

# It's Time to Finish What They Started: How Purdue Pharma and the Sackler Family Can Help End the Opioid Epidemic

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## ABSTRACT

In 1996, pharmaceutical company Purdue Pharma initiated a marketing campaign that represented the opioid OxyContin as a non-addictive medication essential for pain management. In the last 24 years, Purdue Pharma generated billions of dollars in revenue from the sale of OxyContin. However, mass addiction to Oxycontin and other opioids accompanied Purdue Pharma's success. In the U.S., over 11 million people have misused opioids and, on average, over 100 people die each day from opioid-related overdoses. This widespread addiction, also known as the "opioid epidemic," led the Department of Health and Human Services to declare a public health emergency in 2017.

Forty-nine states recently filed lawsuits against Purdue Pharma and the Sackler family, Purdue Pharma's owners, for their contributions to the opioid epidemic. The actions of Purdue Pharma and the Sacklers have imposed a great cost on society, both in lives lost and in financial burdens on the states. In response to the lawsuits, Purdue Pharma proposed a settlement deal worth between \$10 billion and \$12 billion. Per the settlement, Purdue Pharma would declare bankruptcy and transform into a new company that produces opioid-overdose-reversal and addiction-treatment medications. States' responses to the settlement have varied, with about half of the states rejecting the settlement and half accepting it.

This Comment addresses whether states should accept or reject the settlement offer from Purdue Pharma. Ultimately, this Comment recommends that all states should accept the settlement because it offers the best chance for states to receive compensation for the opioid epidemic and provide needed anti-overdose drugs to those impacted.

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#### I. INTRODUCTION

Amy was prescribed Vicodin<sup>1</sup> when she was 14 years old after injuring her knee playing soccer.<sup>2</sup> Over the next five years, she continued to receive opioid prescriptions after multiple knee surgeries.<sup>3</sup> When her prescriptions ran out, Amy “would cut herself and smash her injured knee” to justify having her prescriptions refilled.<sup>4</sup> By the time she was 18, Amy was so desperate for more Vicodin that she intentionally crashed her car.<sup>5</sup> Eventually, with the help of her family and friends, Amy successfully completed addiction treatment and is now sober.<sup>6</sup>

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1. *See Vicodin*, MERRIAM-WEBSTER.COM DICTIONARY, <http://bit.ly/2oUk1i7> (last visited Oct. 27, 2019) (defining Vicodin as a combination of acetaminophen and hydrocodone); *see also Prescription Opioids*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://bit.ly/2PQUKQU> (last visited Oct. 28, 2019) (noting that Vicodin, like other prescription opioids, “can be used to treat moderate-to-severe pain and [is] often prescribed following surgery or injury, or for health conditions such as cancer”).

2. *See Amy’s Story*, TRUTH, <http://bit.ly/34An8e7> (last visited Sept. 18, 2019).

3. *See id.*

4. *Id.*

5. *See id.*

6. *See id.*

Joe became addicted to OxyContin<sup>7</sup> after a car accident sent him to the hospital in his early twenties.<sup>8</sup> Like Amy, Joe resorted to self-harm to continue receiving his prescription.<sup>9</sup> Once, he threw himself off of a high wall with hopes of receiving more OxyContin for his injuries.<sup>10</sup> Another time, Joe walked in front of a moving car to ensure he would be hit.<sup>11</sup> Joe's addiction came to a head when he crawled under a car that was propped up on jacks in his driveway.<sup>12</sup> Joe kicked a jack out from under the car, causing the car to fall, crushing his spine on impact.<sup>13</sup> Luckily, Joe's wife and two neighbors lifted the car off of him, ultimately saving his life.<sup>14</sup> Following this incident, Joe addressed his opioid addiction by abstaining from controlled substances and is currently sober.<sup>15</sup>

Stories like Amy's and Joe's are not uncommon.<sup>16</sup> According to the U.S. Department of Health and Human Services (HHS),<sup>17</sup> 11.4 million people have misused prescription opioids at some point in their lives,<sup>18</sup> and approximately 130 people died every day from opioid-related drug overdoses in 2018 and 2019.<sup>19</sup> In response to the national mass addiction to opioids, HHS declared a public health emergency in 2017.<sup>20</sup>

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7. See *Prescription Opioids*, *supra* note 1 (noting that OxyContin can be used to treat moderate-to-severe pain after surgery or injury); see also discussion *infra* Section II.B.1. See generally Ameet Sarpatwari et al., *The Opioid Epidemic: Fixing a Broken Pharmaceutical Market*, 11 HARV. L. & POL'Y REV. 469 (2017) (noting that Oxycontin is a synthetic combination of Contin and oxycodone).

8. See *Joe's Story*, TRUTH, <http://bit.ly/2PQB12n> (last visited Sept. 18, 2019).

9. See *id.*

10. See *id.*

11. See *id.*

12. See *id.*

13. See *id.*

14. See *id.*

15. See *id.*

16. See, e.g., *Chris's Story*, TRUTH, <http://bit.ly/2Q3j0j1> (last visited Oct. 27, 2019); *Kyle's Story*, TRUTH, <http://bit.ly/32hE5sg> (last visited Oct. 27, 2019); *Rebekkah's Story*, TRUTH, <http://bit.ly/2PW9fCX> (last visited Oct. 27, 2019).

17. See generally *About HHS*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://bit.ly/39vXFpo> (last visited Jan. 1, 2020) (describing HHS as a United States government agency with a mission of "enhance[ing] and protect[ing] the health and well-being of all Americans . . . by providing for effective health and human services and fostering advances in medicine, public health, and social services").

18. See *What Is the U.S. Opioid Epidemic?*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://bit.ly/2rhkuvr> (last updated Sept. 4, 2019); see also *What Are Opioids?*, JOHNS HOPKINS MED., <http://bit.ly/2JYOoeC> (last visited Oct. 28, 2019) (listing the most commonly used opioids as OxyContin and Vicodin (prescription opioids), fentanyl (synthetic opioid), and heroin (illegal drug)); *Heroin and Opioid Policy*, CRIM. JUST. POL'Y FOUND., <http://bit.ly/32s2lbr> (last visited Oct. 28, 2019) (listing the most commonly prescribed opioids as "morphine, OxyContin, Vicodin, codeine and Percocet").

19. See *What Is the U.S. Opioid Epidemic?*, *supra* note 18.

20. See *id.*

But in the 16 years before HHS's declaration, the opioid epidemic had already cost the United States an estimated \$1 trillion.<sup>21</sup> In 2013, the aggregate cost borne by federal, state, and local governments for "prescription opioid-related overdose, abuse, and dependence was over \$78.5 (\$70.1–\$87.3) billion."<sup>22</sup> To alleviate the burden<sup>23</sup> of paying for the opioid epidemic, states started suing prescription opioid manufacturers for their roles in the opioid epidemic.<sup>24</sup> On August 26, 2019, Oklahoma made national news<sup>25</sup> for its lawsuit against Purdue Pharma<sup>26</sup> and other pharmaceutical companies for the companies' roles in fueling the opioid epidemic.<sup>27</sup> Purdue Pharma eventually settled the case for \$270 million.<sup>28</sup>

Prior to and following *Oklahoma v. Purdue Pharma*,<sup>29</sup> other states have pursued various causes of action to obtain compensation for opioid-epidemic-related costs.<sup>30</sup> For example, at least 20 states, including

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21. See Sarah Litton, *Economic Toll of Opioid Crisis in U.S. Exceeded \$1 Trillion Since 2001*, ALTARUM (Feb. 13, 2018), <http://bit.ly/2PVdGxU> (estimating further that the opioid epidemic will cost the country an additional \$500 billion through the end of 2020).

22. Curtis S. Florence et al., *The Economic Burden of Prescription Opioid Overdose, Abuse and Dependence in the United States, 2013*, 54 MED. CARE 901, 904 (2016) (noting that state and local governments paid \$1,823,000,000 for substance abuse treatments, while criminal justice costs (split between federal, state, and local governments), which included funding for police protection, legal costs, correctional facilities, and property lost due to crime, amounted to \$7,654,000,000).

23. See *id.* (listing the aggregate cost of the opioid epidemic at over \$78.5 billion).

24. See generally Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused*, N.Y. TIMES (May 29, 2018), <https://nyti.ms/2uxcg3R> [hereinafter *Origins of an Epidemic*] ("States and cities continue to file a wave of lawsuits against Purdue Pharma and other opioid manufacturers and distributors.").

25. See Beth Macy, *Purdue Pharma and Johnson & Johnson Opioid Cases Expose Big Pharma's Addiction Lies*, NBC NEWS (Aug. 27, 2019, 4:07 PM), <https://nbcnews.to/34DZrS2> (noting that Purdue Pharma settled *Okla. v. Purdue Pharma* for \$270 million); see also Jan Hoffman, *Johnson & Johnson Ordered to Pay \$572 Million in Landmark Opioid Trial*, N.Y. TIMES (Aug. 26, 2019), <https://nyti.ms/34AJw75>.

26. See Sarpatwari et al., *supra* note 7, at 463, 469 (noting that Purdue Pharma created OxyContin, an extended-release oxycodone, and had the drug patented by the United States Patent and Trademark Office in November 1993). See generally *About Purdue Pharma L.P.*, PURDUE PHARMA, <http://bit.ly/2PZhJsS> (last visited Oct. 28, 2019) (explaining that Purdue Pharma defines itself and its subsidiaries as "physician-founded and physician-led companies that develop, manufacture and market medications and consumer health products to meet the evolving needs of healthcare professionals, patients, consumers and caregivers").

27. See generally *Oklahoma v. Purdue Pharma*, CJ-2017-816, at 4–5 (D. Okla. Cleveland Cty. Aug. 26, 2019).

28. See Martha Bebinger, *Purdue Pharma Agrees to \$270 Million Opioid Settlement with Oklahoma*, NPR (Mar. 26, 2019, 2:20 PM), <https://n.pr/36im4Nb>.

29. See generally *Oklahoma v. Purdue Pharma*, CJ-2017-816 (finding that Defendants violated Oklahoma's public nuisance laws for their roles in the opioid epidemic).

30. See generally Mot. for Leave to File Bill of Complaint at 7, *Arizona v. Sackler*, No. 220151, (U.S. July 31, 2019) (outlining Arizona's complaint against Purdue Pharma in the Supreme Court); Second Amended Complaint at 1, *Cty. of Summit, Ohio v. Purdue Pharma*, No. 18-op-45090 (N.D. Ohio May 18, 2018) (outlining the complaints of the

Virginia<sup>31</sup> and Delaware,<sup>32</sup> have sued the current owners of Purdue Pharma, the Sackler family,<sup>33</sup> in state court.<sup>34</sup> The Ohio counties of Cuyahoga and Summit have litigated against Purdue Pharma in federal court.<sup>35</sup> Arizona went even further and filed a bill of complaint<sup>36</sup> directly to the Supreme Court, which was ultimately denied.<sup>37</sup>

However, Purdue Pharma, creator of the prescription opioid OxyContin,<sup>38</sup> complicated the pending suits against it and the Sackler family<sup>39</sup> in September 2019.<sup>40</sup> After months of negotiations between

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Ohio counties of Cuyahoga and Summit against Purdue Pharma in federal court); *Delaware Attorney General Sues Family that Owns Purdue Pharma*, DEL. ST. NEWS (Sept. 10, 2019), <http://bit.ly/2Noat8m> (noting that Delaware sued Purdue Pharma and the Sacklers in state court); Associated Press, *Virginia Joins States Suing Owners of Purdue Pharma*, NBC 12 (Sept. 11, 2019, 10:32 AM), <http://bit.ly/2ClrfyJ> (noting that Virginia sued Purdue Pharma and the Sacklers in state court).

31. See Associated Press, *supra* note 30.

32. See *Delaware Attorney General Sues Family that Owns Purdue Pharma*, *supra* note 30.

33. The Sackler brothers, Arthur, Raymond, and Mortimer, purchased Purdue Pharma (at the time, named Purdue Frederick) in 1952. See Patrick Radden Keefe, *The Family that Built an Empire of Pain*, NEW YORKER (Oct. 23, 2017), <http://bit.ly/34Cq3mB>. Ownership and control of the company has passed to spouses, children, and grandchildren of Arthur, Raymond, and Mortimer. See *id.* Purdue Pharma is a privately held company and has been described as “the Sackler family’s private domain.” *Id.*; see also Jared S. Hopkins & Andrew Scurria, *Sacklers Received as Much as \$13 Billion in Profits from Purdue Pharma*, WALL ST. J. (Oct. 4, 2019, 9:07 PM), <https://on.wsj.com/33qVno4> (estimating that the Sackler family made between \$12 billion and \$13 billion in profits from Purdue Pharma, which North Carolina Attorney General Josh Stein argued is particularly troubling after the company filed for bankruptcy because “[t]he Sackler family is trying to take advantage of the fact that they’ve extracted nearly all the money out of Purdue and pushed the carcass of the company into bankruptcy”).

