

## RECENT CASE DEVELOPMENTS

# Opioid Litigation: Lessons Learned from a Retail Pharmacy Settlement

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### Abstract

As the opioid epidemic continues in the United States and ongoing litigation seeks to hold contributors responsible, state governments have initiated lawsuits against retail pharmacies for their role in contributing to the crisis. This article summarizes an action the State of West Virginia brought against CVS, which the parties recently settled in the fall of 2022. This article examines the unique position of retail pharmacies like CVS, which often serve as both distributors and dispensers, in contributing to the oversaturation and illicit diversion of opioid prescriptions. The article concludes by assessing the viability of potential causes of action against retail pharmacies in opioid litigation.

**Keywords:** Opioids; litigation; settlement; West Virginia; CVS; retail pharmacies

### Introduction

The enormous social and economic toll of the opioid crisis has sparked a tidal wave of litigation against actors who instigated or otherwise contributed to the crisis. Over half a million people in the United States died from overdoses involving any opioid from 1999 through 2020.<sup>1</sup> The Centers for Disease Control and Prevention (CDC) outlines the three phases of opioid overdose deaths: increased prescription opioid overdose deaths starting in 1999, increased overdose deaths involving heroin since 2010, and increased overdose deaths involving synthetic opioids like fentanyl since 2013.<sup>2</sup> From 2000 to 2014, the age-adjusted rate of drug overdose deaths doubled and the rate of opioid overdoses specifically tripled.<sup>3</sup> More people died of drug overdoses in 2014 than any previous year on record, with opioids involved in over 60 percent of those overdose deaths.<sup>4</sup> The opioid crisis continues to ravage the United States: the CDC estimated over 100,000 drug overdose deaths occurred from April 2020 through April 2021, an increase of nearly 30 percent over the 12-month period before.<sup>5</sup>

State and local governments and tribal entities have filed over 3,000 lawsuits against opioid manufacturers, distributors, and other pharmacy supply chain actors.<sup>6</sup> In February 2022, the three largest

<sup>1</sup>Understanding the Opioid Overdose Epidemic, CTNS. FOR DISEASE CONTROL AND PREVENTION, (June 1, 2022), <https://www.cdc.gov/opioids/basics/epidemic.html> [<https://perma.cc/T9FE-UANP>].

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

<sup>3</sup>Rose A. Rudd et al., *Increases in Drug and Opioid Overdose Deaths — United States, 2000–2014*, 64 MORBIDITY AND MORTALITY WKLY REP. 1378 (2016).

<sup>4</sup>*Id.*

<sup>5</sup>*Drug Overdose Deaths in the U.S. Top 100,000 Annually*, NAT'L CTR. FOR HEALTH STAT., (Nov. 17, 2021), [https://www.cdc.gov/nchs/pressroom/nchs\\_press\\_releases/2021/20211117.htm](https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2021/20211117.htm) [<https://perma.cc/8JFG-T3XG>].

<sup>6</sup>Peter C. Condon, Monty Cooper & Jessica D. Gilbert, *Are Opioids a Public Nuisance? It Depends on Whom You Ask*, 51 THE BRIEF 16, 20 (2022).

distributors—AmerisourceBergen, Cardinal Health, and McKesson, or the “Big Three”—reached a national settlement for \$21 billion.<sup>7</sup> Johnson & Johnson, the parent company of a major opioid manufacturer, also reached a national settlement worth \$5 billion.<sup>8</sup> These settlement agreements dedicate most of the funds to state and local governments for opioid abatement efforts.<sup>9</sup>

The opioid crisis has had a particularly devastating effect on West Virginia. According to the CDC, West Virginia had the highest rate of fatal drug overdoses in the country in 2014.<sup>10</sup> In 2020, the per capita opioid mortality rate in West Virginia was more than three times greater than the national average.<sup>11</sup> Over 80 opioid-related lawsuits brought by the Attorney General, counties, hospitals, and local governments have been compiled into a mass litigation panel in the state.<sup>12</sup> West Virginia did not join the landmark national settlements, but the state reached major settlements in summer 2020 in separate suits against the “Big Three” distributors for \$400 million and against Johnson & Johnson for \$99 million.<sup>13</sup> The standalone settlement against distributors afforded West Virginia “more settlement dollars per capita than any other state and more than double its allocation share.”<sup>14</sup> Compared to Washington—another state that abstained from the national settlement with “Big Three” distributors to bring the defendants to court and ultimately settled independently—West Virginia received a slightly lower total award (\$400 million as compared to \$518 million) but substantially greater money per resident (approximately \$225 per capita as compared to approximately \$67 per capita).<sup>15</sup>

