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# OPIOID ADDICTION LITIGATION AND THE WRONGFUL CONDUCT RULE

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*The United States is facing an opioid addiction crisis. Can our civil courts help? This Comment explores obstacles to recovery for plaintiffs in tort suits against health care institutions and practitioners in opioid addiction litigation. It argues that defenses based on plaintiffs' wrongful conduct, which deny plaintiffs access to civil remedies due to their immoral or illegal conduct, should be eliminated or avoided in suits arising out of addiction. This Comment concludes that comparative fault principles adequately protect the interests of plaintiffs and defendants in drug addiction suits and advance important public policy goals. Finally, this Comment suggests that irrespective of the wrongful conduct rule's continued usage, our civil courts and legislatures should encourage a broad-reaching settlement agreement between governments and healthcare industry actors as a means of ameliorating the disastrous impacts of the opioid crisis on American society.*

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## INTRODUCTION

Imagine you have a client who has a history of drug abuse who initially sought out a prescription to manage her migraine headaches. After hearing from a patient of a “pain clinic” in which prescriptions are obtained with ease, your client visited a clinic and was prescribed Fentanyl, a drug fifty to one hundred times more powerful than morphine,<sup>1</sup> by a doctor who has sold over 15,000 signed prescription pads to pain clinics throughout the state.<sup>2</sup> Fentanyl was advertised by its manufacturer as an effective treatment for migraines, despite an FDA ruling to the contrary.<sup>3</sup> Your client becomes dependent, and overdoses on Fentanyl.<sup>4</sup> This hypothetical presents a number of thought-provoking questions relating to who is responsible for your client’s injury. This Comment will address

1. Dan Keating & Samuel Granados, *See How Deadly Street Opioids Like ‘Elephant Tranquilizer’ Have Become*, WASH. POST: HEALTH (Oct. 25, 2017), [https://www.washingtonpost.com/graphics/2017/health/opioids-scale/?utm\\_term=.9e8527fb16b0](https://www.washingtonpost.com/graphics/2017/health/opioids-scale/?utm_term=.9e8527fb16b0) [https://perma.cc/9PTF-JW52].

2. E.g., Yang et al., *Managing Increasing Liability Risks*, 130 AM. J. OF MED. 249, 249 (2015), [http://www.amjmed.com/article/S0002-9343\(16\)30932-9/fulltext?rss=yes](http://www.amjmed.com/article/S0002-9343(16)30932-9/fulltext?rss=yes) [https://perma.cc/4APG-NNST].

3. Don Sapatkin, *Suit: Drugmaker Teva Responsible for Patient’s Death in Opioid Overdose*, INQUIRER (Sept. 26, 2016, 2:43 PM), <http://www.philly.com/philly/health/Suit-Drugmaker-Cephalon-responsible-for-patients-death-in-opioid-overdose.html> [https://perma.cc/Z3A4-MDCH].

4. See Nora D. Volkow, *America’s Addiction to Opioids*, NAT’L INST. ON DRUG ABUSE (May 14, 2014), <https://www.drugabuse.gov/about-nida/legislative-activities/testimony-to-congress/2016/americas-addiction-to-opioids-heroin-prescription-drug-abuse> [https://perma.cc/294U-MH2G] (“[F]entanyl [is] a very potent prescription opioid that is . . . abused by itself.”).

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the liability issues presented in this hypothetical scenario, and explore how tort law regimes could be improved in order to limit these unfortunately common scenarios.

Stories similar to that of the hypothetical client are becoming commonplace in American households; one in four American families has been personally touched by the prescription drug addiction epidemic.<sup>5</sup> All too often, the stories being told at our dinner tables end in tragedy. According to the Centers for Disease Control and Prevention, over twenty-thousand Americans died from prescription drug overdoses in 2016 alone.<sup>6</sup> As a result of the opioid epidemic, deaths by drug overdose exceed deaths from car crashes as the leading cause of accidental death in the United States.<sup>7</sup> And in 2016 alone, the opioid epidemic generated \$504 billion in economic costs.<sup>8</sup>

Our current crisis is often characterized by patients' substantial involvement in the development of their own addictions.<sup>9</sup> Patients will often seek out "pill mills," where they can obtain prescriptions inappropriately or for nonmedical reasons.<sup>10</sup> Patients also partake in "doctor shopping," whereby they are able to obtain prescriptions from multiple doctors concurrently.<sup>11</sup> This presents a unique problem for plaintiffs seeking damages relating to their addictions because they are often barred from recovery by their own illegal or immoral conduct. Perhaps due to our society's increasing awareness of the shocking costs of the opioid addiction crisis, doctors are under pressure from their medical malpractice insurers, medical boards, and the Drug Enforcement Agency (DEA) to prescribe fewer opioids.<sup>12</sup> Further, courts are playing an

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5. Sapatkin, *supra* note 3.

6. AMERICAN SOCIETY FOR ADDICTION MEDICINE, OPIOID ADDICTION 2016 FACTS AND FIGURES, <https://www.asam.org/docs/default-source/advocacy/opioid-addiction-disease-facts-figures.pdf> [https://perma.cc/8HRL-RZD4] [hereinafter OPIOID ADDICTION 2016 FACTS AND FIGURES].

7. Josh Katz, *Drug Deaths in America Are Rising Faster Than Ever*, N.Y. TIMES (June 5, 2017), <https://www.nytimes.com/interactive/2017/06/05/upshot/opioid-epidemic-drug-overdose-deaths-are-rising-faster-than-ever.html> [https://perma.cc/6DGR-MQKM].

8. *Id.*

9. Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1120 (2014).

10. *Id.*

11. *Id.*

12. Sari Horwitz & Scott Higham, *DEA Launches New Crackdown on Pharmacies and Opioid Over-Prescribers*, WASH. POST (Jan. 30, 2018, 8:46 PM), <https://www.washingtonpost.com/world/national-security/dea-launches-new->

increasingly important role in combating America's prescription drug addiction epidemic.<sup>13</sup>

This Comment explores expanding legal remedies for individuals and governments bearing the costs of opioid addiction. It argues for the application of modern tort law principles that will create more just outcomes while heightening the role of courts in curbing the disastrous impacts of America's opioid addiction crisis. Specifically, this Comment focuses on how courts can and should abandon defenses that rely on plaintiff drug users' wrongful acts. It further discusses the potential solution of a multistate settlement agreement as a means of curbing the opioid crisis.

This Comment begins with a discussion of changing views towards the psychology of addiction in the medical field. It then explains the role of the wrongful conduct rule in curbing litigation relating to opioid addiction. To do so, this Comment provides overviews of modern cases in which courts have applied the wrongful conduct rule in suits involving both providers and pharmaceutical company defendants. Using these cases as a framework, it criticizes use of the wrongful conduct rule<sup>14</sup> in light of underlying tort law principles and recent developments in addiction medicine. This Comment further explores counter-arguments and concludes that despite the valid concerns underpinning the wrongful conduct rule, its abandonment in opioid addiction litigation would result in an overall improvement in American tort law. Lastly, this Comment advocates for the use of public tort suits and ultimately a multistate settlement agreement between governments and pharmaceutical companies as an additional means of effectively combating the opioid epidemic in American courts.

