COMMENT

CLEANING UP THE OPIOID CRISIS: EMERGING PUBLIC NUISANCE LIABILITY IN OPIOID LITIGATION

STEPHEN GOETTSCHE*

As the opioid crisis wages on and overdose deaths soar to record highs, communities across the nation struggle to address the devastating impacts. Meanwhile, tribal, state, and local governments have filed thousands of lawsuits that seek to hold pharmaceutical companies liable for funding programs to abate the crisis. Among other claims, the plaintiffs allege that the opioid industry—manufacturers, distributors, and pharmacies—caused a public nuisance through the oversupply of prescription opioids. These claims are a novel application of public nuisance law.

Between November 2021 and August 2022, the protracted opioid lawsuits finally delivered five decisions. The public nuisance claims achieved mixed results. Courts in Oklahoma and West Virginia rejected the claims as a matter of law. In a state court in California, the plaintiffs failed to meet their burden of proof. But federal courts in California and Ohio found the opioid industry defendants liable under public nuisance law. What accounts for these varied and conflicting outcomes?

To answer that question, this Comment conducts an in-depth analysis of the recent decisions to define the contours of this emerging area of law. Five factors are most predictive of a viable public nuisance claim in opioid litigation: (1) a defendant's role in the opioid supply chain; (2) the jurisdiction's standard of causation; (3) a defendant's compliance—or non-compliance—with laws and regulations; (4) precedent from prior public nuisance claims against gun and lead paint manufacturers; and (5) the jurisdiction's approach to abatement as a remedy. These five factors serve to identify a viable theory of public nuisance liability in opioid litigation, as well as the reasons why a public nuisance claim may fail as a matter of fact or law.

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INTRODUCTION

In 2017, the ongoing opioid crisis was declared a public health emergency by the U.S. Department of Health and Human Services.[1] In 2019, 10.1 million persons misused prescription opioids and 1.6 million had an opioid use disorder.[2] In 2020, 68,620 persons died from opioid overdoses—an increase of 30 percent from 2019—amounting to 74.8

1. *Opioid Facts and Statistics*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/opioids/statistics/index.html [https://perma.cc/X9HB-6JR5] (Dec. 16, 2022).

2. *Id.*

percent of drug overdose deaths for that year.[3] The pandemic further exacerbated the crisis, pushing total overdose deaths, the vast majority due to opioids, to over 100,000 in a year—more than automobile and gun fatalities combined.[4]

As much as these statistics corroborate the existence of a public health emergency, they fail to convey the devastating impact that the opioid crisis has had on communities across the nation. With the dramatic increase of opioid addiction and overdoses, emergency response services are taxed by the high rate of overdose responses, in some cases requiring special teams of paramedics to respond to opioid-related calls.[5] Hospitals and medical professionals are overwhelmed by the volume of patients requiring treatment for opioid-related conditions, including the increased number of children that are born with Neonatal Opioid Withdrawal Syndrome.[6] In San Francisco, because of the high number of overdoses that occur in the city's libraries, staff are trained to administer the overdose-reversing medication naloxone.[7] In Wisconsin, lawmakers responded to the crisis with a bill providing civil immunity to school employees that administer naloxone to students experiencing an overdose.[8] In Ohio, as families and communities cope with the loss of parents, siblings, and other caregivers due to opioid addiction and overdose, child welfare services struggle to address the number of children requiring placement out of home.[9] Widespread opioid use and addiction have also increased crime and created a robust illegal market for opioids, including heroin and fentanyl, the dangerously potent synthetic opioid.[10] Indeed, in addition

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3. *Drug Overdose Deaths*, CDC, [https://web.archive.org/web/20230105152944/https://www.cdc.gov/drugoverdose/deaths/index.html] (June 2, 2022).

4. Roni Caryn Rabin, *Overdose Deaths Reached Record High as the Pandemic Spread*, N.Y. TIMES (Nov. 17, 2021), https://www.nytimes.com/2021/11/17/health/drug-overdoses-fentanyl-deaths.html. In 2021, opioids were involved in 80,411 of 106,699 drug overdose deaths in the United States, an increase of fourteen percent from 2020. *Drug Overdose Deaths*, CDC, https://www.cdc.gov/drugoverdose/deaths/index.html [https://perma.cc/6YTY-RGXB] (Aug. 22, 2023).

5. *City & County of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936, 1009 (N.D. Cal. 2022). *See also In re Nat'l Prescription Opiate Litig.* (*Opiate II*), 622 F. Supp. 3d 584, 603 (N.D. Ohio 2022).

6. *Opiate II*, 622 F. Supp. 3d at 603–04. *See also City & County of San Francisco*, 620 F. Supp. 3d at 1009.

7. *City & County of San Francisco*, 620 F. Supp. 3d at 1009.

8. Lauren Jackson, *Legislation to Combat the Opioid Crisis in Wisconsin*, *in* WISCONSIN BLUE BOOK 2019-2020, at 345, 353 (Wis. Legis. Reference Bureau, 2019).

9. *Opiate II*, 622 F. Supp. 3d at 603.

10. *See City & County of San Francisco*, 620 F. Supp. 3d at 944–46, 1009.

to the tragic loss of life and the large-scale loss of quality of life due to opioid use disorder, the opioid crisis has taken an immense toll on the communities that live with and respond to the public health emergency.

As the crisis progressed in the 2010s and communities increasingly experienced its effects, public entities filed lawsuits to hold the opioid industry responsible for the crisis.[11] In addition to alleging that pharmaceutical companies employed false and misleading marketing strategies, plaintiffs sought to hold manufacturers, distributors, and pharmacies liable for the oversupply of opioids—and the public health crisis that ensued—under the legal theory of public nuisance.[12] Why? In the 1990s, pharmaceutical companies aggressively marketed opioids, persuading both the FDA and medical professionals that prescription opioids were a safe, non-addictive way to treat pain, including everyday pain.[13] Consequently, the opioid prescription rate increased steadily until the national dispensing rate reached its peak around 2012 at more than 255 million opioid prescriptions—a nationwide rate of 81.3 prescriptions per one-hundred persons.[14] Further, prescription rates varied significantly across the country: in 2015, providers in the highest prescribing counties prescribed six times more opioids than in the lowest prescribing counties.[15] As a result, some counties and regions were inundated with prescription opioids.[16] Finally, in addition to the dramatic increase in the number of prescriptions, the amount of opioids prescribed per person—*i.e.*, the dosage—increased by three times

11. *Opiate II*, 622 F. Supp. 3d at 590–92.

12. *See id.* at 590; *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 722 (Okla. 2021); *People v. Purdue Pharma L.P.*, No. 30-2014-00725287-CU-BT-CXC, 2021 Cal. Super. LEXIS 31743, at *2 (Cal. Super. Ct. Dec. 14, 2021).

13. *See City & County of San Francisco*, 620 F. Supp. 3d at 942–43; *Opioid Facts and Statistics*, *supra* note 1; *Timeline of Selected FDA Activities and Significant Events Addressing Substance Use and Overdose Prevention*, FDA, https://www.fda.gov/drugs/information-drug-class/timeline-selected-fda-activities-and-significant-events-addressing-opioid-misuse-and-abuse [https://perma.cc/GP6L-T4AN] (Sept. 27, 2023).

14. *U.S. Opioid Dispensing Rate Maps*, CDC, https://www.cdc.gov/drugoverdose/rxrate-maps/index.html [https://perma.cc/2L2U-UU6E] (Nov. 10, 2021). *See also City & County of San Francisco*, 620 F. Supp. 3d at 942–43.

15. *Vital Signs: Opioid Prescribing*, CDC (July 6, 2017), https://www.cdc.gov/vitalsigns/pdf/2017-07-vitalsigns.pdf [https://perma.cc/K9XF-543K].

16. For example, of fifty-five West Virginia counties reporting in 2012, more than half had a prescription rate over one-hundred per one hundred persons, and five had a prescription rate over two hundred. *See U.S. County Opioid Dispensing Rates, 2012*, CDC, https://www.cdc.gov/drugoverdose/rxrate-maps/county2012.html [https://perma.cc/EB9K-8PF8] (Dec. 7, 2020).

between 1999 and 2015.[17] And as prescription and dosage rates soared, so did the misuse of opioids,[18] eventually leading users to turn to heroin when prescription opioids became less available with the decline of prescription rates after 2012.[19] Thus, the general theory of liability against the opioid industry traces the opioid crisis—the alleged public nuisance—back to the alleged oversupply of opioids, which was the outcome of a successful marketing campaign that greatly expanded the medical use of the drugs to treat pain.

In five recent trials, this novel application of public nuisance law—seeking to hold the opioid industry liable for the opioid crisis—has resulted in mixed outcomes. In November 2021, the Oklahoma Supreme Court rejected the theory of liability in a suit against opioid manufacturer Johnson & Johnson.[20] Later in 2021, a California Superior Court found the plaintiffs failed to meet their burden of proof in a public nuisance claim against opioid manufacturers.[21] However, in the opioid multidistrict litigation (the MDL) that has consolidated thousands of suits brought by states and local governments in federal courts, claims under public nuisance law have gained momentum as a viable cause of action. In November 2021, in a federal district court in Ohio, a jury found that large-scale pharmacies were liable for creating a public nuisance in Ohio's Lake and Trumbull Counties.[22] And in a bench trial in August 2022, the Northern District of California ruled that Walgreens was liable for the opioid crisis in San Francisco under the theory of public nuisance.[23] In contrast, in July 2022, the Southern District of West Virginia refused to extend public nuisance law to claims against opioid distributors.[24] As these cases demonstrate, whether opioid manufacturers, distributors, and pharmacies can be held liable for the opioid crisis under public nuisance law is an unsettled question that has recently yielded varied and inconsistent outcomes in state and federal courts.

With each decision on a public nuisance claim against corporations in the opioid supply chain, the contours of this emerging area of law

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17. *Vital Signs: Opioid Prescribing*, *supra* note 15.

18. *Opioid Facts and Statistics*, *supra* note 1.

19. *City & County of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936, 943–44 (N.D. Cal. 2022).

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

21. *See People v. Purdue Pharma L.P.*, No. 30-2014-00725287-CU-BT-CXC, 2021 Cal. Super. LEXIS 31743 (Cal. Super. Ct. Dec. 14, 2021).

22. *Opiate II*, 622 F. Supp. 3d 584, 593 (N.D. Ohio 2022).

23. *See City & County of San Francisco*, 620 F. Supp. 3d at 939, 1009.

24. *See City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408 (S.D. W. Va. 2022).

become slightly clearer. These five trials constitute the significant published decisions and trial orders involving public nuisance claims against the opioid industry.[25] Based on a synthesis of these five cases, this Comment concludes that—in some jurisdictions—a viable theory of liability for causing the opioid crisis is taking shape under public nuisance law. Moreover, the viability of a public nuisance claim for the manufacture, distribution, or sale of prescription opioids depends primarily on five factors: (1) a defendant's role in the opioid supply chain; (2) the jurisdiction's standard of factual and proximate/legal causation; (3) a defendant's compliance—or non-compliance—with laws and regulations; (4) precedent from previous public nuisance claims against gun and lead paint manufacturers; and (5) the jurisdiction's approach to abatement as a remedy. Each factor can weigh for or against holding a defendant from the opioid industry liable under public nuisance law—and a claim that aligns all five factors in favor of liability has the greatest potential to prevail.

