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**ADDICTED TO HOPE: ABATING THE OPIOID EPIDEMIC AND  
SEEKING REDRESS FROM OPIOID DISTRIBUTORS FOR  
CREATING A PUBLIC NUISANCE**

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## I. INTRODUCTION

Oceana, West Virginia, is a small town in Wyoming County situated within the Appalachian coal fields. Oceana was once a prosperous and welcoming town but today, the town and surrounding areas are trying to cope with the lingering effects and impacts of the opioid epidemic. Oceana has a population of only 1,280 people and a median household income of \$27,216.<sup>1</sup> The impact of opioids has affected economic indicators within the town and county. Between 2014 and 2015, Oceana's population decreased by more than 19% and median household income declined by more than 10%.<sup>2</sup> The impact of opioid addiction in Oceana is so extensive that many children are noticing changes within the community; but for some, the impact of opioid addiction is all they have ever known.<sup>3</sup>

A high school student, Chelsea, recalls that a drug problem has been present within Oceana for years, as early as 2011.<sup>4</sup> In addition to her coal mining community, opioids have affected Chelsea's entire family.<sup>5</sup> She notes that her father, who was injured in a coal mining accident, became addicted to opioids.<sup>6</sup> His addiction led to the divorce of her parents and the separation of her family.<sup>7</sup> Another student at Oceana Middle School says that her parents talk about how hospitable Oceana used to be but now is unsafe due to the ongoing drug problems.<sup>8</sup> In fact, she states that it is so dangerous that no one should be outside

<sup>1</sup> *Oceana, WV*, DATA USA, <https://datausa.io/profile/geo/oceana-wv/#economy> (last visited Oct. 14, 2018).

<sup>2</sup> *Id.*

<sup>3</sup> *See generally* *Addiction Affects Everyone, Effects of Opioids on Communities and What Can be Done*, PBS (Jan. 17, 2018) [hereinafter *Addiction Affects Everyone*], <http://www.pbs.org/wned/opioid-epidemic/for-educators/effects-opioids-communities-and-what-can-be-done/> (depicting interviews of Oceana Middle School students by Senator Joe Manchin regarding the effects of opioids within their community and the impacts of opioids on their lives).

<sup>4</sup> *See id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *See id.*

alone, not even in the daytime.<sup>9</sup> Another student conveyed her story to Senator Joe Manchin when he visited the middle school to speak about Oceana's drug problem.<sup>10</sup> Her family was torn apart when she was only five years old, after her stepfather murdered her mother by injecting her with OxyContin and then took his own life.<sup>11</sup>

The stories conveyed by these students about their community in West Virginia illustrate many problems that many communities are currently facing. The opioid epidemic is wreaking havoc throughout the country and imposing economic hardships on many local governments.<sup>12</sup> Oceana's statistics regarding decreased population and income, coupled with an increased crime rate, illustrate just some of the hardships imposed by opioid addiction. As a result, many local governments have filed public nuisance lawsuits against opioid distributors for flooding the state with opioids and creating misrepresentations in marketing.<sup>13</sup> The local governments rest their claims on past public nuisance suits that have sought to hold manufacturers of guns, lead paint, and tobacco liable for effects on public health. Courts in these cases have declined to expand the traditional doctrine of public nuisance into the world of products liability. However, these failures have not stopped governments in West Virginia from seeking damages based on public nuisance.

While these stories derive from a small West Virginia community, the Mountain State is not alone in fighting the damaging impacts of opioid addiction. Governments within West Virginia and other states claim that opioid distributors have created a public nuisance for which they are entitled to abate. States throughout the country are searching for tools to regulate the predatory practices of opioid distributors and provide relief to opioid addicted populations. Because public nuisance allows recovery of equitable remedies and legal damages in

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<sup>9</sup> *Id.*

<sup>10</sup> *See id.*

<sup>11</sup> *Id.*

<sup>12</sup> While West Virginia is also attempting to cope with increased overdoses of residents and economic expenses tied to heroin, this is outside the scope of this paper; however, it is acknowledged that the heroin epidemic likely resulted from the rise in costs of opioids. Heroin is easier to obtain due to the fact that it is relatively inexpensive and, unlike prescription opioids, is not regulated by the pharmaceutical and health care industry. Although West Virginia and other states are burdened by abuse of this drug, this paper focuses on the effects of opioids on the public health of individuals and communities as a result of drug marketing and distribution tactics.

<sup>13</sup> Scott Higham & Lenny Bernstein, *Opioid Distributors Sued by West Virginia Counties Hit by Drug Crisis*, WASH. POST (Mar. 9, 2017), [https://www.washingtonpost.com/national/health-science/lawsuits-filed-against-drug-distributors-in-west-virginia/2017/03/09/f9e3165e-0501-11e7-b1e9-a05d3c21f7cf\\_story.html?utm\\_term=.de902d3c0718](https://www.washingtonpost.com/national/health-science/lawsuits-filed-against-drug-distributors-in-west-virginia/2017/03/09/f9e3165e-0501-11e7-b1e9-a05d3c21f7cf_story.html?utm_term=.de902d3c0718).

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certain circumstances, many governments have filed complaints against opioid distributors for violations of public nuisance law.<sup>14</sup>

This paper acknowledges that although these governments need resources to restore their communities, they have failed to state a valid claim for public nuisance. The governments have failed to allege a violation of a legitimate public right but are instead suing based upon public interests. The acts of doctors, patients, and others obscure the causal chain and make causation a difficult element to establish. Further, even if the local governments succeed in their claims for public nuisance, the tort is inadequate in providing the remedies that these governments seek. Governments throughout the United States require capital to rebuild their communities, but there is no oversight or structure in place to ensure local governments spend these resources in an effective manner. It is the role of the legislature to provide remedies for these harms and not the courts. The opioid epidemic wreaks havoc on many communities throughout the country but expanding the doctrine of public nuisance is hardly an adequate solution to this complex problem.

This paper examines the tort of public nuisance and applies the tort to recent suits filed against opioid distributors. First, Part II of this paper provides an overview of the opioid epidemic and its economic impacts on local governments and municipalities. Part III of this paper explores the common law doctrine of public nuisance and establishes the elements of the tort. Part III also provides modern examples of current public nuisance lawsuits filed in West Virginia against opioid distributors. Next, Part IV actively applies the doctrine of public nuisance to these lawsuits to better illustrate why local government lawsuits against opioid distributors should fail, including intervention by third-party actors, lack of causation, and remoteness of damages. Part V then demonstrates why public nuisance law should not be expanded to serve as an overbroad remedy to the opioid epidemic and recommends regulatory actions as a better solution to ongoing problems facing local governments. Finally, Part VI of this paper concludes by explaining that the expansion of public nuisance law

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<sup>14</sup> See Jamie Satterfield, *TN Attorney General: FDA Approved OxyContin Labels, Not OxyContin Maker's 'Deception'*, KNOX NEWS (Aug. 23, 2018, 9:55 AM), <https://www.knoxnews.com/story/news/crime/2018/08/23/tennessee-opioid-lawsuit-ag-fda-approved-opioid-labels-not-purdue-pharmas-lies/1068786002/> (describing lawsuits filed against Purdue Pharmaceuticals by the state of Tennessee); Tom Rivers, *County Declares Opioid Epidemic a 'Public Nuisance' to Help Recover Costs to Taxpayers*, ORLEANS HUB (Mar. 5, 2018, 1:47 PM) <https://orleanshub.com/county-declares-opioid-epidemic-a-public-nuisance-to-help-recover-costs-to-taxpayers/> (examining actions of the Orleans County Legislature to help the county recover damages resulting from abuse of prescription opioids); Andrew Harris et al., *Justice for Opioid Communities Means Massive Payday for Their Lawyers*, BLOOMBERG (July 25, 2018), <https://www.bloomberg.com/graphics/2018-opioid-lawsuits/> (detailing various types of lawsuits filed against opioid distributors by states and municipalities to recoup damages as a result of the opioid epidemic).

is unprecedented and would create more problems than many local governments hope it would solve.

## II. COPING WITH CATASTROPHE: EXPLORING ECONOMIC HARDSHIPS OF THE OPIOID EPIDEMIC

Local governments are expending financial resources to cope with the damage inflicted by the opioid epidemic. The opioid epidemic has resulted in a need for capital to fund rehabilitation programs and other social welfare programs that will help restore communities to their former capacity. The damages that these communities have suffered include increased public health costs, decreased productivity, and job loss. Many local governments claim that these damages have resulted from the conduct of opioid distributors through the creation of a public nuisance. Now, local governments have filed suits seeking damages. This section of this paper will provide an overview of the opioid epidemic, national economic impacts of the epidemic, and economic hardships incurred by the State of West Virginia.

### A. *An Overview of the Opioid Epidemic*

The opioid epidemic has not victimized subsets of the United States population. The vast damages that occur as a result of the opioid epidemic are not contained to rural settings or to city streets.<sup>15</sup> Instead, opioid addiction has become a national problem that has impacted some states more than others.<sup>16</sup> The extensive impact of the opioid epidemic can be attributed to a variety of factors. First, pharmaceutical companies marketed opioids to physicians as a safe and non-addictive mechanism of treating pain.<sup>17</sup> At the same time, pressure mounted in the United States for health care providers to use pain as a vital sign and for those providers to relieve the pain.<sup>18</sup> Lastly, misrepresentations played a substantial role in the creation of the opioid epidemic through the combination of the pharmaceutical companies' push to prescribe opioids as a solution to the physicians' movement to treat pain.<sup>19</sup> These misrepresentations have led to many deaths, as well as dependency on opioids and heroin.

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<sup>15</sup> *Addiction Affects Everyone*, *supra* note 3.

<sup>16</sup> *Id.*

<sup>17</sup> *The Demand for Opioids, Effects of Opioids on Communities and What Can Be Done*, PBS (Jan. 17, 2018), <http://www.pbs.org/wned/opioid-epidemic/for-educators/effects-opioids-communities-and-what-can-be-done/>.

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

The statistics related to the opioid epidemic are staggering. In 2014 alone, the Centers for Disease Control and Prevention estimate that 53,000 hospitalizations occurred related to opioid abuse while emergency departments received an estimated 92,262 visits due to opioid abuse.<sup>20</sup> Further, 15,281 people died in the United States from drug overdoses of prescription opioids in 2015.<sup>21</sup> Drug overdose death rates have increased since the 1990s, with the most dramatic change occurring between 2013 and 2015.<sup>22</sup> During that time frame, unintentional drug overdose deaths resulting from any opioid increased by sixteen percent per year.<sup>23</sup> In 2016, 116 people died everyday related to opioid overdoses and 948,000 people used heroin.<sup>24</sup>

*B. Plaguing the Nation—The Costs of the Opioid Epidemic*

The numerous deaths and hospitalizations resulting from opioid addiction inflicts detrimental economic impacts on the United States. In 2013, the estimated cost of the opioid epidemic in the United States amounted to \$78.5 billion.<sup>25</sup> Two years later, in 2015, the country incurred \$504 billion in economic cost as a result of opioid addiction.<sup>26</sup> This cost stems mostly from decreased productivity in the labor market but also considers increased costs in health care and the criminal justice system.<sup>27</sup> In 2011, the opioid epidemic accounted for \$25 billion in health care costs and \$5.1 billion in costs related to the criminal justice system;<sup>28</sup> however, the largest costs that were generated in relation to the opioid epidemic occurred in the labor market.<sup>29</sup> The labor market suffered a loss of

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<sup>20</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, ANNUAL SURVEILLANCE REPORT FOR DRUG RELATED RISKS AND OUTCOMES 17 (2017), <https://www.cdc.gov/drugoverdose/pdf/pubs/2017-cdc-drug-surveillance-report.pdf>.

