# SHARING THE BLAME: USING MARKET SHARE TO ALLOCATE LIABILITY IN OPIOID PUBLIC NUISANCE LAWSUITS

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## INTRODUCTION

The opioid epidemic is a public health crisis unlike any other the United States has ever seen. Opioids—a broad group of pain-relieving drugs—are the designated cause of a public health emergency,[1] arguably because of both the number of people harmed and the significance of harm created using these drugs. When used properly, prescription opioids have the capacity to provide users with life-changing relief from chronic pain.[2] But when abused or misused, opioid use can result in life-altering addiction and even death.[3]

> According to the Centers for Disease Control and Prevention, in the quarter century following the introduction of OxyContin, some 450,000 Americans had died of opioid-related overdoses. Such overdoses were now the leading cause of accidental death in America, accounting for more deaths than car accidents—more deaths, even, than that most quintessentially American of metrics, gunshot wounds. In fact, more Americans had lost their lives from opioid overdoses than had died in all of the wars the country had fought since World War II.[4]

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1. On October 26, 2017, President Donald Trump officially labeled the opioid epidemic as a "public health emergency." *See Ongoing Emergencies and Disasters*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Sept. 6, 2023), https://www.cms.gov/about-cms/agency-information/emergency/epro/current-emergencies/ongoing-emergencies.

2. *Risk Factors for Opioid Misuse, Addiction, and Overdose*, U.S. DEP'T. LAB.: OFF. OF WORKERS' COMP. PROGRAMS, https://www.dol.gov/agencies/owcp/opioids/riskfactors#:~:text=Prolonged%20use%20is%20associated%20with,setting%20struggles%20with%20opioid%20addiction (last visited Feb. 12, 2024).

3. *Id.*

4. PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY 20–21 (2021).

The ongoing catastrophe of opioid addiction has been especially devastating in more rural communities of the United States, particularly the Appalachian region. Given the author's upbringing in an eastern Kentucky county in Appalachia, this devastation is in many ways personal. In Appalachian communities, the availability of prescription painkillers was even more abundant than in non-Appalachian regions.[5] Between 1998 and 2000, hydrocodone and (non-OxyContin) oxycodone were being prescribed 2.5 to 5.0 times more than the national average in eastern Kentucky.[6] By 2000, the number of OxyContin prescriptions was up to five to six times higher than the national average.[7]

This public health crisis, both within Appalachia and outside of it, quickly prompted calls for action by public officials at all levels.[8] Unsurprisingly, given the significance of harm and sheer number of people affected by opioids, this was an area particularly appropriate for government response. But "many commentators have criticized the legislative and executive branch responses to the opioid crisis—at both the federal and state levels—as being sluggish and ineffective."[9] Although it is not all that surprising that these political vehicles were not able to provide immediate relief to such a massive crisis, it is interesting that "one side effect of the slow legislative response has been an escalation of state and local governments looking to the *courts* to provide relief . . . ."[10]

At first glance, the decision to rectify the harms of opioids through the judiciary might seem inappropriate, or even morally wrong. One's instinct might be that "there is little reason to have any liability regime in place for these cases,"[11] given the decision to use or misuse drugs is an individual one. In fact, this sentiment was present in early litigation over the opioid epidemic: early phases of opioid litigation were unsuccessful in large part because of the public stigma that opioid users were responsible for their own drug use and subsequent addiction.[12]

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5. NAT'L ASS'N OF CNTYS. AND APPALACHIAN REG'L COMM'N, OPIOIDS IN APPALACHIA: THE ROLE OF COUNTIES IN REVERSING A REGIONAL EPIDEMIC 5 (May 2019). "In 2017, opioid prescription rates were forty-five percent higher in Appalachian counties than in the remainder of the country, and rates have consistently remained at least that much higher since 2006." *Id.*

6. Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 223 (2009).

7. *Id*.

8. *See Ongoing Emergencies and Disasters*, *supra* note 1.

9. James K. Holder, *Opening the Door Wider? Opioid Litigation and the Scope of Public Nuisance Law*, IN-HOUSE DEF. Q. 33 (Spring 2018), https://m.grsm.com/Templates/media/files/Opening%20the%20Door%20Wider%20Opioid%20Litigation.pdf.

10. *Id.* (emphasis added).

11. Richard A. Epstein, *The Private Law Connections to Public Nuisance Law: Some Realism About Today's Intellectual Nominalism*, 17 J. L., ECON. & POL'Y 282, 308 (2022).

12. 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, 353 (2018) ("Stigma against addiction also played a key part in the success of drug manufacturers in defending themselves in these suits. During this era, stigmatization associated with illicit drug use was pervasive and bled into courtrooms.").

However, modern opioid litigation "rests on the theory that the distributers of these drugs flood[ed] the markets with excess capacity in an effort to reap extra products, knowing that such potent drugs had to fall into the wrong hands where death or serious injury would ensue."[13] Opioid lawsuits rely on the understanding that the actors involved in manufacturing and distributing opioids to the public committed grave wrongs: often that these actors had knowledge of the addictive qualities and dangers of opioid drugs and, despite this, maximized the public reach to enlarge their own pocketbooks. The theory underlying this litigation is a controversial, but important one. It relies on the idea that businesses profiting from the distribution of such dangerous products should take special care and be especially responsible for the harms created by their line of business. This idea, of course, has major implications for industries undertaking enterprises with social risk, including transaction costs and externalities on both these businesses and consumers.

Another obstacle to the success of earlier opioid litigation was the difficulty of proof and causation, given the numerous parties involved in opioid distribution.[14] In earlier phases of litigation, any liability of the original opioid manufacturers was found to be severed by interceding causal connections.[15] However, a more flexible tort action, public nuisance, has proven to have greater potential to succeed. In these actions, state attorneys general can bring lawsuits against the manufacturers and distributors of opioids and seek reimbursement for the governmental costs of the opioid epidemic. Public nuisance uniquely seeks reimbursement for the costs incurred by the government. These governmental costs stemming from the opioid epidemic include medical care, drug treatment, and law enforcement associated with the opioid epidemic.[16] Here, the government plaintiffs seek repayment for the millions of public funds spent on the consequences stemming from public opioid addiction.

Although unusual, state action through public nuisance is not all that surprising, because there has been a growing modern trend of seeking relief for public health crises in the courts. The trend of public nuisance lawsuits began in the 1990s, and these suits have become a common vehicle through which states seek financial relief related to public health crises. Public nuisance lawsuits have been waged in the context of tobacco,[17] firearms,[18] and lead

13. Epstein, *supra* note 11, at 309.

14. Gluck, *supra* note 12, at 358.

15. *Id.*

16. Holder, *supra* note 9, at 33.

17. Gluck, *supra* note 12, at 351–52 ("The tobacco litigation of the 1990s is the most salient example of a high-profile litigation effort that after settlement yielded vast sums.").

18. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L., no. 2, 2011 at 3 (citing City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1136 (Ill. 2004); Ganim v. Smith & Wesson Corp., 780 A.2d 98 (Conn. 2001); Camden Cnty. Bd. Of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001); City of Gary v. Smith & Wesson Corp., 801 N.E. 2d 1222 (Ind. 2003)).

paint[19] to name a few. But the results of these lawsuits have been quite varied. Some have occasioned significant settlement agreements early on in litigation,[20] while others have been dismissed altogether.[21]

Because many public nuisance lawsuits related to public health crises have either settled or been dismissed prior to trial, courts have not had much of an opportunity to evaluate what a true resolution of these cases would look like—resolution meaning a full-fledged evaluation of the merits and allocation of liability through the trial process. The allocation of liability is especially important in the context of opioids because there are so many actors involved. The multitude of parties involved—manufacturers, distributors, pharmacies, public health organizations, doctors, prescribed users, unprescribed users, government actors—make liability a much more difficult calculus. It is likely because of these complex facts (and undoubtedly other reasons such as the high costs of litigation) that have thus far induced settlement of opioid public nuisance lawsuits.

This note considers how one doctrine in tort law, market share liability, could resolve damages questions in a public nuisance lawsuit in the context of the opioid epidemic. Specifically, it will apply the market share liability approach used by the California Supreme Court in *Sindell v. Abbott Laboratories*,[22] which originated in a student note.[23] First, Part I will discuss the nature of public nuisance lawsuits, their relatively recent utilization to address other public health crises, and the differences between the use of public nuisance to address other social ills, as compared to the opioid epidemic. Part II will then provide background on the nature of opioids and the complicated nature of the parties involved in this public health crisis. Then, Part III will discuss how market share liability could be applied to allocate liability in opioid public nuisance lawsuits, and the public policy implications of this application.

## I. MODERN USE OF PUBLIC NUISANCE LAWSUITS

The use of public nuisance by courts to rectify public wrongs is a modern development. In fact, the idea that public nuisance is a form of tort liability at all, rather than a public action, is of relatively recent origin.[24] Public nuisance as a tort "is a product of the *Restatement (Second) of Torts*, the relevant

19. *Id*. at 3 (citing State v. Lead Indus. Ass'n., 951 A.2d 428 (R.I. 2008); In re Lead Paint Litig., 924 A.2d 484 (N.J. 2007); County of Santa Clara v. Atlantic Richfield Co., 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 2006)).

20. Holder, *supra* note 9, at 35. In the tobacco public nuisance litigation of the 1990s, "[t]he sheer size and force of the litigation was enough to spur the tobacco industry to accept the largest civil litigation mass settlement agreement in U.S. history at the preliminary stages of the litigation." *Id.*

21. *Id.* Mass public nuisance litigation against handgun manufacturers failed, as did most lawsuits against lead paint manufacturers. *Id.*

22. Sindell v. Abbott Lab'ys, 607 P.2d 924 (Cal. 1980).

23. *Id.* at 927 (citing Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 964–67 (1978)).