This Comment proceeds in three parts. Part I explores the historical origins of public nuisance doctrine, more recent, products-based public nuisance claims, and arguments for and against extending public nuisance law to claims against the opioid industry. Part II discusses the five recent cases involving public nuisance claims against opioid manufacturers, distributors, and/or pharmacies: the state court decisions from Oklahoma and California, followed by the three trials in federal court—from West Virginia, San Francisco, and Ohio—that are part of the MDL. Part III synthesizes the five trials, analyzing the five factors that are most predictive of a viable theory of liability under public nuisance law.

I. PUBLIC NUISANCE LAW: FROM ORIGINS TO PRODUCTS TO OPIOIDS

This Part begins with a general overview of public nuisance law from its historical origins and leading up to the Second Restatement of Torts.[26] It then turns to the application of public nuisance doctrine to claims arising from the manufacture, distribution, and sale of products that preceded the current claims against the opioid industry. This Part concludes with the arguments for and against the application of public nuisance doctrine in opioid litigation.

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25. *See, e.g.*, *State ex rel. Hunter*, 499 P.3d 719; *Purdue Pharma L.P.*, 2021 Cal. Super. LEXIS 31743; *Opiate II*, 622 F. Supp. 3d 584; *City & County of San Francisco*, 620 F. Supp. 3d 936; *City of Huntington*, 609 F. Supp. 3d 408.

26. RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

A. Public Nuisance Doctrine: Historical Origins and the Restatement

Public nuisance is a common law doctrine that has evolved over many centuries since its origin as a prohibition on obstructions of public highways, which was considered an infringement on the rights of the Crown.[27] The doctrine grew to encompass interferences with the interests, comfort, or convenience of the general public, including activities such as running public gaming houses, keeping diseased animals, and the unqualified practice of medicine.[28] The expansiveness of what constitutes a public nuisance illustrates Prosser's colorful description of nuisance doctrine as an "impenetrable jungle" that "is incapable of any exact or comprehensive definition."[29]

In the United States, public nuisance doctrine has developed through both statutes and the common law. Criminal statutes historically declared varied activities and things as a public nuisance: these run the gamut from mosquito breeding waters to houses where illegal drugs are sold to unhealthy dwellings.[30] The common law doctrine in the United States protects public rights in health, safety, and comfort.[31] And the equitable remedy that is available to the state or public entity seeking to enforce such rights is the abatement or enjoinment of the public nuisance.[32] Further, although the plaintiff in a public nuisance suit may be entitled to recover funds to compensate the cost of abatement, courts have generally not allowed for the recovery of the increased costs of typical public services that resulted from the nuisance.[33]

The Second Restatement of Torts, published in 1979, includes the most recent effort to provide a comprehensive overview of public nuisance doctrine. Consistent with the wide-ranging precedent at common law, Section 821B(1) broadly defines a public nuisance as "an unreasonable interference with a right common to the general public."[34]

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27. PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 617–18 (W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen eds., 5th ed. 1984).

28. *See id.* at 618; *id.* § 90, at 645; Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 716–19 (2023).

29. PROSSER AND KEETON ON THE LAW OF TORTS § 86, *supra* note 27, at 616 (footnote omitted).

30. *Id.* § 90, at 646.

31. 2 DAN B. DOBBS, THE LAW OF TORTS § 467, at 1335 (1st ed. 2001).

32. *Id.* at 1334; PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 27, § 90, at 643.

33. 2 DAN B. DOBBS & PAUL T. HAYDEN, THE LAW OF TORTS § 467, at 367 (1st ed. Supp. 2010).

34. RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. L. INST. 1979).

Three sets of circumstances "may sustain a holding that an interference with a public right is unreasonable," including[35]:

> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
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> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[36]

These circumstances are not conclusive tests for making the "unreasonable interference" determination, and the list is disjunctive because any one may justify a finding of unreasonableness.[37] Further, the circumstances "do not purport to be exclusive" and are "not intended to set restrictions against developments" in the doctrine.[38] When a defendant's conduct does not fit within traditional public nuisance categories and has not been declared a public nuisance by legislation, courts face the challenge of deciding the claim "without an established and recognized standard."[39] As the next Section illustrates, courts are reluctant to expand the doctrine into new contexts.

B. Public Nuisance and Products-Based Claims

In the late 1990s and early 2000s, litigation over the sale and marketing of firearms to criminals marked a significant attempt to expand public nuisance doctrine to hold manufacturers and distributors liable for the costs of their products to society.[40] Public-entity plaintiffs sought to recover the increased costs to municipalities in police protection, public health, school security, and so on.[41] Courts varied in their treatment of the claims, sometimes rejecting the theory of liability and other times allowing the claims to proceed.[42] In 2005, Congress

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35. *Id.* § 821B(2).
36. *Id.* §§ 821B(2)(a)–(c).
37. *Id.* § 821B cmt. e.
38. *Id.*
39. *Id.*
40. *See* DOBBS & HAYDEN, *supra* note 33, § 467, at 367.
41. *Id.*
42. *Id. Compare, e.g.*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116–17, 1121, 1148 (Ill. 2004) (refusing to expand public nuisance liability to the manufacture, distribution, and sale of firearms), *with City of Cincinnati v. Beretta*

intervened to settle the issue by providing immunity to the manufacturers, distributers, and sellers of firearms for the criminal or unlawful misuse of firearms by a third party.[43]

After the wave of public nuisance claims against gun manufacturers, litigation in other contexts further attempted to expand the doctrine into the realm of products-based claims.[44] For example, following the meth epidemic of the early 2000s, a group of Arkansas counties sued the manufacturers of over-the-counter cold and allergy medications containing ephedrine, which meth labs purchased in bulk to cook meth.[45] The counties sought damages to abate the costs of combating meth production and distribution, as well as the costs of treating the public health effects of widespread meth use.[46] The court held that the criminal activity of meth cooks was sufficient cause of the injuries to the counties.[47]

Since the pharmaceutical companies did not proximately cause the alleged harm, as a matter of law, they were not liable under the theory of public nuisance.[48] In its analysis, the court expressed its reluctance to "open Pandora's box to the avalanche of actions that would follow if we found this case to state a cause of action under Arkansas law. . . . Proximate cause seems an appropriate avenue for limiting liability in this context, as in the gun manufacturer context."[49] Hence, both precedent and the 2005 Act to protect gun manufactures illustrate the reluctance of courts and legislatures to hold defendants liable under public nuisance law for the manufacture, distribution, and sale of legal, regulated products such as firearms or over-the-counter medicine.

C. Public Nuisance and Opioid Litigation

As states, counties, and municipalities address the societal costs of the opioid crisis, public entities have filed thousands of lawsuits nationwide, attempting to hold the various entities in the opioid supply chain liable for the crisis.[50] Among other claims, a reoccurring theory of liability is that manufacturers, distributors, and retailers are liable

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U.S.A. Corp., 768 N.E.2d 1136, 1141–42 (Ohio 2002) (holding that a public nuisance claim against a gun manufacturer is a viable cause of action).

43. DOBBS & HAYDEN, *supra* note 33, § 467, at 367; 15 U.S.C. §§ 7901–03.
44. *See* DOBBS & HAYDEN, *supra* note 33, § 467, at 367.
45. *Ashley County v. Pfizer, Inc.*, 552 F.3d 659 (8th Cir. 2009).
46. *See id.* at 663.
47. *Id.* at 670.
48. *Id.* at 671–72.
49. *Id.*
50. *Opiate II*, 622 F. Supp. 3d 584, 590–92 (N.D. Ohio 2022).

for creating a public nuisance by oversupplying communities with opioids.[51] In anticipation of, and in reaction to, these lawsuits, commentators have argued both for and against holding corporations liable for the opioid crisis under public nuisance doctrine.

1. OPPONENTS OF LIABILITY UNDER PUBLIC NUISANCE LAW

One of the main arguments against imposing liability on the opioid industry under public nuisance doctrine is that it constitutes a form of policymaking and regulation.[52] Moreover, the regulation of the opioid industry is properly within the scope of authority of the legislative and executive branches of government—an authority that is not delegated to the courts.[53] Commentators identify extensive statutory and regulatory schemes, like that controlling the opioid industry, as evidence of calculated policy decisions by legislators and administrative agencies.[54] And since the opioid industry acted in compliance with state and federal regulations, courts would effectively be imposing a form of "regulation by litigation" in holding manufacturers and distributors liable for creating a public nuisance.[55] To be sure, courts are generally reluctant to enforce public nuisance claims that arise out of this type of regulatory failure—*i.e.*, despite compliance, the industry has caused great harm to the public.[56] Thus, the Second Restatement of Torts explains that when there is "a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations."[57]

Relatedly, commentators argue that applying public nuisance law to hold corporations liable for the consequences of the manufacture, distribution, or sale of prescription opioids constitutes an end run

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51. *Id.* at 590 (setting eleven bellwether trials so far, each of which involves a public nuisance claim).

52. *See* Kendrick, *supra* note 28, at 767–87 (addressing the "institutional" objections that characterize public nuisance as unnecessary policymaking and regulation).

53. *See, e.g.*, Luther J. Strange III, *A Prescription for Disaster: How Local Governments' Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into a Policy-Making Role and Subverts the Equitable Administration of Justice*, 70 S.C. L. REV. 517, 538–43 (2019).

54. *Id.* at 538.

55. *Id.* (citing ANDREW P. MORRIS, BRUCE YANDLE & ANDREW DORCHAK, REGULATION BY LITIGATION (2008)).

56. David A. Dana, *Public Nuisance Law When Politics Fails*, 83 OHIO ST. L.J. 61, 63 (2022).

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

around products liability law.[58] Legislatures and administrative agencies—not courts—have the authority to govern the opioid industry through statutory and regulatory schemes.[59] Hence, an attempt to use the courts to hold corporations liable for any alleged harm caused by their products improperly puts the courts in the position of modifying regulatory schemes to shift the burden of liability.[60] Further, the judicial expansion of public nuisance liability into the realm of products liability is also problematic because it will invite further litigation in the context of opioids and a multitude of other products.[61] Instead of improperly expanding public nuisance doctrine into the realm of products liability, courts should require litigants to seek recourse under existing laws and doctrines, leaving legislatures to hold the opioid industry accountable through new laws and regulations.[62]

2. PROPONENTS OF LIABILITY UNDER PUBLIC NUISANCE LAW

Proponents of public nuisance liability are unpersuaded by the argument that courts lack the authority to require the opioid industry to abate the crisis. By deferring to the authority and expertise of the legislature and the FDA, courts effectively promote the "fiction that the regulatory state" is adequately addressing the opioid crisis.[63] Moreover, there is convincing evidence that opioid manufacturers and distributors engaged in intentional misconduct that prevented the proper regulation of the product, resulting in unaddressed public harm.[64] Thus, when courts dismiss public nuisance claims based on a policy of judicial restraint, they send public plaintiffs "to seek recourse from the very same legislatures and agencies that had allowed" the opioid industry to harm the public in the first place.[65]

But given the enormity of the harm caused by prescription opioids and the obvious need for a remedy—with "no adequate federal or state regulatory response" to date—"it is very difficult to . . . defend the inference that Congress or the state legislature must have intended to

58. *See, e.g.*, *The Plaintiffs' Lawyer Quest for the Holy Grail*, AM. TORT REFORM ASS'N (Apr. 14, 2020), https://www.atra.org/white_paper/public-nuisance-super-tort/ [https://perma.cc/LS4Y-YNGJ].

59. Strange, *supra* note 53, at 539–40.

60. *Id.* at 539–40, 561.

