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## Litigating an Epidemic: California Plaintiffs In the National Opioid Litigation

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## Litigating an Epidemic: California Plaintiffs In the National Opioid Litigation

### Cover Page Footnote

J.D. Candidate 2021, Loyola Law School, Los Angeles. My thanks to Dean Brietta Clark for her insight and guidance, Professor Adam Zimmerman for his procedural expertise, the Volume 53 Loyola of Los Angeles Law Review Developments team, Volume 54 staffers, and any and all professors, teachers, supervising attorneys, and friends past and future who have ever taken a red pen to my work—thank you for helping me and my writing grow.

# LITIGATING AN EPIDEMIC: CALIFORNIA PLAINTIFFS IN THE NATIONAL OPIOID LITIGATION

*Samantha T. Pannier\**

*Can litigation solve a public health epidemic? The opioid epidemic has cost California 24,885 lives,<sup>1</sup> \$4.3 billion, and counting.<sup>2</sup> As a result, over 500 California cities, counties,<sup>3</sup> and sovereign Indian tribes<sup>4</sup> are engaged in civil litigation against over twenty different opioid manufacturers, distributors, and pharmacies for their role in creating and profiting from an epidemic of addiction. Cases brought by California plaintiffs account for about 20 percent of all ongoing opioid litigation nationally.<sup>5</sup> This Note situates the claims of three California plaintiffs—the State, the County of Mariposa, and the City of Los Angeles—within the context of the ongoing national opioid litigation, compares them to previous successful Big Tobacco litigation, and discusses what plaintiffs should do to retain both their ability to control claims and any potential settlement or judgment funds.*

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\* J.D. Candidate 2021, Loyola Law School, Los Angeles. My thanks to Dean Brietta Clark for her insight and guidance, Professor Adam Zimmerman for his procedural expertise, the Volume 53 *Loyola of Los Angeles Law Review* Developments team, Volume 54 staffers, and any and all professors, teachers, supervising attorneys, and friends past and future who have ever taken a red pen to my work—thank you for helping me and my writing grow.

1. *California Opioid Overdose Surveillance Dashboard*, CAL. DEP'T OF HEALTH, <https://discovery.cdph.ca.gov/CDIC/ODdash/> (last visited Dec. 20, 2020) [hereinafter *California Opioid Dashboard*]. Cumulative data were collected and analyzed by author, raw data are publicly available, and data analysis is available upon request. Corroborated by *California: Opioid-Involved Deaths and Related Harms*, NAT'L INST. ON DRUG ABUSE (Apr. 3, 2020), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-summaries-by-state/california-opioid-summary>.

2. Thomas Hale & Sarah DiSalvo, *The Opioid Epidemic: An Economic Overview in the State of California*, CAL. STATE TREASURER'S OFF. (Feb. 15, 2018), <https://medium.com/@catreasurer/the-opioid-epidemic-an-economic-overview-in-the-state-of-california-ad7a5d4558d0>.

3. Jose A. Del Real, *Sick River: Can These California Tribes Beat Heroin and History?*, N.Y. TIMES (Sept. 4, 2018), <https://www.nytimes.com/2018/09/04/us/klamath-river-california-tribes-heroin.html>.

4. *Id.*

5. At the time of writing, California cities and counties alone accounted for 539 of 2,500 local government claims consolidated in the Northern District of Ohio. See *Frequently Asked Questions*, IN RE: NAT'L PRESCRIPTION OPIATES LITIG., <https://www.opioidnegotiationclass.info/Home/FAQ#faq9> (last visited Dec. 20, 2020) [hereinafter *FAQ*, IN RE: NAT'L PRESCRIPTION OPIATES LITIG.].

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## I. INTRODUCTION TO AN EPIDEMIC: HOW DID WE GET HERE?

In an opioid overdose, the drug overwhelms the central nervous system.<sup>6</sup> Specifically, it targets the part of the user’s brain responsible for breathing.<sup>7</sup> Eventually, the respiratory system becomes so depressed that the user suffocates.<sup>8</sup> On average, 128 Americans—six Californians—die this way every day.<sup>9</sup>

In fall 2017, the opioid epidemic officially became a public health emergency.<sup>10</sup> Unlike naturally occurring epidemic diseases, such as influenza or HIV/AIDS, the distinctive characteristic of the opioid crisis is its principal mode of transmission: human malfeasance.<sup>11</sup> Opioid manufacturers, distributors, and pharmacies (collectively “opioid defendants”) created a highly addictive product and presented it to the public as safe when they knew it was not.<sup>12</sup> Drug manufacturer Purdue Pharma’s “blockbuster” opioid, OxyContin, is perhaps the most well-known of all name-brand and generic opioids.<sup>13</sup>

6. *Opioid Overdose Basics: What Is an Overdose?*, NAT’L HARM REDUCTION COAL., <https://harmreduction.org/issues/overdose-prevention/overview/overdose-basics/what-is-an-overdose/> (last modified Sept. 1, 2020).

7. ELIZABETH Y. SCHILLER ET AL., OPIOID OVERDOSE 7–8 (2020), [https://www.ncbi.nlm.nih.gov/books/NBK470415/?report=reader#\\_NBK470415\\_pubdet\\_](https://www.ncbi.nlm.nih.gov/books/NBK470415/?report=reader#_NBK470415_pubdet_) (last updated Nov. 20, 2020).

8. *Id.*

9. *California: Opioid-Involved Deaths and Related Harms*, NAT’L INST. ON DRUG ABUSE (Apr. 3, 2020), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-summaries-by-state/california-opioid-summary> (daily crude averages calculated by author using data from CDC WONDER, California  $n = 2,410/365$  and United States  $n = 46,802/365$ ).

10. Letter from Eric D. Hargan, Acting Sec’y of Health and Hum. Servs., U.S. Dep’t of Health & Hum. Servs. (Oct. 26, 2017), <https://www.hhs.gov/sites/default/files/opioid%20PHE%20Declaration-no-sig.pdf>; see also 42 U.S.C. § 247(d) (2018).

11. See Harriet Ryan et al., ‘*You Want a Description of Hell?*’ *Oxycontin’s 12-Hour Problem*, L.A. TIMES (May 5, 2016), <https://www.latimes.com/projects/oxycontin-part1/>; Kim Christensen, *Purdue Pharma Sought to Divert Online Readers from Critical L.A. Times Series on Opioid Crisis, Records Show*, L.A. TIMES (Aug. 15, 2019, 5:00 AM), <https://www.latimes.com/california/story/2019-08-14/purdue-pharma-coverage-divert-opioid-crisis>; U.S. SENATE HOMELAND SEC. & GOVERNMENTAL AFFS. COMM., FUELING AN EPIDEMIC 2 (2018), <https://www.hsdl.org/?view&id=808171>.

12. Ryan et al., *supra* note 11.

13. OxyContin is so ubiquitous that the terms “oxy” and “perky” frequent pop music lyrics extolling the drugs’ recreational opioid use. See, e.g., *Oxy*, GENIUS, <https://genius.com/Future-oxy-lyrics> (last visited Oct. 4, 2020); Ben Beaumont-Thomas, *The Death of Lil Peep: How the US Prescription Drug Epidemic Is Changing Hip-Hop*, THE GUARDIAN (Nov. 16, 2017, 12:45 PM), <https://www.theguardian.com/music/2017/nov/16/death-lil-peep-us-prescription-drugs-epidemic-hip-hop-rapper>. Oxycontin’s popularity is frequently described in the same terms as a successful film, a “blockbuster.” See German Lopez, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, VOX (Sept. 16, 2019, 11:30 AM), <https://www.vox.com/policy-and-politics/2019/9/16/20868487/purdue-pharma-oxycontin-bankruptcy-opioid-epidemic>.

OxyContin's story is a useful example of how over the course of two decades opioids managed to reshape American life.

Prior to OxyContin—and the wave of new opioids that followed—most pain medication was designed to be immediately released and absorbed into the body.<sup>14</sup> Patients receive the whole dose of opioids all at once.<sup>15</sup> As a result, pain is treated almost immediately, but the medication wears off quickly, and side effects are strong.<sup>16</sup> OxyContin's innovation was its extended release formula, which supposedly released smaller amounts of the drug into the body slowly over a longer period of time.<sup>17</sup> OxyContin's extended release formula broadened the opioid consumer market from patients experiencing acute, intense pain to America's fifty million chronic pain sufferers.<sup>18</sup>

Purdue's marketing materials to physicians and patients promised that OxyContin's "delayed absorption" formula prevented users from dependence and abuse.<sup>19</sup> Until 2001, the label on OxyContin's box read: "Delayed absorption as provided by OxyContin tablets, is believed to reduce the abuse liability of a drug."<sup>20</sup> This statement was the keystone to Purdue's aggressive and, as the plaintiffs allege, false and misleading marketing campaign directed at doctors and the public at large.<sup>21</sup>

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14. Charles E. Argoff & Daniel I. Silvershein, *A Comparison of Long- and Short-Acting Opioids for the Treatment of Chronic Noncancer Pain: Tailoring Therapy to Meet Patient Needs*, 84 MAYO CLINIC PROC. 602, 603 (2009).

15. *See id.*

16. *Id.*

17. *See* Ryan et al., *supra* note 11.

18. James Dahlhamer et al., *Prevalence of Chronic Pain and High-Impact Chronic Pain Among Adults—United States, 2016*, 67 CTR. DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP. 1001, 1002 (Sept. 14, 2018), <https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6736a2-H.pdf>; Argoff & Silvershein, *supra* note 14, at 604.

19. Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 224 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2622774/#bib49>; Marilyn Bulloch, *How Oxycodone Has Contributed to the Opioid Epidemic*, PHARMACY TIMES (Aug. 2, 2018, 5:19 PM), <https://www.pharmacytimes.com/contributor/marilyn-bulloch-pharmd-bcps/2018/08/how-oxycodone-has-contributed-to-the-opioid-epidemic>.

20. Caitlin Esch, *How One Sentence Helped Set Off the Opioid Crisis*, MARKETPLACE (Dec. 13, 2017), <https://www.marketplace.org/2017/12/13/opioid/>; Van Zee, *supra* note 19, at 224; Bulloch, *supra* note 19.

21. David Armstrong, *Secret Trove Reveals Bold 'Crusade' to Make OxyContin a Blockbuster*, STAT (Sept. 22, 2016), <https://www.statnews.com/2016/09/22/abbott-oxycotin-crusade/>; Patrick Radden Keefe, *The Family That Built an Empire of Pain*, THE NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/magazine/2017/10/30/the-family-that-built-an-empire-of-pain>.

Purdue's claim about OxyContin's lack of addictive properties rested on shaky scientific ground: a single Purdue-funded study prior to the drug's launch in 1996.<sup>22</sup> The statement remained on OxyContin's label from the drug's launch in 1996 until 2001 when the Food and Drug Administration (FDA) forced Purdue to replace it with a "Black Box Warning," the strongest warning possible for a drug.<sup>23</sup> The warning includes recommended dosing restrictions, notices about the risk of abuse, diversion,<sup>24</sup> and the risk of "fatal respiratory depression."<sup>25</sup> But by then, the epidemic was already in motion. One study found that "[f]rom 1997 to 2002, OxyContin prescriptions increased from 670,000 to 6.2 million."<sup>26</sup> At the height of opioid prescription-writing in 2002, Purdue made more than \$1 billion on OxyContin alone.<sup>27</sup>

For their part, distributors like McKesson and AmerisourceBergen corporations, which supply pharmacies, hospitals, and clinics with medical equipment including pharmaceuticals, are accused of neglecting to report suspicious orders

22. Robert F. Reeder et al., *Steady-State Bioavailability of Controlled-Release Oxycodone in Normal Subjects*, 18 CLINICAL THERAPEUTICS 95, 95–105 (1996); Bulloch, *supra* note 19.

23. *Timeline of Selected FDA Activities and Significant Events Addressing Opioid Misuse and Abuse*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/drugs/information-drug-class/timeline-selected-fda-activities-and-significant-events-addressing-opioid-misuse-and-abuse> (last visited Oct. 4, 2020) [hereinafter *Opioid Misuse Timeline*]; *FDA Issues New Warnings on Painkiller OxyContin*, WEBMD (July 26, 2001), <https://www.webmd.com/pain-management/news/20010726/fda-issues-new-warnings-on-painkiller-oxycotin#1>; Sujata S. Jayawant & Rajesh Balkrishnan, *The Controversy Surrounding OxyContin Abuse: Issues and Solutions*, 1 THERAPEUTICS & CLINICAL RISK MGMT. 77, 78, 80 (2005); Letter from John F. Naioti, Jr., Drug Utilization Rev. Program Manager, to Prescribers (Aug. 31, 2010), [https://www.health.ny.gov/health\\_care/medicaid/program/dur/communications/2010/08/oxycotin\\_letter\\_final.pdf](https://www.health.ny.gov/health_care/medicaid/program/dur/communications/2010/08/oxycotin_letter_final.pdf) [hereinafter Letter from John F. Naioti, Jr.]; Michelle Llamas, *Black Box Warnings*, DRUGWATCH, <https://www.drugwatch.com/fda/black-box-warnings/> (last modified Apr. 13, 2020); Flyer, A Guide to Drug Safety Terms at FDA, U.S. Food & Drug Admin. 2 (Nov. 2012), <https://www.fda.gov/media/74382/download>.

24. Diversion is "any activity whereby legitimately made controlled substances that are intended to be used for lawful purposes are sold or exchanged in the illegitimate drug market as illicit substances. Controlled substances are contained in Drug Schedules I–V and are regulated by DEA." U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., REVIEW OF THE DRUG ENFORCEMENT ADMINISTRATION'S REGULATORY AND ENFORCEMENT EFFORTS TO CONTROL THE DIVERSION OF OPIOIDS 1 n.2 (2019), <https://oig.justice.gov/reports/2019/e1905.pdf>.