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crackdown-on-pharmacies-and-opioid-over-prescribers/2018/01/30/14cc20be-0600-11e8-94e8-e8b8600ade23\_story.html?utm\_term=.0ac92a4480f6  
[<https://perma.cc/RH3K-FBNL>].

13. Michelle White & Tara Kunkel, *Opioid Epidemic and the Courts*, TRENDS IN STATE COURTS, <http://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2017/Opioid-Epidemic-and-the-Courts.aspx> (last visited Jan. 25, 2018) [<https://perma.cc/7X4H-SCQL>].

14. The wrongful conduct rule provides that "a plaintiff may not recover damages from a defendant for injuries resulting from the plaintiff's own unlawful conduct or immoral act." David M. Brushwood, *West Virginia Rejects Wrongful Conduct Rule in Pharmacy Case*, AM. PHARMACISTS ASS'N (July 1, 2015), <http://www.pharmacist.com/west-virginia-rejects-wrongful-conduct-rule-pharmacy-case> [<https://perma.cc/C3EU-8GGJ>].

## I. ADDICTION, FREE WILL, AND MORALITY

Because notions of free will, behavioral modification, and morality influence the structure of tort law regimes,<sup>15</sup> fashioning civil law solutions to the opioid crisis requires consideration of the psychology of opioid addiction. Recent discoveries in the field of neuroscience reveal that addiction is rooted in chemical changes to the brain that are, at least after a drug is first used, not a matter of free choice.<sup>16</sup> Further, there is legal precedent that supports viewing drug addiction not as a wrongful condition, but as a mind-altering disease.<sup>17</sup> Courts viewing addiction as either immoral or a matter of free choice are generally less amenable to providing plaintiffs with relief, even where a medical professional or pharmaceutical company has wrongfully contributed to their addiction.<sup>18</sup> But because opioid addiction often arises out of legitimate prescription drug use, and research reveals that opioid use causes changes in brain function that limit the agency of the addict, modern courts should reject this strict approach and retire the wrongful conduct rule in cases where plaintiffs seek recovery from those who caused or contributed to their addiction.

This Part begins by exploring the notion of addiction as a brain disease rather than a choice, a view that has gained mainstream acceptance in recent years. It then considers counterarguments, before concluding, based on medical research and legal precedent, that courts should treat addiction as a mental disease and therefore limit moralistic scrutiny of drug users when feasible.

### A. *Addiction as a Brain Disease*

Research into the neuroscience of addiction reveals that opioids impact the brain at its most fundamental levels.<sup>19</sup> Scientists point toward the impact of opioids on the neurotransmitter dopamine, which plays an important role in

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15. See *infra* Section III.A.

16. See Linda C. Fentiman, *Rethinking Addiction: Drugs, Deterrence, and the Neuroscience Revolution*, 14 U. PA. J. L. & SOC. CHANGE 233, 241 (2011).

17. See *infra* Section I.C.

18. See description of wrongful conduct rule, *infra* Section III.A.

19. Fentiman, *supra* note 16, at 242.

producing pleasurable sensations, as a key cause of addiction;<sup>20</sup> they further posit that the capacity of opioids to stimulate dopamine production in a manner that far exceeds any naturally pleasurable activity accounts for their addictiveness.<sup>21</sup> In addition, all addictive drugs target the limbic region of the brain, where learning and emotional memory occur.<sup>22</sup> Research suggests that because narcotics, such as opioids, target this more “primitive” portion of the brain, addictive behavior is harder to change than those behaviors arising from the regions of the brain responsible for higher order learning and speech.<sup>23</sup> The underlying causes of addiction are becoming increasingly clear; recent research shows that the impact of one’s genetic makeup on their neurobiology and personality may alter the likelihood that one will try drugs, use them frequently, develop tolerance, or relapse.<sup>24</sup>

A November 2016 report from the U.S. Office of the Surgeon General outlined the Office’s stance on addiction science and outlined potential solutions to America’s opioid epidemic.<sup>25</sup> The Surgeon General stressed the role of changes in brain function in the development of addiction, stated that well-supported scientific evidence shows that “addiction to alcohol or drugs is a chronic brain disease,” and likened addiction to diseases such as diabetes, asthma, and hypertension.<sup>26</sup> Relying upon an understanding of addiction as a neurobiological issue with social and genetic components, the Surgeon General outlines one potential solution as follows:

We also need a cultural shift in how we think about addiction. For far too long, too many in our country have viewed addiction as a moral failing. This unfortunate stigma has created an added burden of shame that has made people with substance use disorders less likely to

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20. *Id.* at 241–42.

21. *Id.*

22. *Id.* at 244.

23. *Id.* at 242.

24. *Id.* at 245.

25. U.S. DEP’T OF HEALTH AND HUMAN SERVICES, FACING ADDICTION IN AMERICA: THE SURGEON GENERAL’S REPORT ON ALCOHOL, DRUGS, AND HEALTH (2016), <https://addiction.surgeongeneral.gov/executive-summary.pdf> [<https://perma.cc/ZUY8-JYN8>] [hereinafter FACING ADDICTION IN AMERICA].

26. *Id.* at V, ES-3.

come forward and seek help.<sup>27</sup>

### *B. Addiction as a Choice*

While a substantial body of evidence points toward the significant neurobiological changes that result from drug addiction, some researchers stress individual decision-making skills as central to the problem of addiction. One psychological researcher cites the prevalence of a common phenomenon known as “aging out,” in which addicts decide to reduce or cease drug use due to adverse potential consequences of continued use.<sup>28</sup> This view suggests that addiction is fundamentally a disorder of choice.<sup>29</sup> Some have argued that regardless of the neurological changes resulting from drug use, the initial decision to abuse drugs, if made willingly, renders drug use and an ensuing addiction a product of one’s own free will.<sup>30</sup> Additionally, some take the view that because treatment for addiction consists of merely ceasing a given behavior, addiction is not a disease.<sup>31</sup>

### *C. Courts Should Treat Addiction as a Disease*

There is legal precedent for viewing addiction as a disease. In *Robinson v. California*, the Supreme Court struck down a California law making it illegal to be addicted to the use of narcotics as unconstitutional under the Fourteenth Amendment.<sup>32</sup> In that case, a police officer stopped the defendant and observed needle marks on his arm.<sup>33</sup> The defendant was arrested and charged with “being addicted to the use of narcotics.”<sup>34</sup> In striking down this law, the *Robinson*

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27. *Id.* at V.

28. Fentiman, *supra* note 16, at 246.

29. *Id.*

30. *Addiction and Free Choice*, NAT’L INST. ON DRUG ABUSE (Feb. 18, 2014), <https://www.drugabuse.gov/about-nida/noras-blog/2014/02/addiction-free-choice> [<https://perma.cc/FJ8G-2942>].