34. See Laura Strickler, *At Least 20 States and D.C. Reject Settlement with OxyContin Maker Purdue Pharma*, NBC NEWS (Sept. 11, 2019, 7:18 PM), <https://nbcnews.to/33o3FNE>.

35. See Second Amended Complaint at 1, *Cty. of Summit, Ohio v. Purdue Pharma*, No. 18-op-45090 (N.D. Ohio May 18, 2018). *But see* Pet. for Writ of Mandamus of State of Ohio at 1, *Cty. of Summit, Ohio v. Purdue Pharma*, No. 1:18-op-45090, (6th Cir. Aug. 30, 2019) (noting the Ohio Attorney General’s argument that the State of Ohio should be the one to bring such claims, not two counties).

36. See *Bill*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “bill of complaint” as “an original bill that begins an action in a court of equity”).

37. See Mot. for Leave to File Bill of Complaint at 7, *Arizona v. Sackler*, No. 22O151 (U.S. July 31, 2019); see also No. 22O151, SUPREME COURT OF THE U.S., <https://bit.ly/3gpuGGG> (last visited July 3, 2020) [hereinafter No. 22O151, SUPREME COURT OF THE U.S.] (noting that the Supreme Court denied Arizona’s motion).

38. See Sarpatwari et al. *supra* note 7, at 467; see also discussion *infra* Section II.B.

39. The Sackler family created Purdue Pharma, and descendants of the original creators still run the company today. See Keefe, *supra* note 33; see also discussion *infra* Section II.B.

40. See Renae Merie & Lenny Bernstein, *Purdue Pharma’s Bankruptcy Plan Includes Special Protection for the Sackler Family Fortune*, WASH. POST (Sept. 18, 2019, 4:38 PM), <https://wapo.st/2Nocz0T>.

Purdue Pharma and its shareholders, the company announced a proposed bankruptcy settlement.<sup>41</sup> Per the settlement, Purdue Pharma would declare bankruptcy and pay out between \$10 billion and \$12 billion in assets to settle current lawsuits against the company.<sup>42</sup> The company would then be resurrected to manufacture anti-overdose drugs and other addiction treatments.<sup>43</sup> Nonetheless, at least 20 state attorneys general who sued Purdue Pharma declined the proposed settlement.<sup>44</sup>

Part II of this Comment first explores the history of the opioid epidemic<sup>45</sup> and what led manufacturers like Purdue Pharma to advertise prescription opioids as safe, non-addictive substances.<sup>46</sup> Part II then provides an in-depth analysis of *Oklahoma v. Purdue Pharma*, which, along with other litigation,<sup>47</sup> resulted in Purdue Pharma's controversial proposed settlement agreement.<sup>48</sup> Part III recommends that states accept Purdue Pharma's settlement agreement because it guarantees money and anti-overdose medication to the states.<sup>49</sup> Finally, Part IV summarizes this Comment and concludes that Purdue Pharma's involvement in the opioid epidemic impels the company to compensate states for the money expended and the lives lost.<sup>50</sup>

## II. BACKGROUND

In 2017, HHS declared the opioid epidemic a public health emergency.<sup>51</sup> Because Purdue Pharma marketed OxyContin as a non-addictive drug for the treatment of chronic pain, the number of people using the drug increased rapidly from 1997 to 2002.<sup>52</sup> The financial expense required for states to treat individuals impacted by the opioid

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41. *See id.*

42. *See id.*; *see also* Strickler, *supra* note 34 (noting that more than 2,000 pending lawsuits exist against Purdue Pharma and/or the Sackler family).

43. *See* Merie & Bernstein, *supra* note 40.

44. *See* Strickler, *supra* note 34.

45. *See* discussion *infra* Section II.A.

46. *See* discussion *infra* Section II.B.

47. *See* discussion *infra* Section II.D.2.

48. *See* discussion *infra* Section II.D.1.

49. *See* discussion *infra* Part III.

50. *See* discussion *infra* Part IV.

51. *See What Is the U.S. Opioid Epidemic?*, *supra* note 18; *see also* Public Health Services Act, 42 U.S.C. §§ 247d(a)-(a)(2) (2019) (stating that if the Secretary determines that “(1) a disease or disorder presents a public health emergency; or (2) a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists, the Secretary may take such action as may be appropriate to respond to the public health emergency”).

52. *See* U.S. GEN. ACCOUNTING OFF., PRESCRIPTION DRUGS: OXYCONTIN ABUSE AND DIVERSION AND EFFORTS TO ADDRESS THE PROBLEM, at 18 (Dec. 2003), <http://bit.ly/33zIVCs>.

epidemic and the immense havoc wreaked on states' citizens led states to sue Purdue Pharma for its role in fueling the opioid epidemic.<sup>53</sup>

#### A. A Brief History of the Opioid Epidemic

An opioid is a “natural, synthetic, or semi-synthetic<sup>54</sup> chemical[] that interact[s] with opioid receptors on nerve cells in the body and brain.”<sup>55</sup> Opioids bind to opioid receptors in the brain that modulate pain in the central nervous system<sup>56</sup> and peripheral nervous system.<sup>57</sup> In moderate doses, opioids “dull[] the senses, relieve[] pain, and induce[] profound sleep but in excessive doses cause[] stupor, coma, or convulsions.”<sup>58</sup>

Opioids derive from poppy plants, which were first cultivated around 3400 B.C. and nicknamed the “joy plant.”<sup>59</sup> Poppies were eventually used to treat pain and other ailments throughout Europe and

53. See Mot. for Leave to File Bill of Complaint at 2, *Arizona v. Sackler*, No. 22O151 (U.S. July 31, 2019); *Oklahoma v. Purdue Pharma*, CJ-2017-816, at 26, 29; *Pennsylvania v. Purdue Pharma*, No. 257-MD-19, at 4, 12, 107–110 (Pa. Commw. Ct. May 2, 2019).

54. See Andrew Rosenblum et al., *Opioids and the Treatment of Chronic Pain: Controversies, Current Status, and Future Directions*, 16 EXPERIENTIAL & CLINICAL PSYCHOPHARMACOLOGY 405, 406 (2008) (defining semisynthetic opiates as “drugs that are synthesized from naturally occurring opiates (such as heroin from morphine and oxycodone from thebaine)"); *Narcotics (Opioids)*, U.S. DRUG ENFT ADMIN., <http://bit.ly/2NkOI9w> (last visited Oct. 28, 2019) (defining semi-synthetic opioids as “synthesized from naturally occurring products, such as morphine and codeine, and includ[ing] heroin, oxycodone, hydrocodone, and hydromorphone”); see also Rima J. Oken, *Curing Healthcare Providers’ Failure to Administer Opioids in the Treatment of Severe Pain*, 23 CARDOZO L. REV. 1917, 1992 n.27 (2002).

55. *Opioid Overdose: Commonly Used Terms*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://bit.ly/2NmdRAAt> (last visited Oct. 28, 2019).

56. See generally *Central Nervous System*, MERRIAM-WEBSTER.COM DICTIONARY, <http://bit.ly/2CgNsOi> (last visited October 27, 2019) (defining the central nervous system as “the part of the nervous system which in vertebrates consists of the brain and spinal cord, to which sensory impulses are transmitted and from which motor impulses pass out, and which coordinates the activity of the entire nervous system”); *The Central Nervous System*, UNIV. OF CAL. BERKLEY, <http://bit.ly/32kDLsU> (last visited Nov. 6, 2019) (noting that the central nervous system “is responsible for integrating sensory information and responding accordingly”).

57. See Rosenblum et al., *supra* note 54, at 406. See generally *Peripheral Nervous System*, MERRIAM-WEBSTER.COM DICTIONARY, <http://bit.ly/2PTjNTu> (last visited Oct. 27, 2019) (defining the peripheral nervous system as “the part of the nervous system that is outside the central nervous system and comprises the cranial nerves excepting the optic nerve, the spinal nerves, and the autonomic nervous system”); *The Peripheral Nervous System*, NAT’L CANCER INST., <http://bit.ly/2Nnstj5> (last visited Nov. 6, 2019) (noting that the peripheral nervous system “consists of the nerves that branch out from the brain and spinal cord” and that “[t]hese nerves form the communication network between the [central nervous system] and the body parts”).

58. *Narcotic*, MERRIAM-WEBSTER.COM DICTIONARY, <http://bit.ly/2qr2vCq> (last visited Nov. 6, 2019); see also Oken, *supra* note 54, at 1992 n.27.

59. Rosenblum et al., *supra* note 54, at 405.

Asia.<sup>60</sup> In the nineteenth century, researchers first articulated that opioid use included risk of abuse and addiction,<sup>61</sup> in addition to sought-after pain relief.<sup>62</sup> Moreover, during the twentieth century, the “perception among professionals in the United States was that the long-term use of opioid therapy to treat chronic pain was contraindicated by the risk of addiction, increased disability and lack of efficacy over time.”<sup>63</sup>

The opinion that the risk of addiction outweighed the benefits of using opioids radically shifted during the 1990s.<sup>64</sup> During this time, healthcare providers increased prescriptions for opioids because of the reassurances of pharmaceutical companies.<sup>65</sup> The pharmaceutical companies manufacturing opioids, such as Purdue Pharma, advertised that opioids were non-habit-forming and not addictive.<sup>66</sup> Specifically, Purdue Pharma representatives told doctors that opioids caused addiction<sup>67</sup> issues in less than 1% of people.<sup>68</sup> Even though Purdue Pharma’s estimate of addiction may accurately reflect opioid use for acute pain, the estimate does not accurately reflect the risk of addiction

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60. *See id.*

61. *See id.* at 405–06.

62. *See id.* (“Dr. Eduard Livenstein, a German physician, produced the first accurate and comprehensive description of addiction to morphine, including the withdrawal syndrome and relapse, and argued that craving for morphine was a physiological response.”).

63. *Id.* at 406; *see also* Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99(2) AM. J. PUB. HEALTH 221, 223 (2009) (listing the potential problems and risks of opioids as “respiratory depression, sedation, constipation, and nausea; inconsistent improvement in functioning; opioid-induced hyperalgesia; adverse hormonal and immune effects of long-term opioid treatment; a high incidence of prescription opioid abuse behaviors; and an ill-defined and unclarified risk of iatrogenic addiction”).

64. *See Opioid Overdose Crisis*, NAT’L INST. ON DRUG ABUSE, <http://bit.ly/34BxwCj> (last visited Sept. 19, 2019).

65. *See id.*

66. *See id.*

67. *See* Kevin E. Vowles et al., *Rates of Opioid Misuse, Abuse, and Addiction in Chronic Pain: A Systematic Review and Data Synthesis*, 156 PAIN 569, 570 (2015) (defining addiction as a “[p]attern of continued use with experience of, or demonstrated potential for, harm” in contrast to abuse, defined as “[i]ntentional use of the opioid for nonmedical purpose, such as euphoria or altering one’s state of consciousness”). *But see Opioid Overdose: Commonly Used Terms*, *supra* note 55 (defining opioid use disorder as “[a] problematic pattern of opioid use that causes significant impairment or distress” and noting that use of this term “is preferred over other terms with similar definitions, ‘opioid abuse or dependence’ or ‘opioid addiction’”).

68. *See* Jonathan P. Novak, *Bootstrapping the Opioid Epidemic: Civil Litigators Are Assisting Communities in Recovering from the Opioid Crisis Where the Federal Government Cannot*, 52 MD. B.J. 57, 59 (2019); *see also* Zee, *supra* note 63, at 223 (noting that Purdue Pharma’s misrepresentation of the addictiveness of opioids did not go unpunished, with “Purdue Frederick Company Inc, an affiliate of Purdue Pharma, along with 3 company executives, ple[ading] guilty to criminal charges of misbranding OxyContin by claiming that it was less addictive and less subject to abuse and diversion than other opioids” and paying “\$634 million in fines”).



in the treatment of chronic pain,<sup>69</sup> which ranges from a low of 3% to a high of 45%.<sup>70</sup>

While pharmaceutical companies created new marketing campaigns that described opioids as low-risk for addiction, research studies about the prevalence of untreated pain prompted prominent medical groups to promote opioid use for pain management.<sup>71</sup> In one study, researchers found that “only 45% of the patients who had experienced pain during [their current] hospitalization were able to remember a nurse ever discussing their pain with them.”<sup>72</sup> The same study found that 27% of patients had chronic pain, which had started months to years earlier.<sup>73</sup> Worries about such chronic pain led the American Pain Society (APS),<sup>74</sup> the Joint Commission on Accreditation of Healthcare Organizations (JCAHO),<sup>75</sup> and the Department of Veterans Affairs (VA),<sup>76</sup> to promote more aggressive pain management, often in the form of opioid use.<sup>77</sup> In 1996, the President of APS went as far as declaring pain “the fifth vital

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69. See Zee, *supra* note 63, at 223. See generally *Opioid Overdose: Commonly Used Terms*, *supra* note 55 (defining acute pain as “[p]ain that usually starts suddenly and has a known cause, like an injury or surgery” and also noting that acute pain “normally gets better as your body heals and lasts less than three months”); *id.* (defining chronic pain as “[p]ain that lasts 3 months or more and can be caused by a disease or condition, injury, medical treatment, inflammation, or an unknown reason”).

