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## PILLS, PUBLIC NUISANCE, AND *PARENS PATRIAE*: QUESTIONING THE PROPRIETY OF THE POSTURE OF THE OPIOID LITIGATION

### INTRODUCTION

The opioid crisis has been in litigation for almost twenty years on various fronts, including criminal prosecutions of pharmaceutical executives, civil lawsuits by individuals against drug manufacturers and physicians, class actions by those affected by opioid abuse, and criminal actions filed by the Drug Enforcement Administration (“DEA”). In the early 2000s, opioid litigation began with individual plaintiffs filing suit against manufacturers and others for damages allegedly related to opioid use. The litigation has since expanded significantly in terms of the type of plaintiffs and defendants, the nature of the claims being asserted, and the damages attributable to the crisis.

The most current and active litigation is that which is pursued by state attorneys general in both federal and state courts to recover monies expended in their respective jurisdictions in response to the opioid epidemic.<sup>1</sup> Additionally, and to a greater extent, individual municipalities, including cities and counties and even tribes like the Cherokee Nation, have filed similar independent actions against drug manufacturers, distributors, and pharmacies.<sup>2</sup> In 2018, more than 400 of the cases filed in courts throughout the United States by individual states, local governments, individuals, and other nongovernmental entities against drug manufacturers, \*406 distributors, and pharmacies were consolidated and transferred for pre-trial coordination to the Northern District of Ohio by the Judicial Panel on Multidistrict Litigation under the multi-district litigation (“MDL”) process set forth in  28 U.S.C. § 1407.<sup>3</sup> Since that time, an additional 1500 parties have been added to this consolidated litigation, and there are approximately 330 opioid-related cases pending in various state courts, including fifty-five lawsuits filed by state attorneys general.<sup>4</sup> In fact, in April 2019, plaintiffs' expert witnesses provided reports that estimated it will cost more than \$480 billion to “fix” the crisis.<sup>5</sup>

One clear conclusion that can be drawn from even a cursory review of the nature of the litigation that has arisen over the last twenty years is that nearly every facet of the community, from individuals and families to government entities and corporations, has been affected by the opioid crisis. Another point that cannot be denied is that the prescription drug industry, including manufacturers, distributors, and pharmacies, played a significantly culpable role in allowing the crisis to develop into its current magnitude. However, what is also clear is that many, many others played supporting roles in this regard, including, but not limited to, individuals, friends; families; governments, both federal and state; licensing boards; and physicians.

So, how can litigation possibly sort through this massive morass of players, and will it really result in any sort of meritorious resolution? Some believe that the “how” is a recipe that combines, in part, *parens patriae* standing and common law public nuisance claims. However, based on a historical review of the mass tort cases that have used both *parens patriae* standing and public nuisance claims, it is unlikely that the opioid litigation will really benefit anyone or anything other than the lawyers who represent parties on both sides of the proverbial “v.” Most concerning is that opioid \*407 courts have been more interested in orchestrating a mass settlement than evaluating the propriety of the posture of the litigation itself.<sup>6</sup> For example, on September 11, 2019, Judge Dan Polster, the judge assigned to handle the massive opioid MDL, certified a “first-of-its-kind”<sup>7</sup> negotiating

class to promote global settlements between local municipalities, including cities and counties, and the numerous defendants in the MDL, which include drug manufacturers, distributors, and sellers.<sup>8</sup>

This is not the first time that litigation has played a role in attempting to resolve a public health crisis. When the doctrine of *parens patriae* and public nuisance claims are invoked by the states and utilized in mass tort litigation, the matters typically resolve quickly, suggesting perhaps that these two doctrines are beneficial to both sides in matters of complex tort liability. For example, the litigation against the tobacco industry in the 1990s has been referred to as “the most salient example of a high-profile litigation effort that after settlement yielded vast sums.”<sup>9</sup> However, post-Big Tobacco, many strongly believe that the tobacco litigation actually did not do much to change the behavior of the general public and the tobacco industry itself.<sup>10</sup> And, perhaps most importantly, there is significant doubt as to whether that litigation actually improved the public health of the country.<sup>11</sup> Regardless, since the litigation against Big Tobacco, the combination of *parens patriae* standing and public nuisance claims has been used more frequently to address other public health concerns including guns, lead paint exposure, and, currently, opioids.<sup>12</sup>

**\*408** Although many comparisons have been made between the Big Tobacco and opioid litigation to both justify and predict the ultimate outcome of the opioid litigation, there are significant differences between the two that should provide some impetus for courts to consider whether the continued use of *parens patriae* standing and public nuisance claims is justified in these types of matters. In fact, as compared to most other mass tort cases that have utilized a combination of *parens patriae* standing and public nuisance claims since Big Tobacco, the fact that the product involved in the opioid litigation is a legitimate and beneficial prescription drug should signal to the courts that the propriety of the procedural posture of the case deserves some consideration. Further, there are complex causation issues in opioid cases that did not exist in the Big Tobacco litigation. Finally, it is important to acknowledge that there continue to be serious concerns post-tobacco litigation that the settlement reached under the Master Settlement Agreement (“MSA”) did not achieve the goals of tort litigation because the settlement monies were rarely, if ever, used to assist those who were most affected by tobacco use; instead, lawyers took a large chunk of the pot, and states often spent the money for other needs.<sup>13</sup>

So far, some of the settlements reached in the opioid cases urgently point toward a need for judicial oversight over the manner in which standing is asserted and claims are pled. For example, in one of the opioid litigation cases that has already resolved, a significant portion of the money “recovered” by the governmental entities has not been allocated to opioid-related expenses.<sup>14</sup> In another case, Oklahoma’s Attorney General reached a \$270 million settlement with one of the opioid manufacturers, in which the monies would be used to fund addiction research and treatment in Oklahoma and to pay legal fees to the private counsel retained by the state.<sup>15</sup> However, because a large portion of the damages claimed **\*409** in the litigation were Medicaid payments made to Oklahoma citizens for healthcare costs allegedly attributable to opioid use, the federal government has now demanded that Oklahoma reimburse it for a portion of the federal contribution toward those Medicaid payments, which amounted to sixty-two percent of the costs of Oklahoma’s \$5 billion Medicaid program in 2019.<sup>16</sup> As the terms of the settlement only provided for the costs of addiction research and legal fees, it is unclear as to how Oklahoma will address that reimbursement demand. Finally, there is some indication that these settlements are actually creating tax incentives for the opioid defendants as a portion of the settlement may be classified as “restitution,” for which a deduction is provided in tax law for “damage or harm which was or may be caused by the violation of any law or the potential violation of any law.”<sup>17</sup>

In light of the differences between the opioid and Big Tobacco litigation and the post hoc view of the resolution of the Big Tobacco and other mass tort litigation, this Article cautions against the use of *parens patriae* standing and public nuisance claims to achieve a mass settlement without first examining whether the use of those tools will truly lead to a resolution that fulfills the goals of tort litigation—namely, to define acceptable conduct in society, to direct compensation to victims of prohibited conduct, and to deter others from acting in a similar fashion.

Part I of this Article provides an overview of the *parens patriae* doctrine and the expansive role it has played in mass tort litigation. Part II discusses public nuisance claims and how they have evolved into an attractive tool for attorneys seeking reimbursement for expenditures made in relation to respective underlying tort claims. Part III examines, more specifically, the Big Tobacco litigation and evaluates resulting consequences. Part IV of this Article introduces the history of the opioid crisis and the litigation that has flowed from it. Finally, Part V compares the use of *parens patriae* and public nuisance claims in the opioid litigation to the **\*410** Big Tobacco litigation and encourages the courts to consider the propriety of the use of those tools in the opioid crisis.

## I. THE HISTORY OF THE *PARENS PATRIAE* DOCTRINE AND ITS ROLE IN MASS TORT LITIGATION

The doctrine of *parens patriae* is one that the American judicial system adopted from England in an effort to provide standing to state governments to sue on behalf of their citizens when the interests of the state were violated. Although it was initially utilized to recover for violations of sovereign interests in the regulation of the state, the doctrine and its jurisprudence have evolved over the last century to include the state's quasi-sovereign interests, like the health, safety, and welfare of its citizenry. However, the courts have struggled to provide a clear definition or criteria in defining quasi-sovereign interests. Regardless, over the last twenty years, states have expanded the use of *parens patriae* standing in mass tort cases, like the litigation against Big Tobacco and now the opioid litigation. However, with little to no judicial guidance on its modern use in mass tort litigation, it is relatively unclear as to whether such use is appropriate.

### A. History and Development of the *Parens Patriae* Doctrine

The literal translation of the phrase “*parens patriae*” means “parent of the country,” and refers to the role of the state as sovereign and guardian of a person under a legal disability.<sup>18</sup> The doctrine can be traced back to the concept of “royal prerogative,” which gave the Crown the right or responsibility to care of persons who were legally unable to care for themselves or their property,<sup>19</sup> including “infants, idiots, and lunatics.”<sup>20</sup> However, the development of the doctrine in American law has had very little to do with government stepping in to represent legally incompetent citizens. Rather, the concept has evolved into providing Article III standing to state governments to sue on behalf of their citizens for violations of the states' sovereign and quasi-sovereign interests.<sup>21</sup>

\*411 American courts have acknowledged that *parens patriae* is “inherent in the supreme power of every State.”<sup>22</sup> To that end, American courts, including the Supreme Court of the United States, have acknowledged a state's authority to sue under *parens patriae* to protect and vindicate both the state's interests and the interests of the citizens of that state.<sup>23</sup> The sovereign interests of a state include enforcement of criminal, civil, and other regulatory provisions.<sup>24</sup> A state's quasi-sovereign interest exists in the promotion and protection of the health, safety, and welfare of its citizens.<sup>25</sup> Courts have held that a state may assert *parens patriae* standing to bring claims for violations of its criminal and civil laws, as well as claims that the health, safety, and welfare of its citizenry have been adversely affected by a particular defendant's actions.<sup>26</sup>

The most modern and leading case in which the doctrine of *parens patriae* was invoked to provide a basis for recovery for damages to both a state's sovereign and quasi-sovereign interests is *Alfred L. Snapp & Son, Inc. v. Puerto Rico*.<sup>27</sup> In this case, the Commonwealth of Puerto Rico filed a claim for declaratory relief for alleged violations of federal labor laws by individuals and companies in the Virginia apple industry.<sup>28</sup> In short, Puerto Rico alleged that the defendant violated federal law “by failing to provide employment for qualified Puerto Rican migrant farmworkers, by subjecting those Puerto Rican workers that were employed to working conditions more burdensome than those established for temporary foreign workers, and by improperly terminating employment of Puerto Rican workers.”<sup>29</sup> To that end, Puerto Rico alleged that the actions against those farmworkers denied the Commonwealth the “right to effectively participate in the benefits of the Federal Employment Service System” and caused injury to Puerto Rico's efforts to reduce unemployment and “promote opportunities for profitable employment” to its citizens.<sup>30</sup>