<sup>21</sup> *Id.* at 21.

<sup>22</sup> *See id.* at 23–24.

<sup>23</sup> *Id.*

<sup>24</sup> *What Is the U.S. Opioid Epidemic?*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/opioids/about-the-epidemic/> (last visited Oct. 14, 2018).

<sup>25</sup> Evelyn Cheng, *Goldman Sachs Thinks the Opioid Crisis Is so Bad It's Affecting the Economy*, CNBC (July 6, 2017, 11:00 AM), <https://www.cnbc.com/2017/07/06/opioid-crisis-keeping-us-from-reaching-full-employment-goldman.html>.

<sup>26</sup> Darlene Superville, *White House Says Opioid Crisis Cost \$504 Billion in 2015, Much Higher Than Once Thought*, PBS NEWS HOUR (Nov. 20, 2017, 2:51 PM), <https://www.pbs.org/newshour/nation/white-house-says-opioid-crisis-cost-504-billion-in-2015-much-higher-than-once-thought>.

<sup>27</sup> Cheng, *supra* note 25.

<sup>28</sup> Sheelah Kolhatkar, *The Cost of the Opioid Crisis*, THE NEW YORKER (Sept. 18, 2017), <https://www.newyorker.com/magazine/2017/09/18/the-cost-of-the-opioid-crisis>.

<sup>29</sup> *Id.*

\$25.6 billion in lost earnings and employment.<sup>30</sup> Unfortunately, these statistics do not occur in isolation and affect other important factors throughout the economic framework in the United States. In fact, these costs affect more than the labor market as they also impact economic variables in everyday life. According to an interview conducted by the New Yorker, “[i]f people don’t have jobs, they don’t have money to spend in the grocery store, on gasoline. It’s the old multiplier effect: the socioeconomic burden is much broader than on any individual or any firm.”<sup>31</sup>

It is clear that the opioid epidemic is a national problem and has even been declared a public health emergency by the President of the United States.<sup>32</sup> The opioid epidemic plagues the nation through increased economic costs and societal costs.<sup>33</sup> Opioid addiction also passes on costs to federal and state welfare programs for the provision of opioid related services.<sup>34</sup> In 2013, Medicaid expended \$9.4 billion on services for opioid addicted enrollees.<sup>35</sup> The opioid epidemic results in expansive health care costs due to health conditions and public health concerns stemming from the use of opioids.<sup>36</sup> The \$9.4 billion in expenditures by Medicaid included treatment for heart conditions, mental illness, asthma, and other conditions associated with opioid usage.<sup>37</sup> The opioid epidemic resulted in \$215 billion in national health care costs since 2001.<sup>38</sup> One study suggests that opioid addiction has cost the United States \$1 trillion since 2001 and projects that it could cost the country another \$500 billion over the next three years.<sup>39</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Greg Allen & Amita Kelly, *Trump Administration Declares Opioid Crisis a Public Health Emergency*, NPR (Oct. 26, 2017, 5:02 AM), <https://www.npr.org/2017/10/26/560083795/president-trump-may-declare-opioid-epidemic-national-emergency>.

<sup>33</sup> *Id.*

<sup>34</sup> See generally Katherine Young & Julia Zur, *Medicaid and the Opioid Epidemic: Enrollment, Spending, and the Implications of Proposed Policy Changes*, KAISER FAM. FOUND. (July 14, 2017), <https://www.kff.org/medicaid/issue-brief/medicaid-and-the-opioid-epidemic-enrollment-spending-and-the-implications-of-proposed-policy-changes/> (explaining the costs of the opioid epidemic to Medicaid, a federal and state funded social welfare program for health care costs).

<sup>35</sup> *Id.*

<sup>36</sup> See *id.*

<sup>37</sup> *Id.*

<sup>38</sup> Greg Allen, *Cost of U.S. Opioid Epidemic Since 2001 Is \$1 Trillion and Climbing*, NPR (Feb. 13, 2018, 6:00 AM), <https://www.npr.org/sections/health-shots/2018/02/13/585199746/cost-of-u-s-opioid-epidemic-since-2001-is-1-trillion-and-climbing>.

<sup>39</sup> *Id.*

C. *Economic Impacts on the State of West Virginia*

“We are losing a generation of West Virginians to drug abuse, [a]nd . . . when it comes to an addicted mother with her newborn baby, I’m worried we’re losing two.”<sup>40</sup> West Virginia has suffered significant loss due to the opioid epidemic. As the number of opioid deaths has risen in West Virginia, the state has been referred to as the “epicenter” of the opioid epidemic.<sup>41</sup> Many West Virginians who used opioids became addicted and, as a result of this addiction, died. Over the last six years, more than 1,500 West Virginians died as a result of hydrocodone and oxycodone overdoses.<sup>42</sup> Even worse for state and municipal governments is the aftermath of the opioid epidemic. West Virginia counties are left with the burden of providing services to an addicted population, comprised of less productive citizens who need rehabilitation programs and services. West Virginia and other states are attempting to grapple with the aftermath of an opioid epidemic that has plagued the nation.

Not only has the opioid epidemic affected the overall health of the state’s population, but the epidemic has also strained an already difficult financial situation within West Virginia. According to recent statistics, nearly \$1 billion are missing from the West Virginia economy as a result of the opioid epidemic.<sup>43</sup> The use of opioids in the state requires resources to be diverted to efforts of recovery and rehabilitation.<sup>44</sup> Further, because a large population of West Virginians are addicted to opioids, the state experienced significant job loss that resulted in decreased productivity within the state and approximately \$194 million that is now absent from the state economy.<sup>45</sup>

West Virginia’s average deaths due to opioid abuse in 2015 drastically exceeded the national average. In 2015, West Virginia experienced 36 overdose deaths per 100,000 in population whereas the national average was 10.4 deaths

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<sup>40</sup> John Raby, *US Health Secretary Talks About Opioids in West Virginia*, U.S. NEWS (May 9, 2017, 6:06 PM), <https://www.usnews.com/news/best-states/west-virginia/articles/2017-05-09/us-health-secretary-tom-price-visits-west-virginia>.

<sup>41</sup> Corky Siemaszko, *Attorney General Sessions Heading to West Virginia, Epicenter of U.S. Opioid Epidemic*, NBC NEWS (May 11, 2017, 6:10 AM), <https://www.nbcnews.com/storyline/americas-heroin-epidemic/attorney-general-sessions-heading-west-virginia-epicenter-u-s-opioid-n756931>.

<sup>42</sup> Kyla Asbury & Chris Dickerson, *City of Huntington Sues Drug Wholesalers over Opioid Epidemic*, W. VA. REC. (Jan. 20, 2017), <https://wvrecord.com/stories/511075675-city-of-huntington-sues-drug-wholesalers-over-opioid-epidemic>.

<sup>43</sup> Brittany Murray, *Official Says Opioid Epidemic Shorts State’s Economy Nearly \$1 Billion*, WV METRO NEWS (Nov. 15, 2017, 1:50 PM), <http://wvmetronews.com/2017/11/15/official-says-opioid-epidemic-shorts-states-economy-nearly-1-billion/>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*



per 100,000 in population.<sup>46</sup> Increased deaths lead to a smaller workforce, increased expenditures, and decreased productivity.<sup>47</sup> Even those West Virginians who are addicted to opioids have decreased productivity within the state because they are no longer working, are only working a few hours, or are less productive per hour of work.<sup>48</sup> This has led to approximately 1,200 jobs within the state that have suffered from decreased productivity.<sup>49</sup> This decreased productivity costs West Virginia about \$316 million.<sup>50</sup> The opioid epidemic places a financial strain on the state as a whole and on local governments within the state. In fact, the opioid epidemic is “one of the biggest roadblocks to West Virginia’s economic development.”<sup>51</sup>

*D. A Litigation Boom: Governments File Suits Seeking Damages for Opioid Misconduct*

The persistent addiction and rise in opioid-related deaths have caused problems for many counties and states, leaving them without remedies and resources to restore their populations.<sup>52</sup> In efforts to combat the opioid epidemic, many states have filed civil actions against drug distributors for violations of various laws.<sup>53</sup> In 2017, the Attorney General of Ohio filed a civil action against Purdue Pharma, Johnson & Johnson, Teva Pharmaceuticals, Endo Health Solutions, and Allergan for the companies’ roles in facilitating the opioid epidemic within the State of Ohio.<sup>54</sup> The state sought several remedies from the drug companies, including an injunction to discontinue misrepresentations in the marketing of opioids and damages paid to the state to reimburse money spent on

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<sup>46</sup> *Id.*

<sup>47</sup> *See id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See Elizabeth Kneebone & Scott W. Allard, *A Nation in Overdose Peril: Pinpointing the Most Impacted Communities and the Local Gaps in Care*, BROOKINGS (Sept. 25, 2017), <https://www.brookings.edu/research/pinpointing-opioid-in-most-impacted-communities/>; see also Anjali Tsui, *Opioid Overdoses Are up Another 30 Percent, CDC Says*, PBS FRONTLINE (Mar. 8, 2018), <https://www.pbs.org/wgbh/frontline/article/opioid-overdoses-are-up-another-30-percent-cdc-says/> (stating that lack of aid from government has left communities without resources to combat effects of opioid epidemic).

<sup>53</sup> See generally Meg Tirrell, *Ohio Attorney General Sues 5 Pharma Companies over Their Role in the Opioid Epidemic*, CNBC (May 31, 2017, 11:53 AM), <https://www.cnbc.com/2017/05/31/ohio-ag-sues-pharma-companies-over-their-role-in-the-opioid-epidemic.html>; Higham & Bernstein, *supra* note 13.

<sup>54</sup> *Id.*

the opioid epidemic.<sup>55</sup> The state sought these remedies after alleged deceptive marketing by these companies facilitated the prescription of opioids to 2.3 million people within the state—accounting for 20% of Ohio’s population.<sup>56</sup> While Ohio recently filed suit against drug companies, other states and cities have also filed suits against major drug distributors for their role in the opioid epidemic. The Attorney General of Missouri filed suit against large drug companies for damages the state incurred due to the abuse of opioids.<sup>57</sup> The Attorney General lashed out at pharmaceutical companies for misrepresentations with regard to the addictive characteristics of opioids and for using fraudulent science to back those assertions.<sup>58</sup>

Other cities and counties within states have filed lawsuits on their own behalf against drug companies, each looking for a legal tool to stake a valid claim for recovery.<sup>59</sup> Recently, two West Virginia counties filed lawsuits against drug companies for distributing excessive amounts of opioids into the state.<sup>60</sup> Between 2007 and 2012, drug manufacturers distributed 780 million opioids to the state of West Virginia.<sup>61</sup> These shipments supplied West Virginia with enough opioids to distribute 433 pills to each resident of the state.<sup>62</sup> While other states have filed suit against drug companies, the suits filed by West Virginia counties differ in their allegations and legal mechanisms. As opposed to claiming that drug companies misrepresented the characteristics of opioids, the counties instead claim that the drug companies created a public health hazard to the citizens of West Virginia by distributing an inordinate amount of opioids—a public nuisance.<sup>63</sup>

### III. PUBLIC NUISANCE LAW: BENDING A TRADITIONAL TORT TO FIT MODERN PROBLEMS

Currently, numerous public nuisance lawsuits have been filed throughout the country against opioid distributors for their conduct in the

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See *Missouri Attorney General Sues 3 Drug Companies over State’s Opioid Crisis*, CBS NEWS (June 21, 2017, 5:10 PM), <https://www.cbsnews.com/news/opioid-crisis-missouri-attorney-general-josh-hawley-sues-pharmaceutical-companies/>.

