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The Current State of Opioid Litigation

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THE CURRENT STATE OF OPIOID LITIGATION

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I. INTRODUCTION

Opioid litigation began around the turn of the century and mostly involved unsuccessful lawsuits by addicts against the manufacturers of prescription opioids.[1] The landscape began to change several years ago when a number of state and local governments filed lawsuits against opioid drug manufacturers, seeking damages and other relief for the social and economic consequences of widespread opioid addiction in their territory.[2] Since then, hundreds of government entities (hereinafter referred to as "government plaintiffs") have sued the manufacturers, distributors, prescribers, retail sellers, corporate officers and physician promoters of opioid products (hereinafter referred to as "defendants"). When I began working on this Article in the fall of 2017, I expected that the opioid cases would resemble the government lawsuits of the 1990s against the firearms and lead-based industry. Consequently, my research focused on the strength of the liability theories and defenses that the parties would invoke as these cases proceeded through the courts.

All of this changed in December of 2017, when the Judicial Panel on Multidistrict Litigation (JPML) appointed Judge Dan Polster to hear all of the lawsuits pending in federal courts which involved local government plaintiffs.[3] A federal statute authorizes the JPML to consolidate cases and transfer them to a single federal district court in order to conduct discovery and rule on certain pretrial motions. In theory, these cases will be returned to the transferor court at the conclusion of pretrial proceedings. However, it is matter of common knowledge that most cases that are consolidated in this fashion are ultimately settled.[4] Indeed, Judge Polster has made no secret of his desire to have the parties reach a global settlement in this case.[5]

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1. *See* Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1121–22 (2014).

2. The first of these lawsuits was brought against Purdue Pharma by the City of Chicago. *See* Complaint & Jury Trial Demanded, City of Chi. v. Purdue Pharma L.P., No. 1:14-cv-04361 (N.D. Ill. July, 17, 2014) [hereinafter City of Chicago Complaint]. *See generally* City of Chi. v. Purdue Pharma L.P., 211 F. Supp. 3d 1058 (N.D. Ill. 2016).

3. *See* Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html.

4. *See* Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2329 (2008) (quoting DeLaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 151 (D. Mass. 2006)).

5. *See* Daniel Fisher, *Plaintiff Lawyers See Nationwide Settlement as Only End for Opioid Lawsuits*, FORBES (Mar. 6, 2018, 6:39 AM), https://www.forbes.com/sites/legalnewsline/2018/03/06/plaintiff-lawyers-see-nationwide-settlement-as-only-end-for-opioid-lawsuits/#24dfc3c57bc2.

Although it is possible—and even likely—that most of these opioid cases will be settled, it is still necessary to consider the relative strength of the liability theories and defenses available to the respective parties. This information is relevant for the following reasons: First, some plaintiffs may opt out of the proposed settlement and elect to take their cases to trial. Second, at least some cases will be litigated in bellwether trials in order to provide the other parties with information about the value of their cases. Third, the strength or weakness of the plaintiffs' cases will have a significant impact on the size of any global settlement that might be reached. And finally, the strength of liability theories and defenses of individual litigants will affect how the settlement funds are allocated among them. For these reasons, it may be useful to evaluate these various claims and defenses even if an eventual global settlement is likely.

In this Article, I will consider whether the defendants can successfully resist the plaintiffs' claims even if the plaintiffs' narrative is substantially true. Consequently, it will examine both the plaintiffs' liability theories and any defenses or limitations on liability that may be available to the defendants. Part II of the Article discusses some of the liability theories that plaintiffs have relied upon to support their claims against the defendants. These include public nuisance, negligence, fraudulent misrepresentation, violation of statute, unjust enrichment, and civil conspiracy. Part III identifies a number of defenses and doctrines that potentially limit liability, including statutes of limitation, cause-in-fact, duty, proximate cause, shifting responsibility, restrictions on recovery for purely economic losses, regulatory compliance and scienter. The Article concludes by briefly considering a number of possible outcomes to the current opioid litigation.

II. GOVERNMENT CLAIMS

Plaintiff's lawyers typically put forth as many liability theories as possible in their pleadings, including some that are novel or highly questionable, in the hope that at least one of them will survive a motion to dismiss. This part of the Article will examine some of the more popular liability theories, including public nuisance, fraud, negligent marketing, statutory violations, unjust enrichment, and civil conspiracy.

A. Public Nuisance Claims

In order to constitute a public nuisance, the activity or condition must: (1) substantially interfere with a right held in common by the public; (2) be unreasonable; (3) be within the defendant's control and be capable of

abatement by the defendant; and (4) proximately cause the injury in question.[6] At the same time, nuisance law in the United States is highly diverse. For example, some courts have limited liability to activities that take place on or affect real property or violate a statute. In addition, a few jurisdictions restrict damage awards to costs actually incurred by the government to abate the nuisance.[7]

Interference with a public right is essential to any public nuisance claim.[8] A public right is a right common to all members of the general public and not merely one that is enjoyed by a large number of people.[9] Indeed, as one court declared, "[t]he test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights."[10] Because this right is collective in nature, it is distinguishable from an individual right not to be assaulted, defamed, defrauded, or negligently injured.[11]

Courts have sometimes invoked the public right requirement to dismiss public nuisance claims in cases involving firearms and lead-based paints.[12] For example, in *City of Chicago v. Beretta U.S.A. Corporation*,[13] the City of Chicago and Cook County sued various manufacturers, distributors, and retail dealers of handguns to recoup the cost of medical treatment, law enforcement, prosecutions of gun law violators, and other expenses associated with gun violence.[14] The plaintiffs alleged that the sale of illegal firearms constituted a public nuisance because it violated laws "designed to protect the public from a threat to its health, welfare and safety."[15] On appeal from a decision by the lower court, the Illinois Supreme Court suggested that the public right claimed

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6. Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose A New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 940 (2009) (citing Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 562–70 (2006)).

7. *See* Cty. of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 330 (Ct. App. 2006); City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1240 (Ind. 2003); *In re* Lead Paint Litig., 924 A.2d 484, 498–99 (N.J. 2007).

8. *See* Schwartz & Goldberg, *supra* note 6, at 562–64 (quoting Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950, 958 (R.I. 1994)).

9. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. LAW INST. 1979).

10. Ganim v. Smith & Wesson Corp., 780 A.2d 98, 132 (Conn. 2001).

11. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. g. However, a private individual who is injured by a public nuisance can sue for damages if his injury is a "special injury" that is distinct from that suffered by the general public. *See id.* § 821C.

12. *See, e.g.*, *Ganim*, 780 A.2d at 133; City of Chi. v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1115–16 (Ill. 2004); *In re Lead Paint*, 924 A.2d at 505; State v. Lead Indus. Ass'n, 951 A.2d 428, 448 (R.I. 2008).

13. 821 N.E.2d at 1099.

14. *Id.* at 1105–06.

15. *Id.* at 1107.

by the City was nothing more than an assertion of an individual's right not to be assaulted.[16] The court concluded that if it recognized such a right, a similar claim might be made against brewers and distillers whose products caused injuries by drunken drivers to others on the road.[17]

The public right issue also arose in several of the lead-paint cases.[18] *State v. Lead Industries Association*[19] is illustrative. In that case, the Attorney General of Rhode Island filed suit against a number of paint manufacturers and their trade association, claiming that the lead pigment in their products caused various injuries to small children who were exposed to peeling paint in older houses in the state.[20] The plaintiff sought compensatory damages, punitive damages, and injunctive relief to require the defendants to remove lead pigment paint in those buildings that were accessible to children and to fund various educational and lead-poisoning prevention programs.[21] However, the Rhode Island Supreme Court declared that expanding the concept of public right to include being free from contamination in private housing "would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that never was intended . . . ."[22]

On the other hand, another court concluded in *City of Gary* ex rel. *King v. Smith & Wesson Corp.*[23] that Indiana's public nuisance statute was broad enough to include within its scope a claim that the defendant manufacturers' and distributors' marketing practices—with respect to the sale of handguns—interfered with the exercise of a public right.[24] The statute in question declared that conduct that was "injurious to health, indecent, offensive to the senses or an obstruction to the free use of property so as essentially to interfere with the comfortable use of property" was a nuisance.[25]

It is likely that opioid sellers will claim that the addiction to opioid medications affects opioid users as individuals, as opposed to the public at large. They will maintain that the right to be free from the effects of addiction is no different than the right to be free from assault, battery or defamation. In response, the plaintiffs will argue that while this argument might be relevant to asbestos and lead paint contamination, where injuries were largely

16. *Id.* at 1116.
17. *Id.*
18. *In re* Lead Paint Litig., 924 A.2d 484, 505 (N.J. 2007); State v. Lead Indus. Ass'n, 951 A.2d 428, 448 (R.I. 2008).
19. 951 A.2d at 428.
20. *Id.* at 439–40.
21. *Id.* at 440.
22. *Id.* at 453.
23. 801 N.E.2d 1222 (Ind. 2003).
24. *Id.* at 1229–30.
25. *Id.* at 1229 (quoting IND. CODE § 32-30-6-6 (2017)).

associated with property damage, it is less compelling when the damage affects public health and quality of life.

In addition, to be held liable for maintaining a nuisance, the defendant must be able to exercise control over the offending activity or condition. There appears to be two aspects to the control requirement. The first involves whether the defendants exercised control over the instrumentality or condition at the time that it caused harm to the public. The second involves whether the defendant has maintained sufficient control over the instrumentality or condition so that it can abate it if ordered to do so by a court.

Control over the instrumentality or condition that caused the harm has come up in a number of asbestos, handgun, and lead-based paint cases. For example, in *State v. Lead Industries Association, Inc.*, the Rhode Island Supreme Court declared: "[a]s an additional prerequisite to the imposition of liability for public nuisance, a defendant must have *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs*."[26] Finding that the defendant lead paint manufacturers lacked control over their products at the time the damage occurred, the court held that they could not be held responsible for any harm that their products caused after the time of sale.[27]

This rule seems to rest on causation principles. As the court in *City of Philadelphia v. Beretta U.S.A. Corporation*[28] pointed out, "[because] the gun manufacturers do not exercise significant control over the source of the interference with the public right . . . the causal chain is too attenuated to make out a public nuisance claim."[29] However, not every court has agreed with this reasoning. Thus, in *City of Cincinnati v. Beretta U.S.A. Corporation*,[30] the Ohio Supreme Court concluded that, while the defendants did not physically control the actual firearms at the time the nuisance was created, they did contribute to the creation of the nuisance by "marketing, distributing and selling firearms in a manner that facilitated their flow into the illegal market."[31]

Retail gun dealers also raised lack of control as a defense in *City of Chicago v. Beretta U.S.A. Corporation*.[32] However, in that case, the court held that control was merely a "relevant factor" in deciding the proximate cause

26. 951 A.2d 428, 449 (R.I. 2008).

27. *Id.* at 449–50; *see also* Camden Cty. Bd. v. Beretta U.S.A. Corp., 273 F.3d 536, 541 (3rd Cir. 2001) (applying the lack of control argument to a case against firearm manufacturers).

28. 277 F.3d 415 (3rd Cir. 2002).

29. *Id.* at 422.

30. 768 N.E.2d 1136 (Ohio 2002).

31. *Id.* at 1143.

32. 821 N.E.2d 1099, 1128 (Ill. 2004).

issue and in determining what relief to give the plaintiff.[33] Thus, "[i]f a public nuisance later results from the illegal use of the firearms by third parties, liability in public nuisance is not necessarily precluded simply because defendants no longer control the objects."[34]

Lack of control may also be relevant when a government entity seeks to compel the defendants to abate the nuisance. Thus, in *City of Manchester v. National Gypsum Co.*,[35] when the City sought to recover the costs of asbestos removal from certain public buildings, the court pointed out that the City, not the defendants, was now in possession of the affected property.[36] According to the court, "[t]he defendants, after the time of manufacture and sale, no longer had the power to abate the nuisance. Therefore, a basic element of the tort of nuisance is absent, and the plaintiff cannot succeed on this theory of relief."[37] In another asbestos removal case, the court also concluded that the defendants gave up legal control over their products at the time of sale and, therefore, lacked the legal right to abate whatever hazards their products posed.[38]

On the other hand, this argument was rejected by a California appellate court in *Santa Clara I*.[39] In that case, the defendants contended that the plaintiffs' public nuisance action must fail "because defendants lacked the ability to abate the alleged nuisance, and abatement was the only remedy that [the plaintiffs] could seek."[40] In response, the court ruled that the complaint was not defective for failure to affirmatively allege that the defendants had the ability to abate the nuisance.[41] The same court reiterated this conclusion in *People v. ConAgra Grocery Products Co.*[42]

Opioid sellers will no doubt maintain that they lacked sufficient control over their products once they left their possession after they were sold to downstream purchasers. Government plaintiffs would presumably respond

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33. *Id.* at 1132.