\*412 In evaluating whether Puerto Rico had standing to bring such a claim, the Supreme Court discussed all of the interests that may or may not provide a foundation for *parens patriae* standing.<sup>31</sup> The Court began by identifying the sovereign interests upon which *parens patriae* standing may easily be asserted, namely, “the power to create and enforce a legal code, both civil and criminal,” and “the maintenance and recognition of borders.”<sup>32</sup> The Court also made it clear that *parens patriae* actions cannot be used to protect two kinds of nonsovereign interests: proprietary interests, such as ownership of land or other business interests; and private interests of its citizens, which may be pursued by the State but as a nominal party only.<sup>33</sup> Finally, and most importantly to this Article, the Court discussed the role of quasi-sovereign interests as a foundation for *parens patriae* standing.<sup>34</sup> Although the Court recognized that a state also possesses “quasi-sovereign interests,” these interests are less defined

than sovereign interests.<sup>35</sup> In that regard, the *Snapp* Court attempted to develop and clarify the concept of quasi-sovereign interests by giving examples through its own jurisprudence.<sup>36</sup>

As noted by the Court, the ability to base a *parens patriae* action on quasi-sovereign interests was first recognized by the Supreme Court in 1900.<sup>37</sup> In *Louisiana v. Texas*, Louisiana sought to enjoin a quarantine by Texas officials, which limited trade between Texas and the port of New Orleans.<sup>38</sup> The court identified the litigation interest of Louisiana as that of *parens patriae*, as opposed to sovereign or proprietary, and noted that the claim of Louisiana “must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large.”<sup>39</sup>

\*413 From there, the *Snapp* Court cited to a line of cases in which states were able to successfully represent the interests of their citizens through *parens patriae* standing to enjoin public nuisances and remedy injury to its economic well-being.<sup>40</sup> For example, it discussed the harm caused when twenty railroads had allegedly conspired to fix rates that discriminated against Georgia shippers in violation of federal antitrust laws, and the Court stated:

If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy .... Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.<sup>41</sup>

Ultimately, the *Snapp* Court concluded that “the articulation of [quasi-sovereign] interests is a matter for case-by-case development.”<sup>42</sup> However, based on its review of the jurisprudence above, the Court admitted that although “neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract—certain characteristics of such interests are so far evident.”<sup>43</sup> The Court held that those characteristics of a quasi-sovereign interests included a “set of interests that the State has in the well-being of its populace” and “must be sufficiently concrete to create an actual controversy between the State and the defendant.”<sup>44</sup>

The Court then defined the requirements for standing in a *parens patriae* action based on a violation of a state's quasi-sovereign interests.<sup>45</sup> First, the State “must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party.”<sup>46</sup> Further, the State must assert a \*414 “quasi-sovereign interest,” which the Court described as falling into two categories: “a quasi-sovereign interest in the health and well-being”—physical and economic—of the residents of that state, and a quasi-sovereign interest “in not being discriminatorily denied its rightful status within the federal system.”<sup>47</sup>

Because the Court did not “draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior,”<sup>48</sup> post-*Snapp*, courts have accepted a state's “interest in protecting and vindicating the health, safety, and welfare of its people” as a sufficient assertion of a quasi-sovereign interest for purposes of *parens patriae* standing.<sup>49</sup> The courts then evaluate “whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers,” and whether the conduct causing such injury affects, either directly or indirectly, a “sufficiently substantial segment of its population.”<sup>50</sup>

Following *Snapp*, the *parens patriae* doctrine relative to the vindication of health, safety, and welfare of citizens as a quasi-sovereign interest continued to develop. Most cases involved the state's interest in protecting its citizenry from environmental contamination, antitrust, and fraud, in which the states were seeking injunctive relief or some statutory damages.<sup>51</sup> The question of the propriety of monetary damages, as opposed to equitable or statutory relief, began to arise in the context of quasi-sovereign interests.

With respect to monetary damages, no court has affirmatively ruled that *parens patriae* actions may be brought for monetary damages to a quasi-sovereign interest. In fact, in 1973, the Ninth Circuit noted:

*Parens patriae* has received no judicial recognition in this country as a basis for recovery of money damages for injuries suffered by individuals. In a series of cases the Supreme Court has rejected *parens patriae* as a basis for invoking the court's original jurisdiction where individuals were the real parties in interest.<sup>52</sup>

\*415 In fact, all but two of the Supreme Court *parens patriae* cases were actions for solely injunctive relief, and the Court denied recovery in both instances. First, in *Georgia v. Pennsylvania Railroad Co.*, a case involving a conspiracy to fix railroad rates, the Court held that a damages award was inappropriate when allegedly collusive rates had been approved by the Interstate Commerce Commission.<sup>53</sup> In *Hawaii v. Standard Oil Co. of California*, a civil antitrust case, the Court held that Section 4 of the Clayton Act does not authorize damages for an injury to the general economy of the state.<sup>54</sup> Regardless, some have noted, “the plain implication to be drawn from both cases is that, absent some substantive bar, the Court was willing to allow damages to a State suing as *parens patriae*.”<sup>55</sup>

Regardless of the development of the *parens patriae* jurisprudence, it is clear that the Supreme Court, and the courts that followed *Snapp*, did not contemplate the use of this doctrine in the context of mass tort litigation, which makes the need for judicial perspective on the propriety of such use all the more necessary.

### **B. The Evolution of Parens Patriae Standing in Litigation Against Big Tobacco and in Mass Tort Cases Post-Big Tobacco**

The use of *parens patriae* in the Big Tobacco litigation was a marked expansion from the more traditional assertion of a quasi-sovereign interest as described by the *Snapp* Court. As discussed in Part III, after individuals who had tried to sue the tobacco industry for damages arising out of their use of tobacco products had been virtually unsuccessful, the state attorneys general found a way to success by developing a theory of *parens patriae* that they believed squarely fit within a broad, quasi-sovereign interest in the health, safety, and welfare of its people.<sup>56</sup> Although many factors contributed to the overall success in the ability of the attorneys general to reach a settlement with the tobacco companies, including states acting in concert with one another to combine “quality, resources, and risk taking,” the most relevant factor to this Article \*416 was the use and development of the *parens patriae* theory in mass tort actions.<sup>57</sup>

The litigation against the tobacco industry in the 1990s has been considered “[t]he most powerful and sweeping exercise of *parens patriae* power in [United States] history.”<sup>58</sup> However, because the cases ultimately resolved through a MSA, the actual propriety of the use of the doctrine of *parens patriae* was untested by the parties and the courts. In other words, although the tobacco litigation “revived” and modernized the *parens patriae* doctrine, playing the leading role in the ultimate resolution of the cases, the “settlement pretermitted the opportunity for courts to articulate the doctrine's limits.”<sup>59</sup> In fact, Richard Ieyoub, the former Attorney General for the State of Louisiana and principal architect of the *parens patriae* theories espoused in the tobacco litigation, has acknowledged that although he is unsure as to whether “the particulars of Louisiana's *parens patriae* theory would have prevailed in the tobacco litigation[, t]he state's litigation with the industry [was] over.”<sup>60</sup>

It bears noting that only one court in the tobacco litigation specifically indicated its approval of the use of *parens patriae* as a means of aggregating claims.<sup>61</sup> Among the many cases filed by states against the tobacco industry, *Texas v. American Tobacco Co.* discussed a state's authority to maintain a cause of action for harm to the health, safety, and welfare of its people to recover Medicaid expenditures made by the state on behalf of individuals whose health had allegedly been adversely affected by tobacco.<sup>62</sup> The court reaffirmed the finding by the Supreme Court in *Snapp* that a state can maintain a common-law *parens patriae* action to protect quasi-sovereign interests.<sup>63</sup> In examining the claims filed by Texas, \*417 the court found that the state had a sufficient interest to maintain an action in its quasi-sovereign capacity:

First, it is without question that the State is not a nominal party to this suit. The State expends millions of dollars each year in order to provide medical care to its citizens under Medicaid. Furthermore, participating in the Medicaid program and having it operate in an efficient and cost-effective manner improves the health and welfare of the people of Texas. If the allegations of the complaint are found to be true, the economy of the State and the



welfare of its people have suffered at the hands of the Defendants .... It is clear to the Court that the State can maintain this action pursuant to its quasi-sovereign interests found at common law.<sup>64</sup>

In short, the litigation against Big Tobacco by individual states under *parens patriae* standing had little risk, yet the possibility of great reward. First, although each state brought its lawsuit in the name of its respective State, many of the tobacco claims were financed and managed by private law firms under contingent fee agreements.<sup>65</sup> Moreover, in part because of the high costs of extended litigation, the tobacco manufacturers were willing to settle.<sup>66</sup> It comes as no surprise then that states have continued the use of the *parens patriae* doctrine against manufacturers of guns, asbestos, breast implants, lead paint, firearms, and now, opioids.

Following the tobacco litigation, the viability of *parens patriae* in other mass tort cases has been the subject of many scholarly articles. For example, some commentators suggest *parens patriae* provided a means to aggregate private tort claims to “safeguard[] nearly all interests that a state might reasonably seek to protect” that could not otherwise be pursued in a private class action.<sup>67</sup> It bears noting that other scholars and commentators also thought that it was “unlikely” that there would be a “next tobacco,” as many thought the tobacco litigation was a “unique event.”<sup>68</sup> To that end, \*418 the propriety of the use of *parens patriae* standing, including whether the pursuit of monetary expenditures the state was already responsible for regardless of the tort liability of a third party as an exercise to protect a quasi-sovereign interest, was not a concern for anyone. Then along came the opioid litigation.

## II. DEVELOPMENT OF PUBLIC NUISANCE AS A VIABLE CLAIM IN MASS TORT LITIGATION

### A. History and Growth of Public Nuisance as a Tort

Public nuisance has been described as an “ancient tort,” dating back to twelfth-century England, and originated as a “criminal writ to remedy actions or conditions that infringed on royal property or blocked public roads or waterways.”<sup>69</sup> The king was vested with the sole authority to bring a public nuisance claim as an extension of his sovereign powers, and injunction or abatement were the sole remedies.<sup>70</sup> The ability of others to bring such a claim was expanded in England in the sixteenth century to those who sustained “special” injuries as a result of a public nuisance, but the remedy was limited only to injunctive relief.<sup>71</sup>

In the United States, courts initially recognized the common law claim of public nuisance in a consistent fashion with English courts, and its purpose was to remedy conduct that interfered with a public right, usually involving the obstruction of public highways and navigable waterways.<sup>72</sup> In the mid-1800s, public nuisance was expanded to actions involving moral welfare, such as prostitution, gambling, etc.<sup>73</sup> By the 1930s, a need for clarity on what constituted \*419 a public nuisance necessitated the enactment of local statutes and ordinances to help define public nuisance and gave local governments the ability and authority to prohibit certain conduct.<sup>74</sup> This allowed courts to handle “low-level quasi crimes” as torts and to require abatement to minimize or eliminate the threat to public health or safety, as opposed to just imposing a criminal penalty.<sup>75</sup> Because legislative regulation began to supplant public nuisance actions, the tort was not even mentioned in the *First Restatement of Torts* in 1939.<sup>76</sup>

Although William Prosser, the original reporter for the *Second Restatement of Torts*' sections on public nuisance, tried to limit public nuisance to “a criminal interference with a right common to all members of the public” and limited damages recovery only to those individuals who could satisfy the special injury rule, environmentalists saw an opportunity to broaden the rule to allow for suits to stop pollution activities that did not rise to the level of criminal conduct.<sup>77</sup> Consequently, the American Law Institute voted to expand the tort to include “unreasonable interference with a right common to the general public.”<sup>78</sup> Moreover, individuals had standing when suing “as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.”<sup>79</sup> The special injury rule remained in place for individuals seeking damages, as opposed to injunctive relief or abatement.<sup>80</sup>