61. *See* Kristen S. Jones, Comment, *The Opioid Epidemic: Product Liability or One Hell of a Nuisance*, 39 MISS. COLL. L. REV. 32, 34, 75–76 (2021).

62. *See id.* at 74–75.

63. Dana, *supra* note 56, at 67.

64. *Id.* at 111.

65. *Id.* at 63.

preempt public nuisance suits."[66] Indeed, public nuisance law only comes into play when other forms of regulation have failed, resulting in an infringement on a public right.[67] Public nuisance doctrine fulfills its own regulatory purpose by "requir[ing] actors to internalize the public costs of their activities."[68] Finally, public nuisance is fundamentally a common law doctrine, and the role of judges is to adapt the common law to changing circumstances and modern realities.[69] Instead of deferring to a theoretical solution that assumes legislatures and agencies will adequately address the harm caused by the opioid industry, courts can and should do a better job of responding to the current reality by engaging with public nuisance claims on the merits.[70]

II. OPIOID TRIALS: TWO INITIAL STATE COURT DECISIONS AND THE MULTIDISTRICT LITIGATION

This Part discusses the five recent cases that tried public nuisance claims in opioid litigation. The cases are presented in chronological order, and each decision shapes this developing area of law. Sections II.A and B discuss, respectively, the state court decisions from Oklahoma and California, issued late in 2021. Section II.C begins with an introduction to the federal opioid multidistrict litigation. Finally, Section II.D discusses the decisions and orders from district courts in West Virginia, California, and Ohio that were published in the spring and summer of 2022.

For each of the five trials, a procedural summary of the case begins the discussion. The focus is then narrowed to highlight and contextualize the five factors that are most predictive of public nuisance liability, analyzed in Part III: (1) a defendant's role in the opioid supply chain; (2) the jurisdiction's standard of factual and proximate/legal causation; (3) a defendant's compliance—or non-compliance—with laws and regulations; (4) precedent from previous public nuisance claims against gun and lead paint manufacturers; and (5) the jurisdictional approach to the meaning and scope of abatement. The factors had varying degrees of relevance and importance in each trial. In some cases, all factors were present; in others, the court only focused on two or three. Consequently, for each trial, the factors are highlighted in proportion to their role in the court's analysis of the public nuisance claim. With each decision, including the Oklahoma and West Virginia

66. *Id.* at 79.
67. Kendrick, *supra* note 52, at 790.
68. *Id.*
69. *See id.* at 791; Dana, *supra* note 56, at 74.
70. Dana, *supra* note 56, at 69.

cases that refused to extend public nuisance law to opioid litigation, the contours of a viable theory of public nuisance liability progressively emerge.

A. Oklahoma Supreme Court Decision

The lawsuit in Oklahoma was initiated in 2017 when the State of Oklahoma sued three opioid manufacturers: Johnson & Johnson (J&J), Purdue Pharma, and Teva Pharmaceuticals.[71] The State alleged that the manufacturers deceptively marketed prescription opioids in Oklahoma.[72] After settling with Purdue Pharma for $270 million and with Teva Pharmaceuticals for $85 million, the State dismissed all claims against J&J other than a public nuisance claim.[73] The trial court found J&J created a public nuisance by conducting "false, misleading, and dangerous marketing campaigns about prescription opioids," and the court "ordered J&J to pay $465 million to fund one year of the State's abatement plan."[74] Reviewing the construction of Oklahoma's nuisance statute de novo, the state supreme court held that public nuisance law does not extend to the manufacture, marketing, and sale of prescription opioids.[75]

Oklahoma's public nuisance law traditionally applies to conflicts that arise out of criminal conduct or the use of property.[76] Accordingly, the alleged public nuisance arising from the sale of opioids through a false and misleading marketing campaign did "not fit within" Oklahoma's nuisance statutes[77]: "Th[is] Court applies the nuisance statutes to unlawful conduct that annoys, injures, or endangers the comfort, repose, health, or safety of others" only in "criminal or property-based conflict."[78] Thus, the court refused to extend Oklahoma's public nuisance law to encompass product-related claims because it "would create unlimited and unprincipled liability for product manufacturers."[79]

To justify its refusal to extend public nuisance law beyond criminal or property-based conflict, the court distinguished products liability

71. *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 721–22 (Okla. 2021).
72. *Id.* at 722.
73. *Id.* at 722 & n.11.
74. *Id.* at 722 (cleaned up).
75. *Id.* at 729–31.
76. *Id.* at 725.
77. *Id.* at 722, 725.
78. *Id.* at 725.
79. *Id.*

from public nuisance law. The majority opinion characterized the State's allegation that "J&J failed to warn of the dangers associated with opioid abuse and addiction in promoting and marketing its opioid products" as a claim that "sounds in product-related liability."[80] Further, products liability and public nuisance are separate causes of action "with boundaries that are not intended to overlap."[81] And the court concluded that public nuisance law is "fundamentally ill-suited to resolve claims against product manufacturers."[82]

To support the conclusion that public nuisance law is ill-suited to resolve the State's products-related claim, the court determined that J&J neither violated a public right nor proximately caused the alleged nuisance—two elements of a public nuisance claim.[83] The court analogized opioid litigation to public nuisance suits against gun manufacturers in which the harm arose from the unlawful use of a legal product by third parties: "[A] public right to be free from the threat that others may misuse or abuse prescription opioids—a lawful product—would hold manufacturers, distributors, and prescribers potentially liable for all types of use and misuse of prescription medications."[84] Moreover, like the manufacture of guns, the alleged nuisance was "several times removed" from the manufacture of opioids,[85] and "J&J did not control the instrumentality (prescription opioids) alleged to constitute the nuisance at the time the nuisance occurred."[86] Finally, without control of the product after it is sold, a manufacturer has no ability to abate a nuisance that arises from the use or misuse of the product.[87]

Turning to the remedy available in nuisance cases, the court concluded that the trial court's order of a financial contribution to the state's remedial plan was not a true abatement.[88] An abatement is a remedy that "stop[s] the act or omission that constitutes a nuisance."[89] But the proposed plan addressed the social, health, and criminal issues that arose from the conduct alleged to be a nuisance.[90] Because the trial

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80. *Id.*

81. *Id.* (citing *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 456 (R.I. 2008)).

82. *Id.* at 726.

83. *See id.* at 726–30.

84. *Id.* at 727.

85. *Id.* at 728 (citing *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1137 (Ill. 2004)).

86. *Id.* at 729 (citing *Chicago*, 821 N.E.2d at 1138).

87. *Id.* at 728.

88. *Id.* at 729.

89. *Id.*

90. *Id.*

court's remedy did not stop any act or omission of J&J, nor did it stop the opioid epidemic itself, it did not constitute an abatement.[91] Furthermore, the policymaking decision to hold a manufacturer liable for funding government programs designed to address the opioid crisis should be left to the legislative and executive branches.[92]

B. California Superior Court Bench Trial

Unlike the Supreme Court of Oklahoma, which rejected the public nuisance claim as a matter of law, the California trial court found that there was no actionable public nuisance claim against opioid manufacturers based on the merits.[93] The suit was brought on behalf of the People of California by Santa Clara County, Orange County, Los Angeles County, and the Oakland City Attorney.[94] The defendants were a group of pharmaceutical companies that manufacture and sell opioids, including Janssen Pharmaceuticals, Endo Pharmaceuticals, Allergan, and Teva Pharmaceuticals.[95] The plaintiffs alleged that the defendants' aggressive and misleading marketing scheme increased opioid prescriptions, which caused or contributed to the opioid crisis in California—the alleged public nuisance.[96] Ultimately, the court found that the plaintiffs failed to meet their burden of proof.[97]

California public nuisance law requires proof that a defendant caused a substantial and unreasonable interference with a public right.[98] The parties did not dispute that opioid abuse constituted a substantial interference with a public right.[99] Instead, causation and the unreasonableness of the interference were the disputed elements. The causation standard requires that the contribution of the defendant to the interference be more than negligible or theoretical.[100] And the standard of unreasonableness requires "that the social utility of the conduct constituting the interference is outweighed by the gravity of the harm inflicted."[101] Importantly, a separate statute creates immunity from

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91. *Id.*
92. *Id.* at 731.
93. *People v. Purdue Pharma L.P.*, No. 30-2014-00725287-CU-BT-CXC, 2021 Cal. Super. LEXIS 31743, at *61 (Cal. Super. Ct. Dec. 14, 2021).
94. *Id.* at *2.
95. *Id.* at *3.
96. *Id.* at *2.
97. *Id.* at *9–10.
98. *Id.* at *7.
99. *Id.* at *9.
100. *Id.*
101. *Id.*

nuisance liability for any conduct authorized by statute.[102] This safe harbor provision proved to be an insurmountable obstacle to the plaintiffs' public nuisance claim.[103] The court concluded that the plaintiffs failed to prove the alleged interference was unreasonable; moreover, even assuming that the interference was unreasonable, the plaintiffs failed to prove that the defendants caused the alleged interference.[104]

Regulatory approval of prescription opioids provided the defendants with both a presumption of reasonableness and, more importantly, safe harbor immunity in the marketing and selling of the medications.[105] Evidence at trial established that the FDA was aware of the risks associated with prescribing opioids.[106] In approving the medications, the FDA decided that the social utility of "appropriately prescribed" opioids outweighs the gravity of the harm that they would potentially inflict.[107] Additionally, in the Intractable Pain Treatment Act of 1990 and the Pain Patient's Bill of Rights of 1997, the California Legislature ensured that health care practitioners could appropriately prescribe opioids without risk of discipline.[108]

To overcome the safe harbor immunity from nuisance claims for conduct that is authorized by statute, the plaintiffs' theory of liability alleged that misleading marketing and promotion resulted in an increase in prescriptions, thus causing the opioid crisis.[109] But the court distinguished between medically *appropriate* prescriptions and medically *inappropriate* prescriptions.[110] As a matter of law, the safe harbor statute bars public nuisance claims against medically appropriate prescriptions even if they did result from misleading marketing and promotion.[111] Therefore, a finding of unreasonableness—an essential element to an actionable public nuisance claim—would require the plaintiffs to prove that the defendants' allegedly false and misleading marketing caused an increase in medically inappropriate opioid prescriptions, which in turn caused or contributed to the opioid crisis itself.[112]

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102. *Id.* at *17; CAL. CIV. CODE § 3482 (West 2023).
103. *See infra* notes 109–17 and accompanying text.
104. *Purdue Pharma L.P.*, 2021 Cal. Super. LEXIS 31743, at *10, *26–27.
105. *See id.* at *12–18.
106. *Id.* at *12.
107. *Id.*
108. *Id.* at *13–14.
109. *Id.* at *17.
110. *Id.* at *18–19.
111. *Id.* at *18–20.
112. *Id.* at *22–23.

The plaintiffs, however, failed to distinguish between medically appropriate and inappropriate prescriptions.[113] Instead, the plaintiffs offered evidence of a dramatic aggregate increase in the volume of opioid prescriptions.[114] Since the plaintiffs provided no evidence of an increase in medically inappropriate prescriptions, the court would need to "infer that the rise in prescriptions generally must logically also have resulted in the rise of medically inappropriate prescriptions."[115] The court refused to draw that inference.[116] Thus, the lack of evidence to show an increase in medically inappropriate prescriptions was fatal to the element of unreasonableness.[117]

Despite the plaintiffs' failure to prove an actionable public nuisance, opioid manufactures could be held liable for creating a public nuisance under California law, provided there is sufficient evidence.[118] In its conclusion, the court reiterated this point: "Nothing stated herein is intended to suggest that false or misleading marketing and promotion that results in medically inappropriate prescriptions being written may not constitute an actionable public nuisance. But that is not the evidence before this Court."[119] Therefore, the California trial court affirmed the potential to hold opioid manufacturers liable for the opioid crisis under public nuisance law, while clarifying the allegations and evidence that would be necessary to succeed in such a claim.