24. Merrill, *supra* note 18, at 20.

provisions of which were approved by the American Law Institute in 1971 and published in 1977."[25] Following this development, the tort of public nuisance has been applied more frequently and more broadly, providing plaintiffs with a more flexible cause of action.

### *A. What is Public Nuisance?*

The Restatement (Second) of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public."[26] Public nuisance has been targeted as a means for states to obtain relief in public health crises, in large part because of its flexibility as a tort. Unlike other torts, public nuisance "revolves around a type of injury rather than a kind of proscribed conduct, and it focuses on the welfare of the general public rather than the rights of an individual plaintiff."[27]

This elasticity has prompted both strong criticism and fervent support. William Prosser "famously disparaged nuisance law as a 'legal garbage can' and stated, 'there is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance." It 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.'"[28] However, plaintiffs such as state attorneys general appear to view public nuisance as an opportunity. Since the focus of public nuisance is different than a private cause of action, "plaintiffs are able to rely on relaxed evidentiary standards on issues that can derail individual plaintiff lawsuits, such as the statute of limitations, or issues regarding duty, breach, causation, and product identification."[29]

This broad modern view of public nuisance is essentially an invitation to courts "based on the presence of one of three very broadly defined 'circumstances,' to decide what constitutes a 'right common to the general public,' and to determine what sort of circumstances represent an 'unreasonable interference' with this right."[30] Given this breadth, and prior success of some public nuisance challenges, plaintiffs continue to use public nuisance in order to challenge "a laundry list of social ills ranging from smoking to handgun violence to climate change."[31]

### *B. Use of Public Nuisance in Public Health Crises*

States have sought relief for a plethora of social ills through public nuisance, with varying levels of success. Perhaps the most notable success story in public nuisance is the mid-1990s lawsuits against manufacturers of tobacco products. Like the opioid lawsuits at issue in this note, challengers of tobacco

25. *Id.*
26. RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. L. INST. 1979).
27. Holder, *supra* note 9, at 34.
28. *Id.*
29. *Id.*
30. Merrill, *supra* note 18, at 4.
31. *Id.*

product manufacturers sought "recovery of state expenditures under Medicaid and related programs for tobacco-related illnesses."[32] Only one court adjudicated the claim that the marketing and distribution of tobacco products was a public nuisance,[33] but the cases were settled in 1998 for the shocking sum of $246 billion.[34]

The significant success of the tobacco lawsuits stimulated further interest in public nuisance lawsuits, among state attorneys general and private tort lawyers alike, to achieve social policy goals while hopefully achieving significant monetary awards (either through damages or, more likely, settlement).[35] There have been subsequent challenges to other public injuries such as firearms, lead paint, gasoline containing MTBE, and most recently, global warming.

Lawsuits against firearms manufacturers saw mixed results. Many courts exhibited concern with expanding the scope of public nuisance and dismissed the challenges. But the Indiana Court of Appeals reached a different conclusion in *City of Gary v. Smith & Wesson Corp.*[36] and affirmed the denial of the defendants' motion to dismiss public nuisance claims.[37] The decades-long *City of Gary* litigation remains ongoing. Gun manufacturers have lost on three motions to dismiss, and on November 26, 2019, the Indiana Supreme Court allowed the case to proceed to discovery against the gun industry.[38] As of April 2021, the case was still live.[39] Thus, it remains to be seen whether firearms manufacturers could be held liable, and how their liability would be allocated.

Lead paint litigation, like firearms, was mostly unsuccessful. But, one lawsuit in California was a notable exception, where plaintiffs obtained a $1.15 billion judgment to pay for the clean-up of lead paint in older California homes.[40] The California assessment of liability would have proven instructive for opioid cases. However, in November of 2017, despite the California trial court's liability finding being upheld by the court of appeals, its amount of liability was not upheld.[41] Following this partial reversal, California reached a

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32. *Id*. at 2.

33. *Id.* (citing Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997) (rejecting public nuisance liability)).

34. *Id*.

35. *Id.*

36. City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222 (Ind. 2003).

37. Gregory Heinen, *How New Public Nuisance Claims Are Targeting Gun Cos.*, JD SUPRA (Sept. 20, 2022), https://www.jdsupra.com/legalnews/how-new-public-nuisance-claims-are-9403918/.

38. City of Gary v. Smith & Wesson, BRADY, (Aug. 30, 1999), https://www.bradyunited.org/legal-case/city-of-gary-v-smith-and-wesson-indiana-supreme-court-gun-lawsuit.

39. *Survivor Story: Decades Old Gary Gun Lawsuit Still Alive in Hammond Court*, CHI. TRIB. (Apr. 30, 2021), https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-gary-straw-sales-court-st-0502-20210430-4f7okc46pbe2pbffqgbhexx4he-story.html.

40. Holder, *supra* note 9, at 35.

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

$305 million settlement agreement,[42] again leaving open the question of liability.

Similarly, lawsuits claiming public nuisance via the sale of gasoline containing the federally approved additive MTBE resulted in settlement.[43] Following consolidation in the Southern District of New York, and rejection by a trial judge of defendants' motion to dismiss, a settlement was reached for $423 million.[44] Public nuisance litigation related to global warming has also ultimately not survived until trial, either due to settlement, dismissal, or other defects.[45]

Ultimately, the overall scope of public nuisance lawsuits has clearly expanded and continues to be applied to various social problems. However, due to the significance of liability in these challenges and the cost of such a lawsuit for defendants, public nuisance claims appear to almost totally result in settlement, or otherwise, dismissal. This limits the available data for how opioid lawsuits could successfully proceed. This background is relevant in predicting both how opioid lawsuits will be treated, as well as considering what a true liability assessment would look like.

## II. OPIOIDS AS A PUBLIC NUISANCE

### *A. Background on Opioids*

In order to understand the complex nature of the opioid epidemic and its involved parties, it is important to first understand what opioids are and how they created a public health crisis of this magnitude. Opioids are "a broad group of pain-relieving drugs that work by interacting with opioid receptors in your cells."[46] But "[w]hat makes opioid medications effective for treating pain also can make them dangerous."[47] When the opioids attach to opioid receptors in your brain cells, they release signals: both muffling the perception of pain and boosting feelings of pleasure.[48] This stifling of pain can be highly addictive, especially when these drugs are used incorrectly.

There are also different forms of opioids: some are available as prescription medications and are FDA-approved, whereas others are illegal. In

42. County of Santa Clara, *California Counties and Cities Announce Groundbreaking $305 Million Settlement of Landmark Lead Paint Litigation*, OFF. OF THE CNTY. COUNS. (July 17, 2019), https://counsel.sccgov.org/sites/g/files/exjcpb426/files/July%2017%2C%202019%20Press%20Release%20-%20Settlement%20of%20Landmark%20Lead%20Paint%20Litigation.pdf.

43. Merrill, *supra* note 18, at 3.

44. *Id.*

45. *Id.* at 1 (citing California v. Gen. Motors Corp., 2007 WL 2726871 (N.D. Cal. 2007); Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011)).

46. Dana Sparks, *What Are Opioids and Why Are They Dangerous?*, MAYO CLINIC (May 1, 2018), https://newsnetwork.mayoclinic.org/discussion/what-are-opioids-and-why-are-they-dangerous/).

47. *Id.*

48. *Id.*

general, opioids are derived in various forms from the opium poppy plant.[49] Morphine is a naturally occurring substance derived from the poppy plant—a natural opium alkaloidc.[50] Prescription pain medication opioids, like Oxycodone (OxyContin) and Hydrocodone (Vidocin), are semisynthetic.[51] They are also derived from the poppy and are regulated. The illegal opioid, heroin, is created using Morphine, but unlike oxycodone and hydrocodone, there is no currently accepted medical use.[52] There is also a form of opioids synthesized in a laboratory.[53] These synthetic opioids include Fentanyl and similar compounds like Carfentanil.[54] Synthetic compounds are fifty to one hundred times more potent than Morphine.[55]

### *B. Creation of a Public Health Crisis*

A major trigger of the spread of the opioid epidemic is thought to be the 1996 release of the prescription painkiller OxyContin onto the market, and its subsequent promotion and marketing campaign. OxyContin, developed by the privately held company Purdue Pharma, is an extended-release form of oxycodone.[56] Despite previous long-standing fear doctors had about the addictive properties of these types of drugs, "Purdue launched OxyContin with a marketing campaign that attempted to counter this attitude and change the prescribing habits of doctors."[57] And it worked. Purdue's promotion of OxyContin resulted in a nearly tenfold increase in OxyContin prescriptions for non-cancer-related types of pain: jumping from about 670,000 in 1997 to about 6.2 million in 2002.[58] OxyContin was hailed as a medical breakthrough with "millions of patients f[inding] the drug to be a vital salve for excruciating pain."[59] However, Purdue's earlier minimization of OxyContin's risk of addiction proved to be a sham. Many patients grew so hooked on the slow-release oxycodone that they experienced debilitating withdrawal.[60] In eastern Kentucky specifically, from 1995 to 2001, there was a 500% increase in the

49. *Id.*

50. Allison M. Hunter, *Opioids and Orthopedics: Where We Are, What We Know, and Where We Are Going*. UNIV. OF ALA. AT BIRMINGHAM HOSPITAL (Feb. 25, 2020).

51. *Id.*

52. *What Are Opioids?*, U.S. DEP'T OF HEALTH AND HUM. SERV. (Aug. 30, 2020), https://www.hhs.gov/opioids/prevention/index.html.

53. Sparks, *supra* note 46.

54. *What Are Opioids?*, *supra* note 52.

55. *Id.*

56. Patrick Radden Keefe, *The Family That Built an Empire of Pain*, NEW YORKER (Oct. 23, 2017), https://www.newyorker.com/magazine/2017/10/30/the-family-that-built-an-empire-of-pain.