**\*420** The use of the tort of public nuisance to resolve and manage public policy problems began with the expansion of the tort in section 821(2)(c) of the *Restatement (Second) of Torts*. Up until that time, a claim of public nuisance was generally alleged against a defendant for any “unreasonable interference with a right common to the general public,” including those conditions that endanger public health, safety, and welfare.<sup>81</sup> Because *parens patriae* standing allowed states to protect their quasi-sovereign interests in the health, safety, and welfare of their citizens, the use of the *parens patriae* doctrine to establish liability in public nuisance cases involving environmental contamination seemed like a natural fit. As noted by at least one scholar:

Although public nuisance law traditionally has been a disfavored area of the common law in the United States, over time creative plaintiffs' attorneys have attempted to expand the scope of public nuisance law beyond its traditional boundaries to broaden litigation pursuits. Modern attempts to expand the scope of public nuisance law beyond its traditional realm began in the 1970s when plaintiffs in environmental contamination cases successfully revived public nuisance law, which had been largely dormant, to force industrial landowners to stop polluting and pay for the costs of environmental cleanup. Environmental litigation was seen as an appropriate venue for nuisance law because the litigation is connected to the traditional realm of nuisance law--i.e., real property.<sup>82</sup>

However, even when used in this “traditional realm” of environmental cases, public nuisance law has been criticized as a “notoriously vague and elastic concept in the common law.”<sup>83</sup> In fact, as early as 1906, the issue of nuisance was said to be “a much litigated and vexatious one.”<sup>84</sup> Moreover, William Prosser once characterized the tort of nuisance as a “legal garbage can,” and described it as an “impenetrable jungle” that has “meant all things to all people and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.”<sup>85</sup>

**\*421** Regardless of the criticism, the tort continued to be attractive because of its flexibility and vagueness, and the fact that a plaintiff could plead more generally as opposed to bringing claims with well-defined elements.<sup>86</sup> Moreover, public nuisance claims allowed plaintiffs to “rely on relaxed evidentiary standards on issues that can derail individual plaintiffs lawsuits,” most notably those that relate to “duty, breach, causation, and product identification.”<sup>87</sup> In other words, the undefined nature of the public nuisance claim created opportunities for state plaintiffs to bring claims on a massive scale that could be incredibly daunting to defendants.<sup>88</sup>

## **B. Expansion of Public Nuisance as a Novel Tort**

A review of the jurisprudence involving public nuisance claims over the last forty years demonstrates an evolution that can be described as a “catch all” for “increasingly inventive claims.”<sup>89</sup> First, environmental contamination cases provided a fairly reasonable landscape on which to construct a claim for public nuisance in order to recoup the costs of environmental clean-up and force the offending industry to change their operating practices to reduce pollution. For example, a California court dismissed a class action filed by representative plaintiffs on behalf of more than seven million property owners and residents of Los Angeles County against automobile manufacturers, seeking injunctions and billions in compensation for air pollution.<sup>90</sup> In that case, the appellate court affirmed the trial court's dismissal of the action, stating that the case was an attempt at “judicial regulation of the processes, products and volume of business of the major industries of the county,” which the court believed was “an undertaking ... beyond its effective capability.”<sup>91</sup>

The pendulum then began to swing towards the attempted use of public nuisance claims in cases for products liability as opposed to unreasonable conduct. For example, in the asbestos litigation **\*422** that began in the 1980s, schools and municipalities sought to recover the costs related to asbestos abatement, arguing that asbestos, as a product, constituted a public nuisance.<sup>92</sup> Courts rejected the idea that a product, in and of itself, could constitute a public nuisance.<sup>93</sup> Rather, these courts held that such an idea “would give rise to a cause of action ... regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories of recovery.”<sup>94</sup>

Despite the initial lack of success of public nuisance claims in the product liability realm, lawyers continued to file the tort claim outside of environmental contamination, then expanded to products like tobacco, handguns, and lead paint.<sup>95</sup> In fact, the action against Big Tobacco has been described as an “ironic impetus for the filing of public nuisance claims against product manufacturers”<sup>96</sup> because the only court to actually review the propriety of the use of public nuisance claim in tobacco litigation ultimately dismissed it because the court was “unwilling to accept the state's invitation to expand a claim for public nuisance beyond its ground in real property.”<sup>97</sup> As noted by one writer, “[e]ven though public nuisance theory was not validated in [a] single tobacco case, the plaintiff's victory in achieving a mass settlement in litigation that included this novel theory gave it the hint of legitimacy the trial bar needed.”<sup>98</sup>

Following Big Tobacco, the use of public nuisance as a viable claim in the mass torts and products liability arena was off to the races with cities filing claims against the handgun industry for creating a public nuisance by failing to design both a safer gun and safer marketing and distribution strategies to eliminate the risk that these weapons could be used by criminals.<sup>99</sup> The relief sought by the governmental entities included compensation for the costs \*423 of emergency services, law enforcement services, prosecutions, and other expenses, as well as punitive damages and permanent injunctive relief to abate the alleged public nuisance.<sup>100</sup>

In dismissing the claim of public nuisance, courts noted that interference with a public right is not the same thing as widespread interference with private rights. For example, in a case filed against gun manufacturers and distributors by the City of Chicago, the City argued a public nuisance was established by the defendants knowingly designing, marketing, and selling guns that they knew would be used for illegal purposes by individuals.<sup>101</sup> There, the court questioned whether the public right asserted by plaintiffs was “merely an assertion, on behalf of the entire community, of the individual right not to be assaulted.”<sup>102</sup> The court declined to expand the concept of public rights, holding that it was “reluctant to recognize a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it.”<sup>103</sup> The court went on to explain the danger in conflating public rights with private rights in the context of public nuisance claims:

By posing this question, we do not intend to minimize the very real problem of violent crime and the difficult tasks facing law enforcement and other public officials. Nor do we intend to dismiss the concerns of citizens who live in areas where gun crimes are particularly frequent. Rather, we are reluctant to state that there is a public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm to another.

For example, the purchase and consumption of alcohol by adults is legal, while driving under the influence is a crime. If there is public right to be free from the threat that others may use a lawful product to break the law, that right would include the right to drive upon the highways, free from the risk of injury posed by drunk drivers. This public right to safe passage on the highways would provide the basis for public nuisance claims against brewers and distillers, distributing companies, and proprietors of bars, taverns, liquor stores, and restaurants with liquor licenses, all of whom could be said to contribute to an interference with the public right.

\*424 Similarly, cell phones, DVD players, and other lawful products may be misused by drivers, creating a risk of harm to others. In an increasing number of jurisdictions, state legislatures have acted to ban the use of these otherwise legal products while driving. A public right to be free from the threat that other drivers may defy these laws would permit nuisance liability to be imposed on an endless list of manufacturers, distributors, and retailers of manufactured products that are intended to be, or are likely to be, used by drivers, distracting them and causing injury to others.<sup>104</sup>

The court then noted that several other courts had considered this expansion of public nuisance claims to also be inappropriate.<sup>105</sup> For example, and most importantly to this Article, one New York appellate court observed:



[G]iving a green light to a common-law public nuisance cause of action today will, in our judgment, likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities.

All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its nondefective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.<sup>106</sup>

Finally, beginning in 1999, states attempted to use public nuisance as a viable theory in cases filed against lead paint manufacturers to reimburse them for the costs expended in treating lead exposure-related illnesses.<sup>107</sup> Although many of these cases also failed at different stages, the reasons that the individual courts rejected the use of public nuisance theories are notable. For example, the Rhode Island Supreme Court explained that allowing the state's public nuisance claim “would change the meaning of public right to encompass all behavior that causes a widespread interference with the private rights of numerous individuals.”<sup>108</sup> The court viewed that it “would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that never was intended.”<sup>109</sup> The court concluded, “[W]e see no reason to depart from the long-standing principle that a public right is a right \*425 of the public to shared resources such as air, water, or public rights of way.”<sup>110</sup>

Regardless of the historical reluctance of courts to expand the concept of a public nuisance claim to include “widespread interference” with private rights of public citizens, plaintiffs continue to heavily rely on this tort theory in mass tort litigation.<sup>111</sup> As will be discussed below, the theory is, once again, front and center in the opioid litigation.

### III. THE LITIGATION AGAINST BIG TOBACCO AND THE ROLE OF *PARENS PATRIAE* AND PUBLIC NUISANCE

In November 1998, a multi-billion dollar settlement was reached in the litigation filed by forty-six state attorneys general, five U.S. territories, and the District of Columbia against the five largest tobacco companies in the United States.<sup>112</sup> The plaintiffs had sought to recover costs to public health systems, namely under Medicaid programs, to treat smoking-related ailments.<sup>113</sup> Until that time, the tobacco companies had not lost any of the several hundred smoking cases filed by individual plaintiffs.<sup>114</sup> Each time, juries found that the smokers were responsible for smoking and causing their own injuries.<sup>115</sup> However, with the advent of the attorneys general litigation, the legal strategy and theory changed, and Big Tobacco was forced to surrender. Because this litigation has become the blueprint for the use of *parens patriae* and public nuisance claims in mass tort actions, an examination of how the litigation developed and the consequences of the settlement deserve attention.

#### \*426 A. *Individuals Versus Big Tobacco*

Litigation against tobacco manufacturers for smoking-related illness and death began in the 1950s when cancer was linked, for the first time, to smoking.<sup>116</sup> Claims included negligent manufacturing, products liability, fraud, and violations of state consumer protection laws.<sup>117</sup> In each of these early cases, the manufacturers were able to successfully defend themselves by arguing that tobacco was not harmful, the individual plaintiff's harm was caused by factors unrelated to smoking and tobacco, and smokers assumed the risk of cancer when they made the decision to smoke.<sup>118</sup> Until the 1980s, the manufacturers prevailed in all of these cases, and cases were either summarily dismissed or a jury rendered verdicts of “no cause of action” or in favor of the defendants.<sup>119</sup>

In 1992, the landmark case of *Cipollone v. Liggett Group, Inc.* became the first-ever successful jury trial by a smoker against the tobacco industry.<sup>120</sup> In this case, the plaintiff claimed that her lung cancer was caused, in part, by the manufacturers' failure to properly inform the public about the risks of smoking, including addiction, and fraud in their failure to act on their knowledge

of the risks of smoking.<sup>121</sup> During the course of the litigation, Cipollone's attorney gained access to and entered into evidence more than 300 pages of internal documents from the cigarette manufacturers that demonstrated that the tobacco companies had research dating back to the 1940s that nicotine was both addictive and potentially carcinogenic.<sup>122</sup> In fact, the documents revealed that tobacco companies knew of the dangers of cigarettes well before the Surgeon General warned the public in 1964 that tobacco companies had conspired to conceal these documents in order to hide the \*427 health hazards of smoking.<sup>123</sup> The *Cipollone* case would be the first of several victories against the tobacco industry and has been viewed by some commentators as a monumental achievement in the anti-tobacco crusade.<sup>124</sup>

In the 1990s, the House Energy and Commerce Committee's Subcommittee on Health and the Environment, led by Democratic California Representative Henry Waxman, investigated the dangers of tobacco.<sup>125</sup> In 1994, in one of the Subcommittee hearings, the chief executive officers of the seven largest tobacco companies testified that they did not believe nicotine was addictive.<sup>126</sup> Shortly thereafter, internal documents from tobacco manufacturer Brown & Williamson Tobacco Corporation surfaced showing that this testimony was false.<sup>127</sup>

In the late 1990s, as a result in large part of the revelation of documents from the *Cipollone* litigation and the House Subcommittee, an individual plaintiff secured the first “big” victory for smokers in a case in California in which a jury ordered the Philip Morris company to pay \$51.5 million to a smoker who had developed inoperable lung cancer.<sup>128</sup> Although claims for smoking-related illnesses caused by post-1966 smoking were still preempted by federal law, individuals whose claims were predicated on pre-1966 smoking began to see some limited success in the courtroom against the tobacco manufacturers.<sup>129</sup> But, at about this same time, a new plaintiff, not constrained by the causation difficulties and other factors that limited plaintiffs in the past in bringing a successful claim against Big Tobacco, began to take shape--state attorneys general.