25. Letter from John F. Naioti, Jr., *supra* note 23; Jayawant & Balkrishnan, *supra* note 23, at 78.

26. Mark R. Jones et al., *A Brief History of the Opioid Epidemic and Strategies for Pain Medicine*, 7 PAIN & THERAPY 13, 16 (2018).

27. Armstrong, *supra* note 21.

to state and federal authorities, failing to prevent diversion, and flooding communities with readily accessible prescription opioids.<sup>28</sup>

Likewise, pharmacies are also accused of diverting and filling millions of prescriptions that they directly profited from but put their patients at risk.<sup>29</sup> Walgreens even gave their pharmacists bonuses for filling high numbers of opioid prescriptions.<sup>30</sup>

Now, as the opioid crisis continues and worsens,<sup>31</sup> state and local governments, labor unions, and even water districts are suing opioid manufacturers, distributors, and pharmacies using a variety of claims and theories of liability to varying degrees of success.<sup>32</sup> California is no stranger to the epidemic, nor its litigation. On average, six Californians die from an opioid-related overdose every day.<sup>33</sup>

As of this Note, there are at least 539 active lawsuits between California government plaintiffs and opioid manufacturers, distributors, and pharmacies.<sup>34</sup> In total, about 20 percent of all ongoing opioid cases are brought by California plaintiffs.<sup>35</sup> Nationally, local government plaintiffs rather than states predominate.<sup>36</sup> As competition for control of state law claims and any judgment or settlement money

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28. Nathaniel Weixel, *Oklahoma Sues Three Major Opioid Distributors*, THE HILL (Jan. 13, 2020, 5:42 PM), <https://thehill.com/policy/healthcare/478067-oklahoma-sues-three-major-opioid-distributors>; Complaint at 134–36, *City of Los Angeles v. Purdue Pharma L.P.*, No. 18-op-45601-DAP (C.D. Cal. May 3, 2018), ECF No. 1 [hereinafter *City of Los Angeles Complaint*].

29. Complaint at 92–95, *County of Mariposa v. AmerisourceBergen Drug Corp.*, No. 18-op-45618-DAP (E.D. Cal. May 7, 2018), ECF No. 1 [hereinafter *County of Mariposa Complaint*].

30. Jenn Abelson et al., *At Height of Crisis, Walgreens Handled Nearly One in Five of the Most Addictive Opioids*, WASH. POST (Nov. 17, 2019), <https://www.washingtonpost.com/investigations/2019/11/07/height-crisis-walgreens-handled-nearly-one-five-most-addictive-opioids/?arc404=true>.

31. Maria LaMagna, *More Evidence That the Opioid Epidemic Is Only Getting Worse*, MARKETWATCH (Aug. 16, 2018, 10:34 AM), <https://www.marketwatch.com/story/how-much-the-opioid-epidemic-costs-the-us-2017-10-27>.

32. Andrew Harris et al., *Justice for Opioid Communities Means Massive Payday for Their Lawyers*, BLOOMBERG (July 25, 2018), <https://www.bloomberg.com/graphics/2018-opioid-lawsuits/>; Colin Dwyer, *Your Guide to the Massive (and Massively Complex) Opioid Litigation*, NPR (Oct. 15, 2019, 9:05 AM), <https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation>.

33. *California: Opioid-Involved Deaths and Related Harms*, *supra* note 9.

34. Shayna Posses, *Calif. Tribes Become Latest to Bring Opioid Crisis Suits*, LAW360 (Oct. 17, 2018, 6:53 PM), <https://www.law360.com/articles/1093089/calif-tribes-become-latest-to-bring-opioid-crisis-suits>; see *Home*, IN RE: NAT'L PRESCRIPTION OPIATES LITIG., <https://www.opioidsnegotiationclass.info/Home/FAQ#faq9> [hereinafter *Entities of the Negotiation Class*] (last visited Dec. 20, 2020) (click “Cities and Counties” hyperlink); Del Real, *supra* note 3.

35. See *supra* note 5; Dwyer, *supra* note 32.

36. See Morgan A. McCollum, Note, *Local Government Plaintiffs and the Opioid Multi-District Litigation*, 94 N.Y.U. L. REV. 938, 942–43 (2019).

grows, tensions between cities, counties, and their state governments are rising.<sup>37</sup>

The opioid litigation is about two things: control of claims and control of settlement or judgment money. California plaintiffs, especially local governments, have learned the lessons of previous public health litigation. By joining with other local governments across the state and country, California cities and counties have learned how to consolidate both their claims and their bargaining power.<sup>38</sup> However, it remains to be seen whether California plaintiffs have learned the lessons of previous public health settlements. Many California government plaintiffs continue to receive payments from public health settlements, yet very few actually apply those payments to public health programs.<sup>39</sup>

While litigation cannot solve the epidemic, it can provide the means to end it. First, litigation can provide accountability and show us how we got here. An open and public process like a trial can hold opioid manufacturers, distributors, and pharmacies accountable for creating and profiting from the epidemic, expose corporate malfeasance by making internal corporate documents public, and attempt to put a dollar value on the psychological, emotional, and economic toll the epidemic has taken on communities around the country. Second, litigation can provide the funds necessary for governments and opioid defendants to chart a course out of the epidemic. The increasing procedural complexity of the opioid litigation and the public and political attention may exert enough pressure on the parties that they will come to a global settlement agreement rather than continue litigation. Settlement or a judgment in

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37. Andrew J. Tobias & Eric Heisig, *Gov. Mike DeWine, Seeking to Ease Tensions in Opioid Litigation, Holds Talks at Mansion with AG Yost, Local Leaders*, CLEVELAND.COM (Oct. 23, 2019), <https://www.cleveland.com/open/2019/10/gov-mike-dewine-seeking-to-ease-tensions-in-opioid-litigation-holds-talks-at-mansion-with-ag-yost-local-leaders.html>.

38. McCollum, *supra* note 36, at 947–48.

39. See *A State-by-State Look at the 1998 Tobacco Settlement 21 Years Later*, CAMPAIGN FOR TOBACCO-FREE KIDS, <https://www.tobaccofreekids.org/what-we-do/us/statereport> (last updated Jan. 16, 2020) [hereinafter *State-by-State Tobacco Settlements 21 Years Later*]; Micah L. Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience*, 67 U. KAN. L. REV. 1029, 1038 (2019); Tobacco Master Settlement Agreement Payments Received by State, Counties, and Cities 1999–2020, State of Cal. Dep’t of Just., Off. of the Att’y Gen. 20, <https://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/settlements/tmsapc-1999-2019.pdf> (last visited Dec. 21, 2020) [hereinafter *Tobacco MSA Payments 1999–2020*]; Actual Annual Tobacco Settlement Payments Received by the States, 1998–2020, Campaign for Tobacco-Free Kids, <https://www.tobaccofreekids.org/assets/factsheets/0365.pdf> (last visited Oct. 4, 2020).

favor of the plaintiffs can be used to fund long-term addiction treatment, prevention, and other public health programs that will, over time, abate the public health crisis.

As the likelihood of settlement with the opioid defendants grows,<sup>40</sup> how the State of California and its local governments choose to divide and spend these limited funds matters both to Californians and as a model to other states, cities, and counties. However, an effective use of such funds can only be achieved if California plaintiffs appreciate the lessons of previous public health litigation. The blueprint for such litigation and settlement exists. The Big Tobacco suits of the 1990s provide California plaintiffs a beginner's guide to massive, complex public health litigation and settlement. Unlike the funds from the Big Tobacco litigation, California and its cities and counties should start planning now to protect and use settlement funds or judgment money to end the opioid epidemic. Just as in the Big Tobacco litigation, a memorandum of understanding between the state and local governments about the division of funds between different levels of government could be agreed upon before settlement with opioid defendants. California plaintiffs should also take action now to protect any settlement or judgment funds from non-public health expenditures through a statute, referendums and ballot initiatives, and public health mandates within the terms of any settlement agreement.

Part II of this Note will describe the current state of the public health crisis and how the courts are managing the legal response. Part III will discuss previous public health litigation and settlement, and compare the claims, conflicts, and goals of three different California government plaintiffs as test cases: Mariposa County, the City of Los Angeles, and the State of California. Part IV concludes by suggesting methods for protecting public health funds generated by litigation or settlement from misappropriation by state and local legislative bodies.

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40. See Jan Hoffman, *Payout from a National Opioids Settlement Won't Be as Big as Hoped*, N.Y. TIMES (Feb. 17, 2020), <https://www.nytimes.com/2020/02/17/health/national-opioid-settlement.html>.

## II. FACTUAL AND PUBLIC HEALTH BACKGROUND

### A. Public Health Emergency

Epidemics are characterized by a sudden increase in disease occurrence in a population.<sup>41</sup> In some communities, the opioid epidemic is so common it is essentially endemic.<sup>42</sup> In 2018, 45 percent, or 2,410 of all fatal drug overdoses in California, involved opioids.<sup>43</sup> In the same year, 69 percent of all fatal drug overdoses nation-wide involved opioids.<sup>44</sup> The epidemic is evolving so rapidly that comprehensive professional guidelines governing the prescription of opioids in order to prevent addiction were not released until 2016 and 2017.<sup>45</sup>

Opium-derived medications are essential to the modern practice of medicine and have been since the nineteenth century.<sup>46</sup> Despite their usefulness and in some cases medical necessity, opioids' addictive qualities have been known since their discovery, wreaked havoc on communities, and caused wars.<sup>47</sup>

41. U.S. DEP'T OF HEALTH & HUM. SERVS., PRINCIPLES OF EPIDEMIOLOGY IN PUBLIC HEALTH PRACTICE: AN INTRODUCTION TO APPLIED EPIDEMIOLOGY AND BIOSTATISTICS 1–72 (3rd ed. 2012), [https://www.cdc.gov/csels/dsepd/ss1978/Lesson1/Section11.html#\\_ref47](https://www.cdc.gov/csels/dsepd/ss1978/Lesson1/Section11.html#_ref47) (stating “[m]ore specifically, an epidemic may result from: [1] a recent increase in amount or virulence of the agent, [2] [t]he recent introduction of the agent into a setting where it has not been before, [3] [a]n enhanced mode of transmission so that more susceptible persons are exposed, [4] [a] change in the susceptibility of the host response to the agent, and/or [5] [f]actors that increase host exposure or involve introduction through new portals of entry”).

42. See Robin Young, *In Township Ravaged by Opioids, Educators Create Program to Help Kids Cope*, WBUR (Sept. 25, 2019), <https://www.wbur.org/hereandnow/2019/09/25/minford-ohio-opioids-schools>; Nicole Gastala, *Denial: The Greatest Barrier to the Opioid Epidemic*, 15 ANNALS FAM. MED. 372, 372–74 (2017).

43. *California: Opioid-Involved Deaths and Related Harms*, *supra* note 9 (age-adjusted rate of 5.8 per 100,000); *Drug Overdose Deaths*, CTNS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/DRUGOVERDOSE/DATA/STATEDEATHS.HTML> (last reviewed Mar. 19, 2020) (age-adjusted rate of 12.8 per 100,000).

44. *Drug Overdose Deaths*, *supra* note 43 ( $n = 46,802/67,367$ ).

45. See Laxmaiah Manchikanti et al., *Responsible, Safe, and Effective Prescription of Opioids for Chronic Non-Cancer Pain: American Society of Interventional Pain Physicians (ASIPP) Guidelines*, 20 PAIN PHYSICIAN 3, S45–S63 (2017); Michael J. Brownstein, *A Brief History of Opiates, Opioid Peptides, and Opioid Receptors*, 90 PROCS. NAT'L ACAD. SCIS. U.S. 5391, 5391 (1993). See generally Deborah Dowell et al., *CDC Guideline for Prescribing Opioids for Chronic Pain—United States, 2016*, 315 J. AM. MED. ASS'N 1624, 1624 (2016).

46. Brownstein, *supra* note 45, at 5391; Ramtin Arablouei & Rund Abdelfatah, *A History of Opioids in America*, NPR (Apr. 4, 2019, 5:01 AM), <https://www.npr.org/2019/04/04/709767408/a-history-of-opioids-in-america>.

47. Kenneth Pletcher, *Opium Wars*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Opium-Wars> (last visited Dec. 21, 2020); Rebecca Delfino, *Just What the Doctor Ordered: A New Federal Statute to Criminalize Physicians for Overprescribing Opioids*, 39 YALE L. & POL'Y REV. (forthcoming 2021), <http://dx.doi.org/10.2139/ssrn.3535943>.

The origins of the present crisis are now relatively well-understood.<sup>48</sup> Initially, opioids were only prescribed for acute cancer-related or short-term high-intensity pain relief.<sup>49</sup> In the 1990s, prescriptions of hydrocodone and oxycodone for ordinary pain increased.<sup>50</sup> After the development of extended release opioids, like OxyContin, manufacturers' marketing strategies encouraged doctors to expand the market and prescribe the drug for a wider variety of maladies from run-of-the-mill arthritis to sports injuries.<sup>51</sup> This behavior occurred at the same time physicians began to think of pain as "the fifth vital sign" alongside basic signs of life like heart rate and blood pressure.<sup>52</sup> However, around 2012, prescriptions decreased as governments and prescribers recognized the drug's addictive qualities.<sup>53</sup> As a result, many new addicts found their prescriptions cut off, and they needed to feed their addiction through other means. Heroin use, which was at its lowest point in years prior to the opioid epidemic, spiked.<sup>54</sup> The market demand for heroin and synthetic opioids increased markedly.<sup>55</sup> Synthetic opioids (drugs like fentanyl, fentanyl analogs, and tramadol) are chemically manufactured, often illicitly in countries like China, and can be ordered online for delivery by mail.<sup>56</sup> They are often much stronger than their licit FDA-regulated

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48. See Jones et al., *supra* note 26, at 13–21; Lindsay Liu et al., *History of the Opioid Epidemic: How Did We Get Here?*, NAT'L CAP. POISON CTR., <https://www.poison.org/articles/opioid-epidemic-history-and-prescribing-patterns-182> (last visited Oct. 4, 2020); THE NAT'L ACADS. OF SCIS. ENG'G MED., PAIN MANAGEMENT AND THE OPIOID EPIDEMIC: BALANCING SOCIETAL AND INDIVIDUAL BENEFITS AND RISKS OF PRESCRIPTION OPIOID USE 2–3 (Richard J. Bonnie et al. eds., 2017) [hereinafter PAIN MANAGEMENT].