31. Tim Holden, *Addiction Is Not a Disease*, 184(6) CAN. MED. ASS’N. J. 679, 679 (Apr. 3, 2012), <http://www.cmaj.ca/content/cmaj/184/6/679.full.pdf> [<https://perma.cc/MU6J-G55H>].

32. 370 U.S. 660, 667 (1962). *Robinson* remains good law, standing primarily for the principle that criminal statutes must contain an actus reus and cannot simply punish someone for her physical or mental state.

33. *Id.* at 661.

34. *Id.* at 660.

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Court stated that narcotic addiction is an “illness” and likened it to the common cold.<sup>35</sup> The *Robinson* Court noted that the illness of addiction could be contracted innocently or voluntarily.<sup>36</sup> This approach is also in line with the Surgeon General’s official stance on addiction, which acknowledges scientific evidence that addiction is a “chronic brain disease” with genetic and environmental components.<sup>37</sup>

Because of the role of genetic predisposition, fundamental brain alterations, and prescription drug addiction resulting from legitimate drug use for injury or sickness, courts should treat drug addiction as a disease and not as an inherently wrongful condition. Defendants in cases alleging drug addiction causation often rely upon plaintiffs’ wrongful conduct in obtaining and using opioids as a defense.<sup>38</sup> But limiting moralistic scrutiny of those who are addicted to opioids will lead to fairer outcomes for plaintiffs who have suffered from the wrongful acts of doctors, pharmacies, and pharmaceutical companies. Not only is this approach supported by neuroscience and case law; it will ultimately lead to more just outcomes while serving the public policy goal of fighting a public health disaster.

## II. CLAIMS AND DEFENSES IN DRUG ABUSE LITIGATION

This Part will explore traditional medical malpractice claims in the context of opioid addiction, including two commonly used defenses to such claims: the wrongful conduct rule and the doctrine of *in pari delicto*. It will further discuss legal remedies sought against pharmaceutical companies involved in the manufacture and marketing of opioids, and the challenges these suits present to individual and government plaintiffs.

### A. *Causes of Action and Defenses in Suits Involving Healthcare Professionals*

In order for a medical professional to be liable for harm resulting from his practice, courts typically require the

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35. *Id.* at 667.

36. *Id.*

37. FACING ADDICTION IN AMERICA, *supra* note 25, at ES-3.

38. *See infra* Section II.A.

presence of four conditions, widely known as the “Four Ds” of medical malpractice. If these are present, a plaintiff can establish medical negligence.<sup>39</sup> First, the plaintiff must establish that the provider had a “duty” to treat the patient.<sup>40</sup> Next, the plaintiff must show that the provider was “derelict” in the performance of his duties.<sup>41</sup> Then, the plaintiff must establish causation or “directness” between the provider’s derelict acts and the plaintiff’s harm.<sup>42</sup> Finally, the plaintiff must have incurred “damages,” or compensable harm resulting from the provider’s dereliction.<sup>43</sup>

Two important affirmative defenses to medical negligence and negligent prescribing include (1) the wrongful conduct rule,<sup>44</sup> which stands for the proposition that a plaintiff may not recover when his wrongful or illegal act contributed to his injuries; and (2) the doctrine of *in pari delicto* or, “in equal fault,” a variation of the wrongful conduct rule which allows courts to refrain from granting relief to a party who is equally at fault as the party from whom relief is sought.<sup>45</sup>

The wrongful conduct defense is historically rooted in harsh common law rules, which denied legal protection to an “outlaw.”<sup>46</sup> Until recently, American tort law rejected this “outlaw” doctrine and allowed plaintiffs engaged in wrongful acts to recover damages from other wrongdoers who injured them.<sup>47</sup> This principle was stated in the *Restatement (Second) of Torts* as follows: “One is not barred from recovery for an interference with his legally protected interests merely because at the time of the interference he was committing a tort or a crime.”<sup>48</sup> More recently, some courts and state legislatures have rejected the *Restatement* approach by adopting the wrongful conduct rule to deny redress to persons who engaged

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39. Judith G. Edersheim & Theodore A. Stern, *Liability Associated with Prescribing Medications*, 11 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 115, 115 (2009).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Brushwood, *supra* note 14.

45. *In pari delicto*, BLACK’S LAW DICTIONARY (10th ed. 2014).

46. VINCENT R. JOHNSON, ADVANCED TORT LAW: A PROBLEM APPROACH 102 (2010).

47. *Id.*

48. RESTATEMENT (SECOND) OF TORTS § 889 (AM. LAW INST. 1965).

in unlawful or immoral acts.<sup>49</sup> Examples of courts applying the wrongful conduct defense include a case in which a court held that a suspect shot during a robbery could not sue the police for failing to arrest him prior to the robbery,<sup>50</sup> and a case in which a court held that the owner and manufacturer of a vending machine were not liable to the estate of a minor who was killed when the vending machine fell on him while he attempted to steal drinks.<sup>51</sup>

Both statutory and common law versions of the wrongful conduct rule vary significantly in their formulations of prohibited conduct. Some jurisdictions require clear proof of criminal conduct or an actual criminal conviction in order for courts to apply the wrongful conduct rule to deny recovery.<sup>52</sup> On the other hand, some jurisdictions apply broadly worded formulations of the wrongful conduct rule that may encompass conduct that is not criminal at all.<sup>53</sup> Yet still, many jurisdictions continue to implement the *Restatement* approach, allowing plaintiffs to recover regardless of any violation of a criminal statute or immoral conduct.<sup>54</sup> Thus, depending on your jurisdiction, your client may be barred from recovery against a negligent tortfeasor or otherwise culpable defendant due to her role in causing her own addiction. This may be true whether she engaged in illegal conduct, such as illegal doctor shopping, or potentially immoral conduct—such as lawful doctor shopping, or using drugs she knows she is likely to become addicted to due to her past problems with drugs.

1. The Wrongful Conduct Defenses in Action: *Orzel, Inge, and Tug Valley Pharmacy*

The wrongful conduct rule in the context of the prescription drug abuse epidemic is well-illustrated by the Michigan Supreme Court's decision in *Orzel v. Scott Drug*.<sup>55</sup> The *Orzel* opinion includes an in-depth analysis of the wrongful

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49. JOHNSON, *supra* note 46, at 102–03.

50. *See Amato v. United States*, 549 F. Supp. 863, 867 (D. N.J. 1982), *aff'd without opinion*, 729 F.2d 1445 (3d Cir. 1984).

51. JOHNSON, *supra* note 46, at 107 (citing *Oden v. Pepsi Cola Bottling Co. of Decatur, Inc.*, 621 So. 2d 953, 954–55 (Ala. 1993)).

52. *Id.* at 105.

53. *Id.* at 108.

54. *See, e.g., id.* at 104–05.

55. 537 N.W.2d 208 (Mich. 1995).

conduct rule as applied to a drug user who engaged in wrongful conduct to obtain drugs.<sup>56</sup> Although the case is over twenty years old, considering citations in more recent cases such as *Inge v. McClelland*<sup>57</sup> and *Tug Valley Pharmacy v. All Plaintiffs Below in Mingo County*<sup>58</sup> (discussed below), its continued relevance is readily apparent.