#### **\*428 B. State Attorneys General Versus Big Tobacco**

In 1994, the Attorney General for the State of Mississippi, Michael Moore, filed a lawsuit against the largest cigarette manufacturers in the country seeking a recoupment of the \$940 million in costs the state had expended on Medicaid payments for sick smokers.<sup>130</sup> The theory of these lawsuits was that the cigarettes produced by the tobacco industry contributed to health problems among the population, which in turn resulted in significant costs to the state's public health systems.<sup>131</sup> Michael Moore was quoted as declaring: “[The] lawsuit is premised on a simple notion: you caused the health crisis; you pay for it.”<sup>132</sup> By 1997, forty-six states had joined the litigation and all sought repayment of the monies they had expended in Medicaid benefits to individuals suffering from smoking-related illnesses.<sup>133</sup>

Recognizing that they were now facing the prospect of litigation in nearly every jurisdiction in the nation, the tobacco industry sought a congressional remedy in the form of a national settlement agreement.<sup>134</sup> The National Association of Attorneys General, led by Mississippi Attorney General Moore, proposed a national agreement that included more than \$350 billion in baseline payments over twenty-five years to individual states and required funds to be earmarked to combat teenage smoking, oversight of the manufacturing process by the Food and Drug Administration, and federal advertising restrictions.<sup>135</sup> Additionally, the proposed national settlement agreement also provided the industry with immunity \*429 from state prosecutions, eliminated punitive damages in individual actions, and prohibited aggregate litigation by individual lawsuits.<sup>136</sup>

In 1997, while bills reflecting the proposed national agreement were still being passed around Washington, Mississippi's Attorney General settled with the industry.<sup>137</sup> Florida, Texas, and Minnesota also settled shortly after.<sup>138</sup>

In November 1998, the attorneys general of the remaining forty-six states, including the Virgin Islands, Puerto Rico, and the District of Columbia, entered into the MSA to resolve their claims against the largest tobacco manufacturers in the country, which accounted for ninety-eight percent of the domestic market, for over \$200 billion over twenty-five years.<sup>139</sup> The nation's remaining manufacturers, which comprised the remaining two percent of the domestic market, were given the opportunity to sign as “Subsequent Participating Manufacturer[s].”<sup>140</sup> Nearly all signed the document, which provided them with the same

protection that the major manufacturers had received, but with significantly reduced financial obligations because of market share.

The terms of the Tobacco MSA provided not only for \$200 billion in baseline payments over twenty-five years to each of the plaintiffs, but also included broader provisions.<sup>141</sup> Those included restrictions on advertising, particularly those targeting youth, to make the documents disclosed during discovery in the litigation available to the public, to create a foundation dedicated to reducing youth smoking and diseases related to smoking, and payments to the states in perpetuity.<sup>142</sup>

**\*430** The conclusion of many scholars, the health care industry, and some of the state attorneys general that were involved in this litigation, including Mississippi Attorney General Michael Moore, is that the Tobacco MSA did not do enough to resolve the harm caused by tobacco use or prevent future harm from occurring.<sup>143</sup> Because of lack of oversight provisions in the Tobacco MSA, the settlement money came to states and continues to come with “no strings attached.”<sup>144</sup> In an NPR interview in 2013, Moore is quoted as saying:

What happened as the years went by, legislators come and go, and governors come and go ... so we got a new governor and he had a new opinion about the tobacco trust fund .... So a trust fund that should have \$2.5 billion in it now doesn't have much at all, and unfortunately that's one of my biggest disappointments.<sup>145</sup>

In that same interview, Myron Levin, a writer for the *Los Angeles Times* and founder of the health and safety news website *Fair Warning*, said that there was “a feeling” during the settlement process that the states had a “moral obligation” to spend monies on antismoking programs, but this was more of an effort “[t]o show the settlement was not just a big money grab.”<sup>146</sup> At the time, the expectation was that states would make a “big investment” in those programs, but most have not.<sup>147</sup> In fact, in 2007, the Centers for Disease Control and Prevention recommended that states should invest twelve percent of the tobacco settlement monies in anti-smoking programs.<sup>148</sup> But, as the NPR interview notes, “most state governments have decided to prioritize other things: Colorado has spent tens of millions of its share to support a literacy program, while Kentucky has invested half of its money in agricultural programs.”<sup>149</sup> A *New York Times* article notes that “[o]nly a small fraction of the money has gone to tobacco prevention,” and instead states used the “windfall” for other expenditures.<sup>150</sup>

**\*431** Finally, according to the Campaign for Tobacco-Free Kids, “34.3 million U.S. adults still smoke and 47 million--about 1 in 5 adults--still use some form of tobacco.”<sup>151</sup> The organization notes the “large disparities” in smokers among income and education levels, and that youth e-cigarette use threatens another generation with nicotine addiction.<sup>152</sup> Finally, the Campaign for Tobacco-Free Kids also reported that in 2014, states spent 1.9% of their settlement payments and tobacco taxes on prevention programs that year.<sup>153</sup>

In short, although the litigation is viewed as having “an enormous positive impact,” it has also been described as “an enormous loss or failure.”<sup>154</sup> On the benefits side, “[t]he litigation exposed the tobacco industry's lies, dramatically reduced teen smoking and resulted in limits in cigarette advertising.”<sup>155</sup> As further noted by the President of the Campaign for Tobacco-Free Kids, the litigation fell “far short of meeting the objectives. We didn't change the industry's conduct at all. The product is no safer.”<sup>156</sup> Lastly, government watchdog groups Citizens Against Government Waste and the Council for Citizens Against Government Waste noted that the Tobacco MSA “represents one of the most egregious examples of a government shakedown of private industry and offers a case study **\*432** of the problems that stem from big government and big business scratching each other's backs.”<sup>157</sup>

## IV. THE HISTORY OF OPIOIDS IN THE UNITED STATES, THE CURRENT CRISIS, AND LITIGATION

### A. History of Opioids in the United States

The United States has had an opioid problem, in some fashion, for a very long time. In 1806, after a German scientist extracted morphine from opium, the drug was used to treat everything from pain, anxiety, respiratory problems, and female ailments.<sup>158</sup> Morphine was so commonly used during the Civil War that many soldiers developed a dependency on the drug, ultimately referred to as “soldier’s disease.”<sup>159</sup> Between 1853, when the hypodermic needle was invented, and 1898, when heroin was synthesized from morphine, the use of opiates marketed in the United States as “non-addictive” medications was significant.<sup>160</sup> So significant, in fact, that by the end of the nineteenth century, the United States began to focus on ending the nonmedicinal use of derivatives of opium because of the addictiveness of the drug.<sup>161</sup>

In 1916, Bayer Pharmaceuticals developed the drug oxycodone as a substitute for morphine and heroin.<sup>162</sup> Once the Food and Drug Administration (“FDA”) was empowered in 1938 to approve drugs \*433 for their safety and effectiveness, opioid-derived medications like oxycodone were permitted to be sold throughout the United States.<sup>163</sup> Since the early 1960s, especially following periods of war, “abuse of prescription opioids containing oxycodone has been a major concern in the [United States].”<sup>164</sup> Veterans given opioids for combat-related injuries continued to use and misuse the drug even after the need for pain relief was over.<sup>165</sup> By the 1970s, opioids like hydrocodone and oxycodone were developed and marketed for both acute pain relief as well as pain associated with cancer.<sup>166</sup>

Despite the legislative efforts to ban heroin, including the International Opium Convention in 1912 and the Heroin Act of 1924, the importation of illegal heroin into the United States began to rise in the late 1950s and escalated during the Vietnam War.<sup>167</sup> In the 1950s, the United States was involved in an effort to contain the spread of Communism in Asia. In order to gain accessibility and protection along the southeast border of China, the United States established relationships with the various tribes and warlords that occupied that area and supplied them with “ammunition, arms, and air transport for the production and sale of opium.”<sup>168</sup> This action ultimately resulted in “an explosion in the availability and illegal flow of heroin into the United States and into the hands of drug dealers and addicts.”<sup>169</sup> With the Vietnam War came an additional significant increase in the illegal import of heroin into the United States. By 1970, the number of heroin addicts in the United States reached approximately 750,000.<sup>170</sup>

By 1973, the United States was officially involved in the “War on Drugs,” a phrase coined by President Richard Nixon following the creation of the DEA by Executive Order.<sup>171</sup> Throughout the next two decades, the United States medical community fell into \*434 “opiophobia,” a fear of prescribing opiates and other opioids for anything other than acute pain due to injury or surgery, or severe pain related to cancer or other terminal illness, because of the concern for addiction.<sup>172</sup> The placement of opioids like morphine, fentanyl, and oxycodone on the federal Schedule II drug list as part of the Controlled Substances Act in 1970 also contributed to this fear.<sup>173</sup>

However, in 1980, a one paragraph letter to the editors of the *New England Journal of Medicine*, entitled “Addiction Rare in Patients Treated with Narcotics,” is thought to be the impetus for an increase in support of opioid therapy for chronic pain.<sup>174</sup> In that letter, the authors stated that “only 4 of 11,882 patients who had pain and were given opioids became addicted to them.”<sup>175</sup> As scholars have noted, “this 5-sentence letter was referenced over 600 times in support of using opioids for chronic pain.”<sup>176</sup>

Over the next decade, the World Health Organization, medical textbooks, research studies and publications, and medical societies like the American Academy of Pain Medicine and the American Pain Society all encouraged the use of opioids to treat patients with chronic, noncancerous pain.<sup>177</sup> “[M]any states [also] passed Intractable Pain Acts that removed sanctions for physicians who prescribed long-term opioid drug therap[ies].”<sup>178</sup> It is no surprise that from 1990 to 1995, prescriptions for opioids increased by two million to three million each year.<sup>179</sup>

Over time, the concept of “pain” as a diagnosis for treatment was advanced by several influential groups. For example, in 1995, in his presidential address to the American Pain Society, James \*435 Campbell introduced the concept of pain as the fifth vital sign—next to body temperature, pulse, respiration rate, and blood pressure—in order to promote more aggressive pain management.<sup>180</sup> In 1999, the Joint Commission on Accreditation of Healthcare Organizations “issu[ed] pain management

standards that hospitals and outpatient centers would have to meet for certification.”<sup>181</sup> Even the Department of Veterans Affairs developed a national pain management strategy in 2000 that referred to pain as the fifth vital sign.<sup>182</sup>

It followed then that several highly regarded medical organizations adopted the view that opioid therapy was appropriate for chronic pain with limited risk of danger. For example, in 2000, the American Medical Association's Council on Scientific Affairs “noted that the risk of opioid addiction among patients without a history of misuse or abuse was low.”<sup>183</sup> Further, the Federation of State Medical Boards called the use of opioids “essential” in the treatment of both cancerous and noncancerous chronic pain.<sup>184</sup> By that time, the larger medical community, including pharmaceutical drug companies, physicians, pharmacies, and medical and licensing boards, were all on board, and opioid drugs were back in favor.