49. Argoff & Silvershein, *supra* note 14, at 602–03.

50. Andrew Kolodny et al., *The Prescription Opioid and Heroin Crisis: A Public Health Approach to an Epidemic of Addiction*, 36 ANN. REV. PUB. HEALTH 559, 562 (2015), <https://www.annualreviews.org/doi/pdf/10.1146/annurev-publhealth-031914-122957>.

51. *Id.* at 562–63; *Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/epidemic/index.html> (last reviewed Mar. 19, 2020) (Brand names for these drugs include but are not limited to, Vicodin and OxyContin, and the names have even found their way into pop culture); PAIN MANAGEMENT, *supra* note 48, at 25–26.

52. Jones et al., *supra* note 26, at 15.

53. *Id.*; *Opioid Misuse Timeline*, *supra* note 23.

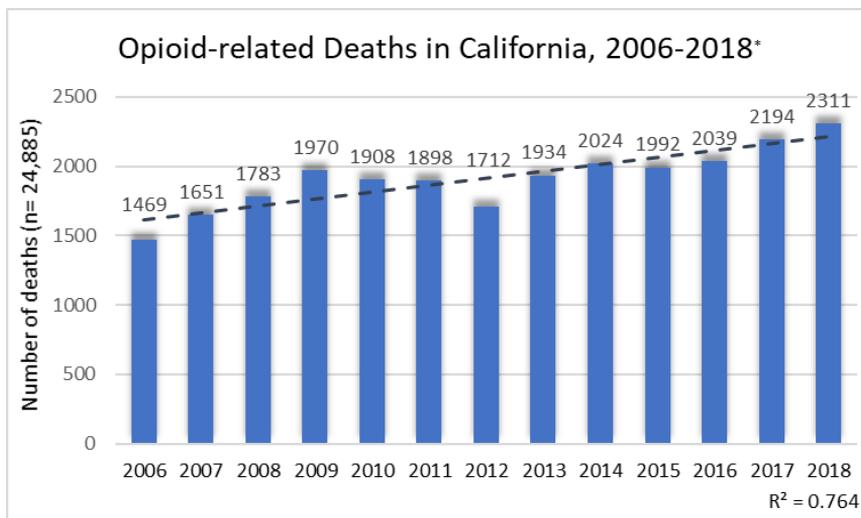
54. *Drug Overdose Deaths*, *supra* note 43; Kolodny et al., *supra* note 50, at 560–62; U.S. DEP'T OF JUST., DRUG ENF'T ADMIN., DEA-DCT-DIR-007-20, 2019 NATIONAL DRUG THREAT ASSESSMENT 9–20 (2019), [https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020\\_Low\\_Web-DIR-007-20\\_2019.pdf](https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020_Low_Web-DIR-007-20_2019.pdf); Theodore J. Cicero et al., *The Changing Face of Heroin Use in the United States: A Retrospective Analysis of Past 50 Years*, 71 J. AM. MED. ASS'N PSYCHIATRY 821, 823 (2014).

55. Cicero et al., *supra* note 54, at 825.

56. Steven Lee Myers, *China Cracks Down on Fentanyl. But Is It Enough to End the U.S. Epidemic?*, N.Y. TIMES (Dec. 1, 2019), <https://www.nytimes.com/2019/12/01/world/asia/china->

equivalents and even street-bought heroin.<sup>57</sup> Due to the strength of synthetics and their widespread availability, overdoses have spiked.<sup>58</sup>

**Fig. 1 Opioid-related Deaths in California, 2006–2018**



\*2018 data reported but subject to change.

\*\*Data from California Department of Public Health Opioid Dashboard

Despite increased visibility through public health campaigns, government efforts, and journalistic scrutiny, California's crisis is not actually getting better, it is getting worse. The age-adjusted rate of drug overdose deaths involving synthetic opioids increased between 2016 and 2017 by forty-five percent.<sup>59</sup> In response, the state launched public health initiatives and passed legislation to provide access to

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fentanyl-crackdown.html; Scott Pelley, *Deadly Fentanyl Bought Online from China Being Shipped Through the Mail*, CBS NEWS (Sept. 15, 2019), <https://www.cbsnews.com/news/deadly-fentanyl-bought-online-from-china-being-shipped-through-the-mail-60-minutes-2019-09-15/>; Holly Hedegaard et al., *Drug Overdose Deaths in the United States, 1999–2017*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/products/databriefs/db329.htm> (last reviewed Nov. 29, 2018).

57. See *infra* note 59 and accompanying text; *Drug Overdose Deaths*, *supra* note 43; *Synthetic Opioid Overdose Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/fentanyl.html> (last reviewed Mar. 19, 2020).

58. See *infra* note 59 and accompanying text; *Drug Overdose Deaths*, *supra* note 43.

59. From 6.2 deaths to 9.0 per 100,000 persons. Hedegaard et al., *supra* note 56; *Data Overview*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/> (last reviewed Dec. 7, 2020).

addiction treatment, education, data sharing, and monitoring.<sup>60</sup> Another strategy has also emerged: litigation.

### B. *The Opioid Litigation So Far*

While current civil suits have gotten the most attention, opioid litigation has been ongoing since the millennium. The first wave of opioid litigation crested in the mid-2000s.<sup>61</sup> It centered on manufacturers and over-prescribing doctors.<sup>62</sup> Among other theories, these early suits alleged products liability, fraud, negligence, and breach of implied warranties.<sup>63</sup> In 2007, three Purdue executives pleaded guilty to federal misbranding charges, and the company paid over \$600 million to the Justice Department in settlement to close the investigation.<sup>64</sup> In 2014, California's Santa Clara and Orange Counties sued seven manufacturers for false advertising<sup>65</sup> and successfully settled with one, while the rest of the case was stayed pending FDA determinations.<sup>66</sup> Unfortunately, these early lawsuits and settlements did not stem the crisis nor changed defendants' behavior.<sup>67</sup> Manufacturers' sales teams continued aggressively marketing even to the point of bribing doctors in exchange for prescriptions.<sup>68</sup>

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60. Sammy Caiola, *Here Are California's New Laws to Address the State's Opioid Crisis*, CAPRADIO (Jan. 16, 2019), <http://www.caprдио.org/articles/2019/01/16/here-are-californias-new-laws-to-address-the-states-opioid-crisis/>.

61. *See In re Oxycontin Antitrust Litig.*, 314 F. Supp. 2d 1388, 1388 (J.P.M.L. 2004).

62. *Id.* at 1389.

63. Abbe R. Gluck et al., *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis* 4 (Mar. 6, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3135410](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135410) (research paper).

64. Barry Meier, *In Guilty Plea, OxyContin Maker to Pay \$600 Million*, N.Y. TIMES (May 10, 2007), <https://www.nytimes.com/2007/05/10/business/11drug-web.html>.

65. *People v. Purdue Pharma*, No. 201400725287, 2015 WL 5123273, at \*2 (Cal. Super. Ct. Aug. 27, 2015); *California v. Purdue Pharma*, No. SACV 14-1080-JLS (DFMx), 2014 WL 6065907, at \*1 (C.D. Cal. Nov. 12, 2014).

66. John Kennedy, *Teva to Pay \$1.6M to Resolve Calif. Counties' Opioid Suit*, LAW360 (May 25, 2017, 6:42 PM), <https://www.law360.com/articles/928559/teva-to-pay-1-6m-to-resolve-calif-counties-opioid-suit>.

67. *See* Sam Stanton, *Feds Target McKesson Plant in West Sacramento Over 'Suspicious' Opioid Sales*, SACRAMENTO BEE (Aug. 2, 2019, 12:26 PM), <https://www.sacbee.com/news/business/article233449717.html>; Abelson et al., *supra* note 30; Mark Morales, *Former Purdue Pharma President Called Addicted People 'Victimizers' in Emails*, CNN (May 8, 2019, 6:04 PM), <https://www.cnn.com/2019/05/08/health/sackler-purdue-opioid-emails/index.html>; David Armstrong, *Inside Purdue Pharma's Media Playbook: How It Planted the Opioid "Anti-Story"*, PROPUBLICA (Nov. 19, 2019, 5:00 AM), <https://www.propublica.org/article/inside-purdue-pharma-media-playbook-how-it-planted-the-opioid-anti-story>.

68. Andrew Joseph, *'A Blizzard of Prescriptions': Documents Reveal New Details About Purdue's Marketing of OxyContin*, STAT (Jan. 15, 2019), <https://www.statnews.com/2019/01/15/massachusetts-purdue-lawsuit-new-details/>; Gabrielle Emanuel, *Pharmaceutical Executives Face*

The second wave of litigation, and the focus of this Note, consists of civil litigation initiated by government plaintiffs like cities, counties, and states, and targets the profit-making behavior that drove the epidemic. Governments seek injunctive relief to abate the crisis and damages for the cost of paying for the opioid crisis on a large scale including the cost of adapting and retrofitting hospitals, jails, police forces, and medical examiners' services and facilities to cope with and combat the epidemic.<sup>69</sup> Defendants fall into three categories: (1) manufacturers that developed and aggressively marketed opioids; (2) distributors that sent large quantities of the opioids to pharmacies, hospitals, and clinics; and (3) commercial pharmacies that filled and refilled prescriptions for addicts, all the while billing their insurance if they had it, and leaving the state to pick up the cost if consumers were uninsured.<sup>70</sup>

## 1. The National Picture: the Multidistrict Litigation, the Negotiation Class, and the States

### *a. The Multidistrict Litigation*

The opioid plaintiffs are a massive and diverse group. They consist of all manner of local governments, Indian tribes, labor unions, and even fire departments, and their cases are scattered among courts all over the country.<sup>71</sup> The two groups with the most negotiation leverage are the focus of this Note: local governments (cities and counties) and states.

Procedurally, the opioid litigation presents huge challenges to the judicial system. Nationally, there are more than 1,900 active cases involving local governments and states.<sup>72</sup> The majority of these cases

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*Prison Time in Case Linked to Opioid Crisis*, NPR (Jan. 13, 2020, 6:00 AM), <https://www.npr.org/2020/01/13/795200200/pharmaceutical-executives-face-prison-time-in-case-linked-to-opioid-crisis>. See generally Delfino, *supra* note 47 (discussing criminal charges against opioid prescribers).

69. County of Mariposa Complaint, *supra* note 29, at 248–51.

70. See Jan Hoffman et al., *3,271 Pill Bottles, a Town of 2,831: Court Filings Say Corporations Fed Opioid Epidemic*, N.Y. TIMES (July 19, 2019), <https://www.nytimes.com/2019/07/19/health/opioids-trial-addiction-drugstores.html>.

71. McCollum, *supra* note 36, at 968–70; see also Gluck et al., *supra* note 63, at 17 (“It is unusual that the transferring panel was willing to group so many different kinds of defendants into the single MDL. . . . The transferring court, however, seemed to prefer a comprehensive action to get at a comprehensive solution.”).

72. Jan Hoffman, *Groundwork Is Laid for Opioids Settlement That Would Touch Every Corner of U.S.*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/health/opioids-lawsuit-settlement.html>.

have been consolidated through a process called multidistrict litigation.<sup>73</sup>

Multidistrict litigation, commonly known as an MDL, is a procedural tool created by Congress in 1968 to promote judicial efficiency.<sup>74</sup> As litigation became increasingly complicated in the mid-twentieth century, MDL proceedings were created to centralize and consolidate discovery and pre-trial motions.<sup>75</sup> When multiple similar civil claims have been filed in different federal district courts, a panel of federal judges called the Judicial Panel on Multidistrict Litigation (JPML) can transfer civil actions with similar questions of fact to a single district court that it assigns to hear consolidated pretrial proceedings.<sup>76</sup> The parties to the litigation need not consent in order for their case to be transferred and in fact are frequently opposed to transfer.<sup>77</sup>

Essentially, MDL transferee courts preside over everything but the trial itself.<sup>78</sup> When an individual case is ready for trial, it is remanded back to the original court in which it was filed.<sup>79</sup> MDLs mitigate the risk of inconsistent rulings between different courts on similar pre-trial issues and save parties time and costs during discovery.<sup>80</sup> Typical MDL cases include employment practices, securities fraud, and quintessentially, medical device, drug, and products liability claims.<sup>81</sup>

The vast majority of cases against opioid defendants have been consolidated by the JPML in the Northern District of Ohio before Judge Dan A. Polster.<sup>82</sup> Five hundred thirty-nine California counties and cities and at least three sovereign California Indian tribes have

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73. *Id.*; Transfer Order, *In re Nat'l Prescription Opiate Litig.*, No. 2084, at 3–4 (J.P.M.L. Dec. 5, 2017) [hereinafter JPML Transfer Order].

74. See 28 U.S.C. § 1407 (2018).

75. *Overview of Panel*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <https://www.jpml.uscourts.gov/overview-panel-0> (last visited Oct. 4, 2020).

76. 28 U.S.C. § 1407(a).

77. 28 U.S.C. § 1407(h); see, e.g., Motion to Remand at 3–4, *South Carolina v. McKesson Corp.*, No. 3:19-cv-02783-BHH (D.S.C. Oct. 7, 2019), ECF No. 7.

78. Kathleen Michon, *Multidistrict Litigation (MDL) for Drug Lawsuits and Other Cases*, NOLO, <https://www.nolo.com/legal-encyclopedia/multidistrict-litigation-mdl-drug-lawsuits-32952.html> (last visited Oct. 4, 2020).

