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Pick Your Poison: Opioids Following the Trends Set by Alcohol and Tobacco Litigation

Luckshume Ketheeswaran*

The poppy flower was cultivated by ancient people who had interesting ways of describing the effects of the opium harvested from sap and fibers. Some of these nicknames remain true of the modern derivatives of ancient opium—opioids.

^{šam}a-a-ba SA “the enemy of muscles”; ^{šam} Bulalu “the drug which confuses”; ^{šam} AS-DUG-GA, sammi arrati tami “drug for laying a curse[.]” – Assyrian¹

^{šam} kanasu “Red Drug” . . . was a loan word from the Sumerian GAN-ZI-SAR meaning “plant which steals the soul.” – Sumerian²

I. INTRODUCTION

Parents, children, and siblings of opioid abusers argued that three large-scale, drug distributors improperly supplied opioids to pharmacies, leading to “abuse of the drugs and the fallout that abuse brought with it.”³ Further, they argued that profit-driven distributors willingly and recklessly “flooded” the city of Brunswick and Glynn County with

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1. Abraham D. Krikorian, *Were the Opium Poppy and Opium Known in the Ancient Near East?*, 8 J. HIST. BIOL. 95, 100 (1975).

2. *Id.*

3. Complaint at 1, Poppell et al. v. Cardinal Health, Inc. et al., no. CE19-00472 (Apr. 17, 2019); Arlin Crisco, *Breaking: Trio of Drug Distributors Prevail in Key Private-Plaintiff Opioid Trial*, CVN NEWS (Mar. 1, 2023), <https://blog.cvn.com/breaking-trio-of-drug-distributors-prevail-in-key-private-plaintiff-opioid-trial> [<https://perma.cc/3ZXN-NXLK>].

opioids.⁴ Even so, the jury found against the plaintiffs; though potentially sympathetic to the lives ruined by opioids, the jury remained unconvinced that all liability fell on the distributors.⁵

On March 1, 2023, the jury found for the three, large-scale drug distributors, finding the defendants neither liable under Georgia's Drug Dealer Liability Act⁶ nor Georgia's RICO statute⁷ when supplying opioids to pharmacies.⁸ As a case of first impression, *Poppell, et al. v. Cardinal Health, et al.*,⁹ is one of the nation's first state court, private-plaintiff trials on the subject of opioids.¹⁰ Most prior claims were brought by government plaintiffs.¹¹

Poppell and future opioid-related cases will likely follow the trends set by their predecessors, including those in the alcohol and tobacco realm. Inebriating substances, whether it be alcohol, tobacco, or opioids, have appeared in human history in one form or another for thousands of years, and there has always been an underlying acknowledgment of what overuse can lead to: dependency and addiction.¹² Many of the same arguments used in alcohol and tobacco litigation apply to current opioid litigation, with varying success. Most litigation against companies, those who manufacture and those who distribute these products, have generally involved at least one of three types of claims: (1) negligence; (2) mislabeling/false advertising; and (3) public nuisance.¹³ This Comment will discuss the history of these types of claims and how trends set by the past continue with striking similarity to opioid litigation of the present.

4. Crisco, *supra* note 3.

5. F. Lane Heard III, one of the attorneys representing Cardinal Health, emphasized that the plaintiffs' relatives had "liv[ed] the drug life, long before they ever started using opioids." *Id.*

6. O.C.G.A. § 51-1-46 (2010).

7. O.C.G.A. § 16-14-4(c) (2022).

8. Crisco, *supra* note 3.

9. Complaint at 1, *supra* note 3.

10. Crisco, *supra* note 3.

11. *Id.*

12. *See Drug Addiction (Substance Use Disorder)*, MAYO CLINIC (Oct. 4, 2022), <https://www.mayoclinic.org/diseases-conditions/drug-addiction/symptoms-causes/syc-20365112> [<https://perma.cc/9RBN-G489>].

13. *See* sources cited *infra* notes 29–31, 37–40, 50–51, 58–65, 74–77, 83–90 (regarding alcohol legal precedent and cases); *see* sources cited *infra* notes 98, 101–08, 113–17, 123–26 (regarding tobacco legal precedent and cases); *see* sources cited *infra* notes 195–96, 201–07, 229, 246–48 (regarding opioid legal precedent and cases).

II. LEARNING FROM THE PAST—ALCOHOL AND TOBACCO LITIGATION

The fight against “drugs” is not new. Although opioids are the most recent trend, alcohol and tobacco have long been players in the American litigation and legislation scene.¹⁴ The struggles between legalization, criminalization, and regulation are intertwined, and the results have provided a roadmap for future legislators and claimants. Although criminal claims often run congruently with civil charges, this Comment focuses on claims which the public can bring against distributors and manufacturers.¹⁵

Although wording changes based on substance, the intent behind each claim seems to attack the same issue. Under a claim of negligence, the question is whether manufacturers or distributors failed to satisfy the duty of reasonable care in putting out a design or a product.¹⁶ This points to whether manufacturers or distributors knew of the negative consequences of their products but continued to produce or sell.¹⁷ Under mislabeling and false advertising claims, plaintiffs argue manufacturers are not completely honest, but are purposefully evasive about the effects of their products.¹⁸ Finally, public nuisance touches upon the morality aspect, claiming distributors’ and manufacturers’ conduct led to damage to the public (i.e. decline in public health or increase in crime.)¹⁹

A. Alcohol Litigation

In 1933, the Twenty-first Amendment²⁰ was ratified and subsequently repealed the Eighteenth Amendment,²¹ which had prohibited the

14. See cases cited *infra* notes 35, 101.

15. See sources cited *infra* notes 29–31, 37–40, 50–51, 58–65, 74–77, 83–90 (regarding alcohol legal precedent and cases); see sources cited *infra* notes 98, 101–08, 113–17, 123–26 (regarding tobacco legal precedent and cases); see sources cited *infra* notes 195–96, 201–07, 229, 244–48 (regarding opioid legal precedent and cases).

16. See *Maynard v. Snapchat, Inc.*, 313 Ga. 533, 534, 870 S.E.2d 739, 743 (2022) (“[A] manufacturer has a duty . . . to use reasonable care in selecting from alternative designs to reduce reasonably foreseeable risks of harm posed by its products.”).

17. *Id.*

18. Roy S. Herbst, *Holding Tobacco Companies Accountable for Deceptive Ads*, AACR (Dec. 12, 2017), <https://www.aacr.org/blog/2017/12/12/holding-tobacco-companies-accountable-for-deceptive-ads/> [<https://perma.cc/L4A9-LXTB>]. See also *infra* notes 50–51, 58–65, 101–08, 113–17.

19. A public nuisance is defined generally as “an unreasonable interference with a right common to the general public . . . [which includes] conduct involv[ing] a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience . . .” RESTATEMENT (SECOND) OF TORTS § 821B(1)–(2)(a) (AM. L. INST., 1979). See also *infra* notes 74–77.

20. U.S. CONST. amend. XXI, § 1.

21. *Id.*; U.S. CONST. amend. XVIII §§ 1–3.

production, importation, transportation, and sale of alcoholic beverages since 1920.²² Not unlike the arguments seen against tobacco and opioids, prohibitionists sought to protect the public from the “scourge of drunkenness.”²³ However, circumstances arose which ultimately outweighed the potential good coming from the ban, such as a rise in crime and a decline in tax revenue.²⁴ Although most Americans rebelled against the idea of a completely “dry” country,²⁵ modern legislation still shapes how alcohol manufacturers and distributors can sell and market to the public.

1. Negligence: Dram Shop Laws²⁶

In modern times, claims surrounding negligence and public nuisance involve distributors.²⁷ Unlike prohibitionists, who set their wrath on all, there seems to be more liability on those situated at the “front-lines,” the last “line of defense” between the alcohol leaving the shelf, to being in the customer’s hands.²⁸

In forty-three states, statutes called dram shop or social host liability laws,²⁹ allow individuals to seek civil liability against people, bars, and alcohol retailers which served alcoholic beverages that resulted in an injury or death.³⁰ In Georgia, under the Dram Shop Act (The Act),³¹ a person who “sells, furnishes, or serves” may be liable if they knew the individual they were serving was a minor or if they knew the individual was clearly intoxicated and would be driving a vehicle soon after.³² Importantly, this statute does not make any distinctions between a

22. *Prohibition*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Prohibition-United-States-history-1920-1933> [<https://perma.cc/NAY5-AJXN>] (last visited Feb. 23, 2024).

23. Cynthia Peterman, *Prohibition and Its Consequences*, NAT’L ARCHIVES AND RECORDS ADMIN. (Jan. 28, 2016), <https://education.blogs.archives.gov/2016/01/28/prohibition-and-consequences/> [<https://perma.cc/82UX-ZCUR>].

24. *Id.*

25. MARGARET SANDS ORCHOWSKI, *THE LAW THAT CHANGED THE FACE OF AMERICA: THE IMMIGRATION AND NATIONALITY ACT OF 1965* 32 (Rowman & Littlefield, 2015).

26. *Dram Shop Rule*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/dram_shop_rule [<https://perma.cc/ST2J-NCZ2>] (last visited Feb. 23, 2024); *see also* O.C.G.A. § 51-1-40 (2020).

27. *See infra* note 30.

28. *Id.*

29. *Dram Shop Rule*, *supra* note 26.

30. *Dram Shop Laws and Liability for Drunk Driving Accidents*, JUSTIA, (2023), <https://www.justia.com/injury/negligence-theory/dram-shop-laws/> [<https://perma.cc/EK8R-AB2L>].

31. O.C.G.A. § 51-1-40.

32. O.C.G.A. § 51-1-40(b) (2020).

commercial vendor (i.e. a liquor store) versus a social host.³³ Not only does this open up liability to those who “sell, furnish, or serve[.]”³⁴ but also provides an insight on what the purpose of this Act was meant to fulfill.

For example, under the old common law in Georgia, the provider of alcohol incurred no liability unless they actually knew the buyer was a minor and would be driving soon after the purchase.³⁵ However, the Supreme Court of Georgia held that this idea did not further the purpose of the Act.³⁶ In *Riley v. H & H Operations*,³⁷ the supreme court discussed whether an alcohol provider must have actual knowledge that a buyer was a minor who would be driving soon after purchasing alcohol.³⁸

The supreme court disagreed with this sentiment, and in construing the Act, “look[ed] diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy.”³⁹ Further, the supreme court held that requiring knowledge to be actual would “render the Act an ineffective sanction,” as the plaintiff could only win if the defendant truthfully admitted what he may or may not have known.⁴⁰ The supreme court’s analysis in this case creates a middle ground protection for commercial and non-commercial providers of alcohol in situations where they reasonably took precautions, while still applying liability if necessary in circumstances of negligence or wrongfulness.

Although Dram Shop Acts did not create strict liability on alcohol distributors,⁴¹ the threat of liability seems to be enough to create some impact. In a 2011 survey, researchers discovered there was a strong reduction of alcohol-related harms in jurisdictions which implemented dram shop statutes.⁴²

This compliance is corroborated with the many requirements businesses need to satisfy to be able to sell and serve alcohol. In most

33. *Id.*

34. *Id.*

35. *Riley v. H & H Operations*, 263 Ga. 652, 654, 436 S.E.2d 659, 661 (1993) (citing *Whelchel v. Laing Props.*, 190 Ga. App. 182, 186, 378 S.E.2d 478, 482 (1989)).

36. O.C.G.A. § 51-1-40.

37. 263 Ga. 652, 436 S.E.2d 659.

38. *Id.* at 653–54, 436 S.E.2d at 660.

39. *Id.* at 654, 436 S.E.2d at 661.

40. *Id.*

41. *See Dram Shop Rule*, *supra* note 26.