57. *Id.* See also Van Zee, *supra* note 6, for an extensive discussion of Purdue Pharma's tactics to market and dissuade fears about prescription opioids.

58. Van Zee, *supra* note 6, at 223.

59. Keefe, *supra* note 56.

60. *Id.*

number of patients entering methadone maintenance treatment programs, about seventy-five percent of whom were OxyContin dependent.[61]

But who is to blame for the devastating addiction that plagues millions? Purdue Pharma, the creator of OxyContin, and its owners, the Sackler family, have been blamed for a significant share of this crisis. Despite many opioid overdoses being the product of opioids other than OxyContin, some argue that "the crisis was initially precipitated by a shift in the culture of prescribing—a shift carefully engineered by Purdue."[62] Although this may be true, the opioid epidemic tells a more complex story of the culpable parties.

Unlike any other public health crisis, the opioid epidemic has multiple layers of parties involved. First, there are the manufacturers of opioids: Purdue Pharma is one of the most significant, but others have been included in lawsuits.[63] Second, there are distributors of opioids. Three distributors in particular "play[ed] a crucial role in getting opioid pills to consumers: Cardinal Health, AmerisourceBergen, and McKesson Corporation."[64] Third, there are retail pharmacies, such as Rite Aid, Walgreens, Walmart, and CVS.[65] And while these three categories encompass some of the more common defendants in opioid lawsuits, plaintiffs have attributed at least some portion of responsibility to other parties as well. This includes doctors charged with over-prescribing opioids, as well as organizations such as the Joint Commission on Accreditation of Health Care Organizations, which published a report on standards of pain management that is "viewed as largely responsible for bringing questions about pain into every routine patient encounter."[66]

### *C. Opioid Lawsuits*

The plethora of possible defendants in opioid lawsuits also means that there are a variety of potential types of lawsuits. The opioid litigation has come in two waves.[67] The first wave of lawsuits began in the early 2000s and primarily targeted Purdue Pharma for its creation of OxyContin.[68] The first suits involved "a wide array of theories including strict products liability, fraud, negligence, breach of implied warranty, conspiracy, and violations of state consumer protection statutes."[69] Overall, plaintiffs were not very successful in these lawsuits. The pharmaceutical defendants took a "no-settlement approach" and were largely able to avoid liability by focusing on the intervening conduct

61. Van Zee, *supra* note 3, at 224.

62. Keefe, *supra* note 56.

63. Gluck et al., *supra* note 12, at 355 ("Purdue Pharma remains a major target but other manufacturers also being sued now include Teva Pharmaceutical, Cephalon Inc, Johnson and Johnson, Janssen Pharmaceuticals Inc, Endo Health Solutions Inc, and Allergan PLC.").

64. *Id.* at 356.

65. *Id*.

66. *Id*.

67. *Id.* at 353.

68. *Id.* at 353–54.

69. *Id.* at 353.

of physicians and plaintiffs themselves.[70] Stigma against addiction also played a significant role in the ability of defendants to avoid liability.[71]

The end of the first wave of victories for pharmaceutical defendants came in 2007 when Purdue Pharma agreed to pay $600 million in fines to the federal government and nearly $20 million to twenty-six states and the District of Columbia, after pleading guilty in a federal suit.[72] The second wave truly began in 2014 when "the perception of a national crisis really began to take hold."[73] Causes of action during the second wave vary because the second wave saw suits against a much wider net of defendants.

Claims against manufacturers include public nuisance, negligence, unjust enrichment; and violations of state consumer protection, racketeering, and Medicaid fraud statutes.[74] But with the shifting of public opinion, and greater data emerging on the true significance and devastation of the opioid epidemic, the focus of these lawsuits began to narrow on public nuisance. As previously mentioned, public nuisance provided a more flexible channel for relief than other torts.[75] Since the political branches did not take necessary steps to abate the crisis, the opioid epidemic became the next social ill to seek relief via public nuisance. This is exhibited by Judge Dan Polster's comments on the consolidated multi-district opioid litigation:

> The federal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government, federal and state, have punted. So it's here. . . . People aren't interested in depositions, and discovery, and trials. People aren't interested in figuring out the answer to interesting legal questions. . . . So my objective is to do something meaningful to abate this crisis and to do it in 2018.[76]

Judge Polster's comments suggest growing public sentiment that the opioid epidemic has gone on far too long and needs to be abated by the courts since the political branches have failed to do so.

### *D. Results of Opioid Lawsuits*

But the overwhelming resolution of the opioid litigation, like other public health litigation, has been via settlement. Either through consolidation of cases under multi-district litigation (MDL) or standard settlement in state court cases, opioid manufacturers and distributors alike have opted to pay hefty settlement fees, rather than take their chances at trial. This choice, of course, is not all that surprising given the tendency of modern American civil cases to settle rather

70. *Id.*
71. *Id.*
72. *Id*.
73. *Id.* at 354.
74. *Id.* at 355.
75. Holder, *supra* note 9, at 34.
76. *Id.*

than take on the ongoing cost and burden of a lawsuit.[77] But it has resulted in significant costs for defendants, as well as plaintiffs. Outside of the financial burdens of settlement, the decision to settle foregoes the potential for greater discovery and information, as well as the vindication of legal rights through a decision on the merits.

Most of the opioid cases were consolidated in federal court under a multi-district litigation umbrella.[78] Although an MDL court "only has the authority to conduct pre-trial discovery and motion practice," in reality, "more than ninety-seven percent of cases before MDL judges settle in the MDL, without returning to their original jurisdiction for a trial."[79]

Other cases have been settled outside of MDL: both in individual states and through coalition settlements. For example, Oklahoma settled its suit against Purdue Pharma for $270 million and Teva Pharmaceuticals for $85 million.[80] In addition, West Virginia settled its suit against McKesson, for $37 million.

In July 2021, a bipartisan coalition of attorneys general announced a $26 billion agreement with Johnson and Johnson, as well as three distributors (McKesson Corporation, Cardinal Health, and AmerisourceBergen).[81] This agreement involved attorneys general from California, Colorado, Connecticut, Delaware, Florida, Georgia, Louisiana, Massachusetts, New York, Ohio, Pennsylvania, and Texas.[82] This includes a settlement with Cuyahoga and Summit counties in Ohio for $260 million to avert a bellwether trial in the MDL.[83] Additionally, "a bipartisan coalition of attorneys general from forty-seven states, the District of Columbia and five U.S. territories, announced a $573 million settlement with one of the world's largest consulting firms, McKinsey & Company, for its role in the opioid epidemic."[84] This settlement resolved the states' investigation into McKinsey's role in advising opioid companies, helping them promote their drugs, and profiting from the opioid epidemic.[85]

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77. *See* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, 101 JUDICATURE 26, 35–36 (2017), https://judicature.duke.edu/wp-content/uploads/2020/06/JUDICATURE101.4-vanishing.pdf (citing Stephen M. Bundy, *Commentary on "Understanding* Pennzoil v. Texaco": *Rational Bargaining and Agency Problems*, 75 VA. L. REV. 335, 337 (1989)) ("Cases that are not voluntarily dismissed or resolved by motion are typically settled, when all parties "believe[] the value of doing so is superior to that of available alternatives.").

78. Holder, *supra* note 9, at 33 (citing *In re: National Prescription Opiate Litigation*, MDL No. 2804).

79. Gluck et al., *supra* note 12, at 359.

80. Rebecca L. Haffajee, *The Public Health Value of Opioid Litigation*, 48 J. L. MED. ETHICS 279, 279 (2009).

81. *Opioids*, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/issues/opioids/ (last visited Feb. 14, 2023).

82. *Id*.

83. Haffajee, *supra* note 80, at 279.

84. *Opioids*, *supra* note 81.

85. *Id*.

Although these sorts of settlements have clearly become the norm in opioid litigation, as in other types of civil litigation, settlement limits the data points available for analysis on *how* these cases could and should actually get resolved through a full judicial process.

One exception to the general tendency of opioid litigation to settle was Oklahoma's lawsuit against Johnson & Johnson. In 2019, it was "the first case against an opioid manufacturer to go to trial out of the more than 2,000 other lawsuits filed around the nation."[86] This trial and judgment was a major win for Oklahoma, as District Judge Thad Balkman ruled in Oklahoma's favor: ordering Johnson & Johnson (and its subsidiaries) to pay $572 million to abate the ongoing opioid epidemic in Oklahoma.[87] However, this judgment was appealed, and ultimately reversed, by the Oklahoma Supreme Court.[88] This reversal was a major blow to states seeking reimbursement for the costs of the opioid epidemic, as well as more generally to the expansion of public nuisance. Contrary to the views of those like Judge Dan Polster, who accept the use of the courts to address social ills, the Oklahoma justices limited the availability of public nuisance as a remedy: rejecting "the misguided and unprecedented expansion of the public nuisance law as a means to regulate the manufacture, marketing, and sale of products, including the Company's prescription opioid medications."[89]

Given the subsequent denial of Oklahoma's damages related to the opioid epidemic, there is even less information on what a successful assessment of liability would look like for public nuisance lawsuits. However, even if the Oklahoma suit had not been reversed, it still would not have been instructive for how to determine the distribution of liability between multiple liable defendants because the lawsuit was only against Johnson and Johnson. Thus, there is a sort of open question on how liability assessment could work in opioid public nuisance lawsuits against multiple defendants. This note argues that market share liability is a feasible theory to fill this gap.

## III. MARKET SHARE LIABILITY

Market share liability is a unique theory of causation in tort law that allocates liability based on the defendants' share of the market for a fungible good when certain other factors are present.[90] The factors required may vary by

86. *Id.*

87. *Attorney General Hunter Celebrates Major Victory for the State after Judge Balkman Issues $572 Million Judgment in Opioid Trial*, OFF. OF THE OKLA. ATT'Y GEN., https://oag.ok.gov/articles/attorney-general-hunter-celebrates-major-victory-state-after-judge-balkman-issues-572 (last visited Feb 14, 2024).