79. *Id.*

80. JPML Transfer Order, *supra* note 73, at 3–4; *Overview of Panel*, *supra* note 75.

81. Michon, *supra* note 78.

82. JPML Transfer Order, *supra* note 73, at 4.

pending actions in the Opioid MDL court.<sup>83</sup> In order to avoid consolidation in the Opioid MDL, most states, including California, have purposefully kept their cases in state court by only alleging state law claims.<sup>84</sup> Of the test cases discussed in this Note, Mariposa County and the City of Los Angeles are consolidated in the Opioid MDL, and California is pursuing its claims alone in California state courts.<sup>85</sup> All three cases were filed after the creation of the Opioid MDL in 2017, and both Mariposa and Los Angeles included federal claims in their original pleadings likely knowing that they would be immediately transferred to the Opioid MDL court.<sup>86</sup>

In addition to being a tool for aggregation and faster resolution of pre-trial issues, MDLs frequently produce broadly binding settlements.<sup>87</sup> To that end, it is clear that the goal of Judge Polster's court and the Opioid MDL proceedings is settlement. At an early hearing on the matter, Judge Polster said, "my objective is to do something meaningful to abate this crisis. . . . [W]e don't need a lot of briefs and we don't need trials. . . . [N]one of those are going to solve what we've got."<sup>88</sup> MDLs attempt to achieve "global peace" or a settlement that uses claim preclusion to close all present and future litigation between the parties.<sup>89</sup>

Though the Opioid MDL has been ongoing since 2017, a global settlement has still not been reached. Judge Polster has tried many tactics to encourage settlement.<sup>90</sup> Some of them, like the negotiation

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83. Posses, *supra* note 34; Del Real, *supra* note 3; *Entities of the Negotiation Class*, *supra* note 34.

84. Dwyer, *supra* note 32. *See generally* Complaint at 50–53, *People v. Purdue Pharma L.P.*, No. 19STCV19045 (Cal. Super. Ct. June 3, 2019) [hereinafter *State of California Complaint*].

85. *See State of California Complaint*, *supra* note 84, at 1; *City of Los Angeles Complaint*, *supra* note 28, at 1; *County of Mariposa Complaint*, *supra* note 29, at 1.

86. *City of Los Angeles Complaint*, *supra* note 28, at 1; *County of Mariposa Complaint*, *supra* note 29, at 1.

87. *See Guide, Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Judges*, U.S. Jud. Panel on Multidistrict Litig. & Fed. Jud. Ctr. 9 (2014), <https://www.fjc.gov/sites/default/files/2014/Ten-Steps-MDL-Judges-2D.pdf>; McCollum, *supra* note 36, at 949–53; Adam S. Zimmerman, *The Bellwether Settlement*, 85 *FORDHAM L. REV.* 2275, 2277–79 (2017).

88. Gluck et al., *supra* note 63, at 17.

89. McCollum, *supra* note 36, at 942.

90. *See* Nate Raymond, *U.S. Judge Schedules 2019 Trial in Opioid Litigation*, *REUTERS* (Apr. 11, 2018), <https://in.reuters.com/article/us-usa-opioids-litigation-idINKBN1H3EI>.

class described below, are novel and being used for the first time ever.<sup>91</sup> Others, like bellwether trials, are frequently used in MDLs.<sup>92</sup>

*b. City and County of San Francisco bellwether*

Alternatively referred to as “test cases,” bellwethers are individual trials that test how different claims and defenses will fair at trial.<sup>93</sup> The goal of a bellwether is to produce reliable information about how similar cases centralized in the same MDL proceeding are likely to play out so that those remaining parties in the MDL may decide if they wish to continue to their own trials or settle.<sup>94</sup> After an initial set of bellwethers settled on the eve of trial in October 2019,<sup>95</sup> the court remanded three additional bellwethers to their original transferor district courts, to be tried simultaneously.<sup>96</sup> *City of Chicago v. Purdue Pharma L.P.* will address claims against manufacturer defendants.<sup>97</sup> *Cherokee Nation v. McKesson Corp.* is aimed at resolving the unique issues in cases brought by sovereign Indian tribes.<sup>98</sup> *City and County of San Francisco v. Purdue Pharma L.P.* names both manufacturers and distributors as defendants and is almost done with the discovery phase.<sup>99</sup>

With California cities, counties, and sovereign tribes counting for over one-fifth of all plaintiffs in the Opioid MDL, *City of San Francisco* could be the most informative bellwether for all California plaintiffs.

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91. Memorandum Opinion Certifying Negotiation Class, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP, at 2 (N.D. Ohio Sept. 11, 2019) [hereinafter N.D. Ohio Memorandum Opinion Certifying Negotiation Class].

92. Zimmerman, *supra* note 87, at 2276–77. Though two bellwether trials were initially scheduled for October 2019, they settled on the eve of trial.

93. Raymond, *supra* note 90.

94. Guide, Bellwether Trials in MDL Proceedings: A Guide for Transferee Judges, Melissa J. Whitney, Fed. Jud. Ctr. & U.S. Jud. Panel on Multidistrict Litig. 3–4 (2019), <https://www.fjc.gov/sites/default/files/materials/19/Bellwether%20Trials%20in%20MDL%20Proceedings.pdf>.

95. The parties settled for about \$300 million. Sara Randazzo & Patrick Fitzgerald, *Novel Plan Aims to Settle Opioid Suits*, WALL ST. J. (Sept. 30, 2019, 5:33 PM), <https://www.wsj.com/articles/drugmakers-look-to-use-purdue-pharmas-bankruptcy-to-settle-opioid-suits-11569877871>; Dwyer, *supra* note 32.

96. Suggestions of Remand, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP, at 1 (N.D. Ohio Nov. 11, 2019), <https://www.ohnd.uscourts.gov/sites/ohnd/files/2941.pdf>.

97. *Id.* at 6.

98. *Id.*

99. *Id.*

San Francisco alleges public nuisance, unfair competition, false advertising, Racketeer Influenced and Corrupt Organizations Act (RICO) violation, negligence, negligent misrepresentation, and fraudulent concealment against Purdue Pharma, individual members of the Purdue family, the Purdue Family Trust, and several other manufacturers and distributors.<sup>100</sup> San Francisco does not make claims against any pharmacies.<sup>101</sup> San Francisco seeks costs, attorney's fees, civil penalties, restitution, disgorgement of unjust enrichment, exemplary damages, punitive damages, and treble damages under RICO.<sup>102</sup> All of the test cases examined in this Note share multiple claims with *City of San Francisco*. It will also be any California plaintiff's first opportunity to litigate any issues of home rule, or which government entities "own" which claims when local governments and the state both seek to make the same claim, on behalf of the same citizens, on the same facts. In this case, California's public nuisance statute is claimed by all plaintiffs.<sup>103</sup> While the results of *City of San Francisco* will not be binding on other California plaintiffs, it should give an accurate picture of how similar claims are likely to play out in their own trials and may even promote settlement. As Table 1 demonstrates, many California plaintiffs share similar claims.

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100. Complaint at 1–2, *City and County of San Francisco v. Purdue Pharma L.P.*, No. 3:18-cv-7591 (N.D. Cal. Dec. 18, 2018), ECF No. 1.

101. *Id.* (a complaint that does not have claims against pharmacies).

102. *Id.* at 158–59.

103. *Id.* at 1.

**Table 1. Comparison of Claims Between California Plaintiffs\***

	City and County of San Francisco	Mariposa County	City of Los Angeles	California
Statutory Public Nuisance	X	X	X	X
RICO	X	X	X	
Negligence	X		X	
Unjust Enrichment		X		
Negligent Misrepresentation	X	X	X	
Fraud		X		
Fraudulent Misrepresentation	X	X		
Untrue or Misleading Representations (Cal. Bus. & Prof. Code § 17500)	X	X		X
Unfair Competition Law (Cal. Bus. & Prof. Code § 17200)	X			X

\* X indicates that the plaintiff makes this claim in its complaint.

### *c. Negotiation class*

The Opioid MDL created a new tool in class action practice: the negotiation class.<sup>104</sup> In a typical class action, putative class members

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104. N.D. Ohio Memorandum Opinion Certifying Negotiation Class, *supra* note 91, at 3; *see also* Deborah Hensler, *Opioid Negotiation Class May Be Organic Procedure Evolution*, LAW360 (Sept. 30, 2019, 4:05 PM), <https://www.law360.com/articles/1204097/opioid-negotiation-class-may-be-organic-procedure-evolution> (discussing Judge Polster being the first judge to adopt the negotiation class); Order Certifying Review of Negotiation Class, *In re Nat'l Prescription Opiate Litig.*, No. 19-0306, at 1–2 (6th Cir. Nov. 8, 2019) [hereinafter 6th Cir. Order Certifying Review of Negotiation Class]. Note, the negotiation class is currently under review with the Sixth Circuit. *See generally Appeals Court Grants Review of Opioid 'Negotiation' Class Opposed by Delaware, Others*, DEL. L. WKLY. (Nov. 8, 2019), <https://plus.lexis.com/api/permalink/3b15ecd3-f77c-43c4-a1d6-d4a01c46dae/?context=1530671>.

may opt in or out of a settlement after terms are reached.<sup>105</sup> However, in the negotiation class, plaintiffs opt in or out of the class before settlement negotiations begin. The mechanism provides defendants with more security during negotiations knowing that individual class members will not opt out later if they do not like the terms. A final settlement will require approval by 75 percent of the class members in five different votes: 75 percent each by allocation, by population, by number, by plaintiffs who have begun litigating, and by plaintiffs who have not begun litigating, plus “approval from six separate supermajority vote counts, reflecting different slices of the class,”<sup>106</sup> and the court will still have to approve the settlement under Federal Rules of Civil Procedure 23(e) and 23(h).<sup>107</sup>

The negotiation class is comprised of all county and city governments involved in the MDL.<sup>108</sup> It explicitly excludes Native American tribal governments and payors, and implicitly excludes states.<sup>109</sup> The negotiation class preserves the rights of class members to pursue their own claims in other fora outside of the MDL until a settlement is approved.<sup>110</sup> The negotiation class will remain active for five years—in other words, the parties will have until 2024 to come to terms.<sup>111</sup>

As the negotiation class is an expansion of Federal Rule of Civil Procedure 23, the Sixth Circuit has granted interlocutory review of Judge Polster’s order certifying the class.<sup>112</sup> The novel nature of the negotiation class potentially puts any settlements reached between defendants and the class at risk. If the Sixth Circuit finds the negotiation class an impermissible expansion of Rule 23, then any settlements reached may be unraveled. A number of plaintiffs,

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105. The Special Master overseeing the Opioid MDL settlement negotiations, Professor Francis McGovern along with Professor William B. Rubenstein pioneered the idea of creating a “Negotiation Class.” Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, TEX. L. REV. (forthcoming 2020), [#https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3403834.#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403834)

106. N.D. Ohio Memorandum Opinion Certifying Negotiation Class, *supra* note 91, at 3.

107. See *FAQ*, IN RE: NAT’L PRESCRIPTION OPIATES LITIG., *supra* note 5 (see answer to question 19).

108. Other political subdivisions are also included, “[a]ll counties, parishes, and boroughs (collectively, ‘counties’); and all incorporated places, including without limitation cities, towns, townships, villages, and municipalities (collectively, ‘cities’).” *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. 6th Cir. Order Certifying Review of Negotiation Class, *supra* note 104, at 2.

defendants, and amici argued against the negotiation class before the Sixth Circuit.<sup>113</sup> In addition, twenty-six state attorney generals led by Texas' Ken Paxton and California's Xavier Becerra oppose the creation of the negotiation class, stating, "Plaintiffs' novel and untested approach . . . . [,] the approval of a novel '[N]egotiation [C]lass' at this stage[,] will invite legal challenges to any eventual settlement, adding uncertainty and making it more difficult for the parties to a achieve a global resolution."<sup>114</sup>

The negotiation class creates a block of plaintiffs (some cities and counties are not even members, yet would still be bound by a global settlement agreement) with the greatest negotiation leverage. This makes other plaintiffs, especially state attorneys general who are used to calling their own shots, uncomfortable. These are not the only points of contention between local and state government plaintiffs.

*d. Disagreements between local and state plaintiffs*

In recent settlement negotiations, fractures developed between states and local governments.<sup>115</sup> The Attorneys General, politically elected or appointed, may have the political incentive and the financial resources of their state's respective departments of justice to be flexible and hold out for settlement offers in a way that many local governments cannot. In response to a settlement offer from Purdue, the Pennsylvania Attorney General called the company's owners, the Sackler family, "'sanctimonious billionaires' with 'blood on their hands.'"<sup>116</sup> Accordingly, cities and counties appear wary of deferring to attorneys general. Another problem is the fact that local and state governments seek to assert the same claims, under the same statutes, on the same facts, and may not both be able to recover. Adding to the confusion is each state's unique case law regarding home rule and

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113. Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) at 1, *In re Nat'l Prescription Opiate Litig.*, No. 19-305 (6th Cir. Sept. 25, 2019); Joint Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) at 1, *In re Nat'l Prescription Opiate Litig.*, No. 19-305 (6th Cir. Sept. 26, 2019), ECF No. 1-2.

114. Letter, Plaintiffs' Notice of Motion and Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, *In Re: National Prescription Opiate Litigation*, MDL No. 2804, from Ken Paxton, State of Tex., Off. of Att'y Gen., Xavier Becerra, State of Cal., Off of Att'y Gen., to Judge Polster (June 24, 2019).

115. Alaina Lancaster, *Why NJ Didn't Join the Settlement with Purdue Pharma*, LAW.COM (Sept. 12, 2019, 2:00 PM), <https://www.law.com/njlawjournal/2019/09/12/why-cities-and-counties-settled-with-purdue-while-some-states-wouldnt-touch-it-399-31661/>.