42. Veda Rammohan et al., *Effects of Dram Shop Liability and Enhanced Overservice Law Enforcement Initiatives on Excessive Alcohol Consumption and Related Harms: Two Community Guide Systematic Reviews*, 41 AM. J. PREVENTIVE MED. 334 (2011).

states,⁴³ in order to sell alcohol, an establishment must have a liquor license; additionally, different applications are often needed for specific types of alcohol or events.⁴⁴ However, once an establishment has a license, there are many ways it can be lost,⁴⁵ including continuing to sell to an obviously intoxicated person.⁴⁶ The mere loss of one's liquor license is often enough to seal the fate of the business.⁴⁷ However, even more detrimental, is having the reputation of overserving which led to injuries or deaths.⁴⁸

2. Misleading and Deceptive Mislabeling on Liquor Labels: Concerns with Content Claims⁴⁹

As part of the Anti-Drug Abuse Act of 1988,⁵⁰ Congress passed the Alcoholic Beverage Labeling Act,⁵¹ requiring health warnings to be on alcoholic beverage labels.⁵² Although the warning label is fairly standard and straightforward,⁵³ the effectiveness of these labels have been highly

43. See *Alcohol Beverage Authorities in United States, Canada, and Puerto Rico*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU (Sep. 20, 2021), <https://www.ttb.gov/wine/alcohol-beverage-control-boards> [<https://perma.cc/5L8H-VRWD>].

44. See *Alcohol Licenses & Permits*, DEP'T OF REVENUE, <https://dor.georgia.gov/alcohol-tobacco/alcohol-licenses-permits/apply-license-sell-alcohol> [<https://perma.cc/RR3K-W9YF>] (last visited Feb. 23, 2024) (examples of types of Alcohol permits an entity can apply for).

45. O.C.G.A. §§ 3-3-20–34 (2020) (examples in GA of how a liquor license can be revoked).

46. O.C.G.A. § 3-3-22 (2020) (“No alcoholic beverage shall be sold, bartered, exchanged, provided, or furnished to any person who is in a state of noticeable intoxication.”).

47. Nick Viland, *Well-Known Evans Business Gets Its Alcohol License Revoked*, WRDW (Oct. 4, 2022), <https://www.wrdw.com/2022/10/05/well-known-columbia-co-business-gets-alcohol-license-revoked/> [<https://perma.cc/G259-YUA9>].

48. Heather Walker, *Grand Rapids Bar's License Suspended After Deadly Crash*, WOODTV (Dec. 16, 2019), <https://www.woodtv.com/news/grand-rapids/grand-rapids-bar-to-close-for-2-weeks-after-deadly-crash/> [<https://perma.cc/9QFN-V56T>]; *Bar Where Forsyth Student Fatally Beaten Closed*, FORSYTH CNTY. NEWS, (Sep. 24, 2014), <https://www.forsythnews.com/local/crime-courts/bar-where-forsyth-student-fatally-beaten-closed/> [<https://perma.cc/T6C9-7E4Q>]; Michael Tanenbaum, *New Jersey Bar Linked to Two Fatal Crashes Has Liquor License Suspended Indefinitely*, PHILLYVOICE (Apr. 19, 2022), <https://www.phillyvoice.com/hi-point-pub-absecon-liquor-license-suspended-new-jersey-nuisance-bars/> [<https://perma.cc/73C2-7J7A>] (collecting news stories).

49. See *infra* notes 50–51, 58–65.

50. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

51. Alcoholic Beverage Labeling Act of 1988, 27 U.S.C. § 201.

52. *Id.*

53. “GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.” 27 U.S.C. § 215 (1988).

scrutinized.⁵⁴ The alcohol warning used in the U.S. “hasn’t been updated in more than 30 years and largely goes unnoticed.”⁵⁵ Additionally, labels often are not prominently displayed and only have vague warnings that alcohol “may cause health problems.”⁵⁶ Only warnings toward pregnancy and operating machinery are specifically addressed on the labels.⁵⁷

Interestingly, despite the health concerns arising from alcohol consumption and addiction, much of the litigation against alcohol manufacturers and distributors focuses on issues with the mislabeling of the drink’s content, rather than a concern with how the mislabeling could lead to health problems.⁵⁸

In a California class action suit against two alcohol manufacturers, the plaintiffs argued that the defendants’ labels overstated the health benefits of its alcoholic beverages.⁵⁹ Further, the plaintiffs argued that the defendants deceptively marketed its alcoholic seltzer as “fortified” and had advertised its product with “beneficial health statements, including ‘antioxidant Vitamin C’ from a ‘superfruit.’”⁶⁰ By using these “health-insinuating” trigger words, the defendants held out their beverages as healthier for consumers compared to other alcoholic seltzers, when in reality the benefits were miniscule.⁶¹

In response, the defendant manufacturers argued: (1) “no reasonable consumer could be misled into thinking that drinking hard seltzer is ‘healthy’ as a matter of law because the dangers of consuming alcohol are generally known”; (2) “the . . . packaging included the required Surgeon General’s warning”; and (3) “by merely disclosing that [the drink]

54. *Researchers Suggest More Detailed Alcohol Warning Labels Could Reduce Health Harms*, UNC GILLINGS SCH. OF GLOBAL PUB. HEALTH (Aug. 27, 2022), <https://sph.unc.edu/sph-news/researchers-suggest-more-detailed-alcohol-warning-labels-could-reduce-health-harms/> [https://perma.cc/5J68-52E4].

55. *Id.*

56. *Id.*

57. *See supra* text accompanying note 53.

58. *See In re Anheuser-Busch Beer Labeling Mktg.*, 644 F. App’x 515, 517 (6th Cir. 2016) (arguing whether a difference between true and claimed alcohol content misled consumers); *Bowring v. Sapporo U.S.A., Inc.*, 234 F. Supp. 3d 386, 388 (E.D.N.Y. 2017) (arguing manufacturer misled plaintiff and consumers that beer was produced in Japan when it was actually mainly produced in the U.S. and Canada.); *Cooper v. Anheuser-Busch, LLC*, 553 F. Supp. 3d 83, 91 (S.D.N.Y. 2021) (holding it was false marketing when advertisement was not clear that drink was made with a malt base, not a spirit base).

59. *Marek v. Molson Coors Bev. Co.*, 580 F. Supp. 3d 848, 853 (N.D. Cal. 2022).

60. *Id.* at 852.

61. The Vitamin C added to their drinks was in an amount so minuscule that it would provide little to no health benefits. *Id.* at 853.

contains ‘antioxidant Vitamin C’, [the distributors] are not conveying specific health messages to reasonable consumers.”⁶²

The United States District Court for the Northern District of California ultimately disagreed with all three of the defendants’ points.⁶³ Pulling directly from FDA guidance, the district court held that fortification of alcoholic beverages can be false and misleading.⁶⁴ Additionally, the packaging prominently featured the fact that the alcoholic beverage contained Vitamin C and was a clear attempt to not only promote this characteristic, but also to distinguish it from its competitors.⁶⁵

Interestingly, these arguments almost harken back to the old contract epitome, *caveat emptor*, or said plainly, “Buyer Beware.”⁶⁶ Even with the common misconception that a glass of wine a day cures cancer,⁶⁷ alcohol providers seem to acknowledge that they know alcohol overconsumption is bad, even if their packaging doesn’t echo this fact.⁶⁸

3. Public Nuisance:⁶⁹ Concerns Accessibility Leads to Higher Rates of Violence and Underage Drinking

Inebriated individuals often do not make the best decisions, such as driving drunk or fighting with others. Although alcohol intoxication can present differently among drinkers, alcohol affects all aspects of the body.⁷⁰ Overuse can lead to the higher likelihood of injuries, including direct effects such as alcohol poisoning and disorientation, to indirect

62. *Id.* at 861.

63. *Id.*

64. “A defendant cannot escape liability simply because it uses a synonym—such as ‘great source’ or ‘excellent source’—instead of the defined term ‘good source.’ The touchstone inquiry is whether the statement either expressly or implicitly characterizes the level of a nutrient in the product.” *Id.* at 859 (citation omitted).

65. *Id.* at 861.

66. *Caveat Emptor*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/caveat_emptor [<https://perma.cc/7F6Q-JGYV>] (last visited Feb. 23, 2024).

67. Research has shown that resveratrol, a compound found in wine-making grapes and other plants, may provide some health effects, such as cancer prevention, but no definitive study has come out to confirm that drinking wine cures cancer. *Alcohol and Cancer Risk Fact Sheet*, NAT’L INST. ON ALCOHOL ABUSE AND ALCOHOLISM (Jul. 14, 2021), <https://www.cancer.gov/about-cancer/causes-prevention/risk/alcohol/alcohol-fact-sheet> [<https://perma.cc/G3J3-QHSE>].

68. *See supra* note 58–65.

69. RESTATEMENT (SECOND) OF TORTS § 821B(1)–(2)(a).

70. *Alcohol’s Effects on Health: Research-Based Information on Drinking and its Impact*, NAT’L INST. ON ALCOHOL ABUSE AND ALCOHOLISM (2022), <https://www.niaaa.nih.gov/publications/alcohol-and-brain-overview> [<https://perma.cc/MY4R-8X8F>].

effects such as poor judgment.⁷¹ For underage drinkers, drinking may lead to permanent brain damage or riskier decision-making, as compared to someone older who may have a higher tolerance and maturity.⁷² When there is a high availability of drugs in an area, there is also a higher opportunity for crime, and studies have shown this also applies to higher densities of alcohol providers.⁷³

In a 2009 study conducted in Minneapolis, Minnesota, researchers documented four categories of violent crimes (assault, rape, robbery, and total violent crime) and determined whether there was a correlation between these crimes and the alcohol establishment density in a neighborhood.⁷⁴ They concluded that a 20% increase in neighborhood alcohol establishments resulted in a 3.9% to 4.3% increase across all crime categories.⁷⁵ Many other studies have confirmed this conclusion,⁷⁶ including another 2003 study which found that areas with higher numbers of businesses selling alcohol provide “ample opportunities” for minors to illegally buy and drink alcohol.⁷⁷

Some states have attempted to curb this issue by implementing curfews and even at most, revoking alcohol licensure. For example, in Macon, Georgia, the Mayor and the Board of Commissioners recently voted on reducing the closing time for bars in the area.⁷⁸ The Mayor hoped closing at 2:00 AM, instead of 3:00 AM, would encourage people not to loiter at and around bars.⁷⁹ Although this decision seems to have the public’s interest in mind, businessowners and bar owners worry about profit cuts—one owner citing a possible decrease in revenue by \$15,000 to \$20,000 a year, a significant number for a small business.⁸⁰ Even with this concern, it would be remiss not to mention that a month

71. *Id.*

72. *Id.*

73. *See infra* notes 74–77.

74. Traci L. Toomey et al., *The Association Between Density of Alcohol Establishments and Violent Crime Within Urban Neighborhoods*, 36 ALCOHOL CLIN. EXP. RES. 1468 (2012).

75. *Id.*

76. *See* D. M. Gorman et al., *Drug ‘Hot-Spots’, Alcohol Availability and Violence*, 24 DRUG ALCOHOL REV. 507 (2005); *see also* R. A. Scribner et al., *An Ecological Analysis of Alcohol-Outlet Density and Campus-Reported Violence at 32 U.S. Colleges*, 71 J. STUD. ALCOHOL DRUGS 184 (2010).

77. Andrew J. Treno et al., *Alcohol Availability as a Predictor of Youth Drinking and Driving: A Hierarchical Analysis of Survey and Archival Data*, 27 ALCOHOL CLIN. EXP. RES. 835 (2003).

78. *This Georgia City is Mandating That Bars Close Earlier*, ASSOCIATED PRESS (Sept. 6, 2023), <https://apnews.com/article/macon-georgia-bars-closing-time-crime-a1783c7da6b68a7a97aee8cc37daf00c> [<https://perma.cc/3WYA-X89J>].