The *Orzel* court addressed a tort suit by a plaintiff who became addicted to Desoxyn (prescription methamphetamine) through his own illegal conduct.<sup>59</sup> The *Orzel* plaintiff, already addicted, went to a weight-loss clinic where he obtained prescriptions for the drug (although he had no actual need or desire to lose weight).<sup>60</sup> The plaintiff eventually required hospitalization for mental illness.<sup>61</sup> He and his family members sued Scott Drug Co., a pharmacy that filled his prescriptions, for causing his addiction.<sup>62</sup> The court set forth the policy justifications for Michigan's use of the wrongful conduct rule as follows:

First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties.<sup>63</sup>

The *Orzel* court also considered a number of exceptions to the wrongful conduct rule, including: (1) where the nature of the wrongful conduct is not sufficiently serious to warrant application of the rule, (2) where degrees of culpability differ such that recovery is permissible, and (3) where the statute under which the plaintiff seeks recovery allows the plaintiff to

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56. *Id.*

57. 257 F. Supp. 3d 1158, 1164 (D.N.M. 2017).

58. 773 S.E.2d 627, 629 (W. Va. 2015).

59. *Orzel*, 537 N.W.2d at 210–11.

60. *Id.* at 211.

61. *Id.*

62. *Id.* at 210.

63. *Id.* at 213 (citations omitted).

recover irrespective of his wrongful conduct.<sup>64</sup> Applying the public policy rationales behind the rule and its exceptions, the court found that due to the plaintiff's wrongful conduct in obtaining Desoxyn, his claim was barred under the wrongful conduct rule.<sup>65</sup>

The continued importance of the *Orzel* decision and its underlying reasoning is exemplified by the District of New Mexico's recent *Inge* decision. In that case, the District of New Mexico addressed claims by plaintiffs who sued a licensed pharmacist for breach of common law duties and statutory violations.<sup>66</sup> The plaintiffs alleged violations of duty by the defendant pharmacist in the form of negligent provision of pharmacy services.<sup>67</sup> Aside from their addictions, the plaintiffs were healthy.<sup>68</sup> In addition to the alleged breaches of duty, the defendant violated federal and state laws during its relationship with the plaintiffs.<sup>69</sup> The plaintiffs sometimes used fraudulent prescriptions to obtain drugs from the defendant pharmacist.<sup>70</sup> Citing the *Orzel* case and New Mexico precedents, the *Inge* court applied the wrongful conduct rule to dismiss the plaintiffs' claims with prejudice.<sup>71</sup>

In contrast to *Inge*, the West Virginia Supreme Court of Appeals's *Tug Valley Pharmacy v. All Plaintiffs Below in Mingo County* decision is an example of a rejection of the wrongful conduct rule.<sup>72</sup> In that case, the court addressed the claims of drug-addicted plaintiffs who alleged that doctors and pharmacies negligently provided them with controlled substances, causing the plaintiffs to become addicted.<sup>73</sup> Most, if not all, patients admitted their use of controlled substances prior to their "treatment."<sup>74</sup> All patients admitted to engaging in at least one of the following illegal activities while being provided with services from the defendants:

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64. *Id.* at 214–18.

65. *Id.* at 221.

66. *Inge v. McClelland*, 257 F. Supp. 3d 1158, 1168 (D. N.M. 2017)

67. *Id.* at 1162.

68. *Id.*

69. *Id.* at 1164–65.

70. *Id.* at 1162.

71. *Id.* at 1161, 1164.

72. *Tug Valley Pharmacy v. All Plaintiffs Below in Mingo Cty.*, 773 S.E.2d 627 (W. Va. 2015).

73. *Id.* at 628.

74. *Id.* at 629.

criminal possession of pain medications; criminal distribution, purchase, and receipt of pain medications (“off the street”); criminally acquiring and obtaining narcotics through misrepresentation, fraud, forgery, deception, and subterfuge (not advising doctors of addiction or receipt of narcotics from other doctors); criminally obtaining narcotics from multiple doctors concurrently (commonly known as “doctor shopping”); and abusing and/or misusing pain medication by ingesting greater amounts than prescribed and snorting or injecting the medications to enhance their effects.<sup>75</sup>

A divided court held that the wrongful and illegal conduct referenced above did not bar their claims against doctors and pharmacies.<sup>76</sup> In rejecting the wrongful conduct rule as an absolute bar to recovery, the majority reasoned that West Virginia’s system of comparative negligence, in which the amount of recoverable damages is reduced by the plaintiff’s contribution to her injury, was an adequate and equitable way of making the plaintiffs whole.<sup>77</sup> The *Tug Valley Pharmacy* majority and dissent touch upon issues with the wrongful conduct rule and *in pari delicto*, and they highlight conflicting understandings of comparative negligence in West Virginia and other jurisdictions in the context of prescription opioid abuse litigation.<sup>78</sup> In holding for the plaintiffs, the *Tug Valley Pharmacy* court considered the practice of barring recovery for wrongful conduct to be based upon the “archaic notion that the judicial system is unavailable to so-called ‘outlaws,’”<sup>79</sup> and found that the plaintiffs’ conduct may be considered by a jury under West Virginia’s doctrine of comparative negligence, which the court found to subsume the wrongful conduct rule and the doctrine of *in pari delicto*.<sup>80</sup>

In his *Tug Valley Pharmacy* dissent, Justice Loughry advocated for adoption and application of the wrongful conduct rule, expressing concern for judicial efficiency and public

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75. *Id.*

76. *Id.* at 636–37.

77. *Id.* at 634.

78. *See id.*

79. *Id.* at 633.

80. *Id.* at 635.

perception of the court.<sup>81</sup> Justice Loughry wrote, “[T]he majority’s decision requires hard-working West Virginians to immerse themselves in the sordid details of the parties’ enterprise in an attempt to determine who is the least culpable—a drug addict or his dealer.”<sup>82</sup> Along with concern for judicial efficiency, the dissent noted other jurisdictions’ use of the wrongful conduct rule to bar recovery in cases involving drug abuse.<sup>83</sup>

*B. Claims and Defenses in Suits Involving the  
Pharmaceutical Industry*

An emerging trend in civil liability for opioid abuse is an increase in legal action against pharmaceutical companies that produce and market prescription opioids. Causes of action pursued by individuals and governments in these suits include fraud, false advertising, public nuisance, unjust enrichment, and various ordinance violations.<sup>84</sup>

Suits by states and municipalities against pharmaceutical companies have been met with mixed success.<sup>85</sup> Plaintiffs bringing actions against pharmaceutical companies as individuals or governments are hindered by problems of causation.<sup>86</sup> Further, because these suits are often settled out of court, little precedent for holding pharmaceutical companies

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81. *Id.* at 638–41.

82. *Id.* at 638.

83. *Id.* at 639.