88. Brian Mann, *Oklahoma's Supreme Court Tossed Out a Landmark $465 Million Opioid Ruling*, NPR (Nov. 9, 2021), https://www.npr.org/2021/11/09/1054000996/oklahoma-supreme-court-465-million-opioid-ruling.

89. *Id.*

90. George L. Priest, *Market Share Liability in Personal Injury and Public Nuisance Litigation: An Economic Analysis*, 18 SUP. CT. ECON. REV. 109, 109–10 (2010) ("Market share liability is a doctrine within products liability law that apportions liability against a set of defendants

jurisdiction, but generally, market share liability aims to impose responsibility on defendants who are jointly responsible for the market of a harmful item. This specific theory of liability is distinct from "the traditional and paradigmatic tort principle that assigns liability only with respect to harm that was directly and identifiably caused by a single defendant or multiple defendants."[91] Instead, it permits the assignment of liability where there is difficulty in identifying which defendant was the cause of a particular plaintiff's injury, but where all defendants were responsible for a *market* causing harm to the plaintiff. Thus, market share liability, like other theories of causation such as alternative causation in *Summers v. Tice*,[92] lowers the traditional requirements of causation in tort.

Market share liability is the most recent example in which "courts have encountered recurring situations in which application of the traditional causation rule would lead to unjust results."[93] In its truest form, this theory of causation is limited and only permits the imposition of responsibility on defendants where certain unique circumstances have been met. Originating in a student note,[94] the theory of liability requires that (1) there is a mass market of fungible goods; (2) a plaintiff was hurt through no fault of her own; (3) the group of defendants all did some harm and can spread risk better than the plaintiff can; and (4) there is a signature illness or injury.[95] The original version of the theory also required that a plaintiff bring suit against "a substantial percentage" of the market.[96] The *Sindell* Court declined to require an explicit percentage. This approach viewed the "market" as the local market: "its share of *that* market unless it demonstrates that it could not have made the product which caused plaintiff's injuries."[97]

The theory was first adopted by the California Supreme Court in *Sindell v. Abbott Laboratories*. There, the plaintiff was the daughter of a woman who took diethylstilbesterol (DES): a drug that is a synthetic compound of the female hormone estrogen and was administered to mothers in order to prevent miscarriage.[98] Plaintiff Judith Sindell brought suit against eleven drug companies on behalf of herself and other women similarly situated because DES may have caused cancerous vaginal and cervical growths in the daughters exposed to it before birth. She advocated alternative theories of liability for

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according to their respective market shares of sales of a harmful product during the period that the harm occurred.").

91. *Id.* at 110.

92. 199 P.2d 1 (Cal. 1948).

93. Andrew R. Klein, *Beyond DES: Rejecting the Application of Market Share Liability in Blood Products Litigation*, 68 TUL. L. REV. 883, 885 (1994).

94. *See* Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978).

95. Sindell v. Abbott Lab'ys, 607 P.2d 924 (Cal. 1980).

96. *Id.* at 937 ("While seventy-five to eighty percent of the market is suggested as the requirement by the Fordham Comment . . . , we hold only that a substantial percentage is required.").

97. *Id.* (emphasis added).

98. *Id.* at 925.

these drug companies, as she was unable to determine which of the companies was responsible for the DES taken by her mother.

In *Sindell*, the California Supreme Court adopted market share liability and concluded that "[e]ach defendant w[ould] be held liable for the proportion of the judgment represented by its share of that market unless it demonstrate[d] that it could not have made the product which caused plaintiff's injuries."[99] Despite lacking certainty of which Defendant was responsible for the DES ingested by Plaintiff's mother, the Court was willing to impose liability anyway. This atypical assessment of blame suggests several value judgments for why the Court allowed liability, despite unclear causation.

### *A. Justifications for Market Share Liability*

The idea that a group of defendants is better able to spread the risk than a plaintiff is one of the rationales for market share liability. Risk-spreading is a common justification in tort law and is indicated explicitly in the requirements in *Sindell*. Seen clearly in the context of products liability, "[t]he manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety."[100] Manufacturers are also better able to spread the cost of liability by imposing costs onto the consumer, rather than the entire cost being borne by the individual plaintiff.

In addition, the fairness of market share liability is rationalized because the plaintiff was harmed due to no fault of her own. As seen in *Sindell*, the plaintiff lacked the requisite information to prove which defendant was responsible for the DES taken by her mother. This lack of knowledge was not for lack of trying, but Ms. Sindell did not have the necessary resources to determine who manufactured the DES. As a matter of fundamental fairness, it would be unjust to give the plaintiff no way to recover and defendants the ability to avoid liability simply because the information was difficult to obtain. [101]

Moreover, the idea of market share liability is that, even if some liable defendants did not manufacture the specific drug or product that caused harm for the specific plaintiff, they *could have*. Because the defendants held liable were in fact part of the market at the time of harm, even if they did not cause harm to the plaintiff suing, they certainly could have (and probably did to unknown parties). By this logic, a guilty defendant should not avoid liability simply because his conduct has gone unchallenged. Even further, the theory of liability "measures the likelihood that a defendant supplied the injurious product by the percentage that defendant bears of the entire production of that product

99. *Id.* at 937.

100. Priest, *supra* note 90, at 115.

101. Smith v. Cutter Biological, Inc.,823 P.2d 717, 727 (Haw. 1991) ("[t]he reasoning of *Summers v. Tice*, that between innocent plaintiffs and negligent defendants, the negligent party should be held liable . . . .") (citation omitted).

in the market."[102] Thus, a defendant is only held liable for the likelihood of his specific conduct causing harm.

The rationales for market share liability raise the question of whether they could, or should, apply in the context of other causes of action. Although *Sindell* dealt with a products liability class action, it is possible that the alternative theory of causation would be appropriate in other actions, such as public nuisance. Moreover, following *Sindell*, states have taken various approaches to market share liability—some of which go so far as to alter, or obliterate, the *Sindell* criterion altogether.

### *B. Versions of Market Share Liability*

Overall, there has not been a widespread application of market share liability.[103] This is not that surprising, as the particular conditions and purpose of imposing market share liability would only exist in very specific contexts. But despite the limited use of this theory, the contexts in which it has been used have yielded different versions than the original approach. Jurisdictions have put their own spin on the initial *Sindell* version, with varying levels of praise and criticism. Some courts have loosened the *Sindell* requirements,[104] while others have expanded it so far so as to abandon some of the initial criteria altogether. [105]

For one, the *Sindell* Court initially required that, to recover under a market share theory, the Plaintiff must sue a "substantial share" or "substantial percentage" of the market.[106] The absence of a more specific definition of "substantial" left open room for interpretation. Thus, "[c]riticisms of *Sindell* include the need for a definition of 'substantial share' of the market, in order not to distort the share of liability."[107] Some courts, seemingly acting upon the worst fears of *Sindell*'s critics, abandoned the requirement of a "substantial share" altogether; instead holding that a "'plaintiff need commence suit against only one' manufacturer to maintain a market-share-liability action."[108] This position was also adopted by the Wisconsin Supreme Court in *Collins v. Eli Lilly & Co*.[109]

Courts have also taken different approaches to how to define the "market". In *Sindell*, the California Supreme Court focused on the local market: where

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102. *Id.* at 719.

103. Priest, *supra* note 90, at 110 ("[C]ourts have accepted the concept in principle in a scattering of cases. . . .").

104. *See* Martin v. Abbott Lab'ys., 689 P.2d 368, 382 (Wash. 1984). *See also* Collins v. Eli Lilly Co., 342 N.W.2d 37, 50 (Wis. 1984).

105. *See* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1077–78 (N.Y. 1989). *See also Smith*, 823 P.2d at 728.

106. Sindell v. Abbott Lab'ys, 607 P.2d 924, 937 (Cal. 1980) ("While seventy-five to eighty percent of the market is suggested as the requirement by the Fordham Comment . . . , we hold only that a substantial percentage is required.").

107. *Smith*, 823 P.2d at 728 (citing *Martin*, 689 P.2d at 381).

108. Klein, *supra* note 93, at 901–02 (citing *Martin,* 689 P.2d at 382).

109. *Collins*, 342 N.W.2d at 50.

defendants could have actually harmed the plaintiff in question. Following *Sindell*, there appear to be two primary approaches accepted by courts. The first, as seen in *Sindell*, and later *Martin v. Abbott Laboratories*, adopts "a narrow definition of the market, that being the plaintiff's particular geographic market."[110] The justification for this limit on the market is that "the narrow market share purports to make a 'particular defendant's potential liability . . . proportional to the probability that it caused plaintiff's injury.'"[111] This more limited approach to the market makes it more likely that a defendant's liability is for conduct for which it actually could have been responsible.

The second approach "has specifically adopted the national market as the best option."[112] The rationale for making the market national in *Hymowitz* was threefold: it was difficult to reliably determine any market smaller than the national one, it avoided the need to establish separate matrices as to market share, and it avoided an unfair burden on litigants.[113] Using a national market "apportion[s] liability so as to correspond to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large."[114] In sum, this view assesses culpability for marketing a product and cares little about the likelihood that the defendants harmed the particular plaintiff. This approach was also adopted by the Court in *Smith v. Cutter Biological*.[115]

This second approach, as seen in *Hymowitz*, is distinct from *Sindell* in a key way: it imposes conclusive responsibility on a defendant, regardless of whether the defendant can prove it was not possibly responsible for the particular plaintiff's harm. Contrary to the *Sindell* rule, which permitted defendants to escape liability by demonstrating they were not responsible,[116] the version of liability adopted in New York in *Hymowitz*[117] chooses "to apportion liability so as to correspond to the overall culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large."[118]

As the *Sindell* requirements have been relaxed by other courts, the only apparent remaining requirement is the "uniform nature of the instrumentality causing the plaintiff's harm."[119] Even the *Hymowitz* Court stressed that "the

110. *Smith*, 823 P.2d at 728 (citing *Martin*, 689 P.2d at 382).