79. *Id.*

80. *Id.*

earlier, deadly shootings led to two downtown Macon bars having their alcohol licenses revoked by the Sheriff.⁸¹

Although there are numerous studies showing the risks of underage drinking and the increased chances of accidents and health problems,⁸² in the legal world there have been very few successful civil cases brought against alcohol providers. In a 2006 action filed in the District of Columbia, a plaintiff attempted to sue nineteen alcoholic beverage manufacturers and importers and the Beer Institute, a trade association.⁸³ The plaintiff argued defendants had intentionally created advertisements in such a way to appeal to underage consumers of alcohol, “thereby creating a demand and causing a myriad of harms . . . for the purpose of reaping millions of dollars of revenue . . . flowing from illegal consumption.”⁸⁴ Although this claim is extremely similar to the key case of this Comment, *Poppell, et al., v. McKesson, et al.*,⁸⁵ the claim would ultimately be dismissed due to the plaintiff’s lack of standing, as he failed to fit into any of the classes he purported to represent.⁸⁶

In a 2013 Idaho case where standing may have been better matched, five plaintiffs, all inmates of the same Idaho prison sued top alcohol manufacturers and distributors for \$1 billion dollars.⁸⁷ They alleged that alcohol led them to commit crimes and alcohol manufacturers and distributors failed to warn them of the addictiveness.⁸⁸ Ranging from manslaughter to grand theft, many of them claimed if they had not become alcoholics, they would not have committed their charged crimes.⁸⁹ One plaintiff was quoted as saying, “[he does not] know if [he] can be a productive member of society and still control the desires and craving to use alcohol.”⁹⁰

81. Anthony Montalto, *Downtown Macon Bar Owner Says Employees Outraged After Alcohol License Suspension. Here’s Why*, 13WMAZ (Aug. 31, 2023), <https://www.13wmaz.com/article/news/local/macon/macon-bar-owner-says-employees-outraged-after-alcohol-license-suspension/93-c19a70b1-6410-41fc-bf72-03fca0eb6eb6> [<https://perma.cc/XZ2D-9NGY>].

82. See *supra* notes 74–77.

83. *Hakki v. Zima Co.*, No. 03-9183, 2006 D.C. Super. LEXIS 10, *1.

84. *Id.*

85. Complaint at 1, *supra* note 3.

86. “Although the complaint alleges that Defendant’s advertising causes underage drinking to the detriment of Plaintiff and the classes he purports to represent . . .” the plaintiff did not fit into any of these classes. *Id.* at *3–4.

87. Ashley Jennings, *Idaho Inmates Sue Beer, Wine Companies for \$1B*, ABC NEWS (Jan. 3, 2013), <https://abcnews.go.com/blogs/headlines/2013/01/idaho-inmates-sue-beer-wine-companies-for-1b> [<https://perma.cc/E3K8-YR7V>].

88. *Id.*

89. *Id.*

90. *Id.*

B. Tobacco Litigation

In 1949, a commercial ran on American televisions advertising Camel cigarettes.⁹¹ The advertisement, in classic black and white, explains the busy life of a doctor. Because of this lifestyle, it gives them little time to relax, but “just long enough to enjoy a Camel cigarette.”⁹² The advertisement then references a national survey where doctors of all types, across the United States, were asked what was their favorite cigarette. The result—“more doctors smoke Camels than any other cigarette.”⁹³

Nearly seventy-five years later, little remains of the type of freedom and power tobacco companies once had with advertising. Not only were these companies’ advertising capabilities decimated in the nineties and early 2000s,⁹⁴ but the modern public is much more aware of the health risks of smoking cigarettes and inhaling secondhand smoke.⁹⁵ Tobacco litigation in the nineties and early 2000s greatly shaped the landscape in which tobacco companies must operate in modern times. Different substance, same issues—three similar claims appeared once again: negligence, mislabeling and false advertising, and public nuisance.⁹⁶

1. Negligence and Mislabeling Claims:⁹⁷ Failure to Warn of Health Risks

Negligence cases against tobacco companies began as early as 1954, when individuals accused companies of failing to notify the public about harmful effects of tobacco use.⁹⁸ However, in a 2014 report by the Surgeon General of the United States Department of Health and Human Services, more than eight hundred cases were filed between the fifties and nineties—none succeeded.⁹⁹

91. Graphicsfx, *More Doctors Smoke Camels Than Any Other Cigarette*, YOUTUBE (Nov. 11, 2006), <https://www.youtube.com/watch?v=gCMzjJjuxQI> [<https://perma.cc/2HPH-3H6T>].

92. *Id.*

93. *Id.*

94. *See infra* notes 107, 120, 129.

95. *See infra* notes 160–62, 64–66.

96. *See infra* notes 103–04, 149.

97. *See infra* notes 105–08.

98. Derek Carr et al., *Reducing Harm Through Litigation Against Opioid Manufacturers? Lessons from the Tobacco Wars Public Health Reports*, 133 PUB. HEALTH REP. 207, (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5871135/> [<https://perma.cc/4H9H-79B5>].

99. *Id.*; *The Health Consequences of Smoking—50 Years of Progress: A Rep. of the Surgeon Gen.*, NAT’L CTR. FOR BIOTECHNOLOGY INFO (2014), <https://www.ncbi.nlm.nih.gov/books/NBK179276/> [<https://perma.cc/DMT7-CCV9>].

Several factors could explain the difficulty plaintiffs had in succeeding against tobacco companies. One could be the financial toll plaintiffs had to endure going against tobacco powerhouses. These plaintiffs, who were already sucked dry by medical bills from hospital stays and expensive treatments, likely could not afford a lengthy litigation. Another reason could be that the recognition of negative health effects associated with using tobacco products was only just beginning to be realized. It was only in 1956 that a scientific study group, conducted by the Surgeon General, determined there was a causal relationship between excessive cigarette smoking and lung cancer.¹⁰⁰ It is likely this study was the catalyst to other confirming studies, and the collective realization that cigarettes were not as risk-free as tobacco companies had made them out to be.

The first big breakthrough was in the Supreme Court of the United States' decision in *Cipollone v. Liggett*.¹⁰¹ Unlike past litigation, *Cipollone* finally was able to break through the relative safety tobacco manufacturers had experienced for the past half a century.¹⁰² The main plaintiff, Rose Cipollone, was a lifelong smoker. Although Rose passed away from lung cancer before the case finally came to the Supreme Court, her son would continue the suit against two tobacco manufacturers on her behalf. The plaintiffs' claim hinged upon the fact that defendant tobacco manufacturers "fraudulently misrepresented . . . hazards . . . because they conspired to deprive the public of medical and scientific information about smoking."¹⁰³

As part of its holding, the Supreme Court deemed the health labels on cigarette packaging as a sufficient warning, and future lawsuits based on advertisements' failures to include sufficient health warnings were mostly moot.¹⁰⁴ However, what made this case significant was the Supreme Court's acknowledgement that tobacco companies had been known to misrepresent and minimize the harms of tobacco use.¹⁰⁵ The Supreme Court referenced statements made by the Federal Trade Commission (FTC). The FTC "criticized [tobacco manufacturers'] advertising that associated cigarette smoking with such positive attributes as contentment, glamour, romance, youth, happiness . . . at

100. *Reducing Tobacco Use: A Report of the Surgeon General*, CTR. FOR DISEASE CONTROL AND PREVENTION (2023), <https://archive.cdc.gov/#/details?url=https://www.cdc.gov/tobacco/sgr/2000/highlights.html>.

101. 505 U.S. 504 (1992).

102. *Id.* at 530–31.

103. *Id.* at 508.

104. *Id.* at 517.

105. *Id.* at 527.

the same time suggesting that smoking is an activity at least consistent with physical health and well-being.”¹⁰⁶

Further, the FTC enacted regulations requiring tobacco manufacturers to disclose the serious risks to life that smoking causes, not just the “positives.”¹⁰⁷ Using this as supportive evidence, the Supreme Court held that federal law did not preempt or prohibit laws based on the tobacco manufacturers’ misrepresentations of the dangers of smoking to the public.¹⁰⁸

The *Cipollone* case and other suits slowly began to pull away the curtain, revealing all along that tobacco providers knew of the dangers of smoking.¹⁰⁹ Yet, even so, they failed to alert the public for fear of lost profits.¹¹⁰ Along with numerous health studies coming out on the negative effects of tobacco use,¹¹¹ these were the initial suits that opened the door for medical care cost recovery lawsuits to be brought by state attorney generals.¹¹²

The first of many cases was *Moore ex rel. State v. American Tobacco Co., et al.*,¹¹³ which was filed by the Mississippi Attorney General, Michael Moore.¹¹⁴ In this suit and others that followed, states claimed the tobacco industry continued to knowingly misinform and deceive people on the dangers of smoking through advertising and marketing efforts.¹¹⁵ Further, the tobacco companies, and not the taxpayers, should be required to pay for Medicaid and state healthcare expenses in treating tobacco-related diseases.¹¹⁶ Worried about increasing litigation and cost,

106. *Id.* (punctuation omitted).

107. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (Jul. 1, 1964) (to be codified at 16 C.F.R. pt. 408).

108. *Cipollone*, 505 U.S. at 530.

109. See Peter Pringle, *The Chronicles of Tobacco: An Account of the Forces that Brought the Tobacco Industry to the Negotiating Table*, 25 WILLIAM MITCHELL L. REV. 387 (1999).

110. *Id.*

111. *The Health Consequences of Smoking—50 Years of Progress: A Rep. of the Surgeon Gen.*, *supra* note 99.

112. *The Master Settlement Agreement*, NAT’L ASS’N OF ATT’Y GEN., <https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement/> [<https://perma.cc/WB9M-X7AW>] (last visited Feb. 23, 2024).

113. No. 94-1429 (Miss. Ch. Ct. Jackson Cnty.); see Sloan, *infra* note 116, at 165.

114. *The Master Settlement Agreement: An Overview*, PUB. HEALTH L. CTR. (Nov. 2018), <https://publichealthlawcenter.org/sites/default/files/resources/MSA-Overview-2018.pdf> [<https://perma.cc/HN73-YM74>].

115. *The Master Settlement Agreement*, *supra* note 112.

116. Frank Sloan & Lindsey Chepke, *Litigation, Settlement, and the Public Welfare: Lessons from the Master Settlement Agreement*, 17 WIDENER L. REV. 159, 165–66 (2011); Carr, *supra* note 98.

tobacco companies began to settle, and ultimately in 1998, all claims culminated under the Master Settlement Agreement (MSA).¹¹⁷

Four of the largest tobacco companies, who agreed to the MSA in perpetuity, settled numerous state lawsuits by agreeing to pay billions of dollars and to submit to annual payments to states.¹¹⁸ These companies submitted to other concessions in order to continue selling tobacco products, albeit under a much more restricted market than a few decades prior.¹¹⁹ Notably, the MSA is what eliminated television advertisements promoting tobacco use and the use of cartoon characters on advertising, labeling, and promotions.¹²⁰ The minority of states that did not agree to settle under the MSA are still able to recover through similar, state-specific programs.¹²¹

Not only did these tobacco companies have to pay a monetary fine, but they were also ordered to run corrective advertisements.¹²² This advertisement requirement was ordered again in 2006, when the United States filed another lawsuit against major cigarette manufacturers and accused them of several violations of the Racketeer Influenced and Corrupt Organization (RICO) Act.¹²³ Using an all too familiar theory, the government hinged their case on evidence that these tobacco providers knowingly misled the public for decades, through coordinated public relations, research, and marketing.¹²⁴

In the final opinion of this case, Judge Gladys Kessler highlighted numerous instances where the public had been deliberately misled.¹²⁵ This list included, but was not limited to, the negative health effects of smoking; the addictiveness of smoking and nicotine, lack of significant health benefits from smoking different types of cigarettes (i.e. branded

117. *The Master Settlement Agreement*, *supra* note 112.

118. Sloan, *supra* note 116, at 159; *The Master Settlement Agreement*, *supra* note 112.

119. *The Master Settlement Agreement*, *supra* note 112.

120. *Id.*; see also *Camel Cigarettes—A Long History of Targeting Kids*, CAMPAIGN FOR TOBACCO-FREE KIDS (Jun. 18, 2013), https://www.tobaccofreekids.org/microsites/camel/Camel_History.pdf [<https://perma.cc/RM4E-6J63>].