C. The Ongoing Opioid Multidistrict Litigation

Since its formation in December 2017,[120] 3,000 cases nationwide have been consolidated into the opioid multidistrict litigation, presided over by Judge Dan Aaron Polster of the Northern District of Ohio.[121] The MDL set eleven bellwether trials involving plaintiffs that are local government entities and defendants that are part of the opioid supply chain—manufacturers of prescription opioids, large-scale distributors that supply pharmacies, and/or pharmacies that dispense prescriptions.[122] The purpose of the bellwether trials is to assess the

113. *Id.* at *19.
114. *Id.* at *18–19.
115. *Id.* at *19.
116. *Id.* at *19–20.
117. *See id.* at *26.
118. *See id.* at *25.
119. *Id.* at *31.
120. *See MDL 2804*, U.S. DIST. CT. N. DIST. OF OHIO, https://www.ohnd.uscourts.gov/mdl-2804 [https://perma.cc/F4LQ-7GLW].
121. *Opiate II*, 622 F. Supp. 3d 584, 590, 592 (N.D. Ohio 2022).
122. *Id.* at 590.

merits of the claims and the relative strength of the parties' positions, which in turn informs the settlement negotiations of parties in similar cases.[123]

Among other claims, the plaintiffs in each bellwether trial asserted that the defendants created a public nuisance through conduct leading to the oversupply of prescription opioids in the plaintiffs' communities.[124] Of the eleven bellwether trials, only three cases went to trial, and the others settled.[125] These settlements resolved "a large swath of the MDL—that is, nearly all claims by governmental subdivisions against manufacturers and distributors."[126]

The three bellwether trials that did not settle are discussed in this Section. Section II.C.1 covers the "Track Two" bellwether trial of public nuisance claims brought by two West Virginia counties against large distributors.[127] In a bench trial, the Southern District of West Virginia found in favor of the defendants, refusing to extend the state's public nuisance law to the sale, distribution, and manufacture of prescription opioids.[128] Second, "Track Four," discussed in Section II.C.2, was a bench trial in federal court in the Northern District of California.[129] Track Four tried claims brought by the City and County of San Francisco against Walgreens.[130] The court found Walgreens liable under public nuisance law because it contributed to the opioid epidemic in San Francisco.[131] Third, Section II.C.3 discusses the "Track Three" cases that tried public nuisance claims in the Northern District of Ohio brought by two counties against large pharmacies.[132] The jury found the pharmacies were liable for creating a public nuisance through the oversupply of prescription opioids,[133] and the court ordered the defendants to fund programs in the counties to abate the opioid crisis.[134]

The discussion of the three MDL trials further contextualizes the five factors that are predictive of a viable public nuisance claim in opioid litigation. First, while the state courts in Oklahoma and

123. *Bellwether Trial*, BLACK'S LAW DICTIONARY (11th ed. 2019).
124. *Opiate II*, 622 F. Supp. 3d 584 at 590.
125. *Id.* at 590–91.
126. *Id.* at 592.
127. *Id.* at 590–91.
128. *Id.*
129. *Id.* at 591.
130. *Id.*
131. *Id.*
132. *Id.* at 591–93.
133. *Id.* at 593.
134. *Id.* at 591–92.

California tried claims against opioid manufacturers, the MDL trials involved claims against distributors and pharmacies, which have a different role in the opioid supply chain. Second, regulatory compliance—or non-compliance—was central to each court's analysis. Third, the courts in West Virginia, California, and Ohio applied different standards of causation. Fourth, each jurisdiction relied on different precedent in products-based claims. Finally, each jurisdiction drew upon a unique understanding of the remedy of abatement.

1. FEDERAL BENCH TRIAL IN THE SOUTHERN DISTRICT OF WEST VIRGINIA

This case was the first of the MDL bellwether trials to publish a decision.[135] The plaintiffs were the City of Huntington and Cabell County in West Virginia—two communities hit especially hard by the opioid crisis.[136] The defendants—AmerisourceBergen, Cardinal Health, and McKesson—were wholesale distributors that supply pharmacies and hospitals across the United States.[137] The case consisted of a single public nuisance claim alleging the defendants' distribution of prescription opioids in the plaintiffs' communities created an opioid epidemic that constituted a public nuisance, and the plaintiffs sought the abatement of the alleged nuisance as a remedy.[138] Following a bench trial lasting more than two months, the court issued its findings of fact and conclusions of law on July 4, 2022.[139] Much like the Supreme Court of Oklahoma, the federal trial court concluded—as a matter of law—that West Virginia's public nuisance law did not support a remedy upon the facts of the case because the doctrine has not been extended to the manufacture, distribution, and sale of opioids—and the Supreme Court of Appeals of West Virginia would predictably refuse to extend it.[140]

The court first acknowledged that there was no state court precedent on whether opioid distributors could be held liable for creating a public nuisance.[141] The court determined that the Supreme Court of Appeals of West Virginia has followed the Restatement of Torts in other cases that address the scope of public nuisance law in the

135. *See id.* at 590–91.

136. *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 419–20 (S.D. W. Va. 2022).

137. *Id.* at 413–14.

138. *Id.* at 413.

139. *Id.* at 412–13, 484.

140. *Id.* at 471–75.

141. *Id.* at 472.

state.[142] And the Restatement (Third) of Torts "states that public nuisance based on the sale and distribution of a product has been rejected by most courts because the common law of public nuisance is an inept vehicle for addressing such conduct."[143] Moreover, the court cited various decisions from other jurisdictions—including the recent decision from Oklahoma—in which courts declined to extend public nuisance doctrine to products-based claims.[144]

Further, the court reasoned that the West Virginia Supreme Court of Appeals has consistently applied public nuisance law to conduct that interferes with public property or resources.[145] And this approach was validated by the Oklahoma Supreme Court's decision to limit public nuisance to land or property use.[146] Reluctant to "open[] the floodgates of litigation,"[147] the court agreed with the Oklahoma court that the expansion of public nuisance doctrine to the manufacture, marketing, and sale of opioids is a matter of public policy that should be left to the legislative and executive branches of government.[148]

After concluding—as a matter of law and policy—that West Virginia public nuisance law should not be extended to include products, the court further explained how neither the plaintiffs' allegations nor the evidence at trial proved that the opioid distributors' conduct constituted a public nuisance.[149] The court found that the plaintiffs failed to prove both an unreasonable interference with a public right and causation.[150] Both are essential elements of a public nuisance claim in West Virginia.

First, the plaintiffs failed to prove an interference with a public right because the defendants' conduct in distributing opioids was not unreasonable.[151] To determine the element of unreasonableness, the "court must balance the danger of the harm with the social utility of the defendants' conduct."[152] Accordingly, the court reasoned that the social utility of opioids to effectively treat chronic pain outweighs the proven dangers and social costs associated with opioids, especially because the

142. *Id.*

143. *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 8 cmt. g (AM. L. INST. 2020)).

144. *Id.* at 473–75.

145. *Id.* at 472–73.

146. *Id.* at 473 (citing *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 730 (Okla. 2021)).

147. *Id.* at 474.

148. *Id.* at 473–74.

149. *Id.* at 475–81.

150. *Id.* at 475.

151. *Id.*

152. *Id.*

volume of opioid distribution in Huntington and Cabell County was determined by medically appropriate decisions made in good faith by prescribing doctors.[153]

Second, the court found that the evidence did not establish the defendants caused the opioid epidemic in the plaintiffs' communities.[154] The plaintiffs alleged the defendants violated the Controlled Substances Act (CSA) and its implementing regulations by oversupplying pharmacies, which in turn filled prescriptions that resulted in the illicit diversion of prescription opioids.[155] However, there was no admissible evidence that any violations of federal regulations caused diversion, nor was there admissible evidence that the volume of opioid distributions caused diversion.[156] To prevent diversion, federal regulations require distributors to maintain suspicious order monitoring systems[157] to guard against "handing over pills to pharmacies that are essentially acting as adjuncts of the illicit market, not against legitimate pharmacies dispensing a vague notion of too many opioids."[158] Based on the evidence at trial, the court found that "at all relevant times" the three defendants had suspicious order monitoring systems as required by the CSA and federal regulations.[159] Additionally, each distributor's system adapted to satisfy the DEA's requirements, which evolved in response to the developing opioid crisis.[160]

Rather than proving the defendants' distribution of prescription opioids to pharmacies caused diversion, the evidence only supported "a reasonable inference that someday, somehow, some of the opioids that defendants shipped fell into the wrong hands. That [was] not enough to sustain a reasonable finding that defendants here caused diversion of opioids or an opioid epidemic."[161] Instead, the oversupply and diversion of opioids that allegedly caused the opioid crisis was caused by doctors that overprescribed, pharmacies that excessively dispensed, and the illegal use of those prescriptions after they were filled at pharmacies.[162] Because all of these causes were "effective intervening causes beyond the control of defendants," the plaintiffs did not satisfy their burden to

153. *Id.*
154. *Id.* at 475–82.
155. *Id.* at 476, 482.
156. *Id.* at 476.
157. *Id.* at 425.
158. *Id.* at 477.
159. *Id.* at 425.
160. *Id.* at 425–38.
161. *Id.* at 481.
162. *Id.* at 482.

prove the defendants' conduct was the proximate cause of the harm to Huntington and Cabell County.[163]

Turning to the remedy, the court asserted that the plaintiffs' claim, in reality, sought damages—not an abatement—which are not available as a remedy under public nuisance doctrine.[164] Under West Virginia law, an abatement is limited to enjoining or stopping allegedly tortious conduct.[165] What the plaintiffs sought was therefore not an abatement, but compensation for the costs of treating opioid use and abuse.[166] Such remuneration constitutes damages because the "costs have no direct relation to any of defendants' alleged misconduct."[167] Since the plaintiffs waived all claims for damages, seeking only an equitable abatement, the court found that the remedy sought—recovering for the harms done by the opioid crisis—did not constitute an abatement.[168]

2. FEDERAL BENCH TRIAL IN THE NORTHERN DISTRICT OF CALIFORNIA

The initial suit, brought by the People of California through the San Francisco City Attorney, was filed against dozens of defendants that manufacture, distribute, and dispense opioids.[169] At the bench trial from April 25 to June 27, 2022, four defendants remained.[170] And by the close of trial, only Walgreens remained as a defendant, facing a single public nuisance claim for its contribution to the opioid epidemic in San Francisco.[171] To succeed in the claim, the plaintiff needed to "prov[e] by a preponderance of the evidence that Walgreens had knowledge that its unreasonable conduct caused a substantial interference with a right common to the public."[172] On August 10, 2022, "[a]fter careful consideration of the evidence," the court found that "Walgreens knowingly engaged in unreasonable conduct that was a substantial factor in contributing to the opioid epidemic in San Francisco."[173] In the subsequent abatement phase of the trial, the court