34. *Id.*

35. 637 F. Supp. 646 (D.R.I. 1986).

36. *Id.* at 656.

37. *Id.*

38. *See* Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 522 (Mich. Ct. App. 1992); *see also* Tioga Pub. Sch. Dist. v. U.S. Gypsum Co., 984 F.2d 915, 920 (8th Cir. 1993); Town of Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 133 (D.N.H. 1984).

39. Cty. of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 330 (Ct. App. 2006).

40. *Id.* at 329.

41. *Id.* at 330.

42. 227 Cal. Rptr. 3d 499, 549 (Ct. App. 2017). On May 16, 2018, one of the defendants, NL Industries, settled the case against them for $60 million. *See* Peter Hayes, *NL Industries Settles Cal. Lead Paint Public Nuisance Claims*, BLOOMBERG L. (May 17, 2018, 11:24 AM), https://news.bloomberglaw.com/product-liability-and-toxics-law/nl-industries-settles-cal-lead-paint-public-nuisance-claims.

that it was sufficient that the defendants controlled the marketing practices that contributed to a nuisance. One can argue that the control requirement should be limited to situations where the defendant would have a legal right to enter the land in order to correct the condition or regulate the activity in question. However, when land is not involved in the creation of the nuisance, the court should still be able to order the defendant to change its marketing practices in a way that eliminates or ameliorates the nuisance.

Furthermore, some courts restrict public nuisance claims to those that affect real property or to cases that involve an illegal act.[43] *Texas v. American Tobacco Co.*[44] is illustrative of this approach. In that case, the state brought a public nuisance action against the defendants in order to recover the costs of providing medical care to its citizens for illnesses related to the consumption of tobacco products.[45] Ruling on the defendants' motion to dismiss,[46] the court concluded that the public nuisance claim was defective because the state failed to allege either that the defendants improperly used their own property or that the plaintiff had been injured in the use of its own property.[47]

A federal district court reached a similar conclusion in *Independence County v. Pfizer, Inc.*[48] In this case, a number of local government entities in Arkansas brought suit against the producers and sellers of certain over-the-counter cold remedies which contained ephedrine and pseudoephedrine.[49] The plaintiffs alleged that defendants knew that their products were being used by criminals to make methamphetamine but resisted efforts to regulate the sale of these drugs.[50] As a result, illegal "meth labs" caused explosions, fires, chemical burns, chemical spills, and toxic fires.[51] In addition, the plaintiffs claimed that they had incurred substantial costs as a result of widespread addiction among their residents.[52] Nevertheless, the court dismissed the plaintiffs' public nuisance claim and quoted from an opinion by the Arkansas Supreme Court which defined a nuisance as "conduct by one landowner which unreasonably interferes the use and enjoyment of the lands of another."[53]

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43. *See* City of Phila. v. Beretta U.S.A. Corp., 277 F.3d 415, 420 (3rd Cir. 2002); Tex. v. Am. Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997); Indep. Cty. v. Pfizer, Inc., 534 F. Supp. 2d 882, 890 (E.D. Ark. 2008); *In re* Lead Paint Litig., 924 A.2d 484, 495–96 (N.J. 2007).

44. 14 F. Supp. 2d at 960.

45. *Id.*

46. *Id.* at 961.

47. *Id.* at 973.

48. 534 F. Supp. 2d at 890.

49. *Id.* at 884.

50. *Id.* at 884–85.

51. *Id.* at 885.

52. *Id.*

53. *Id.* at 890 (quoting Milligan v. General Oil Co., 738 S.W.2d 401, 404 (Ark. 1987)).

However, other courts have ruled with that ownership of real property is not essential to maintaining a public nuisance claim.[54] For example, in *City of Chicago v. Beretta*, the Illinois Supreme Court held that the trial court should not have dismissed plaintiffs' public nuisance claim and instead concluded "that neither the use or misuse of land nor invasion of property rights of another is required for a public nuisance to be found" and, consequently, "plaintiffs' theory of liability is not absolutely foreclosed by the existing common law of public nuisance."[55]

Thus, there is a split of authority on the question of whether an activity or condition, other than one that is *per se* unlawful, must either take place on the defendant's land or adversely affect public land in order to qualify as a public nuisance. Consequently, in some states a public nuisance claim would fail if the nuisance did not occur on either the defendant's or the plaintiff's property.[56]

Finally, in some state governments plaintiffs are not allowed to sue for prospective damages in public nuisance actions, but instead are limited to claims for abatement and for recoupment of the costs of past abatement efforts.[57] For example, in *In re Lead Paint Litigation*,[58] the New Jersey Supreme Court distinguished between a public nuisance brought by a private party who has suffered a special injury different in kind than the one suffered by the general public.[59] The court observed that in such cases, the private plaintiff could seek damages, but the government entity could only seek abatement or recoupment of past abatement expenses.[60]

On the other hand, the Indiana Supreme Court in *City of Gary* ex rel. *King v. Smith & Wesson Corp.* allowed the City to proceed with a damage claim.[61] However, the court based its decision on a state statute that expressly allowed all plaintiffs, including municipalities, to recover damages in a nuisance

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54. *See* City of Chi. v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1111 (Ill. 2004); Young v. Bryco Arms, 821 N.E.2d 1078, 1089 (Ill. 2004); City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1232–33 (Ind. 2003); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1142 (Ohio 2002).

55. 821 N.E.2d at 1105–06.

56. On the other hand, pharmacies and pain clinics that operated as "pill mills" might be subject to abatement as public nuisances.

57. *See* Cty. of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 330 (Cal. Ct. App. 2006); *Smith & Wesson Corp.*, 801 N.E.2d at 1240; *In re* Lead Paint Litig., 924 A.2d 484, 498–99 (N.J. 2007).

58. 924 A.2d 484.

59. *Id.* at 498.

60. *Id.* at 498–99; *see also* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 782 (2003) (quoting RESTATEMENT (SECOND) OF TORTS § 821(C)(1) (AM. LAW INST. 1979)).

61. *See* 801 N.E.2d 1222, 1240 (Ind. 2003).

action.[62] In addition, a California intermediate appellate court in *Santa Clara I* ruled that the plaintiffs in a lead paint case did not have to affirmatively allege in the complaint that the defendants had the ability to abate the alleged nuisance.[63] Finally, in *People v. ConAgra Grocery Products Co.*, the State of California brought suit against various manufacturers and sellers of lead paint to compel them to contribute to a fund created for the purpose of removing lead paint from residential houses.[64] The trial court awarded $1.15 billion for this purpose.[65] The court acknowledged that a public entity could not recover any funds that it had already spent to remediate a public nuisance.[66] Nevertheless, it rejected the defendants' characterization of the abatement fund as a "thinly-disguised" damage award and upheld the trial court's ruling.[67]

Although public nuisance is a popular and appealing liability theory for government plaintiffs, the law in this area is far from uniform. In particular, there is disagreement among the different states over the definition of public rights, whether the defendant must be able to exercise control over the instrumentality that causes harm, whether liability is restricted to conditions or activities on land, and whether government entities can recover damages in a public nuisance action. These differences cannot be summarily brushed away in multidistrict litigation.

B. Negligence Claims

To recover under negligence, the plaintiff must prove: (1) that the defendant owed a duty to the plaintiff to exercise reasonable care to protect him against harm; (2) that the defendant breached this duty by failing to exercise reasonable care; (3) that the defendant's unreasonable conduct was a cause-in-fact and a proximate cause of the plaintiff's harm; and (4) that the plaintiff suffered damage as a consequence of the defendant's conduct.[68] So far, government plaintiffs have charged opioid manufacturers and sellers with various forms of negligence, including negligent marketing, gross negligence, and negligence per se.

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62. *Id.*
63. *See Atl. Richfield Co.*, 40 Cal. Rptr. 3d at 330.
64. 227 Cal. Rptr. 3d 499, 514 (Cal. Ct. App. 2017).
65. *Id.*
66. *Id.* at 569.
67. *Id.*
68. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 30, at 164–65 (5th ed. 1984).

1. *Negligent Marketing*

The concept of negligent marketing assumes that product sellers should not engage in marketing strategies that significantly increase the risk that their products will be purchased by consumers who will injure themselves or others.[69]

The first type of negligent marketing involves products that designed to appeal to unsuitable consumers, such as criminals.[70] Negligent marketing may also include the targeting of advertising or other promotional efforts at unsuitable or vulnerable members of the public.[71] The last type of marketing practice involves the failure to supervise illegal or tortious conduct by distributors and retail sellers.[72]

Each of these forms of negligent marketing is potentially available to government plaintiffs in the context of opioid litigation. For example, the manufacture of high-dosage opioid pills whose time-release mechanism could be easily defeated made it highly probable that these products would be misused by drug abusers. Furthermore, according to government plaintiffs, opioid manufacturers have targeted vulnerable groups such as veterans and the elderly. Finally, manufacturers, distributors, and retail pharmacies have all been charged with failing to monitor drug sales and report suspicious activities to the United States Drug Enforcement Administration (DEA) as required by the Controlled Substances Act (CSA).

2. *Gross Negligence*

A defendant may be liable of gross negligence if he fails to exercise even slight care[73] or, in some states, if he has actual knowledge of the risk and acts

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69. Richard C. Ausness, *Tort Liability for the Sale of Non-Defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 S.C. L. REV. 907, 912 (2002); Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777, 800–18 (1995).

70. *See* Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 154 (Ct. App. 1999), *rev'd on other grounds*, 28 P.3d 116, 131 (Cal. 2001).

71. An example of this practice was the infamous cartoon character, "Joe Camel," who was intended to create a favorable impression of smoking in the minds of young children. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1481 (1999); Kathleen J. Lester, Note, *Cowboys, Camels, and Commercial Speech: Is the Tobacco Industry's Commodification of Childhood Protected by the First Amendment?*, 24 N. KY. L. REV. 615, 628–29 (1997).

72. *See, e.g.*, City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1241–42 (Ind. 2003); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1144–45 (Ohio 2002).

73. Food Pageant, Inc. v. Consol. Edison Co., 429 N.E.2d 738, 740 (N.Y. 1981).

recklessly in the face of it.[74] In the latter case, the defendant's conduct may be described as highly unreasonable "involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent."[75] For example, in one case, the City of Everett, Washington charged Purdue with gross negligence in connection with its failure to prevent a Los Angeles pharmacy from supplying a criminal drug ring with opioid products that were subsequently shipped from California to Everett. Other plaintiffs may be able to bring gross negligence claims against manufacturers, distributors and retail pharmacies if they can prove that these defendants knew that opioids were being diverted for illicit uses and failed to take any action to prevent the diversions from occurring.

3. Negligence per se

Under the doctrine of negligence per se, the court will treat an unexcused violation of a statute or ordinance as unreasonable as a matter of law.[76] In other words, the standard of care is conclusively determined by the conduct required by the legislative body that promulgated the statute.[77] The only way that one who violates a statute can avoid liability is to show that either the violation should be excused, that the violation was not a cause-in-fact of the plaintiff's injury, that the plaintiff was not within the class of persons that the statute was designed to protect, or that the plaintiff's injuries did not fall within the scope of harm the statute was designed to address.[78]

Opioid manufacturers, distributors, and retail sellers have been charged with—and in some cases convicted of—violating statutes dealing with consumer protection and unfair trade practices, false claims, racketeering, and regulation of controlled substances. Assuming that the plaintiffs can prove that the defendants violated these statutes, the only way to avoid the effect of negligence per se would be for the defendants to convince a court that these statutes were narrow in focus and were not intended to protect state and local governments against the effects of opioid abuse and addiction.

74. KEETON ET AL., *supra* note 68, § 34, at 212–13.

75. *Id.* § 34, at 214; *see* RESTATEMENT (SECOND) OF TORTS § 288B (AM. LAW INST. 1965).

76. *See* RESTATEMENT (SECOND) OF TORTS § 288B (AM. LAW INST. 1965).

77. *See* KEETON ET AL., *supra* note 68, § 36, at 220.

78. *Id.* § 36, at 224–29.