84. Perhaps the most egregious example of pharmaceutical company misconduct involves drug company Cephalon’s promotion of its pain medication Actiq, a synthetic opioid analgesic 50 to 100 times more powerful than morphine. Cephalon promoted off-label uses of Actiq and two other drugs in violation of the Food, Drug and Cosmetic Act. Press Release, Dep’t of Justice, Biopharmaceutical Company Cephalon to Pay \$425 million & Enter Plea to Resolve Allegations of Off-Label Marketing (Sept. 29 2008), <https://www.justice.gov/archive/opa/pr/2008/September/08-civ-860.html> [<https://perma.cc/9NHM-VQEJ>]. The FDA approved Actiq for treatment of opioid-tolerant cancer patients; however, Cephalon promoted Actiq for non-cancer patients for treatment of migraines, injuries, and wound dressings. *Id.* at 31. Cephalon promoted off-label use of its product by instructing its sales representatives to market Actiq to practitioners not engaged in oncology and for uses not approved by the FDA. *Id.* Cephalon was charged with one count of distribution of misbranded drugs (inadequate directions for use), a misdemeanor offense, and eventually paid \$425 million in criminal and civil fines. *Id.*

85. Ausness, *supra* note 9, at 1165.

86. *Id.*

liable for the costs of addiction is available for analysis.<sup>87</sup> Along with the issue of attenuated causal connections between pharmaceutical company practices and injuries to states and municipalities, pharmaceutical companies have used the wrongful conduct rule to avoid liability.

*Foister v. Purdue Pharma*,<sup>88</sup> cited by the *Tug Valley Pharmacy* court, highlights wrongful conduct defense issues in suits against drug companies by individuals with addictions. In that case, the United States District Court for the Eastern District of Kentucky addressed a suit by a number of opioid users alleging that Purdue Pharma failed to adequately warn them of the risks inherent to OxyContin use.<sup>89</sup> Seven of the plaintiffs altered the drug in an illegal manner that contravened the company's warnings by crushing it, which eliminated its time-release function and gave rise to the full narcotic effect of the drug.<sup>90</sup> These seven plaintiffs also procured OxyContin through illegal means.<sup>91</sup> The court found that the wrongful conduct rule barred these plaintiffs' recovery.<sup>92</sup> The *Foister* court relied largely upon its determination that public policy is best served when those who have committed illegal acts are not allowed to recover compensation for the ensuing costs.<sup>93</sup> Judge Reeves cited *Orzel* with approval.<sup>94</sup> Because the *Foister* plaintiffs used unlawful or improper means to acquire and use OxyContin, the *Foister* court reasoned, they should be barred from recovering from Purdue, irrespective of Purdue's conduct.<sup>95</sup> Essentially, Judge Reeves found that these plaintiffs are "left with the dilemma which they created."<sup>96</sup> The *Foister* case demonstrates the continued relevance of the wrongful conduct rule as a bar to recovery in suits against pharmaceutical companies.

The wrongful conduct rule has played a substantial role in civil suits against health care industry actors where opioid

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87. *Id.* at 1164.

88. 295 F. Supp. 2d 693 (E.D. Ky. 2003).

89. *Id.* at 696.

90. *Id.* at 703.

91. *Id.* at 705.

92. *Id.*

93. *Id.*

94. *Id.* at 704 (citing *Orzel v. Scott Drug Co.*, 537 N.W.2d 208, 210–13 (Mich. 1995)).

95. *Foister*, 295 F. Supp. 2d at 705.

96. *Id.*

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overuse is at issue. Application of this rule results in a complete bar to plaintiffs' recovery, even if their wrongful conduct played a comparatively small role in generating their harm. If our tort law system seeks to accurately compensate plaintiffs for harms inflicted upon them, application of this rule undermines that goal. From a public health standpoint, the harsh results wrought by the wrongful conduct rule exculpate bad actors in the health care industry who are arguably responsible for the opioid epidemic.

### III. SOLUTIONS: LIMITING DEFENSES OF DRUG USER INTERVENTION

Due to overwhelming public health concerns and the aptness of comparative fault in achieving results consonant with the underlying purposes of the tort law system, defenses based upon wrongful conduct should not serve as a complete and automatic bar to plaintiffs' recovery from doctors, pharmacies, or pharmaceutical companies for causing addiction. Instead, courts should apply principles of comparative fault by assessing the relative contributions of the plaintiff and defendant to a defendant's injury in fashioning relief.

This Part first deconstructs the oft-cited rationales behind the wrongful conduct rule. It observes the numerous ways in which these rationales are inapplicable to opioid addiction litigation. It then explores the philosophical underpinnings of tort law with a discussion of the concept of moral agency in tort law. It argues that considering parties to opioid addiction suits as moral agents supports allowing plaintiffs who have wrongfully obtained or used drugs to recover from contributing tortfeasors. This Part discusses policy-based counterarguments to limiting the wrongful conduct rule. It concludes by contending that, despite these legitimate concerns, public health interests favor abandonment of the rule in opioid addiction litigation.

An inquiry into the underlying purposes of tort law provides a necessary framework for an analysis of wrongful conduct defenses in the context of addiction-related injury. To varying degrees, tort law regimes may be crafted to more accurately compensate injuries caused by unreasonable harmful acts, to incentivize certain socially beneficial behavior,

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punish wrongdoing, conserve judicial resources, or project the legitimacy of the justice system to the public. These values are often in conflict with one another. The solutions set forth below involve a worthwhile compromise that serves the dual goals of making more injured plaintiffs whole while heightening consequences for bad actors in the medical field and pharmaceutical industry, ultimately helping to curb the disastrous effects of opioid abuse in the United States.

A. *Opioid Abuse Litigation: When the Wrongful Conduct Rule is Wrong*

Courts should reject *Orzel* and *Inge* and adopt the approach taken by the majority in *Tug Valley Pharmacy* by disallowing wrongful conduct defenses in opioid abuse litigation. This will achieve a result that is both reflective of the serious costs of America's opioid addiction crisis and grounded in contemporary tort law principles. Per the majority's opinion in *Tug Valley Pharmacy*, a modern comparative fault regime allows juries to adequately weigh the role of a drug user in the creation of his own medical issue.<sup>97</sup> Courts can then limit damages by the extent to which the plaintiff brought about his own injury. Meanwhile, tortfeasor defendants will not escape liability for their own tortious conduct. Not only is this result just, it also has the substantial policy impact of expanding liability to bad actors in the medical field, who would not be entirely shielded from liability because of the wrongful acts of intervening plaintiffs.

Application of the approach championed by the majority in *Orzel* ignores the unique challenges of America's drug addiction crisis in its application of the wrongful conduct rule. The *Orzel* court noted its concern for discouraging illegal conduct,<sup>98</sup> but ignored the public policy implications of allowing defendants to escape liability entirely, even when they have illegally or wrongfully contributed to a plaintiff's addiction. Similarly, the *Foister* opinion emphasizes a moralistic understanding of addiction, implying that plaintiff drug users—even where they have been wronged—have chosen their fate, and should

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97. *Tug Valley Pharmacy v. All Plaintiffs Below in Mingo Cty.*, 773 S.E. 2d 627 (W. Va. 2015).