163. *Id.*
164. *Id.* at 482–84.
165. *Id.* at 483.
166. *Id.* at 483–84.
167. *Id.* at 483.
168. *Id.* at 482, 484.
169. *City & County of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936, 938 (N.D. Cal. 2022).
170. *Id.* at 938.
171. *Id.*
172. *Id.* at 998.
173. *Id.* at 938.

will "determine the extent to which Walgreens must abate the public nuisance that it helped to create."[174]

Despite California's safe harbor immunity provision, the court concluded that Walgreens engaged in two forms of unreasonable conduct.[175] Walgreens distributed suspicious orders to its pharmacies, and the pharmacies "dispens[ed] hundreds of thousands of red flag opioid prescriptions without due diligence in violation of 21 C.F.R. § 1306.04(a)" of the CSA.[176] Notwithstanding California's safe harbor provision that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance,"[177] the court noted "conduct is unreasonable if it violates a statute, ordinance, or administrative regulation."[178] "[B]ecause of the direct link from dispensing to diversion," the court based its finding of liability on regulatory violations at the pharmacy level: Walgreens distribution centers only supplied Walgreens pharmacies, so the diversion happened through suspicious orders that were improperly sent from its distribution centers to its pharmacies, which in turn filled red flag prescriptions without due diligence.[179]

Beginning with violations of regulations at the distribution level, Walgreens operated three distribution centers—in California, Florida, and Ohio—that exclusively supplied Walgreens pharmacies with prescription opioids.[180] Under the CSA and its implementing regulations, distributors must develop and maintain a monitoring system that effectively identifies suspicious orders.[181] The evidence established that "neither Walgreens corporate nor its distribution centers maintained effective suspicious order monitoring systems for years."[182] A 2006 Drug Enforcement Administration (DEA) audit of the Ohio center found a deficient suspicious order monitoring system; in 2008, a

174. *Id.* at 1009. The remedy phase was scheduled for the fall of 2022, but the parties initiated productive settlement negotiations and requested a continuance of the trial. In May 2023, Walgreens agreed to pay the City of San Francisco $230 million to abate the opioid crisis in the city, settling the case. Press Release, City Att'y of S.F., San Francisco City Attorney Announces $230 Million Settlement with Walgreens After Victory in Opioid Litigation (May 17, 2023), https://www.sfcityattorney.org/2023/05/17/sanfrancisco-city-attorney-announces-230-million-settlement-with-walgreens-after-victoryin-opioid-litigation/ [https://perma.cc/3BPU-9VD6].

175. *City & County of San Francisco*, 620 F. Supp. 3d at 998–1000.

176. *Id.* at 998.

177. *Id.* at 999 (quoting CAL. CIV. CODE § 3482 (West 2023)).

178. *Id.* (citation omitted).

179. *Id.* at 998–99.

180. *Id.* at 953.

181. *Id.* at 951.

182. *Id.* at 955.

Walgreens Internal Audit Team concluded that the deficiencies had not been resolved.[183] Similarly, internal audits in 2008 and 2011 found the California distribution center was not in compliance with DEA regulations, in part because it was shipping suspicious controlled substance orders without any investigation.[184] In 2012, the DEA issued an immediate suspension of the distribution of controlled substances from the Florida center because its "violations of the CSA created an imminent threat of harm to public health and safety."[185] Finally, in 2014, Walgreens distribution centers stopped supplying Walgreens pharmacies with controlled substances altogether, using third-party distributors instead.[186]

Turning to the pharmacies, the evidence at trial proved that it is more likely than not that Walgreens violated federal regulations.[187] Under the CSA, a pharmacy has a responsibility to ensure that its pharmacists perform due diligence to ensure opioid prescriptions are legitimate.[188] Testimony from Walgreens pharmacists in San Francisco established that they did not have the time, staffing, resources, or training to investigate suspicions prescriptions.[189] Furthermore, the company's goal of generating revenue by increasing volumes of prescriptions was prioritized over allowing pharmacists to perform due diligence.[190]

These circumstances prevented pharmacists from fulfilling their obligations as "the last line of defense against the diversion of controlled substances."[191] Between 2006 and 2020, a yearly average of 83,420 prescriptions containing more than five million opioid pills were filled without first resolving the red flags[192]—"a significant number" of these being "illegitimate" prescriptions.[193] Consequently, the DEA issued multiple findings that Walgreens pharmacies filled illegitimate opioid prescriptions, entering into memoranda of agreement to resolve "systemic deficiencies in Walgreens' due diligence policies and procedures."[194] However, Walgreens did not fulfill its agreement to

183. *Id.*
184. *Id.* at 955–56.
185. *Id.* at 957.
186. *Id.* at 958.
187. *Id.* at 1000.
188. *Id.* at 959.
189. *Id.* at 970–76.
190. *Id.* at 976–78.
191. *Id.* at 978 (cleaned up).
192. *Id.* at 997.
193. *Id.* at 979.
194. *Id.* at 996.

develop more effective controls to avoid filling illegitimate prescriptions.[195] Applying these facts to the standard of unreasonable conduct, the court concluded that "[t]here is no social utility in violating a federal regulation designed to protect the public from harm."[196] Walgreens's nearly fifteen-year violation of the CSA, which requires pharmacies to take reasonable steps to prevent the diversion of controlled substances, constituted unreasonable conduct sufficient to support a public nuisance claim.[197]

Proceeding to causation, the court analyzed whether Walgreens's knowingly unreasonable conduct was a substantial factor in contributing to the alleged public nuisance—the opioid crisis in San Francisco.[198] Under California law, the substantial factor test requires that a defendant's contribution to the harm be more than negligible or theoretical.[199] The substantial factor test "subsumes 'but for' causation," and conduct may substantially contribute to a public nuisance when there are other independent or concurrent causes in fact.[200] Further, "causation may be reasonably inferred from circumstantial evidence," and it is not necessary to provide direct proof of each independent link in the chain of causation.[201] Given this standard, the evidence "support[ed] a reasonable inference that Walgreens dispensed large volumes of illegitimate opioid prescriptions" that contributed to the opioid epidemic in San Francisco in a way that was more than negligible or theoretical.[202]

Next, the court addressed the policy considerations that limit liability under the label of proximate or legal cause—specifically, the foreseeability of the harm and the refusal to extend public nuisance law to encompass products-based claims.[203] First, plaintiffs proved that the harmful downstream consequences of the unlawful filling of opioid prescriptions by Walgreens pharmacies were foreseeable.[204] Second, the court was unpersuaded by the reasoning of the Oklahoma Supreme Court and the federal court in West Virginia that applying the law of public nuisance to a products-based claim will invite litigation against

195. *Id.*
196. *Id.* at 1000.
197. *Id.*
198. *See id.* at 1002–04.
199. *Id.* at 1002.
200. *Id.* (citation omitted).
201. *Id.*
202. *Id.* at 1004.
203. *Id.* at 1006–07.
204. *Id.* at 1007.

any potentially dangerous product.[205] Unlike Oklahoma, California does not require that a public nuisance claim be limited to an interference with the use land or property.[206] Moreover, because the claim is based on Walgreens's violation of federal regulations—not the inherent risk of opioids as a product—there is no risk that finding liability will open the floodgates of litigation "against a company that sells any product with a known risk of harm."[207]

Finally, the court disagreed with Walgreens's argument that a public nuisance claim is not actionable because the defendant does not have the ability to abate the harm[208]—*i.e.*, that Walgreens cannot control or remedy the opioid crisis in San Francisco through any discrete conduct. The "ability to abate" argument is not supported by California law.[209] Instead, liability for an actionable nuisance is based on showing that a defendant created or assisted in creating the nuisance.[210] The plaintiff proved that the opioid epidemic in San Francisco interferes with all five categories of public rights—health, safety, peace, comfort, and convenience—and that Walgreens substantially contributed to the opioid epidemic in the city "with far-reaching and devesting effects across San Francisco."[211] Accordingly, the court concluded that Walgreens was liable for abating the public nuisance.[212]

3. FEDERAL JURY TRIAL IN THE NORTHERN DISTRICT OF OHIO

The claims were brought by Lake and Trumbull Counties of Ohio, and the pharmacy defendants at trial were CVS, Walgreens, and Walmart.[213] The trial was bifurcated: phase I was a liability phase decided by a jury, followed by phase II in which the court would decide the appropriate remedy.[214] On November 23, 2021, the jury found each defendant liable for creating a public nuisance through the oversupply of prescription opioids that were diverted to illicit uses in the plaintiffs' communities.[215] Following the remedial trial, on August 17, 2022, the

205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 1008.
209. *Id.*
210. *Id.*
211. *Id.* 1008–09.
212. *Id.* at 1009.
213. *Opiate II*, 622 F. Supp. 3d 584, 593 (N.D. Ohio 2022).
214. *Id.* at 591.
215. *Id.* at 593.

court issued an order holding the defendants jointly and severally responsible for paying $650 million to abate the public nuisance—one third of the "recoverable" cost of mitigating the harm caused by the improper dispensing of opioids in Lake and Trumbull Counties.[216]

To prevail in their public nuisance claim, the plaintiffs needed to prove the defendants "engaged in intentional and/or unlawful conduct that caused a significant and ongoing interference with a public right to health or safety."[217] The standard for unlawful conduct required showing the defendants "did not substantially comply with the Federal and Ohio Controlled Substances Acts and their accompanying regulations."[218] Specifically, the jury was instructed that "a violation . . . occurs when a person knowingly fills or allows to be filled an illegitimate prescription."[219] The plaintiffs' theory of proof was based on aggregate evidence showing the defendants repeatedly failed to "take legally-required, effective measures to identify and resolve 'red flags' prior to dispensing, and fail[ed] to document any due diligence with respect to those red flags."[220] Finally, under Ohio law, safe harbor immunity from nuisance liability is "available only to those who perform in accordance with their applicable licensing and regulatory obligations."[221] However, the plaintiffs' claim alleged "material non-compliance with the CSA and related state obligations."[222] Because the jury found the defendants failed to comply with regulations, they were not entitled to safe harbor immunity.[223]

To prove unlawful conduct, the plaintiffs offered evidence of the defendants' failure to comply with regulations. Testimony from pharmacists, corporate employees, and experts established that the pharmacies had inadequate diversion control policies and systems, and the policies that were in place were not sufficiently enforced.[224] According to expert testimony, ninety percent of red flag prescriptions were not properly documented, identified, and resolved.[225] The estimated number of red flag prescriptions ranged from 37,379 for Walmart (between 2006 and 2018), to 141,651 for CVS (between 2006

216. *Id.* at 592.

217. *In re Nat'l Prescription Opiate Litig.* (*Opiate I*), 589 F. Supp. 3d 790 (N.D. Ohio 2022) (cleaned up).

218. *Id.* at 796.

219. *Id.* at 797.

220. *Id.* at 796 (footnote omitted).

221. *Id.* at 800 (cleaned up).

222. *Id.* at 816 (cleaned up).

223. *Id.* at 801.

224. *Id.* at 798–800, 802, 804.