C. *Fraudulent Misrepresentation and Fraudulent Concealment Claims*

Fraudulent misrepresentation involves a false representation by the defendant that is material and is made with knowledge of its falsity or in a manner that is reckless as to whether it is true or false, and with the intent of inducing the plaintiff to rely upon it.[79] In addition, the plaintiff must rely on the defendant's statement and it must proximately cause the resulting injury.[80] On the other hand, fraudulent concealment requires proof that: the defendant concealed a material fact or remained silent when he or she had a duty to disclose this information to the plaintiff; the defendant acted with *scienter*; the defendant intended for the plaintiff to rely upon the concealment; and the defendant's conduct caused harm to the plaintiff.[81]

In the past, some government entities claimed that the manufacturers of products such as cigarettes, asbestos insulation, and lead-based paint were guilty of fraud.[82] A number of these claims were eventually dropped, and the principal issue with the remaining fraud claims was whether they were pleaded with sufficient particularity to satisfy the Federal Rules of Civil Procedure,[83] which required that the circumstances constituting fraud be stated with particularity.[84] For example, in *City of Manchester v. National Gypsum Co.*, the defendant asbestos manufacturer moved to dismiss the City's fraud claim for lack of particularity.[85] The court agreed that the pleadings were not specific enough; however, it allowed the plaintiff to amend its complaint in order to correct this deficiency.[86] Other courts have relaxed the particularity requirement when they felt that the defendant was already fully

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79. *See* Tex. v. Am. Tobacco Co., 14 F. Supp. 2d 956, 974 (E.D. Tex. 1997) (citing Crawford Painting & Drywall Co. v. J.W. Bateson Co., 857 F.2d 981, 985 (5th Cir. 1988)); Goldstein v. Phillip Morris, Inc., 854 A.2d 585, 590–91 (Pa. Super. Ct. 2004) (citing Debbs v. Chrysler Corp., 810 A.2d 137, 155 (Pa. Super. Ct. 2002)).

80. *Am. Tobacco Co.*, 14 F. Supp. 2d at 974; *Goldstein*, 854 A.2d at 591.

81. *See* Nicolet, Inc. v. Nutt, 525 A.2d 146, 149 (Del. 1987).

82. *See* Tioga Pub. Sch. Dist. v. U.S. Gypsum Co., 984 F.2d 915, 917 (8th Cir. 1993) (asbestos); *Am. Tobacco Co.*, 14 F. Supp. 2d at 974 (tobacco); City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 654–56 (D.R.I. 1986) (asbestos); Town of Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 135–36 (D.N.H. 1984) (asbestos); Cty. of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 319 (Ct. App. 2006) (lead-based paint); *In re* Lead Paint Litig., 924 A.2d 484, 487 (N.J. 2007) (lead-based paint). It should be noted that the government entities sued as property owners rather than in their governmental capacity in some of the asbestos cases.

83. *See Am. Tobacco Co.*, 14 F. Supp. 2d at 974; *Nat'l Gypsum Co.*, 637 F. Supp. at 654–56; *Hooksett Sch. Dist.*, 617 F. Supp. at 135–36; *U.S. Gypsum Co.*, 580 F. Supp. at 293–94.

84. FED. R. CIV. P. 9(b).

85. 637 F. Supp. 646.

86. *Id.* at 654–55.

aware of the facts involved. Thus, in *Town of Hooksett School District v. W.R. Grace Co.*,[87] when the defendant asbestos company demanded that the plaintiff provide more detail about false statements that the defendant allegedly made about its asbestos products in some of its advertisements, the court responded that the defendant was "ably situated to know what advertisements were made around the date of purchase in the instant case."[88] Furthermore, the court went on to declare that "the Defendant is in a better position than the Plaintiff to know what medical and scientific tests had been conducted on asbestos products, what safety information was known, and what information was withheld."[89] Consequently, the court denied the defendant's Rule 12(e) motion.[90] Several other courts have relied on the same reasoning to deny such motions.[91]

The requirement to plead allegations of fraud with particularity should not be a problem in opioid litigation. As in the asbestos cases, the opioid manufacturers have sufficient information about their alleged acts of fraudulent misrepresentation and fraudulent concealment to enable them to draft responsive pleadings. In addition, the pleadings of the various plaintiffs contain a great number of specific examples of false statements and concealments. While there is little doubt that opioid manufacturers engaged in widespread misrepresentation and concealment, there could be problems proving injury or reliance. First of all, it is doubtful that government entities can stand in the shoes of individuals who have suffered personal injuries. The personal injuries suffered by these individuals are clearly different from the economic injuries incurred by the government plaintiffs.

Proving reliance could be an even greater problem. Before proceeding further, it is necessary to distinguish between fraud as it relates to prescriptions provided by government entities to employees or welfare recipients and fraud as it relates to the problem of opioid addiction in the general community. In the first case, the government plaintiffs may be able to claim that the defendants' misrepresentations caused them to pay for unnecessary or excessive amounts of drugs.[92] Even though the fraud was not specifically directed at government health care providers, they were clearly

87. 617 F. Supp. 126 (D.N.H. 1984).

88. *Id.* at 135.

89. *Id.* at 136.

90. *Id.*

91. *See Nat'l Gypsum Co.*, 637 F. Supp. at 654–55; *U.S. Gypsum Co.*, 580 F. Supp. at 293–94.

92. *See* Complaint & Jury Trial Demanded ¶ 278, at 74, Cty. of Lackawanna v. Purdue Pharma L.P., No. 17-CV5156 (Pa. Ct. Com. Pl. Sep. 25, 2017) [hereinafter Lackawanna Complaint].

the ultimate targets since they would pay for the drugs that were prescribed, as well as for any opioid treatment. Indeed, that appears to be the focus of the fraud claim in those complaints that have addressed the reliance issue.

Proving reliance would be especially difficult in cases where government plaintiffs seek to recover for the costs of dealing with the overall consequences of opioid addiction. The false assurances made by drug companies about the safety and effectiveness of opioid therapy were directed at health professionals and potential patients, rather than at government entities. Even if these representations eventually reached government entities, it is hard to see that the plaintiffs reasonably relied on them or that the opioid epidemic directly resulted from any such reliance that might have occurred.

In sum, the plaintiffs' common law fraud claims are problematic. Traditionally, fraud is viewed as a relational tort: For example, assume that *A* owes a duty not to misrepresent a material fact to *B* or to conceal a material fact from him; *A* intentionally misrepresents or conceals a material fact; *B* relies on this and suffers an injury as a result. *A* would be liable to *B*. However, in this case, no such relationship exists. Although *A* has misrepresented or concealed material facts from *B*, no relationship exists with *C* that would give rise to a duty nor is there is anything that would cause *C* to rely on *A*. That being the case, it is difficult to see how *A* can be liable to *C* under these circumstances.

4. Statutory Violation Claims

Government plaintiffs have also claimed that opioid sellers violated consumer protection and unfair competition laws, statutes prohibiting false claims and Medicaid fraud, and federal and state anti-racketeering (RICO) statutes.

a. Consumer Protection and Unfair Competition Statutes

At the federal level, the Federal Trade Commission is empowered to protect consumers against "unfair or deceptive acts or practices in or affecting commerce."[93] In addition, every state has enacted legislation to protect consumers against fraudulent practices or higher prices caused by unfair

93. Federal Trade Commission Act, 15 U.S.C. § 45(a)(2) (2012).

competition.[94] These laws are referred to as Unfair or Deceptive Acts and Practices (UDAP), Consumer Protection Acts (CPA), or Unfair or Deceptive Trade Practices Acts (UDTPA).[95] Most of these statutes authorize the state Attorney General to issue regulations to define prohibited conduct.[96] Unlike the case of common law fraud, a statutory violation usually does not require proof of either harm or reliance.[97]

A number of state and local governments have alleged that the marketing and distribution of opioid products violated various consumer protection statutes.[98] For example, Lackawanna County's complaint alleges that the

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94. *See* Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 U. KAN. L. REV. 209, 211 (2016).

95. *Id.* at 209 & n.1.

96. *Id.* at 212.

97. *Id.* at 215–16.

98. *See* Complaint & Trial by Jury Requested ¶¶ 160–64, at 51–53, Ala. v. Purdue Pharma L.P., No. 2:18-CV-89 (M.D. Ala. Feb. 6, 2018) [hereinafter Alabama Complaint]; Complaint ¶¶ 159–71, at 69–73, Alaska v. Purdue Pharma L.P., No. 3AN-17-09966CI (Alaska Super. Ct. Oct. 30, 2017) [hereinafter Alaska Complaint]; Petition ¶¶ 166–76, at 41–43, Cherokee Nation v. McKesson Corp., No. CV-2017-203 (D. Cherokee Nation Apr. 20, 2017) [hereinafter Cherokee Nation Complaint]; City of Chicago Complaint, *supra* note 2, ¶¶ 274–96, at 96–103; Complaint & Trial by Jury of 12 Demanded ¶¶ 225–28, at 90–92, Del. *ex rel.* Denn v. Purdue Pharma L.P., No. N18C-01-223 MMJ CCLD (Del. Super. Ct. Jul. 5, 2018) [hereinafter Delaware Complaint]; Complaint & Jury Trial Demanded ¶¶ 233–44, at 64–67, Del. Cty. v. Purdue Pharma L.P., No. 17-8095 (Pa. Sept. 21, 2017) [hereinafter Delaware County Complaint]; Complaint ¶¶ 89–94, at 21–22, City of Everett v. Purdue Pharma L.P., No. 17-2-00469-31 (Wash. Super. Ct. Jan. 19, 2017) [hereinafter City of Everett Complaint]; Complaint & Jury Trial Demanded ¶¶ 233–46, at 42–44, Florida v. Purdue Pharma L.P., No. 72158675 (Fla. Cir. Ct. May 15, 2018) [hereinafter Florida Complaint]; Lackawanna Complaint, *supra* note 92, ¶¶ 269–76, at 71–74; Complaint ¶¶ 245–61, at 68–71, Massachusetts v. Purdue Pharma L.P., No. 1884CV01808 (Mass. Super. Ct. Jun. 13, 2018) [hereinafter Massachusetts Complaint]; Complaint ¶¶ 614–21, at 227–33, Mississippi v. Purdue Pharma L.P., No. 25CH1:15-CV-001814 (Miss. Ch. Dec. 15, 2015) [hereinafter Mississippi Complaint]; Petition & Jury Trial Demanded ¶¶ 240–95, at 27–36, Mo. *ex rel.* Hawley v. Purdue Pharma, L.P., No.1722-CC10626 (Mo. Cir. Ct. June 21, 2017) [hereinafter Missouri Complaint]; Complaint ¶¶ 148–53, at 52–54, Montana v. Purdue Pharma L.P., No. ADV-2017-949 (Dist. Ct. Mont. Nov. 30, 2017) [hereinafter Montana Complaint]; Complaint & Jury Trial Demanded ¶¶ 205–38, at 58–63, ¶¶ 267–86, at 68–71, Navajo Nation v. Purdue Pharma L.P., No. 1:18-CV-338 (D.N.M. Apr. 11, 2018) [hereinafter Navajo Nation Complaint]; Complaint ¶¶ 206–38, at 77–83, New Hampshire v. Purdue Pharma, L.P., No. 1:17-CV-427 (N.H. Super. Ct. Sept. 15, 2017) [hereinafter New Hampshire Complaint]; Complaint for Violation of the N.J. False Claims Act, N.J.S.A. 2A:32C-1, et seq., as well as Other Claims ¶¶ 262–88, at 91–96, Porrino v. Purdue Pharma, L.P., No. ESX-CC-00245-17 (N.J. Super. Ct. Oct. 31, 2017) [hereinafter New Jersey Complaint]; Plaintiff's Complaint for Damages, Restitution, & Civil Penalties ¶¶ 249–78, at 92–101, N.M. *ex rel.* Balderas v. Purdue Pharma L.P., No. 1:18-cv-00386 (N.M. Dist. Ct. Sept. 7, 2017) [hereinafter New Mexico Complaint]; Complaint & Jury Trial Demanded & Endorsed Hereon ¶¶ 178–92, at 72–81, Ohio *ex rel.* DeWine v. Purdue Pharma L.P., No. 17-CI-261 (Ohio Ct. Com. Pl. May 31, 2017) [hereinafter

defendants violated the law *inter alia* by claiming that opioid drugs were safe and effective for the long-term treatment of chronic pain in order to deceive them into prescribing opioids for this purpose.[99] It also claims that the defendants disseminated misleading statements to doctors and patients that concealed the risk of addiction and espoused the scientifically unproven theory of "pseudoaddiction."[100] In addition, they provided financial support to pro-opioid doctors and front groups in order to avoid state and federal labeling regulations.[101] Furthermore, the drug companies sponsored misleading CME programs and scientific studies to persuade doctors that they could safely prescribe opioids to treat chronic pain.[102] Finally, the complaint alleged that sales representatives of the defendants made deceptive statements about opioids to doctors during the course of person-to-person detailing.[103] The complaint concluded by declaring that these deceptive marketing practices resulted in "increased expenditures on public healthcare services, law enforcement, the justice system, child and family services as well as lost productivity and lost tax revenue."[104]

This sort of conduct, which is typical of the conduct alleged in most of the other complaints, would seem to meet the statutory definition of "deceptive" or "unfair." Thus, a strong argument can be made that government plaintiffs—who allege that the defendants violated state consumer protection or unfair competition statutes—can avoid dismissal of their claims. This occurred in *City of Chicago v. Purdue Pharma L.P.*,[105] where the City alleged that the defendant opioid manufacturers engaged in various deceptive marketing practices in violation of the Illinois Consumer Fraud and Deceptive Business Practice Act (ICFA).[106] The district court observed that the state Attorney General was not required to prove that the defendants' actions proximately harmed any consumers in order to establish standing to sue under ICFA.[107] Instead, it declared that a deceptive practice

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Ohio Complaint]; Complaint ¶¶ 228–40, at 83–89, Seattle v. Purdue Pharma L.P., No. 2:17-cv-01577 (Wash. Super. Ct. Sept. 28, 2017) [hereinafter City of Seattle Complaint]; State of Texas's Original Petition ¶¶ 11.1–11.4, at 27–29, Texas v. Purdue Pharma L.P., No. D-1-GN-18-2403 (Dist. Ct. Tx. May 15, 2018) [hereinafter Texas Complaint].