<sup>58</sup> *Id.*

<sup>59</sup> See sources cited *infra* note 64.

<sup>60</sup> Higham & Bernstein, *supra* note 13.

<sup>61</sup> Margaret Talbot, *The Addicts Next Door*, THE NEW YORKER, (June 5, 2017), <https://www.newyorker.com/magazine/2017/06/05/the-addicts-next-door>.

<sup>62</sup> *Id.*

<sup>63</sup> Higham & Bernstein, *supra* note 13.

distribution of opioids.<sup>64</sup> Local governments that need resources to remedy their communities and treat residents addicted to opioids are seeking damages from these distributors. The local governments in West Virginia and other states feel that opioid distributors engaged in conduct that affects public health and therefore violated a public right.<sup>65</sup> As a result, West Virginia local governments wish to abate the public nuisance that they claim opioid distributors created. This section of the paper will discuss the common law doctrine of public nuisance. Because West Virginia courts have not applied the tort of public nuisance to distributors or manufacturers of products, this section will survey cases from other jurisdictions to discuss the elements of public nuisance within the context of product manufacturing and distribution. After providing rationales from other jurisdictions, this section discusses the public nuisance claims set forth by Cabell County and McDowell County, two local governments within the State of West Virginia.

#### A. *The Common Law Doctrine of Public Nuisance*

The legal theory of public nuisance originated in English common law but has since expanded.<sup>66</sup> The tort required four elements to be satisfied for liability: (1) injury to a public right; (2) unreasonable conduct; (3) control of the instrumentality causing the nuisance; and (4) proximate cause.<sup>67</sup> Although these elements were derived from common law, states' attempts to define public nuisance further obscures the actual requirements. For example, the Florida Supreme Court has referred to a public nuisance as an "annoyance to the community or harm to public health."<sup>68</sup> While Florida's definition seems relatively straightforward, other state definitions are more complicated.<sup>69</sup>

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<sup>64</sup> See Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html>; Greg Kocher & Bill Estep, *Wave of Kentucky Counties File Lawsuits Against Drug Distributors for Creating 'a Public Nuisance'*, LEXINGTON HERALD LEADER (Sept. 12, 2017, 6:04 PM), <http://www.kentucky.com/news/state/article172934021.html>.

<sup>65</sup> See generally *Is the Public Nuisance Universe Expanding?*, BLOOMBERG NEWS (Jan. 31, 2017), <https://www.bna.com/public-nuisance-universe-n57982083122/> (discussing public nuisance lawsuits against product manufactures that have produced products in which adversely affected the public health).

<sup>66</sup> Victor E. Schwartz et al., *Game Over? Why Recent Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 OKLA. L. REV. 629, 632 (2010).

<sup>67</sup> *Id.* at 633–34.

<sup>68</sup> Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 774 (2003).

<sup>69</sup> Many states have codified the common law doctrine of public nuisance and, in doing so, have also set forth statutory definitions of "public nuisance." For example, see MONT. CODE ANN. § 45-8-111 (West 2018), which defines a public nuisance as "a condition that endangers safety or

The Restatement provides that a public nuisance is “an unreasonable interference with a right common to the general public.”<sup>70</sup> Further, the Restatement provides guidance on circumstances that determine what constitutes an unreasonable interference with a public right.<sup>71</sup> According to the Restatement,

[c]ircumstances that may sustain a holding that an interference with a public right is unreasonable include the following:  
(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or  
(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or  
(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.<sup>72</sup>

Although, traditionally, all four elements of the tort must be satisfied in order to successfully prevail on a theory of public nuisance, plaintiffs have sought to expand the law over recent decades.<sup>73</sup> The Restatement (Second) of Torts expanded public nuisance law by granting standing to a representative who may sue on behalf of the general public.<sup>74</sup> Thereafter, plaintiffs began to sue manufacturers for products that annoyed or threatened the community or public health. During the 1980s, litigation ensued against manufacturers for creating public nuisances that unreasonably interfered with rights common to the general public.<sup>75</sup> Most of the suits alleged the substantial interference with the public

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health, is offensive to the senses, or obstructs the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or by any considerable number of persons.” *Compare* N.M. STAT. ANN. § 30-8-1 (West 2018) (stating that a public nuisance is “knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either: injurious to public health, safety, morals or welfare; or interferes with the exercise and enjoyment of public rights, including the right to use public property”), *with* W. VA. CODE ANN. § 7-1-3kk (West 2018) (providing that the county commission may eliminate “hazards to public health and safety and to abate or cause to be abated anything which the commission determines to be a public nuisance”).

<sup>70</sup> RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

<sup>71</sup> *See id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See generally* Schwartz et al., *supra* note 66 (parsing attempted expansion of public nuisance law into areas of product liability).

<sup>74</sup> *Id.* at 637.

<sup>75</sup> *Id.*

health. In the past, plaintiffs filed suits against car, asbestos, tobacco, and gun manufacturers on the theory of public nuisance.<sup>76</sup>

Plaintiffs who have sued based upon the theory of public nuisance have also generally mischaracterized the remedies available under public nuisance law.<sup>77</sup> Although public nuisance law permits governments to abate public nuisances, the law does not traditionally award monetary damages as a legal remedy to government plaintiffs.<sup>78</sup> Instead, the law provides for equitable remedies, such as injunctions, and the court may award costs in abating the nuisance to help aid local governments regulate conduct that is creating a public nuisance.<sup>79</sup> The Restatement does allow actions for damages under the tort of public nuisance but provides different standards for actions that seek damages from actions that seek equitable relief.<sup>80</sup> Government plaintiffs who are seeking damages for the adverse effects of manufactured products, such as lead paint or guns, have relied on theories of public nuisance to obtain relief.

Public nuisance arguably began to expand through litigation for expenses related to the hazardous health effects from tobacco products.<sup>81</sup> As a result of the health problems caused by tobacco products, plaintiffs sued for reimbursements for state health program expenditures that were tied to treating the public with tobacco related illnesses.<sup>82</sup> Although the courts never actually resolved the case based on the merits of public nuisance law, the tobacco companies settled the cases with states for \$246 billion;<sup>83</sup> however, one court ultimately decided that the claim against tobacco companies on the basis of public nuisance was outside the scope of the law.<sup>84</sup> The court declined to hold manufacturers liable through an expansion of public nuisance law.<sup>85</sup> Though the court denied the attempted expansion of public nuisance law in this case, public nuisance was one of the claims against manufacturers for which the states

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<sup>76</sup> See *id.* at 637–39.

<sup>77</sup> See Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 570 (2006).

<sup>78</sup> See *id.* (discussing injunctions as a traditional remedy of public nuisance law for government plaintiffs); see also Greg J. Carlson, *Lead Paint: Who Will Bear the Cost of Abating the Latest Public Nuisance?*, 59 HASTINGS L.J. 1553, 1573 (2008).

<sup>79</sup> See Schwartz & Goldberg, *supra* note 77, at 570.

<sup>80</sup> RESTATEMENT (SECOND) TORTS § 821B cmt. i (AM. LAW INST. 1979) (providing that the accurate inquiry for actions seeking legal damages is “whether it is unreasonable to engage in the conduct without paying for the harm done” whereas for actions seeking equitable relief the court must determine “whether the activity itself is so unreasonable that it must be stopped”).

<sup>81</sup> Gifford, *supra* note 68, at 758–63.

<sup>82</sup> See Schwartz et al., *supra* note 66, at 638.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

received settlement.<sup>86</sup> Based upon this settlement, many plaintiffs have attempted to sue manufacturers for damages that they have suffered as a result of manufacturers' products. During recent years, courts have continued to deny the expansion of the doctrine of public nuisance.

### 1. Violation of a Public Right—Lead Based Paint Litigation

In order to succeed on a claim of public nuisance against a manufacturer, a plaintiff must establish that the manufacturer violated a public right. This is often a difficult standard in public nuisance law, especially when suing based on products that have been produced by manufacturers but are privately consumed.<sup>87</sup> The courts have wrestled with this element and have ultimately held that the term "public right" is to be construed to include common rights that have historically been protected by public nuisance law—the common use of water ways and public highways.<sup>88</sup> Even in the case of protecting children from the hazards of lead based paint, the Rhode Island Supreme Court, in *State of Rhode Island v. Lead Industries Ass'n, Inc.*,<sup>89</sup> declined to expand public nuisance law and impose liability on paint manufacturers.<sup>90</sup> The court determined that production of an environmental hazard did not constitute an interference with a public right as required by public nuisance law.<sup>91</sup>

A public right is an interest that is common to the general public, as opposed to an interest of one or several individuals.<sup>92</sup> "It is not . . . necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large."<sup>93</sup> A public right is collective in nature and is not violated if conduct affects only some individuals of a community.<sup>94</sup> Instead, an interference of a public right more likely occurs when there is interference with a resource that is communal among

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<sup>86</sup> *See id.*

<sup>87</sup> *See* DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION* 146 (2010).

<sup>88</sup> *See id.* at 145.

<sup>89</sup> 951 A.2d 428 (R.I. 2008).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 453–54.

<sup>92</sup> *Id.* at 447.

<sup>93</sup> RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. LAW INST. 1979).

<sup>94</sup> *Lead Indus. Ass'n*, 951 A.2d at 448 (discussing the pollution of a stream that bars only a few farmers from retrieving water from that stream does not constitute interference with a public right but that pollution of a stream that bars a community's right to fish within the stream does constitute a public right).

the general public “like air, water, and public rights of way.”<sup>95</sup> Further, the Supreme Court of Rhode Island in *Lead Industries*, discussed the differences between a public right and a public interest—concluding that what constitutes a public interest is broader than a public right.<sup>96</sup> The court agreed that “. . . while it is in the public interest to promote the health and well-being of citizens generally, there is no common law public right to a certain standard of medical care or housing.”<sup>97</sup>

The court held that the state’s assertion that it had a public right to be free from health hazards that were occurring due to unabated lead did not constitute a public right within the traditional contexts that the law had been used.<sup>98</sup> The court determined that the right of children not to be poisoned by lead paint was an individual right and was, in fact, similar to other individual rights that had been dismissed by other courts.<sup>99</sup> Despite efforts of the state, the court sided with other courts and reiterated that a public right did not include the right to be free from “unreasonable jeopardy to health” caused by products of manufacturers.<sup>100</sup> Therefore, the court declined to impose liability on manufacturers because it would expand public nuisance law to a context that was never intended.<sup>101</sup>

## 2. Establishing Unreasonable Interference in Public Nuisance Law

A plaintiff must establish that a manufacturer has unreasonably interfered with a public right in order to successfully succeed on a claim for public nuisance. In order to clarify what constitutes unreasonable interference, the Restatement (Second) of Torts offers some statutory guidance in regards to this element.<sup>102</sup> As previously discussed, the court may examine certain circumstances in which an unreasonable interference may occur including “significant interference” with the public health, safety, convenience, or comfort.<sup>103</sup> Further, a court may examine whether the conduct is permitted by

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<sup>95</sup> *Id.* (quoting *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 132 (Ill. App. Ct. 2005)).

<sup>96</sup> *See id.*

<sup>97</sup> *Id.* (quoting Gifford, *supra* note 68, at 815).

<sup>98</sup> *Id.* at 453.

<sup>99</sup> *Id.* at 454.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 453.

<sup>102</sup> *See* RESTATEMENT (SECOND) OF TORTS § 821B(2) (AM. LAW INST. 1979).