As litigation against opioid manufacturers and distributors culminated, state attorneys general turned their attention to retail pharmacies and their potential role in improperly dispensing the drugs in question.<sup>16</sup> West Virginia sued CVS Corporation, among other retail pharmacy chains,<sup>17</sup> for its role in exacerbating the opioid crisis.<sup>18</sup> West Virginia and CVS agreed to settle the case in September 2022 for \$85.2 million. The agreement does not preclude West Virginia from joining any future national settlements involving CVS.<sup>19</sup> Michael DeAngelis, a spokesperson for CVS, stated that “putting these claims behind us is in the best interest of all parties” in the West Virginia case. Nonetheless, he reiterated the company’s position that pharmacies should not be liable for the harms of the opioid crisis: “that

<sup>7</sup>Brian Mann, *4 U.S. companies will pay \$26 billion to settle claims they fueled the opioid crisis*, NPR, (Feb. 25, 2022, 7:39 AM), <https://www.npr.org/2022/02/25/1082901958/opioid-settlement-johnson-26-billion> [<https://perma.cc/5DWD-XY3K>].

<sup>8</sup>*Id.*

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

<sup>10</sup>35.5 deaths per 100,000. Rudd et al., *supra* note 3.

<sup>11</sup>Dietrich Knauth, *CVS, Walmart reach \$147.5 mln opioid settlement with West Virginia*, REUTERS, (Sept. 20, 2022, 5:19 PM), <https://www.reuters.com/business/healthcare-pharmaceuticals/cvs-health-walmart-reach-1475-mln-opioid-settlement-with-west-virginia-attorney-2022-09-20/> [<https://perma.cc/YAT7-NYK2>].

<sup>12</sup>Condron et al., *supra* note 6.

<sup>13</sup>Knauth, *supra* note 11; Caroline MacGregor, *West Virginia Reaches Landmark Settlement With ‘Big Three’ Opioid Distributors*, W. VA. PUB. BROAD., (Aug. 1, 2022, 8:33 PM), <https://www.wvpublic.org/government/2022-08-01/west-virginia-reaches-landmark-settlement-with-big-three-opioid-distributors> [<https://perma.cc/9XHN-WB9Y>].

<sup>14</sup>*Id.*

<sup>15</sup>Press Release, Washington State Office of the Attorney General, AG Ferguson: Half-billion dollars to fight opioid epidemic will start flowing Dec. 1 (Oct. 3, 2022), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-half-billion-dollars-fight-opioid-epidemic-will-start-flowing-dec-1> [<https://perma.cc/53ZP-KUHU>]. The U.S. Census estimated Washington and West Virginia’s 2022 populations at 7,785,786 and 1,775,156, respectively. *QuickFacts: Washington*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/WA>; *QuickFacts: West Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/WV> [<https://perma.cc/CFC2-7WW5>].

<sup>16</sup>Knauth, *supra* note 11.

<sup>17</sup>The State of West Virginia also sued Rite Aid, Walgreens, and Walmart. Knauth, *supra* note 11.

<sup>18</sup>Complaint, *West Virginia ex rel. Morrisey v. CVS Health Corp.*, CC-40-2020-C-131 (W.V. Cir. Aug. 18, 2020).