70. See Zee, *supra* note 63, at 223 (citing multiple studies that show prescription drug abuse by chronic pain patients at rates of: 3–18%, 23%, 12%, 34%, 43%, 24–31%, and 45%).

71. See Sarpatwari et al., *supra* note 7, at 465.

72. Marilee Donovan et al., *Incidence and Characteristics of Pain in a Sample of Medical-Surgical Inpatients*, 30 PAIN 69, 73 (1987).

73. See *id.* at 72.

74. See *Update on the American Pain Society*, INT’L ASS’N FOR THE STUDY OF PAIN (June 25, 2019), <http://bit.ly/2WZVx3H> (explaining that prior to its dissolution because of bankruptcy, APS made “longstanding and impactful efforts in the US to increase the knowledge of pain and transform public policy and clinical practice to reduce pain-related suffering”); see also *American Pain Society*, AMERICAN ACAD. OF PAIN MED. (June 29, 2019), <http://bit.ly/36FeIUK> (noting that APS dissolved in 2019); U.S. GEN. ACCOUNTING OFF., *supra* note 52, at 24 (noting that Purdue Pharma was one of 28 corporate donors of APS).

75. See *About Us: Facts About The Joint Commission*, THE JOINT COMM’N, <https://bit.ly/2DEUGja> (last visited Nov. 6, 2019) (detailing that JCAHO is a non-profit organization that “accredits and certifies over 22,000 health care organizations and programs in the United States”); see also *id.* (noting that JCAHO’s mission is “[t]o continuously improve health care for the public, in collaboration with other stakeholders, by evaluating health care organizations and inspiring them to excel in providing safe and effective care of the highest quality and value”).

76. See generally *About VA*, U.S. DEP’T OF VETERANS AFFAIRS, <http://bit.ly/32onhix> (last visited Nov. 6, 2019) (defining the vision of the VA as “[t]o provide veterans the world-class benefits and services they have earned - and to do so by adhering to the highest standards of compassion, commitment, excellence, professionalism, integrity, accountability, and stewardship”).

77. See Sarpatwari et al., *supra* note 7, at 465.

sign” determining a person’s health.<sup>78</sup> Because monitoring vital signs is crucial to evaluate the proper functioning of a patient’s body,<sup>79</sup> the APS President sought to elevate pain “to the level of essential information”<sup>80</sup> so that “it would be properly evaluated and managed.”<sup>81</sup> To help with pain management, researchers and physicians urged medical providers to prescribe opioids at greater rates.<sup>82</sup> Purdue Pharma, along with other medical companies, capitalized on the new focus on opioid-based pain management.<sup>83</sup>

### B. *Purdue Pharma and OxyContin’s Role in the Opioid Epidemic*

Purdue Pharma’s first large prescription-drug success occurred during the 1980s with a marketing campaign for a morphine sulfate extended-release tablet called MS Contin.<sup>84</sup> Purdue Pharma created MS Contin at the suggestion of a British physician who told the company that a replacement was needed for traditional morphine.<sup>85</sup> Before the creation of MS Contin, traditional morphine lasted for only four hours, and patients with severe pain had to take six doses a day.<sup>86</sup>

Purdue Pharma controlled the speed at which pills broke down in the body by applying the Contin<sup>87</sup> method to traditional morphine.<sup>88</sup> With the Contin method,

Purdue figured out that by coating not only a tablet’s outer layer, but also the microscopic ingredients inside, with various waxes and

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78. Wesley A. Shumway, Comment, *2017 Drug Laws in West Virginia: The Wrong Prescription for the State’s Opioid Crisis*, 123 PENN ST. L. REV. 559, 562 (2019) (noting that the VA followed APS’s lead and developed the “Pain as the 5th Vital Sign Toolkit” in 2000). See generally *Vital Signs*, MEDLINEPLUS, <http://bit.ly/2PUdgIf> (last visited Nov. 6, 2019) (listing the four main vital signs as body temperature, pulse rate, rate of breathing (respiration rate), and blood pressure).

79. See *Vital Signs*, *supra* note 78 (noting that the four main vital signs “show how well your body is functioning” and are usually taken in a doctor’s office).

80. Natalia E. Morone & Debra K. Weiner, *Pain as the Fifth Vital Sign: Exposing the Vital Need for Pain Education*, 35 CLINICAL THERAPEUTICS 1728, 1728 (2013).

81. *Id.*

82. See Sarpatwari et al., *supra* note 7, at 465.

83. See *id.* at 466.

84. See Keefe, *supra* note 33. See generally *Label: MS Contin—Morphine Sulfate Tablet*, DAILYMED, <http://bit.ly/2Q0mUsV> (last visited Nov. 6, 2019) (listing the full name of MS Contin as “morphine sulfate extended-release tablets”).

85. See Grant Robertson & Karen Howlett, *How a Little-Known Patent Sparked Canada’s Opioid Crisis*, GLOBE & MAIL (last updated Nov. 12, 2017), <https://tgam.ca/2CgXCi5>.

86. See *id.*

87. Contin is short for continuous when used in this capacity. See Keefe, *supra* note 33.

88. See Sarpatwari et al., *supra* note 7, at 469 (noting that Purdue Pharma had developed Contin in 1972 as “a method to control the release of the active ingredient of a drug from a tablet”); see also Robertson & Howlett, *supra* note 85.

resins, it could manipulate how fast the pill breaks down inside the body. In doing so, researchers could control the rate at which the active medication was released into the blood, and prolong its effect.<sup>89</sup>

The initial dose of medication comes when the tablet dissolves partly in the stomach.<sup>90</sup> As the tablet passes through the intestinal tract, small doses of medication are released.<sup>91</sup> Consequently, MS Contin can disperse medicine for eight to ten hours after ingestion, as compared to the four-hour dosage from traditional morphine.<sup>92</sup> As MS Contin's patent was about to expire in the late 1980s, Purdue executives and scientists started experimenting with drugs to replace it.<sup>93</sup> The company soon succeeded with OxyContin.<sup>94</sup>

### 1. Purdue Pharma's Creation of OxyContin

In a 1990 memo from a Purdue Pharma scientist to Richard Sackler,<sup>95</sup> the scientist described "ongoing efforts to create a product containing oxycodone."<sup>96</sup> In 1993, the United States Patent and Trademark Office (USPTO) granted Purdue Pharma a patent for its synthetic combination of Contin<sup>97</sup> and oxycodone<sup>98</sup> to form OxyContin, an extended-release oxycodone.<sup>99</sup> According to information filed in the patent for OxyContin, 12.5–42.5% of oxycodone would be released into the bloodstream one hour after taking OxyContin.<sup>100</sup> After six hours, 55–

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89. Robertson & Howlett, *supra* note 85. *But see Label: MS Contin– Morphine Sulfate Tablet*, *supra* note 84 (explaining that the controlled-release of MS Contin may have negative effects because "there is a greater risk for overdose and death due to the larger amount of morphine present").

90. *See* Robertson & Howlett, *supra* note 85.

91. *See id.*

92. *See id.*

93. *See* Keefe, *supra* note 33 (referencing a 1990 memo sent by a Purdue Pharma scientist who wrote that "MS Contin could 'face such serious generic competition that other controlled-release opioids must be considered'").

94. *See* Sarpatwari et al., *supra* note 7, at 469; *see also infra* Section II.B.1.

95. *See* Keefe, *supra* note 33 (noting that Richard was the son of Purdue Pharma founder Raymond Sackler and had trained as a doctor).

96. *See id.*; *see also Oxycodone*, REHABSPOT, <http://bit.ly/32nPoPB> (last visited Nov. 6, 2019) (defining oxycodone as a semi-synthetic opiate derived from a chemical found in opium called thebaine and also noting that oxycodone is "most commonly used for post-surgery recovery, broken bones, steady pain, clinically sensitive pain response, chronic pain, steady pain, and cancer-related pain").

97. *See* Robertson & Howlett, *supra* note 85 (explaining how Contin creates an extended-release formula).

98. *See Oxycodone*, *supra* note 96 and accompanying parenthetical.

99. *See* Sarpatwari et al., *supra* note 7, at 469; *see also* Robertson & Howlett, *supra* note 85.

100. Controlled Release Oxycodone Compositions, U.S. Patent No. 5,266,331 (filed Nov. 27, 1991) (issued Nov. 30, 1993).

85% of oxycodone would be released.<sup>101</sup> The USPTO noted that “the present inventors have *surprisingly* found that, in the case of oxycodone, a peak plasma level at between 2–4 hours after administration gives at least 12 hours pain relief.”<sup>102</sup> According to Purdue Pharma’s patent for OxyContin, the drug would be effective for up to ten hours after the drug had reached peak plasma level.<sup>103</sup>

In 1995, the Food and Drug Administration (FDA)<sup>104</sup> approved OxyContin “for the management of moderate to severe pain in which use of an opioid analgesic is appropriate for more than a few days.”<sup>105</sup> Notably, the FDA did not base the decision to approve OxyContin on clinical trials from Purdue Pharma.<sup>106</sup> Instead, the FDA based its approval on the unfounded theory that the controlled-release formula of OxyContin would reduce its appeal to drug abusers.<sup>107</sup> This theory rested on the idea that “drug abusers favored shorter-acting painkillers because the narcotic they contained was released faster and so produced a quicker ‘hit.’”<sup>108</sup> Capitalizing on evolving perceptions of pain management,<sup>109</sup> Purdue Pharma made OxyContin available to the public in 1996.<sup>110</sup>

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101. *See id.*; *see also* Jennifer Le, *Drug Absorption: Oral Administration*, MERCK MANUAL PROF'L VERSION (May 2019), <https://mrkmnls.co/2SI3aLJ> (noting that the absorption of oral drugs is affected by “differences in luminal pH along the GI tract[,] [s]urface area per luminal volume[,] [b]lood perfusion[,] [p]resence of bile and mucus[,] [and] [t]he nature of epithelial membranes”).

102. '331 Patent (emphasis added).

103. *See id.*

104. *See generally* *What We Do*, U.S. FOOD & DRUG ADMIN., <http://bit.ly/2qCZZZJ> (last visited Nov. 7, 2019) (“The Food and Drug Administration is responsible for protecting the public health by ensuring the safety, efficacy, and security of human and veterinary drugs, biological products, and medical devices . . .”).

105. *See* U.S. GEN. ACCOUNTING OFF., *supra* note 52, at 35 (quoting the language approved by the FDA in 1995).

106. *See* *Origins of an Epidemic*, *supra* note 24.

107. *See id.* (noting that Purdue Pharma made this claim, and the FDA accepted the claim without findings from clinical trials).

108. *Id.* (noting, additionally, that this theory was incorrect because Purdue Pharma executives learned that drug abusers actually sought out OxyContin because it had higher narcotic levels than short-acting painkillers); *see* Robertson & Howlett, *supra* note 85 (“Purdue would later admit that it knew the claims it made about OxyContin’s safety weren’t accurate, but as the profits piled up, the company wasn’t letting on.”); *see also* Barry Meier, *In Guilty Plea, OxyContin Maker to Pay \$600 Million*, N.Y. TIMES (MAY 10, 2007), <https://nyti.ms/33zN3m2> [hereinafter *In Guilty Plea, OxyContin Maker to Pay \$600 Million*] (“But both experienced drug abusers and novices, including teenagers, soon discovered that chewing an OxyContin tablet or crushing one and then snorting the powder or injecting it with a needle produced a high as powerful as heroin.”).

109. *See* Morone & Weiner, *supra* note 80, at 1728.

110. *See* U.S. GEN. ACCOUNTING OFF., *supra* note 52, at 22.