121. Since Georgia first joined the MSA, the state has received a total of \$3.15 billion dollars from tobacco producers and manufacturers. *Tobacco's Master Settlement Agreement: How Funds Are Allocated in Georgia*, GA. CORE CTR. FOR ONCOLOGY RSCH. AND EDUC., https://www.georgiacancerinfo.org/articleImages/articlePDF_666.pdf [<https://perma.cc/T32V-M926>] (last visited Feb. 23, 2024).

122. Corrective advertisements fixed the misconceptions that tobacco manufacturers had propagated throughout the prior decades. See *infra* note 129.

123. 18 U.S.C. § 1961 (2023); *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006).

124. Herbst, *supra* note 18.

125. *Id.*

as “low tar,” “light,” “ultra-light,” etc., as compared to regular cigarettes), and downplaying adverse health effects of secondhand smoke.¹²⁶

The corrective advertisements would run on the front section of fifty Sunday newspapers and on major television networks during prime time for one year.¹²⁷ Additionally, corrective statements had to be published on websites and cigarette packs.¹²⁸ All corrective advertisements began with naming the parties and a declaration that they were ordered by a federal court to make these statements.¹²⁹ The corrective advertisements ranged from stating death statistics of Americans killed by smoking, listing the different kind of diseases arising from smoking (notably, a variety of cancers), and even quotes as clear as “[i]t’s not easy to quit.”¹³⁰

2. Public Nuisance:¹³¹ Worries of Health Risks from Secondhand Smoke

Although cigarette smoke odor has been the center of some litigation, the main issue surrounding secondhand smoke is the health dangers posed to the public.¹³² Studies conducted by the Center of Disease Control (CDC) have determined secondhand smoke contains many of the cancer-causing substances and poisons that would be inhaled if the individual did smoke.¹³³ Even though individuals can choose whether to smoke, the CDC has determined that “there is no safe level of exposure to secondhand smoke.”¹³⁴ The Surgeon General would eventually release a report in 1986, which detailed the dangers of secondhand smoke, especially emphasizing the increased risk of cancer and other diseases to children.¹³⁵

126. *Id.*

127. *Id.*

128. *Id.*

129. American Cancer Society Cancer Action Network, *Mockup of Tobacco Industry “Corrective Statement” National TV Ad: Addictiveness*, YOUTUBE (Jan. 13, 2014) <https://www.youtube.com/watch?v=PsCU8YcttXA> [<https://perma.cc/SL35-S5BT>]; *Philip Morris Point-of-Sale Images*, U.S. DEPT. OF JUSTICE—CIV. DIV., <https://www.justice.gov/civil/consumer-protection-branch/case/philip-morris/settlement-images> [<https://perma.cc/BJ2J-JWET>] (last visited Feb. 23, 2024).

130. *Id.*

131. RESTATEMENT (SECOND) OF TORTS § 821B(1)–(2)(a).

132. *Health Problems Caused by Secondhand Smoke*, CTR. FOR DISEASE CONTROL AND PREVENTION (Nov. 1, 2022), <https://www.cdc.gov/tobacco/secondhand-smoke/health.html> [<https://perma.cc/E57S-ZTDB>].

133. *Id.*

134. *Id.*

135. *Perspectives In Disease Prevention and Health Promotion 1986 Surgeon General’s Report: The Health Consequences of Involuntary Smoking*, CTR. FOR DISEASE CONTROL AND

Even so, one of the first instances of a secondhand smoke claim with a health concern basis began much earlier in 1976, a decade prior. In *Shimp v. New Jersey Bell Telephone Co.*,¹³⁶ a case of first impression in New Jersey, a non-smoking employee argued she was denied a safe working environment when she was forced “by proximity . . . to involuntarily inhale secondhand cigarette smoke [from smoking employees].”¹³⁷

In the Superior Court of New Jersey’s analysis, it acknowledged smoke from burning cigarettes is “toxic and deleterious to the health not only of smokers but also of nonsmokers who are exposed to secondhand smoke.”¹³⁸ Further, the superior court emphasized there is evidence that “[the] plaintiff is confronted with a work environment contaminated by the presence of a nonnecessary [sic] toxic substance.”¹³⁹ Interestingly, the superior court distinguished other cases that involved nuisance smoke or particles, one such case involving cellulose acetate dust, which is created during a certain manufacturing process.¹⁴⁰ Unlike acetate dust, secondhand smoke: (1) was not a “natural by-product of [the] business” and “[t]here [was] no necessity to fill the air with tobacco smoke in order to carry on defendant’s business”; and (2) there was plenty of evidence to show tobacco smoke was dangerous and toxic.¹⁴¹ Furthermore, the superior court stated plainly that “[t]he right of an individual to risk his or her own health does not include the right to jeopardize the health of those who remain around him or her in order to properly perform the duties of their jobs.”¹⁴²

In setting the limits to which smoking could be allowed, the superior court explained that smoking employees have opportunities to smoke (i.e. during breaks and lunch hours) and can access areas outside of the common area to smoke.¹⁴³ Additionally, the hardship imposed on the defendant company was minimal to accommodate this ruling.¹⁴⁴ Finally, the superior court seemed to admonish the defendant company’s reluctance and pointed to an already implemented rule preventing smokers from smoking near machines. The superior court further stated:

PREVENTION (Dec. 19, 1986), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00000837.htm> [<https://perma.cc/B48L-RV9B>].

136. 145 N.J. Super. 516 (Super. Ct. Ch. Div. 1976).

137. *Id.* at 520.

138. *Id.* at 523.

139. *Id.* at 523–24.

140. *Id.* at 523.

141. *Id.*

142. *Id.* at 530–31.

143. *Id.* at 531.

144. *Id.*

The rationale behind the rule is that the machines are extremely sensitive and can be damaged by the smoke. Human beings are also very sensitive and can be damaged by cigarette smoke. Unlike a piece of machinery, the damage to a human is all too often irreparable It is not so simple in the case of a human lung, eye or heart [to find a replacement part.] A company which has demonstrated such concern for its mechanical components should have at least as much concern for its human beings. Plaintiff asks nothing more than to be able to breathe the air in its clear and natural state.¹⁴⁵

In another case involving exposure to secondhand smoke as part of one's employment, seven current and former flight attendants sued tobacco companies in *Broin, et al. v. Philip Morris Cos.*¹⁴⁶ The plaintiffs alleged they had contracted lung cancer and other types of disorders due to inhaling cigarette smoke on airplanes.¹⁴⁷ At the trial, Dr. Freddy Homburger, testified that while he worked as a tobacco researcher in 1973, he found cancer in the larynx of laboratory hamsters exposed to cigarette smoke.¹⁴⁸

Since these cases, a multitude of others involving secondhand smoke have appeared in the litigation sphere, notably those involving the nuisance of smoke seepage. One such case involved a non-smoker tenant who refused to pay rent after secondhand smoke from a bar on the first floor seeped into her apartment.¹⁴⁹ The tenant alleged that the "amounts of smoke that had seeped into her apartment deprived her of the quiet enjoyment of that apartment."¹⁵⁰ The Massachusetts Housing Court judge ultimately ruled in the tenant's favor, finding the smoke had "made the apartment unfit for smokers and nonsmokers alike."¹⁵¹

Although there has not yet been a case where an individual has sought a public nuisance action against a tobacco company directly, there was a recent suit in 2022 involving the City of Baltimore suing tobacco companies for cigarette litter.¹⁵² A case of first impression in the nation,

145. *Id.*

146. 641 So.2d 888, 889 (Dist. Ct. App. 1994).

147. *Id.*

148. E. L. Sweda Jr., *Lawsuits and Secondhand Smoke*, 13 TOBACCO CONTROL i61, i65 (2004).

149. See Sweda Jr., *supra* note 148, at i63 (discussing the Boston Housing Court decision in the case of Gainsborough St. Realty Trust v. Haile, et. al); see also *Donnelley v. Cohasset Hous. Auth.*, 16 Mass. L. Rep. 318 (2003).

150. *Id.*

151. *Id.*

152. Clark Mindock, *Baltimore Sues R. J. Reynolds, Altria Group Over Cigarette-Butt Litter*, REUTERS (Nov. 22, 2022), <https://www.reuters.com/legal/litigation/baltimore-sues-rj->

the city sued tobacco companies for their refusal to use biodegradable cigarette filters or to add to their packaging a label warning buyers of discarding cigarette butts.¹⁵³

According to the suit, this litter cost the city a whopping \$5.3 million annually to clean.¹⁵⁴ Alleging a public nuisance claim, Baltimore City Solicitor James Shea spoke negatively of the companies, saying “[t]he same tobacco companies that for decades failed to acknowledge the health risks of their products are now refusing to take responsibility for cigarette butt waste.”¹⁵⁵

3. State Regulations¹⁵⁶ to Curb Secondhand Exposure

Under federal law, there are currently no laws regulating smoking in workplaces (other than a ban inside federal buildings) or in public spaces. To combat this gap in the law, states and municipalities are implementing rules that will assist with limiting secondhand exposure in workplaces and public spaces.¹⁵⁷

Typically, most states have heavily restricted smoking within the confines of shared workspaces or public areas.¹⁵⁸ If smoking is allowed, smokers are typically required to smoke in a designated area.¹⁵⁹ In Florida, the state enacted the Florida Clean Indoor Air Act (FCIAA) in 1985.¹⁶⁰ This act prohibits smoking in indoor, public areas, including workplaces, restaurants, bars, bingo halls with food service, and other civic or fraternal organizations.¹⁶¹ Within the FCIAA, the stated purpose is to protect against the dangers of secondhand smoke.¹⁶²

The fight against secondhand smoke exposure even fundamentally changed tourism in Savannah, Georgia, a city primarily known for its bar

reynolds-altria-group-over-cigarette-butt-litter-2022-11-22/ [https://perma.cc/38BA-N6 HB].

153. *Id.*

154. *Id.*

155. *Id.*

156. *Infra* notes 160–62, 64–66.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Florida Clean Indoor Air Act*, FLA. DEPT OF HEALTH (Jun. 16, 2022), <https://www.floridahealth.gov/programs-and-services/prevention/tobacco-free-florida/indoor-air-act/index.html#:~:text=The%20Florida%20Clean%20Indoor%20Air,X%20of%20the%20State%20Constitution> [https://perma.cc/9XFC-JUWY].

161. *Id.*

162. *Id.*

scene along the river. Although known for its Open Container Policy,¹⁶³ Savannah government officials have reacted differently to smoking in those same areas. In 2011, the Savannah Smokefree Air Ordinance¹⁶⁴ became effective, prohibiting smoking in businesses. This ordinance specifically restricted smoking in all enclosed facilities leased or operated by the state or the city; all enclosed public places within the city; all enclosed areas within places of employment; and any place in which a non-smoking sign is posted.¹⁶⁵ Additionally, all smoking in and within ten feet, or a “reasonable distance” of certain areas, are prohibited for smokers as well.¹⁶⁶ Although bar owners and smokers alike were unhappy with the ordinance, ultimately, a study determined there was minimal impact on businesses after the effective date.¹⁶⁷

III. OPIOID LITIGATION

Although *Poppell, et al. v. Cardinal Health, et al.*¹⁶⁸ has created an interesting precedent in the world of opioid litigation, looking back, this is not a surprising result. Opioids have consistently been a topic of legal discussion since the nineties,¹⁶⁹ and like alcohol and tobacco, has been a substance that has existed in the world since early civilizations.

A. History of Opioids in the U.S.: Following Its Origin

Even with its dangerously addictive qualities, the medical importance of opium and opioids was undeniable. Opium poppy, which opioids are derived from, was used as far back as 3400 B.C. in Mesopotamia and was nicknamed “Hul Gil” or the “joy plant.”¹⁷⁰ In the United States, evidence shows that opioids were used during the Civil War to treat gunshot

163. *Savannah's Open Container Policy: The To-Go Cup Takeaway*, SAVANNAH, <https://www.savannah.com/savannahs-open-container-policy-the-to-go-cup-takeaway/> [https://perma.cc/9RWA-66FS] (last visited Feb. 23, 2024).