<sup>19</sup>*CVS and Walmart - Payout to West VA.*, AM. BAR ASS’N: HEALTH L. SECTION NEWS, (Sept. 30, 2022), [https://www.americanbar.org/groups/health\\_law/section-news/2022/september/cvs-and-walmart-payout-to-west-va/#:~:text=On%20September%2021%2C%20West%20Virginia,prescription%20drugs%2C%20fueling%20the%20epidemic](https://www.americanbar.org/groups/health_law/section-news/2022/september/cvs-and-walmart-payout-to-west-va/#:~:text=On%20September%2021%2C%20West%20Virginia,prescription%20drugs%2C%20fueling%20the%20epidemic) [<https://perma.cc/D46K-8WUM>].

opioid prescriptions are written by doctors, not pharmacists, and that opioid medications are made and marketed by manufacturers, not pharmacies.”<sup>20</sup>

As of this agreement, West Virginia has settled \$875 million worth of opioid lawsuits; this includes \$296 million with manufacturers and \$177.5 million involving pharmacies.<sup>21</sup> West Virginia also received \$27 million worth of Narcan, an overdose reversal drug, according to a settlement with opioid distributors Teva and AbbVie’s Allergan.<sup>22</sup> Consequently, the state has received approximately \$493 per capita in opioid funds.<sup>23</sup> In contrast, West Virginia dedicated approximately \$115 to \$150 per capita to public health from 2007 to 2014, with state public health expenditures spiking at \$296 per capita during 2015 to 2016, as the opioid epidemic raged, and falling back to approximately \$145 per capita from 2017 to 2019.<sup>24</sup> West Virginia Attorney General Patrick Morrisey said, “This has ravaged our state unlike anything else... We can’t bring back those lives [lost to overdoses], but we can have accountability. And we can make sure that West Virginia has more strength in the accountability side than any other state in the nation.”<sup>25</sup>

In February 2022, the West Virginia Attorney General’s Office and most municipalities within the state signed a Memorandum of Understanding to describe how money obtained from opioid settlements and litigation judgments would be spent.<sup>26</sup> The memorandum directs approximately one-quarter of funds to local governments and approximately three-quarters to a new nonprofit foundation created to manage and distribute funds for opioid abatement activities.<sup>27</sup> The memorandum outlines core priorities for abatement, including: naloxone and other opioid reversal drugs; treatment for opioid use disorder, including medication-assisted treatment; services for pregnant and postpartum women; treatment for neonatal abstinence syndrome; warm hand-off and recovery services; treatment for incarcerated populations; opioid use prevention programs; evaluation of abatement strategies; law enforcement; and research.<sup>28</sup>

### West Virginia’s Civil Action against CVS

West Virginia sued CVS<sup>29</sup> for their contributions to the opioid crisis on consumer credit and protection grounds. The West Virginia Consumer Credit and Protection Act (WVCCPA) prohibits “unfair methods of competition” as well as “unfair or deceptive acts or practices” in trade or commerce.<sup>30</sup> West Virginia alleged that CVS’s failure to comply with state narcotics laws constituted a failure to “abide by a requirement of laws or rules enacted to protect the consuming public or to promote a public interest,”

<sup>20</sup>*Id.*

<sup>21</sup>CVS, *Walmart reach \$147.5M opioid settlement with West Virginia*, NBC News, (Sept. 21, 2022, 7:34 AM), <https://www.nbcnews.com/news/us-news/cvs-walmart-reach-1475m-opioid-settlement-west-virginia-rcna48691> [<https://perma.cc/TLV8-WGYW>].

<sup>22</sup>Zoey Becker, *Teva, AbbVie’s Allergan hand over \$161M to settle opioid lawsuit in West Virginia*, FIERCE PHARMA, (May 25, 2022, 11:58 AM), <https://www.fiercepharma.com/pharma/teva-and-abbvies-allergan-settle-opioid-lawsuit-west-virginia> [<https://perma.cc/KF6L-TJ8L>].

<sup>23</sup>The U.S. Census estimated West Virginia’s 2022 population at 1,775,156. *QuickFacts: West Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/WV> [<https://perma.cc/4QUW-ZM3A>].

<sup>24</sup>These figures include federal grants from the Centers for Disease Control and Prevention and the Health Resources & Services Administration. *Trend: Public Health Funding in West Virginia, United States*, AMERICA’S HEALTH RANKINGS, [https://www.americashealthrankings.org/explore/annual/measure/PH\\_funding/state/WV](https://www.americashealthrankings.org/explore/annual/measure/PH_funding/state/WV) [<https://perma.cc/9T69-QE5X>].