98. *Orzel v. Scott Drug Co.*, 537 N.W.2d 208, 213 (Mich. 1995).

therefore be barred from recovery.<sup>99</sup>

There are four primary justifications for denying recovery under the wrongful conduct rule. Citing *Orzel*, the *Tug Valley* court stated these justifications as follows: “1) to avoid ‘condon[ing] and encourag[ing] illegal conduct’; 2) to prevent wrongdoers from profiting from their illegal acts; 3) to avoid damage to the public’s perception of the legal system; and 4) preventing wrongdoers from shifting responsibility for their illegal acts to other parties.”<sup>100</sup> This argument is largely grounded in the broad tort law goals of encouraging socially beneficial behavior and preserving the integrity of the judicial system.

The rationale behind these justifications is severely weakened in cases involving wrongful conduct in the context of opioid addiction. First, the wrongful conduct rule as applied in the context of addiction undercuts the “condoning and encouraging” argument, as it allows those parties who have acted wrongfully in facilitating the addiction of another to escape liability entirely for the damage they have helped cause, which renders unlawful or unethical prescribing and advertising practices more profitable to health care industry actors. The neurological status and self-defeating aims of drug-addicted individuals undermines the application of wrongful conduct defenses in the context of opioid abuse as a means of altering behavior. Considering the fundamental neurological changes associated with opioid addiction,<sup>101</sup> it is worth questioning whether tort law regimes will play a significant role in encouraging or discouraging addicts’ behavior in attempting to procure prescription opioids. In other words, justifications for the wrongful conduct defense that advance the rule as a means of influencing social behavior may be weaker in the context of opioid addiction suits. An argument to the contrary not only presupposes a high degree of awareness of tort law rules, it also assumes that an individual who would not otherwise seek out opioids would do so because of a more plaintiff-friendly system of tort recovery. One may question whether such a rational thought process can be expected from a neurologically compromised plaintiff engaging in such a

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99. *Foister v. Purdue Pharma, L.P.*, 295 F. Supp. 2d 693 (E.D. Ky. 2003).

100. *Tug Valley Pharmacy*, 773 S.E.2d at 631 (citing *Orzel*, 537 N.W.2d 208).

101. *See supra* Section I.A.

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manifestly self-defeating endeavor as recreational opioid use. What is clear is that drug abusers lack the sophistication and legal knowledge of the medical providers and corporations that share fault for the opioid epidemic. This indicates that the healthcare industry would be more responsive to attempts at behavioral modification than individual plaintiffs. In other words, the wrongful conduct rule in opioid suits exculpates the more knowledgeable and responsive parties, undermining the rule's behavioral modification rationale.

Regarding the third “profiting wrongdoer” justification, drug-addicted plaintiffs often do not profit from their wrongful conduct in obtaining and abusing prescription drugs—in fact, they suffer grave consequences.<sup>102</sup> Thus, courts need not worry about drug-addicted plaintiffs “profiting” from their crimes, as might a burglar who is injured during a robbery and later sues the property owner. Instead, if courts truly wish to prevent wrongful actors from profiting from their bad behavior, they should disallow the wrongful conduct defense in the context of opioid addiction because it tends to relieve health care industry actors—many of whom profit enormously off of prescription drug sales<sup>103</sup>—of liability for the harm they cause.

As for the fourth “shifting responsibility” justification, rather than shifting responsibility to the appropriate party, using the wrongful conduct rule to bar plaintiffs from recovering from doctors or pharmaceutical companies that have acted negligently or unlawfully only serves to insulate bad actors in the health care industry from liability for their actions.<sup>104</sup> In doing so, the wrongful conduct rule itself “shifts responsibility” away from those engaged in immoral or illegal acts, fueling the opioid epidemic in the process. A system of comparative fault without the wrongful conduct rule avoids shifting responsibility by striving to accurately account for all parties' roles in creating the relevant harm.

So in the context of opioid addiction lawsuits, we are left with only the “public perception of the courts” rationale as justifying application of the wrongful conduct rule. It is true that some might recoil at the sight of courts granting relief to

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102. See OPIOID ADDICTION 2016 FACTS AND FIGURES, *supra* note 6.

103. Due to its aggressive marketing tactics, sales of Purdue Pharma's OxyContin grew from \$48 million in 1996 to almost \$1.1 billion in 2000. Ausness, *supra* note 9, at 1119.

104. See *supra* Part II.

plaintiffs whose actions contributed so directly to their own harm. But to others the sight of a pharmaceutical distributor or “pill mill” shirking liability for knowingly or willfully giving addicts access to dangerous drugs is equally or more revolting. Similarly, allowing a prescriber to escape liability for clear breaches of his or her duty to his or her patient may detract from public perception of our courts. Regardless, a far more significant perception problem for our legal system, our government, and our society at large may arise from a potential 500,000 opioid-related deaths in the next decade.<sup>105</sup> By relieving bad actors in the healthcare industry of civil liability for their wrongs, the wrongful conduct rule does nothing to address this perception problem, and in fact only worsens it by exculpating manufacturers, providers, and distributors from liability for their own bad acts.

### 1. The Doctrine of *In Pari Delicto*

The doctrine of *in pari delicto* is even less suited for claims arising out of opioid addiction than the wrongful conduct rule. *In pari delicto* is applicable where parties are “equally at fault.”<sup>106</sup> Such a rule gives rise to the possibility of unnecessary and wasteful litigation over whether the extremely unlikely circumstance of equality of fault has occurred.<sup>107</sup> *In pari delicto* suffers the exact same weaknesses as the wrongful conduct rule in the context of addiction, with the added unnecessary inquiry of whether fault is “equal.”<sup>108</sup> Rather than considering the preliminary question of whether plaintiff and defendant are equally at fault (which results in a complete waste of judicial resources if the suit is dismissed), a system of comparative fault<sup>109</sup> which rejects the doctrine of *in pari delicto*

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105. Matt Blau, *STAT Forecast: Opioids Could Kill Nearly 500,000 Americans in the Next Decade*, STAT (June 27, 2017), <https://www.statnews.com/2017/06/27/opioid-deaths-forecast/> [<https://perma.cc/3LVB-C8US>]. The author does not attempt to place blame for this catastrophe entirely on the shoulders of health care industry actors. A failure of this magnitude is becoming too massive and complex to trace to such a limited class. There is blame to spread among many social and political institutions and drug users themselves.

106. JOHNSON, *supra* note 46, at 110.

107. *Id.*

108. *Id.*

109. *Comparative Negligence*, WEX LEGAL DICTIONARY, LEGAL INFORMATION INST., [https://www.law.cornell.edu/wex/comparative\\_negligence](https://www.law.cornell.edu/wex/comparative_negligence) (last visited Feb. 2, 2018) <https://perma.cc/WVU3-8KFF>].

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is a more direct and fair way of apportioning costs and making plaintiffs whole.

Instead of shaping defenses to discourage drug use based on the difficulty of recovering in the courts, tort law should be formulated to avoid the issue of addiction from the outset through discouraging overprescribing and misleading advertising by limiting wrongful conduct defenses available to the health care industry.