<sup>103</sup> *Id.* § 821B(2)(a).

law<sup>104</sup> and whether the conduct has produced a long lasting effect.<sup>105</sup> This effect would provide the actor with sufficient reason to know that the conduct is having a significant effect on a public right.<sup>106</sup>

Although the Restatement provides some guidance on this element of public nuisance law, elaboration upon this element largely derives from common law. In *City of Chicago v. Beretta U.S.A. Corp.*,<sup>107</sup> the Supreme Court of Illinois examined claims of the City of Chicago in the face of damages as a result from gun violence.<sup>108</sup> The court parsed the claims of the city against gun manufacturers and examined what constitutes unreasonable interference in the context of manufacturing and distributing products that result in harm.<sup>109</sup>

The Supreme Court of Illinois examined the standard set forth by common law within the State of Illinois. At common law in Illinois, an unreasonable interference with the public right is established if a manufacturer negligently operated its business.<sup>110</sup> The court must examine whether the manufacturer acted negligently and whether the conduct created a “significant” effect on a public right.<sup>111</sup> Because this part of a public nuisance claim is established through negligent conduct, the court must examine whether or not the manufacturer owed a duty of care to the public.<sup>112</sup> To determine whether the gun manufacturers owed a duty to the City of Chicago in this case, the court examined the necessary elements of duty under Illinois common law.<sup>113</sup>

In order to determine that a manufacturer owed a duty to the general public and therefore unreasonably interfered with a public right, the court examines public policy considerations. These public policy considerations include “(1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant.”<sup>114</sup> The City of Chicago specifically alleged that gun manufacturers owed a duty to Chicago residents by exercising reasonable care.<sup>115</sup> The city claimed that manufacturers had a duty to ensure that guns did not end up in the hands of individuals who

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<sup>104</sup> *Id.* § 821B(2)(b).

<sup>105</sup> *Id.* § 821B(2)(c).

<sup>106</sup> *Id.*

<sup>107</sup> 821 N.E.2d 1099 (Ill. 2004).

<sup>108</sup> *Id.* at 1117.

<sup>109</sup> *See id.*

<sup>110</sup> *Id.* at 1125.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (citing *Bajwa v. Metro. Life Ins. Co.*, 804 N.E.2d 519, 528 (Ill. 2004)).

<sup>115</sup> *Id.* at 1109.



illegally possess and use guns.<sup>116</sup> The Supreme Court disagreed and ultimately held that the gun manufacturers did not owe a duty to the public.<sup>117</sup>

The court discussed the four public policy considerations in order to determine whether the gun manufacturers owed a duty to the public and therefore unreasonably interfered with a public right. Although the court agreed that it is reasonably foreseeable that permitting the sale of guns will result in the criminal acquisition of firearms, it is less foreseeable that the sale of firearms will result in a public nuisance within a community.<sup>118</sup> Further, the court explained that imposing the changes sought by the city was too great of a burden on gun manufacturers and distributors because it would require substantial changes to their business practices.<sup>119</sup> The court also explained that the city's proposed positive outcomes of saving lives and fostering a safer community were merely speculative.<sup>120</sup> The court stated that "the negative consequence of judicially imposing a duty upon commercial enterprises to guard against the criminal misuse of their products by others will be an unprecedented expansion of the law of public nuisance."<sup>121</sup> Therefore, because the burden on the manufacturer to change business practices was far too great and the potential outcomes were uncertain, the court held that gun manufacturers did not owe a duty to the City of Chicago.<sup>122</sup>

The Supreme Court of Illinois is not alone in applying a negligence standard in order to evaluate public nuisance claims.<sup>123</sup> Although some states may apply a negligence standard to determine whether there was an unreasonable interference with a public right, states may also examine whether the conduct significantly interferes with public health, is permitted by law, and has a long lasting effect.<sup>124</sup> The Restatement also provides that a negligence standard may

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1126.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 621 F. Supp. 2d 513, 521 (N.D. Ohio 2009) (citing *Allen Freight Lines, Inc. v. Consol. Rail Corp.*, 595 N.E.2d 855, 856 (Ohio 1992)) ("Because it is premised upon negligence, a qualified nuisance claimant must plead and prove the traditional elements thereof: duty, breach, proximate causation, and damages."); see also *District of Columbia v. Beretta U.S.A. Corp.*, 872 A.2d 633, 646 (D.C. 2009) ("The question, nevertheless, is whether the District has sufficiently pleaded that cause of action, and the answer depends critically on how prepared we are to loosen the tort from the traditional moorings of duty, proximate causation, foreseeability, and remoteness that have made us reject the plaintiffs' claim of negligence.").

<sup>124</sup> See RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

be used in determining whether an unreasonable interference has occurred.<sup>125</sup> Although it might seem that a negligence standard may be easy to prove, it is likely more difficult when trying to show that a manufacturer owed a duty to the general public. Even if a plaintiff can establish that the manufacturer owed a duty to the public and that an unreasonable interference with a public right occurred, the plaintiff may have more difficulty establishing that the manufacturer exercised sufficient control.

### 3. Maintaining the Causal Connection: Establishing Proximate Cause

The last element that must be established in a public nuisance case is proximate cause. It is not enough to establish a public right, an unreasonable interference, and control. The plaintiffs must demonstrate that a causal link exists between the manufacturers' conduct and the damages that have occurred. Proximate cause has been discussed in length by many jurisdictions in relation to public nuisance and products produced by manufacturers. Part i of this section will discuss what constitutes proximate cause in public nuisance law and Part ii will demonstrate how third-party actions may break the causation chain.

Proximate cause is somewhat debated in relation to public nuisance law. Although proximate cause is often evaluated based on the reasonable foreseeability of harm that results from a defendant's conduct,<sup>126</sup> many courts have also determined a plaintiff must establish that the manufacturer exercised "sufficient control" over the product that caused the injury.<sup>127</sup> Many courts, including the Fourth Circuit, have emphasized control and discussed a manufacturer's control of the product as a part of proximate cause and a factor that may be determinate of liability.<sup>128</sup>

#### *i. Constituting Sufficient Control*

In the 1990s, cities filed suits against gun manufacturers to gain reimbursement for law enforcement and public health expenses as a result of gun violence.<sup>129</sup> The cities argued that gun manufacturers were liable for public

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<sup>125</sup> *Id.* § 821B cmt. e (stating that "the defendant is held liable for a public nuisance if his interference with the public right was intentional or was unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities").

<sup>126</sup> *See* Schwartz & Goldberg, *supra* note 77, at 569.

<sup>127</sup> *See id.* at 567.

<sup>128</sup> *See generally* Liberty Mut. Fire Ins. Co. v. JM Smith Corp., 602 F. App'x 115, 121 (4th Cir. 2015) (discussing the conduct of physicians, pharmacies, and distributors whose conduct alone could have caused the opioid epidemic complicates the chain of causation).

<sup>129</sup> *See* Schwartz et al., *supra* note 66, at 639.

nuisance through marketing and sales tactics, which aided in the creation of an illegal gun market and interfered with public health and safety, creating a public nuisance.<sup>130</sup> The courts in these cases also determined that holding gun manufacturers liable for engaging in lawful conduct that did not affect the property of others would be an unlawful expansion of public nuisance law.<sup>131</sup> The court held that the plaintiffs had not claimed a valid public right nor had the manufacturers engaged in unreasonable conduct as required by public nuisance law.<sup>132</sup> Ultimately, attempts to expand public nuisance law once again failed.

The Third Circuit in *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*,<sup>133</sup> declined to hold gun manufacturers liable where a county in New Jersey alleged that gun manufacturers' marketing and distribution of guns constituted a public nuisance.<sup>134</sup> Specifically, the county alleged that the manufacturers' conduct endangered the public health of citizens through the facilitation of a handgun distribution system that provided easy access of guns to criminals.<sup>135</sup> The county alleged that it suffered significant losses related to gun violence that likely stemmed from manufacturers releasing more guns into the market than they expected law abiding citizens would purchase.<sup>136</sup> Further, the county alleged that the manufactures did not adequately monitor the sales of handguns, nor did they take any action to mitigate the damage that stemmed from their conduct.<sup>137</sup>

The court applied public nuisance law of New Jersey and noted that the county had failed to allege a vital element of the claim—control.<sup>138</sup> According to New Jersey law, for an interference with a public right to be actionable, a manufacturer must exert control over its source.<sup>139</sup> The court held that the manufacturers were not liable for public nuisance claims because the chain of causation was too sparse to connect gun manufacturers to the effects of gun violence.<sup>140</sup> The court declined to hold manufacturers liable for the actions of third parties who divert guns to unauthorized owners because the manufacturers had no control whatsoever over third party dealers.<sup>141</sup> The court stated “[t]he

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> 273 F.3d 536 (3d Cir. 2001).

<sup>134</sup> *Id.* at 540.

<sup>135</sup> *Id.* at 538.

<sup>136</sup> *Id.* at 539.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 541.

<sup>141</sup> *Id.*

manufacturers may not be held responsible ‘without a more tangible showing that the defendants were a direct link [in] the causal chain that resulted in the plaintiffs’ injuries, and that defendants were realistically in a position to prevent the wrongs.’”<sup>142</sup> Ultimately, the court held that the nuisance created by gun violence was not within the control of gun manufacturers and therefore, the manufacturers were not liable.<sup>143</sup>

Although many attempts to expand public nuisance laws have failed, the reasoning that the courts provided is insightful. Some suggest that these failed attempts signal the end of public nuisance law as a theory for manufacturer liability, but many plaintiffs continue to assert the theory of public nuisance against manufacturers, including the manufacturers of lead paint and opioid distributors.<sup>144</sup> The persistence of plaintiffs in the use of public nuisance is admirable, but the doctrine is unworkable in the context of product manufacturing and distributing that merely affects public health.

ii. *Reasonable Foreseeability Among Multiple Actors*

In order to determine whether an injury resulted from conduct, the court must examine whether the injury was reasonably foreseeable.<sup>145</sup> In examining proximate cause, the court also examines cause in fact and legal cause.<sup>146</sup> Both of these requirements must be established in order to hold a defendant liable for public nuisance. If the act of the defendant did not factually and legally cause injury to the plaintiff, then the defendant cannot be held liable for public nuisance.

In *City of Chicago v. Beretta U.S.A. Corp.*, the Supreme Court of Illinois examined both cause in fact and legal cause to determine whether the city had established proximate cause.<sup>147</sup> According to the Supreme Court, “cause in fact, is present, ‘when there is reasonable certainty that a defendant’s acts caused the injury or damage.’”<sup>148</sup> To satisfy this requirement a plaintiff must show that the injury would not have occurred absent the defendant’s conduct.<sup>149</sup> If many factors are involved in bringing about the injury, then the Illinois Supreme Court

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<sup>142</sup> *Id.* (quoting *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1062 (N.Y. 2001) (alteration consistent with original)).

<sup>143</sup> *Id.*

<sup>144</sup> See Gifford, *supra* note 68, at 773–74; Higham & Bernstein, *supra* note 13.

<sup>145</sup> See Schwartz & Goldberg, *supra* note 77, at 569.

