While much could be said about reforming public-health litigation, this Section will attempt to draw lessons from the opioid litigation. Most pressingly, modern MDLs have brought previously coercive and public litigation into the domain of private agreements with little judicial or public oversight.<sup>419</sup> Further, MDLs are mandatory—plaintiffs cannot opt out.<sup>420</sup> The result is essentially that, with the exception of a few lucky bellwethers, claims are held hostage until a confidential settlement can be reached, without regard for public health.<sup>421</sup> The simplest way to reclaim public-health goals would be remanding a large fraction of cases. It is true these cases would require federal judges’ time and resources—but MDLs can

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418. Michael Stein & Sandro Galea, *A Party Trick*, PUB. HEALTH POST (Apr. 4, 2019), <https://www.publichealthpost.org/the-publics-health/a-party-trick> [<https://perma.cc/REQ7-8XF3>].

419. See BURCH, MASS TORT DEALS, *supra* note 19, at 167 (“When parties co-opt a public system for their private bargaining needs, the whole structure shifts. . . . Getting rid of time-consuming jury trials for all but a few bellwether cases means greater efficiency. But the costs are steep too: fewer opportunities for public judgments, less transparency, fewer procedural safeguards, and, quite possibly, less fairness.”).

420. Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111 (2015).

421. See *supra* Section IV.B. (discussing how rapid settlements in opioid litigation disserve public health).

streamline discovery and resolution of pretrial motions. Trials would help produce larger monetary awards, more transparency, a better public venue to discuss the misconduct at issue, specific relief, and, perhaps most importantly, accountability.<sup>422</sup>

Congressional reforms could provide other destinations besides rapid confidential settlement. MDL judges could be mandated to establish large litigation tracks with tens or hundreds of trials. Alternatively, plaintiffs could be guaranteed the opportunity to opt out and pursue trial. Early bellwether settlement could be disincentivized by retaining a portion of the settlement funds for the group. Congress could mandate that MDL documents, including settlements, be made public, with a high bar to obtain a protective order. Congress also could provide mechanisms to avoid sweetheart settlements, such as having attorneys' fees capped or paid by the state. Some of these reforms are discussed in the companion piece,<sup>423</sup> but suffice it to say that Congress has broad authority to structure MDLs, and there is no shortage of reforms that could better protect public health.<sup>424</sup>

To give public health a direct voice in the proceedings, MDLs could be reformed to add public-health checks where public health is at issue. To this end, public-health special masters could specifically represent public health in mass tort litigation.<sup>425</sup> Rule 53 allows appointment of a special master for pretrial matters that cannot be effectively addressed by a federal judge, such as a public-health evaluation.<sup>426</sup> A public-health master should ideally not be picked by the judge or the attorneys, who might favor individuals aligned with rapid settlement. Rather, Congress should provide a process for the selection of public-health masters, paid by government, to participate in mass tort litigation. Although nobody can perfectly represent public health, a complex and omnibus concept, these special masters would be a voice specifically hired to support it. Congress could vest these public-health masters with the authority to make public-health assessments of judicial rulings or litigation outcomes. For example, where public health is

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422. See Aaron, *supra* note 1.

423. *Id.*

424. For further discussion of possible MDL reforms for purposes beyond public health, see, for example, Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1 (2021); BURCH, MASS TORT DEALS, *supra* note 19; David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403 (2019); Burch & Williams, *supra* note 393.

425. To the author's knowledge, this has never been tried.

426. See FED. R. CIV. P. 53(a)(1)(C) (defining scope of special masters' authority to address pretrial and posttrial matters); cf. Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 347 (2008) (“[Rule 53] was undoubtedly intended to expand the use of masters in new directions in order to assist courts in coping with ever-increasing caseloads and in addressing difficult issues that require disproportionate judicial attention and expertise not otherwise available to the court.”).

implicated, Congress could require MDL settlements to be consistent with public health as determined by a special master.<sup>427</sup> Public-health special masters would provide a more neutral assessment than an expert witness, who tends to favor the position of the hiring counsel.<sup>428</sup> In the absence of legislation, courts could still appoint public-health special masters to represent public health and bring necessary information to bear on important decisions that implicate public health.