164. SAVANNAH, GA., ORDINANCES § 9-3017 (2010); *Savannah Smokefree Air Ordinance of 2010: Enforcement Guide*, GA. DEPT OF PUB. HEALTH, <https://coastalhealthdistrict.org/wp-content/uploads/2016/03/Savannah-Smoke-Free-Ordinance-Enforcement-Guide.pdf> [https://perma.cc/UZ95-WSGL] (last visited Feb. 23, 2024).

165. *Savannah Smokefree Air Ordinance of 2010: Enforcement Guide*, *supra* note 164.

166. *Id.*

167. *Economic Impact of the 2010 Savannah Smokefree Air Ordinance*, GA. DEPT OF PUB. HEALTH (Jul. 2013), https://www.alabamapublichealth.gov/tobacco/assets/economic_impact_savannah.pdf [https://perma.cc/SA2Z-A72V].

168. Complaint at 1, *supra* note 3.

169. See Ortiz, *infra* note 178.

170. *Opium Poppy*, DEA MUSEUM, <https://museum.dea.gov/exhibits/online-exhibits/cannabis-coca-and-poppy-natures-addictive-plants/opium-poppy> [https://perma.cc/JBM9-9H4W] (last visited Feb. 23, 2024).

wounds and other injuries, including diarrhea and cough.¹⁷¹ Whether doctors or medical personnel knew of the consequences, soldiers were often prescribed opium gum, laudanum, or morphine to treat wounds and injuries sustained from battle.¹⁷² In fact, before addicts were known by that term, often they were called “opium slaves.”¹⁷³ These individuals, often soldiers who became addicted from battlefield use of opium would lose their military pension trying to “chase the dragon.”¹⁷⁴

Fast-forward to 1898, the pharmaceutical company, Bayer, introduced heroin and marketed it as “less habit-forming” than morphine.¹⁷⁵ A mere decade later, the United States began implementing restrictions against opioids and narcotics.¹⁷⁶ The Controlled Substances Act¹⁷⁷ was enacted by President Richard Nixon in 1970, in an effort to combine previous federal drug laws and create a classification system to help law enforcement fight against drug abuse.¹⁷⁸ However, even with this attempt, pharmaceutical companies seemed to take the changes in stride. In 1995, Purdue Pharma, a modern pharmaceutical titan, introduced OxyContin, which was advertised as “gentler and less-addictive” compared to opioid pills.¹⁷⁹

Unlike the days of poppy fields, larger populations, easier accessibility, quicker production methods, and a different focus on treatment, all contributed to the major upsurge of opioid addiction that swung hard during the early 2000s to the present year.¹⁸⁰ Dr. Aly Hassan, M.D.,

171. Jennifer Micale, *Civil War on Drugs: Doctoral Candidate Explores the Nation's First Opioid Epidemic*, BINGHAMTON NEWS (Nov. 15, 2021), <https://www.binghamton.edu/news/story/2405/civil-war-on-drugs-doctoral-candidate-explores-the-nations-first-opioid-epidemic> [<https://perma.cc/A927-PBY5>].

172. *Id.*

173. *Id.*

174. Interestingly, the phrase “chasing the dragon” or “chasing the tiger” originates from Hong Kong in the 1950's to describe the vapors emitted from smoking heroin. Eventually it came to represent the pursuit of a high that can never be achieved again. J. Strang et al., *Heroin Smoking By 'Chasing the Dragon': Origins and History*, 92 ADDICTION 685 (Jun. 1, 1997).

175. *The Origin and Causes of the Opioid Epidemic*, GEORGETOWN BEHAV. HEALTH INST. (Aug. 14, 2018), <https://www.georgetownbehavioral.com/blog/origin-and-causes-of-opioid-epidemic> [<https://perma.cc/7W9H-QX7C>].

176. *Id.*

177. 21 U.S.C. § 801 (1970).

178. Nicole R. Ortiz & Charles V. Preuss, *Controlled Substances Act*, STATPEARLS (Mar. 24, 2023).

179. *The Origin and Causes of the Opioid Epidemic*, *supra* note 175.

180. *Understanding the Epidemic*, *infra* note 190.

Assistant Professor of Psychiatry at the University of Nebraska's College of Medicine recalled the nineties as "the decade of [pain treatment.]"¹⁸¹

Pain was considered the "fifth vital sign," and doctors were not worried about the addictive effects of opioids, which, in a 1990 study by the Sacramento-El Dorado Medical Society, could be used "with little risk of developing the self-destructive behavior[al] characteristic of addiction."¹⁸² However, many in the medical community failed to consider that the chemical makeup of these medications was tailored to be absorbed quickly and then eliminated quickly.¹⁸³ This combined with their ability to trigger large amounts of endorphins, or "feel-good" neurotransmitters results in a very temporary but extremely powerful feeling of euphoria.¹⁸⁴

Unlike other substances, opioids create a physical and a mental dependence on the drug.¹⁸⁵ An individual may take the drug pursuant to a proper course of treatment, take the pills properly, and still feel withdrawal symptoms.¹⁸⁶ The patient may feel the irresistible urge to find the drug somewhere else, thus resorting to purchasing off the criminal market.¹⁸⁷ In fact, the typical case study of a patient who becomes addicted to opioids are individuals who, for example, suffered back injuries and were prescribed opioids to combat the pain.¹⁸⁸ Women experiencing pregnancy pain and complications were also given opioids.¹⁸⁹ Since the nineties, the United States has experienced three waves of opioid-related deaths: one in the 1990s, one in the 2010s, and one most recently in 2013.¹⁹⁰

181. Kalani Simpson, *1990s Focus on Pain a Catalyst in the Prescription Abuse Epidemic*, UNIV. OF NEB. MED. CTR. (Nov. 13, 2012), <https://www.unmc.edu/newsroom/2012/11/13/1990s-focus-on-pain-a-catalyst-in-the-prescription-abuse-epidemic/> [<https://perma.cc/AS5Y-DHNN>].

182. *Id.*

183. *Id.*

184. *How Opioid Use Disorder Occurs*, MAYO CLINIC (Nov. 29, 2023), <https://www.mayoclinic.org/diseases-conditions/prescription-drug-abuse/in-depth/how-opioid-addiction-occurs/art-20360372#> [<https://perma.cc/93J7-QQZ4>].

185. *Opioid Addiction*, CTR. FOR ADDICTION AND MENTAL HEALTH, <https://www.camh.ca/en/health%20info/mental%20illness%20and%20addiction%20index/opioid%20addiction#> [<https://perma.cc/7CX3-V9YJ>] (last visited Feb. 23, 2024).

186. *Id.*

187. *Id.*

188. Joseph Connolly, III, et al., *Predictors of Long Term Opioid Use Following Lumbar Fusion Surgery*, 42 SPINE 1405 (2018).

189. Sarah S. Osmundson et al., *Opioid Prescribing After Childbirth: Overprescribing and Chronic Use*, 31 CURRENT OP. IN OBSTETRICS AND GYNECOLOGY 83 (2018).

190. *Understanding the Epidemic*, CTR. FOR DISEASE CONTROL AND PREVENTION (Aug. 8, 2023), <https://www.cdc.gov/opioids/basics/epidemic.html> [<https://perma.cc/XKP6-858D>].

B. Opioid Abuse in Georgia: Following the Nation's Overdose Boom

Following the waves, many states also began to see an uptick in those addicted.¹⁹¹ Like many other states, Georgia battled with the consequences of overprescribing in the nineties and the subsequent appearance of new, stronger, but much more dangerous, synthetic opioids, such as fentanyl.¹⁹² The opioid epidemic was so bad in the nation that in 2017, the U.S. Department of Health and Human Services declared the crisis a national public health emergency.¹⁹³ According to the Georgia Department of Public Health (GA DPH), between the period of 2010 to 2020, there was a 207% increase in the total number of opioid-related overdose deaths in the state.¹⁹⁴ Unfortunately, the trend does not seem to be experiencing a dip anytime soon. The GA DPH has documented that in 2021 there were 2,390 drug overdose deaths in Georgia, with 71% of that number being attributed to opioids and 57% attributed to fentanyl.¹⁹⁵

C. Manufacturers, Distributors, Providers, Drug Dealers: Who's to Blame?

In January 2022, Georgia joined with other states and local subdivisions in an opioid settlement agreement against three of the largest pharmaceutical distributors: McKesson; Cardinal Health; AmerisourceBergen; and Janssen Pharmaceuticals, Inc., a manufacturer whose parent company is Johnson & Johnson (J&J).¹⁹⁶ This settlement sought to resolve more than 4,000 claims that the distributors and manufacturers had across the United States.¹⁹⁷

As part of the settlement, Georgia is expected to receive \$636 million: the National Distributor Settlement funds will be disbursed over the

191. *Drug Overdose Mortality by State*, CTR. FOR DISEASE CONTROL AND PREVENTION (Mar. 1, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/drug_poisoning_mortality/drug_poisoning.htm [<https://perma.cc/GT4P-7CCM>].

192. *Opioid and Substance Misuse*, GA. DEP'T OF PUB. HEALTH (Feb. 22, 2023), <https://dph.georgia.gov/stopopioidaddiction#> [<https://perma.cc/YJ2Y-X6LG>].

193. *Opioid Facts and Statistics*, U.S. DEP'T OF HEALTH AND HUM. SERVS. (Dec. 16, 2022), <https://www.hhs.gov/opioids/statistics/index.html#>: [<https://perma.cc/9BE2-CMHJ>].

194. *Opioid and Substance Misuse*, *supra* note 192.

195. *Id.*

196. *Opioid Settlement Agreements*, GOVERNOR'S OFFICE OF PLAN. AND BUDGET, <https://opb.georgia.gov/ohsc/opioid-settlement-agreements> [<https://perma.cc/PPN4-EUP8>] (last visited Feb. 23, 2024).

197. *Drug Distributors Commit to \$21 Billion Opioid Agreement; New Hampshire to Receive \$115 Million to Fight the Opioid Crisis*, N.H. DEP'T OF JUST. OFF. OF THE ATT'Y GEN. (Feb. 25, 2022), <https://www.doj.nh.gov/news/2022/20220225-opioid-agreement.htm> [<https://perma.cc/HHQ9-KH8Y>].

course of eighteen years while the Janssen/J&J Settlement funds will be disbursed over nine years.¹⁹⁸ Johnson & Johnson, known for their items such as baby shampoo and band-aids, was ordered in another settlement to pay the state of Wisconsin \$572 million.¹⁹⁹ As big as that payout seems, Wisconsin had initially asked for \$17 billion, which further pales in comparison to the \$81.6 billion Johnson & Johnson had reported for its 2018 sales.²⁰⁰

Although the sums of money these giants are forking over are enormous, three questions naturally arise: (1) is it “justice” for these companies to pay while continuing to produce dangerous opioids?; (2) does this truly heal the financial harm opioids have done to the community?; and (3) are these companies actually the ones to blame, or are there other, more liable parties?

Although these huge manufacturers are able to produce large quantities of opioids and equally large distributors are able to ship them out all across the nation,²⁰¹ down the supply chain, pharmacies and medical providers have also been found culpable. The following chart (Figure 1) lists a few of the many cases that have been brought against doctors and other medical providers in Georgia who were found by courts to have failed their oaths not to harm.

Provider Name and Type	Settlement Amount/Restrictions	Wrongdoing
North Georgia Healthcare Center, Inc., nonprofit corporation and healthcare provider ²⁰²	\$130,000	Between 2012 to 2018, violated the False Claims Act by submitting unnecessary claims for Schedule II controlled substances. Further, a former

198. *Opioid Settlement Agreements*, *supra* note 196.

199. Katie Thomas & Tiffany Hsu, *Johnson & Johnson’s Brand Falts Over Its Role in the Opioid Crisis*, N.Y. TIMES (Aug. 27, 2019), <https://www.nytimes.com/2019/08/27/health/johnson-and-johnson-opioids-oklahoma.html> [<https://perma.cc/N8M4-YQGK>].