<sup>146</sup> *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1127 (Ill. 2004).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

examines whether or not the defendant's conduct is a "material element and substantial factor in bringing about the injury."<sup>150</sup>

In examining legal cause, the court must examine how closely related the defendant's conduct is to the injury that occurred.<sup>151</sup> The Supreme Court of Illinois determines legal cause through a test of foreseeability.<sup>152</sup> The Supreme Court examines "whether the injury is of a type that a reasonable person would see as a likely result of his conduct."<sup>153</sup> This foreseeability is used to establish proximate cause in compliance with the remoteness doctrine. If an injury is too "remote" from the conduct of the defendant, then the defendant cannot be liable for damages related to that injury.<sup>154</sup>

The doctrine of remoteness examines reasonably foreseeable consequences of a defendant's conduct to establish the chain of causation; however, when the criminal acts of independent third parties also bring about damages to the plaintiff, liability generally will not be imposed upon the defendant.<sup>155</sup> In *City of Chicago v. Beretta U.S.A. Corp.*, the Illinois Supreme Court refused to impose liability on gun manufacturers due in part to the criminal sales of guns by independent third parties.<sup>156</sup> The Supreme Court acknowledged that even though it might have been foreseeable that producing and distributing guns would foster gun violence, the Supreme Court stated, ". . . [T]he alleged public nuisance is not so foreseeable to the dealer defendants that their conduct can be deemed a legal cause of a nuisance that is a result of the aggregate of the criminal acts of many individuals over whom they have no control."<sup>157</sup>

The Fourth Circuit has also discussed remoteness in proximate cause of public nuisance claims. The Fourth Circuit examined the duty of an insurance company to defend its insured customers against a lawsuit brought by the West Virginia Attorney General for creating a public nuisance through distribution of opioids.<sup>158</sup> In determining whether the insurance company had a duty to defend drug manufacturers, the Circuit Court acknowledged that the chain of causation was obscure and indirect.<sup>159</sup> The causal chain included drug manufactures that distributed opioids to pharmacies that then distributed those opioids to patients

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *See id.*

<sup>153</sup> *Id.*

<sup>154</sup> *See id.* at 1132; *see also* *District of Columbia v. Beretta U.S.A. Corp.*, 872 A.2d 633, 648 (D.C. 2005).

<sup>155</sup> *City of Chicago*, 821 N.E.2d 1099, 1134–35 (Ill. 2004).

<sup>156</sup> *Id.* at 1136.

<sup>157</sup> *Id.* at 1138.

<sup>158</sup> *See* *Liberty Mut. Fire Ins. Co. v. JM Smith Corp.*, 602 F. App'x 115, 116 (4th Cir. 2015).

<sup>159</sup> *Id.* at 121.

who may have been abusing opioids, which resulted in damages to the State of West Virginia.<sup>160</sup> The facts alleged created a chain of causation that involved many parties whose own individual actions could have resulted in the damages incurred by the state.<sup>161</sup> However, the Fourth Circuit held that a duty to defend existed because there was a possibility that the lower court may find that the drug manufacturers did not exercise sufficient care in distributing opioids that brought about accidental harm to the state of West Virginia.<sup>162</sup> Ultimately, the lower courts must examine the defendant's control of the substance causing harm and the remoteness of the defendant's conduct from the damages suffered by the plaintiff.

*B. West Virginia's Public Nuisance Lawsuits*

West Virginia has yet to discuss public nuisance law in the context of products that have been produced by manufacturers. Traditionally, West Virginia common law has addressed roadways, obstructions, waterways, hazardous wastes and other typical subjects of public nuisance law in other states.<sup>163</sup> However, with the recent filings of public nuisance lawsuits within the state of West Virginia, the courts will likely need to examine West Virginia law and other jurisdictions to decide whether or not opioid distributors are liable for damages to local governments. The complaints filed by the West Virginia counties allege that pharmaceutical drug distributors have created a public nuisance through distribution practices that have caused economic damages to the counties.<sup>164</sup> These counties seek to abate the public nuisance under their authority granted by West Virginia statutory law.<sup>165</sup> The counties claim that they are entitled to relief

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 122.

<sup>163</sup> See *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d 616, 619–22 (W. Va. 1985) (discussing public nuisance in the context of hazardous wastes); *Clay Cty. Ct. v. Adams*, 155 S.E. 174, 177–78 (W. Va. 1930) (discussing what constitutes public nuisance when a public road is obstructed); *City of Martinsburg v. Miles*, 121 S.E. 285, 286–87 (W. Va. 1924) (discussing public nuisance in the context of obstructions to a sidewalk).

<sup>164</sup> Complaint at 4, *Cabell Cty. Comm'n v. AmerisourceBergen Drug Corp.*, No. 3:17-CV-01665 (S.D.W. Va. 2017); Amended Complaint at 26, *Cty. Comm'n of McDowell Cty. v. McKesson Corp.*, 263 F. Supp. 3d 639 (S.D.W. Va. 2017).

<sup>165</sup> See W. VA. CODE ANN. § 7-1-3kk (West 2018).

In addition to all other powers and duties now conferred by law upon county commissions, commissions are hereby authorized to enact ordinances, issue orders and take other appropriate and necessary actions for the elimination of hazards to public health and safety and to abate or cause to be abated anything which the commission determines to be a public nuisance. The ordinances may provide for a misdemeanor penalty for its violation. The ordinances may

and aid in remedying the problems that are associated with a population that is addicted to opioids.<sup>166</sup>

### 1. Cabell County Seeks Damages to Fight Opioid Addiction

The Cabell County Commission has filed suit against ten prescription drug manufacturers and distributors for creating a public nuisance within the county.<sup>167</sup> Cabell County has authority to bring this suit by West Virginia statutory law, which gives county commissions the power to enact ordinances or take other appropriate actions to address threats to the public health and safety.<sup>168</sup> Additionally, the statute provides that county commissions may also “abate or cause to be abated anything which the commission determines to be a public nuisance.”<sup>169</sup> Cabell County filed suit based on the claim that the defendants’ distribution practices were hazards to the public health and safety and that the county had a right to abate the public nuisance that the defendants created.<sup>170</sup>

Cabell County alleged that the defendants violated a public right in their complaint, which is a necessary element of public nuisance claims.<sup>171</sup> According to the complaint that was filed in the Southern District of West Virginia, “prescription opiate abuse, addiction, morbidity, and mortality” are hazards to the public health, public safety, and are a temporary public nuisance.<sup>172</sup> To remedy the public nuisance that the defendants have allegedly created, Cabell County seeks economic damages from the defendants in order to eliminate the hazards to public health and abate the public nuisance.<sup>173</sup>

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further be applicable to the county in its entirety or to any portion of the county as considered appropriate by the county commission.

*Id.*; see also W. VA. CODE ANN. § 16-3-6 (West 2018).

The state director of health or any county or municipal health officer shall inquire into and investigate all nuisances affecting the public health within his jurisdiction; and the said director or any such officer or the county commission of any county or any municipality is authorized and empowered to apply to the circuit court of the county in which any such nuisance exists, or to the judge thereof in vacation, for an injunction forthwith to restrain, prevent or abate such nuisance.

*Id.*

<sup>166</sup> See Complaint, *supra* note 164, at 35; Amended Complaint, *supra* note 164, at 29–30.

<sup>167</sup> Complaint, *supra* note 164, at 1.

<sup>168</sup> W. VA. CODE ANN. § 7-1-3kk.

<sup>169</sup> *Id.*

<sup>170</sup> See Complaint, *supra* note 164, at 4.

<sup>171</sup> See *id.*

<sup>172</sup> See *id.* at 4, 32.

<sup>173</sup> *Id.* at 37.

Cabell County also contends that the defendants breached duties that they owed under both federal law and West Virginia law.<sup>174</sup> Further, the complaint contends that the defendants were well aware of the duties imposed on them by these laws because some of the laws had been in effect for 40 years.<sup>175</sup> Cabell County also provided facts that each defendant was on notice of these duties after receiving letters and reminders from the Drug Enforcement Agency about their duties and responsibilities as prescription drug distributors.<sup>176</sup> As a result of the breach of these duties, Cabell County contends that the damage it incurred through opiate and heroin addiction was reasonably foreseeable.<sup>177</sup>

Cabell County alleges that defendants' failures to adequately monitor, refuse, and report suspicious orders of prescription opiates is a proximate cause of the public nuisance and the damages that the county has incurred.<sup>178</sup> Specifically, Cabell County claims that defendants conduct is a proximate cause of the diversion of opioids for nonmedical uses, the opioid epidemic within Cabell County, and the heroin epidemic within Cabell County.<sup>179</sup> Although Cabell County has pleaded facts that allege misconduct on behalf of opioid distributors, the complaint fails to allege facts that establish the necessary elements of a public nuisance claim.

## 2. McDowell County Demands Protection of the "Public Rights" of Citizens

The County Commission of McDowell County has also filed a lawsuit against prescription drug distributors and the West Virginia Board of Pharmacy for creating a public nuisance within McDowell County by distributing "millions of doses of commonly-abused, highly addictive controlled substances."<sup>180</sup> McDowell County claims that the defendants, in breaching their duties, have engaged in unreasonable conduct that interfered with citizens' rights to be free from unwarranted injuries, addictions, annoyances, and overdoses that affect the safety of others.<sup>181</sup> The county also contends that the defendants' conduct has inflicted damages upon the county and residents of the county who have not only become addicted to opioids, but those who have been adversely affected by the

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<sup>174</sup> *Id.* at 9.

<sup>175</sup> *Id.* at 10.

<sup>176</sup> *See id.*

<sup>177</sup> *See id.* at 15.

<sup>178</sup> *Id.* at 25.

<sup>179</sup> *See id.* at 25–26.

<sup>180</sup> Amended Complaint, *supra* note 164, at 29.

<sup>181</sup> *See id.* at 27.



addiction of others.<sup>182</sup> McDowell County, like Cabell County, alleges that the defendants engaged in unreasonable distribution of opioids that caused the diversion of prescription opioids into an illicit illegal market, thereby creating a public nuisance that the county wishes to abate.<sup>183</sup>

According to the Second Amended Complaint, the county is entitled to abate the nuisance that the defendants created because the defendants' failure to adequately monitor the distribution of opioids and inability to report suspicious orders was the direct and proximate cause of the harm suffered by the county and its residents.<sup>184</sup> Because the defendants had notice and knowledge of the opioid epidemic within the state of West Virginia, McDowell County contends that the damages to the county were reasonably foreseeable consequences of the defendants' conduct.<sup>185</sup> The drug distributors disregarded all available information regarding the severity of the opioid epidemic throughout the country and in the state of West Virginia.<sup>186</sup> McDowell County contends that this intentional and malicious disregard as well as the inadequate distribution practices threatened and continues to threaten the public health and safety of McDowell County and its residents.<sup>187</sup> Therefore, McDowell County seeks damages for assistance in abating the public nuisance, punitive damages, and a permanent restraining order against the defendants.<sup>188</sup>

#### IV. CASE STUDY: APPLICATION OF PUBLIC NUISANCE LAW TO WEST VIRGINIA CLAIMS

Although public nuisance traditionally was not a theory of liability intended to hold manufacturers and distributors liable for negligent practices, many plaintiffs have used this theory to file lawsuits against gun manufacturers, paint producers, tobacco companies, and now prescription opioid distributors; however, plaintiffs have had little success with these lawsuits. Courts across jurisdictions should not hold opioid distributors liable for public nuisance because the conduct and violation of rights alleged fail to establish the basic elements of the tort. This section will use the complaints of Cabell and McDowell Counties to provide an analysis that will be useful across jurisdictions. Subsection A will assert that the counties have failed to allege the violation of a

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 27–28.

<sup>184</sup> *Id.* at 28–29.

<sup>185</sup> *See id.* (asserting that opioid distributors were on notice of the existing opioid epidemic yet engaged in a pattern of distributing opioid that were known to be abused).

<sup>186</sup> *See id.* at 178.

<sup>187</sup> *Id.* at 29.