### **B. The Present-Day Opioid Crisis**

As demands for opioids to treat pain increased, drug companies explored how best to satisfy those demands in light of the addictive properties of the drug. In 1995, the drug that has been viewed as principally responsible for the latest opioid crisis, OxyContin, was produced by Purdue Pharma (“Purdue”) and approved by the \*436 FDA.<sup>185</sup> OxyContin was marketed and sold as being safe and nonaddictive for the treatment of chronic pain, and was designed to slowly release the opioid over a twelve-hour period.<sup>186</sup> Initially, it was believed that the time-release formulation allowing for delayed absorption of the drug would “reduce the abuse liability of [the] drug,” but that claim was not backed up by clinical studies.<sup>187</sup> Based on these representations, doctors felt comfortable prescribing the medication.<sup>188</sup>

However, recreational drug users and abusers learned to get high by crushing or dissolving the pill, thereby getting the immediate and full effect of the opioid in the pill.<sup>189</sup> As a result, OxyContin quickly became the most desired prescription drug on the black market.<sup>190</sup> In fact, between 1996, when OxyContin hit the market, and 2000, sales grew from \$48 million to over \$1.1 billion.<sup>191</sup> “[T]he annual number of prescriptions for OxyContin increased from 670,000 to 6.2 million between 1997 and 2002, and the total number of opioid prescriptions [by all pharmaceutical companies] increased by 45 million.”<sup>192</sup> Additionally, “[n]early 62 million patients had at least [one] opioid prescription filled in 2016.”<sup>193</sup>

In 2007, the federal government brought criminal charges against Purdue and three of their executives for “misleading and defrauding doctors and consumers” by advertising OxyContin as safer and less addictive than other opioids.<sup>194</sup> Purdue and the three \*437 executives pleaded guilty and agreed to pay \$634.5 million in criminal and civil fines.<sup>195</sup> In 2010, the FDA approved an “abuse-deterrent” formulation of OxyContin to allow physicians to continue to prescribe the drug while also curbing the abuse of the medication.<sup>196</sup>

In May 2015, the DEA executed the largest prescription drug bust in the history of the agency, “Operation Pilluted,” in which 280 people, including twenty-two doctors and pharmacists, were arrested for dispensing large amounts of opioids.<sup>197</sup> In 2017, the President of the United States declared the opioid crisis a national public health emergency, and legislative measures and industry efforts have been put into effect to address opioid addiction and find new pain management alternatives to opioids.<sup>198</sup>

According to the National Center on Health Statistics, “[s]ince 2011, fatal overdoses from [prescription] opioids alone have remained relatively stable, but those involving fentanyl have shot through the roof.”<sup>199</sup> In fact, synthetic fentanyl, created in 1960 as a treatment for cancer pain, played a part in sixty percent of opioid deaths in 2017, up from eleven percent five years ago.<sup>200</sup> “[T]he rate of drug overdoses involving [synthetic fentanyl] skyrocketed by about 113% each year from 2013 through 2016.”<sup>201</sup>

### **\*438 C. The Opioid Litigation by Individuals and Governmental Entities**


With respect to the current opioid crisis, the civil litigation that has followed has included claims filed against drug manufacturers and physicians by individual plaintiffs, and suits brought by state and local governments that targeted not only the manufacturers



and physicians, but also opioid distributors and pharmacy retailers. It also bears noting that, although this Article is largely focused on the civil litigation spawned by the opioid crisis, a number of criminal prosecutions and enforcement actions have also occurred. For example, in 2007, the United States filed a criminal case against Purdue and its three officers for violating federal law, including the misbranding of drugs under the Federal Food, Drug, and Cosmetic Act, which resulted in a guilty plea and a settlement of more than \$620 million in criminal fines to the federal government, twenty-six states, and the District of Columbia.<sup>202</sup> Further, the DEA has also filed criminal actions against physicians and pharmacists for violating the Controlled Substance Act through improper opioid prescription practices.<sup>203</sup> In short, civil and criminal litigation has had a prominent role in the opioid crisis, and there does not appear to be any signs of an end.

### 1. Individual Litigation Against Manufacturers and Physicians

In the early 2000s, the litigation that arose out of the opioid crisis was almost entirely focused on the pharmaceutical industry for the manufacture and distribution of the extended-release oxycodone drugs such as OxyContin.<sup>204</sup> The majority of these cases were filed as either individual suits or class actions, and alleged fraudulent and negligent marketing of these drugs as less addictive than other formulations.<sup>205</sup> The damages sought in these cases were for the costs associated with the prescriptions and for “expenses related to over-prescribing,” including the costs to the individual states in treating addiction.<sup>206</sup>

**\*439** Most of the suits brought by private citizens against the manufacturers were dismissed at the summary judgment stage for a variety of different reasons. Simply put, many plaintiffs had difficulty establishing any sort of duty or causation because of intervening, superseding conduct of either the patients themselves or the physician who prescribed the drugs.<sup>207</sup> In many cases, courts found that addiction or abuse of a prescription drug was a choice made solely by the individual plaintiff and that dependence on prescription opioids amounted to “illegal conduct.”<sup>208</sup> Class actions were dismissed at the certification stage because the medical records of individual plaintiffs caused the class to fail the commonality requirement under  [Rule 23 of the Federal Rules of Civil Procedure](#).<sup>209</sup>

Claims brought against physicians also proved to be challenging for plaintiffs for some of the same reasons stated above. Additionally, plaintiffs struggled to establish that the requisite standard of care for a medical malpractice claim had been breached when dealing with prescription of opioids because there was not a clear standard on how to treat pain.<sup>210</sup> It bears noting that both state medical boards and the DEA had some success in disciplining doctors for overprescribing opioids and bringing criminal charges against doctors under the Controlled Substances Act for “knowingly prescribing a controlled substance without a legitimate medical purpose and outside the course of professional practice.”<sup>211</sup> In fact, between 2001 and 2004, pursuant to the “OxyContin Action Plan,” sixty percent of the arrests relating to the distribution, dispensing, and possession of OxyContin by the DEA were medical professionals, including doctors and pharmacists.<sup>212</sup>

### **\*440 2. *Parens Patriae* and Public Nuisance Claims in Opioid Litigation by Governmental Entities**


Although the suits brought by private citizens, as either individual suits or as a class action, were, in large part, dismissed by the trial courts, lawsuits filed by state and local governments, and even American Indian nations, have been much more successful. In these cases, the governmental entities as plaintiffs have invoked *parens patriae* standing to assert claims of public nuisance, among others, to recover monies expended in responding to the opioid crisis in their respective communities. Additionally, the net for defendants has been cast much wider in these cases than in those filed by private citizens and includes not only pharmaceutical manufacturers and physicians, but also opioid distributors, pharmacies and retailers, licensing boards, and other professional accreditation entities. In short, the pockets of the defendants have expanded in both width and depth.


For example, in 2001, West Virginia's Attorney General filed suit against Purdue for maintaining a public nuisance, as well as violating the West Virginia Consumer Credit Protection Act, negligence, and antitrust violations, among others.<sup>213</sup> The State alleged it had expended more than \$30 million in OxyContin-related costs between 1996 and 2003,<sup>214</sup> and sought “restitution and reimbursement sufficient to cover all costs expended for health care services and programs associated with the diagnosis and treatment of adverse health consequences of OxyContin use, including, but not limited to, addiction due to defendants' wrongful conduct.”<sup>215</sup> The State also sought compensation for all prescription costs for Oxy-Contin that it had incurred under

Medicare as a result of the defendants' wrongful conduct.<sup>216</sup> Although the case ultimately settled in 2004 for \$10 million, some have viewed the willingness of West Virginia's Attorney General to settle for such a small amount as a sign that, if given the chance, a trial court may find that the causal \*441 chain between the expenses incurred by the State was severed by the misuse of the drug by abusers in that jurisdiction.<sup>217</sup>

The relative success of West Virginia against an opioid manufacturer is thought to have prompted twenty-six other states and the District of Columbia to quickly file similar claims in a class action against Purdue, accusing the company of misbranding and fraud that led to opioid related expenditures in their respective jurisdictions.<sup>218</sup> In 2007, Purdue and three of its executives agreed to pay \$600 million in civil and criminal fines to the federal government and almost \$20 million to twenty-six states and the District of Columbia following a plea agreement in which the company pleaded guilty to a felony charge of misbranding OxyContin with the intent to defraud or mislead, and the executives pleaded guilty to a misdemeanor charge of misbranding.<sup>219</sup> An additional \$130 million was spent to settle private civil claims related to OxyContin.<sup>220</sup> Although the settlement here was significantly more modest than the \$250 billion Big Tobacco settlement, described more fully in Part III of this Article, the resolution of these claims proved to be a turning point for the opioid litigation as state and local governments began to see that the stage for the opioid cases could be set just as it had in Big Tobacco.

In 2007, the Commonwealth of Kentucky, as well as Pike County, Kentucky, filed a lawsuit against two drug manufacturers, Purdue and Abbott, in New York state court.<sup>221</sup> Kentucky had been a part of the 2007 national settlement described above, but had refused its \$500,000 allocated portion, and instead the case was transferred to Kentucky state court.<sup>222</sup> The complaint alleged claims of public nuisance and antitrust, among others, and sought damages and equitable relief for the addiction and health problems \*442 suffered by residents and expenditures of money and services by both the County and the Commonwealth that were allegedly connected to the opioid crisis in their respective jurisdictions.<sup>223</sup> The case was removed to a federal district court in Kentucky,<sup>224</sup> and then transferred to and consolidated in a New York federal district court with other OxyContin cases involving antitrust claims against Purdue.<sup>225</sup> In responding to an effort to remove the case back to state court by the plaintiffs, Purdue argued that Kentucky consumers were the real parties in interest and that the case should be viewed as a class action under the Class Action Fairness Act ("CAFA").<sup>226</sup> The court ultimately rejected this argument, holding that there were only two plaintiffs involved, Kentucky and Pike County and declared that the suit was a *parens patriae* action in which the state sought to vindicate its quasi-sovereign interests.<sup>227</sup>