## 2. Purdue Pharma's Marketing of OxyContin

Purdue Pharma used a multi-pronged approach to market OxyContin to physicians and patients.<sup>111</sup> As part of the marketing campaign, the company hosted multiple all-expenses-paid symposia to influence physicians to prescribe the new synthetic blend.<sup>112</sup> Purdue Pharma also funded an educational campaign with JCAHO<sup>113</sup> to educate hospital staff about postoperative pain treatment and compliance with JCAHO's pain standards.<sup>114</sup>

In addition to influencing doctors through an educational campaign, Purdue Pharma also targeted doctors directly in their offices.<sup>115</sup> From 1996 to 2001, Purdue Pharma increased the size of its sales force from 318 to 671 sales representatives.<sup>116</sup> These representatives received higher bonuses than ever before, with average bonuses exceeding average salaries by 30%.<sup>117</sup> Purdue Pharma also created "prescriber profiles on individual physicians,"<sup>118</sup> which allowed Purdue Pharma to identify the highest prescribers of opioids throughout the country.<sup>119</sup> Purdue Pharma sales representatives targeted these high-prescribing physicians and urged them to regularly use OxyContin as a pain management drug.<sup>120</sup>

Purdue Pharma's aggressive marketing efforts worked, and OxyContin prescriptions increased nearly tenfold.<sup>121</sup> In 1997, the number

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111. *See id.* at 21 ("These approaches included expanding its physician speaker bureau and conducting speaker training conferences, sponsoring pain-related educational programs, issuing OxyContin starter coupons for patients' initial prescriptions, sponsoring pain-related Web sites, advertising OxyContin in medical journals, and distributing OxyContin marketing items to health care professionals.").

112. *See Zee, supra* note 63, at 221; *see also* U.S. GEN. ACCOUNTING OFF., *supra* note 52, at 22 (noting that these conferences were discontinued in the fall of 2000 after over 5,000 physicians, pharmacists, and nurses attended and listened to health care practitioners trained by Purdue Pharma to discuss the use of opioids and OxyContin).

113. *See About Us: About The Joint Commission, supra* note 75.

114. *See* U.S. GEN. ACCOUNTING OFF., *supra* note 52, at 23 ("Under an agreement with JCAHO, Purdue was the only drug company allowed to distribute certain education videos and a book about pain management . . .").

115. *See Zee, supra* note 63, at 221.

116. *See id.* at 222.

117. *See* Sarpatwari et al., *supra* note 7, at 467; *see also Zee, supra* note 63, at 222 ("In 2001, in addition to the average sales representative's annual salary of \$55[, ]000, annual bonuses averaged \$71[, ]500, with a range of \$15[, ]000 to nearly \$240[, ]000. Purdue paid \$40 million in sales incentive bonuses to its sale representatives that year.").

118. *Zee, supra* note 63, at 222.

119. *See id.*

120. *See id.* (noting that Purdue Pharma also used a coupon program for OxyContin to provide patients with a free supply of the drug for up to 30 days, with more than 34,000 coupons redeemed nationally throughout the course of the program); *see also* Sarpatwari et al., *supra* note 7, at 467 (noting that Purdue Pharma outspent its rival opioid maker, Janssen, by six to twelve times for marketing OxyContin).

121. *See* U.S. GEN. ACCOUNTING OFF., *supra* note 52, at 18.

of non-cancer OxyContin prescriptions<sup>122</sup> was 670,000.<sup>123</sup> By 2002, that number jumped to 6.2 million.<sup>124</sup> Purdue Pharma's sale of OxyContin generated \$2.8 billion in sales between 1996 and 2001, and an additional \$2 billion from 2008 to 2014.<sup>125</sup> However, the marketing strategy was, at best, unethical.<sup>126</sup>

The FDA cited Purdue Pharma twice for using advertisements that violated the Federal Food, Drug, and Cosmetic Act (FD&C Act).<sup>127</sup> The FDA first cited Purdue Pharma in May 2000 for an OxyContin advertisement in a medical journal.<sup>128</sup> The FDA noted several problems in the advertisement, most notably that "the advertisement suggested OxyContin could be used as an initial therapy for the treatment of osteoarthritis pain without substantial evidence to support this claim,"<sup>129</sup> and that the advertisement marketed OxyContin to the elderly without noting risk information for that specific group.<sup>130</sup>

The FDA cited Purdue Pharma a second time in January 2003, again for Oxycontin advertisements in medical journals.<sup>131</sup> The FDA said that the advertisements "minimized [OxyContin's] risks and overstated its efficacy, by failing to prominently present information . . . warning on the potentially fatal risks associated with OxyContin and its abuse liability, along with omitting important information about the limitations on the indicated use of OxyContin."<sup>132</sup>

Based on Purdue Pharma's advertising campaign and marketing tactics, doctors began to readily prescribe opioids.<sup>133</sup> However, Purdue

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122. *See id.* (noting that "Purdue promoted the drug to physicians for noncancer pain conditions that can be caused by arthritis, injuries, and chronic diseases, in addition to cancer pain").

123. *See id.*

124. *See id.*

125. *See* Sarpatwari et al., *supra* note 7, at 467. *But see* Nate Raymond, *OxyContin Maker Purdue Pharma Cuts Remaining Sales Force*, REUTERS (June 20, 2019, 9:41 AM), <https://reut.rs/2sg4xGS> (noting that "sales of OxyContin have been declining in recent years," with "OxyContin generat[ing] \$1.74 billion in sales in 2017, down from \$2.6 billion five years earlier").

126. *See* U.S. GEN. ACCOUNTING OFF., *supra* note 52, at 25.

127. *See id.*; *see also* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. ch. 9 (2018). *See generally* *What Is the Difference Between the Federal Food, Drug, and Cosmetic Act (FD&C Act), FDA Regulations, and FDA Guidance?*, U.S. FOOD & DRUG ADMIN., <http://bit.ly/2ploNqe> (last visited Nov. 7, 2019) (noting that the FD&C Act is a federal law that establishes the limits within which the FDA operates).

128. *See* U.S. GEN. ACCOUNTING OFF., *supra* note 52, at 25–26 (stating that Purdue Pharma stopped running the advertisement after the citation).

129. *Id.* at 26.

130. *See id.*

131. *See id.*

132. *Id.*

133. *See* *Petition to Require Purdue Pharma L.P. to Revise the Labeling of OxyContin Tablets*, U.S. FOOD & DRUG ADMIN., at 18 (Jan. 23, 2004), <http://bit.ly/2QfeEVI> (noting that approximately "27.8% of OxyContin prescriptions

Pharma failed to deliver on its product.<sup>134</sup> Purdue Pharma marketed OxyContin as lasting for 12 hours.<sup>135</sup> And yet, after the drug's debut in 1996, the company was "confronted with additional evidence, including complaints from doctors, reports from its own sales reps and independent research," showing that many patients were not getting 12 hours of relief.<sup>136</sup>

As a result, physicians prescribed OxyContin at shorter intervals, attempting to manage pain with doses of OxyContin at much higher than the recommended rate.<sup>137</sup> According to a nationwide analysis by the *LA Times*, "[m]ore than half of long-term OxyContin users are on doses that public health officials consider dangerously high."<sup>138</sup> Purdue Pharma sales representatives instructed doctors to prescribe stronger doses, rather than more frequent ones,<sup>139</sup> leading some to accuse Purdue Pharma of being a "key player in fomenting America's opioid crisis."<sup>140</sup>

Although Purdue Pharma denies that its marketing techniques<sup>141</sup> or product failures<sup>142</sup> had any hand in the opioid epidemic,<sup>143</sup> in 2007, Purdue Pharma and some of its representatives were criminally charged for misbranding OxyContin.<sup>144</sup> The company and three Purdue Pharma executives<sup>145</sup> pled guilty to misbranding OxyContin by mispresenting "its risk of addiction and potential to be abused."<sup>146</sup> Purdue Pharma and its

written by family practice physicians and general practitioners were dosed [every eight hours] or more frequently in 2001"); see also Harriet Ryan et al., 'You Want a Description of Hell?' *OxyContin's 12-Hour Problem*, *L.A. TIMES* (May 5, 2016), <https://lat.ms/2QaLAhU>.

134. See Ryan et al., *supra* note 133. But see *Origins of an Epidemic*, *supra* note 24 (noting that a Purdue Pharma spokesperson said, "Suggesting that activities that last occurred more than 16 years ago are responsible for today's complex and multifaceted opioid crisis is deeply flawed").

135. See Ryan et al., *supra* note 133.

136. *Id.*

137. See *id.*

138. *Id.*

139. See *id.*; see also Zee, *supra* note 63, at 223 (noting that trials of "opioids for chronic, non-cancer-related pain showed statistically significant but small to modest improvements in pain relief, with no consistent improvement in physical function").

140. Patrice Taddonio, *Revisit Purdue Pharma's Role in the Opioid Crisis*, *FRONTLINE* (Sept. 12, 2019), <https://to.pbs.org/2SUGYyn>.

141. See U.S. GEN. ACCOUNTING OFF., *supra* note 52, at 25–26 (outlining the FDA's citations of Purdue Pharma's advertisements for violating the FD&C Act).

142. See Ryan et al., *supra* note 133 (discussing the failure of OxyContin to last for 12 hours).

143. See *Origins of an Epidemic*, *supra* note 134 and accompanying parenthetical.

144. See *Origins of an Epidemic*, *supra* note 24; *In Guilty Plea, OxyContin Maker to Pay \$600 Million*, *supra* note 108.

145. See generally *Origins of an Epidemic*, *supra* note 24 (noting that the three executives charged were "the company's chief executive, Michael Friedman; its top medical officer, Dr. Paul D. Goldenheim; and Mr. Udell," Purdue Pharma's general counsel).

146. See *id.*

three executives paid \$634.5 million in combined fines.<sup>147</sup> While the Justice Department<sup>148</sup> viewed the settlement favorably, the decision not to bring more serious charges and air prosecutors' evidence<sup>149</sup> "meant that a critical chance to slow the trajectory of the opioid epidemic was lost."<sup>150</sup> Such a trajectory change could have been instrumental in avoiding the epidemic's unexpected surge in the 2010s.<sup>151</sup>

### C. *The Opioid Epidemic Today*

The opioid epidemic has been costly, both in the number of lives impacted and the economic burden incurred.<sup>152</sup> Nearly 11.4 million people have misused prescription opioids.<sup>153</sup> In 2018 and 2019, an average of 130 people died *every single day* from opioid-related drug overdoses.<sup>154</sup> But while these numbers are staggering, and the opioid epidemic is considered an ongoing public health emergency,<sup>155</sup> progress has been made to combat the epidemic.<sup>156</sup> The Centers for Medicare and Medicaid Services (CMS)<sup>157</sup> has seen success in prevention, treatment,

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147. *See id.* (noting that the three executives were sentenced to community service); *see also In Guilty Plea, OxyContin Maker to Pay \$600 Million*, *supra* note 108 (noting that the Western District of Virginia heard the case).

148. *See generally About DOJ*, U.S. DEP'T OF JUSTICE, <http://bit.ly/35ec7iK> (last visited Jan. 1, 2020) (describing the Justice Department as a United States Government agency with a mission to "enforce the law and defend the interests of the United States according to the law; . . . to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans").

149. *See Origins of an Epidemic*, *supra* note 24 (claiming that Purdue Pharma knew about reports of abuse of OxyContin, in addition to "a call to a pharmacy describing OxyContin as the hottest thing on the street").

150. *See id.* (noting that former government officials who question the settlement include Terrance Woodworth, a former Drug Enforcement Administration official, who was knowledgeable about the Purdue Pharma investigation).

151. *See What Is the U.S. Opioid Epidemic?*, *supra* note 18.

152. *See id.*; Litton, *supra* note 21.

153. *See What Is the U.S. Opioid Epidemic?*, *supra* note 18.

154. *See id.*

155. *See Public Health Emergency Declarations*, OFF. OF THE ASSISTANT SEC'Y FOR PREPAREDNESS & RESPONSE, <http://bit.ly/2FedYt2> (last visited Jan. 1, 2020) (noting that the opioid epidemic's Public Health Emergency declaration has been renewed nine times, and as recently as October 2019). *See generally Ongoing Emergencies & Disasters*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://go.cms.gov/2ZFThj8> (last visited Jan. 1, 2020) (listing the opioid epidemic as an ongoing public health emergency).

156. *See CMS Roadmap*, CTRS. FOR MEDICARE & MEDICAID SERVS. (June 2020), <https://go.cms.gov/2SNcmP1>; *HHS by the Numbers*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://bit.ly/2QAgC1L> (last updated Feb. 11, 2020). *But see FDA Plagued by Lack of Training and Oversight During Opioid Crisis, Report Says*, CBS NEWS (Dec. 31, 2019, 7:36 AM), <https://cbsn.ws/2udE4KE> ("A newly released report says the Food and Drug Administration may have failed to set strict enough standards and follow-through for training doctors about the risks associated with opioids.")