<sup>188</sup> *Id.* at 29–30.

valid public right within the traditional application of the law. Subsection B will examine how plaintiffs are unable to establish that prescription opioid distributors exercised sufficient control over opioids that actually caused damages to the counties. Subsection C determines that the damages incurred by the counties are too remote from the conduct of opioid distributors to establish causation. Because the counties are unable to establish the elements of a public nuisance claim and previous courts have declined to hold manufacturers liable for public nuisance, courts should decline to expand public nuisance liability.

A. *Unwarranted Addiction, Morbidity, and Mortality Fail to Establish Valid Public Rights*

Traditionally, public nuisance law did not include threat or harm to a person or set of persons. Instead, a public right was something that all communities used or were entitled to use. However, plaintiffs have misconstrued this element and have attempted to expand public right to any conduct that affects public health.<sup>189</sup> For example, McDowell County has alleged that the opioid distributors' conduct interfered with citizens' rights to be free from unwarranted addiction, overdoses, injuries, and diseases.<sup>190</sup> Cabell County has claimed that the opioid distributors' conduct harmed the public health through "opioid and heroin abuse, addiction, morbidity, and mortality" and claims that these are threats to the public health and safety.<sup>191</sup>

Local governments will likely argue that West Virginia law grants them more leeway under this element than the restatement allows. Cabell and McDowell counties will likely argue that the law in West Virginia permits the abatement of nuisances that affect public health<sup>192</sup> and allows the elimination of "hazards to public health"<sup>193</sup> while the restatement requires a significant interference with public health.<sup>194</sup> Courts should be wary of this argument. The counties are seeking to take advantage of an area of law that is underdeveloped in West Virginia. Moreover, West Virginia courts have adopted the Restatement (Second) of Torts in discussing public nuisance law.<sup>195</sup> Although it may seem

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<sup>189</sup> See *supra* Section III.A.1.

<sup>190</sup> See Amended Complaint, *supra* note 164, at 27.

<sup>191</sup> Complaint, *supra* note 164, at 32–33.

<sup>192</sup> W. VA. CODE ANN. § 16-3-6 (West 2018).

<sup>193</sup> W. VA. CODE ANN. § 7-1-3kk.

<sup>194</sup> RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

<sup>195</sup> See *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d 616, 620 (W. Va. 1985) (citing *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 354 (W. Va. 1945)) (defining public nuisance as "an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons"); see also *Duff v. Morgantown Energy Assocs.*, 421 S.E.2d 253, n.6 (W. Va. 1992)

that the law in West Virginia provides more leeway, holding opioid distributors liable contrary to the rationales of other jurisdictions could have serious consequences for businesses in West Virginia that produce or distribute products that merely “affect” the public health. Instead, courts in West Virginia and other states should examine the interpretations of other jurisdictions on what constitutes a public right.

There is no common law right to be free from health hazards or a product that may be dangerous to health.<sup>196</sup> Courts have reiterated that, although it is desirable to be free from products that may pose hazards to a person’s health, this is a public interest—not a public right.<sup>197</sup> Even in the case of products that are dangerous to the health of children, courts have determined that the right to be free from lead based paint is an individual right and not a communal interest held by the public.<sup>198</sup> Because courts have construed the element of public right to include traditional communal interests, the right to be free from addiction, morbidity, and mortality should be considered an individual right, not a communal interest held by the public.

Although being free from addiction and disease is certainly a public interest, enjoying good health is not a communal interest that everyone enjoys nor has the right to enjoy.<sup>199</sup> It does not share the same qualities as a communal stream from which everyone receives their food or a roadway that each person uses for access to another part of town.<sup>200</sup> Instead, good health, or the right to be free from health defects, is an individual quality that each person enjoys at an individual level.<sup>201</sup> Although others’ poor health may cause adverse effects on citizens of the community, this alone does not make it a communal interest or a public right.

The desire and interest to be free from addiction and disease is likely more closely tied to the lead-based paint litigation, which concerned the health of children. The court declined to expand public nuisance law to encompass interests that have not typically been construed as a public right, including the right to be free from “unreasonable jeopardy to health.”<sup>202</sup> The apprehension of courts to expand public nuisance law likely rests on public policy concerns and the role that manufacturers and distributors play in society. Corporations and

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(stating that the Court believes the definition for public nuisance set forth by *Sharon Steel Corp.* is consistent with the Restatement (Second) of Torts § 821B).

<sup>196</sup> See *State v. Lead Indus. Ass’n*, 951 A.2d 428, 448 (R.I. 2008).

<sup>197</sup> *Id.* (citing Gifford, *supra* note 68, at 815).

<sup>198</sup> *Id.* at 453.

<sup>199</sup> See *id.* at 448.

<sup>200</sup> See RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. LAW INST. 1979).

<sup>201</sup> Compare Gifford, *supra* note 68, at 817, with Schwartz & Goldberg, *supra* note 77, at 562.

<sup>202</sup> *Lead Indus. Ass’n*, 951 A.2d at 454.

business interests tend to take precedence in the eyes of the courts in recent years.<sup>203</sup> Although certain products may undoubtedly pose risks to a person's health, the benefit of the product may potentially outweigh the harm, or the harm may be easily eliminated. This is likely the case with opioid distribution because the opioids themselves benefit patients, but the plaintiffs claim that the distributors did not adequately market the opioids and completely disclose the addictive nature of the drugs.<sup>204</sup>

Business interests and policy concerns should carry some weight in deciding whether to expand public nuisance law; however, in the case of opioid distributors, based upon the facts set forth in the McDowell and Cabell County complaints, no public right has been pleaded.<sup>205</sup> Instead, the plaintiffs have pleaded that the negligent distribution of opioids is basically an "unreasonable jeopardy to health."<sup>206</sup> Although the distribution of opioids has caused economic damages to residents and governments of West Virginia, the plaintiffs have failed to assert an actionable public right under public nuisance law.

*B. The Individual Actions of Doctors, Pharmacies, Government Agencies, and Patients Negate Opioid Distributor's Control*

Opioid distributors are responsible for distributing opioids to pharmacies and physicians' offices for professionals to provide to patients. Physicians are responsible for prescribing opioids, and pharmacies must fill the orders that the physician prescribes if the physician cannot provide the drugs. A plaintiff must prove that the distributor exercised sufficient control over the product in order to be successful on a public nuisance claim.<sup>207</sup> If third parties other than the distributor also exercised control over the product, which may have caused damages to the plaintiff, a court may determine that the distributor did not exercise sufficient control and is not the cause of the damages.<sup>208</sup>

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<sup>203</sup> See Adam Winkler, *Why Big Business Keeps Winning at the Supreme Court*, WASH. POST (June 26, 2017), [https://www.washingtonpost.com/news/posteverything/wp/2017/06/26/why-big-business-keeps-winning-at-the-supreme-court/?utm\\_term=.72b2538c0f59](https://www.washingtonpost.com/news/posteverything/wp/2017/06/26/why-big-business-keeps-winning-at-the-supreme-court/?utm_term=.72b2538c0f59).

<sup>204</sup> See Courtney Hessler, *Drug Firms Press for Dismissal of Lawsuits*, HERALD DISPATCH (Apr. 15, 2017), [http://www.herald-dispatch.com/news/drug-firms-press-for-dismissal-of-lawsuits/article\\_155bcb0a-4d40-5569-b198-15311cc24898.html](http://www.herald-dispatch.com/news/drug-firms-press-for-dismissal-of-lawsuits/article_155bcb0a-4d40-5569-b198-15311cc24898.html).

<sup>205</sup> Compare Complaint, *supra* note 164, at 4, and Amended Complaint, *supra* note 164, at 26, with *Lead Indus. Ass'n*, 951 A.2d at 454 (comparing public nuisance actions against opioid distributors against public nuisance actions against lead producers where the court determined that no public right had been pleaded).

<sup>206</sup> *Lead Indus. Ass'n*, 951 A.2d at 454.

<sup>207</sup> See *supra* Section III.A.3.i.

<sup>208</sup> *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.* 273 F.3d 536, 541 (3d Cir. 2001).

In the case of prescription opioid distributors, the court should not determine that the opioid distributors exercised sufficient control over the opioids unless the plaintiff can establish a causal chain between the distributors' conduct and the damages that the plaintiffs incurred. However, in this case, similar to the gun manufacturer cases, third parties are responsible for prescribing, filling, and sometimes administering opioids to citizens.<sup>209</sup> Further, patients who may not need opioid medication could obtain opioids from a physician and sell the opioids to others who are abusing the drug. Patients, physicians, and pharmacies could have engaged in conduct that would have contributed to the opioid epidemic and the damages that it has created to counties and municipalities.

McDowell and Cabell Counties have both alleged that the opioid distributors' have fostered the opioid epidemic by not adequately monitoring the distribution process of opioids. Specifically, the counties allege that the opioid distributors are required to report suspicious orders of opioids.<sup>210</sup> Because statistics show that the state of West Virginia has received a surplus of opioids in the past,<sup>211</sup> the counties contend that the opioid distributors did not report extremely large orders for opioids that exceeded the amount necessary for medical purposes.<sup>212</sup> Through this conduct, the counties allege that the opioid distributors are responsible for the diversion of opioids into an illicit market whereby addicts buy and abuse opioids for nonmedical purposes.<sup>213</sup> Although the opioid distributors may have exercised some control and failed to report suspicious orders, the plaintiffs cannot likely tie the opioid distributors conduct alone to the creation of an illicit market.

First, opioid distributors will likely refute their control over opioids and the creation of an illicit market by blaming patients for their role in opioid misuse. Patients who were addicted to opioids or who wanted to profit from the addiction of others could have visited physicians in order to receive a prescription. If a patient was addicted but was no longer able to receive opioids, the patient would likely turn to others who had a prescription or find other ways to cope with their addiction, which may have included drugs like heroin. Even if a patient received a prescription, the patient could have become addicted to opioids if the patient did not comply with the directions provided with the drug. Distributors will argue that they did not solely contribute to the illicit market because patients, through their own actions, could have played a significant role in opioid and heroin abuse. The distributors will also argue that patients could

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<sup>209</sup> See *Liberty Mut. Fire Ins. v. JM Smith Corp.*, 602 F. App'x 115, 121–22 (4th Cir. 2015).

<sup>210</sup> See Complaint, *supra* note 164, at 25; Amended Complaint, *supra* note 164, at 3.

<sup>211</sup> See Higham & Bernstein, *supra* note 13.

<sup>212</sup> See Complaint, *supra* note 164, at 25; Amended Complaint, *supra* note 164, at 3.

<sup>213</sup> See Complaint, *supra* note 164, at 25; Amended Complaint, *supra* note 164, at 3.

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have received a prescription and then diverted that prescription to others, thereby creating an illicit market even though the prescription they received was valid and legitimate. These arguments will reduce the amount of control that the distributors were able to exercise over opioids because once the opioids were distributed to physicians and patients, the distributors had no say in how those opioids were used.<sup>214</sup>

Patients rely upon physicians to responsibly treat their ailments, which include pain management. Doctors who over-prescribed opioids are also likely at-fault and exercised control over opioids that trickled down into an illicit market. Some doctors may engage in over-prescribing opioids, regardless of whether they practice in hospitals, practice in emergency rooms, or have their own private practice.<sup>215</sup> Other doctors may refrain from prescribing opioids. When doctors prescribe opioids they may not adequately warn patients about the addictive nature of opioids, or they may not adequately direct the patient on when it is appropriate to take an opioid.<sup>216</sup> Patients who visit a physician for back pain or some other acute pain may end up becoming addicted if that physician is more likely to manage pain through opioid prescriptions.<sup>217</sup> Physicians play a significant role in whether a patient receives an opioid prescription and whether that patient has been fully briefed on the benefits and dangers of an opioid prescription.<sup>218</sup> Because physicians have a significant role in the disbursement of opioids and information, drug distributors will argue that they cannot be held liable for the conduct of physicians who over prescribe opioids and do not communicate the dangers of the medication. The conduct of physicians weakens the amount of control that opioid distributors exercise over opioids that have contributed to the creation of an illicit market, which has caused damage to communities.