99. Lackawanna Complaint, *supra* note 92, ¶ 270, at 71–72.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. 211 F. Supp. 3d 1058 (N.D. Ill. 2016).

106. *Id.* at 1070.

107. *Id.* at 1071.

violated the Act even if it did not actually deceive or injure anyone.[108] Consequently, the court concluded that the City alleged a claim under ICFA against each of the defendants.[109]

b. False Claims and Medicaid Fraud Statutes

A few complaints have accused opioid sellers of violating false claims or Medicaid fraud laws.[110] These statutes are modeled after the federal False Claims Act,[111]

> which imposes liability on any person who 'knowingly presents, or causes to be presented [to the United States Government], a false or fraudulent claim for payment or approval' or who 'knowingly makes, uses, or causes to be made or used, a false record or statement' to get a false or fraudulent claim paid or approved by the Government.[112]

According to the government plaintiffs, fraudulent misrepresentations and other illegal marketing practices by opioid sellers caused them to pay for treatments that were either inappropriate or ineffective.[113] The New Hampshire complaint is illustrative. The state statute in that case provides that a violation occurs when any person "[k]nowingly presents, or causes to be presented, to an officer or employee of the department [of Health and Human Services], a false or fraudulent claim for payment or approval."[114] According to the complaint, opioid sellers made various false and misleading statements about the risks and benefits of using opioids to treat chronic pain in order to persuade doctors to prescribe them for this purpose.[115] However, the state's Medicaid program was only authorized to pay the cost of prescription drugs

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108. *Id.*

109. *Id.* at 1074.

110. *See* Alabama Complaint, *supra* note 98, ¶¶ 180–91, at 55–57; City of Chicago Complaint, *supra* note 98, ¶¶ 315–17, at 108; Mississippi Complaint, *supra* note 98, ¶¶ 604–13, at 225–27; Missouri Complaint, *supra* note 98, ¶¶ 296–313, at 36–41; Montana Complaint, *supra* note 98, ¶¶ 154–68, at 54–58; New Hampshire Complaint, *supra* note 98, ¶¶ 239–58, at 83–87; New Jersey Complaint, *supra* note 98, ¶¶ 289–96, at 97–87; New Mexico Complaint, *supra* note 98, ¶¶ 279–93, at 101–04; Ohio Complaint, *supra* note 98, ¶¶ 193–203, at 81–83.

111. False Claims Act, 31 U.S.C. §§ 3729–3733 (2012).

112. *Id.* § 3729(a)(1).

113. *See, e.g.*, Ohio Complaint, *supra* note 98, ¶ 245, at 99.

114. New Hampshire Complaint, *supra* note 98, ¶ 240, at 83 (quoting N.H. REV. STAT. ANN. § 167:61-b(1)(a) (2012)).

115. *Id.* ¶ 242–246, at 84.

that were "medically necessary."[116] According to the complaint, doctors, pharmacists, and other health care providers relied on the defendants' false and misleading statements when they assured Medicaid officials that opioids were medically necessary to treat chronic pain.[117] But for the defendants' statements, these false claims would never have been submitted to the state for payment.[118]

Plaintiffs who have relied upon false claim statutes appear to have a strong *prima facie* case. First of all, it appears that opioid manufacturers and their third-party allies misrepresented the efficacy of opioids for the long-term treatment of chronic pain and also misrepresented or omitted information about the risks of addiction if opioids were used for this purpose. However, it is less obvious that opioid therapy is entirely useless, or that doctors or Medicaid officials were fooled by the defendants into prescribing opioids inappropriately. Thus, to sustain their false claim allegations, the plaintiffs will have to identify which opioid prescriptions were appropriate for the medical condition involved and which were not.

The false claims issue arose in *City of Chicago v. Purdue Pharma L.P.*, where the City alleged that the defendant opioid manufacturers, through their deceptive marketing practices, caused prescribing physicians to submit false statements to it in order to obtain payment for fraudulent claims.[119] The defendants contended, *inter alia*, that the City failed to establish a sufficient causal connection between its conduct and the presentation of false claims by prescribing physicians.[120] They identified a number of intervening events, such as the prescribers' independent medical judgment, patients' preferences, patients' decisions to fill their prescriptions, patients' decisions on how to use their medication, and the City's decision to pay for opioid prescriptions.[121] Nevertheless, the court concluded that the City's payments of false claims was a foreseeable outcome of the misrepresentations that defendants made to Chicago-area physicians.[122]

116. *Id.* ¶ 246, at 84.
117. *Id.* ¶ 246, at 85.
118. *Id.* ¶ 251, at 86.
119. 211 F. Supp. 3d 1058, 1076 (N.D. Ill. 2016).
120. *Id.* at 1079.
121. *Id.* at 1080.
122. *Id.* at 1081.

c. RICO

Congress enacted the federal Racketeer Influenced and Corrupt Organizations Act (RICO)[123] in 1970 to combat the infiltration of legitimate business enterprises by organized crime.[124] RICO imposes liability on any person who invests income from a pattern of racketeering activity in an enterprise, acquires an interest in an enterprise through a pattern of racketeering activity, conducts an enterprise's affairs through a pattern of racketeering activity, or who conspires with others to do any of these things.[125]

The RICO statute defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[126] According to RICO, racketeering activity includes such criminal acts as mail fraud, wire fraud, drug trafficking, murder, arson, gambling, extortion, bribery, and embezzlement.[127] RICO also requires that the defendant engage in a pattern of racketeering activity, which consists of two or more acts that reflect a relationship and continuity of purpose, results, participants, victims, or methods, but which are sufficiently distinct so that they amount to more than a single episode or an isolated occurrence and which occur within ten years of each other.[128] These offenses are referred to as "predicate acts."[129]

Health care organizations have invoked RICO on a number of occasions seeking to recover from pharmaceutical companies for promoting off-label uses of prescription drugs.[130] For example, in the *Neurontin* case, Kaiser Foundation Health Care Plan (Kaiser) and other health care insurers claimed that Pfizer engaged in a fraudulent marketing campaign to encourage doctors to prescribe Neurontin for off-label uses in violation of federal law.[131]

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123. 18 U.S.C. §§ 1961–1968 (2012 & Supp. I 2017).

124. *See* Richard C. Ausness, *"There's Danger Here, Cherie!": Liability for the Promotion and Marketing of Drugs and Medical Devices for Off-Label Uses*, 73 BROOK. L. REV. 1253, 1264 (2008) (citing Beth S. Schipper, Note, *Civil Rico and Parens Patriae: Lowering Litigation Barriers Through State Intervention*, 24 WM. & MARY L. REV. 429, 431 (1983)).

125. 18 U.S.C. § 1962 (2012).

126. *Id.* § 1961(4).

127. *Id.* § 1961(1).

128. *Id.* § 1961(5).

129. Ed Dawson, Note, *Legigation*, 79 TEX. L. REV. 1727, 1740 (2001) (quoting 18 U.S.C. § 1961(5) (2012)).

130. *See In re* Neurontin Mktg. & Sales Practices Litig., 712 F.3d 21, 26 (1st Cir. 2013); Hamm v. Rhone-Poulenc Rorer Pharm., Inc., 187 F.3d 941, 941 (8th Cir. 1999).

131. *See Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d at 28. The United States brought a criminal case against Pfizer and its subsidiary, Warner-Lambert. *Id.* at 25. Warner-

Neurontin was originally approved by the FDA for the treatment of epilepsy, but the defendant sought to increase the sales of this product by promoting it for the treatment of bipolar disorder, migraine, neuropathic pain, and at dosages exceeding the FDA-approved level of 1800 mg per day.[132]

The jury found that this marketing campaign involved: "(1) direct marketing (or detailing) to doctors, which misrepresented Neurontin's effectiveness for off-label uses; (2) sponsoring misleading informational supplements and continuing medical education (CME) programs; and (3) suppressing negative information about . . . Neurontin's off-label effectiveness."[133] Kaiser and the other plaintiffs alleged that these efforts influenced both formulary and prescribing decisions, causing them to pay for treatments that were ineffective or less effective than cheaper alternatives.[134] The jury found in Kaiser's favor and rendered an award of $47 million which was increased by the trial court to $142 million.[135]

Some government plaintiffs in opioid cases have alleged that opioid manufacturers also violated RICO or comparable state RICO statutes.[136] For example, the City of Lansing's complaint argues that the defendants were guilty of multiple RICO violations.[137] The complaint alleged that the RICO defendants were "persons" because they were capable of holding a legal or beneficial interest in property.[138] The complaint also declared that the defendants were involved in a number of illegal enterprises.[139] The first category was described as a diversion enterprise in which manufacturers, distributors and retail sellers "engaged in a conspiracy to expand the market for opioid drugs—thus inflating their own profits—without regard to legal requirements that Defendants take action to prevent the diversion of drugs to

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Lambert pleaded guilty and agreed to pay a criminal fine of $240 million, while Pfizer agreed to pay $190 in civil fines. *Id.*

132. *Id.* at 26.

133. *Id.* at 28.

134. *See id.* at 28–31.

135. *Id.* at 26.

136. *See* Florida Complaint, *supra* note 98, ¶¶ 247–59, at 44–47. Complaint for (1) Pub. Nuisance; (2) Negligence Per Se; (3) Negligence; & (4) Violations of the Racketeer Influenced & Corrupt Org. Act ¶¶ 519–613, at 119–46, City of Lansing v. Purdue Pharma L.P., No. 1:17-CV-01114-JTN-ESC (W.D. Mich. Dec. 19, 2017) [hereinafter City of Lansing Complaint]; Complaint & Jury Trial Demanded & Endorsed Hereon ¶¶ 171–208, at 51–60, Louisville/Jefferson Cty. Metro Gov't v. AmerisourceBergen Drug Corp., No. 3:17-CV-508-JHM-CHL (W.D. Ky. Aug. 21, 2017) [hereinafter Louisville/Jefferson County Complaint]; New Mexico Complaint, *supra* note 98, ¶¶ 294–365, at 105–23; Ohio Complaint, *supra* note 98, ¶¶ 215–48, at 89–100; City of Seattle Complaint, *supra* note 98, ¶¶ 241–71, at 89–97.

137. City of Lansing Complaint, *supra* note 136, ¶¶ 519–613, at 119–46.

138. *See id.* ¶ 530, at 121.

139. *Id.* ¶¶ 534–613, at 122–46.

illegal channels."[140] The second category was referred to as the marketing enterprise in which opioid manufacturers and others "engaged in a coordinated conspiracy to deceive the American public and the medical profession about the efficacy and safety of opioids, including by minimizing the addictive qualities of opioids."[141]

According to the complaint, each diversion enterprise was a vertical chain, consisting of an opioid manufacturer, one or more distributors and one or more retail sellers.[142] The purpose of the enterprise was "to maximize the members' profits at all costs," and "to manufacture, encourage excessive prescriptions, distribute, and sell as many addictive—and often deadly—pills as legally possible."[143] The complaint declared that the defendants' conduct constituted a pattern of racketeering.[144] It concluded that "[t]he multiple acts of racketeering activity . . . were related to each other, had a similar purpose, involved the same or similar participants and methods of commission, and have similar results affecting similar victims, . . . [all of which] constitute[ed] a 'pattern of racketeering activity.'"[145]

The complaint also identified a number of predicate acts, which it declared "constituted a variety of unlawful activities, each conducted with the common purpose of obtaining significant monies and revenues while benefitting from, encouraging, indirectly creating, contributing to, and maintaining an illegal secondary market for highly addictive and dangerous drugs."[146] The complaint added that these predicate acts "involved the same or similar purposes participants, victims, criminal acts that have the same or similar purposes, results, participants, victims, methods of commission, and are not isolated events."[147] More specifically, the complaint charged the defendants with intentionally providing false information to the DEA about suspicious orders and omitting material information from documents required to be filed with the DEA.[148] To support this allegation, the complaint identified various show cause orders, fines, and settlement agreements between the DEA and the distributor defendants for failure to maintain effective control against the diversion of controlled substances.[149]

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140. *Id.* ¶ 534, at 122–23.
141. *Id.* ¶ 574, at 135.
142. *Id.* ¶ 539, at 124.
143. *Id.* ¶ 540, at 124.
144. *Id.* ¶ 555, at 128.
145. *Id.*
146. *Id.* ¶ 566, at 132.
147. *Id.*
148. *Id.* ¶ 570, at 133.
149. *Id.* ¶¶ 571–73, at 133–35.