111. *Id.* (citing *Martin,* 689 P.2d at 382).

112. *Id.* (citing Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1077 (N.Y. 1989)).

113. *Id.* (citing *Hymowitz*, 539 N.E.2d at 1077).

114. *Id.* (citing *Hymowitz*, 539 N.E.2d at 1078).

115. *Id.*

116. Sindell v. Abbott Lab'ys, 607 P.2d 924, 937 (Cal. 1980) ("Each defendant will be held liable for the proportion of the judgment represented by its share of that market *unless it demonstrates that it could not have made the product which caused plaintiff's injuries*.") (emphasis added).

117. *Hymowitz*, 539 N.E.2d at 1077.

118. DES Daughter, *Market Share Liability New York Style: Negligence in the Air*, DIETHYLSTILBESTROL DES (July 13, 2016), https://diethylstilbestrol.co.uk/market-share-liability-new-york-style-negligence-in-the-air/.

119. Klein, *supra* note 93, at 905.

DES situation is a singular case, with manufacturers acting in a parallel manner to produce an identical, generically marketed product, which causes injury many years later."[120] In fact, many supporters of the *Hymowitz* decision believed that market share liability would be specific to DES.[121]

Despite this expectation, "courts have accepted the concept in principle in a scattering of cases involving mineral spirits; DPT vaccines; blood clotting agents; asbestos brake pads; MBTE, a gasoline additive; airplane aluminum beverage carts; and rowing exercise machines."[122] But even with extension of the doctrine to other products, it seems that "courts have found that there are very few products that share the product-and market-characteristics of DES—in particular, that all units of the product are identically harmful—and, therefore, have adopted market share liability in very small fraction of cases in which it has been proposed."[123]

However, with the expansion of market share liability outside of the DES arena, some argue that the identical harm requirement is being eroded.[124] In the context of blood clotting agents, the Hawai'i Supreme Court found sufficient fungibility[125] of coagulation factor VIII, "the protein that is deficient or defective in patients with classical hemophilia and Von Willebrand syndrome."[126] The *Smith* Court recognized that Factor VIII—despite being "fungible insofar as it can be used interchangeably"—"does not have the constant quality of DES."[127] The primary difference between the two products is that DES was inherently harmful, where Factor VIII only became harmful when the "donor was infected" with HIV.[128]

Despite this difference in *Smith*, the Court was not convinced that Factor VIII should be treated differently from DES, specifically citing defendants' alleged breaches of "the lack of screening of donors and failure to warn."[129] Additionally, the Court noted the "continually expanding field" of tort law as justification for market share liability in this case. The Hawai'i high court opined on the particular need for expansion of liability in "mass tort" cases:

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120. *Hymowitz*, 539 N.E.2d at 1075.

121. Klein, *supra* note 93, at 887 ("However, even *Hymowitz* supporters believed that courts would limit extension of the decision to DES cases.").

122. Priest, *supra* note 90, at 110 (citation omitted). *Id*. at 110 n.4. (noting that in most contexts, it is the ultimate appellate court considering the issue on either a motion for summary judgment or a motion to dismiss, thus accepting the possibility of application while remanding the case to trial for actual implementation). Priest "found no comprehensive reporting of the extent to which trial courts have actually employed the concept in determining verdicts." *Id*.

123. Priest, *supra* note 90, at 110.

124. Klein, *supra* note 93, at 922 ("Perhaps the most fundamental reason that blood products do not lend themselves to market share liability is that blood products are not uniform.").

125. Smith v. Cutter Biological, Inc., a Div. of Miles Inc., 823 P.2d 717, 724 (Haw. 1991).

126. Stephen I. Chavin, *Factor VIII: Structure and Function in Blood Clotting*, 16 AM. J. HEMATOLOGY 297, 297 (1984).

127. *Smith*, 823 P.2d at 724.

128. *Id.*

129. *Id.*

> No longer can we apply traditional rules of negligence, such as those used in individual and low level negligence to mass tort cases, especially here, where we are dealing with a pharmaceutical industry that dispenses drugs on a wide scale that could cause massive injuries to the public, and where fungibility makes the strict requirements difficult to meet. The problem calls for adopting new rules of causation, for otherwise innocent plaintiffs would be left without a remedy.[130]

Another instance where the fungibility requirement was less stringent was in *Thomas ex rel. Gramling v. Mallett*.[131] There, the "Wisconsin Supreme Court applied the Wisconsin version of market share liability to allow recovery by a child who claimed to have been injured from the ingestion of white lead paint chips or lead paint dust."[132] It is especially notable for its discussion about fungibility: the seemingly last pure requirement of *Sindell* not yet altered.

The *Thomas* Court noted that "[w]hile 'fungibility' [has] become an obsession for courts discussing market share liability, no court has ever explained thoroughly what 'fungibility' means or why it is important."[133] The Wisconsin Supreme Court agreed that a product can be fungible in at least three different senses: by being functionally interchangeable, physically indistinguishable, or where there is a uniformity of risk. Although the lead paint at issue in *Thomas* was chemically identical, the Court found it did not have to be in order to be fungible: "[i]t is the common denominator in the various white lead carbonate formulas that matters; namely, lead."[134]

*Thomas* was later abrogated by a Wisconsin statute,[135] the constitutionality of which was later challenged.[136] Given the determined unconstitutionality of the statute, *Thomas* is arguably good law. Reliance on the case may best be measured, due to demonstrated legislative disfavor. However, for purposes of considering an expansion of market share liability to opioids, the Wisconsin Supreme Court's analysis and application are instructive as to whether this liability theory could be appropriate in the context of other public health crises.

In sum, states have taken their own approaches to the use of market share liability. Some have denied application of the theory altogether, citing that "[a]cceptance of market share liability and the concomitant burden placed on the courts and the parties will imprudently bog down the judiciary in an almost

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130. *Id.*

131. Thomas ex rel. Gramling v. Mallet, 701 N.W.2d 523 (Wis. 2005).

132. Priest, *supra* note 90, at 112 (citation omitted).

133. *Thomas,* 701 N.W.2d at 560 (citing Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L. REV. 151, 163 (2004)).

134. *Thomas,* 701 N.W.2d at 562.

135. Clark ex rel. Gramling v. Am. Cyanamid Co., No. 2014AP775, 2015 WL 5684280, at *2 (Wis. Ct. App. Sept. 29, 2015) ("[T]he legislature's enactment of WIS. STAT. § 895.046 (2011–12), which abrogated *Thomas* prospectively as of February 1, 2011.")

136. State Farm Fire and Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964 (W.D. Wis. 2019).

futile endeavor."[137] But many others have opted for more expansive versions of market share liability, including some who have developed an entirely new approach to the theory: encompassing more defendants and more conduct than anticipated in *Sindell*.

The diverging approaches demonstrate a tension of interests in these cases. The competing interests of plaintiffs and defendants require serious consideration of the public policy implications of expanding or limiting this area of tort law. On one hand, the desire to compensate innocent plaintiffs, harmed due to no fault of their own, justifies expanding market share liability. However, there are legitimate objections to this expansion of market share liability.

For one, market share liability, in its original form, was already an expansion of traditional tort doctrine. Market share loosens traditional causation by holding defendants who *could have* caused a harm rather than "harm that was directly and identifiably caused by a single defendant or multiple defendants."[138] It functions as an exception to "the tenet of tort law that an 'individual is responsible for *all* he does, but for *only* what he does.'"[139] Despite the previously discussed rationales for this expansion, many argue that applying market share, and especially expanding it even further, too greatly undermine the causation principle of tort law. Without greater certainty that a defendant was the cause of plaintiff's harm, it is argued, liability commits a grave injustice against defendants.

In addition, the use of this theory to go after wealthy, corporate defendants creates concern for unjust wealth distribution. The use and expansion of market share liability has been against large companies either making or distributing products. Market share functions because it targets a group of defendants who dominate the market, and with this domination comes large amounts of wealth. Opposition to market share liability is also justified by the concern that the theory only applies to take wealth from these large companies.

In total, there are strong debates on both sides. Courts can, and do, come to reasonable determinations on both sides of the spectrum. The decision to use or not use market share liability ultimately comes down to a court's priority in cases with severe harm but unclear causation: whether to give injured plaintiffs a course for compensation, or to stringently impose causation requirements to protect defendants from unwarranted liability. But undoubtedly in an ever-expanding, advanced society, new products and innovations inevitably cause harm. Courts will continue to face questions of how to resolve these social ills.

### *C. Extending Market Share Liability to Opioids*

One area in which courts could apply market share liability is the opioid epidemic. As previously mentioned, the large majority of opioid cases have resulted in settlement or dismissal. The lone case surviving to trial ultimately

137. Smith v. Eli Lilly & Co., 560 N.E.2d 324, 338 (Ill. 1990).

138. Priest, *supra* note 90, at 110.

139. Klein, *supra* note 93, at 892 (citation omitted).

was reversed on appeal and then settled.[140] Perhaps market share liability could offer a fairer way to allocate liability related to the opioid epidemic, since defendants are already in the pattern of making a "deal" via settlement. However, this application of market share would be particularly unique because the opioid litigation has largely consisted of public nuisance lawsuits. Given the already debatable use of public nuisance and its flexibility as a tort, applying market share might be a bridge too far from the traditional aims of tort law. The following analysis will evaluate the feasibility and optimality of using market share theory to allocate liability in opioid public nuisance lawsuits.