157. *See HHS Agencies & Offices*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., <http://bit.ly/2sDraFh> (last updated Oct. 27, 2015) ("The Centers for Medicare & Medicaid



and data collection since the declaration of a public health emergency for the opioid epidemic.<sup>158</sup> In fiscal years 2016 to 2019, HHS provided \$9 billion in grants “to states, tribes, and local communities to fight the opioids crisis.”<sup>159</sup> As a result, over 14,000 substance-abuse facilities exist in the U.S., and 1.27 million Americans are receiving medication-assisted treatment.<sup>160</sup> Even so, the fight against the opioid epidemic, along with treatment costs, have cost states millions, and in some cases, billions, of dollars.<sup>161</sup>

#### D. Recent Lawsuits Against Purdue Pharma

The opioid epidemic has cost the country an estimated \$1 trillion from 2001 to 2017.<sup>162</sup> The burden is only expected to grow, as scholars estimate that the opioid epidemic will cost the country an additional \$500 billion through the end of 2020.<sup>163</sup> The financial toll, combined with the loss of human life,<sup>164</sup> led cities and states to sue Purdue Pharma, the Sackler family, and other pharmaceutical companies to recover at least some epidemic-related costs.<sup>165</sup> States have filed suits in federal and state courts, with varying degrees of success.<sup>166</sup> One of the first states to sue

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Services combines the oversight of the Medicare program, the federal portion of the Medicaid program and State Children’s Health Insurance Program, the Health Insurance Marketplace, and related quality assurance activities.”). *See generally Centers for Medicare & Medicaid Services, CTRS. FOR MEDICARE & MEDICAID SERVS.*, <https://go.cms.gov/37truW0> (last visited Jan. 1, 2020) (listing CMS as a part of HHS).

158. *See CMS Roadmap, supra* note 156.

159. *See HHS by the Numbers, supra* note 156 (noting that 10,422 awards have been given from HHS as part of the \$9 billion in total awards, with the largest total anticipated award amount (\$2,466,000) going toward SAMHSA state opioid response grants). *See generally About Us, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN.*, <http://bit.ly/2QgB1K5> (last updated May 27, 2020) (noting that the Substance Abuse and Mental Health Services Administration (“SAMHSA”) is the agency within HHS “that leads public health efforts to advance the behavioral health of the nation” and whose “mission is to reduce the impact of substance abuse and mental illness on America’s communities”).

160. *See HHS by the Numbers, supra* note 156; *see also Ending America’s Opioid Crisis, THE WHITE HOUSE*, <http://bit.ly/2SGNvfP> (last visited Jan. 1, 2020) (“[T]here has been a 20 percent increase in young adults receiving outpatient treatment. And in 2017, America had an increase in the number of patients age 12 and older with illicit drug-use disorders being treated at specialty facilities and private provider offices.”).

161. *See Litton, supra* note 21; *see also infra* Section III.B.

162. *See Litton, supra* note 21; *see also Florence et al., supra* note 22, at 904 (noting that in 2013 alone, “the aggregate cost for . . . prescription opioid related overdose, abuse and dependence was over \$78.5 (\$70.1 — \$87.3) billion” and that \$1,823,000,000 of that total was left to state and local governments to pay for substance abuse treatments, while an additional \$7,654,000,000 was for criminal justice costs).

163. *See Litton, supra* note 21.

164. *See What Is the U.S. Opioid Epidemic?, supra* note 18.

165. *See Origins of an Epidemic, supra* note 24.

166. *See discussion infra* Sections II.D.1–II.D.2.

Purdue Pharma was Oklahoma.<sup>167</sup> The litigation produced a \$270 million settlement deal<sup>168</sup> and brought Purdue Pharma's role in the opioid epidemic into the national spotlight.<sup>169</sup>

### 1. *Oklahoma v. Purdue Pharma*

On June 30, 2017, Oklahoma filed suit against 13 pharmaceutical firms ("Defendants"),<sup>170</sup> including Purdue Pharma, for their roles in creating Oklahoma's opioid crisis.<sup>171</sup> The opioid epidemic especially plagued Oklahoma.<sup>172</sup> In 2016, "enough opioids were prescribed in Oklahoma for every adult [there] to have more than 100 pills."<sup>173</sup> In 2017, Oklahoma was the sixth highest opioid-prescribing state,<sup>174</sup> with 88.1 opioid prescriptions written for every 100 people.<sup>175</sup>

Oklahoma made two claims against Purdue Pharma: (1) that the Defendants caused a nuisance<sup>176</sup> under Oklahoma law<sup>177</sup> and (2) that the Defendants created a public nuisance<sup>178</sup> in violation of Oklahoma law.<sup>179</sup>

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167. See *Oklahoma v. Purdue Pharma*, CJ-2017-816, at 26, 29.

168. See Bebinger, *supra* note 28.

169. See Christine Vestal, *Nation's First Opioid Trial Promises Long Odds, High Drama*, PEW (May 24, 2019), <https://bit.ly/2MNy2GE> (stating that *Oklahoma v. Purdue Pharma* was "the first time Americans . . . [heard] the full scope of arguments on both sides in any of the lawsuits claiming that false and aggressive marketing by U.S. painkiller manufacturers caused an opioid overdose crisis").

170. See *Oklahoma v. Purdue Pharma*, CJ-2017-816 at 1 (listing the Defendants as Purdue Pharma L.P.; Purdue Pharma, Inc.; The Purdue Frederick Company; Teva Pharmaceuticals USA, Inc.; Cephalon, Inc.; Johnson & Johnson; Janssen Pharmaceuticals, Inc.; Ortho-McNeil-Janssen Pharmaceuticals, Inc.; Janssen Pharmaceutica, Inc.; Allergan, PLC; Watson Laboratories, Inc.; and Actavis Pharma, Inc.).

171. See *id.* at 1, 4.

172. See *U.S. State Prescribing Rates, 2017*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://bit.ly/2sII46r> (last updated July 31, 2017).

173. See *Oklahoma's Purdue Pharma Settlement Gives OSU-CHS More Resources to Treat Patients, Train Physicians and Tackle the Opioid Crisis Nationwide*, OKLA. ST. UNIV. (Aug. 29, 2019), <http://bit.ly/2QmcWBX> [hereinafter *Oklahoma's Purdue Pharma Settlement*].

174. See *U.S. State Prescribing Rates, 2017*, *supra* note 172 (listing the highest states' opioid prescribing rates per 100 people as Alabama (107.2), Arkansas (105.4), Tennessee (94.4), Mississippi (92.9), and Louisiana (89.5)).

175. See *id.*; see also *Oklahoma's Purdue Pharma Settlement*, *supra* note 173 (calculating that the aforementioned prescription rate amounts to 3.44 million opioid prescriptions for the 3.933 million people in Oklahoma). See generally *U.S. Prescribing Rate Maps*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://bit.ly/2QM6djI> (last updated Mar. 5, 2020) (noting that the national average for opioid prescriptions per 100 people was 58.7 in 2017).

176. See OKLA. STAT. ANN. tit. 50, § 1 (West 2019) (defining a nuisance as "unlawfully doing an act, or omitting to perform a duty, which act or omission . . . [a]nnoys, injures or endangers the comfort, repose, health, or safety of others").

177. See *Oklahoma v. Purdue Pharma*, CJ-2017-816, at 2, 22; see also OKLA. STAT. ANN. tit. 50, § 1 (West 2019).

Current Oklahoma Attorney General Mike Hunter sought \$20 billion in damages against the Defendants.<sup>180</sup> However, on March 26, 2019, Purdue Pharma agreed to a settlement worth \$270 million.<sup>181</sup> Per the settlement agreement, Purdue Pharma created an endowment to fund the new National Center for Addiction Studies and Treatment at Oklahoma State University in Tulsa.<sup>182</sup> In a statement made after the settlement, the families of Dr. Mortimer and Dr. Raymond Sackler stated that the agreement “will provide assistance to individuals nationwide who desperately need these services—rather than squandering resources on protracted litigation—and is in keeping with [Purdue Pharma’s] continuing commitment to making meaningful contributions to solutions that save lives.”<sup>183</sup> However, the Sackler family cautioned in the same statement that the agreement reached with Oklahoma “is not a financial model for future settlement discussion.”<sup>184</sup>

Other Defendants also reached settlement agreements with Oklahoma, and Johnson & Johnson was the only Defendant not to settle.<sup>185</sup> The Court found Johnson & Johnson guilty of violating Oklahoma’s nuisance laws and ordered the company to pay Oklahoma \$572,102,028 in damages<sup>186</sup> to abate the nuisance.<sup>187</sup> Other states have

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178. See OKLA. STAT. ANN. tit. 50, § 2 (West 2019) (defining a public nuisance as “one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal”).

179. See *Oklahoma v. Purdue Pharma*, CJ-2017-816 at 30; see also OKLA. STAT. ANN. tit. 50, § 2 (West 2019).

180. See *Bebinger*, *supra* note 28.

181. See *id.*; see also Alex Gerszewski, *Oklahoma Supreme Court Denies Defendants Appeal of Lower Court Decision, Keeping State Trial Against Opioid Manufacturers Set for May*, ST. OKLA. (Mar. 25, 2019), <http://bit.ly/2MQC7tV> (noting that although Defendants sought to delay the start of the trial in Cleveland County District Court for 100 days, the Oklahoma Supreme Court rejected the appeal and agreed with the set court date of May 28, 2019).

182. See *Bebinger*, *supra* note 28; see also *Statement of Dr. Mortimer and Dr. Raymond Sackler Families Regarding Purdue Pharma’s Settlement with State of Oklahoma*, BUSINESS WIRE (Mar. 26, 2019, 2:41 PM), <https://bwnews.pr/2MNBql2> [hereinafter *Statement of Dr. Mortimer and Dr. Raymond Sackler Families*].

183. See *Statement of Dr. Mortimer and Dr. Raymond Sackler Families*, *supra* note 182.

184. See *id.*

185. See Jan Hoffman, *Why Was Johnson & Johnson the Only Opioid Maker on Trial in Oklahoma?*, N.Y. TIMES (Aug. 26, 2019), <https://nyti.ms/2SgaCNw> (suggesting that the company may have refused to settle because it “has long had a reputation for being ready to risk jury trials”).

186. See *Oklahoma v. Purdue Pharma*, CJ-2017-816, at 41; see also *id.* at 31 (stating that the central services in the Abatement plan are opioid use disorder (“OUD”) prevention, treatment, and recovery services). See generally *Module 5: Assessing and Addressing Opioid Use Disorder (OUD)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://bit.ly/2QHPPAG> (last visited Jan. 3, 2020) (defining OUD as “a problematic pattern of opioid use leading to clinically significant impairment or distress” and noting

sued Purdue Pharma under a similar public nuisance theory, while others have used different theories to seek compensation from Purdue Pharma for its role in creating and fueling the opioid epidemic.<sup>188</sup>

## 2. Other Lawsuits Against Purdue Pharma

Forty-eight other states<sup>189</sup> and their attorneys general have sued Purdue Pharma, the Sackler family, or both, in state or federal court.<sup>190</sup> These suits proceeded primarily on two theories: (1) that Purdue Pharma created a public nuisance, as discussed in *Oklahoma v. Purdue Pharma*,<sup>191</sup> and (2) that through deceptive marketing techniques, Purdue Pharma violated the states' consumer protection laws.<sup>192</sup> Pennsylvania and Arizona provide two examples of lawsuits brought for violation of state consumer protection laws.<sup>193</sup>

### a. *Pennsylvania v. Purdue Pharma*

Pennsylvania's<sup>194</sup> Consumer Protection Law prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”<sup>195</sup> “Unfair methods of competition”

that OUD has previously been referred to as opioid abuse, opioid dependence, and opioid addiction).

187. See *Oklahoma v. Purdue Pharma*, CJ-2017-816 at 30 (noting that the public nuisance could be abated, and the proper remedy was equitable abatement).

188. See discussion *infra* Section II.D.2.

189. Counties and tribes have also sued Purdue Pharma and the Sackler family. See *Cty. of Summit, Ohio v. Purdue Pharma (In re National Prescription Opiate Litigation)*, No. 17-md-2804, at 1–2 (N.D. Ohio May 18, 2018). See generally Grant Schulte & Geoff Mulvihill, *Nebraska Attorney General Is Only One Not Pursuing Opioid Lawsuits*, SIOUX CITY J., <http://bit.ly/2QNIS0K> (last updated Aug. 14, 2019) (noting that Nebraska is the only state that has not pursued litigation against Purdue Pharma or the Sackler family and that Nebraska's opioid-related death rate in 2017 was the lowest in the United States).