Purdue ultimately appealed the issue of whether a *parens patriae* action, such as the one brought by the Kentucky Attorney General, was a class action and therefore removable to federal court under CAFA.<sup>228</sup> The Second Circuit concluded that since the complaint by the Commonwealth "[made] no mention" of the Kentucky class action rule, Kentucky Rules of Civil Procedure Rule 23, it could not be considered a class action under CAFA, which required that the civil action be filed under a state law equivalent to the  [Federal Rules of Civil Procedure Rule 23](#).<sup>229</sup> Purdue argued that, even absent the mention of Kentucky Rule of Civil Procedure Rule 23, the Kentucky Attorney General was actually relying on state law statutes to assert representative claims for restitution on behalf of individual OxyContin users.<sup>230</sup> However, even though the complaint alleged that defendant's false misrepresentations and omissions about OxyContin caused Kentucky residents to become addicted and suffer health problems for which the Commonwealth ultimately paid for prescriptions and other medical services that would not have otherwise been required, the Second Circuit rejected that reasoning and stuck to its literal reading of the complaint as lacking any use of the term "class action" or reference to \*443 Kentucky Rules of Civil Procedure Rule 23.<sup>231</sup> In June 2013, Pike County settled its claims against Purdue for \$4 million and the Commonwealth of Kentucky settled in 2015 for \$24 million.<sup>232</sup>

Since December 2017, more than 2000 opioid-related cases filed by individual states, local governments, individuals, and other non-governmental entities against drug manufacturers, distributors, and pharmacies have been consolidated and transferred for pre-trial coordination to the Northern District of Ohio by the Judicial Panel on Multidistrict Litigation under the MDL process set forth in  [28 U.S.C. § 1407](#) ("National Prescription Opiate MDL").<sup>233</sup> When the first cases were consolidated, it was noted by some scholars that the consolidation of so many different types of defendants "[was] unusual" for an MDL.<sup>234</sup> In fact, some defendants protested the consolidation, arguing that the varied roles of each defendant--manufacturers, distributors, retailers, and doctors--would make it difficult, if not impossible, to be handled in an efficient and fair manner.<sup>235</sup> Considering

that the Judicial Panel on Multidistrict Litigation (the “Panel”) was responsible for the consolidation and ultimately signed the transfer order, it is clear that the Panel did not find those differences compelling enough.

In both the National Prescription Opiate MDL as well as the hundreds of opioid-related cases filed across the country, the claims pleaded by the plaintiffs pursuant to *parens patriae* standing are numerous and varied, and include common law claims of public nuisance. For example, under the initial Transfer Order in the National Prescription Opiate MDL:

Plaintiffs in the actions before us are cities, counties and states that allege that: (1) manufacturers of prescription opioid medications overstated the benefits and downplayed the risks of the use of their opioids and aggressively marketed (directly and through key opinion leaders) these drugs to physicians, and/or (2) distributors failed to monitor, detect, investigate, refuse and report suspicious orders of prescription opiates. All actions involve common factual questions about, *inter alia*, the manufacturing and distributor defendants' knowledge of and conduct regarding the alleged diversion of these prescription opiates, as well as the manufacturers' alleged improper marketing of such drugs. Both manufacturers and distributors are under an obligation \*444 under the Controlled Substances Act and similar state laws to prevent diversion of opiates and other controlled substances into illicit channels. Plaintiffs assert that defendants have failed to adhere to those standards, which caused the diversion of opiates into their communities. Plaintiffs variously bring claims for violation of RICO statutes, consumer protection laws, state analogues to the Controlled Substances Act, as well as common law claims such as public nuisance, negligence, negligent misrepresentation, fraud and unjust enrichment.<sup>236</sup>

Immediately following the transfer of the opioid cases to his court by the Panel, Judge Polster provided some indication that he viewed his role in dealing with the opioid crisis in a way that “approximates a *legislative* approach more than a litigation approach.”<sup>237</sup> In fact, in the first hearing in January 2018, the judge stated:

People aren't interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unraveling complicated conspiracy theories. So my objective is to do something meaningful to abate this crisis and to do it in 2018 .... What we've got to do is dramatically reduce the number of the pills that are out there and make sure that the pills that are out there are being used properly .... [W]e need a whole lot--some new systems in place, and we need some treatment .... We don't need--we don't need a lot of briefs and we don't need trials. They're not going to--none of them are--none of those are going to solve what we've got.<sup>238</sup>

As 2018 came and went, it became clear that the matter was not going to resolve as quickly as Judge Polster had once hoped. In fact, in December 2018, the court began ruling on numerous legal issues, including public nuisance and standing.<sup>239</sup> Although he dismissed a public nuisance claim brought by the City of Akron and limited the County's claim to injunctive relief, he stated that:

It is accurate to describe the opioid epidemic as a man-made plague, twenty years in the making. The pain, death, and heartache it has wrought cannot be overstated. As this Court has previously stated, it is hard to find anyone in Ohio who does not have a family member, a friend, a parent of a friend, or a child of a friend who has not been affected.

\*445 Plaintiffs have made very serious accusations, alleging that each of the defendant Manufacturers, Distributors, and Pharmacies bear part of the responsibility for this plague because of their action and inaction in manufacturing and distributing prescription opioids. Plaintiffs allege that Defendants have contributed to the addiction of millions of Americans to these prescription opioids and to the foreseeable result that many of those addicted would turn to street drugs.

While these allegations do not fit neatly into the legal theories chosen by Plaintiffs, they fit nevertheless. Whether Plaintiffs can prove any of these allegations remains to be seen, but this Court holds that they will have that opportunity.<sup>240</sup>

In addition to the National Prescription Opiate MDL, there are at least 330 opioid-related cases pending in forty-five lower courts.<sup>241</sup> These cases have been brought by state attorneys general that have opted to file independent lawsuits against drug manufacturers, distributors, retailers, and medical providers, rather than “share the stage” with the national litigation.<sup>242</sup>

Most recently, the State of Oklahoma settled its lawsuit for a record \$270 million against Purdue, which was scheduled to begin trial in May 2019.<sup>243</sup> The Oklahoma litigation, had it gone to trial, was considered a bellwether case, and one of the attorneys representing the State, Michael Burrage, summarized the trial strategy as the following: “We intend to prove that all of the defendants contributed to a public nuisance ... and that they’re all responsible for the whole ball of wax.”<sup>244</sup> Approximately \$200 million of the settlement “went to Oklahoma State University to establish a center for treatment and research on addiction, ... [m]ore than \$12 million was allocated to cities and counties, and the rest was spent” on private civil attorneys hired by the Attorney General to handle the lawsuit.<sup>245</sup> Because none of the money went into the state treasury, pursuant to the terms of the settlement agreement, Oklahoma legislators passed a law requiring future opioid settlements to be paid directly into the state treasury.<sup>246</sup> To that end, the \$85 million \*446 settlement reached between Oklahoma and one of the other defendants, Teva Pharmaceuticals Industries, was deposited with the State.<sup>247</sup>

On June 12, 2019, the federal government, through the U.S. Centers for Medicaid and Medicare Services, asked for a portion of Oklahoma’s settlement with Purdue to be paid to it as reimbursement because it believed the basis for the settlement was for monies expended in Medicare payments for opioid-related health issues.<sup>248</sup> Interestingly, the Medicaid claims had been withdrawn from the lawsuit on April 4, 2019, nine days after Oklahoma’s Attorney General settled with Purdue.<sup>249</sup> Moreover, in its case against Johnson & Johnson, Oklahoma asserted only that the defendant “violated the state’s public nuisance law by fueling the drug crisis through deceptive promotion of drugs and by providing raw materials to drug manufacturers.”<sup>250</sup> In August 2019, the trial against Johnson & Johnson resulted in a historic jury verdict of \$572 million.<sup>251</sup> Because Medicaid is funded jointly by state and federal governments and, in 2019, the federal government was responsible for about sixty-two percent of the cost of Oklahoma’s \$5 billion Medicaid program,<sup>252</sup> it will be interesting to see whether Oklahoma ultimately reimburses the federal government, and, if so, how much.

Finally, attorneys for local governments across the country have revealed a plan for global settlement of the more than 24,000 local communities that have brought claims in either the National Prescription Opiate MDL or in their own state courts against opioid manufactures, distributors, retailers, and medical providers.<sup>253</sup> The plan sweeps cities, towns, villages, and counties, but not states themselves, into a single “negotiating class,” which would allow local government leaders to participate in settlement negotiations, approve or disapprove any settlement, and provide opportunities \*447 to opt-out entirely.<sup>254</sup> On September 11, 2019, despite the lack of any clear procedural rule that gave him authority to do so, Judge Polster certified this class and included more than 30,000 local governments nationwide that have not yet filed lawsuits.<sup>255</sup> Attorneys general for most states involved in the national litigation indicated that a settlement with local governments could harm the ability to reach a comprehensive national settlement with both state and local governments.<sup>256</sup> Interestingly, on September 14, 2019, attorneys for some of the pharmacy defendants filed a motion to disqualify Judge Polster for bias based on his numerous comments over the last twenty-one months that he intended to conclude the litigation with a settlement as opposed to trials that could ultimately lead to appeals and his substantial involvement in the settlement talks themselves.<sup>257</sup>

## V. THE POSTURE OF THE OPIOID LITIGATION DESERVES THE JUDICIAL REVIEW THAT NEVER HAPPENED IN BIG TOBACCO

The formula for the opioid litigation, a combination of *parens patriae* standing based on a rather undefined quasi-sovereign interest and vague public nuisance claims, is one that was developed and utilized in the Big Tobacco litigation and evolved in subsequent mass tort cases. Despite the fact that, as stated in Part II, many of those post-Big Tobacco courts rejected the use and expansion of a public nuisance claim in cases involving legal products like guns, asbestos, and lead paint, the relative “success” of the Big Tobacco litigation has seemingly skewed the vision of the judiciary and empowered state attorneys general and local governments to pursue money damages in the opioid litigation through the vague claims of public nuisance. Moreover, there was no examination as to whether this pursuit is legally proper as a function of quasi-sovereign interests by a governmental entity because the Big Tobacco Litigation settled through an MSA. What is clear from Part III, however, is that the Big Tobacco litigation did not really further \*448 any of the goals of tort law-- deterrence, defining acceptable social conduct, and compensation of victims-- and it did not bring about any significant change in public policy or social reform. Rather, the only conclusion that can be drawn from Big Tobacco is that the litigation succeeded in transferring some money from private, corporate wallets to government coffers with little-to-no oversight.

In an effort to learn from mistakes of the past, there are several steps that can be taken now to try and accomplish some true remediation of the opioid crisis. First, by comparing the Big Tobacco litigation and the opioid litigation, one must conclude that there are more differences than there are similarities. As such, the procedural posture of the opioid litigation should be reviewed carefully to assure that the claims asserted, and the parties asserting them, are proper. To that end, the courts must make a determination of whether state attorneys general and local governments have *parens patriae* standing to pursue monetary damages for reimbursement of expenditures made in connection with opioid use in their respective jurisdictions as a function of a quasi-sovereign interest. Further, in light of the fact that opioids are legal drugs and are heavily regulated by the FDA and DEA, the courts must also determine whether the use of public nuisance claims in the opioid litigation is proper. In this regard, courts must consider whether they should manage these types of public policy concerns through public nuisance litigation.

#### ***A. Big Tobacco Litigation Is Not the Same as the Opioid Litigation***

As stated previously, the use of the *parens patriae* doctrine, in conjunction with public nuisance claims, has taken center stage in the opioid litigation. At first blush, it may seem like this is Big Tobacco all over again. In fact, the lawyers that played prominent roles in the tobacco litigation are now involved in the opioid litigation, and many state and local governments are hiring these lawyers and law firms on a contingency-fee basis to sue the private industry defendants.<sup>258</sup> However, there are significant and relevant differences between the litigation against Big Tobacco and litigation against opioid defendants, as well as other products that \*449 have been the subject of mass public nuisance tort claims filed by governmental entities under *parens patriae* standing, that suggest that the propriety of the use *parens patriae* and public nuisance claims in opioid litigation, as well as the likelihood of success, should be reevaluated.