## 2. A Moral Agency Rebuke of Wrongful Conduct Defenses in Drug Abuse Litigation

With the oft-cited public policy rationales behind the wrongful conduct rule inapplicable where opioid addicted plaintiffs bring suit, might a broader look at the underlying principles behind our tort law system support application of the rule? Through application of the concept of moral agency, we can answer this question with an unequivocal no.

The negligence doctrine can be seen as grounded in the concept of moral agency; this concept sheds light on the misguided nature of the wrongful conduct rule with respect to opioid litigation.<sup>110</sup> One has agency when he or she is able to make a difference in another's life by making a different decision.<sup>111</sup> Moral agency incorporates responsibility into this decision-making process.<sup>112</sup> For instance, the "but-for" test that determines whether a tortfeasor is the cause-in-fact of an injury is grounded in the notion that where an act is not within the control of the defendant as a decision-maker (or outside the scope of her agency), she should not be held responsible for that injury.<sup>113</sup> Further, the duty of reasonableness attendant to the doctrine of negligence binds an actor only to the consequences of only his unreasonable acts; as a moral agent, he is bound to act with reasonable care in his dealings with others so as not to harm them.<sup>114</sup> But the reach of this reasonableness requirement ends where reasonable human control ends. Thus, where an actor lacks the reasonable cognitive abilities to anticipate how his actions might cause harm, the actor's

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110. *Id.*

111. PETER M. GERHART, TORT LAW AND SOCIAL MORALITY 136 (2010).

112. *Id.*

113. *Id.*

114. *Id.* at 137–38.

responsibility for the consequences of his actions is limited.<sup>115</sup> Holding individuals civilly liable for the consequences of their actions beyond what they could have anticipated through use of reasonable cognitive efforts would render individuals incapable of shaping their behavior to avoid liability and cause them to become unduly cautious or risk the consequence of incurring liability for injuring another while exercising reasonable care.<sup>116</sup>

Viewing negligence as grounded in the notion of moral agency weakens the reasoning behind wrongful conduct defenses in opioid addiction lawsuits. Due to the ability of opioids to diminish the decision-making ability of their user by changing the user's brain functioning, an opioid user is in a state of diminished agency relative to a doctor or pharmaceutical company advertising executive who unreasonably or unlawfully harms patients through the promotion or prescription of opioids. This is true not only because of the psychological capability of the sober-minded, sophisticated, and knowledgeable healthcare industry professional, but also because of the direct negative impact of his actions on his addict-victims compared to the more indirect harm that the drug abuser inflicts upon others through his drug use. In weighing the fundamental question of "wrongfulness" underpinning the wrongful conduct rule, it is important that we consider notions of moral agency and how wrongful actors who abuse drugs and healthcare industry professionals differ in their respective capacities to minimize harm done to themselves and others.

Defendants in opioid litigation might argue that the concept of moral agency could be relied upon to relieve drug-addicted parties from all civil liability for their actions. This issue is reminiscent of the longstanding debate over whether tort law should recognize an insanity defense.<sup>117</sup> Indeed, a difficult question of moral agency may arise where an innocent plaintiff seeks recovery for injuries caused by a mentally ill or incapacitated defendant.<sup>118</sup> At that point, there is a strong

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115. *Id.* at 139.

116. *Id.*

117. See John Fanning, *Mental Capacity as a Concept in Negligence: Against an Insanity Defence*, 24 PSYCHIATRY, PSYCHOLOGY & L. 694 (2017).

118. See *Hammontree v. Jenner*, 97 Cal. Repr. 739 (Cal. Ct. App. 1971) (applying principles of negligence to deny a plaintiff recovery where the defendant

argument that a mentally ill defendant, though perhaps lacking in agency, should still be held liable because it is most fair to shift the costs of the harm to the party that is best able to prevent the harm (i.e., the mentally ill defendant), and away from a completely innocent party. But we need not confront such a question in the context of the wrongful conduct rule where mentally ill *plaintiffs* seek recovery from defendants who have harmed them. Here, there is no completely innocent party in need of compensation (assuming the wrongful conduct rule is at play) and, arguably, the parties best able to prevent the harm are defendants in the health care and medical industries, who are ostensibly sophisticated professionals and, in the case of prescribers, carry heightened duties to patients.

The costs of the opioid crisis will fall somewhere. It has already given rise to extraordinary costs in the healthcare and justice systems.<sup>119</sup> This cost should be borne not only by addiction sufferers and cash-strapped governments, but also by those who, through breach of common law duties or violations of federal law, blatantly facilitated this public health crisis.

In light of the extraordinary magnitude of America's opioid addiction crisis, doctors, pharmacies, and pharmaceutical companies should be aware of the dangers of opioids. Further, the prevalence of doctor shopping and the use of fraudulent methods to obtain prescriptions is also widely known in the medical community.<sup>120</sup> The notion of moral agency requires that defendants uphold their responsibilities to society as moral agents and compensate those that they harm—irrespective of plaintiffs' own conduct—legal or otherwise. Therefore, despite the entirely common and predictable intervening conduct drug-addicted patients carry out in order to fuel their addictions, courts should give plaintiffs the opportunity to seek recovery from health care industry actors

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became suddenly incapacitated while driving, causing an accident and injuring the plaintiff).

119. Katz, *supra* note 7.

120. More than half of American primary care physicians use their state's prescription drug monitoring program, which is a database used to prevent patients from obtaining prescriptions from multiple doctors. *Only 53 Percent of Doctors Use Their State Prescription Drug Monitoring Program: Study*, PARTNERSHIP FOR DRUG-FREE KIDS (Mar. 3, 2015), <http://www.drugfree.org/news-service/53-percent-doctors-use-state-prescription-drug-monitoring-program-study/> [https://perma.cc/G8HW-K6K5]. These databases are available in every U.S. state except Missouri.

who contribute to their condition. This solution is not radical or even novel. Use of the “outlaw” defenses fell out of favor long ago only to be revived by courts relatively recently.<sup>121</sup> Because the elimination of wrongful conduct defenses in the context of opioid addiction is supported by fundamental tort law principles, defenses based upon plaintiffs’ intervening acts should not be available where defendants are alleged to have caused an addiction.

### 3. The Costs of Expanding Liability

Expanding liability for pharmaceutical companies and doctors involved in the sale and prescription of opioids could limit opioid prescribing for pain, even when such treatment is medically necessary. This could have the potential to reduce quality of care<sup>122</sup> and drive a wedge between doctors and their patients.<sup>123</sup> Recent crackdowns by the DEA and state drug review boards have some doctors on edge about prescribing opioids for non-cancer pain, with some stopping the prescription of opioids altogether.<sup>124</sup> One might argue that, considering this trend, placing heightened pressure on providers and pharmaceutical companies in civil courts may come at the cost of hurting chronic pain sufferers.

However, while the usefulness of short-term opioid therapy is beyond question, research into the effectiveness of long-term opioid treatment for chronic pain sufferers is scant.<sup>125</sup> What the little available research does show is a tendency of long-term opioid treatment to cause overdose, abuse, myocardial infarction, and sexual dysfunction.<sup>126</sup> Doctors must make medical decisions in light of their education and expertise and the needs of the individual patients. But considering the lack of

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121. JOHNSON, *supra* note 46, at 102.