<sup>25</sup>Jessica Patterson, *West Virginia reaches opioid settlements of over \$147M total with Walmart, CVS pharmacies*, WFXR NEWS, (Sept. 21, 2022, 7:40 AM), <https://www.wfxrtv.com/news/regional-news/west-virginia-reaches-opioid-settlements-of-over-147m-total-with-walmart-cvs-pharmacies/> [<https://perma.cc/T7VK-C457>].

<sup>26</sup>West Virginia First Memorandum of Understanding, Feb. 16, 2022.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>CVS Health Corporation; CVS Pharmacy, Inc.; CVS Indiana, LLC; CVS RX Services, Inc.; and CVS TN Distribution LLC. Complaint, *West Virginia ex rel. Morrisey v. CVS Health Corp.*, CC-40-2020-C-131 (W.V. Cir. Aug. 18, 2020).

<sup>30</sup>W. VA. CODE § 46A-6-104 (2022).

which thus “constitutes an unfair or deceptive act or practice” in violation of the statute.<sup>31</sup> Violation of the WVCCPA may result in monetary damages or equitable relief a court considers “necessary or proper.”<sup>32</sup> The statute does not provide for punitive damages in the context of opioid litigation.<sup>33</sup>

In addition, West Virginia’s complaint included a common law public nuisance claim against CVS. Although the complaint does not cite to case law defining the parameters of public nuisance in the state, West Virginia alleges that CVS “contributed to and/or assisted in creating and maintaining a condition that has interfered with the operation of the commercial market, interfered with public health, and endangered the lives and health of West Virginia residents” by their conduct that violated state consumer protection law.<sup>34</sup> Public nuisance claims in West Virginia are not legal claims that may result in monetary damages, but rather yield equitable relief.<sup>35</sup>

The State of West Virginia filed the complaint against CVS in state court in Putnam County on August 18, 2020. Nearly a year later, the court transferred the case to the West Virginia Mass Litigation Panel and joined it with other opioid litigation in the state.<sup>36</sup> The court entered various orders related to case management of the “State Opioid Pharmacy Proceedings” involving CVS and other retail pharmacies from November 2021 through May 2022.<sup>37</sup> This case and the three other cases involving different retail pharmacy chains were originally scheduled to go to trial in September 2022, but the trial was pushed back to June 2023.<sup>38</sup> Upon establishment of a settlement agreement in principle between CVS and the state, the court formally stayed the proceedings against CVS on September 16, 2022.<sup>39</sup>

CVS distribution centers (as well as other vendors) supplied opioids to CVS pharmacy stores, which dispensed the drugs to consumers until 2014.<sup>40</sup> West Virginia alleges that CVS knew its legal obligations according to state narcotics laws. Notably, CVS had the unique capacity to meet those obligations due to its vertical integration of pharmacies and distributors. The company could track the number of opioids distributed to pharmacies and subsequently dispensed to consumers, so it should have reasonably known that the number of opioids sold exceeded legitimate demand. However, CVS failed to fulfill their legal obligations to maintain effective safety controls over their dispensation to retail pharmacies in a way that oversupplied opioids in West Virginia, fueling the opioid crisis and ultimately harming the state and its citizens. West Virginia’s claims do not implicate CVS’s overall dispensation of opioids but rather the underutilization of their retail pharmacy data to detect potentially suspicious orders and prevent the diversion of opioids to illicit markets.<sup>41</sup>

### CVS’s Legal Obligations

Various narcotics laws require CVS to prevent the diversion of narcotics into the “illicit drug market.”<sup>42</sup> The West Virginia Uniform Controlled Substances Act (WVCSA) requires that distributors maintain “effective controls against diversion of controlled substances into other than legitimate medical,

<sup>31</sup>Complaint at 13, 18, 27, 29, West Virginia *ex rel.* Morrisey v. CVS Health Corp., CC-40-2020-C-131 (W.V. Cir. Aug. 18, 2020).

<sup>32</sup>W. VA. CODE § 46A-6-106 (2022).

<sup>33</sup>See *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 850 (N.D. W. Va. 2004).

<sup>34</sup>*Id.* at 29-30.

<sup>35</sup>35 State *ex rel.* AmerisourceBergen Drug Corporation v. Moats, 859 S.E.2d 374, 385-86 (W. Va. 2021).