200. *Id.*

201. *U.S. Dispensing Rate Maps*, CTR. FOR DISEASE CONTROL AND PREVENTION (Dec. 11, 2023), <https://www.cdc.gov/drugoverdose/rxrate-maps/index.html> [<https://perma.cc/3C2L-UX3A>].

202. *North Georgia Health Clinic and its CEO Agree to Pay \$130,000.00 to Settle False Claims Act Allegations That They Issued Medically Unnecessary Opioid Prescriptions*, U.S. DEPT OF JUST. (Aug. 2, 2021), <https://www.justice.gov/usao-ndga/pr/north-georgia-health-clinic-and-its-ceo-agree-pay-1300000-settle-false-claims-act#> [<https://perma.cc/35QS-39K2>].

		physician ²⁰³ would improperly prescribe opioids without the “appropriate medical review and judgment of medical necessity.” ²⁰⁴
Ellis Pain Center, Mark A. Ellis, M.D. ²⁰⁵	\$5,000,000	The allegations involved violations of the False Claims Act by sending bills to Medicare to pay for diagnostic and urine tests that were never given. Although there was not an accusation of incorrectly prescribing opioids, the issue was that this center handled pain treatments which were improperly managed.
Dr. Frank H. Bynes Jr. ²⁰⁶	20 years in federal prison and payment of \$615,145.06 to Medicare,	He operated a “pill mill” where he would negligently dispense controlled substances

203. See Lois Norder, *Georgia Clinic Settles Whistleblower Lawsuit Alleging Unnecessary Opioid Prescriptions*, ATLANTA J. CONST. (Aug. 3, 2021), <https://www.ajc.com/news/georgia-clinic-settles-whistleblower-lawsuit-alleging-unnecessary-opioid-prescriptions/24MWV2BIJBDXTPOHILG6HQK7YQ/> [<https://perma.cc/3M5E-SG7M>].

204. *North Georgia Health Clinic and its CEO Agree to Pay \$130,000.00 to Settle False Claims Act Allegations That They Issued Medically Unnecessary Opioid Prescriptions*, *supra* note 202.

205. *Athens, Georgia, Pain Medicine Owner, Practice Manager Agree to \$5 Million Settlement Resolving Violations Under the False Claims Act*, U.S. DEPT OF JUST. (Mar. 20, 2023), <https://www.justice.gov/usao-mdga/pr/athens-georgia-pain-medicine-owner-practice-manager-agree-5-million-settlement> [<https://perma.cc/V3FA-2T4H>].

206. Dr. Bynes wrote prescriptions for more than 1,800 patients, and approximately 51,329 pharmacy fills came from his office in a period of three-years. Based on this, it was estimated that in these three-years, Dr. Bynes had prescribed in excess of 4.6 million doses of pills, opioid patches, and other types of controlled substances. *Pill-Mill Doctor Gets Decades in Prison for Healthcare Fraud, Illegally Dispensing Massive Amounts of Drugs*, U.S. DEPT OF JUST. (Feb. 14, 2020), <https://www.justice.gov/usao-sdga/pr/pill-mill-doctor-gets-decades-prison-healthcare-fraud-illegally-dispensing-massive#> [<https://perma.cc/BT4C-GXDD>].

	Medicaid, and Tricare.	and occasionally trade the drugs for cash or sex.
Dr. Thomas H. Sachy ²⁰⁷	Up to 97 months in federal prison with a minimum of 3 years of supervised release. Forfeit \$833,000 in currency and real property, including his medical office. Following his release, he agreed to not: (1) engage in the medical practice of pain management; (2) treat anyone for pain; or (3) seek to reinstate his DEA license to prescribe controlled substances.	He admitted to knowingly and intentionally dispensing and distributing, two Schedule II opioids, lisdexamfetamine and oxycodone.

D. Drug Dealer Liability Act O.C.G.A. § 51-1-46: Attempted Use Against Legal “Drug Dealers”

The Drug Dealer Liability Act of 1999 (DDLA)²⁰⁸ amended the Controlled Substances Act by providing a civil cause of action for individuals harmed by persons who illegally manufactured or distributed controlled substances.²⁰⁹ As of 2021, eighteen states have adopted this model Act in some form.²¹⁰

In Georgia’s version,²¹¹ the Act seeks to “shift . . . the damage caused by the existence of the illegal drug market in a community who illegally

207. *Middle Georgia Doctor Pleads Guilty to Unlawfully Prescribing Opioids*, U.S. DEP’T OF JUST. (Jun. 22, 2021), <https://www.justice.gov/usao-mdga/pr/middle-georgia-doctor-pleads-guilty-unlawfully-prescribing-opioids#> [<https://perma.cc/E6LR-QHA5>].

208. O.C.G.A. § 51-1-46.

209. Drug Dealer Liability Act, H.R. 1042, 106th Cong. (1999).

210. Kate Halloran, *State Law on Illegal Drug Market Liability Applies to Opioid Pharm Defendants*, *Tenn. High Court Rules*, AM. ASS’N FOR JUST. (Jan. 14, 2021), <https://www.justice.org/resources/publications/trial-news/2021-jan-14-state-law-on-illegal-drug-market-liability-applies> [<https://perma.cc/QE4N-FHQG>].

211. O.C.G.A. § 51-1-46.

profit from the market . . . [as well as use] substantial monetary loss as a deterrent to those who have not yet entered into the illegal drug distribution market.”²¹² More particularly, it allows persons including “parents, employers, insurers, governmental entities, and others who pay for drug treatments, as well as infants injured as a result of exposure to drugs in utero” to receive a civil remedy for damages incurred as a result of illegal drug use.²¹³ Although companies are not completely immune to liability, the use of this Act in *Poppell, et al. v. McKesson, et al.*,²¹⁴ was one of the first times in opioid litigation that it was used to attach liability to legal manufacturers and distributors.²¹⁵

*E. Case of First Impression: The Outcome of Poppell, et al., v. McKesson, et al.*²¹⁶

In 2022, twenty-one plaintiffs in Georgia sued three wholesale medicine and medical distributors, Cardinal Health Inc., McKesson Corp, and JM Smith Corp, for being “illegal drug dealers” as applicable under Georgia’s Drug Dealer Liability Act (DDLA).²¹⁷

Unlike most of the prior lawsuits under the DDLA,²¹⁸ there were two key differences that made *Poppell* unique. First, this case was the first time where individuals, and not government entities, brought opioid claims against a drug company.²¹⁹ Second, while most state and local governments had filed similar cases with public nuisance or deceptive marketing claims,²²⁰ the plaintiffs in this case sued under DDLA, essentially arguing that these three corporations knew of the risk but continued to illegally oversell to the public.²²¹

Although the stories of the individual plaintiffs were certainly sympathetic, the jury ultimately ruled that the defendants had not

212. *Id.*

213. O.C.G.A. § 51-1-46(b) (2010).

214. Complaint at 1, *supra* note 3.

215. Crisco, *supra* note 3.

216. Jan Hoffman, *Opioid Distributors Cleared of Liability to Georgia Families Ravaged by Addiction*, N.Y. TIMES (Mar. 1, 2023), <https://www.nytimes.com/2023/03/01/health/opioid-victims-trial-georgia.html> [<https://perma.cc/C6QK-2HG7>]; Complaint at 1, *supra* note 3.

217. Dietrich Knauth, *Georgia Families Accuse Opioid Distributors of Illegal Drug Dealing*, REUTERS (Jul. 19, 2022), <https://www.reuters.com/legal/government/georgia-families-accuse-opioid-distributors-illegal-drug-dealing-2022-07-19/> [<https://perma.cc/CA4T-8A2N>]; O.C.G.A. § 51-1-46.

218. O.C.G.A. § 51-1-46.

219. Knauth, *supra* note 217.

220. *Id.*

221. *Id.*

violated the Georgia DDLA²²² and were not liable.²²³ It can only be speculated on exactly why the jury ruled in favor of the defendants, but a key factor that sticks out from the case is how remote the defendant companies were to the alleged traumatizing conduct of the plaintiffs' parents and relatives.²²⁴ Unlike prior cases where direct liability could be traced from the manufacturers, doctors, and pharmacies to the injured plaintiff,²²⁵ in *Poppell*, the plaintiffs sued the middleman.²²⁶

McKesson Corporation, for example, is in the business of distributing pharmaceuticals and other medical supplies.²²⁷ From first aid to skin care to opioids, McKesson distributes any and all kinds of products that can be found at a local Walgreens or CVS drug store.²²⁸ However, they do not manufacture opioid drugs but rather receive it from manufacturers depending on need and orders.²²⁹

Admittedly, McKesson previously paid a civil penalty of \$150 million for failure to report suspicious pharmacy orders;²³⁰ likely its success in the *Poppell* case hinged on remoteness of liability.²³¹ The following addresses two arguments that have been pulled from the *Poppell* suit:

1. McKesson and the other defendants are continuing to “pump” illegal drugs into the area.²³²

McKesson and the other defendants were neither manufacturers nor providers. Although it did fill requests when it received them, this is not

222. O.C.G.A. § 51-1-46.

223. *HunterMaclean Obtains Landmark Verdict for McKesson Corporation*, HUNTERMACLEAN (Mar. 10, 2023), <https://www.huntermaclean.com/news/huntermaclean-obtains-landmark-verdict-for-mckesson-corporation/> [<https://perma.cc/TQ7K-ZLFJ>].

224. Plaintiffs contended that they suffered through physical and sexual abuse throughout their childhoods due to their parents/relatives either being active drug abusers or overdosing. This resulted from the companies alleged negligent selling of opioids. Knauth, *supra* note 217.

225. *See supra* notes 196–200, 202–07.

226. *See infra* notes 227–29.

227. *McKesson Brand Products*, MCKESSON, <https://mms.mckesson.com/content/shop-products/mckesson-brands/> [<https://perma.cc/HD96-7NZN>] (last visited Feb. 23, 2024).

228. *Id.*

229. *McKesson’s Role in the Pharmaceutical Supply Chain*, MCKESSON, <https://www.mckesson.com/About-McKesson/Fighting-Opioid-Abuse/Pharmaceutical-Supply-Chain/> [<https://perma.cc/FM9F-2Z49>] (last visited Feb. 23, 2024).

230. *McKesson Agrees to Pay Record \$150 Million Settlement for Failure to Report Suspicious Orders of Pharmaceutical Drugs*, U.S. DEP’T OF JUST. (Jan. 17, 2017), <https://www.justice.gov/usao-nj/pr/mckesson-agrees-pay-record-150-million-settlement-failure-report-suspicious-orders#> [<https://perma.cc/E3GR-JLRA>].

231. *See* Knauth, *supra* note 217.

232. Crisco, *supra* note 3.

the same as the other sides of the supply chain.²³³ Liable manufacturers knew the addictiveness of the opioids they were creating but still chose to advertise and market their medications as “healthier” or “less addictive.”²³⁴ Liable providers (nurses, doctors, pharmacists) failed to serve as the safety net between patients and addictive opioid prescriptions.²³⁵

During the trial, there was a reference to McKesson as being the “delivery truck.”²³⁶ It only brought the supplies and medications somewhere but neither directly manufactured them nor chose to prescribe them to members of the public.²³⁷

2. McKesson and the fellow defendants are a major reason why the plaintiffs lived a terrible and difficult life.²³⁸

The attorneys for the defendants in this case consistently hammered home the fact that the plaintiffs, though having experienced horrible situations, still bore some personal responsibility.²³⁹ For example, one plaintiff’s mother, Brandy Turner, used to receive methadone from her own mother in exchange for doing household chores.²⁴⁰ Though sympathetic, the defense pointed out that Brandy’s daughters, aunt, and sister, who all had been exposed to the same type of tumultuous background, did not choose to take drugs.²⁴¹

Further, the defendants listed copious other factors that may have led to the plaintiffs’ and their families’ tough and unstable upbringing.²⁴² “[S]treet drug dealers, alcohol, other drugs . . . greedy pharmacists and doctors” could have all contributed to addiction that was plaguing the plaintiffs.²⁴³ Because many of the plaintiffs had prior criminal records and/or continued to use drugs,²⁴⁴ it reasonably would have made the jury feel skeptical to the claims that the distributor was the only cause of their troubles.