190. See Berkley Lovelace, Jr., *Nearly Every US State Is Now Suing OxyContin Maker Purdue Pharma*, CNBC, <https://cnb.cx/2MSFC2Z> (last updated June 6, 2019, 1:47 PM).

191. See *Oklahoma v. Purdue Pharma*, CJ-2017-816 at 30; see also *California v. Purdue Pharma*, No. 19STCV19045, at 52–54 (Super. Ct. L.A. Cty. June 3, 2019); *West Virginia v. Purdue Pharma*, No. 19-C-62, at 1, 56–58 (Cir. Ct. Boone Cty. May 15, 2019).

192. See *California v. Purdue Pharma*, No. 19STCV19045 at 24; *Pennsylvania v. Purdue Pharma*, No. 257-MD-19, at 112–13 (Pa. Commw. Ct. filed May 2, 2019); *West Virginia v. Purdue Pharma*, No. 19-C-62 at 1, 51–56.

193. See *Pennsylvania v. Purdue Pharma*, No. 257-MD-19 at 112–13; see also Mot. for Leave to File Bill of Complaint at 2, *Arizona v. Sackler*, No. 22O151 (U.S. July 31, 2019).

194. See 73 PA. STAT. AND CONS. STAT. ANN. § 201-4 (West 2019) (granting permission to the State Attorney General or a District Attorney to bring suit against any person who “is using or is about to use any method, act or practice declared by section 3 of this act to be unlawful”).

195. *Id.* at § 201-3.

and “unfair or deceptive acts or practices” include representing that goods have uses or benefits that they do not have and representing that goods are of a certain quality that they are not.<sup>196</sup>

Under a consumer protection law theory, Pennsylvania alleged that Purdue Pharma embarked on a “campaign of deception” to change doctors’ and patients’ perception of opioids<sup>197</sup> and that claims made by Purdue Pharma about the non-addictive quality of OxyContin were not backed by scientific evidence.<sup>198</sup> Pennsylvania further alleged that Purdue Pharma deceptively marketed OxyContin to Pennsylvania physicians by making the following deceptive claims:

- (1) [P]ain is undertreated;
- (2) long term use of OxyContin was appropriate to treat moderate to severe chronic pain;
- (3) OxyContin has no maximum dose and prescribers could increase the potency of a prescription without posing an added risk of addiction;
- (4) OxyContin’s dose is effective for twelve hours; and
- (5) OxyContin is superior to other opioid and non-opioid pain medications.<sup>199</sup>

Pennsylvania requested \$1,000 in penalties for each violation of its Consumer Protection Law, to be increased to \$3,000 for each violation involving a victim over 60 years old.<sup>200</sup> Further, Pennsylvania asked the court to order Purdue Pharma to forfeit all profits derived from the alleged violations of the Consumer Protection Law.<sup>201</sup>

Important to Pennsylvania’s case was the fact that Purdue Pharma had great success in marketing OxyContin<sup>202</sup> and that such marketing produced devastating effects.<sup>203</sup> Pennsylvania had the third-highest rate of drug overdose deaths in the country, with 44.3 deaths per 100,000 people.<sup>204</sup> According to Pennsylvania Attorney General Josh Shapiro, this epidemic was “entirely avoidable”<sup>205</sup> if Purdue Pharma had not

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196. *Id.* at § 201-2 (internal quotation marks omitted).

197. *See Pennsylvania v. Purdue Pharma*, No. 257-MD-19 at 14. At the time of publication, *Pennsylvania v. Purdue Pharma* has not yet gone to trial.

198. *See id.*

199. *Id.*

200. *See id.* at 113–14; *see also* 73 PA. STAT. AND CONS. STAT. ANN. § 201-8(b) (West 2019).

201. *See Pennsylvania v. Purdue Pharma*, No. 257-MD-19 at 114.

202. *See id.* at 14–15; *see also id.* at 107–08 (noting that OxyContin is “the most commonly abused prescription opioid”).

203. *See id.* at 4 (“Pennsylvania is among the top four states with the highest opioid use and overdose rates”). *See generally* DEA PHILA. DIV. & UNIV. OF PITT., THE OPIOID THREAT IN PENNSYLVANIA (Sept. 2018), <http://bit.ly/39Czp4i> (reporting that prescription opioids were responsible for 20% of fatal drug overdoses in Pennsylvania in 2017).

204. *See Drug Overdose Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://bit.ly/2wmZsOF> (last updated Mar. 19, 2020).

205. *Pennsylvania v. Purdue Pharma*, No. 257-MD-19 at 15.

falsely marketed OxyContin, and opioids generally, as being non-addictive.<sup>206</sup>

Pennsylvania also alleged that Purdue Pharma's marketing of OxyContin harmed Pennsylvanians economically.<sup>207</sup> Pennsylvania asserted that Purdue Pharma's "campaign of deception"<sup>208</sup> caused Pennsylvania, through its public health insurance program and employee health plans, to spend money on prescription opioids for the treatment of chronic pain.<sup>209</sup> Additionally, Pennsylvania claimed that it spent funds on "health care utilization related to the physical and medical consequences of opioid prescribing,"<sup>210</sup> including opioid-related hospitalizations.<sup>211</sup> In 2017, "hospital admissions for opioid use disorder amount[ed] to an estimated \$32 million in hospital payments at an average cost of \$10,321 per stay related to prescription opioid overdoses."<sup>212</sup> Taxpayers were left to pay most of this bill, with Medicaid<sup>213</sup> responsible for covering 44.3% of opioid-related hospitalizations in 2017.<sup>214</sup> Medical costs, however, were not the only costs the opioid epidemic imposed on Pennsylvania.<sup>215</sup>

In addition to alleging that Purdue Pharma's fraudulent marketing campaign increased medical costs, Pennsylvania also alleged that its funds were used for non-medical opioid-related costs.<sup>216</sup> Some of these non-medical costs include increased expenses for disability,<sup>217</sup> law enforcement,<sup>218</sup> and Child Welfare and Youth Services.<sup>219</sup> Additionally,

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206. *See id.* at 12 ("Purdue's false statements played a major role in moving Pennsylvania out of a world in which opioid use was sharply limited, due to well-documented concerns about addiction and patient safety, and into a world where opioid prescriptions, addictions, and overdoses . . . have become omnipresent.").

207. *See id.* at 11.

208. *Id.* at 111.

209. *See id.*

210. *Id.*; *see also id.* at 110 (noting that between 2008 and 2015 in Pennsylvania, opioid-related hospitalizations increased 103.6%).

211. *See id.* at 110.

212. *Id.* at 110.

213. *See generally Medicaid*, CTRS. FOR MEDICARE & MEDICAID SERVS., <http://bit.ly/3827pGH> (last visited Jan. 9, 2020) ("Medicaid provides health coverage to millions of Americans, including eligible low-income adults, children, pregnant women, elderly adults and people with disabilities. Medicaid is administered by states, according to federal requirements. The program is funded jointly by states and the federal government.").

214. *See Pennsylvania v. Purdue Pharma*, No. 257-MD-19 at 110 (noting that Medicaid paid the largest percentage among insurance payer groups).

215. *See id.* at 111.

216. *See id.*

217. *See id.* (explaining that the increased costs for disability occur because "many patients on long-term opioids will become less active and more subject to other illnesses, including obesity, depression, diabetes, and accidents").

218. *See id.* (noting that these costs include "opioid related arrests, court costs, incarceration, and treatment").

Pennsylvania saw “decreased productivity and revenue due to opioid addiction and death.”<sup>220</sup> Pennsylvania’s desire to recover at least some of the money expended on the opioid epidemic and to punish Purdue Pharma for its false marketing campaign is being echoed in other states, like Arizona.<sup>221</sup>

b. Arizona Filing in U.S. Supreme Court

On July 31, 2019, Arizona took a rather unusual approach<sup>222</sup> and filed its motion for leave to file a bill of complaint directly to the United States Supreme Court.<sup>223</sup> Arizona alleged that Purdue Pharma illegally minimized the risks of OxyContin and encouraged doctors to increase the number of opioid prescriptions.<sup>224</sup> The filing also alleged that the Sackler family<sup>225</sup> and Purdue Pharma, while directing the “deceptive sales and marketing of OxyContin,”<sup>226</sup> participated in “massive cash transfers—totaling billions of dollars—at a time when Purdue faced enormous exposure for its role in fueling the opioids crisis.”<sup>227</sup>

Arizona alleged that, because Purdue Pharma is not a public company and is instead run by the eight Sackler family members listed as defendants, the defendants were not only aware of Purdue Pharma’s

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219. *See id.* (explaining that the increased costs for Child Welfare and Youth Services occur “because parental substance misuse and abuse is a significant contributing factor to increased rates of child abuse and neglect”).

220. *Id.*

221. *See infra* Section II.D.2.b.

222. *See Ariane de Vogue, Arizona Tells US Supreme Court that the Sackler Family Is ‘Looting’ Money to Avoid Legal Penalties in Opioid Cases*, CNN (July 31, 2019, 3:41 PM), <https://cnn.it/306Oc3D> (“Although the Supreme Court can initially hear lawsuits in which a state is a party, it almost never does so when the lawsuit is between a state and private parties, in contrast to a dispute between two or more states . . . .”); *see also id.* (noting that Purdue Pharma stated that the U.S. Supreme Court “is an improper forum to conduct a trial of the claims being made by Arizona” and that “[t]his petition was filed solely for the purpose of leapfrogging other similar lawsuits, and we expect the Court will see it as such”).

223. *See Mot. for Leave to File Bill of Complaint at 2, Arizona v. Sackler*, No. 22O151 (U.S. July 31, 2019); *id.* at 2 (stating that the Supreme Court has jurisdiction under Article III, § 2, cl. 2 of the Constitution). *See generally* U.S. CONST. art. III, § 2, cl. 2 (“The judicial power shall extend to all Cases . . . between a State and Citizens of another State . . . .”); *About the Court*, SUPREME COURT OF THE U.S., <http://bit.ly/2sccjS5> (last visited Jan. 10, 2020) (stating that the Supreme Court is the “highest tribunal in the Nation for all cases and controversies arising under the Constitution or the laws of the United States”).

224. *See Arizona v. Sackler*, No. 22O151 at 7.

225. *See id.* at 1 (listing the names of the Sackler family members who are Defendants as Richard Sackler, Theresa Sackler, Kathe Sackler, Jonathan Sackler, Mortimer D.A. Sackler, Beverly Sackler, David Sackler, and Irene Sackler Lefcourt); *see also id.* at 3–5 (noting the positions that each Sackler family member held within Purdue Pharma).

226. *Id.* at 3.

227. *Id.* at 2.

marketing, but also “ordered or oversaw much of Purdue’s illegal marketing.”<sup>228</sup> The motion alleged that, as Purdue Pharma began to face more public scrutiny because of the opioid epidemic, the Sacklers regularly transferred assets from Purdue Pharma to the Sackler family members themselves, amounting to \$4 billion between 2008 and 2016.<sup>229</sup> Additionally, the Sacklers allegedly helped Purdue Pharma transfer billions of dollars to companies controlled by the family members, in violation of Arizona’s consumer protection laws.<sup>230</sup>

Arizona alleged that Purdue Pharma’s transfers to the Sackler family and to Sackler-controlled companies violated the fraudulent conveyance statute of Arizona and 43 other states.<sup>231</sup> Arizona’s fraudulent conveyance statute states that:

[A] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . [w]ith actual intent to hinder, delay or defraud any creditor of the debtor.<sup>232</sup>

Arizona asked the Supreme Court to declare the transfers void because the transfers would prevent Purdue Pharma from paying for potential judgments against the company for its role in the opioid epidemic.<sup>233</sup> The Supreme Court denied the motion on December 9, 2019, offering no explanation for its decision.<sup>234</sup>

As evidenced by the lawsuits of Oklahoma,<sup>235</sup> Pennsylvania,<sup>236</sup> and Arizona,<sup>237</sup> states are seeking compensation from Purdue Pharma for its role in the opioid epidemic.<sup>238</sup> With 49 states filing suit against Purdue Pharma,<sup>239</sup> Purdue Pharma needed to make a choice regarding its future and how to deal with pending litigation. Purdue Pharma did so in

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228. *Id.* at 12.

229. *See id.* at 13–14. *But see* Merie & Bernstein, *supra* note 40 (noting that Massachusetts claims that, between 2008 and 2016, the Sacklers transferred over \$4 billion to personal accounts, while Oregon claims the Sacklers transferred \$10 billion to personal accounts).

230. *See Arizona v. Sackler*, No. 22O151 at 14 (noting that the Sacklers have transferred nearly \$2 billion to PLP Associates Holdings L.P., a company controlled by the Sacklers).