225. *Id.* at 799–800, 801–02, 805.

and 2019), and 175,609 for Walgreens (between 2006 and 2019).[226] This high rate of unresolved red flag prescriptions was combined with the volume of opioids dispensed in each county during the same time period: CVS dispensed forty million dosage units;[227] Walgreens dispensed fifty-two million dosage units;[228] and Walmart dispensed fifteen million dosage units.[229] Given this aggregate evidence, the jury had a reasonable basis to find that all three defendants "knowingly engaged in unlawful conduct by dispensing opioids without effective controls and procedures to guard against diversion."[230]

In addition to unlawful conduct, the plaintiffs needed to prove causation by showing the defendants' conduct was "a substantial factor in creating" the opioid crisis.[231] The court rejected the defendants' theory that proving causation requires proof of dispensing specific prescriptions that were illicit or eventually diverted.[232] Instead, "massive increases in the supply of prescription opioids, combined with" the defendants' failure "to maintain effective controls against diversion, supported a reasonable inference that defendants' conduct was a substantial factor in creating the alleged nuisance."[233]

The defendants further contended that their conduct was "too immaterial to be a 'substantial factor' in causing the nuisance" because of their limited market share in the plaintiffs' counties and their "remote role" in the opioid supply chain.[234] But under Ohio's substantial factor test, "[t]here may be multiple causes of a public nuisance," and a defendant is not relieved from liability because of other causes.[235] Accordingly, the contributing causes that included manufacturers, distributors, governmental entities, prescribing doctors, and criminal actors did not remove the pharmacies' liability—as the "last line of defense" in the supply of opioids—for failing to ensure that prescriptions were legitimate.[236]

In a products liability argument, the defendants relied on the Oklahoma Supreme Court's refusal to expand public nuisance law to products-based claims; however, the court found that Ohio's public

226. *Id.* at 799, 803, 805.
227. *Id.* at 800.
228. *Id.* at 803.
229. *Id.* at 805.
230. *Id.* at 800 (CVS); *id.* at 803 (Walgreens); *id.* at 805 (Walmart).
231. *Id.* at 796 (cleaned up).
232. *Id.* at 808.
233. *Id.*
234. *Id.* at 809.
235. *Id.*
236. *Id.* at 809–10.

nuisance law is different.[237] Specifically, in the wave of litigation against gun manufacturers, the Ohio Supreme Court held that public nuisance law is not limited to "actions connected to real property or to statutory or regulatory violations involving public health or safety."[238] Instead, Ohio's public nuisance law can encompass the "marketing, distributing, and selling of firearms in a manner that facilitated their flow into the illegal secondary market."[239] Thus, the Oklahoma court's holding that public nuisance law does not apply to products is inapplicable in Ohio.[240]

Turning to the abatement remedy, the court rejected the defendants' argument that they were not liable for abating the current opioid crisis because they stopped the alleged misconduct that created the public nuisance.[241] The defendants contended the nuisance consisted only of the conduct leading to the oversupply and diversion of prescription opioids.[242] But under Ohio's public nuisance law, the interference with a public right includes both the conduct that causes the nuisance *and* the harm caused by a defendant's tortious conduct.[243] In addition to enjoining nuisance-causing conduct, "a court, sitting in equity, may require the defendant to abate (*i.e.*, eliminate, mitigate, or otherwise meaningfully ameliorate) that ongoing harmful condition, which continues to interfere with public health and safety."[244] Here, the public nuisance that requires abating is "the harm resulting from Defendants' conduct"—specifically, the large population of individuals that suffer from opioid use disorder in the plaintiffs' communities resulting from the oversupply and diversion of prescription opioids.[245]

Continuing its remedy analysis, the court distinguished the funding of abatement programs from compensatory damages.[246] The defendants argued that the plaintiffs sought damages in the form of remuneration, which are not available as a remedy in an equitable cause of action.[247] However, the court determined "[i]t is well-established that an order requiring defendants to pay money to abate harm going forward does

237. *Id.* at 815.

238. *Id.* (quoting *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002)).

239. *Id.* (quoting *Cincinnati*, 768 N.E.2d at 1143).

240. *Id.*

241. *Id.* at 826.

242. *Opiate II*, 622 F. Supp. 3d 584, 600–01 (N.D. Ohio 2022).

243. *Id.* at 602.

244. *Id.* at 603.

245. *Id.* at 602.

246. *See id.* at 605–07.

247. *Id.* at 605–06.

not convert an equitable remedy into a damages award."[248] Accordingly, the proposed abatement plan—the funding of programs to address the opioid crisis—is within the scope of an abatement remedy that will effectively mitigate the ongoing nuisance.[249]

III. FACTORS THAT ARE PREDICTIVE OF A VIABLE PUBLIC NUISANCE CLAIM IN OPIOID LITIGATION

These five trials of public nuisance claims against the opioid industry yielded varied and inconsistent outcomes. The state court in Oklahoma and federal court in West Virginia refused to extend public nuisance law to encompass the manufacture, sale, and distribution of a product, including opioids.[250] Without rejecting the public nuisance theory of liability, the California state court held that the plaintiffs did not offer sufficient evidence to prove that opioid manufacturers caused the opioid crisis.[251] And the federal courts in the California and Ohio MDL trials found the pharmacy defendants liable under public nuisance law for abating the opioid crisis.[252] While all five claims sought to hold companies from the opioid industry liable for causing a public nuisance, there are many factors that distinguish the cases, helping to explain the conflicting outcomes.

By synthesizing each jurisdiction's reasoning, and the similarities and differences of the claims, five factors emerge to identify a viable theory of liability under public nuisance law for causing the opioid crisis—at least in some jurisdictions. This Part analyzes the factors that are most predictive of the outcomes in public nuisance claims in opioid litigation: (1) the different types of defendants in the opioid supply chain; (2) the jurisdiction's standard of factual and proximate/legal causation; (3) a defendant's compliance—or non-compliance—with laws and regulations; (4) precedent from previous public nuisance claims against gun and lead paint manufacturers; and (5) the jurisdictional approach to the meaning and scope of abatement. While it is difficult to gauge the extent to which the factors are determinative of outcomes,

248. *Id.* at 607.

249. *Id.* at 613–15. Although the court adopted "in large part Plaintiffs' proposed abatement plan," the court acknowledged it was "not blind to the fact that Plaintiffs' plan ask[ed] for too much." *Id.* at 615.

250. *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021); *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408 (S.D. W. Va. 2022).

251. *People v. Purdue Pharma L.P.*, No. 30-2014-00725287-CU-BT-CXC, 2021 Cal. Super. LEXIS 31743 (Cal. Super. Ct. Dec. 14, 2021).

252. *City & County of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936, 939 (N.D. Cal. 2022); *Opiate II*, 622 F. Supp. 3d 584.

each factor can slant in favor of or against an actionable public nuisance claim in opioid litigation.

A. Types of Defendants in the Supply Chain: Manufacturers, Distributors, and Pharmacies

The five cases analyzed in this Comment involved claims against defendants that have different roles in the supply of prescription opioids. Based on the outcomes of these cases, pharmacies are much more likely to be found liable under public nuisance law. By contrast, it appears more difficult to prevail in a public nuisance claim against a distributor and, even more so, against a manufacturer.[253] Both evidentiary factors and legal considerations impact the level of exposure to public nuisance liability, depending on a defendant's role in the opioid supply chain.

Claims against manufacturers failed both as a matter of law and of fact. The claims in the state court trials in Oklahoma and California involved similar allegations that manufacturers caused a public nuisance through aggressive and misleading marketing that succeeded in increasing the prescription rate of opioids, which in turn led to the oversupply and/or diversion of prescription opioids that caused the opioid crisis.[254] In the Oklahoma case, the court was unwilling to extend public nuisance doctrine to the lawful manufacture and sale of products.[255] In contrast, the claim in California state court failed, not as a matter of law, but because the plaintiffs failed to meet their burden of proof, having offered insufficient evidence to show that the allegedly aggressive and misleading marketing campaign caused a public nuisance through the medically inappropriate oversupply of prescription opioids.[256]

The two cases illustrate two different reasons why plaintiffs will face significant obstacles in pursuing public nuisance claims against manufacturers of prescription opioids. First, as a matter of law, courts are reluctant to extend public nuisance doctrine to encompass the

253. *Compare City & County of San Francisco*, 620 F. Supp. 3d 936, *and Opiate II*, 622 F. Supp. 3d 584, *with City of Huntington,* 609 F. Supp. 3d 408, *and State ex rel. Hunter*, 499 P.3d 719.

254. *See State ex rel. Hunter*, 499 P.3d at 722; *Purdue Pharma L.P.*, 2021 Cal. Super. LEXIS 31743, at *2.

255. *State ex rel. Hunter*, 499 P.3d at 723.

256. *See Purdue Pharma L.P.*, 2021 Cal. Super. LEXIS 31743, at *9–10, *19–20, *26–27. *Id.* at *31 ("Nothing stated herein is intended to suggest that false or misleading marketing and promotion that results in medically inappropriate prescriptions being written may not constitute an actionable public nuisance. But that is not the evidence before this Court.").

manufacture and sale of a legal product such as prescription opioids. Second, even if state public nuisance law can encompass the manufacture or sale of a product—either by statute or precedent—plaintiffs still face great evidentiary obstacles to showing that a manufacturer's marketing campaign caused a public nuisance: there are too many links in the supply chain, as well as the causal chain, that distance manufacturers from the communities that are impacted by the opioid crisis. Moreover, because prescription opioids are both legal and socially beneficial—when appropriately used to treat pain—plaintiffs will also struggle to prove the unreasonableness of any interference with the public right to health that is allegedly caused by the manufacture, marketing, and sale of the opioids.[257]

Opioid distributors face greater exposure to public nuisance liability than manufacturers, but proving causation still presents a significant obstacle, especially compared to pharmacies. Distributors' role in the supply chain is to purchase opioids in bulk directly from manufacturers and supply pharmacies, which fill prescriptions. The claims against the three major distributors in the West Virginia MDL trial[258] failed, among other reasons, because the plaintiffs were unable to offer admissible evidence to show that the alleged oversupplying of pharmacies caused the opioid crisis in the plaintiffs' communities.[259] Additionally, the intervening causes of prescribing physicians, pharmacies that dispensed an oversupply of opioids, and the illicit diversion that happened after the prescriptions were filled did not allow for the reasonable inference that the distributors proximately caused the opioid crisis.[260]

In contrast to the major distributors in the West Virginia MDL trial that supply a multitude of pharmacies, the Walgreens distribution operation provides an example of how a distributor can be held liable for causing a public nuisance. In the California MDL trial, the court found that Walgreens distributors exclusively supplied Walgreens pharmacies that were shown to dispense red flag prescriptions.[261] And Walgreens distribution centers also failed to identify and resolve the suspicious orders that were shipped to those pharmacies.[262] This "direct link from dispensing to diversion"[263] is a supply chain model that

257. *See, e.g.*, *id.* at *14, *19.

258. *City of Huntington*, 609 F. Supp. 3d at 414, 484.

259. *Id.* at 480–81.

260. *Id.* at 480–82.

261. *City & County of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936, 998–99 (N.D. Cal. 2022).

262. *Id.* at 998.

263. *Id.*

reduces the potential for intervening causes, removing significant obstacles to proving causation. Nevertheless, the court based its finding of liability on the conduct of Walgreens pharmacies, not the distribution centers.[264]

Pharmacies face the greatest liability for causing a public nuisance through the oversupply of prescription opioids because pharmacies are the point in the supply chain where prescription opioids are dispensed directly to consumers. As the "last line of defense" in the supply chain, the diversion of prescription opioids that unlawfully contributes to the opioid crisis—the alleged public nuisance—occurs when pharmacies fill illegitimate prescriptions.[265] The public nuisance claims that prevailed in the California and Ohio MDL trials involved claims against pharmacies that allegedly dispensed red flag prescriptions without performing due diligence.[266] Unlike the claims against manufacturers in the California state trial and distributors in the West Virginia trial that required proof of "extended chains of causation,"[267] claims against pharmacies involve a much shorter "causal link" that can be proven with evidence of regulatory non-compliance.[268] If a plaintiff can offer evidence to show a significant pattern of filling red flag prescriptions without performing due diligence, the factfinder can reasonably infer that the pharmacy causally contributed to the diversion of prescription opioids that resulted in the opioid crisis.[269] Hence, pharmacy defendants face the greatest exposure to public nuisance liability.