233. *McKesson’s Role in the Pharmaceutical Supply Chain*, *supra* note 229.

234. *The Origin and Causes of the Opioid Epidemic*, *supra* note 175.

235. *See supra* notes 202–07.

236. Knauth, *supra* note 217.

237. *McKesson’s Role in the Pharmaceutical Supply Chain*, *supra* note 229.

238. Crisco, *supra* note 3.

239. *Id.*

240. Hoffman, *supra* note 216.

241. *Id.*

242. *Id.*

243. *Id.* Before the trial, independent pharmacies had settled for undisclosed amounts and many of the “pill mill doctors” lost their licenses and were given federal sentences. *See supra* Figure 1.

244. Hoffman, *supra* note 216.

Included in the distributor defendants, five pharmacies were also named: Altama Discount Pharmacy, Darien Pharmacy, Rainbow Drug Store, Woodbine Pharmacy, and City Drug, before it closed down.²⁴⁵ All five of these pharmacies were known to be top distributors of oxycodone in Georgia. The following chart (Figure 2) illustrates the quantities that four of these locations were producing.

Altama Discount Pharmacy	By 2010 it was distributing more opioids than three times the amount it did in 2008. It ranked in the top 5% of the most distribution of oxycodone medications in Georgia. ²⁴⁶
Darien Pharmacy	It ranked in the top 5% of Georgia pharmacies that distributed oxycodone and remained in this position each year between 2009 to 2013. ²⁴⁷
City Drug	It was in the top one-half of 1% of all Georgia pharmacies in oxycodone distribution in 2010 and 2011. ²⁴⁸
Woodbine Pharmacy	In 2006 and 2007, Woodbine was the highest distributor of oxycodone and methadone in the state, and the highest distributor of hydrocodone in 2006. ²⁴⁹

IV. IMPLICATIONS AND ANALYSIS

A. Differences Between Opioids and Tobacco/Alcohol Litigation

Many of the arguments that were used in tobacco and alcohol litigation have also reappeared in opioid litigation.²⁵⁰ Although opioids can be used in non-recreational, non-abusive ways,²⁵¹ there are some individuals, like opioid addicts and alcoholics, who use the substance in a dangerous

245. Wes Wolfe, *Local Opioid Lawsuit Filed Against Large Distributors, Local Pharmacies*, THE BRUNSWICK NEWS (May 3, 2019), https://thebrunswicknews.com/news/local_news/local-opioid-lawsuit-filed-against-large-distributors-local-pharmacies/article_a909ef01-ec2b-5b16-b4cd-dfe3403a64dc.html [https://perma.cc/F3CU-Z3YH].

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. See sources cited *supra* note 13.

251. *Patients' Frequently Asked Questions*, *infra* note 254.

manner.²⁵² Although a lot can be learned from past litigation in both tobacco and alcohol-related cases, there are some key differences that change the field within which opioid cases are entering into today.

1. Accessibility of Accurate Health Information to Individuals

With today's modern technology and advancements in medicine, the public is more aware of the risks associated with opioid abuse. This is not to say that less people become addicted to opioids but simply that the addictive qualities of opioids has been studied and medical professionals are typically more cautious in overprescribing a patient that may be suffering some sort of pain.²⁵³

A simple Google search yields links for government websites that are useful for the uninformed patient.²⁵⁴ Additionally, through its interaction with patients and having dealt with opioid abuse for so long, government websites and other resources seem to proactively have answers to common questions such as "will I get addicted" or "how addictive are opioids" clearly stated for readers to be aware of.²⁵⁵

By empowering patients to know their options, this may promote better discussions with doctors and pharmacists.²⁵⁶ Furthermore, finding other options for dealing with short and long-term pain may lead to the decrease in opioid use in pain management.²⁵⁷

252. *Understanding the Epidemic*, *supra* note 190.

253. This hesitation may arise from professional and moral goals or fear of criminal prosecution. See Will Stone & Pien Huang, *CDC Issues New Opioid Prescribing Guidance, Giving Doctors More Leeway to Treat Pain*, NAT'L PUB. RADIO (Nov. 3, 2022), <https://www.npr.org/sections/health-shots/2022/11/03/1133908157/new-opioid-prescribing-guidelines-give-doctors-more-leeway-to-treat-pain> [<https://perma.cc/89T9-FV3L>].

254. *Patients' Frequently Asked Questions*, CTR. FOR DISEASE CONTROL AND PREVENTION (Aug. 8, 2023), <https://www.cdc.gov/opioids/patients/faq.html> [<https://perma.cc/YAG7-Y848>].

255. *Id.*; Finding Resources for Question "Can I Get Addicted to Opioids?", GOOGLE SEARCH, <https://www.google.com/> (follow "Google" hyperlink; type "Can I get addicted to opioids" in the search bar and browse the available resources such as the SAMHSA National Helpline); see also *Find a Treatment Facility*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., <https://www.findtreatment.gov/> [<https://perma.cc/7K6J-MWZK>] (last visited Feb. 24, 2024).

256. See Gravititas Documentaries, *To Err Is Human—The Silent Epidemic Of Medical Mistakes*, YOUTUBE (Oct. 26, 2022), <https://youtu.be/2t9znAZ0Hs8?si=Zyji7jqe81HqSqc2> [<https://perma.cc/CZF2-4XPX>].

257. *What Are Opioids?*, AM. SOC'Y OF ANESTHESIOLOGISTS, <https://www.asahq.org/madeforthismoment/pain-management/opioid-treatment/what-are-opioids/> [<https://perma.cc/CXB4-TQHA>] (last visited Feb. 23, 2024).

2. Opioid Use and Addiction are Generally not Glamorized

Intertwined with the previous notion, opioid use is less widely glamorized than how tobacco used to be, and alcohol, to some extent, still is. In a study published in the *Journal of Applied Social Psychology*, researchers looked to see whether smoking in popular media affected the viewers desire to smoke or opinion towards smoking.²⁵⁸ Although there were some differences in responses between genders (both smokers and non-smokers), the study found that viewing movie stars smoking increased the likelihood a viewer would smoke following their exposure to the media.²⁵⁹ Not only are these views passively interpreted by the viewer but creators often use the trope of smoking to portray a certain aspect of their character.²⁶⁰

This same sentiment is reflected in alcohol consumption. Although there is the old character archetype of the “town drunk,” on the opposite end of the spectrum we have fictional characters like James Bond (one medium dry vodka martini, shaken, not stirred) who not only has a license to kill but exudes natural charm and charisma while doing so.²⁶¹ George Clooney, who is known for portraying that same cool and suave demeanor in American movies,²⁶² was one of the first celebrities to market his own liquor brand.²⁶³ To give credit to Clooney, his stardom and acting prowess likely helped with sales, but some purchases may still be attributed to those who consciously or subconsciously hope to mimic Clooney’s debonair attitude by drinking his liquor.²⁶⁴

There are very few pieces of media that portray opioid use in a positive light. Even if the character does use some sort of opioid, it is always seen

258. David Hines et al., *Cigarette Smoking in Popular Films: Does it Increase Viewers Likelihood to Smoke?*, 30 J. OF APPLIED SOC. PSYCH. 2246 (2000).

259. *Id.* at 2264.

260. *Smoking Is Cool*, TV TROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/SmokingIsCool> [<https://perma.cc/8T43-FPPL>] (last visited Feb. 23, 2024).

261. *The Alcoholic*, TV TROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/TheAlcoholic> [<https://perma.cc/VWF6-79WH>] (last visited Feb. 23, 2024); *Tuxedo and Martini*, TV TROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/TuxedoAndMartini> [<https://perma.cc/UE7L-PMFW>] (last visited Feb. 23, 2024).

262. *George Clooney Biography*, IMDB, https://www.imdb.com/name/nm0000123/bio/?ref_=nm_ov_bio_sm [<https://perma.cc/2C5K-Y7UT>] (last visited Feb. 23, 2024).

263. Jonah Flicker, *George Clooney’s Casamigos Just Dropped A New Cristalino Tequila*, ROBB REP. (Jul. 31, 2023), <https://robbreport.com/food-drink/spirits/george-clooney-casamigos-tequila-cristalino-1234874367/> [<https://perma.cc/CK3X-GKFP>].

264. See Clint Lanier, *COOL SPIRITS! Understanding the Ridiculous World of Celebrity Liquor Brands*, BARLEYCORN DRINKS (Mar. 21, 2023), <https://www.barleycorn.com/cool-spirits-understanding-the-ridiculous-world-of-celebrity-liquor-brands/> [<https://perma.cc/4X8F-QNEQ>].

as a detriment or a burden²⁶⁵ they cannot get rid of, rather than making them someone to emulate.

3. Opioids Still Have A Medicinal Purpose Unlike Tobacco and Alcohol

Although one could argue alcohol and tobacco serve some roles in obscure home remedies, currently there is little medical use for them in their commonly-used forms.²⁶⁶ Opioids, on the other hand, still serve as major pain relievers.²⁶⁷ Sometimes opioids are prescribed because they are tolerated the best by the patient. For example, an individual who has a codeine allergy may need to take a chemically unrelated opioid like tramadol—both of which are subject to abuse.²⁶⁸

Due to the necessary usage of opioids in medicine and treatment, it is unlikely opioids will ever be completely removed from use, unless a similar alternative appears on the market.²⁶⁹ Seeing as opioids are still being used today, regardless of the countless deaths and “waves” of opioid

265. Spoiler Alert! Dr. Gregory House from the television show *House*, was addicted to Vicodin which resulted in his character being placed in rehabilitation between seasons. Spencer Reid from the show *Criminal Minds*, developed an addiction to the opioid Dilaudid, after being repeatedly injected by a serial killer. Both characters were negatively affected by their own addictions, which often was the source of turmoil in relationships each had with other characters in their respective shows. See Diane Kristine, *Constructing House: An Interview With House, M.D. Writer Lawrence Kaplow*, BLOGCRITICS MAGAZINE (Oct. 24, 2005), <https://web.archive.org/web/20071106012144/http://blogcritics.org/archives/2005/10/24/213107.php> [<https://perma.cc/Y78J-9WUX>]; see Shawn S. Lealos & Ana Dumaraog, *Why Criminal Minds Dropped Reid's Drug Addiction Story*, SCREENRANT (Oct. 3, 2023), <https://screenrant.com/criminal-minds-reid-drug-addiction-story-end-reason/> [<https://perma.cc/KA8V-NGFG>].

266. Different forms of alcohol have practical uses as antiseptics or disinfectants in medicine. Carly Vandergriendt, *What to Know About Using Alcohol to Kill Germs*, HEALTHLINE (Jun. 30, 2021), <https://www.healthline.com/health/does-alcohol-kill-germs#bottom-line> [<https://perma.cc/U7LX-SX3Y>].

267. Oxycodone and morphine are used as pain relievers. Hydrocodone can be used as a pain reliever and cough suppressant. *Prescription Opioids*, CTR. FOR DISEASE CONTROL AND PREVENTION (Aug. 29, 2017), <https://www.cdc.gov/opioids/basics/prescribed.html> [<https://perma.cc/3MTK-Z8XG>]; *Hydrocodone and Homatropine (Oral Route)*, MAYO CLINIC (Feb. 1, 2024), <https://www.mayoclinic.org/drugs-supplements/hydrocodone-and-homatropine-oral-route/side-effects/drg-20406079?p=1#> [<https://perma.cc/8BRV-M2HG>].

268. *Codeine Allergy Reactions, Symptoms & Alternatives*, THE RECOVERY VILLAGE DRUG AND ALCOHOL REHAB (Aug. 10, 2023), <https://www.therecoveryvillage.com/codeine%20addiction/codeine%20allergy/#:~:> [<https://perma.cc/HG6G-2TMM>].