In addition, because many scholars believe MDLs have too many claims to litigate individually,<sup>429</sup> Congress could revitalize class actions, which are increasingly obstructed by ongoing changes in civil procedure.<sup>430</sup> Public-health class actions, which carry the prospect of aggregate trial (unlike MDLs), would generate more settlement pressure on defendants and more leverage for plaintiffs. A resulting settlement would better reflect the strength of plaintiffs' cases and provide more money and accountability. Congress could restore the class action by revising Rule 23. While many reforms should be considered, an example is revising the commonality requirement. Under modern Supreme Court precedent, plaintiffs often lack the commonality with each other to establish a class action.<sup>431</sup> However, modern disease is often a function of nationwide misconduct surrounding opioids, food, alcohol, tobacco, guns, and so forth. In public-health cases, the peculiar harm to plaintiffs is less important than the broader practice that often violates public-health laws and costs lives. Congress ought to design a pathway for class actions predicated on patterns of conduct that harm public health.<sup>432</sup>

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427. This framework is similar to class-action requirements that settlements be fair, reasonable, and adequate. FED. R. CIV. P. 23(e)(2).

428. See, e.g., THOMAS O. MCGARITY & WENDY E. WAGNER, BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH 32 (2008) (explaining how experts are biased toward supporting parties who hire them).

429. See Gluck et al., *supra* note 19, at 359 (explaining the overflow of cases in MDLs and the difficulty to avoid settlement because of these numbers).

430. BURCH, MASS TORT DEALS, *supra* note 19, at 15 (discussing increased procedural hurdles to class-action certification); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 296 (2014) (detailing procedural obstacles created by courts to abide by Rule 23).

431. BURCH, MASS TORT DEALS, *supra* note 19, at 15. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359–60 (2011) (discussing the lack-of-commonality rule for class actions); Miller, *supra* note 430, at 321–22 (noting differences between plaintiffs that have led to failure of class certification for lack of “cohesion”).

432. One possibility is using the issue class. See Myriam Gilles & Gary Friedman, *Rediscovering the Issue Class in Mass Tort MDLs*, 53 GA. L. REV. 1305, 1309 (2019) (arguing the utility of issues classes in mass torts). However, congressional intervention might facilitate class actions without the need for a change of heart in federal courts, and changes could be targeted to protecting public health.

## CONCLUSION

The opioid crisis has led to a tremendous loss of life and generated family traumas that will take decades to heal. As victims and governments have turned to litigation, they have infused their disputes with the language and significance of public health. The better one understands the opioid crisis, the litigation, its players, and the historical and modern roles of tort law, the clearer it becomes that the litigation is more than private. Article III stands for the idea that courts resolve cases and controversies, but how they do so in mass tort litigation implicates public health. Because of the tight connection between the opioid litigation and public health, there arises the prospect of agency problems.

Agency problems have led the parties in the opioid litigation to favor rapid settlement to the exclusion of broader public-health goals. Of course, some will argue that public health *is* represented in that rapid settlement will provide money to alleviate the opioid epidemic. However, a broad conception of public health would support different and larger goals that are broad across people and time.<sup>433</sup> Further, it appears that rapid resolution is being advanced not for public-health reasons, but for efficiency, docket clearance, and the financial incentives of attorneys. Given the constraints, it is tempting to narrow the scope of public health to obtain some public-health relief for the opioid crisis. However, this paper argues the scope of public health must not be narrowed to accommodate serious agency problems.

If we aim to take seriously the root cause of the opioid crisis—largely corporate misconduct—and if we desire to mitigate the underlying incentive structures, we must retain a broad conception of public health across people and time and target root causes and incentive structures. Companies must not be allowed to buy their way out of misconduct with the financial returns of a malfunctioning industry. To produce measurable change for today and for future generations, we must recognize that the opioid litigation affects everyone, and it is high time the participants give due consideration to what would maximize public health.<sup>434</sup>

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433. See Aaron, *supra* note 1 (discussing tort accountability within the opioid crisis).

434. See *id.* (elaborating on how the opioid litigation can maximize public health).