The arguments that opioid distributors will set forth are similar to the reasons that courts have given in declining to hold gun manufacturers liable for the negative effects from gun distribution and the illicit market that it has

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<sup>214</sup> This is not to say that opioid distributors have no fault in the facilitation or fostering of the opioid epidemic. Nor does this section seek to lay blame on those patients who have become addicted to opioids. Instead, this section intends to set forth potential arguments of opioid distributors in refuting their control under public nuisance claims.

<sup>215</sup> See Teresa Carr, *Some Doctors Still Prescribe Too Many Opioids, CDC Finds: What You Can Do to Find Safer Pain Relief*, CONSUMER REPS. (July 6, 2017), <https://www.consumerreports.org/opioids/some-doctors-still-prescribe-too-many-opioids-cdc-finds/>.

<sup>216</sup> See generally Kelly K. Dineen & James M. DuBois, *Between a Rock and a Hard Place: Can Physicians Prescribe Opioids to Treat Pain Adequately While Avoiding Legal Sanction*, 42 AM. J. L. & MED. 7, 8 (2016).

<sup>217</sup> See *id.* at 11.

<sup>218</sup> See *id.*

created.<sup>219</sup> Courts declined to hold distributors and manufacturers liable where the manufacturers or distributors had no control over the actions of third parties.<sup>220</sup> Opioid distributors will argue that, like gun manufacturers, the opioid distributors had no control over the conduct of physicians, pharmacies, or patients in their prescription, distribution, or use of opioids. While courts may find this convincing, counties and municipalities likely have a strong argument that the opioid distributors exercised sufficient control.

Although the Third Circuit declined to hold gun manufacturers liable because the city was unable to show that there was a direct link in causation between the gun manufacturers' conduct and the harm suffered, cities and counties alleging control of opioid distributors may be able to establish sufficient control. Cities and counties may argue that because federal law and state law require opioid distributors to report suspicious orders of opioids this constitutes sufficient control. The causal chain is more direct in the opioid cases because the opioid distributors retain the ultimate power to distribute opioids. If an opioid distributor received a suspicious order, the distributor should then have reported the suspicious order. By law, opioid and other drug distributors are required to report any pharmaceutical orders that are unusually large, deviate from normal patterns, or are unusual in frequency.<sup>221</sup> Once these orders are reported, law enforcement officials may investigate and take action;<sup>222</sup> however, opioid distributors failed to report suspicious orders to the West Virginia Pharmaceutical Board.<sup>223</sup> Instead, the distributors held these reports for years.<sup>224</sup>

Plaintiffs may use these facts to indicate that, but for the distributors conduct, excessive amounts of opioids would not have been available to patients and would not have resulted in the use of opioids for nonmedical purposes. Courts should carefully scrutinize this argument and consider the actions of third parties, including patients, physicians, pharmacies, and state medical boards. Because the ultimate decision to distribute opioids belongs to the opioid distributors, there is a direct link between the opioid distributors and the excessive flow of opioids into counties and cities. The opioid distributors further had means to prevent the excessive pumping of opioids into counties and cities because they could have reported the orders and not filled those that were

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<sup>219</sup> See *supra* Section III.A.3.i.

<sup>220</sup> See *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001).

<sup>221</sup> See Eric Eyre, 'Suspicious' Drug Order Rules Never Enforced by State, CHARLESTON GAZETTE-MAIL (Dec. 18, 2016) [hereinafter *Drug Rules Never Enforced*], [https://www.wvgazette.com/news/health/suspicious-drug-order-rules-never-enforced-by-state/article\\_3c9f1983-9044-5e97-87ff-df5ed5e55418.html](https://www.wvgazette.com/news/health/suspicious-drug-order-rules-never-enforced-by-state/article_3c9f1983-9044-5e97-87ff-df5ed5e55418.html).

<sup>222</sup> *Id.*

<sup>223</sup> See *id.*

<sup>224</sup> *Id.*

suspicious if they so chose; however, the complaint by McDowell and Cabell Counties alleges that opioid distributors conduct caused an illicit market for the use of opioids.<sup>225</sup> Nevertheless, their conduct alone is not likely the sole cause of an illicit market and must be considered with the actions of patients, physicians, pharmacies, and state pharmaceutical boards.

*C. Damages Incurred by Local Governments are too Remote Because Damages Could Have Occurred Absent the Conduct of Opioid Distributors*

If the conduct of opioid distributors is not the cause in fact and the legal cause of the damages incurred by local governments, then opioid distributors should not be held liable for creating a public nuisance. If local governments cannot show that opioid distributors' conduct was the factual cause and legal cause of the opioid epidemic, the damages that the local governments have incurred will be deemed too remote.

The standard before plaintiffs in public nuisance cases is difficult, especially where products like opioids, guns, and tobacco are at issue. Plaintiffs who are suing opioid distributors must prove that the damages they have suffered would not have occurred absent the conduct of the opioid distributors.<sup>226</sup> If plaintiffs can show this, then they have proven that there is reasonable certainty that the damages occurred from the opioid distributors' conduct, and cause-in-fact is established. This becomes more difficult in the cases of opioid distributors. The claims against opioid distributors do not focus on their conduct alone. Some also scrutinize the conduct of the West Virginia State Board of Pharmacy as partially responsible for bringing about the opioid epidemic.<sup>227</sup> Further, the opioid distributors will likely attest that physicians, pharmacies, and even patients are also responsible for the creation of the opioid epidemic and resulting damages. Other courts have modified the standard where the conduct of multiple parties is involved. A court will only hold opioid distributors responsible if the local governments and other plaintiffs can show that the conduct of the opioid distributors was a material element and substantial factor in bringing about the injuries suffered by local governments.<sup>228</sup>

If the court finds that the opioid distributors' failure to report and refuse suspicious orders of opioids to the West Virginia Board of Pharmacy constitutes a material element and substantial factor in bringing about the opioid epidemic,

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<sup>225</sup> Complaint, *supra* note 164, at 25; Amended Complaint, *supra* note 164, at 3.

<sup>226</sup> See *supra* Section III.A.3.ii.

<sup>227</sup> See Eric Eyre, *WV Board of Pharmacy Dismisses Director*, CHARLESTON GAZETTE-MAIL (July 18, 2017), [https://www.wvgazette.com/news/health/wv-board-of-pharmacy-dismisses-director/article\\_d854ed6b-9e54-500c-be8d-542be617c7cf.html](https://www.wvgazette.com/news/health/wv-board-of-pharmacy-dismisses-director/article_d854ed6b-9e54-500c-be8d-542be617c7cf.html).

<sup>228</sup> See *supra* Section III.A.3.ii.



then the court must then examine whether the conduct is also the legal cause of the damages. Only damages that are reasonably foreseeable as a result of the conduct will constitute legal cause; however, this foreseeability is diminished when the actions of third parties obscure the chain of causation. Even the Fourth Circuit has acknowledged the complexity and occlusion of the chain of causation in opioid cases.<sup>229</sup> West Virginia courts and other courts will need to closely examine the conduct of potential parties involved in the production, distribution, prescription, and use of opioids.

Here, the courts must ultimately determine whether opioid distributors' failure to refuse and report suspicious orders of opioids from West Virginia pharmacies constitutes the cause in fact and legal cause of the damages suffered by Cabell County, McDowell County, and other local governments. While it is plausible that a court may find that the damages of the local governments would not have occurred absent the opioid distributors conduct and that those damages were reasonably foreseeable, the chain of causation is likely too indirect to hold opioid distributors liable for creating a public nuisance. The conduct of physicians who were likely over-prescribing in some cases will likely be used to refute liability. Further, the opioid distributors will also introduce evidence that both physicians and patients were abusing opioids through excessive prescribing and intake. Some patients may have been seeking opioids, not to use them, but to sell those opioids to other persons who were abusing opioids.

Drug companies might also contend that physicians have access to patient records and history, and they ultimately decide whether or not to prescribe opioids to patients. Pharmacies may also have played a role in the excessive distribution of opioids. Pharmacists not only play a role in the distribution of opioids but also provide educational information on the drugs that they are providing.<sup>230</sup> An opioid distributor may blame pharmacies for opioid abuse by arguing that pharmacies play a fundamental role in attending to patients and detecting potential signs of opioid misuse.<sup>231</sup> The fact that multiple parties are involved in the distribution, prescription, and usage of opioids, any one of which could have caused the opioid epidemic, will likely make the opioid distributors' conduct too remote. Further, if West Virginia courts follow the reasoning of the Illinois Supreme Court, the West Virginia courts should not hold opioid distributors liable on the basis of public nuisance because the criminal acts of third parties likely caused damages to local governments and contributed to the opioid epidemic. All of these factors obscure the chain of causation and make it difficult to hold that the conduct of opioid distributors is the factual and legal

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<sup>229</sup> See *Liberty Mut. Fire Ins. v. J-M Smith Corp.*, 602 F. App'x 115, 116 (4th Cir. 2015).

<sup>230</sup> See Victoria Reynolds et al., *The Role of Pharmacists in the Opioid Epidemic: An Examination of Pharmacist-Focused Initiatives Across the United States and North Carolina*, 78 N.C. MED. J. 202, 203 (2017).

<sup>231</sup> *Id.*

cause of the opioid epidemic. Although local governments need resources to address damages incurred as a result of the opioid epidemic, public nuisance suits are not the answer.

V. PUBLIC NUISANCE SUITS—A NARROW REMEDY TO A BROAD PROBLEM

Public nuisance suits are an inadequate tool for local governments in seeking redress for the damages they have incurred as a result of the opioid epidemic. Local governments are at a loss for ways to repair their broken systems. Providing treatment to those who are addicted to opioids and reducing the use of opioids by residents will require expenditures of capital that local governments may not have. Public nuisance suits are not simply a remedy for local governments but a cry for help. Local governments need assistance, but a lump sum of cash with no accountability measures to encourage responsible spending will not ensure adequate redress of economic harms. A uniform approach to the opioid epidemic is needed. Therefore, legislatures should place tougher restrictions on opioid distributors and enact legislation to help relieve the economic hardships suffered by local governments. Section A explains that courts should refrain from expanding the doctrine of public nuisance because the expansion would exceed the purpose of the law. To better combat the opioid epidemic, Section B recommends that legislatures seek to resolve the opioid epidemic by capitalizing on existing regulatory measures and enacting targeted legislation.

A. *Courts Should Refrain from Engaging in Creating an Unprecedented Expansion of Public Nuisance Law*

In addressing the claims of public nuisance against product manufacturers, courts have declined to hold manufacturers liable.<sup>232</sup> The courts have determined that the claims put forth by plaintiffs against product manufactures do not constitute public nuisance and have declined to expand the common law doctrine. State courts have declined to expand public nuisance liability because an expansion of the doctrine would exceed the original purpose

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<sup>232</sup> See *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002) (holding that claims against gun manufacturers by the city did not constitute public nuisance, and there is no guarantee that states will expand the doctrine of public nuisance); *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (declining to expand public nuisance law to hold plaster manufacturers liable because such an expansion would create a “monster that would devour in one gulp the entire law of tort”); *State v. Lead Indus. Ass’n*, 951 A.2d 428, 453 (R.I. 2008) (explaining that “expanding the definition of public right based on the allegations in the complaint would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that never was intended”).

surrounding the doctrine.<sup>233</sup> For example, when lead paint posed a detrimental health risk to children, the Rhode Island Supreme Court declined to expand public nuisance law.<sup>234</sup> Instead, the Rhode Island Supreme Court held that the term “public right” had not traditionally been interpreted to include the right to a certain standard of living or medical care but had more generally been confined to the access of a public good.<sup>235</sup> Because previous courts have declined to expand the common law doctrine of public nuisance, West Virginia courts and other courts deciding public nuisance cases against opioid distributors should defer to the legislature in expanding public nuisance law.