In order for this combination of doctrines to be possible, opioid public nuisance lawsuits must satisfy the market share liability criterion, as set out in *Sindell*. In the alternative, courts could apply an altered version of market share, as adopted by other jurisdictions.[141] Therefore, the subsequent discussion will consider both *Sindell* and its variants, as applied to opioids.

1. Mass Market of Fungible Goods

The first requirement of *Sindell*, a mass market of fungible goods, arguably exists for opioids. However, this conclusion is in part dependent on the working definition of fungibility. The "mass market" aspect of the requirement is not seriously in question. For comparison, *Sindell* found there was a mass market for DES: "An estimated five to ten million U.S. citizens received diethylstilbestrol during pregnancy or were exposed to the drug *in utero* from the 1940s to the 1970s."[142] In contrast, the total number of prescriptions of opioids in the United States in 2006 alone was 215.9 million.[143] This number increased annually up until 2012, reaching its height at 255.2 million.[144] In fourteen years (2006–2020), prescriptions exceeded three billion in the United States,[145] undoubtedly reaching "mass market" status in comparison to diethylstilbestrol's five to ten million in thirty years.

The fungibility of opioids is more difficult to determine because "opioid" is a sort of catchall term to encompass several different types of drugs, derived from the same poppy plant. As previously mentioned, there are natural opium alkaloids such as Morphine, semisynthetic opioids—including prescription pain medications like oxycodone (OxyContin) and hydrocodone (Vidocin) and illegal semisynthetic opioids like heroin—and there are synthetic opioids, which

140. Mann, *supra* note 88.

141. *See e.g.*, Martin v. Abbott Lab'ys, 689 P.2d 368 (Wash. 1984); Collins v. Eli Lilly Co., 342 N.W.2d 37 (Wis. 1984); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989); Smith v. Cutter Biological, Inc., 823 P.2d 717 (Haw. 1991).

142. INT'L AGENCY FOR RSCH. ON CANCER, PHARMACEUTICALS: A REVIEW OF HUMAN CARCINOGENS 176 (2012), https://www.ncbi.nlm.nih.gov/books/NBK304334/pdf/Bookshelf_NBK304334.pdf (citing Ruthann M. Giusti et. al., *Diethylstilbestrol Revisited: A Review of the Long-Term Health Effects*, 122 ANNALS OF INTERNAL MED. 778 (May 1995)).

143. *See Drug Overdose: U.S. Opioid Dispensing Rate Maps*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 11, 2023), https://www.cdc.gov/drugoverdose/rxrate-maps/index.html.

144. *Id.*

145. *Id.*

include variations in potency: fentanyl being one more potent form.[146] The wide variety of drugs containing opium makes it particularly difficult to narrow in on a definition of the "opioid epidemic."

Reference to the opioid epidemic "specifically refers to the growing number of deaths and hospitalizations from [o]pioids, including both prescription and illicit drugs."[147] However, the sheer prevalence of prescription opioids due to over-prescription is typically understood to be a primary cause of the epidemic. Many individuals who were prescribed semisynthetic opioids developed such severe addiction that they then introduced even more potent and dangerous opioids: "[o]f those who began abusing opioids in the 2000s, seventy-five percent reported that their first opioid was a prescription drug."[148] In particular, the targeted marketing campaign by Purdue Pharma upon its launch of OxyContin is cited as an exacerbating cause of OxyContin's widespread abuse.[149]

Because of the complexity and breadth of what is labeled the "opioid epidemic," this article's analysis will focus on the fungibility of prescription opioids, given the evidence of prescription opioids as a gateway to further opioid abuse.[150] Moreover, since the targeted defendants in opioid lawsuits control the "market" of prescription opioids, it is only rational to constrain the market definition to prescription opioids.

Specifically, the Centers for Disease Control and Prevention designates methadone, oxycodone (such as OxyContin), and hydrocodone (such as Vicodin) as the "most common drugs involved in prescription opioid overdose deaths."[151] Therefore, this analysis will focus on the fungibility of these drugs in order to determine whether market share liability could be appropriate in opioid litigation. Even among these three prescription opioids, and their variants, there are differences. The key inquiry is whether these drugs are still effectively fungible. However, the answer to this question depends on the operating definition of fungibility, and whether the opioids must be fungible among each other, or just as between variants of each type.

As previously discussed, the original requirements of market share liability, as seen in *Sindell*,[152] have been altered and expanded by subsequent

146. *See* Hunter, *supra* note 50. *See also* Sparks, *supra* note 46.

147. Cooper Smith, *The Opioid Epidemic*, ADDICTION CTR. (Oct. 30, 2023), https://www.addictioncenter.com/opiates/opioid-epidemic/.

148. *Prescription Opioids and Heroin Research Report: Prescription Opioid Use Is a Risk Factor for Heroin Use*, NAT'L INST. ON DRUG ABUSE (Oct. 1, 2015), https://nida.nih.gov/publications/research-reports/prescription-opioids-heroin/prescription-opioid-use-risk-factor-heroin-use (citing Stephen E. Lankenau et al., *Initiation into Prescription Opioid Misuse Among Young Injection Drug Users*, 23 INT'L J. DRUG POL'Y 37 (2012)).

149. Keefe, *supra* note 56 ("By 2003, the Drug Enforcement Administration had found that Purdue's 'aggressive methods' had 'very much exacerbated OxyContin's widespread abuse.").

150. *See* Lankenau et al., *supra* note 148, at 37; *see also* Smith, *supra* note 147.

151. *Prescription Opioids*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 29, 2017), https://www.cdc.gov/opioids/basics/prescribed.html.

152. Sindell v. Abbott Lab'ys, 607 P.2d 924 (Cal. 1980).

cases.[153] Variations in the definition of "fungible" may make a difference in whether prescription opioids can be classified as such. However, prescription opioids arguably even fall within the *Sindell* version of fungibility.

The *Sindell* version of fungibility focuses on the "common and mutually agreed upon formula," which allowed "pharmacists to treat the drug as a 'fungible commodity' and to fill prescriptions from whatever brand of DES they had on hand at the time."[154] The California Supreme Court rationalized that because brands of DES were "interchangeable with other brands of the same product[,] defendants knew or should have known that it was customary for doctors to prescribe the drug by its generic name rather than its brand name and that pharmacists filled prescriptions from whatever brand of the drug happened to be in stock."[155]

This view of fungibility should apply to prescription opioids despite there being multiple types of opioids at issue in these lawsuits. Because the most common prescription opioids—methadone, oxycodone, and hydrocodone—all represent the generic prescription drug and each has respective brand name versions, they too are interchangeable. Methadone is fungible in its various forms: its brand name equivalents could easily be prescribed in its place. "There are no clinical differences between the various types or brands of methadone. All versions use the same active ingredient and carry the same methadone side effects and methadone drug interactions."[156]

Hydrocodone is slightly more complicated but is arguably still fungible. Products containing hydrocodone also typically contain at least one other medication, known as hydrocodone combination products. However, these products should still be considered fungible for purposes of market share liability because it is the presence of hydrocodone that creates risks in each of these combination products. This danger exists, regardless of what the other included medications are, as evidenced by "hydrocodone combination products" being classified jointly as a Schedule II drug by the Drug Enforcement Administration.[157]

The same is true of oxycodone. Oxycodone is marketed in combination products such as Percodan and Roxicet.[158] However, oxycodone is also marketed alone as OxyContin, an extended-release version of oxycodone, developed and marketed by Purdue Pharma.[159] For the same reason that hydrocodone combination products should be considered fungible, so should

153. *See e.g.*, Martin v. Abbott Lab'ys., 689 P.2d 368 (Wash. 1984); *see also* Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis. 1984); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989); Smith v. Cutter Biological, Inc.,823 P.2d 717 (Haw. 1991).

154. *Sindell*, 607 P.2d at 932.

155. *Id.* at 926.

156. Abid Nazeer, *Types and Brands of Methadone (Methadose, Dolophine)*, SYMETRIA RECOVERY (Mar. 1, 2023), https://www.symetriarecovery.com/blog/brands-of-methadone/.

157. *Hydrocodone Combination Products Now DEA Schedule II Drugs*, N.M. DEP'T OF HEALTH (Oct. 6, 2014), https://www.nmhealth.org/news/information/2014/10/?view=154.

158. *Oxycodone*, DEP'T OF JUST. & DRUG ENF'T ADMIN. (Apr. 2020), https://www.dea.gov/sites/default/files/2020-06/Oxycodone-2020_0.pdf.

159. Keefe, *supra* note 56.

oxycodone combination products. It is the presence of oxycodone that generates a risk to users. OxyContin, Purdue Pharma's 1996 innovation, is slightly different. However, it should still be considered fungible.

Although it only contains oxycodone, the key difference with OxyContin is its extended-release capability. Rather than oxycodone, which is the generic, immediate-release form of the drug, OxyContin is a brand name version of the extended-release of oxycodone.[160] They both bind to receptors to block pain signals and stop pain, they are both used to treat moderate to severe pain, and the side effects are very similar.[161] The difference, in theory, is that immediate-release oxycodone is used for short-term treatment, such as after a surgery or severe injury, whereas extended-release OxyContin is thought to be a more long-term treatment associated with the last stages of chronic diseases.[162]

Despite this characterization of OxyContin as serving a different type of pain, oxycodone (including OxyContin) should still be viewed as fungible. The primary ingredient in OxyContin is oxycodone; the only real difference is the timing of when the medication is released in a user's body. In theory, since both aim to treat moderate to severe pain, they could very well be interchangeable for different types of moderate to severe pain. If anything, this is demonstrated by the over-prescription of OxyContin and its contribution to the opioid epidemic. The marketing strategy employed by Purdue Pharma specifically aimed to "'broaden' the use of OxyContin for pain management."[163] In fact, "[a] 1995 memo sent to the launch team emphasized that the company did 'not want to niche' OxyContin just for cancer pain."[164] Seemingly, any difference in prescription practice for oxycodone and OxyContin was intentionally undermined by Purdue Pharma, in an effort to profit off of patients who were 'opioid naïve.'"[165]

In summary, prescription opioids should be viewed as fungible under the *Sindell* version of fungibility because each version (methadone, hydrocodone, and oxycodone) is, for all intents and purposes, interchangeable with various brandings of their substance. However, even if a court or critic would require a stricter finding of fungibility among these different types of opioids, the fungibility tests seen in other cases would support general opioid fungibility.