269. *Id.*

misuse,²⁷⁰ it is likely that officials have weighed and determined the necessity of opioids in medical treatment.²⁷¹

However, medical opioid use is not without heavy restrictions.²⁷² As discussed in length in this Comment, the United States Government, state governments, and health officials have come up with several solutions to try and restrict the ability of legal and illegal manufacturers, prescribers, and distributors from illegally giving opioids to the public.²⁷³ Although opioid-related cases have been litigated previously, new legal precedent of liability owed to individual plaintiffs by big opioid titans is on the horizon.²⁷⁴

B. What's Stayed the Same? What Have We Learned from Alcohol and Tobacco?

With different substances and usages, there will be deviations in how courts and laws seek to control lawful and unlawful behavior. However, trends arising from alcohol and tobacco litigation regarding (1) negligence; (2) mislabeling/false advertising; and (3) public nuisance claims²⁷⁵ have created a roadmap that opioid litigation has more or less followed.

1. Negligence:²⁷⁶ There must be a more direct disregard or affirmative action linking the manufacturer/distributor with the affected public

Without a direct link of harm from the defendant to the plaintiff, it is often difficult for the claim to survive.²⁷⁷ As *Poppell* has illustrated, without some proof that distributors directly or even negligently caused

270. *Understanding the Epidemic*, *supra* note 190.

271. *Codeine Allergy Reactions, Symptoms & Alternatives*, *supra* note 268.

272. *See Statutes, Regulations, and Guidelines*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. (Feb. 5, 2024), <https://www.samhsa.gov/medications-substance-use-disorders/statutes-regulations-guidelines> [<https://perma.cc/XQU4-R3LU>].

273. *Id.*

274. Jessica L. Reno & Paul S. Seward, *Opioid Trial Client Alert: Defense Verdict for Distributors*, ECKERT SEAMANS (Mar. 8, 2023), <https://www.eckertseamans.com/legal-updates/opioid-trial-client-alert-defense-verdict-for-distributors> [<https://perma.cc/M63W-RXSY>].

275. *See* sources cited *supra* Section II.A., B.

276. *See Maynard*, 313 Ga. 533, 534, 870 S.E.2d 739, 74 (“[A] manufacturer has a duty . . . to use reasonable care in selecting from among alternative designs to reduce reasonably foreseeable risks of harm posed by its products.”).

277. *See Hakki*, 2006 D.C. Super. LEXIS at *1 (claim was dismissed due to plaintiff’s lack of standing as he was not part of the class that he alleged had been harmed by alcoholic beverage manufacturers and importers).

an action that immediately affected the public, plaintiffs will unlikely succeed.²⁷⁸ Obtaining opioids through criminal means, improperly taking medication, comorbidities, and many other risk factors may cause a negative effect on the individual;²⁷⁹ however, many of these factors are not linked with the actions of a manufacturer or distributor who simply created and then put the item out for sale.²⁸⁰

Opioid litigations have acknowledged some sort of liability through paying hundreds of millions, even billions of dollars in settlement fees.²⁸¹ Even so, the research seems to suggest plaintiffs will have to jump through more hoops to sue via negligence, especially with the requirements of the settlement pushing manufacturers and distributors to follow more guidelines and likely allowing the argument that more regulation leads to less error on their side.²⁸²

2. Mislabeling/False Advertising:²⁸³ Honesty with Benefits and Risks of Products

Pharmaceutical companies, especially those that manufacture opioids, have strayed away from being too encouraging in commercials of their items. Labelling in the sense of marketing for some sort of non-medical comfort is likely not applicable to opioids (i.e. no company is advertising opioids as something to be used recreationally at a summer party).²⁸⁴ However, comments regarding opioids' medicinal abilities without mentioning the harms and addictiveness may result in a situation similar to tobacco and alcohol companies and potential health risks that arise from consumption.²⁸⁵

Even so, this is likely becoming an issue of the past. Whether it be regulations or investigative reports, it is difficult for nefarious companies to hide behind inaccurate marketing.²⁸⁶ Online media, television, and local news and announcements have made it common knowledge what

278. *Crisco*, *supra* note 3; *Hoffman*, *supra* note 216.

279. *Hoffman*, *supra* note 216.

280. *McKesson's Role in the Pharmaceutical Supply Chain*, *supra* note 229.

281. *Opioid Settlement Agreements*, *supra* note 196.

282. Companies such as McKesson frequently post press releases to explain new initiatives it plans on implementing against the opioid problem. See *McKesson Announces New Initiatives, Launches Foundation to Help Fight Nation's Opioid Epidemic*, MCKESSON (Mar. 29, 2018), <https://www.mckesson.com/About-McKesson/Newsroom/Press-Releases/2018/New-Initiatives-Fight-Opioid-Epidemic/> [<https://perma.cc/WEM2-FC8Q>].

283. See *supra* notes 50–51, 58–65, 101–08.

284. *But see Cipollone*, 505 U.S. at 527.

285. See *supra* notes 58–65, 101–08.

286. See *Table of Key Opioid Label Updates*, FDA, <https://www.fda.gov/media/167056/download?attachment> [<https://perma.cc/222U-KGDT>] (last visited Feb. 23, 2024).

opioids are, their risks, and the current epidemic sweeping the nation.²⁸⁷ This is not to say companies could not attempt to market a “wonder drug” that has the same effects as opioids without the risks (as they did in the nineties).²⁸⁸ However, with the general skepticism surrounding opioids, the bountiful amounts of resources and outspoken critics of opioids, and the copious regulations manufacturers and distributors have to follow, there seems to be far more safety nets and entities to keep manufacturers and distributors from being dishonest.²⁸⁹ Although these companies generate billions of dollars a year,²⁹⁰ whether it be due to a good conscience or the pain of penalty, it will be more difficult for an improper label to pass through all the checks.²⁹¹

3. Public Nuisance:²⁹² Criminality and Illegality Break the Causal Chain

Similar to the weakness of a negligence claim, the issue of criminality and illegality typically breaks the liability of manufacturers and distributors.²⁹³ Although there is some argument if these companies have failed to disclose the health dangers of these medications, the issue occurs after the opioids have left the possession of manufacturers and distributors. As the decision in *Poppell* touched upon, “drug dealer” has an element of criminality or criminal-like negligence attached.²⁹⁴ Although an individual may come to possess opioids through unlawful means, this does not directly trace back to the manufacturer or distributor simply because they were at the beginning of that chain.²⁹⁵

287. *The Origin and Causes of the Opioid Epidemic*, *supra* note 175; *Opioid Facts and Statistics*, *supra* note 193.

288. *The Origin and Causes of the Opioid Epidemic*, *supra* note 175.

289. See *About Us*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. (Feb. 14, 2024), <https://www.samhsa.gov/about-us> [<https://perma.cc/WHX5-ERS2>] (a congressionally established agency which seeks to make substance use and mental disorder information, services, and research more available to the public).

290. Thomas, *supra* note 199.

291. *Table of Key Opioid Label Updates*, *supra* note 286.

292. RESTATEMENT (SECOND) OF TORTS § 821B(1)–(2)(a).

293. Hoffman, *supra* note 216.

294. O.C.G.A. § 51-1-46(b) (“A further purpose of this Code section is to shift . . . the cost of the damage caused by the existence of the illegal drug market in a community to those who illegally profit from that market.”).

295. *McKesson’s Role in the Pharmaceutical Supply Chain*, *supra* note 229; see Bernstein et al., *How Drugs Intended for Patients Ended Up in the Hands of Illegal Users: ‘No One Was Doing Their Job’*, WASH. POST (Oct. 22, 2016) https://www.washingtonpost.com/investigations/how-drugs-intended-for-patients-ended-up-in-the-hands-of-illegal-users-no-one-was-doing-their-job/2016/10/22/10e79396-30a7-11e6-8ff7-7b6c1998b7a0_story.html [<https://perma.cc/D4DW-XE4L>].

V. CONCLUSION

Who holds the burden to change? Manufacturers and distributors certainly are not innocent bystanders in this opioid and addiction-fueled transaction. Not only were opioids refined and strengthened by these companies, but case precedent shows that these companies have also agreed to pay exorbitant amounts of money in response to litigation against them.²⁹⁶ Although the hope is that this is due to their understanding of the negative effects of their businesses, it is certainly profitable for manufacturers and distributors to pay a penalty to continue producing, which they do.²⁹⁷

However, in the grand scheme of the connections, it is the doctors, pharmacists, and other medical providers who interact with patients directly;²⁹⁸ they are the ones who must be the front-line defense to what the patient is coming for. When a patient goes to see a doctor, the doctor must prescribe the best course of action that he or she thinks will either alleviate or mitigate the patient's symptoms.²⁹⁹

Similarly, when a pharmacist receives a prescription that he or she has to fill, he or she must consider questions such as whether the patient has medications that react similarly to another and should be discontinued, whether the amount prescribed on the note is a reasonable amount, or whether the patient may be at risk of overusing.³⁰⁰ Not only are these important considerations that are part of a pharmacist's job description, but it also provides a check on the doctors, who may have easily made an innocent mistake.³⁰¹

This is not like a manufacturer. Distributors, like McKesson, who are the "middlemen" in the transaction,³⁰² are answering to a need and are not looking into the eyes of potential addicts and determining then and there to make a decision to over prescribe them opioids.³⁰³

Additionally, when a distributor is merely doing its job, to fill orders and to convey the stock to a certain location, that is not an "illegally

296. *Opioid Settlement Agreements*, *supra* note 196.

297. Thomas, *supra* note 199.

298. *Prescriber Collaboration*, NAT'L CMTY. PHARMACISTS ASS'N, <https://ncpa.org/prescriber-collaboration> [<https://perma.cc/35Z3-793K>] (last visited Feb. 2, 2024).

299. AMA CODE OF MEDICAL ETHICS OPINION 1.1.1 PATIENT-PHYSICIAN RELATIONSHIPS (AM. MED. ASS'N).

300. *Pharmacists' Patient Care Process*, AM. COLL. OF CLINICAL PHARM. (May 29, 2014), https://www.accp.com/docs/positions/misc/JCPP_Pharmacists_Patient_Care_Process.pdf [<https://perma.cc/5KJK-NS2X>].

301. *Prescriber Collaboration*, *supra* note 298.

302. *McKesson's Role in the Pharmaceutical Supply Chain*, *supra* note 229.

303. *Prescriber Collaboration*, *supra* note 298; *Pharmacists' Patient Care Process*, *supra* note 300.

distributed” opioid as is described in the DDLA.³⁰⁴ This situation is distinguishable from other, successful cases, where it was proved there was an element of illegality.³⁰⁵

Although the opioid crisis still continues,³⁰⁶ it appears that the past and the present availability of knowledge may more positively shape the outcomes of the future. The consumer is far more educated and less naïve of the dangerous side effects that these medications possess.³⁰⁷ All of the plaintiffs in *Poppell* suffered from generational effects of opioid misuse,³⁰⁸ and although other factors played a role in their issues, stories of plaintiffs and users like the *Poppell* plaintiffs should serve as a reminder for both companies and the public alike.

The future of opioid litigation appears to be expanding. The legislature is realizing that this is not just a phase and that opioid litigation touches every aspect of the law. Even though the ruling in the *Poppell* case appears to have decreased the ability for plaintiffs to pursue claims, the result is another push in the right direction for companies to manufacture and distribute opioids legally and ethically. While manufacturers and distributors should not be extorted out of their money, they should still understand that the law, government entities, and the public are watchdogs for individuals who should not have to fight when they are already physically, mentally, and financially drained from battling their addiction or the addiction of a loved one.

304. O.C.G.A. § 51-1-46(b).

305. See *supra* Figure 1; see also *supra* notes 246–249.

306. *Opioid and Substance Misuse*, *supra* note 192.

307. *Id.*

308. *Crisco*, *supra* note 3; *Hoffman*, *supra* note 216.