B. Standard of Factual and Legal Causation

In addition to a defendant's proximity to consumers in the supply chain, exposure to liability is significantly impacted by the legal standard that determines the causation element of the public nuisance claim. Causation standards vary significantly across jurisdictions, and the "but-for" test serves to limit liability in comparison to the broad substantial factor test, which lessons the burden of proving causation. Thus, a pharmacy or distributor found liable for causing a public nuisance under the substantial factor test may not be liable under the

264. *Id.* at 998–99.

265. *See id.* at 978; *Opiate I*, 589 F. Supp. 3d 790, 810 (Ohio 2022).

266. *City & County of San Francisco*, 620 F. Supp. 3d at 998–99; *Opiate I*, 589 F. Supp. 3d at 796.

267. *City & County of San Francisco*, 620 F. Supp. 3d at 1005 (distinguishing *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408 (S.D. W. Va. 2022), and *State ex rel. Hunter*, 499 P.3d 719 (Okla. 2021)).

268. *Id.* at 1006.

269. *See id.* at 1003–04; *Opiate I*, 589 F. Supp. 3d at 808–09.

but-for test. In addition to tests for factual causation, the scope of liability is also impacted by a jurisdiction's approach to proximate or legal causation, which reflect policy considerations to limit liability for a defendant's conduct when the harm is too remote or unforeseeable.[270] A comparison of the standard of causation in West Virginia with the standards in California and Ohio illustrates this point.

In a public nuisance action, West Virginia courts apply the but-for standard of causation, limiting liability through an emphasis on the proximity of a defendants' conduct relative to the alleged harm.[271] The test for causation requires that a plaintiff prove that "but for the alleged wrongful conduct, the alleged harm would not have occurred."[272] Moreover, the proximate cause of a nuisance is "the last negligent act contributing to the injury and without which the injury would not have occurred."[273] Consequently, if there is any "effective intervening cause, there can be no other causes proximately resulting in the alleged injury."[274] Therefore, a defendant's unlawful conduct can contribute to a public nuisance but not be the proximate cause of the harm because of the intervention of another, more recent proximate cause.[275]

Applying this standard, the federal court in West Virginia determined that the plaintiffs failed to prove the distributors proximately caused the alleged opioid crisis through the oversupply of opioids.[276] The doctors that wrote prescriptions, the pharmacies that filled prescriptions, and the illicit diversion that happened after pharmacies dispensed the opioids all constituted "effective intervening causes" that relieved the distributors of liability for causing the alleged public nuisance.[277] Under this standard of proximate causation, a theory of liability would need to establish that a distributor was illicitly diverting the opioids directly into the community or that a distributor was supplying pharmacies that were diverting opioids—*e.g.*, illegitimate "pill mill" pain clinics.[278]

In contrast to West Virginia's but-for test, the substantial factor test for causation only requires that a defendant's conduct contribute to

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270. *City & County of San Francisco*, 620 F. Supp. 3d at 1006–07.

271. *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 475–76 (S.D. W. Va. 2022).

272. *Id.* (citation omitted).

273. *Id.* (quoting *Sergent v. City of Charleston*, 549 S.E.2d 311, 320 (W. Va. 2001)).

274. *Id.* at 482.

275. *Id.* at 481.

276. *Id.* at 482.

277. *Id.*

278. *See id.* at 468–70, 479–80.

a public nuisance. Under the California standard, a defendant's causal contribution to the alleged harm is a substantial factor if it is more than theoretical or negligible.[279] Further, causation may be reasonably inferred from circumstantial evidence, and it is not necessary to provide direct proof of each independent link in the chain of causation.[280] And under the Ohio standard, a defendant's conduct is a substantial factor if it is "one of the material, meaningful, or considerable causes of the nuisance."[281] Moreover, in both California and Ohio, other causes that contribute to the public nuisance do not relieve a defendant from liability.[282] Accordingly, the pharmacy defendants in the California and Ohio MDL trials were still liable for causing the opioid crisis despite a myriad of contributing causes: manufacturers, distributors, over-prescribing physicians, and the more proximate conduct of individuals that diverted opioid prescriptions after they were dispensed by pharmacies.[283] Under the West Virginia standard, these contributing causes would constitute intervening causes that relieve defendants from liability.[284] Instead, to prove causation in California and Ohio, it was sufficient for the plaintiffs to establish that the defendant pharmacies failed to perform due diligence on red flag prescriptions in aggregate, without providing direct evidence of specific illegitimate prescriptions that were filled.[285]

Additionally, proximate or legal causation did not limit liability for the pharmacies' conduct due to considerations of remoteness or foreseeability. The downstream consequences of dispensing red flag opioid prescriptions were foreseeable in the California case,[286] and in the Ohio case, the downstream interference with public health and safety could reasonably be expected.[287] But it seems likely that these claims would have failed in a jurisdiction like West Virginia under a standard of causation that requires proving the opioid crisis would not

279. *People v. Purdue Pharma L.P.*, No. 30-2014-00725287-CU-BT-CXC, 2021 Cal. Super. LEXIS 31743, at *7–8 (Cal. Super. Ct. Dec. 14, 2021); *City & County of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936, 1002 (N.D. Cal. 2022).

280. *City & County of San Francisco*, 620 F. Supp. 3d at 1002.

281. *Opiate I*, 589 F. Supp. 3d 790, 810 (Ohio 2022) (cleaned up).

282. *See City & County of San Francisco*, 620 F. Supp. 3d at 1002; *Opiate I*, 589 F. Supp. 3d at 809.

283. *Opiate I*, 589 F. Supp. 3d at 810–11; *City & County of San Francisco*, 620 F. Supp. 3d at 1003–04.

284. *See supra* notes 271–75 and accompanying text.

285. *Opiate I*, 589 F. Supp. 3d at 796–97; *City & County of San Francisco*, 620 F. Supp. 3d at 1004.

286. *City & County of San Francisco*, 620 F. Supp. 3d 936 at 1007.

287. *Opiate I*, 589 F. Supp. 3d at 810 n.87.

have occurred but for the pharmacies' failure to perform due diligence and, moreover, that the pharmacies' conduct was the last, most proximate contribution to the alleged public nuisance.

C. Compliance—or Non-Compliance—with Laws and Regulations

An important limitation on the scope of liability under public nuisance law is provided in safe harbor statutes or precedent that create immunity for lawful conduct. For example, the safe harbor provision of California's public nuisance statute provides that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance."[288] In Ohio case law, safe harbor immunity from nuisance liability is "available only to those who perform in accordance with their applicable licensing and regulatory obligations."[289] For prescription opioids, safe harbor immunity depends on compliance with the CSA and its implementing regulations, which authorize and regulate the manufacture, distribution, and dispensing of prescription opioids.[290] Similarly, the courts' refusal to extend public nuisance law to the manufacture, marketing, distribution, and sale of lawful products in Oklahoma and West Virginia reflects the same underlying policy that liability should not apply to legal conduct.[291]

Nevertheless, statutory and regulatory authorization of the prescription opioid industry cuts both ways in terms of public nuisance liability. On the one hand, manufacturers, distributors, and pharmacies that comply with regulatory requirements will be entitled to safe harbor immunity in jurisdictions like Ohio and California. Even absent safe harbor immunity, the authorization of the CSA and its implementing regulations extend a presumption of reasonableness to the conduct of companies in the opioid supply chain as long as they are in compliance, thus making it difficult or impossible to establish that any interference with a public right is unreasonable.[292] But when actors in the opioid supply chain are not in compliance with the regulatory scheme of the CSA, they lose safe harbor immunity, and the failure to comply with

288. CAL. CIV. CODE. § 3482 (West 2023).

289. *Opiate I*, 589 F. Supp. 3d at 800 (internal quotations omitted).

290. *See* 21 U.S.C. §§ 801–32; *City & County of San Francisco*, 620 F. Supp. 3d at 950, 999–1000.

291. *See State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 725 (Okla. 2021); *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 473–75 (S.D. W. Va. 2022).

292. *People v. Purdue Pharma L.P.*, No. 30-2014-00725287-CU-BT-CXC, 2021 Cal. Super. LEXIS 31743, at *18 (Cal. Super. Ct. Dec. 14, 2021).

regulations satisfies the element of unlawful or unreasonable conduct in a public nuisance action.[293]

A successful theory of public nuisance liability against a company in the opioid supply chain can therefore be based on a defendant's failure to comply with regulations. Proving non-compliance with the CSA and its implementing regulations prevents a defendant from receiving safe harbor immunity for conduct authorized by statute.[294] Regulatory non-compliance also establishes the element of unreasonable or unlawful conduct.[295] Additionally, a public nuisance theory of liability based on regulatory non-compliance—not the inherent risks of opioids as a product—avoids the problem of merging public nuisance law with products liability law, which potentially creates unlimited liability for manufacturers.[296] Conversely, without proof that a defendant failed to comply with regulations governing prescription opioids, a public nuisance claim is likely to fail because of safe harbor immunity, a presumption of reasonableness, or a court's unwillingness to extend the doctrine to lawful conduct.

Indeed, the public nuisance actions that prevailed at trial offered extensive evidence of pharmacy defendants' failure to perform due diligence in documenting and resolving red flag prescriptions—as required under the CSA.[297] Furthermore, the claim in California state court failed precisely because the plaintiffs did not prove the defendants' aggressive and misleading marketing campaign resulted in medically inappropriate prescriptions that did not comply with state and federal regulations governing prescription opioids.[298] The evidence presented in the MDL trials in California and Ohio demonstrates that there was widespread, systemic non-compliance—sufficient to sustain a public nuisance action—among some large-scale pharmacies between 2006 and 2020.[299] But the fact that the majority of claims against manufacturers and distributors in the MDL have settled[300] leaves an

293. *Opiate I*, 589 F. Supp. 3d at 800–01, 820; *City & County of San Francisco*, 620 F. Supp. 3d at 999–1000.

294. *Opiate I*, 589 F. Supp. 3d at 800–01.

295. *City & County of San Francisco*, 620 F. Supp. 3d at 999.

296. *Id.* at 1007. *See also Opiate I*, 589 F. Supp. 3d at 816–17. This potential for unlimited liability was a central concern of the Oklahoma and West Virginia courts. *See supra* notes 79, 144–45 and accompanying text.

297. *See City & County of San Francisco*, 620 F. Supp. 3d at 1000; *Opiate I*, 589 F. Supp. 3d at 820.

298. *People v. Purdue Pharma L.P.*, No. 30-2014-00725287-CU-BT-CXC, 2021 Cal. Super. LEXIS 31743, at *23–26 (Cal. Super. Ct. Dec. 14, 2021).

299. *City & County of San Francisco*, 620 F. Supp. 3d at 997–98; *Opiate I*, 589 F. Supp. 3d at 797–805.

300. *Opiate II*, 622 F. Supp. 3d 584, 592 (N.D. Ohio 2022).

important question unanswered: whether manufacturers and distributors also failed to comply with regulations and whether plaintiffs can offer sufficient evidence to prove non-compliance to support a public nuisance claim against these defendants.