In *Thomas ex rel. Gramling v. Mallett*, the Wisconsin Supreme Court enumerated at least three different senses in which a product could be fungible: by being functionally interchangeable, physically indistinguishable, or where there is a uniformity of risk. The lead paint at issue in *Thomas* was found to be fungible not because of its chemically identical nature, but because of the common denominator of lead being present in each instance. Because lead is

160. Alan Carter, *Oxycodone vs. OxyContin*, HEALTHLINE (Sept. 2, 2018), https://www.healthline.com/health/pain-relief/oxycodone-vs-oxycontin.

161. *Id.*

162. *Id.*

163. Keefe, *supra* note 56.

164. *Id.*

165. *Id.*

dangerous, its presence in the paint created a uniform danger of lead exposure, regardless of how high the concentration of lead was in each instance.[166]

This uniformity of risk approach to fungibility offers a natural comparison to prescription opioids. Methadone, hydrocodone, and oxycodone, as well as all their variants, have a uniform risk: addiction.[167] Even if these opioids are combination products, the danger of their usage comes from the presence of semisynthetic opioids, and the addiction associated with these drugs. The presence of opioids, like the presence of lead in *Thomas*, supports a finding of fungibility.

Moreover, in *Smith v. Cutter Biological*, although the Factor VIII at issue was chemically identical, the blood clotting agent was not itself dangerous; it only became harmful when the "donor was infected" with HIV.[168] The Factor VIII at issue in *Smith* was not inherently dangerous, yet the Hawai'i Supreme Court still determined it was fungible. In rationalizing its holding, the Court advocated for the expansion of tort law in more cases. Particularly, the *Smith* Court noted the importance of this expansion in the context of mass court cases, especially "where we are dealing with a pharmaceutical industry that dispenses drugs on a wide scale that could cause massive injuries to the public, and where fungibility makes the strict requirements difficult to meet."[169]

Here, unlike *Smith*, opioids *are* inherently dangerous. The risk of addiction is not merely a cursory warning label slapped on to absolve its producer of liability. The opioid crisis is clear proof of the hazards of opioid addiction. Moreover, *Smith*'s elaboration on the reasons to expand tort law resonates soundly for opioids: "a pharmaceutical industry that dispenses drugs on a wide scale that could [and did] cause massive injuries to the public."[170]

In sum, the prescription opioids blamed for the opioid epidemic should be considered fungible for purposes of market share liability. The multifaceted nature of these drugs, including their names, components, and purposes certainly makes fungibility analysis more difficult than in other market share cases. However, each type of prescription opioid is arguably interchangeable among its brand name and various versions. Further, even if fungibility requires that all products at issue be fungible with each other, prescription opioids possess the same uniformity of harm, and thus, they should be treated as fungible.

2. Plaintiff Was Hurt Through No Fault of Her Own

Next, the second *Sindell* requirement, that a plaintiff was harmed due to no fault of her own, is easily satisfied. This prong is met because the plaintiffs in public nuisance lawsuits are state attorneys general, on behalf of their state. As previously discussed, the unique nature of public nuisance permits states to

166. Thomas ex rel. Gramling v. Mallet, 701 N.W.2d 523, 560–61 (Wis. 2005).

167. *See Opioid Abuse*, AM. SOC'Y OF ANESTHESIOLOGISTS, https://www.asahq.org/madeforthismoment/pain-management/opioid-treatment/opioid-abuse/.

168. Smith v. Cutter Biological, Inc., 823 P.2d 717, 724 (Haw. 1991).

169. *Id.* (alteration in original).

170. *Id.*

recover for harms to the public. And although some may argue that state governments should have done more to combat the opioid crisis after its inception, there are no meritorious arguments that state governments were responsible for the harm.

Outside of a far-fetched argument that state governments brought on themselves the governmental costs for medical care, treatment, and law enforcement to protect its citizens, there is no legitimate case that the costs of the opioid crisis are the fault of state governments. Thus, opioid public nuisance lawsuits satisfy the requirement that a plaintiff was harmed through no fault of her own.

3. Group of Defendants All Did Some Harm

Satisfaction of the third *Sindell* requirement—that the group of defendants all did some harm—depends first on which defendants are targeted by the opioid litigation. Additionally, the satisfaction of this requirement also depends on what is meant by "harm." The scope of these definitions has major public policy implications for liability.

Based on the waves of opioid lawsuits thus far, the primary targeted defendants have been opioid manufacturers, distributors, and retail pharmacies.[171] Each of these groups obviously played some role in the acquisition, use, and subsequent addiction of the three million United States citizens worldwide who "have had or currently suffer from opioid use disorder (OUD)."[172] Therefore, if one takes a barebones reading of "all did *some* harm," the fact of harm stemming from conduct of these defendants is clear. Each of these types of defendants played *a* part in enabling greater societal access to these highly addictive medications.

However, the benefit of market share liability here, as well as its downside, is that traditional tort causation is not required. Plaintiff does not have to prove that Defendant was the actual and proximate cause of her harm. Rather, she just must show that the group of defendants all did some sort of harm. Particularly in the context of opioids, this seems like a significant departure from how the law normally imposes liability because of the multiple layers of involved parties. To hold parties involved in the opioid crisis liable is to impose liability at every step of opioid manufacture and distribution: a long causal chain saturated with highly wealthy corporations. There are strong arguments that this breadth of liability goes too far beyond the aims of tort law. But whether liability here is outside of the appropriate scope of tort law depends at least in part on which approach to defining the defendant's "market" a court takes.

The traditional *Sindell* version, as replicated in *Martin v. Abbott Laboratories*,[173] defines the "market" to be the local market (i.e., holding liable only those defendants who could *actually* have harmed the particular plaintiff

171. Gluck et al., *supra* note 12, at 8–9.

172. Mohammadreza Azadfard et al., *Opioid Addiction*, STATPEARLS (Jan. 2022), https://www.ncbi.nlm.nih.gov/books/NBK448203/.

173. Martin v. Abbott Lab'ys., 689 P.2d 368, 382 (Wash. 1984).

at the specific time and place she was harmed). Under this version, defendants could escape liability by demonstrating they were not responsible for the particular harm. Alternatively, the approach by the *Hymowitz* and *Smith* courts assessed liability based on the national market by imposing conclusive responsibility on a defendant, regardless of whether the defendant can prove it was not possibly responsible for the particular plaintiff's harm.

If applying the traditional local market understanding to opioids, defendant liability is arguably fairer because defendants have the opportunity to prove they were not responsible for the harm in question. Still, these defendants would be held responsible for being a link in a long chain of harm. But this liability would at least be limited to harm defendants metaphysically could have caused.

Although the national market approach is more extreme, it too has its justifications. Given the insidious nature of the opioid crisis—the number of people harmed, the level of devastation, and the proven knowledge of harm of at least some defendants—[174] the desire for accountability does not fall on deaf ears.

Moreover, fairness here could depend on whether plaintiffs bring suit against a "substantial share of the market," as required in *Sindell*.[175] *Sindell* used the criteria of "substantial share," but other courts[176] have abandoned it by only requiring that plaintiff bring suit against one defendant. One could argue that market share liability aims to compensate the *market* of defendants, and that only targeting a single defendant does not achieve the purpose of this liability theory. This could be seen as unfairly saddling one or only a couple of defendants with the liability of a much larger scheme of wrongdoing: effectively treating the liable defendant(s) as a scapegoat.

However, in the reverse, one could argue that a defendant who participated in wrongdoing within a mass market should be held liable regardless, particularly because the nature of mass market sales inhibits tracking causation and other evidentiary concerns. Since it is both expensive and difficult, if not impossible, to obtain discovery on which defendants created the specific harmful good, arguably a defendant should still be held liable.

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174. *See* Keefe, *supra* note 56 (discussing internal documents from Purdue Pharma that indicate not only the company's awareness of the addictive nature of OxyContin, but a desire to exploit those uninformed about this danger) ("According to internal documents, Purdue officials discovered that many doctors wrongly assumed that oxycodone was *less* potent than [M]orphine—a misconception that the company exploited."). *Id.* ("'What Purdue did really well was target physicians, like general practitioners, who were not pain specialists.' In its internal literature, Purdue similarly spoke of reaching patients who were 'opioid naïve.'"). *Id.* (describing the Purdue practice to overcome objections about opioids from doctors) ("[Purdue Pharma sales rep, May,] presented them with studies and literature provided by other physicians. Purdue had a speakers' bureau, and it paid several thousand clinicians to attend medical conferences and deliver presentations about the merits of the drug. Doctors were offered all-expenses-paid trips to pain-management seminars in places like Boca Raton."). *Id.*

175. Sindell v. Abbott Lab'ys, 607 P.2d 924 (Cal. 1980).

176. *See Martin*, 689 P.2d at 382; *see also* Collins v. Eli Lilly & Co., 342 N.W.2d 37, 50 (Wis. 1984).

Here, the likelihood of a government plaintiff bringing suit against only one or a low number of opioid defendants seems low. The significance of the harm, public knowledge of the identity of the involved defendants, and level of sophistication of government plaintiffs' information capabilities suggest that opioid lawsuits would have a "substantial share" of the market brought as defendants.

Overall, the requirement that the group of defendants all did *some* harm is likely met for the traditional targets of opioid lawsuits: manufacturers and distributors. Given the relatively low burden, it would not be hard to argue that all of these parties played a role in the creation, marketing, or distribution of harmful, highly addictive substances to the public.