First, and perhaps most importantly, the products in the other mass tort cases, as compared to opioids, are radically different in that the benefits associated with those products are outweighed by the risk factors of the products themselves. As one article notes, “[t]obacco is the only consumer product that is not capable of being used safely.”<sup>259</sup> In fact, until the MSA was put into place, cigarettes were not governed by any regulatory body. As described in Part II, as time went on, products like lead paint and asbestos became the focus of mass tort and products liability litigation. In each of these cases, the products that were the focus of the litigation were deemed to have no real legitimate or beneficial use that was not outweighed by the safety issues surrounding them. For example, although asbestos is an excellent heat insulator, the product's risk factors to the health of those who are exposed to the product outweighs the benefit. Similarly, although the addition of lead to paint promotes faster drying and improves the overall quality of the paint, the risks associated with lead in paint, particularly those used in homes and on toys, outweighs the beneficial factors. Consequently, both products have been banned, either in whole or in large part, in the United States.<sup>260</sup>

Conversely, as noted above, opioids can be and are routinely used safely, and are commonly used to treat chronic pain and other pain symptoms. Further, opioids are regulated by the FDA and the DEA, and patients can receive a legitimate prescription for opioids from a licensed physician or medical provider. Moreover, as noted by the health care community, the use of opioids to treat pain is beneficial, and the risks of the product, like addiction, can be reduced significantly when the patient works collaboratively with his medical provider.<sup>261</sup>

\*450 Further, the pool of plaintiffs in the opioid litigation is radically different as compared to the plaintiffs in the litigation against Big Tobacco and other mass tort products. As stated previously, the plaintiffs in Big Tobacco were individual states who



brought claims against the tobacco manufacturers to recover monies expended as Medicaid payments made to citizens of the respective states for smoking-related illnesses. In the opioid litigation, cities, counties, and tribes have taken the lead in filing their cases in courts across the country, with state attorneys general taking a backseat in their own respective state actions. Why is this important? Because one of the keys to success in the tobacco litigation was the ability of the plaintiffs to cooperate and agree on how to resolve the matter. In the opioid litigation, there are cases in nearly every state and a massive MDL in Cleveland, Ohio that has consolidated more than 1500 cases for purposes of pre-trial proceedings and discovery. It is unlikely, given the “unique needs and plans” of each community, that there will be any ability to be cohesive and reach a global settlement.<sup>262</sup> As such, the fact that these individual state and local governments have been permitted to utilize *parens patriae* standing to bring these opioid lawsuits without any real evaluation of the propriety of such use is concerning.

Also, the named defendants in the opioid litigation are substantially different than those in the tobacco litigation. In the tobacco litigation, there were a finite number of major tobacco manufacturers as named defendants. Once the MSA was reached, provisions were made for the smaller manufacturers to join the settlement. This manageable group made it much easier for the state attorneys general to negotiate a settlement to resolve the claims. The opioid litigation defendants are numerous and are as varied as the number of lawsuits filed. In some cases, the respective governmental plaintiff named only one or two of the major opioid manufacturers. In other cases, manufacturers, distributors, and pharmacies are named defendants. Still, in others, the plaintiffs have sued manufacturers, doctors, and the clinics that sell the drugs. As is the case with respect to the types of plaintiffs bringing these claims, resolving all of the opioid claims filed across the country with something like the global settlement achieved in the litigation against Big Tobacco is extremely unlikely.

**\*451** Compared to the Big Tobacco litigation, in which causation was a minimal concern to the parties because proper use of tobacco was connected to health concerns, causation issues abound in the opioid litigation. The causation waters are significantly murkier in the opioid crisis than in Big Tobacco because the reasons why state and local governments expend monies to respond to the opioid crisis in their respective communities are different depending on the individual who becomes addicted to the drug. The courts are either unwilling or disinterested in considering these causation issues and the relative fault of each defendant, but have concluded, without any evaluation of the requisite evidence, that the pharmaceutical industry as a whole is liable.

As ironic as it sounds, one of the more important differences between the Big Tobacco and opioid litigation is that the industry that sold the unsafe and unregulated product, tobacco, is significantly wealthier than the players involved in the heavily regulated opioid industry. As experts note, “[t]he U.S. opioid market generates around \$10 billion in annual gross sales. Big Tobacco had nearly \$20 billion in *net profits* in 2016.”<sup>263</sup> So why does this matter? Because the ultimate monetary resolutions sought by the plaintiffs across the country threaten to bankrupt a sector of the industry that needs to continue to function because opiates are necessary, valuable, beneficial, and safe drugs.

## ***B. Judicial Guidance on the Issue of Parens Patriae Standing To Protect Quasi-Sovereign Interests and Recover Monetary Expenditures in the Opioid Litigation Is Necessary***

*Parens patriae* actions have been recognized as appropriate in the context of the protection of quasi-sovereign interests. However, as the Supreme Court noted in *Snapp*, because “an exhaustive formal definition” or “definitive list of qualifying interests” in determining what is or is not a quasi-sovereign interest cannot be provided,<sup>264</sup> the Court required that the characteristics of a quasi-sovereign interest be “sufficiently concrete to create an actual controversy between the State and the defendant.”<sup>265</sup> Consequently, concerns for the health, safety, and welfare of a state’s people have been recognized as a quasi-sovereign interest for *parens patriae* standing.<sup>266</sup> However, the *Snapp* Court advised that an inquiry be made as to whether the injury to the state is one that it “would likely attempt to address through its sovereign lawmaking powers,” as well as whether the causal conduct affected a “substantial segment of the population.”<sup>267</sup>

When looking at Big Tobacco, one might be convinced that the use of *parens patriae* was appropriate in light of the overall resolution of the litigation. However, it cannot and should not be ignored that the “settlement pretermitted the opportunity for courts to articulate the doctrine’s limits.”<sup>268</sup> As previously stated, even Louisiana’s Attorney General, the principal architect of the *parens patriae* theories espoused in the tobacco litigation, has acknowledged that he is unsure as to whether “the particulars of Louisiana’s *parens patriae* theory would have prevailed in the tobacco litigation.”<sup>269</sup>

Since that time, only one court has examined whether the exercise of *parens patriae* power to recover damages, like Medicaid expenditures, made as a consequence of the conduct of a third party is proper.<sup>270</sup> In *Texas v. American Tobacco Co.*, the question arose as to whether the State could bring a direct action against a tortfeasor to recover Medicaid benefits, or whether the reimbursement and subrogation process provided by the Medicaid statute and Texas law was the exclusive remedy.<sup>271</sup> The court reasoned:

First, it is without question that the State is not a nominal party to this suit. The State expends millions of dollars each year in order to provide medical care to its citizens under Medicaid. Furthermore, participating in the Medicaid program and having it operate in an efficient and cost-effective manner improves the health and welfare of the people of Texas. If the allegations of the complaint are found to be true, the economy of the State and the welfare of its people have suffered at the hands of the Defendants .... It is clear to the Court that the State can maintain this action pursuant to its quasi-sovereign interests found at common law.<sup>272</sup>

As noted by some scholars, in *American Tobacco Co.*, the judge “clearly assumed that damages, to the extent proven, would be \*453 available to a state seeking to vindicate its quasi-sovereign interests.”<sup>273</sup> However, other than the conclusory finding that this action was in furtherance of a quasi-sovereign interest, there was no analysis of this issue, including whether or not this action truly satisfied the guidance of the *Snapp* Court.<sup>274</sup> For example, the court did not consider whether the issue was one in which Texas “would likely attempt to address through its sovereign lawmaking powers,” or whether the causal conduct of the tobacco manufacturers affected a “substantial segment of [the] population.”<sup>275</sup> Rather, the court found that, even though the purpose of the applicable federal and state regulations was to “require states such as Texas to recover money spent that can be attributed to the wrongs of third-parties” through subrogation of rights, it was “impractical” to require the state to “follow the mandates of the Medicaid statute’s reimbursement provisions ... on a claim-by-claim basis.”<sup>276</sup> Although the court was clearly compelled that claim-by-claim subrogation cases were ineffective and costly as compared to a *parens patriae* action, nowhere in the opinion is there any evidence that the court considered whether the population affected by the conduct of the tobacco manufacturers was “substantial.”<sup>277</sup>

As was the case in the tobacco litigation, in the opioid litigation, the damages for which *parens patriae* standing are being asserted are for expenditures and other monetary damages sustained, including Medicaid expenses, as a consequence of the opioid crisis. Because courts in the Big Tobacco litigation, in light of the mass settlement, never had the chance to analyze whether these types of actions were truly in furtherance of a quasi-sovereign interest, courts should feel compelled to provide that kind of guidance now. This would provide significant confidence in the validity of any settlement between the parties, as well as guidance to future actions in which *parens patriae* standing to recover Medicaid and other monetary damages are claimed.

Post-Big Tobacco, *parens patriae* suits have become “an increasingly popular vehicle for state attorneys general to vindicate the rights of their constituents.”<sup>278</sup> If *parens patriae* in the context of \*454 quasi-sovereign interests is viewed as a “go to” tool for states and local governments in mass tort claims, the opportunity for some real consideration and analysis by our judicial system to assure that the procedural tool is not abused is now.

### ***C. Courts Must Consider Whether Public Nuisance Tort Claims by Governmental Entities Are Appropriate in Mass Torts Claims Like the Opioid Litigation***

As detailed in Part II, public nuisance, due to its characteristics, is an incredibly unique tort claim. It “represents a uniquely potent weapon in the hands of governmental entities and contingency fee private counsel representing them.”<sup>279</sup> One scholar describes public nuisance claims as this:

Public nuisance offers plaintiffs several important strategic advantages. Its primary advantage is a more direct focus on the merits--the existence of the nuisance, the injury, and the appropriate remedy--than is available in many statutory cases, where the focus is often on procedure or violations of permits or standards. Moreover, public nuisance gives plaintiffs the opportunity to obtain damages and injunctive relief, lacks laches and other common tort defenses, is immune to administrative law defenses like exhaustion, avoids the private nuisance requirement

that the plaintiff be a landowner/occupier of affected land, eliminates a fault requirement, and circumvents any pre-suit notice requirement.<sup>280</sup>

Even though public nuisance claims are “notoriously vague and elastic,” governmental entities continue to try and stretch the parameters of the common law to their advantage.<sup>281</sup> Clearly, that “stretch” occurred in the Big Tobacco litigation, but the courts were unable to examine the propriety of it as the case resolved through the MSA. The opioid courts now have a chance to do what the Big Tobacco courts were foreclosed from doing and to provide judicial guidance and opinion on whether the use of the public nuisance claim in *parens patriae* actions is appropriate. In order to accomplish that task, the courts must consider several issues, including whether the opioid cases satisfy the requirement of a public right, \*455 whether the remedy pursued is that which is traditionally recoverable in a public nuisance claim, and whether a show of causation is required. Most importantly, the court must examine whether a public nuisance claim is the most appropriate vehicle for remedying what is really a public policy problem.