<sup>36</sup>Order Granting Motions to Transfer Cases to the Mass Litigation Panel, In re: Opioid Litig. Civil Action No. 19-C-9000, Transaction ID 66781772 (W.V. Cir. July 20, 2021).

<sup>37</sup>Case Management Order Relating to the Pharmacy Cases, In re: Opioid Litig., Civil Action No. 21-C-9000 PHARM, Transaction ID 67073428 (W.V. Cir. Nov. 5, 2021); Second Amended Case Management Order, Civil Action No. 21-C-9000 PHARM, Transaction ID 67482006 (Apr. 15, 2022).

<sup>38</sup>Patterson, *supra* note 25.

<sup>39</sup>Order Staying Proceedings Against CVS, In re: Opioid Litig. Civil Action No. 20-C-131 PNM, Transaction ID 68113547 (W.V. Cir. Sept. 16, 2022).

<sup>40</sup>Complaint at 20, West Virginia *ex rel.* Morrisey v. CVS Health Corp., CC-40-2020-C-131 (W.V. Cir. Aug. 18, 2020).

<sup>41</sup>*Id.* at 8.

<sup>42</sup>*Id.* at 10.

scientific, or industrial channels.”<sup>43</sup> In addition, distributors must operate consistent with the public interest.<sup>44</sup> These state requirements “independently parallel and incorporate” provisions of the federal Controlled Substances Act.<sup>45</sup> Distributors must conduct ongoing due diligence on its customers.<sup>46</sup> Federal regulations require distributors to inform the Drug Enforcement Administration (DEA) of “suspicious” orders, including those that deviate from patterns in order size or frequency.<sup>47</sup> Additionally, they may not fulfill or ship any suspicious orders unless an adequate investigation by the distributor concludes that the order is not likely to be diverted to illicit markets.<sup>48</sup> Investigations must “dispel all red flags” that may indicate the customer is trying to divert the substances.<sup>49</sup> West Virginia asserts that compliance with these laws required CVS to “[review] its own data, [rely] on its observations of its own pharmacies, and [follow] up on reports or concerns of potential diversion.”<sup>50</sup>

### *CVS’s Awareness of its Legal Obligations*

CVS received “guidelines, input, and communications” from the DEA through various channels that put CVS on notice as to its legal obligations to prevent narcotics diversion.<sup>51</sup> The DEA has long established that distributors must report suspicious orders at the time of receipt—through means such as letters to distributors and manufacturers, DEA-organized conferences attended by pharmaceutical industry professionals, correspondence to industry associations that later becomes incorporated into their guidelines, and seminars widely attended by pharmaceutical manufacturer and wholesaler representatives.<sup>52</sup> During a deposition, a DEA official stated that it was clear to industry professionals that “failure to prevent diversion was threat to public safety and public interest.”<sup>53</sup> The DEA has taken enforcement action against registrants for failures to comply with due diligence requirements, of which industry members should be aware.<sup>54</sup> Furthermore, industry groups have articulated these diversion prevention obligations. The Healthcare Distribution Alliance began developing “industry compliance guidelines” in 2007, which emphasized the role of distributors’ due diligence in maintaining the security of controlled substances within the health care industry; they consulted with the DEA as they developed the guidelines.<sup>55</sup> CVS was a member of the Healthcare Distribution Alliance and thus should have seen these best practices outlining their unique ability to monitor controlled substances.

### *CVS’s Unique Capacity to Prevent Diversion*

CVS vertically integrates its pharmacies and distributors, meaning it “essentially... distributed narcotics to itself” and thus had the unique capacity to monitor and assess orders for suspicious activity.<sup>56</sup> The complaint outlined the types of data CVS internally collected that it could have used to complete due diligence properly. Within an individual pharmacy, staff could identify duplicative or otherwise unusual patterns of prescriptions ordered by physicians and filled by customers.<sup>57</sup> Furthermore, customer data

<sup>43</sup>*Id.* at 10 (citing W. VA. CODE § 60A-3-303(a) (2022)).

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

<sup>45</sup>*Id.* at 10.

<sup>46</sup>*Id.* at 11-12.

<sup>47</sup>21 C.F.R. § 1301.74(b).