But this prong of the analysis in particular raises fundamental questions about the fairness of liability here. For one, questions of fairness are raised because of the inability to determine causation in this case. Regardless of whether the "market" is defined as the local or national market, both leave open possibilities of defendants being liable for harm they did not cause (though a national market definition does this to a much larger extent). But for another, liability in opioid cases is particularly difficult to determine because of the numerous types of involved parties. Metrics for damages calculations would be highly complex when analyzing market share in each context for manufacturers and distributors. Moreover, it is possible, and likely, that the different types of defendants had different levels of knowledge and culpability. This calculus is essentially impossible, and thus, leaves it to the subjectivity of the jury.

Finally, another factor in the fairness analysis is the nature of *who* the defendants are. Large, sophisticated companies are the targeted defendants in opioid lawsuits as well as virtually all public nuisance lawsuits.[177] Though this would not be the first time that wealthy corporations are targeted by litigation, these lawsuits should be viewed critically to ensure that liability is not arbitrarily expanded, just by nature of the identity of the defendant. Tort law aims to compensate for the *harm done*, and should not increase a plaintiff's recovery simply because a defendant has deeper pockets.

However, even given these concerns for fairness to the defendant, the plain language of this prong—that "the group of defendants all did some harm"—is satisfied by opioid manufacturers, distributors, and pharmacies. Each type of defendant, in performing their role in the various stages of opioid manufacture and distribution, played a part in the harm caused to opioid users, and in turn, government plaintiffs.

4. Signature Illness or Injury

Finally, the requirement that a plaintiff have a signature illness or injury has an unusual application to government plaintiffs. But arguably, the signature nature of the harm remains.

177. *See* Gluck et al., *supra* note 12, at 8 (discussing the defendants involved in opioid litigation, including manufacturers like Purdue Pharma, distributors like McKesson, and retail pharmacies like CVS); *see also* Holder, *supra* note 9 (discussing public nuisance lawsuits against large companies such as firearms and lead paint manufacturers).

Unlike *Sindell*'s product liability claim, an action for public nuisance seeks recovery for the harm done to the government. This harm is an amalgamation of costs imposed on the government, due to the harm committed by defendants. In the context of opioids, this harm includes "governmental costs of medical care, drug treatment, and law enforcement associated with the opioid epidemic . . . ."[178] And more generally, the harm to the state is the widespread addiction and overdose of its citizens.

Perhaps one could argue that the diversity of these costs on the government is too great to satisfy "signature illness or injury." However, this harm done to the government is interrelated in an important way: the harm is entirely financial. Whether for greater police presence or hospital bills, state governments have been burdened with significant monetary responsibility as a consequence of the opioid epidemic. The signature injury is money shelled out by the government. Despite being for different purposes, the funds spent by states as a result of the opioid crisis should be a consistent enough harm to satisfy this prong of analysis.

### *D. Public Policy Implications*

The foregoing analysis demonstrates how opioid public nuisance lawsuits could satisfy the market share liability criteria, as seen in *Sindell*. However, even if the opioid litigation does not satisfy the *Sindell* criterion, the variations on market share liability seen in other jurisdictions suggest that a court could also expand the market share liability criterion here.

The ultimate question though is whether a court *should*, as a matter of public policy, extend market share liability to the opioid public nuisance lawsuits. The prevailing trend in these cases has been settlement and often for massive sums.[179] Perhaps this practice should continue, and courts would prefer to allow parties to make a deal based on the risks and costs of proceeding to trial. This would not be surprising given the modern trend for settlement across civil litigation.[180]

However, there is a strong argument that using market share liability is a better avenue for opioid lawsuits. Market share liability is a superior method of liability allocation to settlement because the settlement sums seen in the opioid context do not even scratch the surface of the economic harm caused by the opioid crisis.

For example, a recent West Virginia settlement with Walgreens brings the total dollars the state has "brought in from opioid litigation to more than $950 million."[181] West Virginia has only one more remaining opioid case pending,

178. Holder, *supra* note 9, at 33.

179. *See* Haffajee, *supra* note 80 (discussing settlement agreements in Ohio, Oklahoma, and West Virginia).

180. *See* Smith, *supra* note 77.

181. Leah Willingham, *West Virginia Announces $83 Million Opioid Settlement with Walgreens*, USA TODAY (Jan. 18, 2023), https://www.usatoday.com/story/news/nation/ 2023/01/ 18/walgreens-west-virginia-opioid-settlement/11075082002/.

which is scheduled to go to trial in June.[182] In contrast to the funds received in West Virginia, the economic cost of the opioid epidemic in West Virginia in 2016 *alone* was over $8.72 billion.[183] The cost of opioids in West Virginia was more than nine times the amount it had received via settlement.

This calculus is supported by the November 2017 report by the Council for Economic Advisers (CEA), which found that in 2015, "the economic cost of the opioid crisis nationwide was over $500 billion—as much as six times larger than previous estimates."[184] The CEA has concluded that prior estimates of the costs of the opioid epidemic fell grossly below actual costs. West Virginia is an example of the practical difference of this calculation.

Acknowledging this divergence in actual cost and actual compensation demonstrates why market share liability should be applied in these cases. Although settlements have provided states with some relief from the burdens of this public health crisis, they have not come anywhere close to compensating plaintiffs adequately or fairly. Of course, litigation settlements rarely do fully compensate plaintiffs, as they are a compromising cost lowered for the risk and costs of going to trial. But nevertheless, opioid settlements are such a gross departure from the harm imposed by defendants, that they should not be viewed as a sufficient remedy for this societal ill.

Despite the complicated balancing of interests in this issue, and the valid concern for further expanding tort doctrine, market share liability is an appropriate scheme for resolving the destruction resulting from opioids. In a new age of technology and innovation, tort law must also continue to innovate. And as the Hawai'i Supreme Court noted in *Smith*, modern problems of mass tort cases with potential for colossal injury to the public "call[] for adopting new rules of causation, for otherwise innocent plaintiffs would be left without a remedy."[185]

182. *Id.*

183. *The Economic Cost of the Opioid Epidemic in West Virginia*, JOE MANCHIN U.S. SEN. FOR W. VA., https://www.manchin.senate.gov/imo/media/doc/Economic%20Cost%20of%20Opioid%20Epidemic%20in%20West%20Virginia.docx.pdf?cb.

184. *Id.* (citing Council of Economic Advisers Report, *The Underestimated Cost of the Opioid Crisis*, WHITE HOUSE ARCHIVES (Nov. 20, 2017), https://trumpwhitehouse.archives.gov/briefings-statements/cea-report-underestimated-cost-opioid-crisis/#:~:text=CEA%20estimates%20that%20in%202015,economic%20cost%20of%20the%20epidemic.).

185. Smith v. Cutter Biological, Inc., 823 P.2d 717, 724 (Haw. 1991).

## CONCLUSION

In conclusion, many scholars and members of the bench have called for limits on, or avoiding the use entirely, of public nuisance lawsuits in the context of public health crises. As this doctrine has expanded over the last three decades, its growing use has rightfully prompted concern.[186] Similarly, the expansion of market share liability doctrine has its fair share of critics.

Expanding and extending the original *Sindell* requirements raises valid concerns for the impact it will have on tort law, should the doctrine continue to expand.

Despite this, public nuisance and market share liability doctrines are appropriately combined in the specific context of the opioid epidemic. The opioid crisis is unlike most other societal ills. It instigated an unprecedented level of destruction through severe drug addiction and death, devastated communities across the United States, and was at least in some ways preventable. Moreover, while the extent of the crisis might not have been fully foreseeable, the market participants responsible for the facilitation of this catastrophe were sophisticated, knowledgeable parties in the best position to prevent or limit this harm. Critics of both doctrines raise valid reasons for limiting their expansion. However, the significance of the opioid epidemic provides ample reason to look past these concerns.

By providing a pathway for state governments to receive more accurate compensation, these doctrines can serve a specific, narrow purpose to combat an unprecedented public crisis. Should litigants choose to advocate for this scheme of liability, and should courts choose to listen, the principles of these doctrines can be limited and constrained so as not to totally abandon traditional tort principles. Specifically, as seen in the *Sindell* requirements for market share liability, the application of this doctrine can be constrained to apply to very specific circumstances. Here, too, courts can limit the application of these doctrines to adequately protect the purpose of tort law, while also being flexible enough to achieve greater fairness and justice. With innovation and expansion in societal development comes a need to innovate and expand the law. Modern medicine—its ease of access and effectiveness of medication—has provided great societal benefit. But its dangers are also unparalleled and must be adequately measured by an effective legal system.

Using this combination of doctrines to allocate liability for the opioid crisis offers a legitimate, legally supported liability scheme, as opposed to permitting cases to settle out and having defendants "make a deal." Although settlement is a commonplace method for resolving litigation, here, the harm is too great. Market share liability can provide a more accurate assessment for plaintiff recovery, as compared to the actual economic harm incurred by plaintiffs. Moreover, by allowing state governments to recover these funds, they can allocate funds from judgment to opioid misuse education and prevention.

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186. *See* Merrill, *supra* note 18.

In addition, imposing more rigorous liability, vindicated by legal doctrine, has the potential to serve as a form of deterrence for future wrongdoing. Although the opioid epidemic was an unprecedented health crisis, it may not be the last, unfortunately. Societal advances will always come with risks and dangers to the public. Thus, providing a narrow but effective scheme of liability for these situations will help to combat future abuses in public health.

In sum, a market share theory of liability, as applied to opioid public nuisance lawsuits, will offer a method for determining compensation in this litigation beyond settlement, vindicate the atrocities resulting from opioid defendant conduct, provide state government plaintiffs with a more accurate compensation scheme, and deter future wrong against the public health. The law must catch up to the modern innovations of our advancing world.