According to the City of Lansing's complaint, the opioid manufacturers and others also created a marketing enterprise which involved a coordinated conspiracy to deceive the American public and the medical profession about the efficacy and safety of opioids.[150] According to the complaint, this arrangement qualified as a RICO enterprise because it "existed separate and apart from defendants' racketeering acts and their conspiracy to commit such acts."[151] More specifically, "[i]t has a consensual decision making structure that is used to coordinate strategy, manipulate scientific data, suppress the truth about the addictive qualities of opioids, and otherwise further the Manufacturer defendants' fraudulent unified scheme."[152] According to the complaint, each of the defendants, acting in concert with other defendants, "created and maintained systematic links for a common purpose," namely to market opioids for the treatment of moderate pain and to suppress evidence that they were harmful or ineffective for that purpose.[153]

In addition, the complaint alleged that the marketing enterprise engaged in a pattern of racketeering activity.[154] According to the complaint, examples of this pattern of racketeering activity included the formation of front groups or the infiltration of existing professional organizations and trade associations, such as the American Pain Foundation, the American Academy of Pain Management, the American Pain Society, Federation of State Medical Boards (FSMB), the Pain Care Forum, and the Healthcare Distribution Alliance, in order to avoid regulation by the DEA.[155] The enterprise also recruited physicians and other opinion leaders to promote the use of opioids.[156] According to the complaint, these linkages between opioid manufacturers, doctors, professional organizations, and other marketing participants were established to achieve a common purpose, namely to market opioids to treat all levels of pain.[157] In addition, many participants in the enterprise received substantial revenues from the scheme to increase the use of opioids.[158] Furthermore, the complaint stated that the marketing enterprise engaged in interstate commerce or their activities affected interstate commerce.[159]

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150. *Id.* ¶ 574, at 135.
151. *Id.* ¶ 576, at 136.
152. *Id.*
153. *Id.* ¶ 582, at 137.
154. *Id.* ¶ 584, at 138.
155. *Id.* ¶ 584(a)–(f), at 138–39.
156. *Id.* ¶ 586, at 140.
157. *Id.* ¶ 588, at 140–41.
158. *Id.* ¶ 588, at 141.
159. *Id.* ¶ 590, at 141.

The complaint also identified various predicate acts of racketeering in connection with the marketing enterprise.[160] These included mail fraud and wire fraud.[161] Examples cited by the complaint involved false and misleading communications to regulatory agencies and the public, sales and marketing materials publications for doctors and patients, statements by front groups that promoted opioids, guidelines issued by professional organizations that recommended the use of opioids to treat chronic pain, and books and articles sponsored by opioid manufacturers that assured doctors that opioids could be safely prescribed for such purposes.[162] Finally, the complaint alleged that the City of Lansing sustained damages as the result of the conduct of the diversion and marketing enterprises,[163] and that these damages were neither derivative nor remote.[164]

It should be noted that defendants' marketing conduct was quite similar to that of Pfizer in the *Neurontin* case. The City of Lansing complaint identifies conduct that suggests that the opioid manufacturers are RICO persons, that they created a RICO enterprise for the purpose of misleading the public and the medical profession, that they engaged in predicate acts of racketeering activity which affected interstate commerce, and as a result, caused harm to the plaintiff.

D. Unjust Enrichment and Restitution Claims

The principle of unjust enrichment enables a person to recover from another when he has received a benefit and when it would be unjust for him to retain the benefit, as for example when the defendant has obtained possession or title to the plaintiff's property by fraud or by mistake.[165] In order to recover on such a claim, the plaintiff must prove: (1) the existence of a benefit conferred upon the defendant by him; (2) that the defendant was aware of the benefit; and (3) that the defendant has accepted the benefit under circumstances where it would be inequitable to allow him to retain the benefit without paying for it.[166] It is important to note that unjust enrichment is concerned with restitution—that is, it forces the defendant to disgorge

160. *Id.* ¶¶ 592–93, at 141–43.

161. *Id.* ¶ 592, at 141.

162. *Id.* ¶ 593, at 142–43.

163. *Id.* ¶ 611, at 146.

164. *Id.* ¶ 612, at 146.

165. Merchants Mut. Ins. v. Newport Hosp., 272 A.2d 329, 332 (R.I. 1971) (citing Seekins v. King, 17 A.2d 869, 871 (R.I. 1941)).

166. Bouchard v. Price, 694 A.2d 670, 673 (R.I. 1997) (quoting Anthony Corrado, Inc. v. Menard & Co. Bldg. Contractors, 589 A.2d 1201, 1201–02 (R.I. 1991)).

improperly retained benefits rather than compensating the plaintiff for any harm done to him.[167]

In the past, private plaintiffs and government entities have sued product manufacturers, seeking disgorgement of gains resulting from not paying for the harm caused by the sale of dangerous products.[168] For example, several school districts brought successful unjust enrichment claims against asbestos manufacturers to recover the cost of removing asbestos products from school property.[169] In addition, a number of states sought restitution from tobacco companies for the health costs of smoking.[170] However, since a "global settlement" was reached before these cases could be tried, there is no way to know whether the states' restitution claims would have been successful.[171]

Other unjust enrichment cases against tobacco manufacturers produced mixed results.[172] For example, in *City of St. Louis v. American Tobacco Co.*,[173] the trial court agreed that St. Louis had stated a valid claim according to the First Restatement of Restitution for the reimbursement of smoking-related health care costs incurred by indigent residents.[174] On the other hand, in *Allegheny General Hospital v. Philip Morris*,[175] a federal appeals court rejected an unjust enrichment claim by a charitable hospital.[176] Unjust enrichment suits were also filed against gun manufacturers by state and local governments as well as by individuals.[177] For example, in *White v. Smith & Wesson Corporation*,[178] the Mayor of Cleveland alleged that the city had conferred a benefit on the defendant gun manufacturer by incurring the costs of harm incurred as the result of the manufacturer's negligent marketing

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167. *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (2011).

168. *See* Candace Saari Kovacic-Fleischer, *Restitution in Public Concern Cases*, 36 LOY. L.A. L. REV. 901, 913 (2003).

169. *See generally, e.g.*, Unified Sch. Dist. No. 500 v. U.S. Gypsum Co., 788 F. Supp. 1173 (D. Kan. 1992); Indep. Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286 (D. Minn. 1990).

170. *See* Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847, 849 (1999).

171. *See* Anthony J. Sebok, *Pretext, Transparency and Motive in Mass Restitution Litigation*, 57 VAND. L. REV. 2177, 2180 (2004).

172. Kovacic-Fleischer, *supra* note 168, at 917–21.

173. 70 F. Supp. 2d 1008 (E.D. Mo. 1999).

174. *Id.* at 1016–17 (applying the RESTATEMENT OF RESTITUTION § 115 (1937)).

175. 228 F.3d 429 (3d Cir. 2000).

176. *Id.* at 446–48.

177. Kovacic-Fleischer, *supra* note 168, at 917–20.

178. 97 F. Supp. 2d 816 (N.D. Ohio 2000).

practices and its failure to incorporate certain safety features in its products.[179] The trial court refused to dismiss the plaintiff's claim.[180]

More recently, unjust enrichment has also played a role in lead paint litigation. In *State v. Lead Industries, Association*, the State of Rhode Island argued that the tobacco companies were unjustly enriched because health care and abatement costs paid by the government conferred a benefit on the defendants by enabling them to profit from the sale of lead-based paint without having to bear any of the costs.[181] The defendants sought to dismiss the case, but the trial court refused, declaring that it was not yet possible for it to determine whether the State's expenditures had either enriched the defendants or saved them from sustaining a loss.[182]

City of New York v. Lead Industries Association provides additional support for the plaintiffs.[183] In that case, the trial court dismissed the City's unjust enrichment claim, but its decision was reversed on appeal.[184] The appellate court concluded that "in undertaking such expenditures plaintiffs discharged a duty which, although imposed upon plaintiffs by statutes and regulation, should properly have been borne by the defendants who were responsible for having created this danger to public health and safety . . . ."[185]

Although a number of unjust enrichment claims have been brought against opioid sellers, many of them have provided little detail or analysis. For example, the City of Everett's complaint declares that the defendant failed to exercise effective controls against the diversion of its products, and as a result was unjustly enriched at the plaintiff's expense.[186] The Lackawanna County complaint was more specific, stating that the defendants' "wrongdoing directly caused the Plaintiff to suffer increased expenditure on public healthcare services, law enforcement, the justice system, child and family services as well as lost productivity and lost tax revenue without receiving any of the purported benefits deceptively promoted by Defendants."[187]

Other complaints have sought to recover for ineffective or unnecessary drug treatments. For example, the New Hampshire complaint recited that by deceptively and illegally marketing opioid products to treat chronic pain,

179. *Id.* at 829.
180. *Id.*
181. No. 99-5226, 2001 WL 345830 at *14 (R.I. Super. Ct. 2001).
182. *Id.* at *15.
183. *See generally* 222 A.D.2d 119 (1996).
184. *Id.* at 130–31.
185. *Id.* at 124.
186. City of Everett Complaint, *supra* note 98, ¶ 97, at 22.
187. Lackawanna Complaint, *supra* note 92, ¶ 288, at 77.

Purdue induced health care providers to prescribe them for this purpose, thereby causing the state to reimburse them for prescriptions that should never have been written.[188] According to the complaint, "Purdue has reaped revenues and profits from the State's payments, enriching itself at the State's expense, even as the State continues to cope with a crisis of opioid addiction, overdose injury, and death that Purdue helped create."[189]

In addition, the Navajo Nation sought to recover against distributors and pharmacies rather than manufacturers.[190] In that case, the complaint alleged that the plaintiff had "conferred a benefit upon Distributor Defendants and Pharmacy Defendants by paying for what may be called Distributor Defendants' and Pharmacy Defendants' externalities—the costs of the harm caused by Distributor Defendants' and Pharmacy Defendants' improper sales, distribution, and dispensing practices."[191] The problem with this reasoning, is that it assumes that the defendants could have been legally compelled to pay for the costs that the Navajo Nation incurred in responding to the opioid epidemic. Otherwise, these costs would not be externalities that could be characterized as a cost of business that the defendants shifted to the plaintiff.

E. Civil Conspiracy Claims

A civil conspiracy claim requires: (1) an *agreement* to commit an unlawful act or to commit a lawful act by unlawful means; (2) the commission of an *overt act* in order to promote the conspiracy; (3) *causation*; and (4) *damages* to another resulting from the conspiracy.[192] A civil conspiracy claim can be very useful for plaintiffs because, if it succeeds, each member of the conspiracy is treated as a joint tortfeasor, which reduces causation and proof of damage problems for the plaintiffs because the acts of one defendant is imputed to other members of the conspiracy.[193]

In the past, civil conspiracy claims were brought against the sellers of cigarettes, asbestos, lead-based paint, and other products.[194] For example, in

188. New Hampshire Complaint, *supra* note 98, ¶ 270, at 90.

189. *Id.* ¶ 271, at 90–91.

190. Navajo Nation Complaint, *supra* note 98, ¶¶ 310–16, at 77–78.

191. *Id.* ¶ 313, at 77.

192. *See In re* N.D. Pers. Injury Asbestos Litig. No. 1, 737 F. Supp. 1087, 1096 (D.N.D. 1990) (citation omitted); Thomas *ex rel.* Gramling v. Mallett, 701 N.W.2d 523, 566 (Wis. 2005); City of Milwaukee v. NL Indus., 691 N.W.2d 888, 896 (Wis. Ct. App. 2004).

193. *See* Mark A. Behrens & Christopher E. Appel, *The Need for Rational Boundaries in Civil Conspiracy Claims*, 31 N. ILL. U. L. REV. 37, 38 (2010).

194. Richard Ausness, *Conspiracy Theories: Is There a Place for Civil Conspiracy in Products Liability Litigation?*, 74 TENN. L. REV. 383, 396 (2007).