116. *Id.*

ambiguous statutory language as to whether local governments may bring claims on behalf of all people in the state. When Ohio attempted to pass legislation consolidating the state's one hundred or so local government cases under the Attorney General's office, Akron mayor Dan Horrigan wrote, "[t]o suggest, at the 11th hour, that the state should control and keep the hard-fought compensation our community and first responders deserve is offensive . . . . It's clear who is grasping for power (and money) in this situation."<sup>117</sup>

*e. Purdue's bankruptcy: defendants seek to control settlement*

Plaintiffs are not the only ones attempting to control settlement on their own terms.<sup>118</sup> Purdue Pharmaceuticals, the most frequently named and maligned defendant, recently entered bankruptcy proceedings in the Southern District of New York.<sup>119</sup> Because Purdue's assets will be severely restricted, bankruptcy has significantly increased Purdue's leverage in settlement negotiations.

Further complicating settlement negotiations is the uncertain valuation of Purdue's assets and plaintiffs' choice to name or not name the Sackler family individually as defendants in order to access their personal assets in trial or settlement.<sup>120</sup> Bankruptcy court documents estimate that the Sackler family personally profited \$13 billion from Purdue, and before declaring bankruptcy, transferred \$1 billion into offshore personal accounts.<sup>121</sup>

The early outlines of a settlement agreement between Purdue and twenty-nine U.S. territories and states began to take shape in 2019. The proposed settlement would transfer all of Purdue's assets into a trust and restructure the business into a new company that is

117. Robin Goist, *Summit County Executive, Akron Mayor Condemn Proposed State Takeover of Lawsuits Against Opioid Makers*, CLEVELAND.COM (Aug. 28, 2019), <https://www.cleveland.com/open/2019/08/summit-county-executive-akron-mayor-condemn-proposed-state-takeover-of-lawsuits-against-opioid-makers.html>.

118. See McCollum, *supra* note 36, at 953–54, 969–71.

119. See Voluntary Petition for Non-Individuals Filing for Bankruptcy at 5, No. 19-23649-rdd (Bankr. S.D.N.Y. Sept. 15, 2019).

120. Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, N.Y. TIMES (Sept. 15, 2019), <https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html> (updated Sept. 17, 2019).

121. Christopher Rowland, *Sackler Family Transferred \$1.36 Billion in Purdue Pharma Profits Overseas, Company Says in Court Filing*, WASH. POST (Dec. 16, 2019, 5:02 PM), [https://www.washingtonpost.com/business/economy/sackler-family-transferred-136-billion-in-purdue-pharma-profits-overseas-company-says-in-court-filing/2019/12/16/b4ecb3d2-205d-11ea-86f3-3b5019d451db\\_story.html](https://www.washingtonpost.com/business/economy/sackler-family-transferred-136-billion-in-purdue-pharma-profits-overseas-company-says-in-court-filing/2019/12/16/b4ecb3d2-205d-11ea-86f3-3b5019d451db_story.html).

permanently enjoined from marketing opioids.<sup>122</sup> The new company would also donate overdose reversal and addiction treatment medications to communities in need.<sup>123</sup> Moreover, the Sackler family would relinquish ownership of Purdue and contribute at least \$3 billion of their own money to the \$10 to \$12 billion settlement.<sup>124</sup> The Bankruptcy Court for the Southern District of New York will administer the settlement during Purdue's Chapter 11 proceedings. Most compelling of all, five other manufacturer defendants Endo International, Johnson & Johnson, Teva Pharmaceutical Industries, Allergan, and Mallinckrodt seek to join Purdue's bankruptcy proceedings through a global settlement agreement.<sup>125</sup> The other drugmakers would contribute to the settlement's trust in exchange for settlement and a so-called third-party release of claims—a form of settlement only available in some jurisdictions like New York.<sup>126</sup>

Besides carrying heavy debts as a result of litigation, defendants like Purdue are also facing challenges from their litigation insurers.<sup>127</sup> As local, state, and federal governments begin to receive judgments against manufacturers, distributors, and pharmacies in the hundreds of millions of dollars, defendants' litigation insurers are questioning whether their coverage extends to cover a public health crisis.<sup>128</sup> Health insurance companies are also suing manufacturers for insurance fraud.<sup>129</sup> For example, Athena is suing bankrupt opioid manufacturer Insys, claiming “that the rapid increase in Insys's sales was due to a two-pronged scheme in which Insys encouraged physicians to overprescribe . . . and defrauded insurers into providing coverage for the off-label prescriptions.”<sup>130</sup>

Not all states are buying into Purdue's bankruptcy-driven settlement offer. Some attorneys general draw issue with the fact that

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122. *Id.*; Hoffman & Walsh, *supra* note 120.

123. Rowland, *supra* note 121; Hoffman & Walsh, *supra* note 120.

124. Hoffman & Walsh, *supra* note 120.

125. Randazzo & Fitzgerald, *supra* note 95.

126. *Id.*

127. Raymond Tittmann et al., *5 Insurance Coverage Questions Raised by Opioid Litigation*, LAW360 (Aug. 7, 2019, 3:09 PM), <https://www.law360.com/articles/1185428/5-insurance-coverage-questions-raised-by-opioid-litigation>; Michael Levesque et al., *Research Announcement: Moody's—More Opioid Settlements Likely in 2020, with Mainly Negative Credit Impact for Defendants*, MOODY'S (Mar. 12, 2020), [https://www.moody's.com/research/Moodys-More-opioid-settlements-likely-in-2020-with-mainly-negative--PBC\\_1218393](https://www.moody's.com/research/Moodys-More-opioid-settlements-likely-in-2020-with-mainly-negative--PBC_1218393).

128. Tittmann et al., *supra* note 127.

129. *See* Aetna Inc. v. Insys Therapeutics, Inc., 324 F. Supp. 3d 541, 547 (E.D. Pa. 2018).

130. *Id.* at 548.

the Sackler family will not personally be forced to disgorge any of their profits.<sup>131</sup> The Ad Hoc Group of Non-Consenting States is a group opposed to a bankruptcy settlement and includes California, twenty-three other states, and D.C.<sup>132</sup> While state court cases against Purdue are stayed during Purdue’s bankruptcy, until a majority of states with active suits consent, there will be no settlement.<sup>133</sup>

## 2. California Plaintiffs: A Fight on Many Fronts

This Note compares the claims lodged by Mariposa County in northern California, the City of Los Angeles, and the State of California. Local governments pleaded broadly and are pursuing claims in federal court in the MDL, where the state’s case is narrowly pleaded against a single manufacturer and remains in state superior court.

### *a. Mariposa County*

Mariposa County (“Mariposa” or “the County”) is home to just under 18,000 Californians,<sup>134</sup> portions of Yosemite National Park, and 14,441 active prescriptions for opioids—roughly 0.85 per resident.<sup>135</sup> Mariposa is a named member of the Opioid MDL negotiation class and has also joined other local plaintiffs in the California Opioid Consortium, a group mostly made up of other California local governments represented by the same plaintiff’s firm.<sup>136</sup> Mariposa

131. Nathaniel Weixel, *Holdouts Vow to Challenge Purdue Pharma Settlement*, THE HILL (Sept. 17, 2019, 6:00 AM), <https://thehill.com/policy/healthcare/461664-holdouts-vow-to-challenge-purdue-pharma-settlement>. New York alleges that it discovered \$1 billion of wire transfers from Purdue to Sackler family Swiss bank accounts just two days before the bankruptcy was announced. *Id.*

132. *Id.*; Christopher Rowland, *OxyContin Settlement Snag: Arizona Objects to Stay of Litigation Against Purdue Pharma and Sacklers*, WASH. POST (Oct. 8, 2019, 3:04 PM), [https://www.washingtonpost.com/business/economy/oxycontin-settlement-snap-arizona-objects-to-stay-of-litigation-against-purdue-pharma-and-sacklers/2019/10/08/88105058-e9da-11e9-85c0-85a098e47b37\\_story.html](https://www.washingtonpost.com/business/economy/oxycontin-settlement-snap-arizona-objects-to-stay-of-litigation-against-purdue-pharma-and-sacklers/2019/10/08/88105058-e9da-11e9-85c0-85a098e47b37_story.html).

133. See Mary Williams Walsh, *Judge Orders Pause in Opioid Litigation Against Purdue Pharma and Sacklers*, N.Y. TIMES (Oct. 11, 2019), <https://www.nytimes.com/2019/10/11/health/purdue-bankruptcy-opioids.html>.

134. *QuickFacts: Mariposa County, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/mariposacountycalifornia> (last visited Oct. 4, 2020).

135. *California Opioid Dashboard*, *supra* note 1 (click “County Dashboards”; then choose “Mariposa” from “Select County to view Dashboard” dropdown).

136. Brandi Cummings, *30 California Counties Sue Drugmakers for Opioid Crisis*, KCRA (May 10, 2018, 12:05 AM), <https://www.kcra.com/article/30-california-counties-sue-drugmakers-for-opioid-crisis/20640984>; *Entities of the Negotiation Class*, *supra* note 34 (click “Cities and Counties” hyperlink).

alleges 1) two claims for public nuisance;<sup>137</sup> 2) two claims under RICO;<sup>138</sup> 3) false advertising;<sup>139</sup> 4) negligent misrepresentation;<sup>140</sup> 5) fraud and fraudulent misrepresentation;<sup>141</sup> and 6) unjust enrichment.<sup>142</sup> Mariposa seeks punitive damages under common law and California Civil Code section 3294.<sup>143</sup> It also seeks abatement of the public nuisance, enjoinder from creating further nuisance, declaratory relief stating that defendants were in violation of the California False Advertising Act, enjoinder from further false advertising, restitution, actual damages, compensation for the costs of the epidemic, and civil penalties of \$2,500 per each incident of false advertising, and attorney's fees and costs.<sup>144</sup>

The relief sought by Mariposa is by far the most broad-based. Mariposa seeks to “recover the costs of prevention efforts, treatment and services, as well as costs associated with jailing residents addicted to prescription painkillers and heroin.”<sup>145</sup> Mariposa alleges it was harmed by being required to repair and retrofit “property related to police, emergency, health, prosecution, corrections and other services” and other governmental costs.<sup>146</sup> It also alleges “specific and special injuries because its damages include, *inter alia*, injury to the property and systems of its health services, law enforcement, and medical examiner, as well as property costs related to opioid addiction treatment and overdose prevention.”<sup>147</sup> The County seeks reimbursement for infrastructure costs related to increasing the number of jail beds, retrofitting and upgrading court, jail, medical

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137. County of Mariposa Complaint, *supra* note 29, at 121.

138. *Id.* at 135, 251.

139. *Id.* at 299 (in violation of Cal. Bus. & Prof. Code § 17500).

140. *Id.* at 302.

141. *Id.* at 306.

142. *Id.* at 308.

143. *Id.* at 311.

144. Mariposa lists such costs as: medical care and addiction care, treatment counseling and rehabilitation services, costs for “treatment of infants born with opioid-related medical conditions; . . . care for children whose parents suffer from opioid-related disability or incapacitation; and . . . costs associated with law enforcement and public safety relating to the opioid epidemic.” *Id.* at 311–13.

145. Letter, Resolution Authorizing Participation in the California Counties Opioid Consortium and Approving Agts, from Steve Dahlem, Cnty. Couns. Interim Hum. Res. Dir., to Bd. of Supervisors 1 (May 1, 2018), [https://www.mariposacounty.org/DocumentCenter/View/66935/Resolution\\_2018-192?bidId=](https://www.mariposacounty.org/DocumentCenter/View/66935/Resolution_2018-192?bidId=) [hereinafter Letter Authorizing Participation in the California Opioid Consortium].

146. County of Mariposa Complaint, *supra* note 29, at 135.

147. *Id.*

examiner, hospital, and treatment facilities.<sup>148</sup> It alleges causation through the defendants' awareness of the likelihood of diversion and their failure to control it.<sup>149</sup> Mariposa alleges public nuisance both on behalf of the County and, per the language of the statute, on behalf of all Californians.<sup>150</sup>

Mariposa alleges with excellent specificity damages caused by the diversion of opioids. The complaint quantifies and details increases in pharmacy robberies, neonatal abstinence syndrome, fentanyl seizures, and ultimately opioid-related deaths.<sup>151</sup> Mariposa also does an excellent job of pleading facts specific to their County, including opioid-related deaths, the increased rate of emergency department visits for opioid-overdoses, and the county-specific rate of opioid misuse and disorder.<sup>152</sup>

When it comes to the problem of causation, Mariposa acknowledges a slightly more attenuated chain, but is able to draw a straight line between the defendants' actions and damages to the county, stating, "Although not as direct as a car accident or a slip-and-fall case, this causal chain is still a 'direct sequence' and a logical, substantial and foreseeable cause of the County's injury."<sup>153</sup> Mariposa is represented by the county's counsel and four plaintiffs' firms, all of whom are representing other cities and counties in the Opioid MDL.<sup>154</sup> Mariposa's complaint has the benefit of the plaintiffs' firm's expertise and no up-front costs to the county or tax payers. The claims here are pleaded specifically, tracking the claims of other Opioid MDL plaintiffs, yet take advantage of pertinent state law and specific damages to Mariposa.

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148. *Id.* at 132.

149. *Id.* at 127–28.

150. *Id.* at 127–30.

151. *Id.* at 292–94, 296–98.

152. *Id.* at 294–95.

153. *Id.* at 296.

154. They refer to themselves as a "National Consortium" of plaintiff's attorneys working on similar MDL claims. See Letter Authorizing Participation in the California Opioid Consortium, *supra* note 145 at 2.