<sup>48</sup>Complaint at 12-13, *West Virginia ex rel. Morrisey v. CVS Health Corp.*, CC-40-2020-C-131 (W.V. Cir. Aug. 18, 2020).

<sup>49</sup>*Id.* at 12.

<sup>50</sup>*Id.* at 12.

<sup>51</sup>*Id.* at 14.

<sup>52</sup>*Id.* at 13-17.

<sup>53</sup>*Id.* at 17-18.

<sup>54</sup>*Id.* at 17.

<sup>55</sup>*Id.* at 14.

<sup>56</sup>*Id.* at 11.

<sup>57</sup>*Id.* at 19.

could shed light on the “volume, frequency, dose, and type” of controlled substances ordered among different pharmacies.<sup>58</sup> Importantly, “CVS had complete access to all prescription opioid dispensing data related to its pharmacies in West Virginia, complete access to information revealing the doctors who prescribed the opioids dispensed in its pharmacies in and around the state, and complete access to information revealing the customers who filled or sought to fill prescriptions for opioids in its pharmacies in and around the state.”<sup>59</sup> West Virginia alleges CVS thus “played a dual role in fostering the opioid epidemic,” both transmitting orders of opioids to their retail pharmacies and dispensing them to consumers from those stores.<sup>60</sup>

### *CVS’s Failure to Monitor Suspicious Orders and Complete Proper Due Diligence*

Despite CVS’s requirements and ability to prevent narcotics diversion, West Virginia alleged that the company flagrantly failed to do so as they distributed opioids to their pharmacy stores. CVS did not implement any “suspicious order monitoring” (SOM) system until 2009, instead relying on “gut instincts” of workers to identify “really big” orders.<sup>61</sup> During a deposition, a CVS employee stated that CVS did not train its employees to identify “unusual orders of size, frequency, or pattern.”<sup>62</sup> CVS began developing a standard operating procedures manual intended to cover DEA controlled substances compliance, which would purportedly include a section on SOM. CVS did not complete the manual until December 2007, but the SOM section remained incomplete through 2009.<sup>63</sup> While the manual was in development, drafts reveal that CVS knew or should have known that it was “unacceptable” to lack a SOM policy.<sup>64</sup> John Mortelliti, the Director of Loss Prevention, wrote in late 2009 that the lack of an SOM policy was “a big issue with CVS and the DEA.”<sup>65</sup> CVS did not incorporate an SOM policy into their manual until December 2010, fulfilling an “apparent promise” to the DEA.<sup>66</sup> Mortelliti circulated SOM procedures via email in September 2010, describing them as “final approved speaking points for the DEA” in case agents questioned the suspicious order monitoring process at a CVS facility and advised teams to review the material to ensure it “doesn’t look like a prop instead of a tool.”<sup>67</sup> As of November 2011, CVS employed a “DEA compliance coordinator” but the role was nominal: a former CVS employee claimed that was her role solely “for reference in the [standard operating procedures]” and “not her real job.”<sup>68</sup> These alleged facts illustrate a top-down culture of disregard for suspicious order monitoring protocols and callous indifference to the seriousness with which controlled substances should be handled.

By 2009, CVS implemented an algorithm to identify potentially suspicious orders and flag them for investigation.<sup>69</sup> The company became aware of critical errors in the algorithm—including its failure to account for opioid orders from outside vendors and its tracking of the drug type instead of the active ingredient, which inhibited proper trend analyses when drug names or descriptions changed.<sup>70</sup> CVS hired consultants in 2012 to troubleshoot these issues, either by fixing the current system or developing a new one, but through mid-2013 CVS continued to use flawed data that rendered analyses “for the most

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

<sup>59</sup>*Id.*

<sup>60</sup>*Id.* at 7.

<sup>61</sup>*Id.* at 20.

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

<sup>63</sup>*Id.* at 21.

<sup>64</sup>*Id.*

<sup>65</sup>*Id.* at 22.

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

<sup>69</sup>*Id.* at 23.