United States v. Philip Morris, Inc.,[195] the Justice Department alleged that corporate officers from various tobacco companies met in 1953 to develop a plan to rebut claims that smoking was a health hazard.[196] Consequently, the court ruled that the numerous misstatements and acts of concealment alleged in the complaint indicated that they were made as "part of a far-ranging, multi-faceted, sophisticated conspiracy" which was sufficient to state a RICO violation claim.[197]

Plaintiffs also alleged that asbestos companies conspired to conceal the health risks of asbestos from the medical profession and the public. Corporate officers attended a meeting in 1936 and agreed to finance research at the Trudeau Foundation's Saranac Laboratory in order to accumulate data to defend against potential lawsuits.[198] In response, a federal court ruled that the plaintiffs had made a *prima facie* showing that the asbestos industry, including its trade association and a Canadian company, had engaged in a conspiracy to suppress information about the health risks of exposure to asbestos.[199]

Government plaintiffs have also brought civil conspiracy claims against the manufacturers of lead-based paint.[200] It was alleged that the executives from the lead pigment industry established a trade association in 1928 known as the Lead Industries Association and agreed to adopt a common strategy regarding lead-based paints.[201] Furthermore, between 1930 and 1945, the lead paint industry encouraged the use of lead paint even though it knew of the health risks associated with this product.[202] The City of Milwaukee was more successful in its lawsuit against the lead paint industry.[203] In that case, the lower court dismissed the conspiracy claim because it found that there was no underlying tort upon which a conspiracy claim could be based.[204] However, the appeals court cited a letter from one of the defendants, along with documentation of the other defendant's involvement in the promotion of lead-based paint and its opposition to proposed federal regulatory legislation, to

195. 116 F. Supp. 2d 131 (D.D.C. 2000).

196. *Id.* at 136.

197. *Id.* at 149.

198. *See* Ronald L. Motley & Anne McGuinness Kearse, *Decades of Deception: Secrets of Lead, Asbestos, and Tobacco*, TRIAL, Oct. 1, 1999 at 46, 47.

199. *See In re* N.D. Pers. Injury Asbestos Litig. No. 1, 737 F. Supp. 1087, 1096–97 (D.N.D. 1990).

200. *See In re* Lead Paint Litig., 924 A.2d 484, 487 (N.J. 2007); State v. Lead Indus. Ass'n, 951 A.2d 428, 440 (R.I. 2008).

201. *See* Motley & Kearse, *supra* note 198, at 46, 47.

202. *See* Santiago v. Sherwin Williams Co., 3 F.3d 546, 552 (1st Cir. 1993); Brenner v. Am. Cyanamid Co., 288 A.D.2d 869, 869 (N.Y. App. Div. 2001).

203. *See generally* City of Milwaukee v. NL Indus., 691 N.W.2d 888 (Wis. Ct. App. 2004).

204. *Id.* at 895.

conclude that there is sufficient evidence of their participation on the alleged conspiracy to preclude summary judgment.[205]

Although several of the government plaintiffs in the opioid litigation have included claims of civil conspiracy in their complaints, each allegation is somewhat different. For example, in the City of Chicago's case, the complaint alleged that the defendants "conspired to defraud the City while illegally and deceptively promoting opioids in an effort to further opioid sales."[206] As a result of these efforts, the City paid $9.5 million to reimburse third parties for some 400,000 opioid prescriptions.[207]

On the other hand, the Cherokee Nation's complaint alleged the existence of a conspiracy between distributors and retail sellers of opioids.[208] According to the complaint, the distributors continuously supplied prescription opioids to the defendant pharmacies knowing that they were continuously violating the Controlled Substances Act's monitoring and reporting requirements.[209] This tacit arrangement between distributors and retail sellers enabled both to profit from the illegal sale of opioid products.[210]

It remains to be seen whether the government plaintiffs can prove the existence of an agreement, an overt act, causation, and damages in these cases. In the case of the opioid manufacturers, the overt act requirement can be satisfied by the various acts of misrepresentation and concealment about the risks of using of opioids to treat chronic pain. As far as distributors and retail sellers are concerned, the overt acts would involve violations of the Controlled Substances Act, specifically selling opioids to suspicious parties, and failing to monitor and report suspicious purchases to the DEA. The causation requirement may be satisfied by showing that the opioid addiction problem was directly caused by the manufacturers' misrepresentations to prescribers, as well as the marketing and sale of excessive quantities of opioid drugs by manufacturers, distributors, and retail pharmacies. Damages to the government plaintiffs would include the cost of treating addiction, the cost of law enforcement, and the intangible costs arising from the degrading of the quality of life within the respective jurisdictions.

The agreement requirement will probably present the greatest problem for government plaintiffs. Unlike the case with tobacco and asbestos companies, where there was ample evidence of explicit agreements between the

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205. *Id.* at 896.

206. City of Chicago Complaint, *supra* note 2, ¶ 332, at 111. The trial court subsequently dismissed the City's conspiracy complaint and the City abandoned it.

207. *Id.* ¶ 343, at 113.

208. *See* Cherokee Nation Complaint, *supra* note 98, ¶ 222, at 50.

209. *Id.* ¶ 218, at 50.

210. *Id.* ¶ 221, at 50.

defendants, so far little direct evidence of such agreements among opioid sellers has emerged. However, there were some instances of joint funding by opioid manufacturers of front groups and other activities that might provide proof of an underlying agreement to mislead prescribers and potential patients. In addition, it is possible that the plaintiffs will find a "smoking gun" during the discovery process. Therefore, although allegations of civil conspiracy have not been particularly successful in the case of other products, they may fare better in the upcoming opioid litigation.

III. PRINCIPLES THAT POTENTIALLY LIMIT LIABILITY

Even if government plaintiffs satisfy the requirements of a particular liability theory, the defendants are sure to invoke defenses and other legal doctrines that potentially limit liability. First of all, lawsuits must be brought within the statute of limitations period. In addition, the plaintiff must prove that the defendant actually caused the injury in question and, where multiple actors are involved, must generally identify the damages that were caused by each defendant. Furthermore, principles of proximate cause, duty, and shifting responsibility may prevent the plaintiffs from recovering. Also, there are a number of specialized doctrines, such as the economic loss rule, that may affect a plaintiff's ability to recover in tort. Finally, defendants may invoke the regulatory compliance defense and the *scienter* requirement.

A. Statute of Limitations

It is self-evident that a claim must be brought within the period specified by the applicable statute of limitations. Generally speaking, the statute of limitations begins to run when the plaintiff's claim first accrues.[211] Tort claims typically accrue when the plaintiff suffers some form of actual harm;[212] however, this rule is subject to a number of exceptions. The first is known as the discovery rule, which provides that the limitations period will not begin to run until the plaintiff discovers—or with the exercise of reasonable care should have discovered—that he or she has been injured by a particular defendant.[213] The limitations period will also be tolled if the defendant

211. *See* City of San Diego v. U.S. Gypsum, 35 Cal. Rptr. 2d 876, 882 (Ct. App. 1994) (citing Davies v. Krasna, 535 P.2d 1161, 1169 (Cal. 1975)).

212. *Id.*

213. *See* City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 652 (D.R.I. 1986) (citing Town of Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 129 (D.N.H. 1984)).

fraudulently conceals the plaintiff's injury.[214] Finally, the statute of limitations will not completely bar recovery for a continuing nuisance, although damages will be limited to those which occurred within the limitations period.[215] It should also be noted that statutes of limitation do not run against the state or against local government entities when they are exercising governmental functions as an arm of the state.[216]

In the past, asbestos and lead-based paint manufacturers successfully argued that the passage of the limitations period barred claims against them based on negligence,[217] fraud,[218] and violation of unfair trade practice statutes.[219] Although these cases involved damage to real property rather than economic losses to a government plaintiff, they suggest that statutes of limitation may be a powerful tool for defendants in opioid litigation as well. Moreover, because the limitations periods depend on the cause-of-action involved, and also vary from state to state, they could greatly complicate matters in consolidated proceedings such as multidistrict litigation, which involve statutes of limitation from numerous states.

B. Cause-in-Fact

The traditional test for cause-in-fact is the "but for" or *sine qua non* test, which asks whether the injury would have occurred in the absence of the defendant's conduct.[220] However, some states have adopted the substantial factor test, particularly when multiple causes have contributed to the plaintiff's injuries.[221] Under this approach, the causation requirement is

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214. *See Hooksett*, 617 F. Supp. at 129 (D.N.H. 1984) (citing EIMCO-BSP Serv. Co. v. Davison Constr. Co., 547 F. Supp. 57, 59 (D.N.H. 1982)).

215. *See* Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 520 (Mich. Ct. App. 1992).

216. *See* Johnson Cty. *ex rel.* Bd. of Educ. v. U.S. Gypsum Co., 580 F. Supp. 284, 288 (E.D. Tenn. 1984) (citing Jennings v. Davidson County, 344 S.W.2d 359, 361–62 (Tenn. 1961)).

217. *See id.* at 288; *Detroit Bd. of Educ.*, 493 N.W.2d at 520.

218. *See Johnson Cty.*, 580 F. Supp. at 288; City of San Diego v. U.S. Gypsum, 35 Cal. Rptr. 2d 876, 882 (Ct. App. 1994).

219. *See* City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 655–56 (D.R.I. 1986).

220. *See* Young v. Bryco Arms, 821 N.E.2d 1078, 1085 (Ill. 2004) (citing Lee v. Chi. Transit Auth., 605 N.E.2d 493, 502 (Ill. 1992)).

221. *See* People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 543 (Cal. Ct. App. 2017); City of Chi. v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1133 (Ill. 2004); *Young*, 821 N.E.2d at 1086 (citing Lee v. Chi. Transit Auth., 605 N.E.2d 493, 502 (Ill. 1992)); City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 114 (Mo. 2007) (en banc).

satisfied if a defendant's act is a "substantial factor" in causing the plaintiff's injury.[222]

Regardless of which test of causation is used, the plaintiff must identify the actual defendant who caused the harm. For example, in *City of St. Louis v. Benjamin Moore & Co.*,[223] although the plaintiff identified the residences in which it had incurred costs in removing asbestos, it was unable to identify any of the manufacturers whose paint had to be removed in any particular residence.[224] Consequently, the trial court ruled in favor of the defendants.[225] On appeal, the court held the City's claim was properly dismissed because it could not identify the specific defendant who had caused the harm in each particular case.[226]

However, other courts have taken a more relaxed view of the causation requirement. For example, in *City of Chicago v. Beretta U.S.A. Corp.*, the court held that the City had shown that the defendant handgun dealers' marketing practices caused the public nuisance described in the City's complaint.[227] The court observed that the complaint contained "detailed allegations regarding the dealer defendants' participation in bringing about the alleged nuisance, specifically their conduct leading up to and at the point of sale."[228] The court apparently felt that the City should not have the impossible burden of identifying which gun dealer's products caused which specific gun-related costs that the City incurred.

The court in *People v. ConAgra Grocery Products Co.* also applied a more liberal test of causation.[229] In that case, the State of California brought a public nuisance action against two lead-based paint manufacturers and a retail seller of these products.[230] The trial court ordered the defendants to pay $1.15 billion into a fund to pay for the State's lead-based paint abatement program.[231] On appeal, the defendants argued that the State had failed to prove that their promotion of lead-based paint was a substantial factor in causing the

222. J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (citing Childers v. Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966)).

223. 226 S.W.3d 110.

224. *Id.* at 113.

225. *Id.*

226. *Id.* at 116–17.

227. 821 N.E.2d at 1132.

228. *Id.*

229. 227 Cal. Rptr. 3d 499 (Ct. App. 2017).

230. *Id.* at 514.

231. *Id.*

alleged nuisance.[232] However, the appellate court concluded that "at least some of those who were targets of these recommendations heeded them."[233]

Proving causation could be difficult for government plaintiffs in cases where they seek damages for generalized costs such as law enforcement, emergency treatment, and degradation of the quality of life within their territory where multiple defendants are involved. To make matters worse, many of these costs are not solely attributable to opioid use but are also caused by street drugs such as heroin, cocaine, and methamphetamines. Government plaintiffs would almost certainly lose if they had to show how much of these costs were caused by each opioid seller. A similar cost identification problem could arise where statutory violations are alleged. Since these claims are based on payments made by consumers or government entities for ineffective opioid products, the government plaintiffs would presumably have to show in each case whether the treatments were effective or not.

C. Duty

In most states, there is normally no duty to take measures to protect another from harm.[234] However, there are a number of exceptions to this "no duty" rule. For example, a duty to act may arise: (1) when there is a special relationship between the plaintiff and the defendant; (2) when the defendant voluntarily assumes a duty to act on the plaintiff's behalf; and (3) when the defendant is subject to a duty imposed by law.[235] Several courts have relied on a "no duty" analysis to relieve product sellers from liability for damages caused by their products.[236] Thus, in *City of Chicago v. Beretta U.S.A. Corp.*, the City of Chicago and Cook County bought a public nuisance action against various manufacturers, distributors, and retail sellers of handguns, including retail sellers who were located outside of the jurisdiction.[237] To determine whether a duty existed, the court considered four factors: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of

232. *Id.* at 543.

233. *Id.* at 544.