*a. City of Los Angeles*

The City of Los Angeles (“the City”) alleges four claims: 1) public nuisance,<sup>155</sup> 2) RICO violations,<sup>156</sup> 3) negligence,<sup>157</sup> and 4) negligent misrepresentation.<sup>158</sup> The City of Los Angeles is a member of the negotiation class.<sup>159</sup> Initially, the City did not make any claims against the Sackler family individually nor pharmacies, but the City filed a supplemental amendment in March 2019 and now names a total of thirty defendants.<sup>160</sup> In a press release announcing the suit, the City Attorney said,

“The scourge of prescription drug addiction has made a significant impact on Los Angeles residents and created a continued public nuisance in our City” . . . . “Manufacturers and distributors of these highly addictive and potentially fatal drugs must be held accountable for driving the opioid epidemic and the significant impacts of their reckless and irresponsible business practices.”<sup>161</sup>

The City seeks injunctions against defendants for maintaining the public nuisance, failing to report suspicious orders, “further false marketing and require[s] they take affirmative action to ameliorate the effects of their prior false marketing.”<sup>162</sup>

The City is represented by the City Attorney and a San Francisco securities fraud and complex litigation firm.<sup>163</sup> It is the only California plaintiff examined here that alleges negligence, and it does so based on both common law and statutory duties to comply with the California unfair competition law (UCL), false advertising statute, and

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155. City of Los Angeles Complaint, *supra* note 28, at 145; CAL. CIV. CODE §§ 3479–3480 (Deering 2020); CAL. CIV. PROC. CODE § 731 (Deering 2020).

156. City of Los Angeles Complaint, *supra* note 28, at 146.

157. *Id.* at 157.

158. *Id.* at 159.

159. *Entities of the Negotiation Class*, *supra* note 34.

160. Short Form for Supplementing Complaint and Amending Defendants and Jury Demand at 1, *In Re Nat’l Prescription Opiate Litig.*, No. 1:18-op-45601-DAP (N.D. Ohio Mar. 14, 2019), ECF No. 24 [hereinafter Short Form for Supplementing City of Los Angeles Complaint].

161. *City Attorney Mike Feuer Files Lawsuit Against Opioid Manufacturers, Distributors*, L.A. CITY ATT’Y MIKE FEUER (May 3, 2018), [https://www.lacityattorney.org/post/2018/05/03/city-attorney-mike-feuer-files-lawsuit-against-opioid-manufacturers-distributors?preview=true&site\\_id=312](https://www.lacityattorney.org/post/2018/05/03/city-attorney-mike-feuer-files-lawsuit-against-opioid-manufacturers-distributors?preview=true&site_id=312) (updated Nov. 13, 2018).

162. City of Los Angeles Complaint, *supra* note 28, at 160.

163. *Id.* at 1; *Consumer Cases*, ROBBINS GELLER RUDMAN & DOWD LLP, <https://www.rgrdlaw.com/cases-consumer.html> (last visited Oct. 4, 2020).

the California Health and Safety Code, as well as a duty to comply with the Controlled Substances Act, a federal law that regulates, among other things, how high-risk pharmaceuticals are distributed.<sup>164</sup> Equitable relief predominates the City's prayer for relief, but it also seeks restitution, disgorgement of unjust enrichment, exemplary, and punitive damages. Probably due to the fact that most public health data on the issue are more accessible at the county level, the City alleges specific facts related to Los Angeles County damages but not the impact of opioids on the City of Los Angeles.<sup>165</sup> The only city-specific factual allegation is at least the most important metric: opioid-related death rates until 2015 averaged 2.5 per one hundred thousand persons, and 9.0 per one hundred thousand emergency room visits Angelenos were admitted to hospitals for an opioid overdose at about the same rate.<sup>166</sup> The City's theory of causation for public nuisance, RICO, and negligence rests on failure to report suspicious orders, whereas the negligent misrepresentation claim rests on causation by the affirmative concealment and omission of the risk of addiction.<sup>167</sup>

The City's pleadings represent a comprehensive effort to plead broadly against many kinds of defendants and to benefit from sharing and incorporating complicated claims like RICO along with other plaintiffs,<sup>168</sup> while testing out lesser pleaded theories like negligence.

### *c. California State*

On June 3, 2019, California filed a complaint in Los Angeles County Superior Court against Purdue and the Sackler family alleging violations of: 1) California's public nuisance statute,<sup>169</sup> 2) untrue or misleading representations,<sup>170</sup> and the UCL.<sup>171</sup> The State seeks permanent injunctions from false advertising and abatement of the public nuisance, civil penalties for each violation of the false

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164. City of Los Angeles Complaint, *supra* note 28, at 158.

165. *Id.* at 5–7.

166. *Id.* at 8.

167. *Id.* at 159.

168. Short Form for Supplementing City of Los Angeles Complaint, *supra* note 160, at 1–8.

169. State of California Complaint, *supra* note 84, at 52; CAL. CIV. CODE §§ 3479–3480 (Deering 2020).

170. State of California Complaint, *supra* note 84, at 50; CAL. BUS. & PROF. CODE § 17500 (Deering 2020).

171. State of California Complaint, *supra* note 84, at 51; CAL. BUS. & PROF. CODE § 17200.

advertising law and the UCL, and other equitable relief.<sup>172</sup> California seeks, above all else, to hold the Sacklers accountable and to make an example of them.<sup>173</sup>

California attempts to “take[] charge of any public nuisance, unfair competition law, and false advertising law claims brought on behalf of the People concerning the matters described herein.”<sup>174</sup> Seeking a friendlier jury at home and to maintain control of its own claims, the state has purposefully kept its claims out of the MDL and in state court.<sup>175</sup> In a press conference announcing the lawsuit, Attorney General Xavier Becerra said,

[T]he start of this crisis can be traced back to . . . Purdue Pharma and the Sackler family . . . Purdue and the Sacklers traded the health and well-being of Californians for profit and created an unprecedented national public health crisis in the process, but we will hold them accountable.<sup>176</sup>

The goals of the State seem to be just that, holding Purdue alone, and no other manufacturer, distributor, or pharmacy, accountable.

About three weeks after California filed its complaint, Purdue filed for bankruptcy and the State subsequently amended its complaint to include eight other members of the Sackler family.<sup>177</sup> Confoundingly, the State does not allege claims against any other opioid manufacturers, distributors, or pharmacies—not even against defendants like distributor McKesson, California’s second-largest company after only Apple.<sup>178</sup> Since 2017, McKesson has distributed more hydrocodone and oxycodone in California than any other

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172. State of California Complaint, *supra* note 84, at 54–55; Patrick McGreevy, *California Joins Opioid Fight, Sues Purdue Pharma over Marketing of OxyContin*, L.A. TIMES (June 3, 2019, 11:41 AM), <https://www.latimes.com/politics/la-pol-ca-oxycontin-maker-sued-by-california-20190603-story.html>.

173. Press Release, Attorney General Becerra Sues Opioid Manufacturer Purdue Pharma for Its Illegal Practices and Role in the Opioid Crisis, State of Cal. Dep’t of Just., Xavier Becerra, Att’y Gen. (June 3, 2019), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-sues-opioid-manufacturer-purdue-pharma-its-illegal> [hereinafter Becerra Press Release].

174. State of California Complaint, *supra* note 84, at 4–5.

175. *Id.* at 1.

176. ABC10, *Xavier Becerra Announces Lawsuit Against Maker of Oxycontin at Opioid Summit*, YOUTUBE (June 3, 2019), <https://www.youtube.com/watch?v=Lzeu6m9sDZc>.

177. First Amended Complaint at 1, *People v. Purdue Pharma L.P.*, No. 19STCV19045 (Cal. Super. Ct. Oct. 2, 2019) [hereinafter State of California First Amended Complaint]; Becerra Press Release, *supra* note 173.

178. Joe Mathews, *It’s California’s Second Richest Company, but You Probably Haven’t Heard of It*, SACRAMENTO BEE (Jan. 11, 2018, 3:05 PM), <https://www.sacbee.com/opinion/california-forum/article194175574.html>.

company.<sup>179</sup> McKesson also generated \$214 billion in revenue in 2019, up 3 percent from the year prior—roughly \$4 billion from opioid distribution alone.<sup>180</sup> Further, McKesson is under investigation by the Drug Enforcement Administration (DEA) for non-compliance with a 2017 settlement with the Justice Department over alleged diversion of opioids in violation of the Controlled Substances Act.<sup>181</sup> The settlement requires McKesson to report suspicious orders to the DEA.<sup>182</sup> It is alleged that it failed to do so.<sup>183</sup>

The State attempts to preempt state statutory violations from cities and counties in their own cases against Purdue. California appears to be experiencing a similar internal disagreement as other states over which claims can be alleged by local governments and which claims the state “owns.” Though less public than Ohio’s dispute, California attempts to assert control over all pending UCL and false advertising statutory claims against Purdue. As discussed below, case law does not support this exertion of power.

#### i. Home rule

In its first amended complaint in *People v. Purdue Pharma*, the state wrote:

Pursuant to his constitutional and statutory authority as chief law officer, including his responsibility to ensure that the laws are uniformly and adequately enforced, his supervision over District Attorneys and other law enforcement officers, and his authority to take charge of any investigation or prosecution over which the Superior Court has jurisdiction, the Attorney General, through the filing of this action, takes charge of any public nuisance, unfair competition law, and false advertising law claims brought on behalf of the People

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179. *Id.*

180. Brian Alexander, *When a Company Is Making Money from the Opioid Crisis*, THE ATLANTIC (Sept. 6, 2017), <https://www.theatlantic.com/business/archive/2017/09/opioid-crisis-responsibility-profits/538938/>; *McKesson Reports Fiscal 2019 Fourth-Quarter and Full-Year Results*, MCKESSON (May 8, 2019), <https://www.mckesson.com/about-mckesson/newsroom/press-releases/2019/mckesson-reports-fiscal-2019-fourth-quarter-results/>.

181. Stanton, *supra* note 67.

182. *Id.* McKesson did not donate to Becerra’s campaign for Attorney General, AmerisourceBergen, however, did. *Rep. Xavier Becerra—California District 34: Political Action Committees (PACs) 2015–2016*, OPENSECRETS.ORG, <https://www.opensecrets.org/members-of-congress/pacs?cat=H04&catlong=Pharmaceuticals%2FHealth+Products&cid=N00009774&cycle=2016&seclong=Health&sector=H> (last visited Dec. 20, 2020).

183. Stanton, *supra* note 67.

concerning the matters described herein. This is the People's operative complaint, and the people's [sic] operative action, concerning those claims and matters.<sup>184</sup>

While it is important to note that “those claims and matters” refer only to claims made against Purdue and the Sacklers and no other defendant, this has been the only sign of a home rule conflict between the state and the local governments. Even though California is attempting to assert control over claims made under the public nuisance statute, city attorneys, county counsel, and district attorneys have “concurrent” rights to bring public nuisance claims in the name of the people of the State of California.<sup>185</sup> The statute actually says nothing about the Attorney General.<sup>186</sup> Under a strict reading of the statute, the concurrent claims of Mariposa, the City of Los Angeles, and the State of California in theory can stand separately from one another, meaning that they may be able to recover independently. Recovery on a successful claim of public nuisance includes abatement and past damages.<sup>187</sup>

The California Supreme Court's interpretation of the California Constitution's home rule provisions protects Mariposa and Los Angeles's right to litigate such claims on their own behalves.<sup>188</sup> It is still unclear whether both the Attorney General and a political subdivision may bring simultaneous claims on behalf of the People of California. Absent an express statutory provision, state preemption of these claims is unlikely: the statutes provide no express preemption language,<sup>189</sup> and the state constitution has been construed broadly to give deference to cities and counties. “It has long been settled that, insofar as a charter city legislates with regard to municipal affairs, its charter prevails over general state law. . . . However, as to matters of statewide concern, charter cities remain subject to state law. . . . Similar rules apply to charter counties.”<sup>190</sup> In fact, California's public nuisance statutes seem to expressly permit local governments to

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184. State of California First Amended Complaint, *supra* note 177, at 5–6.

185. CAL. CIV. PROC. CODE § 731 (Deering 2020).

186. *See id.*

187. CAL. CIV. CODE § 3484 (Deering 2020).

188. CAL. CONST. art. XI, §§ 4–5.

189. *See* CAL. BUS. & PROF. CODE § 17500 (Deering 2020). *See generally* CAL. CIV. CODE § 3494; *Cnty. of Santa Clara v. Superior Ct.*, 235 P.3d 21, 21 (Cal. 2010) (in which several cities and counties brought public nuisance action against manufacturers of lead paint).

190. *Sonoma Cnty. Org. of Pub. Emps. v. Cnty. of Sonoma*, 591 P.2d 1, 12 (Cal. 1979) (in bank).

pursue them on behalf of the state.<sup>191</sup> When a similar issue arose in 2014 when Orange and Santa Clara Counties brought UCL and false advertising claims against Purdue, Purdue removed to federal court but the district court remanded finding that because the action was brought on behalf of the People of the State of California (per the statute's express authorization), no diversity existed.<sup>192</sup>

Complicating matters further is the broad pleading of local governments like Los Angeles and Mariposa to include multiple defendants as opposed to California's narrowly pleaded case against Purdue and the Sacklers alone.<sup>193</sup> Purdue and the Sacklers are included in Los Angeles and Mariposa's complaints, with both alleging public nuisance on behalf of their local communities and all Californians.<sup>194</sup> Additionally, Mariposa alleges violation of the California false advertising statute.<sup>195</sup> The State's attempt to co-opt those claims is likely to be unsuccessful, or at the very least, not worth the time to litigate.

#### ii. The State's claims

The State's claims are the most narrowly pleaded of any California plaintiff. California alleges only three causes of action against Purdue and its owners. No common law causes of action are alleged, only statutory claims.

While the State pleaded with great detail as to the general wrongdoing of Purdue and the Sacklers, it only alleged few facts specific to defendants' impact on California.<sup>196</sup> Establishing damages specific to California, and more critically, linking causation to those damages may prove difficult.

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191. CAL. GOV'T CODE § 26528 (Deering 2020) provides, "The district attorney may, and when directed by the board of supervisors shall, bring a civil action in the name of the people of the State of California to abate a public nuisance in his county."

192. *California v. Purdue Pharma L.P.*, No. SACV 14-1080-JSL (DFMx), 2014 WL 6065907, at \*1 (C.D. Cal. Nov. 12, 2014) ("Here, the FAC shows the Plaintiff is the People of the State of California. A state is not a citizen of itself and thus cannot be party to a diversity action. *Fifty Assocs. v. Prudential Ins. Co.*, 446 F.2d 1187, 1191 (9th Cir. 1970.) Therefore, looking to the face of the complaint, diversity jurisdiction does not appear to exist in this matter.").