<sup>70</sup>*Id.*

part, irrelevant and pointless.”<sup>71</sup> CVS did not implement a new system until 2014, the year it stopped wholesale distributing opioids.<sup>72</sup>

West Virginia further alleges that CVS failed to perform due diligence regarding orders the SOM algorithm flagged as potentially suspicious. A small percentage of suspicious orders received appropriate investigation.<sup>73</sup> At some points in 2012 and 2013, only one CVS employee reviewed potentially suspicious orders across all pharmacy stores in the United States.<sup>74</sup> This employee could only review five to six orders per day—among the 200-500 suspicious orders identified by the algorithm per day.<sup>75</sup> CVS reported its first-ever suspicious order to the DEA in February 2012; only seven suspicious orders were reported to the DEA through November 2013.<sup>76</sup> CVS never reported any suspicious order from its distribution centers to its retail pharmacies located in West Virginia, neither to West Virginia authorities nor the DEA.<sup>77</sup>

### *CVS’s Failed Diversion and Effects in West Virginia*

The pure volume of opioids dispensed in West Virginia should have alerted CVS officials that many of the orders were illegitimate and intended for illicit uses. During the period from 2006 to 2014, CVS distributed “the equivalent of 48,201,629 10 [milligram] oxycodone pills to its retail pharmacy locations in West Virginia, a state with a population of less than 2 million people.”<sup>78</sup> This figure excludes orders from outside distributors. West Virginia alleges that “per capita opioid prescriptions in West Virginia far exceeded the national average and increased in ways that should have alerted CVS to potential diversion.”<sup>79</sup> This data “put [CVS] on notice that it was exceeding legitimate market demand.”<sup>80</sup> The state alleges that CVS’s failure to stop opioid diversion and the resulting oversupply of opioids contributed to widespread damage within West Virginia. The complaint identifies social harms, including “deaths, drug addiction, personal injuries, child neglect, children placed in foster care, babies born addicted to opioids, criminal behavior, poverty, property damage, unemployment, and lost productivity,” and increased state expenditures to address these social issues. Furthermore, the complaint identifies economic losses attributable to “medical treatment, rehabilitation costs, hospital stays, emergency room visits, emergency personnel costs, law enforcement costs, substance abuse prevention costs, costs for displaced children, naloxone costs, medical examiner expenses, self-funded state insurance costs, and lost tax revenues.”

### Discussion

Although a great amount of opioid litigation settled before courts could rule on the merits of cases, a few litigation outcomes shed light on the viability of these claims. While early opioid litigation involved products liability-related claims, more recent cases have involved claims such as unjust enrichment, statutory violations (like the Controlled Substances Act), and public nuisance—the last of which was at issue in this West Virginia complaint.<sup>81</sup> Trends have emerged with respect to public nuisance arguments, a relatively nascent area of opioid litigation.<sup>82</sup> Many courts rely on the Restatement (Second) of Torts to define a public nuisance as requiring the existence of a public right, a “substantial and unreasonable”

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<sup>71</sup>*Id.* at 24.

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

<sup>73</sup>*Id.*

<sup>74</sup>*Id.* at 24-25.

<sup>75</sup>*Id.* at 25.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.* at 13, 25.

<sup>78</sup>*Id.* at 25.

<sup>79</sup>*Id.* at 98.

<sup>80</sup>*Id.* at 9.

<sup>81</sup>Rebecca L. Haffajee, *The Public Health Value of Opioid Litigation*, 48 J. L. MED. AND ETHICS 279, 284 (2020).

<sup>82</sup>Richard C. Ausness, *A Progress Report on Opioid Litigation*, 40 J. LEGAL MED. 429, 429-431 (2020).

interference with the right, causation, and an injury.<sup>83</sup> Legal analysts suggest that the widely varying success of public nuisance claims may relate to the decisionmaker in each case. Juries may be more inclined to find defendants liable for public nuisance because jury members may be more sympathetic toward plaintiffs.<sup>84</sup> In contrast, judges ruling in bench trials may side with defendants due to skepticism of the application of public nuisance theory to opioid harms or closer scrutiny as to whether plaintiffs have met the technical elements of public nuisance claims.<sup>85</sup>