231. *See id.* at 15. *See generally* *Fraudulent Transfer Act*, UNIFORM LAW COMMISSION, <http://bit.ly/308k87F> (last visited Jan. 10, 2020) (listing the states that have adopted a fraudulent transfer act).

232. ARIZ. REV. STAT. ANN. §§ 44-1004(A)–(A)(1) (2019).

233. *See Arizona v. Sackler*, No. 22O151 at 14–15, 18.

234. *See No. 22O151*, SUPREME COURT OF THE U.S., *supra* note 37.

235. *See supra* Section II.D.1.

236. *See supra* Section II.D.2.a.

237. *See supra* Section II.D.2.b.

238. *See supra* Section II.B.

239. *See* Schulte & Mulvihill, *supra* note 189.



September 2019 by filing for Chapter 11 bankruptcy and offering a settlement to all the states that had filed suit against it.<sup>240</sup>

*E. Purdue Pharma Files for Chapter 11 Bankruptcy*

On September 15, 2019, Purdue Pharma filed for Chapter 11 bankruptcy.<sup>241</sup> The bankruptcy is part of a tentative settlement that Purdue Pharma reached with plaintiffs from various lawsuits.<sup>242</sup> In total, Purdue Pharma would relinquish assets worth between \$10 billion and \$12 billion.<sup>243</sup> For Purdue Pharma, the settlement would protect the company from subsequent litigation with any party.<sup>244</sup> In return, the Sacklers would relinquish control of Purdue Pharma and declare it bankrupt.<sup>245</sup> The estimated \$10 billion to \$12 billion would come from \$3 billion in cash given over seven years from the Sackler family and from future revenues from the sale of OxyContin<sup>246</sup> after Purdue Pharma becomes a for-profit trust.<sup>247</sup> Additionally, the Sackler family would rebrand Purdue Pharma as a new company that provides “opioid overdose reversal and addiction treatment medications at no or low cost.”<sup>248</sup>

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240. See Merie & Bernstein, *supra* note 40.

241. See Bobby Allyn, *Purdue Pharma, Accused of Fueling Opioid Crisis, Files for Chapter 11*, NPR (Sept. 16, 2019, 2:01 AM), <https://n.pr/2uBHWp0>. See generally *Chapter 11 – Bankruptcy Basics*, U.S. COURTS, <http://bit.ly/37PSsY3> (last visited Jan. 10, 2020) (noting that Chapter 11 bankruptcy “generally provides for reorganization, usually involving a corporation or partnership” and that a Chapter 11 debtor “usually proposes a plan of reorganization to keep its business alive and pay creditors over time”).

242. See Merie & Bernstein, *supra* note 40 (revealing that the settlement includes “more than 2,000 plaintiffs in a mammoth federal lawsuit and about half the attorneys general in the United States”).

243. See *id.*

244. See *id.* (finding, further, that Purdue Pharma asked the court to extend this protection against lawsuits to the Sackler family because “[i]f forced to bear the risk of adverse money judgments, the [Sackler family] may be unwilling – or unable – to make the billions of dollars of contributions contemplated by the Settlement Structure”); see also Renae Merie, *Judge in Purdue Pharma Bankruptcy Case Extends Lawsuit Protection to Sacklers*, WASH. POST (Nov. 6, 2019, 6:04 PM), <https://wapo.st/2FEoiL8> (noting that the bankruptcy judge extended this protection to members of the Sackler family until April 8, 2020 but not noting that the protection has been extended past April 8, 2020).

245. See Merie & Bernstein, *supra* note 40.

246. See Jan Hoffman, *Purdue Pharma Tentatively Settles Thousands of Opioid Cases*, N.Y. TIMES, <https://nyti.ms/2RNWfi9> (last updated Sept. 13, 2019) [hereinafter *Purdue Pharma Tentatively Settles Thousands of Opioid Cases*].

247. See Strickler, *supra* note 34.

248. See *Purdue Pharma Announces Agreement in Principle on Landmark Opioid Litigation Settlement*, PURDUE PHARMA (Sept. 16, 2019), <http://bit.ly/3a1PWQv> [hereinafter *Purdue Pharma Announces Agreement in Principle*].

Attorneys general in at least 27 states have agreed to the terms of the settlement.<sup>249</sup> Chairman of Purdue Pharma's Board of Directors, Steve Miller, stated that "[t]his settlement framework avoids wasting hundreds of millions of dollars and years on protracted litigation, and instead will provide billions of dollars and critical resources to communities across the country trying to cope with the opioid crisis."<sup>250</sup> Details of the settlement, including how the money from the settlement and the promised overdose medication from Purdue Pharma would be divided among the states, have not been released to the public.<sup>251</sup>

While some attorneys general have been enthusiastic to accept the settlement, at least 20 other attorneys general have rejected the deal.<sup>252</sup> Some attorneys general who rejected the settlement claim that the Sacklers fraudulently conveyed money from Purdue Pharma into their personal accounts after learning that Purdue Pharma would be sued by the states.<sup>253</sup> Others maintain that the \$3 billion given by the Sackler family is simply not enough.<sup>254</sup> And still other attorneys general argue that the settlement as a whole is "not yet good enough for the magnitude of the death and destruction Purdue and the Sacklers caused."<sup>255</sup>

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249. See Strickler, *supra* note 34.

250. *Purdue Pharma Announces Agreement in Principle*, *supra* note 248; see also Merie & Bernstein, *supra* note 40 (noting that Purdue Pharma claims "it is spending \$2 million a week on legal and other costs associated with lawsuits").

251. See Strickler, *supra* note 34 (stating that the Minnesota Attorney General released a statement that the terms of the settlement are protected by a federal gag order). See generally *Gag Order*, CORNELL L. SCH.: LEGAL INFO. INST., <http://bit.ly/39W25pL> (last visited Jan. 10, 2020) (defining gag order as a "judge's order prohibiting the attorneys and parties in a pending lawsuit or criminal prosecution from talking about the case to the media or the public").

252. See Strickler, *supra* note 34; see also Steve Karnowski & Geoff Mulvihill, *States Split by Party on Accepting Purdue Pharma Settlement*, AP NEWS (Sept. 13, 2019), <http://bit.ly/35D246L> (showing graphically that states like Pennsylvania, Maine, and California have rejected the settlement).

253. See Merie & Bernstein, *supra* note 40 (quoting Connecticut Attorney General William Tong, "We will not allow Purdue Pharma to cry poverty after illegally transferring hundreds of millions of dollars to members of the Sackler family"); see also *supra* Section II.D.2.b (discussing Arizona's claim that Purdue Pharma's transfers to the Sackler family and to Sackler-backed companies violated the State's fraudulent conveyance statute).

254. See Merie & Bernstein, *supra* note 40; see also Strickler, *supra* note 34 (noting that the Attorney General of North Carolina, along with several other attorneys general, believes because the Sackler family is one of the richest families in the U.S., the family needs to provide more money). See generally #19 *Sackler Family*, FORBES, <http://bit.ly/2FEWJGw> (last updated June 29, 2016) (stating the Sackler family has an estimated worth of \$13 billion).

255. Strickler, *supra* note 34.

### III. ANALYSIS AND RECOMMENDATION

Purdue Pharma can help mitigate the opioid crisis by providing both money and anti-overdose drugs to every state. States can pursue money and anti-overdose drugs by accepting Purdue Pharma's settlement offer, which provides for both.<sup>256</sup> Alternatively, states could sue the company and demand money and anti-overdose drugs as damages.<sup>257</sup> Following Purdue Pharma's filing for bankruptcy and proposed settlement,<sup>258</sup> states presumably have just one decision to make: reject<sup>259</sup> or accept the settlement.<sup>260</sup> States should carefully consider and accept the settlement agreement because it offers the promise of funding and anti-overdose drugs to combat the opioid epidemic.<sup>261</sup>

#### A. States Should Accept Purdue Pharma's Settlement

Rejecting Purdue Pharma's settlement is a risky option for states because they cannot be certain that they will receive money or anti-overdose medication from Purdue Pharma or the Sacklers otherwise.<sup>262</sup> Accordingly, those states that have rejected the settlement should re-evaluate and should accept the settlement.

As part of the proposed settlement, Purdue Pharma will begin to market anti-overdose drugs to help those who have been affected by the opioid epidemic.<sup>263</sup> Purdue's provision of anti-overdose drugs may elicit two possible reactions from states.<sup>264</sup> On one hand, states could view the anti-overdose drugs as Purdue Pharma's good-faith effort to help slow or stop the opioid epidemic.<sup>265</sup> On the other hand, states could view Purdue's anti-overdose drugs as a way for Purdue to profit from an epidemic that the company itself caused. States are likely to reject the

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256. See Merie & Bernstein, *supra* note 40; see also *Purdue Pharma Announces Agreement in Principle*, *supra* note 248.

257. See *supra* Section II.D.

258. See Merie & Bernstein, *supra* note 40; see also discussion *infra* Part III.

259. See Strickler, *supra* note 34; see also discussion *infra* Section III.A.

260. See Strickler, *supra* note 34; see also discussion *infra* Section III.A.

261. See discussion *infra* Section III.A.

262. See Ana Radelat, *Rejecting Purdue Settlement, CT Hopes to Gain from Other Opioid Deals*, CT MIRROR (Oct. 3, 2019), <http://bit.ly/38D69K5>; Karnowski & Mulvihill, *supra* note 252.

263. See Merie & Bernstein, *supra* note 40.

264. See *Purdue Pharma Announces Agreement in Principle*, *supra* note 248. But see Claire Galofaro & Kristen Gelineau, *Purdue Pharma's Foreign Affiliate Now Selling Overdose Cure*, WGBH NEWS (Dec. 15, 2019), <http://bit.ly/2tHnN0N>.

265. See *Purdue Pharma Announces Agreement in Principle*, *supra* note 248 (describing Purdue Pharma's hope that providing anti-overdose medications at little or no cost "will dramatically increase access to this life-saving opioid reversal medication" and that the settlement preserves "the value of Purdue's assets for the benefit of those impacted by the opioid crisis").

settlement if they believe that Purdue Pharma is continuing to profit from the opioid epidemic.

Some states correctly argue that the funds offered by Purdue Pharma will not lessen the amount of money that the federal government and the states have already spent on the opioid epidemic.<sup>266</sup> However, rejecting the settlement does not guarantee that the states will receive any money from Purdue Pharma or the Sacklers because states that do not join the settlement may not be able to collect on judgments.<sup>267</sup> And even if states are still allowed to litigate against Purdue Pharma, states are not guaranteed a victory in court.<sup>268</sup> Litigation is costly, and Purdue Pharma and the Sackler family continue to spend over \$2 million a week for attorneys' fees,<sup>269</sup> diverting money away from those states that need it most.<sup>270</sup> Even if states win judgments against Purdue Pharma, the funds available to pay those judgments may be depleted by Purdue Pharma's payouts to other states that already accepted the settlement agreement.<sup>271</sup>

If states are still able to collect on judgments, the settlement does not address how the state and federal court systems would create any sort of level playing field.<sup>272</sup> Purdue Pharma and the Sackler family may eventually run out of money to compensate damages, which means that not all states could receive damages.<sup>273</sup> Awarding damages based on the order in which courts reach judgments seems unfair, as each case proceeds at a different pace.<sup>274</sup> Courts that move slower would penalize

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266. See Litton, *supra* note 21.

267. See Radelat, *supra* note 262; see also Karnowski & Mulvihill, *supra* note 252.

268. See generally Josh Kovner, *Judge Dismisses Cities' Lawsuits Against Purdue Pharma; State's Case Remains Intact*, HARTFORD COURANT (Jan. 9, 2019), <http://bit.ly/2GppdzC> (noting that a state court judge in Connecticut dismissed several lawsuits against Purdue Pharma and others "saying they failed to prove the firms were directly responsible for the costly medical and social needs of addicts").

269. See Merie & Bernstein, *supra* note 40.

270. See Alex Brill & Scott Ganza, *The Geographic Variation in the Cost of the Opioid Crisis* 5–6 (Am. Enter. Inst., Working Paper No. 2018-03, 2018), <http://bit.ly/2TUd8dw> (listing West Virginia, New Hampshire, Ohio, Maryland, Massachusetts, Rhode Island, Connecticut, Delaware, Maine, and Kentucky as the ten states with the highest per capita cost for the opioid epidemic in 2015).

271. See Merie & Bernstein, *supra* note 40 (noting that the approximate value of the settlement is between \$10 billion and \$12 billion); Strickler, *supra* note 34 (stating that 27 states have agreed to the settlement deal).