234. *See* Burnett v. Family Kingdom, Inc., 387 S.C. 183, 190, 691 S.E.2d 170, 174 (Ct. App. 2010).

235. *See* Wells v. City of Lynchburg, 331 S.C. 296, 307, 501 S.E. 2d 746, 752 (Ct. App. 1998).

236. *See* City of Chi. v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1126 (Ill. 2004); Young v. Bryco Arms, 821 N.E.2d 1078, 1085 (Ill. 2004); Riordan v. Int'l Armament Corp., 477 N.E.2d 1293, 1296 (Ill. App. Ct. 1985); People v. Sturm, Ruger & Co., 309 A.D. 2d 91, 102 (App. Div. 2003); *see also* Ashley Cty. v. Pfizer, Inc., 552 F.3d 659, 670 (8th Cir. 2009).

237. 821 N.E.2d at 1105–06.

placing that burden on the defendant.[238] Applying these factors, the court held that the defendants owed no duty to protect the public at large against gun violence.[239]

In some cases, plaintiffs have argued that marketing and promotional activities can give rise to a special relationship which imposes a duty to inform the public about the risks of its products. However, this view was rejected by a federal appeals court in *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*.[240] In that case, seven union health and welfare funds sued a number of tobacco manufacturers and trade associations to recover for the costs of treating their members for smoking-related illnesses.[241] The plaintiffs contended that the defendants' assurances about the safety of their products constituted an undertaking which required them to exercise due care.[242] However, the appeals court rejected that argument, declaring that:

> [c]onverting a company's marketing into a special undertaking to inform the public about the known risks of its products would subject every manufacturer that advertises its products to liability for a "special duty" created by such marketing, and that duty would be violated by every material omission in such advertising. We are unwilling to so dramatically extend the scope of liability for a state-law cause of action.[243]

One would expect government plaintiffs to argue that the Controlled Substances Act and other statutes impose a duty on the defendants to avoid making false claims to doctors and patients and to monitor the actions of distributors and retail sellers. However, the defendants will no doubt respond that these statutes are concerned with protecting the physical welfare of patients and do not give rise to a duty to protect the economic interests of state and local governments.

238. *Id.* at 1125 (citing Bajwa v. Metropolitan Life Insur., 804 N.E.2d 519, 529 (Ill. 2004)).
239. *Id.* at 1126.
240. 171 F.3d 912 (3d Cir. 1999).
241. *Id.* at 918.
242. *Id.* at 935–36.
243. *Id.* at 936.

D. Proximate Cause

Proximate cause, sometimes referred to as "legal cause,"[244] reflects the principle that some outer limit should be set to the imposition of liability for the consequences of an act, even a negligent one.[245] Determining whether the defendant's conduct is a proximate cause of the plaintiff's injury often involves the question of foreseeability—that is, "whether the injury is of a type that a reasonable person would see as a likely result of his conduct."[246] In addition, proximate cause is often invoked to cut off liability when other causes have intervened between the defendant's conduct and the plaintiff's harm. Acts or events of this nature are often referred to as superseding causes and include intervening criminal acts.[247]

Some courts distinguish between a situation where the defendant's conduct merely furnishes a condition by which an injury is made possible, and a third person, acting independently, subsequently causes the injury.[248] In such cases, the creation of the condition by the defendant is not considered to be the proximate cause of the injury.[249] Several courts have relied on this condition-versus-cause analysis to conclude that a defendant's conduct was not a cause of the plaintiff's injury.[250] For example, in *Ashley County, Arkansas v. Pfizer, Inc.*,[251] twenty Arkansas counties accused a number of drug companies of distributing over-the-counter cold medicines containing ephedrine and pseudoephedrine knowing that these products would be used by criminals to produce methamphetamine.[252] When the lower court dismissed the plaintiffs' public nuisance and unjust enrichment claims, the plaintiffs appealed, but a federal appellate court upheld the lower court's ruling.[253] The appellate court agreed that the defendants' sale of cold medicine did not proximately cause the counties to incur increased costs for government services, declaring that:

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244. *See* People v. ConAgra Grocery Products Co., 227 Cal. Rptr. 3d 499, 545 (Ct. App. 2017).

245. *See id.* at 545; City of Chi. v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1127 (Ill. 2004); People v. Sturm, Ruger & Co., 309 A.D.2d 91, 103–04 (App. Div. 2003).

246. *See* Young v. Bryco Arms, 821 N.E.2d 1078, 1086 (Ill. 2004) (citing Lee v. Chi. Transit Authority, 605 N.E.2d 493, 503); *see also* State v. Lead Indus. Ass'n, 951 A.2d 428, 451 (R.I. 2008).

247. *See* KEETON ET AL., *supra* note 68, § 44, at 313.

248. *See* First Springfield Bank & Tr. v. Galman, 720 N.E.2d 1068, 1071 (Ill. 1999).

249. *Id.*

250. *See Young*, 821 N.E.2d at 1087; *Lead Indus. Ass'n*, 951 A.2d at 451.

251. 552 F.3d 659 (8th Cir. 2009).

252. *Id.* at 662.

253. *Id.* at 670.

> [t]he criminal actions of the methamphetamine cooks and those further down the illegal line of manufacturing and distributing methamphetamine are 'sufficient to stand as the cause of the injury' to the Counties in the form of increased government services, and they are 'totally independent' of the Defendants' actions of selling cold medicines to retail stores, even if the manufacturers knew that cooks purchased their products to use in manufacturing methamphetamine.[254]

A New York intermediate appellate court reached a similar conclusion in *People v. Sturm, Ruger & Co., Inc.*[255] That case involved a public nuisance action by the State of New York against various handgun manufacturers, distributors, and retail sellers.[256] The lower court dismissed the public nuisance claim and the State appealed.[257] However, the appeals court affirmed the lower court's ruling and concluded that the connection between the defendants, criminal wrongdoers, and the plaintiff was too attenuated to satisfy the proximate cause requirement.[258] Courts have also ruled against health care providers and unions on proximate cause grounds when they have sought to recover against product sellers for costs associated with the treatment of product-related injuries or diseases.[259]

However, in *People v. ConAgra Grocery Products Co.*, another court recently concluded that the plaintiff had shown that the defendants' marketing practices proximately caused a public nuisance.[260] In that case, the State of California sued manufacturers and sellers of lead-based paint for allegedly creating a public nuisance in the State.[261] On appeal, the defendants maintained that their promotion and marketing efforts were too removed from the current public nuisance to be a proximate cause.[262] Instead, they argued that due to the passage of time, the damage to the state from lead-based paint was "more closely attributable to owner neglect, renovations, painters,

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254. *Id.* at 670; *see also* Indep. Cty. v. Pfizer, Inc., 534 F. Supp. 2d 882, 889 (E.D. Ark. 2008).

255. 761 N.Y.S.2d 192, 200 (App. Div. 2003).

256. *Id.* at 194.

257. *Id.*

258. *See id.* at 202.

259. Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 433 (3d Cir. 2000) (public nuisance and civil conspiracy); Or. Laborers-Employers Health & Welfare Tr. Fund v. Philip Morris, Inc., 185 F.3d 957, 966 (9th Cir. 1999) (RICO and antitrust); Ark. Carpenters' Health & Welfare Fund v. Philip Morris, Inc., 75 F. Supp. 2d 936, 943–44 (E.D. Ark. 1999).

260. 227 Cal. Rptr. 3d 499, 545 (Ct. App. 2017).

261. *Id.* at 514.

262. *Id.* at 545.

architects, and repainting."[263] However, the appeals court affirmed the trial court's ruling that the plaintiff had met the proximate cause requirement.[264] According to the court:

> [t]he connection between the long-ago promotions and the current presence of lead paint was not particularly attenuated. Those who were influenced by the promotions to use lead paint on residential interiors in the 10 jurisdictions were the single conduit between the defendants' actions and the current hazard. Under these circumstances, the trial court could have reasonably concluded that the defendants' promotions, which were a substantial factor in creating the current hazard, were not too remote to be considered a legal cause of the current hazard even if the actions of others in response to those promotions and the passive neglect of owners also played a causal role.[265]

It remains to be seen whether the *ConAgra* court's view of proximate cause is an *outlier*, or whether it represents the beginning of a more expansive treatment of this issue by courts in the future.

E. Shifting Responsibility

The principle of shifting responsibility provides that a defendant may escape liability if it can show that it reasonably relied on other parties to take adequate precautions to protect the plaintiff from harm. Both drug manufacturers and distributors might invoke the shifting responsibility doctrine as a defense, essentially seeking to blame other members of the chain of distribution for failing to take effective measures to prevent widespread misuse of their products. According to this argument, once manufacturers delivered their products to distributors, they no longer had legal or physical control over them and could reasonably assume that downstream sellers would take measures to prevent diversion as they were required to do under the CSA. However, government plaintiffs would point out that this argument is weakened by the fact that opioid manufacturers were fully aware that their products were being distributed in quantities that far exceeded legitimate therapeutic needs.

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263. *Id.*
264. *Id.* at 546.
265. *Id.*

F. Restrictions on Damage Awards

Some states prohibit government entities from seeking damage awards for future losses in public nuisance actions, and instead limit them to injunctive relief.[266] In addition, there are two other doctrines that could cause trouble for government plaintiffs. The first is known as the economic loss rule and the second is referred to as the free public services or municipal cost recovery doctrine.

1. The Economic Loss Rule

The economic loss rule prevents plaintiffs from recovering in negligence or strict liability cases when they suffer only economic losses, as opposed to personal injuries or property damage.[267] A defendant asbestos manufacturer successfully invoked the economic loss doctrine in *Adams-Arapahoe School District No. 28-J.*[268] In that case, a federal appeals court concluded that the plaintiff school board had failed to prove that asbestos in vinyl asbestos tile installed in its schools had contaminated the school buildings, and rejected its claim that the threat of future harm was sufficient to allow it to recover the cost of removal.[269] However, most other courts have ruled that asbestos removal costs should not be treated as purely economic losses.[270]

On the other hand, an Illinois court held the economic loss doctrine to be applicable in a public nuisance action against handgun manufacturers, distributors, and dealers in *City of Chicago v. Beretta U.S.A. Corporation.*[271] In that case, the City sought to recover for "the costs of emergency medical services, law enforcement efforts, the prosecution of violations of gun control ordinances, and other related expenses."[272] Cook County also sought to recover for similar costs.[273]

The plaintiffs contended that the damages that they incurred were not the product of "disappointed commercial expectations" such as "damages for inadequate value, costs of repair and replacement of the defective product, or

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266. *See* Gifford, *supra* note 60, at 872.

267. *See* Richard C. Ausness, *Tort Liability for Asbestos Removal Costs*, 73 OR. L. REV. 505, 523 (1994); Catherine M. Sharkey, *In Search of the Cheapest Cost Avoider: Another View of the Economic Loss Rule*, 85 U. CIN. L. REV. 1017, 1017 (2017).

268. 959 F.2d 868 (10th Cir. 1992).

269. *Id.* at 874.

270. *See, e.g.*, Tioga Pub. Sch. Dist. v. U.S. Gypsum Co., 984 F.2d 915, 919–20 (8th Cir. 1993); City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 651–52 (R.I. 1986).

271. 821 N.E.2d 1099, 1143 (Ill. 2004).

272. *Id.* at 1106.

273. *Id.*

consequent loss of profits."[274] Instead, the court concluded that the true purpose of the economic loss doctrine was to prevent plaintiffs from relying on tort law in order to recover for speculative or unlimited damages.[275] Accordingly, the court held that the damages sought were solely economic in nature "in the sense that they represent costs incurred in the absence of harm to a plaintiff's person or property."[276]

Although government plaintiffs in the current opioid litigation may argue that the economic loss doctrine should not be applied to their claims, it appears that the facts in the opioid cases are distinguishable from the asbestos cases. In the asbestos cases, the plaintiffs sought to recover for the costs of removing highly dangerous material from their *property*. In contrast, the plaintiffs in the opioid cases do not own any property that is directly affected by the defendants' conduct. Rather, they are seeking reimbursement for costs that they have incurred while performing governmental functions. The losses involved in the opioid cases arguably resemble those involved in the *City of Chicago* decision where the prospect of unlimited damages persuaded the court to limit this type of liability.

2. *Municipal Cost Recovery Doctrine*

The free public services or municipal cost recovery doctrine provides that a government entity cannot sue a tortfeasor to recover the costs of public services that were made necessary because of the defendant's negligence.[277] This doctrine has been adopted by a number of jurisdictions, though not a majority,[278] and various rationales have been offered to support it.[279] Perhaps the most persuasive was that set forth by a federal appeals court in the *City of Flagstaff* case:

> [w]here such services are provided by the government and the costs are spread by taxes, the tortfeasor does not expect a demand for reimbursement. This is so even though the tortfeasor is fully aware

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274. *Id.* at 1139.

275. *See id.* at 1143.