In November 2021, a jury in Ohio found that CVS, Walgreens, and Walmart contributed to a public nuisance through opioid dispensation and sales.<sup>86</sup> A federal judge subsequently ordered the pharmacies to pay a combined \$650.6 million in damages.<sup>87</sup> In contrast, other cases reveal limitations to public nuisance as a legal theory to hold contributors to the opioid crisis accountable. In Oklahoma, a judgment against a manufacturer was reversed in which the trial court decided their conduct injured or endangered community health and safety such that it constituted a public nuisance. When the Oklahoma Supreme Court heard the appeal in late 2021, it determined that public nuisance required the offensive conduct be within the offender's control and reasoned that manufacturers lost control of their products once they had been sold, so public nuisance would pose never-ending potential liability. The court decided that public nuisance theory was "fundamentally ill-suited to resolve claims against product manufacturers."<sup>88</sup> Even where public nuisance could present a viable claim for opioid litigation, it may be difficult to satisfy. A California state court found insufficient evidence to support the claim that opioid manufacturers' marketing practices constituted a public nuisance. During a bench trial, they determined the plaintiffs did not prove the elements of "reasonable interference," given that producing, selling, and prescribing opioids are legal and highly regulated activities, and "causation," because various intermediaries affect opioid supply and prescription patterns.<sup>89</sup> Interestingly, two West Virginia municipalities pursued their own litigation against opioid manufacturers and lost on the public nuisance theory in a federal district court in July 2022.<sup>90</sup>

The variation in public nuisance litigation outcomes suggests that this legal theory may be an unreliable vehicle for claims against defendants in any future opioid litigation. Even where public nuisance claims succeed, the resulting equitable relief may fail to meet the moment of the opioid epidemic without other concurrent legal claims. Injunctions against harmful actions that contribute to the oversupply and excessive uptake of opioids serve important purposes: they can hold companies that fueled the crisis accountable for their conduct, deter similar corporate malfeasance, and generally raise awareness about the severity of the opioid epidemic.<sup>91</sup> However, monetary damages are critical to funding abatement efforts that aspire to help communities they recover and move forward.

Questions about promising legal theories to support opioid litigation crop up at an interesting inflection point: state and local governments and other plaintiffs may begin to exhaust potential parties within existing categories of defendants for new lawsuits, especially as major contributors to the opioid epidemic like manufacturers, distributors, and pharmacies continue to settle claims. The current

<sup>83</sup>Condron et al., *supra* note 6, at 18.

<sup>84</sup>*Id.* at 23.

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

<sup>86</sup>Brian Mann, *3 of America's biggest pharmacy chains have been found liable for the opioid crisis*, NPR, (Nov. 23, 2021, 8:23 PM), <https://www.npr.org/2021/11/23/1058539458/a-jury-in-ohio-says-americas-big-pharmacy-chains-are-liable-for-the-opioid-epide> [<https://perma.cc/P7DY-8QSZ>].

<sup>87</sup>*Pharmacies must pay \$650.6 million to Ohio counties in opioid case*, CNBC, (Aug. 17, 2022, 12:46 PM), <https://www.cnbc.com/2022/08/17/pharmacies-must-pay-650point6-million-to-ohio-counties-in-opioid-case.html#:~:text=The%20order%20by%20U.S.%20judge,way%20onto%20the%20black%20market> [<https://perma.cc/D6GN-XPLD>].

<sup>88</sup>Condron et al., *supra* note 6, at 21 (citing *People v. Purdue Pharma LP*, No. 30-2014-00725287-CU-BT-CXC, 2021 Cal. Super. LEXIS 31743 (Cal. Super. Dec. 14, 2021)).

<sup>89</sup>*Id.* at 20-21 (citing *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021)).

<sup>90</sup>Bailey Brautigam & Mark Curtis, *Decision reached in major Huntington opioid lawsuit*, WOWK 13 News, (July 4, 2022, 7:22 PM), <https://www.wowktv.com/news/local/decision-reached-in-major-huntington-opioid-lawsuit/> [<https://perma.cc/2MSP-FF2Z>].

<sup>91</sup>Haffajee, *supra* note 81, at 279-281.



moment presents an opportunity for attorneys to consider how the contours of the opioid crisis have changed in the current decade, what unaddressed harms of the opioid epidemic still demand adjudication and vindication, and who else may be responsible for these outcomes—all of which can inform the development of promising future litigation strategies.

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