272. See Strickler, *supra* note 34 (noting that the details of the settlement have not been released).

273. See Hopkins & Scurria, *supra* note 33 (noting that the Sackler family has made between \$12 billion and \$13 billion in profits from Purdue Pharma). *But see Purdue Pharma Tentatively Settles Thousands of Opioid Cases*, *supra* note 246 (stating that as part of the settlement, Purdue Pharma will only have to pay the states the sales of OxyContin for seven years).

274. See DALE ANNE SIPES ET AL., ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 6 (1988), <https://bit.ly/2OrZM4g> ("[B]oth civil and criminal trials vary

the suing state because the state would not have equal access to the monies from Purdue Pharma or the Sackler family, even if the state has been drastically impacted by the opioid epidemic.<sup>275</sup> However, suing Purdue Pharma has its benefits.

States that have sued at the federal level, whether in a federal district court<sup>276</sup> or the United States Supreme Court,<sup>277</sup> have a better chance of creating a uniform policy for how pharmaceutical companies should be penalized for marketing and selling addictive medications.<sup>278</sup> While a uniform policy for dealing with both Purdue Pharma and future pharmaceutical companies would be advantageous, creating such a policy takes time.<sup>279</sup> Time is of the essence for states, as the opioid epidemic has immense costs both in the number of lives lost<sup>280</sup> and economic impact.<sup>281</sup> By not accepting the settlement offer, states will continue fighting the opioid epidemic without the guarantee of necessary funding and anti-overdose medication.<sup>282</sup> Therefore, the decision to reject the settlement offer is likely too risky for states and should not be considered the most viable option.<sup>283</sup>

Accepting the settlement presents the best option for all states because it would end costly litigation and ensure that participating states receive payment from Purdue Pharma and the Sackler family. The 27 attorneys general who have accepted the settlement “have generally contended that getting a settlement now is better than uncertainty and years of litigation.”<sup>284</sup>

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dramatically in length from state to state and among courts within the same state, whether cases are tried to a jury or judge.”)

275. See Brill & Ganza, *supra* note 270 at 5–6 (listing Nebraska, Montana, Texas, Mississippi, Iowa, South Dakota, Kansas, California, Alabama, and Arkansas as the ten states with the lowest per capita cost for the opioid epidemic in 2015).

276. See *supra* Section II.D.2.

277. See *supra* Section II.D.2.b.

278. See Michele L. Jawando & Sean Wright, *Why Courts Matter*, CTR. FOR AM. PROGRESS (Apr. 13, 2015, 9:03 AM), <https://ampr.gs/2RRpVea> (stating that federal courts “influence important policy issues” that “have repercussions on people’s lives”).

279. See generally Section 1. *Changing Policies: An Overview*, CMTY. TOOL BOX, <http://bit.ly/2O0933J> (last visited Jan. 25, 2020) (“Policy change is difficult and time-consuming, and it may look discouraging.”).

280. See *What Is the U.S. Opioid Epidemic?*, *supra* note 18 (noting that in 2018 and 2019, 130 people died every day from opioid-related drug overdoses).

281. See *Pennsylvania v. Purdue Pharma*, No. 257-MD-19 at 110 (Pa. Commw. Ct. May 2, 2019) (“[H]ospital admissions for opioid use disorder amount[ed] to an estimated \$32 million in hospital payments at an average cost of \$10,321 per stay related to prescription opioid overdoses.”).

282. See Radelat, *supra* note 262.

283. See Karnowski & Mulvihill, *supra* note 252 (noting that attorneys general who have accepted the settlement believe that accepting the settlement is “better than uncertainty and years of litigation”).

284. *Id.*

*B. Economic Implications of Accepting Purdue Pharma's Settlement*

If states choose to accept the settlement, they could split the money equally or proportionately. The states least impacted by the opioid epidemic would benefit most from an equal division of the settlement money.<sup>285</sup> Those states most impacted by the opioid epidemic would receive the most benefit from a proportionate division of the settlement money.<sup>286</sup>

Although the terms of the settlement are unclear,<sup>287</sup> what is clear is that no state will be able to receive an award as large as Oklahoma<sup>288</sup> if the terms of the settlement prescribe an equal division of the money among the affected states.<sup>289</sup> Even if the Sackler family agrees to pay \$3 billion evenly to the 27 states whose attorneys general have agreed to the settlement, each state would receive approximately \$111 million from the Sackler family.<sup>290</sup> While this may seem like a generous amount of money, even the state with the second-lowest per capita cost for the opioid epidemic could see less than one-fifth of its costs covered.<sup>291</sup>

Additionally, the states would receive money from the sale of OxyContin for the next seven years.<sup>292</sup> Because Oxycontin sales have been declining in recent years, future revenues from OxyContin will likely not exceed the \$1.74 billion in revenue from 2017.<sup>293</sup> Consequently, if the settling states evenly split this revenue, the states would each receive approximately \$64 million.<sup>294</sup> Adding this to \$111 million from the Sackler family, each of the current states who have accepted the settlement could expect less than \$175 million, with the settlement amount only decreasing as more states agree to the settlement.<sup>295</sup> However, accepting the settlement is still less risky than

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285. See *infra* notes 297–301 and accompanying text.

286. See *infra* notes 302–06 and accompanying text.

287. See Strickler, *supra* note 34 (noting that Purdue Pharma and the Sackler family have not made public any information about how the settlement assets will be divided or how money must be used by the states).

288. See Bebinger, *supra* note 28 (noting that Purdue Pharma settled *Oklahoma v. Purdue Pharma* for \$270 million); *supra* Section II.D.1.

289. See Strickler, *supra* note 34 (noting that the terms of the settlement have not been made public).

290. \$3 billion divided by 27 equals \$111,111,111.

291. The second-lowest per capita cost in a state for the opioid epidemic in 2015 was approximately \$600,000,000. See *infra* notes 299–300 and accompanying text.

292. See *Purdue Pharma Tentatively Settles Thousands of Opioid Cases*, *supra* note 246.

293. See Raymond, *supra* note 125.

294. \$1.74 billion divided by 27 equals \$64 million.

295. See *Purdue Pharma Tentatively Settles Thousands of Opioid Cases*, *supra* note 246.

rejecting the settlement, as states that participate ensure that they receive compensation and anti-overdose drugs.<sup>296</sup>

If the settlement terms divided the monies evenly among the states, states less affected by the opioid epidemic would receive the most benefit.<sup>297</sup> For example, in states like Montana, which had the second-lowest<sup>298</sup> total epidemic cost per capita in 2015,<sup>299</sup> \$175 million (or less) could provide more than sufficient compensation for the state's epidemic-related costs.<sup>300</sup> However, for states like West Virginia, which had the highest total cost per capita of the opioid epidemic in 2015,<sup>301</sup> \$175 million (or less) is nowhere near enough to recover from the devastation of the epidemic.<sup>302</sup>

Alternatively, the proposed settlement could split the funds and anti-overdose medications proportionately amongst the states. Proportionate distribution would use certain factors to assess the epidemic's impact on each state and distribute money and medicine accordingly, resulting in more accurate and adequate funding and medication to help those affected by the opioid epidemic.<sup>303</sup> Some factors that the attorneys general and Purdue Pharma could consider in determining distributions are: the number of opioid prescriptions per 100 persons in each state;<sup>304</sup> the number of overdose deaths annually in each

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296. See Karnowski & Mulvihill, *supra* note 252.

297. See Brill & Ganza, *supra* note 270, at 5–6 (listing Nebraska, Montana, Texas, Mississippi, Iowa, South Dakota, Kansas, California, Alabama, and Arkansas as the ten states with the lowest per capita cost for the opioid epidemic in 2015).

298. The state with the lowest per capita cost was Nebraska, but Nebraska has not sued Purdue Pharma or the Sackler family. See Brill & Ganza, *supra* note 270, at 6; Schulte & Mulvihill, *supra* note 189 (noting that Nebraska is the only state that has not pursued litigation against Purdue Pharma or the Sackler family).

299. See Brill & Ganza, *supra* note 270, at 6 (listing Montana's total per capita cost of the opioid epidemic in 2015 as \$596).

300. The cost of the opioid epidemic in Montana in 2015, based on Census data and the per capita cost calculation from Brill & Ganza, would be between \$589,691,340 and \$636,991,688. See *id.* See generally *QuickFacts: Montana*, U.S. CENSUS BUREAU, <http://bit.ly/2TUeqVU> (last visited Jan. 25, 2020) (listing Montana's population as 989,415 in 2010 and 1,068,778 in 2019).

301. See Brill & Ganza, *supra* note 270, at 5 (listing West Virginia's total per capita cost of the opioid epidemic in 2015 as \$4,378).

302. The cost of the opioid epidemic in West Virginia in 2015, based on Census data and the per capita cost calculation from Brill & Ganza, would be between \$7,846,019,556 and \$8,112,407,732. See *id.* See generally *QuickFacts: West Virginia*, U.S. CENSUS BUREAU, <http://bit.ly/3aKNspF> (last visited Jan. 25, 2020) (listing West Virginia's population as 1,852,994 in 2010 and 1,792,147 in 2019).

303. See Geoff Mulvihill & Andrew Welsh-Huggins, *Opioid Settlement Would Divide Money Based on Local Impact*, AP NEWS (Aug. 30, 2019), <http://bit.ly/2SjcBAG> (reporting that the settlement may include a formula for dividing money based on need, which “could forestall squabbles over the money”).

304. See *U.S. State Prescribing Rates, 2017*, *supra* note 172.

state;<sup>305</sup> and the amount of money that hospitals have spent in opioid-related hospitalizations.<sup>306</sup> Thus, a proportionate settlement distribution would ensure that states that most need money and medication—those with larger populations and those most seriously impacted by the opioid epidemic—would receive it.<sup>307</sup>

Regardless of the exact terms of the settlement, states should seriously consider accepting the settlement as a guaranteed means to help combat the opioid epidemic.

#### IV. CONCLUSION

Purdue Pharma's aggressive marketing of OxyContin created monumental issues.<sup>308</sup> Although states have sued other companies besides Purdue Pharma,<sup>309</sup> Purdue Pharma's OxyContin marketing campaign and the failure of OxyContin to last for the promised 12 hours led to mass addiction and contributed significantly to the opioid epidemic.<sup>310</sup>

The opioid epidemic has been costly in both the number of lives lost and the economic burden,<sup>311</sup> which led 49 states to file lawsuits against Purdue Pharma in state and federal court.<sup>312</sup> In response to the multitude of lawsuits, Purdue Pharma's proposed settlement agreement would relinquish assets worth between \$10 billion and \$12 billion, while transforming Purdue Pharma into a new company that produces opioid-overdose-reversal and addiction-treatment medications.<sup>313</sup> The settlement should be carefully considered by each state.<sup>314</sup>

States that are small or have experienced a smaller impact of the opioid epidemic would receive the most benefit if the settlement terms divide the funds evenly.<sup>315</sup> States that have large populations or have

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305. See *HHS by the Numbers*, *supra* note 156.

306. See *Pennsylvania v. Purdue Pharma*, No. 257-MD-19, at 110 (Pa. Commw. Ct. May 2, 2019).

307. See *Mulvihill & Welsh-Huggins*, *supra* note 303 (stating that formulas could “take into account several factors, including opioid distribution in a given jurisdiction, the number of people who misuse opioids and the number of overdose deaths”).

308. See *supra* Section II.C.

309. See *Oklahoma v. Purdue Pharma*, CJ-2017-816, at 1 (D. Okla. Cleveland Cty. Aug. 26, 2019) (listing companies other than Purdue Pharma that Oklahoma sued as Teva Pharmaceuticals USA, Inc.; Cephalon, Inc.; Johnson & Johnson; Janssen Pharmaceuticals, Inc.; Ortho-McNeil-Janssen Pharmaceuticals, Inc.; Janssen Pharmaceutica, Inc.; Allergan, PLC; Watson Laboratories, Inc.; and Actavis Pharma, Inc.).

310. See *supra* Sections II.B.2, II.C.

311. See *supra* Section II.D.

312. See *supra* Section II.D.2.

313. See *supra* Part III.

314. See *supra* Part III.

315. See *supra* Section III.B.



been more seriously impacted by the opioid epidemic would receive the most money if the funds are divided proportionately.<sup>316</sup> *All* states, however, should be hesitant to outright reject the settlement because there is no guarantee that any state will succeed in a lawsuit against Purdue Pharma.<sup>317</sup> The time is now for Purdue Pharma, as an entity responsible for fueling the opioid epidemic, to compensate states for the lives lost and the money expended.<sup>318</sup>

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316. *See supra* Section III.B.

317. *See supra* Section III.A.

318. *See supra* Section II.B.