276. *Id.*

277. *See id.* at 1143–44.

278. *See, e.g.*, City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co., 719 F.2d 322, 323 (9th Cir. 1983); Cty. of San Luis Obispo v. Abalone All., 223 Cal. Rptr. 846, 859 (Dist. Ct. App. 1986); Town of Freetown v. New Bedford Wholesale Tire, Inc., 423 N.E.2d 997, 998 (Mass. 1981); Dep't of Nat. Res. v. Wis. Power & Light Co., 321 N.W.2d 286, 289 (Wis. 1982).

279. *See* Timothy D. Lytton, *Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 TUL. L. REV. 727, 752–59 (2002).

> that private parties injured by its conduct, who cannot spread their risk to the general public, will have a cause of action against it for damages proximately or legally caused.[280]

At least one court has invoked the municipal cost recovery rule to prohibit government entities from recovering damages against the manufacturers and retail sellers of handguns. In *City of Chicago v. Beretta U.S.A. Corporation*, the Illinois court applied the rule to prevent the City from recovering the costs of law enforcement and emergency medical care that it claimed resulted from illegal gun sales.[281] According to the court, "where a system already exists for the rational allocation of costs, and where society as a whole relies upon that system, there is little reason for a court to impose an entirely new system of allocation."[282] Therefore, the court held that the City could not recover monetary damages that were not directly related to the costs of abatement or as compensation for damage to municipal property.[283]

On the other hand, an Ohio court refused to apply the municipal cost recovery doctrine in a similar case. In *City of Cincinnati v. Beretta U.S.A. Corporation*, defendant gun manufacturers urged the court to reject the City's damage claim, arguing that it was foreclosed by the municipal cost recovery rule.[284] Although the court acknowledged that the City could not reasonably expect to recover the costs for services a City incurs whenever a tortfeasor causes harm, it concluded that the rule was primarily concerned with a "single, discrete incident requiring a single emergency response," and would not necessarily apply in a case where the alleged harm was "ongoing and persistent," and that the continuing nature of the defendants' misconduct justified the recoupment of the City's costs.[285] Other courts have also held that the municipal cost recovery rule does not automatically bar all government damage claims.[286]

The economic loss rule may also cause a problem for government plaintiffs.[287] Although the rule would not bar fraud claims or most statutory claims, at least one court has extended it to public nuisance actions.[288] Finally, the municipal cost recovery rule may also prevent government plaintiffs from

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280. *See Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d at 323.

281. *See* 821 N.E.2d 1099, 1147 (Ill. 2004).

282. *Id.* at 1145.

283. *Id.* at 1147.

284. 768 N.E.2d 1136, 1149 (Ohio 2002).

285. *Id.*

286. *See* City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222, 1240 (Ind. 2003).

287. *See* Adams-Arapahoe School Dist. No. 28-J, 959 F.2d 868, 874 (10th Cir. 1992); *Beretta U.S.A. Corp.*, 821 N.E.2d at 1143.

288. *See Beretta U.S.A. Corp.*, 821 N.E.2d at 1143.

recovering from drug companies for the cost of providing certain public services, such as emergency room treatment and law enforcement activities. Since courts have split over whether the rule should be applied in cases involving handguns,[289] it is likely that at least some courts will also apply it to lawsuits against opioid sellers.

G. Regulatory Compliance and Scienter

Although the regulatory compliance defense and the *scienter* requirement are relatively weak arguments, they should not be dismissed out of hand. As we have seen, violation of a statute or safety regulation may cause the defendant's conduct to be labeled as negligence per se. However, compliance with a statute or regulation is usually only evidence of due care. Yet, a number of states have enacted legislation that provides that warnings that have been approved by the FDA are presumed to be adequate. Opioid manufacturers may try to assert a regulatory compliance defense in those states since they provided FDA-approved warnings about the risk of addiction on all of their products. According to the defendants, they produced a useful pharmaceutical drug, complied with all government regulations and should not be held responsible for the misuse of their products by others. However, government plaintiffs may respond that they did not necessarily claim that the defendants' warnings were inadequate, but rather that they lied about the suitability of opioid therapy for chronic pain and failure to properly control the distribution of opioids for non-medical uses.

The overwhelming majority of courts apply a foresight test as far as liability for product risks are concerned.[290] In other words, a plaintiff must show that at the time of sale, the defendant had knowledge or *scienter* of the risk that occurred.[291] Therefore, opioid producers can argue that while they were aware of the risk of addiction (and warned about it), they could not have foreseen that their products would be widely abused and would thereby cause economic harm to the plaintiffs. In response, government plaintiffs will point out that evidence of opioid addiction in many parts of the country was widely publicized as early as 1998 and the defendants failed to change the marketing practices that contributed to this problem.

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289. *Compare Beretta U.S.A. Corp.*, 821 N.E.2d at 1147 (applying the municipal cost recovery rule), *with* City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1149–50 (Ohio 2002) (refusing to apply the municipal cost recovery rule).

290. Richard W. Wright, *The Principles of Product Liability, in Symposium, Products Liability: Litigation Trends on the 10th Anniversary of the Third Restatement*, 26 REV. LITIG. 1067, 1080 (2007).

291. *See* KEETON ET AL., *supra* note 68, § 31, at 169–70.

IV. CONCLUSION

This Article identified a number of liability theories that state and local government plaintiffs have invoked in their lawsuits against the producers and sellers of prescription opioids. These theories, some of which are more persuasive than others, included public nuisance, negligence, fraudulent misrepresentation, violation of statute, unjust enrichment, and civil conspiracy. Public nuisance is the most popular of these liability theories, but a number of states have limited such a theory to activities that take place on land and a few refuse to allow government plaintiffs to recover damages. Negligence claims are based on questionable marketing practices and the failure to prevent these highly addictive products from falling into the hands of drug abusers. Opioid manufacturers clearly misrepresented the safety and effectiveness of their products to doctors, but fraudulent misrepresentation claims are questionable because they were directed at doctors rather than state or local governments officials.

Violation of statute might be a viable theory, especially those which involve RICO or false claims. Other statutory violations are more problematic, unless government plaintiffs can show they were designed to protect their economic interests. Unjust enrichment appears to be a weak theory, unless government plaintiffs can show that opioid producers and sellers were wrongly enriched at their expense. Finally, if government plaintiffs bring civil conspiracy claims against opioid manufacturers or sellers, they will have to prove they agreed to commit tortious or illegal acts.

In addition to limitations in the liability theories identified above, government plaintiffs will also have to contend with a host of other doctrines that potentially limit liability. These include the statute of limitations, cause-in-fact, proximate cause, duty, and shifting responsibility. In addition, defendants may rely upon certain specialized doctrines, such as the economic loss rule and the municipal cost recovery rule, that prohibit the recovery for purely economic losses. Finally, defendants may invoke the regulatory compliance defense and the *scienter* requirement. All of this suggests that there is no assurance that government plaintiffs will necessarily satisfy state law requirements in every state.

Of course, the liability of opioid producers and sellers may not ultimately be decided by jury trials. Other outcomes are possible, including bankruptcy, settlement, or protracted case-by-case litigation. One possibility is that some defendants, particularly smaller ones, will follow the lead of the asbestos industry and seek refuge in bankruptcy protection. Under this approach, the bankruptcy court may distribute some of the bankrupt company's assets to government plaintiffs and create a trust fund from other assets to satisfy future

claims.[292] Presumably, the size of these disbursements will depend on the expected value of present and future claims. A second approach, which was pursued by defendants in the handgun and lead-based paint litigation, would be to take any and all cases to trial. Opioid defendants would not voluntarily choose to follow this course unless they expected either to win most of these cases or to settle them individually on attractive terms. However, they might not have any choice if settlement negotiations broke down.

The third, and most likely, result would be a "global" settlement. Indeed, a settlement of some sort will probably emerge out of the multidistrict litigation proceeding currently underway in a federal district court in Cleveland, Ohio. One would assume that such a settlement, if it occurs, will resemble the Master Settlement Agreement (MSA) that was reached between the states and the tobacco industry in 1998.[293] In that case, the defendants agreed to make annual payments to the states in perpetuity, with the value of these payments estimated to be over $200 billion for the first twenty-five years.[294] In addition to specifying the percentage of settlement funds that each state would receive, the MSA imposed marketing and advertising restrictions on the tobacco industry, as well as restrictions on lobbying and the targeting of minors.[295]

What are the prospects for a similar global settlement in the opioid litigation? First of all, the parties must regard settlement as an acceptable option. Since the defendants appear to have requested that the lawsuits against them be consolidated, they were presumably aware that the vast majority of

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292. This technique was successfully used in the A.H. Robins (Dalkon Shield IUD) bankruptcy proceeding. Georgene Vairo, *Mass Torts Bankruptcies: The Who, The Why and The How*, 78 AM. BANKR. L.J. 93, 111–17 (2004).

293. Another settlement of interest is the one reached in the *Vioxx* litigation. *See generally* Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 142–46 (2012). The case arose from the sale of Merck's pain-killing drug Vioxx between 1999 and 2004. The drug was taken off the market in 2004 after it was accused of causing heart attacks and strokes. Eventually, more than 50,000 suits were filed against Merck in state and federal courts. *See* Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2213 (2008). In 2007, Merck's representatives signed an agreement with the plaintiffs' law firms under which the pharmaceutical company agreed to pay $4.85 billion to settle these claims. *See* Benjamin C. Zipursky & Howard M. Erichson, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 266 (2011).

294. *See* Andrew J. Haile & Matthew W. Krueger-Andes, *Landmark Settlements and Unintended Consequences*, 44 U. TOL. L. REV. 101, 102–03 (2012). So far, these annual payments have averaged between $7 billion and $9 billion. *See* Gregory W. Traylor, Note, *Big Tobacco, Medicaid-Covered Smokers, and the Substance of the Master Settlement Agreement*, 63 VAND. L. REV. 1081, 1099 (2010).

295. James J. White & Hanoch Dagan, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 373 (2000).

MDL cases ultimately settle.[296] There are reasons why a settlement might be attractive to the defendants. For example, if a reasonable settlement could be reached, it would save the defendants a considerable amount of money in litigation expenses. A settlement would also reduce the chances of being damaged by a "smoking gun" disclosure during one of the many trials that would occur in the absence of a settlement. Finally, a settlement would bring a measure of closure to the opioid controversy and allow the defendants to move on.

One would also expect the plaintiffs to have an interest in reaching a settlement. In the first place, the plaintiffs would start receiving their money much sooner if they settled than if they took each case to trial. In addition, the trial lawyers who financed these cases on a contingency fee basis would rather be paid sooner than later. Moreover, the plaintiffs (and their lawyers) would probably prefer to settle for a guaranteed sum of money rather than taking their chances by going to trial. Finally, a settlement could impose requirements on opioid sellers to regulate their marketing practices.

However, even if all of the parties agreed that a settlement was in their best interests, there is no assurance that they could actually reach one. One problem is for the parties to agree on the overall size of the proposed settlement. In theory, this would require an evaluation of both liability and damages for each claim. Unfortunately, as this Article has pointed out, liability rules (including rules that limit liability) vary substantially from state to state. In addition, calculating damages for each of these claims will require extensive documentation. Although bellwether trials may provide some information on these issues, it can be expected that the parties will find it difficult to reach an agreement.

Furthermore, if the parties can eventually agree on an overall settlement amount, each side will then have to determine how to apportion benefits and liabilities. Here again, one would expect the relative strengths and weaknesses of each party's case, as well as the damages suffered by each plaintiff, to be relevant to resolving apportionment problems. At the present time, there are more than a thousand government plaintiffs involved in opioid litigation. Not every plaintiff has sued every defendant, nor has every plaintiff brought the same claims. All of this will have to be sorted out by them. Another problem is determining the amount of damages that each plaintiff has suffered.

Of course, the defendants have the same problem, though not on the same scale. Excluding doctors and other individuals, there are three classes of defendants: manufacturers, distributors, and retail sellers. For a settlement to go forward, these defendants will have to agree on how much of the settlement

296. *See* Fallon, Grabill & Wynne, *supra* note 4, at 2329.

costs each group will have to bear. Assuming that such an agreement is possible, each group would have to agree on a formula to apportion responsibility its share of the settlement among the individual defendants in each category.

All of this suggests that the parties may not be able to reach a settlement, even though it is in their best interests to do so. In some respects, this task may be easier for the plaintiffs because settlement negotiations for them are largely handled by lead counsel or a steering committee. If the plaintiffs' lawyers can reach a global settlement with the defendants, they can exert considerable pressure on their clients to agree to the settlement terms.[297] Although the parties may be able to reach a quick settlement, it is more likely that this process will take a number of years.

297. Presumably, the defendants only care about their overall liability under the settlement and will have no interest in how the settlement proceeds are distributed among the plaintiffs and their lawyers.

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