193. See City of Los Angeles Complaint, *supra* note 28. *But see* State of California Complaint, *supra* note 84.

194. County of Mariposa Complaint, *supra* note 29, at 121; City of Los Angeles Complaint, *supra* note 28, at 145.

195. County of Mariposa Complaint, *supra* note 29, at 299.

196. See State of California Complaint, *supra* note 84, at 46–48 (facts related to Purdue's California sales force and donations to California organizations supposedly friendly to opioids).

This narrative-heavy, but generalized form of pleading, combined with the State's choice to only pursue claims against the single most notorious defendant in the opioid litigation may suggest that the State is more interested in the publicity associated with a high-profile trial than in seeking reimbursement of damages and abatement of the crisis. It is equally possible that the State would pursue this strategy to avoid recovering a judgment out from under its cities and counties or work behind the scenes to broker a global settlement. However, it seems that the State may not be factually equipped to handle trial on these claims and should aggressively seek settlement in Purdue's bankruptcy proceedings.

A look at the actual costs associated with the opioid epidemic in California provides the scale that a settlement or judgment would have to reach to effectively reimburse governments for damages. In 2018, the California State Treasurer's Office estimated the total cost of the epidemic to the State at \$4.3 billion.<sup>197</sup> One study estimates that the cost of a single inpatient hospital stay related to opioid misuse is \$6,671.<sup>198</sup> The National Center on Addiction and Substance Abuse calculates that 19.5 percent of California's state budget is spent coping with substance use and addiction, though only 2 percent of that is used for addiction treatment and recovery.<sup>199</sup> Though the overall death toll from opioids in California is lower than other parts of the country, the economic cost is higher than any other state.<sup>200</sup> Considering Purdue's bankruptcy, it is unlikely that California will be able to recover all of its costs against Purdue alone.

Moreover, the UCL earmarks how civil penalties from a judgment are used. The statute provides,

If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to

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197. Hale & DiSalvo, *supra* note 2.

198. Peter J. Mallow et al., *Geographic Variation in Hospital Costs, Payments, and Length of Stay for Opioid-Related Hospital Visits in the USA*, 11 J. PAIN RSCH. 3079, 3083–85 (2018).

199. Hale & DiSalvo, *supra* note 2. Plaintiffs are in the odd position that the more they spent on treatment and services, the better the case they have to prove damages. Poorer counties and cities who did not have the money to begin with might be at a disadvantage.

200. *Id.* California tops the list of opioid related expenditures by a landslide; the closest state is Texas, \$2 billion behind. See also THE COUNCIL OF ECON. ADVISERS, EXEC. OFF. OF THE PRESIDENT OF THE U.S., THE UNDERESTIMATED COST OF THE OPIOID CRISIS 3–9 (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf> (attempting to quantify costs to the federal government).

the General Fund. . . . The aforementioned funds shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws.<sup>201</sup>

Likewise, the false advertising statute earmarks civil penalties as one-half to the state and one-half to the county where the action was brought.<sup>202</sup> Because of this predetermined statutory earmark, no judgment recovered under this statute could be used to reimburse the State for healthcare costs associated with the opioid epidemic, start new addiction recovery programs, or fund any other public health use.<sup>203</sup>

Clearly, the opioid epidemic begs several questions of the American legal system. These questions bring into focus the limitations of the courts when it comes to class action, which local governments can sue on behalf of their citizens, and the meaning and scope of corporate accountability. Ultimately, only one question matters to the tens of thousands of people suffering from addiction or its second-hand consequences: can litigation provide relief? If so, what kind and if not, why bother?

California cannot solve its opioid problem with litigation alone. But litigation can provide a path toward the best public health strategy local governments and states have: prevention. By seeking both remuneration for government funds spent fighting the opioid crisis and funds to abate the crisis, governments at all levels can create and fund long-term public health strategies that fit the unique needs of their individual communities. However, as past public health litigation demonstrates, these funds must be proactively protected from expenditure or reappropriation to non-public health expenditures through legislation, settlement terms, or ballot measures.

### *C. Past Public Health Litigation: Lessons from Big Tobacco*

While the opioid litigation stands to be the most impactful public health litigation ever, it is not the first of its kind. The most prominent and successful example of public health litigation to date is the state-

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201. CAL. BUS. & PROF. CODE § 17206 (Deering 2020).

202. *See id.* § 17536(c). “If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer.” *Id.*

203. *Id.*

driven suits against tobacco companies for smoking-related harms in the 1990s. In that case, the parties agreed to a twenty-five-year \$246 billion Master Settlement Agreement (MSA) that ended the decades-long litigation.<sup>204</sup> Most importantly, the MSA is a landmark not just for its size and scope, but because it was crafted with public health in mind.<sup>205</sup>

### 1. Tobacco Litigation Background

Litigation against tobacco companies began in the 1950s.<sup>206</sup> These cases, usually brought by individuals, failed for forty-five years.<sup>207</sup> Then, in the 1990s, the tide began to turn.<sup>208</sup> By sharing resources and strategies from the few plaintiff victories through plaintiffs-only conferences and associations like the Tobacco Trial Lawyers Association, the Minnesota Tobacco Document Depository, and the Tobacco Control Resource Center at Northeastern University School of Law, plaintiffs' attorneys were able to replicate and multiply the success of those early victories on a larger scale.<sup>209</sup> State attorneys general led by Mike Moore of Mississippi quickly followed, and by 1998 D.C., five U.S. Territories, and forty-six states, including California, had filed suit.<sup>210</sup>

### 2. California Plaintiffs in the Tobacco Litigation

California, now a state that heavily regulates tobacco and has one of the highest tobacco sales taxes (\$2.87 per pack), did not join the

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204. U.S. GEN. ACCT. OFF., GAO-01-851, TOBACCO SETTLEMENT: STATES' USE OF MASTER SETTLEMENT AGREEMENT PAYMENTS 8 (2001), <https://www.gao.gov/assets/240/231942.pdf> [hereinafter STATES' USE OF TOBACCO SETTLEMENTS]; Nicolas Terry & Aila Hoss, *Opioid Litigation Proceeds: Cautionary Tales from the Tobacco Settlement*, HEALTH AFFS.: BLOG (May 23, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180517.992650/full/>; W.E. Parmet & R.A. Daynard, *The New Public Health Litigation*, 21 ANN. REV. PUB. HEALTH 437, 437 (2000).

205. THE TOBACCO CONTROL RES. CTR., INC., AT NE. U. SCH. OF L., THE MULTISTATE MASTER SETTLEMENT AGREEMENT AND THE FUTURE OF STATE AND LOCAL TOBACCO CONTROL 17–18 (1999).

206. Kathleen Michon, *Tobacco Litigation: History & Recent Developments*, NOLO, <https://www.nolo.com/legal-encyclopedia/tobacco-litigation-history-and-development-32202.html> (last visited Oct. 4, 2020).

207. Richard A. Daynard & Mark Gottlieb, *Keys to Litigating Against Tobacco Companies*, TRIAL, Nov. 1999, at 18.

208. Michon, *supra* note 206.

209. Daynard & Gottlieb, *supra* note 207, at 20.

210. Frank A. Sloan et al., *States' Allocations of Funds from the Tobacco Master Settlement Agreement*, 24 HEALTH AFFS. 220, 222 (2005); STATES' USE OF TOBACCO SETTLEMENTS, *supra* note 204, at 12–13.

tobacco suits until June 12, 1997, late in the process.<sup>211</sup> Eight days later, the companies and states announced that a global settlement agreement had been reached.<sup>212</sup> Notably, the County of Los Angeles, the City and County of San Francisco, and the City of San Jose were the first and some of the only local government plaintiffs in the country to sue tobacco companies and did so well before the state got involved.<sup>213</sup> As a result, they preserved local government interests in the settlement, and California split its settlement funds with all of its local governments—not just the three that sued—equally.<sup>214</sup>

### 3. Tobacco MSA Basics

The MSA bound forty-six states, five territories, D.C., and the five largest tobacco companies who collectively owned over 99 percent of the tobacco market.<sup>215</sup> In exchange for dropping all claims, states receive annual payments from the companies totaling \$246 billion between 2000 and 2025.<sup>216</sup> Major highlights of the agreement include: a moratorium on advertising targeting minors, regulating tobacco industry lobbying, reimbursement of states' attorney's fees, payments to both a smoking-prevention public education fund and national foundation, and opening internal industry records and research to the public.<sup>217</sup> The agreement did not mandate how states spent their settlement money nor how states distributed settlement money to local governments if at all.<sup>218</sup> The Centers for Disease Control (CDC) recommends that 12 percent of settlement and tobacco sales tax money go to comprehensive state tobacco control programs.<sup>219</sup> In 2014, only seven states were funding tobacco control

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211. *Inside the Tobacco Deal*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/settlement/timelines/fullindex.html> (last visited Oct. 4, 2020).

212. *Id.*

213. Report, *Task Force on Tobacco Litigation*, 27 CUMB. L. REV. 575, 581 n.1 (1997); STATES' USE OF TOBACCO SETTLEMENTS, *supra* note 204, at 13.

214. Sloan et al., *supra* note 210, at 222; STATES' USE OF TOBACCO SETTLEMENTS, *supra* note 204, at 13.

215. Joy Johnson Wilson, *Summary of the Attorneys General Master Tobacco Settlement Agreement*, AFI HEALTH COMM. (Mar. 1999), <https://academic.uydayton.edu/health/syllabi/tobacco/summary.htm#Statute>.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Fast Facts and Fact Sheets*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/index.htm#:~:text=Smoking%20costs%20the%20United%20States,those%20funds%20on%20tobacco%20control](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/index.htm#:~:text=Smoking%20costs%20the%20United%20States,those%20funds%20on%20tobacco%20control) (last reviewed Dec. 10, 2020).

or smoking prevention programs at CDC-recommended levels or higher.<sup>220</sup> In 2020, none was.<sup>221</sup>

The MSA mandated that state legislatures pass a model statute requiring any tobacco companies who did not agree to settle “to require that such manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise.”<sup>222</sup> States that did not pass the model statute faced a reduction in settlement payments.<sup>223</sup> This ensured that the settlement was globally enforceable among defendants and even companies not named in the suit.

#### 4. California’s Share of the MSA

As of 2019, California has received a total of \$16,550,051,823 in MSA payments.<sup>224</sup> It has spent \$250,400,000 (or 1.5 percent) on tobacco prevention efforts.<sup>225</sup> California and New York, which account for the largest payouts from the MSA, are the only states that chose to split MSA money with local governments, in part due to the fact that cities and counties in both states filed their own suits alongside the attorneys general.<sup>226</sup> In California, a Memorandum of Understanding between the state and local governments was executed in August of 1998, before the MSA was finalized.<sup>227</sup> It governs the division of MSA funds between the state, cities, and counties.<sup>228</sup> The state keeps 50% of MSA funds, the counties receive 45% apportioned by population, and 5% goes to the state’s four largest cities.<sup>229</sup> Since then, the state, counties, and cities have sold off interest in future MSA payments by securitizing them and issuing high-risk bonds.<sup>230</sup>

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220. Cezary Podkul & Yue Qiu, *Tobacco Bonds May Be Dangerous to Your State’s Financial Health*, PROPUBLICA (Aug. 7, 2014), <https://projects.propublica.org/graphics/tcbonds-statemap>.

221. *State-by-State Tobacco Settlements 21 Years Later*, *supra* note 39.

222. Wilson, *supra* note 215.

223. *Id.*

224. Payments to Date (as of April 18, 2019), Nat’l Ass’n of Att’ys Gen. (2019) (on file with the *Loyola of Los Angeles Law Review*).

225. *State-by-State Tobacco Settlements 21 Years Later*, *supra* note 39.

226. Podkul & Qiu, *supra* note 220; Sloan et al., *supra* note 210, at 222.

227. Memorandum of Understanding at 17–18, *In re Tobacco Cases*, No. JCCP 4041 (Cal. Super. Ct. Aug. 5, 1998).

228. *Id.* at 12–14.

229. *Id.* at 12–13; Sloan et al., *supra* note 210, at 222.

230. Issue Brief, Tobacco Securitization Bond Issuance in California, Nova Edwards, Cal. Debt and Inv. Advisory Comm’n 2, 7–8, <https://www.treasurer.ca.gov/cdiac/reports/tobacco.pdf>

Securitization and reappropriation of MSA funds are not uncommon. Though recent research has shown that public health prevention efforts yield a high return on investment,<sup>231</sup> in the 1990s, many states secured their share of the tobacco MSA or put money into their general funds to patch up budget shortfalls.<sup>232</sup> Even in states with the best laid plans, MSA funds have been subject to disagreements within statehouses regarding budgets and executive power, enabled by the fact that the terms of MSA do not bind states to use their funds exclusively for tobacco-related public health purposes.<sup>233</sup> As one author wrote, “[t]he tragedy of the MSA is that it was a unique opportunity to build a sustainable tobacco control (or broader public health) infrastructure. With only 18% of the MSA revenues, every state could have funded its tobacco control program at CDC-recommended levels, with no other funding needed.”<sup>234</sup> A global settlement in the opioid litigation could provide similar public health research and crisis control funding for the epidemic but may only be effective if states do not appropriate funds to non-public health purposes.

There is a few ways MSA funds have been protected, in some cases by voters. In 2000, just as the first settlements were paid out, Orange County voters approved Measure H, an initiative that earmarked the county’s share of the MSA funds to 12% tobacco prevention and control, 20% to the sheriff’s department, and the remaining 68% to other public health initiatives.<sup>235</sup> Similarly, San Jose County voted to allocate their funds to a children’s health insurance

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(last visited Oct. 4, 2020) [hereinafter Cal. Debt and Inv. Advisory Comm’n Issue Brief]; STATES’ USE OF TOBACCO SETTLEMENTS, *supra* note 204, at 9, 44–48; Podkul & Qiu, *supra* note 220.