Legislators could propose amendments to the existing public nuisance laws to specifically permit counties to recover damages from opioid distributors if they engage in negligent practices; however, this is likely not the best option. Public nuisance has served a specific purpose since it was enacted.<sup>236</sup> Expanding the law could make “public interests” a basis for filing complaints against product distributors and manufacturers when products cause an adverse effect on public health and safety. In examining these adverse effects, courts have repeatedly declined to hold car, tobacco, gun, and paint manufacturers liable for producing products that cause adverse effects on public health.<sup>237</sup>

Expanding the doctrine of public nuisance could subject more manufacturers to lawsuits and unnecessary litigation when laws are already in place to impose liability for defective design, manufacturing defect, and marketing defects.<sup>238</sup> These and other tort theories are already in place to protect consumers while maintaining business and economic interests.<sup>239</sup> Further, allowing local governments to collect damages to abate the opioid epidemic poses many challenging problems. First, determining how to measure and award damages based on the opioid epidemic is problematic because the injuries are expansive and at times abstract. If courts were able to award significant damages to abate the opioid epidemic, the local governments may not have the capabilities to ensure that this money is actually used in a meaningful manner to reduce opioid addiction. If the responsible spending of money to fund programs is a goal of state government, this would be best accomplished through government

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<sup>233</sup> See *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1126 (Ill. 2004) (“The negative consequence of judicially imposing a duty upon commercial enterprises to guard against the criminal misuse of their products by others will be an unprecedented expansion of the law of public nuisance.”).

<sup>234</sup> *Lead Indus. Ass’n*, 951 A.2d at 453.

<sup>235</sup> *Id.*

<sup>236</sup> See Gifford, *supra* note 68, at 817–18 (discussing purposes of public nuisance law and traditional public rights).

<sup>237</sup> See Schwartz & Goldberg, *supra* note 77, at 552–62.

<sup>238</sup> See *id.* at 578–81.

<sup>239</sup> See *id.*

programs that require compliance and oversight. Lastly, expanding public nuisance law could make it even more difficult to determine where to draw the line in holding product manufacturers and distributors liable if their products merely affect public health. If legislators wish to hold opioid distributors more accountable for their conduct, they have greater tools at their disposal than expanding the doctrine of public nuisance.

*B. Legislators Should Seek to Redress the Damages Incurred by Local Governments Through Targeted Legislation and Regulatory Action*

If legislatures wish to make opioid distributors more accountable for distribution practices, legislatures should enact regulations that place tougher restrictions on opioid distributors. West Virginia representatives have announced that they intend to introduce legislation that seeks to eliminate the amount of opioids available to patients.<sup>240</sup> The new laws would reinforce good prescription practices to physicians that may be over-prescribing opioids.<sup>241</sup> In order to curb the amount of opioids that are being prescribed, lawmakers in West Virginia are seeking to limit opioid prescriptions to include pills only for a seven-day supply;<sup>242</sup> however, this action may not go far enough. Opioid distributors have already turned a blind eye to reporting laws within the state, which likely has contributed to the opioid epidemic.<sup>243</sup> If the new legislation is introduced and passed, this would be a first step in the regulation of opioids within the state. However, given the disparaging impacts of opioids in West Virginia, the state cannot afford to be a follower and should consider setting an example to those states affected by the opioid epidemic.

Governments throughout the country should also seek to place more accountability on physicians and pharmacists by mandating that they utilize Prescription Drug Monitoring Programs (“PDMPs”).<sup>244</sup> Almost all states currently have a PDMP and some states mandate that health care providers utilize the PDMP when prescribing and filling controlled substances.<sup>245</sup> Not only are

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<sup>240</sup> See Eric Eyre, *WV Lawmakers Seek to Limit Opioid Prescribing*, CHARLESTON GAZETTE-MAIL (Jan. 8, 2018) [hereinafter *Lawmakers Limit Opioid Prescribing*], [https://www.wvgazette.com/news/health/wv\\_drug\\_abuse/wv-lawmakers-seek-to-limit-opioid-prescribing/article\\_1b088ea7-de2c-55c8-98de-a293bece51f4.html](https://www.wvgazette.com/news/health/wv_drug_abuse/wv-lawmakers-seek-to-limit-opioid-prescribing/article_1b088ea7-de2c-55c8-98de-a293bece51f4.html).

<sup>241</sup> See *id.*

<sup>242</sup> *Id.*

<sup>243</sup> See *Drug Rules Never Enforced*, *supra* note 221.

<sup>244</sup> See *What States Need to Know About PDMPs*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/pdmp/states.html> (last updated Oct. 3, 2017).

<sup>245</sup> Christine Vestal, *States Require Doctors to Use Prescription Drug Monitoring Systems for Patients*, WASH. POST (Jan. 15, 2018), <https://www.washingtonpost.com/national/health-science/states-require-doctors-to-use-prescription-drug-monitoring-systems-for->

PDMPs useful within the state but health care providers may also gain access to PDMPs of other states.<sup>246</sup> PDMPs are administered by varying administrative bodies within each state.<sup>247</sup> The utilization of PDMPs can serve as a useful tool in monitoring prescriptions of opioids and whether patients have filled their prescriptions.<sup>248</sup> This could ultimately reduce doctor shopping and excessive distribution of opioids that local governments claim facilitate an illicit market. Although this system is likely not an answer in itself to the opioid epidemic, governments should mandate that health care providers utilize PDMPs in order to encourage quality prescribing practices and reduce excessive distributions of opioids. Because administrative agencies operate PDMPs, legislatures should formulate laws focused on bolstering the state's administrative framework and regulatory functions.

West Virginia should utilize the administrative framework that it has set forth through the creation of the West Virginia Board of Pharmacy, which has been vested with the ability to promulgate rules in furtherance of the laws that the legislature set forth.<sup>249</sup> The legislature has introduced legislation that would give the Board more authority in the regulation of prescription opioids.<sup>250</sup> Current legislation being proposed would give the Board authority to investigate reports of suspicious orders of controlled substances at any point in the distribution process.<sup>251</sup> This law would enable the Board to conduct an investigation at manufacturing, distribution, and consumption levels.<sup>252</sup> Further, it would enable the Board to conduct hearings in deciding to revoke or suspend a controlled substance registration.<sup>253</sup>

This law, if enacted, could work alongside other proposed laws in limiting the number of opioids permissible in prescriptions.<sup>254</sup> West Virginia

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patients/2018/01/12/c76807b8-f009-11e7-97bf-bba379b809ab\_story.html?utm\_term=.0929d33067f3; see also W. VA. CODE ANN. § 16-5Y-5(j) (West 2018) (mandating that physicians access the Controlled Substances Monitoring Program to ensure that the patient is not seeking controlled substances from multiple locations).

<sup>246</sup> NAT'L ALL. FOR MODEL STATE DRUG LAWS, INTERSTATE SHARING OF PRESCRIPTION MONITORING DATA INFORMATION 2 (2011), <http://www.namsdl.org/library/2BA908DC-1372-636C-DD0EDA3313BE8CF8/>.

<sup>247</sup> *Prescription Drug Monitoring Frequently Asked Questions (FAQ)*, PDMP TTAC, <http://www.pdmpassist.org/content/prescription-drug-monitoring-frequently-asked-questions-faq> (last visited Oct. 14, 2018).

<sup>248</sup> See *What States Need to Know About PDMPs*, *supra* note 244; Vestal, *supra* note 245.

<sup>249</sup> W. VA. CODE ANN. § 30-5-6 (West 2018).

<sup>250</sup> See H.D. 4372, 83rd Leg., Reg. Sess. (W. Va. 2018).

<sup>251</sup> See W. VA. CODE ANN. § 30-5-6.

<sup>252</sup> *Id.* § 30-5-6(u).

<sup>253</sup> *Id.* § 30-5-6(v).

<sup>254</sup> See *Lawmakers Limit Opioid Prescribing*, *supra* note 240.

should take a robust regulatory and administrative approach at the opioid epidemic. This should not involve expanding the doctrine of public nuisance. Instead, West Virginia should rely on existing federal laws, enhance state laws, and utilize administrative frameworks to address misconduct among opioid distributors, pharmacies, and physicians. West Virginia could (1) enact laws that place mandatory reporting requirements on opioid distributors, pharmacies, and physicians; (2) develop laws that limit the number of opioids available to consumers; (3) give standing to local governments who have suffered the most harm; and (4) bolster administrative capacity to ensure compliance. Legislatures should also consider specifying a minimum amount of monetary damages that may be imposed on opioid distributors for failing to report suspicious orders of opioids. These legal mechanisms, when utilized together, will address many facets of the opioid epidemic and encourage opioid distributors to comply with reporting laws.

## VI. CONCLUSION

Although public nuisance law may be a viable claim in some contexts, it is hardly applicable in the case of opioid distributors and their conduct relating to the opioid epidemic. Some have characterized public nuisance as a promising area of litigation; however, expanding public nuisance law causes more problems than it solves. Adequate remedies already exist to hold product manufacturers liable for manufacturing defects and defective design. Yet, local governments are attempting to utilize public nuisance law to obtain large amounts of damages that would help remedy hardships that have resulted from opioid addiction. Granting large sums of money to local governments to spend in whatever way they believe will solve the opioid epidemic is a risky practice. Instead, local governments throughout the country should seek help from state governments because the suits alleged thus far do not constitute a valid claim for public nuisance.

The suits filed by local governments misconstrue the traditional tort by claiming that governments are entitled to recourse when a product affects the public health. Further, the causal chain between the conduct of opioid distributors is fragmented and obscured due to the actions of third parties involved in the distribution of opioids. Courts should refrain from expanding public nuisance law into areas for which the tort was never intended and allow the legislature to take appropriate action. Legislatures are better equipped to handle this problem because they can enact programs that will ensure responsible spending of resources. Further, the legislature can enact targeted legislation, strengthen regulatory frameworks, and mandate the utilization of Prescription Drug Monitoring Programs to aid in the regulation of opioid distributors. Local governments should look to their legislatures for help because public nuisance provides mostly equitable remedies—rarely legal damages. The opioid epidemic

has damaged communities throughout the country and West Virginia. Due to the damages that communities have endured as a result of misconduct, opioid distributors likely shoulder some blame. However, holding opioid distributors liable for public nuisance would be an unprecedented expansion of the tort and subject companies to liability when their products merely affect public health, blurring the line of liability even more under public nuisance law.

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\* J.D., West Virginia University College of Law, 2018; MPA, West Virginia University, 2018; B.A. in International Studies and World Languages, Literatures, & Linguistics, 2015. The Author would like to thank the members of the *West Virginia Law Review* for their diligence and insightful comments in preparing this Note for publication. The Author would also like to express his appreciation and gratitude to Professor Valarie Blake at the West Virginia University College of Law for her guidance in developing this Note. Finally, special thanks and sincerest appreciation to my wife, family, and friends who provided unwavering encouragement and support throughout this process. Any errors contained herein are the Author's alone.