First, the courts must consider whether the consequences sustained by a particular jurisdiction and attributed to the abuse of prescription opioids by individuals is truly a violation of a public right. Public rights are “collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.”<sup>282</sup> As noted by many, “the rights protected by public nuisance law are not simply aggregations of private rights.”<sup>283</sup> In fact, some have argued that “[a] mass tort, such as distributing a defective product to millions of consumers, violates a large number of private rights. But this does not convert such a tort into a violation of a public right.”<sup>284</sup> Therefore, the 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.”<sup>285</sup> If that is true, then the courts must justify why the remedy sought by the governmental entities is compensable when the claims brought by private citizens have nearly all been dismissed for lack of causation due to misuse of the product; intervening, superseding conduct of the plaintiff or the physician who prescribed it; or illegal conduct. Also, in many of these cases, the governmental agencies include the damages to the individual citizens themselves in their prayers for relief.<sup>286</sup>

It is important to note that in April 2019, a magistrate in the opioid MDL considered a motion to dismiss public nuisance claims in *Muscogee (Creek) Nation v. Purdue Pharma, L.P.*<sup>287</sup> There, the \*456 defendants argued that the public nuisance claims filed by the plaintiffs should be dismissed as an unlawful expansion of public nuisance law based on the reasoning set forth in *City of Chicago v. Beretta U.S.A. Corp.*, a case concerning firearms as a public nuisance.<sup>288</sup> In *City of Chicago*, the allegations pleaded by the plaintiffs were that “[t]he defendants’ conduct of ‘intentionally and recklessly’ designing, marketing, distributing, and selling firearms that they ‘should know’ will be taken to Chicago causes ‘thousands of firearms to be possessed and used in Chicago illegally’ and causes ‘a significant and unreasonable interference’ with the rights of the public.”<sup>289</sup> The *City of Chicago* Court found this allegation to be an improper expansion of the public nuisance theory, stating

[a]ny change of this magnitude in the law affecting a highly regulated industry must be the work of the legislature, brought about by the political process, not the work of the courts. In response to the suggestion of *amici* that we are abdicating our responsibility to declare the common law, we point to the virtue of judicial restraint.<sup>290</sup>

Similar to the claims pled in *City of Chicago*, the claims in the opioid litigation are that the nuisance occurred as a result of defendants’ conduct in sales, marketing, and distribution of opioids.<sup>291</sup> However, regardless of similarity to *City of Chicago*, the opioid court not only denied the defendants’ motion, but failed to distinguish the opioid cases from the gun cases relative to claims of public nuisance. Moreover, the court made no effort to articulate why the use of the public nuisance theory in the opioid litigation would not be an improper expansion and use of a public nuisance claim, as the court in *City of Chicago* found.<sup>292</sup> In fact, as of this writing, the parties in the National Opioid Prescription MDL will argue a motion on September 16, 2019, as to who should hear the contested theory of public nuisance, the judge or a jury.<sup>293</sup>

Further, the court must consider whether the monetary remedies requested by the parties are recoverable in a public nuisance claim. Traditionally, as previously discussed, remedies for public nuisance were limited to abatement or injunctive relief. The costs \*457 of abatement in cases remedying a public nuisance, like blocking a public roadway or interfering with navigable waters, would be ascertainable.<sup>294</sup> However, the costs of abating a large public policy or public health problem like the opioid crisis are absolutely incomprehensible. Although there is precedent “for allowing a state to seek a damage remedy as well, especially in cases where abatement would involve significant expense, in cases that involve concurrent causes of action, such as statutory and regulatory violations, or in cases where the offensive conduct has already been discontinued,”<sup>295</sup> in the opioid litigation, where parties are claiming increased health costs, lost productivity, increased demand for emergency services, generalized detrimental effect on families and communities, and other social issues, determining how to estimate those damages becomes all the more difficult. Moreover, the inability to calculate specific damages that are traced to the wrongful conduct of the defendants “incentivizes manufacturers to settle because their potential liability ... remains imprecisely defined.”<sup>296</sup> The courts should resist this push by both sides to reach some monetary resolution without some inquiry into the basis for the damages claimed attributable to the individual defendants.

#### ***D. The Courts Must Consider the Appropriate Causation Standard and the Effect It Will Have on Public Policy***

Causation standards and public policy concerns play a significant role in determining the propriety of the use of public nuisance claims. Some courts have refused to allow governmental entities to change the inquiry from whether a particular defendant caused a particular injury to whether the defendant “substantially participated” in creating a perceived threat to public health and safety.<sup>297</sup> However, in cases in which that inquiry was expanded, the end result resembles “the creation of a social program more than the resolution of a particular dispute.”<sup>298</sup>

\*458 As can be seen in many of the complaints filed in the opioid litigation, the focus of the parties is less on the discrete injury to the public right and more on the “generalized societal problem.”<sup>299</sup> Consequently, judges, like Judge Polster in the National Prescription Opiate MDL, are encouraged to focus more on the overall crisis and less on the requirements of the tort claims before them. For example, as noted by Judge Polster, “[m]ore and more over the last [fifty] years, cities have turned to courts to solve complex social problems .... Whether that's good or bad, people can debate. But it is a fact.”<sup>300</sup> Judge Polster acknowledged that ultimate resolution of the opioid crisis is a social problem more appropriate for the executive and legislative branches, as opposed to the courts, but acknowledged “it's here.”<sup>301</sup> The concern then becomes the use of public nuisance as a litigation strategy. As noted by some commentators, such use “can create an uncomfortable separation of powers issue by allowing state attorneys general to step into a regulatory role for which they have no constitutional authority.”<sup>302</sup> However, to the extent that the opioid courts can refrain from issuing injunctive relief in the form of regulatory schemes and focus on elements of the claims pleaded and the defenses asserted, the danger of legislating public policy reform from the bench is greatly reduced.<sup>303</sup>

As noted previously, the court and the parties have begun to consider causation issues in the National Prescription Opiate MDL, but with the certification of the negotiating class of local governments, that issue may ultimately be overshadowed by the focus on settlement. Provided that this court, and other opioid courts like it around the country, can focus on the legal issues before it and resist the temptation to implement “solutions” to the public health crisis, the use of public nuisance claims in future cases will not be untenably expanded.

#### **\*459 CONCLUSION**

Mass tort cases like the national opioid litigation, as well as the aggregate pressure of the thousands of state and local government lawsuits that have been filed independently across the country, will have an enormous impact on public policy. Although the question as to whether “litigation is the ideal way to solve a public health problem,”<sup>304</sup> is a good one, it bears noting that several scholars also note that

[I]itigation has helped set the agenda and frame the issues in this crisis. The start of litigation, or in some cases the mere threat of it, has brought additional political, health, and educational attention to the opioid crisis and, arguably, changed the way actors at the edge of the web, including distributors, retailers, and accreditation entities, conceive of their responsibilities. In addition, the pressure to rehabilitate a company reputation damaged by

litigation and other publicity may prompt companies to contribute to the solution, perhaps even before court resolution.<sup>305</sup>









As noted by at least one commentator, “‘Courts are hard-wired for litigation,’ through which facts can come to light.”<sup>306</sup> Pushing hard, as Judge Polster initially stated, for “something meaningful to abate this crisis” is a lofty goal, but the courts cannot ignore the fact that pushing for resolution without any fact-finding, evidentiary proofs, or witness testimony is a “short-circuiting of that process” that can leave the validity and propriety of any resolution up for debate.<sup>307</sup> Most importantly, any positive impact or change to public policy is placed at risk because of a lack of confidence in the manner in which that impact or change came about.
















The combination of *parens patriae* standing and public nuisance claims as an instrument to reform public policy and institute social change through judicial action is wildly problematic. As can be seen post-Big Tobacco, there is significant doubt as whether the \*460 litigation by states achieved any of the goals of tort law or if it was just a “big money grab” by governmental entities.<sup>308</sup> To that end, it is comforting to see that, at least in the National Prescription Opiate MDL, there is some movement by the court and the parties involved to confirm that the cases are postured correctly in order to achieve more than just a cash settlement or paper resolution and to assure that the legal doctrines and claims employed by the parties are utilized properly now and in the future. Rest assured, unlike the end of the Big Tobacco litigation in which many thought that it was “unlikely” there would be a “next tobacco,” there will be a “next opioid” case.<sup>309</sup> The courts should use the current opioid litigation to assist those future parties and their respective litigation in posturing their case so that there are no questions as to the propriety of the use of procedural tools and claims, like *parens patriae* and public nuisance.




### Footnotes

- a1 Assistant Professor of Law, University of Detroit Mercy School of Law, J.D., 1994, University of Detroit Mercy School of Law; B.A., 1991, Michigan State University. The author gratefully acknowledges the support of Detroit Mercy Law colleagues Professor Julia Belian, mentor Professor Howard Abrams, and research assistant Aaron Pattison (2020). Many thanks also to Allison Bohan and the staff at *University of Richmond Law Review*.
- 1 See *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio Dec. 8, 2017).
- 2 *Id.*
- 3 Transfer Order, *In re Nat'l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375 (J.P.M.L. Dec. 5, 2017).
- 4 Christine Vestal, *Pay Attention to This Little-Noticed Opioid Lawsuit in Oklahoma*, PEW CHARITABLE TRUSTS: STATELINE (Feb. 14, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/02/14/pay-attention-to-this-little-noticed-opioid-lawsuit-in-oklahoma> [<https://perma.cc/LNN8-JJN9>].
- 5 Alison Frankel, *Expert Witness in Opioids MDL: Fixing Crisis Will Cost \$483 Billion*, REUTERS: ON THE CASE (Apr. 18, 2019, 5:48 PM), <https://www.reuters.com/article/us-otc-opioids/expert-witness-in-opioids-mdl-fixing-crisis-will-cost-483-billion-idUSKCN1RU2I5> [<https://perma.cc/4XSH-EJSZ>].
- 6 See Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html> [<https://perma.cc/QP8G-U7GC>]; see also *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804, 2019 U.S. Dist. LEXIS 101660 (N.D. Ohio Apr. 1, 2019); *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804, 2018 U.S. Dist. LEXIS 213567 (N.D. Ohio Dec. 19, 2018).
- 7 See Alison Frankel, *Opioid MDL Judges OKs Novel Negotiating Class as 'Likely To Promote Global Settlement'*, REUTERS: CREDIT RSS (Sept. 12, 2019, 5:20 PM), <https://www.reuters.com/article/us-otc-opioids/opioid-mdl-judges-oks-novel-negotiating-class-as-likely-to-promote-global-settlement-idUSKCN1VX2RE> [<https://perma.cc/JJN2-HEAC>].



- 8 See Order Certifying Negotiating Class and Approving Notice at 1, 7-8, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio Sept. 11, 2019).
- 9 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, 351 (2018).
- 10 See *id.*
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
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- 80 *Id.* at 7-8. The Restatement also provides:  
 (1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.  
 (2) In order to maintain a proceeding to enjoin to abate a public nuisance, one must  
 (a) have the right to recover damages, as indicated in Subsection (1), or  
 (b) have authority as a public official or public agency to represent the state or a political subdivision in the matter, or  
 (c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.  
 RESTATEMENT (SECOND) OF TORTS § 821C (AM. LAW INST. 1977).
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- 101  *Id.* at 1108-09.
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