231. Julia A. Dille et al., *Program, Policy, and Price Interventions for Tobacco Control: Quantifying the Return on Investment of a State Tobacco Control Program*, 102 AM. J. PUB. HEALTH e22, e27 (2012) (finding that in Washington State for every dollar spent, the state saved five dollars in tobacco-related public health costs).

232. *State-by-State Tobacco Settlements 21 Years Later*, *supra* note 39; Berman, *supra* note 39, at 1038, 1041–46.

233. See Berman, *supra* note 39 at 1036, 1040–42. It stands to reason that MSA funds appropriately allocated to tobacco programming would be helpful in combatting the consequences of tobacco use that were unforeseeable at the time of the MSA like the rise in vaping-related respiratory illness. The same could be said for future issues yet unknown arising out of the opioid epidemic.

234. Berman, *supra* note 39, at 1058.

235. CNTY. OF ORANGE CAL., HEALTH CARE AGENCY, TOBACCO SETTLEMENT PROGRAMS OUTCOMES REPORT: FISCAL YEAR 2010–2011, at 1, <https://www.ochealthinfo.com/civicax/filebank/blobdload.aspx?BlobID=22537> (last visited Oct. 4, 2020).

program.<sup>236</sup> This is one method voters could use to protect any opioid settlement or judgment funds. Furthermore, it could work at all levels of government: state, county, and city.

Paralleling the first few settlements in the tobacco litigation, some early settlements in the opioid litigation have been reached. Oklahoma prevailed at trial in state court against manufacturer Johnson & Johnson for over \$400 million.<sup>237</sup> Manufacturer Mallinckrodt is the first drug company to reach a global settlement with forty-seven states and territories for \$1.6 billion.<sup>238</sup> Concerns about how plaintiffs in these early cases plan to use their settlement and judgment money are growing.<sup>239</sup> Lawmakers in states like Oklahoma are attempting to control the distribution of opioid settlement money away from research and treatment and directly into the state treasury where it could be used for any state expense.<sup>240</sup>

As of 2018, Mariposa County received a total of \$3.5 million from MSA payments.<sup>241</sup> In fiscal year 2018–2019 the county received \$193,157 in MSA payments<sup>242</sup> and used it for after-school bussing, a Rural Media Arts Program, and the construction of four fire stations.<sup>243</sup> As of 2018, the City of Los Angeles received a total of over \$196 million from MSA payments.<sup>244</sup> In fiscal year 2018–2019, the city received \$10.9 million<sup>245</sup> which was put into the city's general fund.<sup>246</sup> Since 1999, the state government has received over \$8.2

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236. Sloan et al., *supra* note 210, at 222.

237. Colin Dwyer & Jackie Fortier, *Oklahoma Judge Shaves \$107 Million Off Opioid Decision Against Johnson and Johnson*, NPR (Nov. 15, 2019, 3:31 PM), <https://www.npr.org/2019/11/15/779439374/oklahoma-judge-shaves-107-million-off-opioid-decision-against-johnson-johnson>.

238. Sheila Kaplan & Jan Hoffman, *Mallinckrodt Reaches \$1.6 Billion Deal to Settle Opioid Lawsuits*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/health/mallinckrodt-opioid-settlement.html>.

239. Sean Murphy, *Concerns Arise About How Oklahoma's Opioid Settlement Money Will Be Used*, INS. J. (Aug. 29, 2019), <https://www.insurancejournal.com/news/southcentral/2019/08/29/538343.htm>.

240. Jackie Fortier, *Here's What Happened to \$829M Oklahoma Was Awarded to Treat Opioid Addiction*, PUB. RADIO TULSA (Jan. 16, 2020), <https://www.publicradiotulsa.org/post/heres-what-happened-829m-oklahoma-was-awarded-treat-opioid-addiction>.

241. Tobacco MSA Payments 1999–2020, *supra* note 39, at 19.

242. *Id.*

243. Mariposa County Budget, Final Budget Fiscal Year 2018–19, Cnty. of Mariposa 58, <https://mariposacounty.org/DocumentCenter/View/70481/FY-18-19-Final-Adopted-Budget> (last visited Oct. 4, 2020).

244. Tobacco MSA Payments 1999–2020, *supra* note 39, at 19.

245. *Id.*

246. City of Los Angeles Budget, Budget Fiscal Year 2018–19, City of L.A. 16, 33 (May 25, 2018).

billion in MSA payments.<sup>247</sup> Even though the state legislature passed a bill limiting state expenditures of the MSA to “health purposes” including health care expansions like Medi-Cal, “education and outreach, including, but not limited to, efforts to help reduce the use of tobacco products. . . . [s]moking cessation services. . . . [e]nforcement of tobacco-related statutes. . . . [and] primary care and other state-funded clinics that serve low-income, uninsured, or underinsured Californians,”<sup>248</sup> as of 2014, the state has only spent 8.9 percent on smoking prevention.<sup>249</sup>

The California Legislature also passed laws capping the amount of tobacco securitization bonds at \$5 billion, but that was later repealed.<sup>250</sup> As of 2009, the state had securitized 78.4 percent of its future MSA revenues through bonds.<sup>251</sup>

The structure of the MSA is such that after the twenty-five-year payment period ends states will continue to receive smaller MSA payments in perpetuity tied to tobacco sales.<sup>252</sup> The more sales, the higher the payments. Counterintuitively, states are encouraged to use the money from tobacco sales on public health programs to control and curtail tobacco use, thus reducing their payments from the settling companies over time.<sup>253</sup> Unfortunately, the structure of the settlement actually disincentivizes local governments from controlling tobacco use in their communities because the MSA generates revenue. Many governments, especially small local ones, may in fact rely on MSA payments and sizable sales taxes on tobacco products to pay bond debt and to balance the budget. As one scholar wrote, “for public health, the size of any settlement may matter less than how the settlement is structured.”<sup>254</sup>

### III. ANALYSIS

While there are many lessons from tobacco plaintiffs’ decades-long struggle, California plaintiffs should take heed of two. First, like

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247. Tobacco MSA Payments 1999–2020, *supra* note 39, at 20.

248. CAL. HEALTH & SAFETY CODE § 104898 (Deering 2020).

249. Podkul & Qiu, *supra* note 220.

250. Cal. Debt and Inv. Advisory Comm’n Issue Brief, *supra* note 230, at 4.

251. *Id.* at 6.

252. *Id.* at 8.

253. *See id.*

254. Faith Khalik et al., *Learning the Lessons of Tobacco: A Public Health Approach to the Opioid Settlements*, HEALTH AFFS.: BLOG (Sept. 26, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190925.554104/full/>.

the California cities and counties that sued tobacco companies independently of the state, asserting claims now and maintaining control of them throughout litigation greatly increase the chance of maintaining control over a portion of any settlement or judgment. Second, unless states are bound by legislation, public initiative, referendum, or settlement terms, states will not use settlement or judgment funds for public health. Legislators at all levels of government cannot resist the temptation to use opioid funds to patch holes in budgets or on non-public health expenses.<sup>255</sup>

On the whole, opioid plaintiffs seem to have learned the first lesson from the MSA. The sheer number and diversity of plaintiffs is evidence of this. Plaintiffs even formed a new class action tool called the negotiation class and for the most part have hired within the same small group of plaintiffs' firms and tobacco litigation veterans to represent them on contingency. Both the negotiation class and plaintiffs' firms have created a surprisingly unified front in the Opioid MDL while simultaneously exacerbating fractures between cities and counties and their state governments that were initially exposed by the tobacco litigation.<sup>256</sup> In the tobacco litigation, the fault lines between different levels of government were never resolved. Now those divisions may hamper some plaintiffs' bargaining power and make negotiation exceedingly difficult for defendants. If the MDL negotiation class is upheld on appeal, it may prove to be the major procedural legacy of the opioid litigation even as fractures between local and state governments grow deeper as a result.

The second lesson is more important now than ever. While including public health spending mandates in any settlement agreement is the best option, short of that, plaintiffs, in consultation with public health agencies, can begin crafting statutes, resolutions, and memorandums of understanding for state legislatures and city and county councils with specific public health programs in mind. The

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255. This temptation may prove increasingly difficult to overcome, as other public health emergencies like the COVID-19 pandemic create widespread economic damage. See Jeannie Baumann & Jacquie Lee, *Virus Pandemic, Opioid Epidemic Collide Around Social Distancing*, BLOOMBERG L. (Apr. 7, 2020, 3:54 AM), <https://news.bloomberglaw.com/pharma-and-life-sciences/virus-pandemic-opioid-epidemic-collide-around-social-distancing>; Nicola Cantore et al., *Coronavirus: The Economic Impact—10 July 2020*, UNITED NATIONS INDUS. DEV. ORG. (July 10, 2020), <https://www.unido.org/stories/coronavirus-economic-impact-10-july-2020>.

256. Jan Hoffman, *States Clash with Cities over Potential Opioids Settlement Payouts*, N.Y. TIMES (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/health/opioids-litigation-settlement.html>.

benefits of starting this process early are many. First, with a plan already in place, treatment and recovery resources will enter the community faster. Second, legislation will ensure that absent amendment or repeal, funds are spent on opioid treatment and recovery in the long-term rather than diverted to other government expenses. Third, it avoids a potentially difficult initiative or referendum process. Since the passage of the Affordable Care Act (ACA), ballot initiatives have become a widely used health policy tool.<sup>257</sup> States not known for strong social safety nets nor robust public health funding have seen voters mandate the expansion of Medicaid under the ACA.<sup>258</sup> Legislators at all levels of government have an opportunity to avoid a public fight about how to spend any opioid funds by beginning to plan now. Otherwise, California's heavily used ballot measure process combined with public scrutiny surrounding the structure of early opioid settlements is a straightforward recipe for a ballot measure or initiative. For instance, San Jose's children's health insurance ballot measure and Orange County's Measure H in 2000 reserving county tobacco settlement funds to specific programs may be a useful template for public health interest groups and voters who want to use the initiative process to protect opioid funds for public health purposes.

#### IV. CONCLUSION

While many question the role of public health litigation in stopping and solving the opioid epidemic,<sup>259</sup> it is clear that the opioid litigation, the most widely pleaded and argued public health litigation ever, is not just rewriting the rules of public health litigation, but those of multidistrict litigation and class action. For California, the state may not be aggressive enough in its pleading, particularly when one considers where the epidemic overlaps with other major issues of state

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257. See Akeiisa Coleman et al., *Medicaid Expansion Across the Country: A Check-In on Recent Ballot Initiatives*, THE COMMONWEALTH FUND (Feb. 25, 2019), <https://www.commonwealthfund.org/blog/2019/medicaid-expansion-across-country-check-recent-ballot-initiatives>.

258. *Id.*

259. Alana Semuels, *Are Pharmaceutical Companies to Blame for the Opioid Epidemic?*, THE ATLANTIC (June 2, 2017), <https://www.theatlantic.com/business/archive/2017/06/lawsuit-pharmaceutical-companies-opioids/529020/>; Holly M. Karibo, *Why Lawsuits Alone Aren't the Opioid Solution We Need*, CNN (Apr. 3, 2019, 3:19 PM), <https://www.cnn.com/2019/04/03/opinions/purdue-pharma-settlement-not-the-solution-karibo/index.html>.

policy, like homelessness and the COVID-19 pandemic.<sup>260</sup> All California plaintiffs are no doubt paying close attention to the second round of bellwethers, particularly *City and County of San Francisco v. McKesson Corp.* Because each test case alleges similar claims, City of San Francisco should prove to be an informative bellwether and provide useful information for settlement negotiation and trial strategy for all parties.<sup>261</sup> All three plaintiffs should seek a lucrative settlement in lieu of trial, particularly the state, considering that pursuing its claims could entail a lengthy home rule fight, and a judgment may yield less money than a settlement.

As a public health tool, settlement is much more effective than trial. Consider broadly the remedies available at trial: public accountability and disclosure. However, relief is limited to damages assessed by a judge or jury and some injunctive powers. On the other hand, settlement offers more flexibility to creatively craft public health prevention efforts in a way a jury or judge simply cannot. Pursuing settlement of the opioid litigation with public health and opioid use disorder and addiction prevention budget mandates remains the best chance many local governments have at recouping money lost in fighting the epidemic right now and investing in the public health prevention and treatment efforts that will stop it in the long term. Litigation cannot stop the opioid epidemic, but it can jumpstart the public health strategies and programs that will.

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260. See *Homeless and Housing Services Providers Confront Opioid Overdose*, U.S. DEP'T OF HEALTH & HUM. SERVS.: SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (July 10, 2019), <https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/homeless-housing-services-providers-confront-opioid>; Thomas Fuller et al., *As Homelessness Surges in California, So Does a Backlash*, N.Y. TIMES (Oct. 21, 2019), <https://www.nytimes.com/2019/10/21/us/california-homeless-backlash.html>; L.A. CNTY. DEP'T OF PUB. HEALTH, CTR. FOR HEALTH IMPACT EVALUATION, RECENT TRENDS IN MORTALITY RATES AND CAUSES OF DEATH AMONG PEOPLE EXPERIENCING HOMELESSNESS IN LOS ANGELES COUNTY 3, 5 (2019), [https://publichealth.lacounty.gov/chie/reports/HomelessMortality\\_CHIEBrief\\_Final.pdf](https://publichealth.lacounty.gov/chie/reports/HomelessMortality_CHIEBrief_Final.pdf); Jason McGahan, *Homeless Opioid Deaths Force Change in L.A. Jails*, CAP. & MAIN (Nov. 21, 2019), <https://capitalandmain.com/homeless-opioid-deaths-force-change-in-los-angeles-jails-1121>; Baumann & Lee, *supra* note 255.

261. Remand Order, *In re Nat'l Prescription Opiate Litig.*, No. 2804, at 3 (J.P.M.L. Feb. 5, 2020).