D. Precedent from Other Products-Based Public Nuisance Cases

Whether or not a public nuisance claim is actionable against an opioid manufacturer, distributor, or pharmacy correlates with the precedent, or lack of precedent, in the jurisdiction from cases that were brought against either gun or lead paint manufacturers. Based on these five cases, if a public nuisance claim can encompass the manufacture, sale, and distribution of opioids, there is a state court decision that previously applied public nuisance law to encompass the manufacture, sale, and distribution of either guns or lead paint. Not only does such precedent provide authority for public nuisance liability in opioid litigation, but it also relieves a court from making a policy decision to extend nuisance liability into new areas.

In both the state and federal trials in California, the court, as well as the plaintiffs, cited extensively to *People v. ConAgra Grocery Products Co.*,[301] which found that manufacturers that marketed lead paint for interior residential use were liable for creating a public nuisance.[302] Although the California state court decided that the plaintiffs had not offered sufficient evidence to prove the elements of a public nuisance claim against opioid manufacturers, *ConAgra* provided the standard for how a products-based public nuisance action could prevail against a manufacturer.[303] Likewise, in the California MDL trial, the federal court relied on *ConAgra* as authority for the standard of proving the elements of the plaintiffs' public nuisance claim against Walgreens.[304] Additionally, the court cited *ConAgra* to address the legal counterarguments that Walgreens should not be held liable for creating a public nuisance due to considerations of proximate causation and an inability to abate the nuisance.[305] Similarly, in the Ohio MDL trial, the court cited *City of Cincinnati v. Beretta U.S.A. Corporation*[306]—in which the Ohio Supreme Court held a public nuisance claim against gun

301. 227 Cal. Rptr. 3d 499 (Ct. App. 2017).

302. *See id.* at 518–19, 551–56; *Purdue Pharma L.P.*, 2021 Cal. Super. LEXIS 31743, at *17–24; *City & County of San Francisco*, 620 F. Supp. 3d at 998–1002, 1006, 1008.

303. *See Purdue Pharma L.P.*, 2021 Cal. Super. LEXIS 31743, at *7–25.

304. *See City & County of San Francisco*, 620 F. Supp. 3d at 998–1002.

305. *Id.* at 1006–08.

306. 768 N.E.2d 1136 (Ohio 2002).

manufacturers is a viable cause of action[307]—to reject the defendants' arguments that public nuisance law cannot encompass products-based claims.[308]

On the other hand, jurisdictions that never extended public nuisance law to encompass claims involving guns or lead paint have refused to apply public nuisance doctrine to the manufacture, sale, and distribution of prescription opioids. Without controlling precedent, courts are free to selectively cite persuasive authority to justify rejecting public nuisance liability for products-based claims. In the Oklahoma case, the court relied on a Rhode Island lead paint case, *State v. Lead Industry Association, Inc.*,[309] to assert that "public nuisance and product-related liability . . . are not intended to overlap."[310] And the court relied on an Illinois gun manufacturer case, *City of Chicago v. Beretta U.S.A. Corporation*,[311] for the proposition that the manufacture and distribution of a product does not cause a violation of a public right—an essential element of a public nuisance action.[312] *Chicago* was also persuasive to support the argument that a manufacturer cannot be held liable for an alleged nuisance that is caused by a product that is no longer in the manufacturer's control.[313]

Similarly, in the West Virginia MDL trial, the federal court cited *Chicago* and a New Jersey lead paint case, *In re Lead Paint Litigation*,[314] as persuasive authority to support the policy concern that applying public nuisance law to products-based claims would create liability without limitation, "opening the floodgates of litigation."[315] Courts that lack precedent applying public nuisance law to products-based claims are understandably reluctant to expand the doctrine into new areas with the potential for unlimited liability. Since public nuisance claims against gun and lead paint manufacturers received such varied treatment across jurisdictions, there is no shortage of persuasive authority to buttress a court's refusal to extend the doctrine to claims against the opioid industry.

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307. *Id.* at 1140–43.

308. *Opiate I*, 589 F. Supp. 3d 790, 815 (Ohio 2022).

309. 951 A.2d 428 (R.I. 2008).

310. *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 725 (Okla. 2021).

311. 821 N.E.2d 1099 (Ill. 2004).

312. *See State ex rel. Hunter*, 499 P.3d at 726–27.

313. *Id.* at 727–29.

314. 924 A.2d 484 (N.J. 2007).

315. *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 474 (S.D. W. Va. 2022).

E. What Constitutes an Abatement as a Remedy

One of the main legal arguments against public nuisance liability for the manufacture, distribution, and sale of prescription opioids focuses on the abatement remedy. Specifically, whether the remedy sought—the mitigation of the opioid crisis through the funding of abatement plans[316]—matches the equitable abatement remedy that is available under public nuisance doctrine.[317] When the relief sought is not within the scope of a public nuisance claim's available remedy, the claim will fail as a matter of law.[318] Thus, a court's analysis of abatement as a remedy, including whether the alleged nuisance—the opioid crisis—is abatable, is central to the viability of a public nuisance claim against an actor in the opioid supply chain.

The inquiry begins with an analysis of what constitutes an abatement. The courts that refused to extend public nuisance law to claims against the opioid industry—*i.e.*, Oklahoma and West Virginia—narrowly define abatement as ceasing the conduct that caused or is causing the alleged nuisance.[319] Under this view of the remedy, the funding of abatement plans does not constitute an abatement because it does not stop the alleged oversupply of opioids that caused the opioid crisis, or even the opioid crisis itself.[320] Instead, such remuneration constitutes a damages award that is not an abatement, and therefore the relief sought is not available under public nuisance law.[321]

In contrast to the view that abatement only entails stopping the conduct that caused the alleged nuisance, a broader view of the remedy includes paying to mitigate the harm that resulted from a defendant's conduct.[322] Applying this broader view of the abatement remedy, the courts in the Ohio and California MDL trials found that the defendants

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316. *See, e.g.*, *City of Huntington*, 609 F. Supp. 3d at 483–84; *State ex rel. Hunter*, 499 P.3d at 723; *Opiate II*, 622 F. Supp. 3d 584, 591–92, 607–08 (N.D. Ohio 2022).

317. *See supra* notes 32–33 and accompanying text.

318. *See State ex rel. Hunter*, 499 P.3d at 729; *City of Huntington*, 609 F. Supp. 3d at 482–84.

319. *See State ex rel. Hunter*, 499 P.3d at 729; *City of Huntington*, 609 F. Supp. 3d at 483–84.

320. *State ex rel. Hunter*, 499 P.3d at 729; *City of Huntington*, 609 F. Supp. 3d at 483–84.

321. *State ex rel. Hunter*, 499 P.3d at 729; *City of Huntington*, 609 F. Supp. 3d at 482–84.

322. *Opiate II*, 622 F. Supp. 3d 584, 606–07 (N.D. Ohio 2022) (explaining that "an equitable abatement award is designed solely to force a liable defendant to clean up the mess it made, even when it has to pay someone else to do it" and that "the remedy . . . possibly include[es] paying the costs to remediate harmful conditions it caused").

were liable for abating the opioid crisis—even though the pharmacies stopped the conduct that initially caused the harm, and the ongoing opioid crisis was not within the defendants' control.[323] At the liability phase of the trial, the California court did not further analyze the abatement remedy.[324] However, the Ohio court found that requiring a defendant to pay to mitigate an ongoing nuisance is a well-established form of abatement, not a damages award.[325] To illustrate, the court drew an analogy between environmental pollution and the opioid crisis: abatement remedies have historically required defendants in environmental cases to mitigate the harm from pollution *after* stopping the contamination-causing conduct; likewise, an abatement remedy can require defendants in opioid public nuisance cases to pay to mitigate the ongoing harm of the opioid crisis.[326] Ultimately, for a public nuisance claim seeking the mitigation of the opioid crisis as a remedy to be actionable, the court must define abatement to include the payment of money to address an ongoing harm that resulted from the nuisance-causing conduct.

CONCLUSION

After more than five years of litigation in the opioid MDL, two of the three bellwether trials recently yielded positive indications that public nuisance claims against pharmacy defendants can prevail.[327] In August 2022, the federal court in California held Walgreens liable for creating a public nuisance in its role as a distributor and pharmacy,[328] and the Ohio court ordered CVS, Walgreens, and Walmart to pay $650 million to abate the opioid crisis in two counties after the jury found the pharmacy defendants liable in the first phase of the trial.[329] Rather than leaving the court to determine the remedy in the California trial, the parties requested a continuance of the abatement phase, scheduled to begin in the fall of 2022, to engage in settlement negotiations.[330] In May 2023, Walgreens agreed to pay $230 million to the City of San

323. *Id.* at 635–36; *City & County of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936, 1008–09 (N.D. Cal. 2022).

324. *See City & County of San Francisco*, 620 F. Supp. 3d at 1009.

325. *Opiate II*, 622 F. Supp. 3d at 605–07.

326. *Id.* at 602–04. *See also City of Huntington*, 609 F. Supp. 3d at 483 (recognizing that an abatement can include, "in certain environmental nuisance cases, an injunction to remove the contaminant from the environment").

327. *See supra* notes 120, 127–34 and accompanying text.

328. *See supra* notes 169–73 and accompanying text.

329. *See supra* notes 213–16 and accompanying text.

330. San Francisco City Attorney Announces $230 Million Settlement with Walgreens After Victory in Opioid Litigation, *supra* note 174.

Francisco to settle the case and forego the abatement trial.[331] Furthermore, in November 2022, CVS, Walgreens, and Walmart offered to settle the remaining lawsuits brought by state, local, and tribal governments for a combined $13.1 billion.[332] To be sure, the emerging public nuisance liability in the MDL bellwether trials is a significant consideration in the settlement negotiations with the pharmacies.[333] The viability of public nuisance claims will thus determine the extent to which the pharmaceutical industry will take accountability for its role in causing the opioid crisis.[334]

In the public nuisance claims that prevailed in the California and Ohio MDL trials, all five of the factors analyzed in Part III aligned in favor of the plaintiffs. The defendants were pharmacies, occupying the link in the supply chain that is closest to the oversupply and illicit diversion of prescriptions. The jurisdictions have plaintiff-friendly standards of factual and legal causation. The pharmacies' regulatory non-compliance was systematic and egregious. State court precedent had previously applied public nuisance law to products-based claims. And mitigation of the opioid crisis by funding abatement programs fits within the scope of the equitable remedy in the jurisdiction. When all factors slant in favor of liability, they define a profile of a successful public nuisance claim in opioid litigation. On the other hand, the factors are also predictive of how a public nuisance claim may fail as a matter of law or fact. How the MDL trials from Ohio and West Virginia—both for and against liability—hold up on appeal is the next significant chapter in the nationwide endeavor to seek redress for the opioid crisis through public nuisance liability.

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331. *Id.*

332. Jan Hoffman, *Walmart Agrees to Pay $3.1 Billion to Settle Opioid Lawsuits*, N.Y. TIMES (Nov. 15, 2022), https://www.nytimes.com/2022/11/15/health/walmart-opioids-settlement.html. The agreements are tentative, pending approval of state, local, and tribal governments. *Id.*

333. *See* Jan Hoffman, *CVS and Walgreens Near $10 Billion Deal to Settle Opioid* Cases, N.Y. TIMES (Nov. 2, 2022), https://www.nytimes.com/2022/11/02/health/cvs-walgreens-opioids-settlement.html.

334. *See id.*