122. *Pain specialist: Many Doctors Underprescribe for Chronic Pain*, NAT’L PUBLIC RADIO: HERE & NOW (Feb. 16, 2016), <http://www.wbur.org/hereandnow/2016/02/16/underprescribing-opioids-for-pain> [<https://perma.cc/AQ2X-NUU6>].

123. Jan Hoffman, *Patients in Pain, and a Doctor Who Must Limit Drugs*, N.Y. TIMES (Mar. 16, 2016), <https://www.nytimes.com/2016/03/17/health/er-pain-pills-opioids-addiction-doctors.html> [<https://perma.cc/86R5-H79Y>].

124. *Id.*

125. Roger Chou et al., *The Effectiveness and Risks of Long-Term Opioid Therapy for Chronic Pain*, AM. COLLEGE OF PHYSICIANS (Feb. 17 2015), <http://annals.org/aim/article/2089370/effectiveness-risks-long-term-opioid-therapy-chronic-pain-systematic-review> [<https://perma.cc/AFN6-ZZKN>].

126. *Id.*

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evidence showing that long-term opioid use is worth the risks associated with such prescribing practices, from a policymaking perspective, concerns related to the underprescription of opioid pain medication should be considered secondary to the issue of America's widespread and disastrous addiction epidemic.

Limiting the use of wrongful conduct defenses in the context of addiction-related litigation will bring about inevitable costs related to increased medical malpractice insurance premiums. Increasing the exposure of doctors, pharmacies, and pharmaceutical companies to litigation related to the addiction crisis they have helped create will increase the costs parties incur, and in turn, the prices paid by consumers for their products and services. But in the long term, adjustments in marketing and prescribing practices that would result will serve to mitigate this cost, not only through decreased litigation costs, but also through preservation of human life.

*B. Another Path: The MSA Model*

In January 2018, more than one hundred attorneys representing pharmaceutical companies and city, county, and state governments gathered in the courtroom of U.S. District Judge Dan Polster.<sup>127</sup> Judge Polster was overseeing massive litigation by governments from across the country against opioid manufacturers and distributors.<sup>128</sup> Addressing the attorneys, Judge Polster explained that the executive and legislative branches of government had not adequately addressed the opioid crisis, and encouraged a judicial remedy in the form of a broad settlement agreement.<sup>129</sup> Judge Polster suggested a remedy of more than money—one that incorporated real solutions to the opioid epidemic into its terms.<sup>130</sup> The following Section discusses the possibility of a multistate settlement agreement strategy that, in addition to the limitation of wrongful conduct defenses, would serve as an

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127. Eric Heisig, *Here's Why a Federal Judge Presiding Over Opioid Lawsuits Thinks Settling Them is Important*, CLEVELAND.COM (Jan. 9, 2018), [http://www.cleveland.com/court-justice/index.ssf/2018/01/heres\\_why\\_a\\_federal\\_judge\\_pres.html](http://www.cleveland.com/court-justice/index.ssf/2018/01/heres_why_a_federal_judge_pres.html) [<https://perma.cc/PX8V-G7WK>].

128. *Id.*

129. *Id.*

130. *Id.*

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effective means of combating the opioid crisis through the judiciary.

Even if courts retain wrongful conduct defenses in addiction suits, increasing coordinated public tort litigation by state and local governments could serve as an effective means to curb the opioid epidemic. Coordinated legal efforts by state governments would be an efficient and effective means of challenging those pharmaceutical companies that have contributed to the opioid abuse epidemic through deceptive and misleading marketing practices. While legal action by state and municipal governments may present standing and causation issues,<sup>131</sup> these actions do not invoke defenses based upon plaintiffs' wrongful acts<sup>132</sup> and therefore avoid the absolute defenses of the wrongful conduct rule and the doctrine of *in pari delicto*, enhancing the effectiveness of this strategy.

Two of the most promising liability theories in public tort suits to recover addiction-related costs are negligent marketing and public nuisance.<sup>133</sup> Negligent marketing claims typically arise when defendants target vulnerable populations and fail to adequately supervise the distribution of their product.<sup>134</sup> Public nuisance claims arise where a defendant has created an unreasonable interference with a right held in common by the general public.<sup>135</sup> Claims based upon violations of anti-deceptive marketing statutes are also popular remedies in public tort suits involving addiction and public health.<sup>136</sup>

Armed with these liability theories, governments could ameliorate the effects of the opioid epidemic by pursuing a coordinated settlement with pharmaceutical companies. This settlement could, in some respects, be modeled after the 1998 Master Settlement Agreement (MSA), in which major tobacco companies compensated governments for healthcare costs related to cigarette use and agreed to increase public awareness of cigarettes' negative health effects.

In 1998, after decades of private litigation against the tobacco industry, forty-six state attorneys general took coordinated legal action against America's largest tobacco

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131. Ausness, *supra* note 9, at 1147–48.

132. *Id.* at 1165.

133. *Id.* at 1148.

134. *Id.*

135. *Id.*

136. *Id.* at 1122–23.

companies.<sup>137</sup> This method of fighting the public health crisis created by tobacco had the benefit of eliminating companies' defenses to private suits—primarily that smokers assumed the inherent risks of smoking and contributed towards their own health problems.<sup>138</sup> Ultimately, the states and tobacco companies agreed to the MSA,<sup>139</sup> which stipulated that the tobacco companies would end certain marketing practices and compensate states for smoking-related medical costs in a series of annual payments.<sup>140</sup> Further, the MSA dissolved certain tobacco industry groups and established funding for an anti-smoking advocacy group, the American Legacy Foundation.<sup>141</sup> The MSA required tobacco companies to pay the states \$206 billion over the subsequent twenty-five years.<sup>142</sup> The success of the MSA settlement led some states to bring similar actions against manufacturers of guns and lead paint.<sup>143</sup>

Like the government action against tobacco companies in the late 1990s, a concerted effort by state governments would be an effective means of compensating the public for the massive financial costs of the opioid crisis and ensuring corporate accountability, while avoiding some of the more difficult issues of causation that inevitably arise in suits by private individuals, as illustrated by *Foister*. Pharmaceutical company malfeasance, such as Purdue's advertisement of off-label uses of OxyContin, impacted Americans from coast to coast, driving up medical costs for municipalities and states alike. If states were to work together to pursue an agreement with pharmaceutical manufacturers, instead of pursuing causes of action as individual government bodies, states could pool resources, greatly enhancing the efficiency and effectiveness of litigation. And recent public suits against pharmaceutical companies have revealed their effectiveness in

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137. Richard A. Deynard et al., *Implications for Tobacco Control of the Multistate Tobacco Settlement*, 91 AM. J. PUB. HEALTH, 1964 (Dec. 2001), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446915/pdf/0911967.pdf> [<https://perma.cc/P8BE-L7BP>].

138. Kathleen Michon, *Tobacco Litigation: History & Developments*, NOLO (Dec. 1, 2015), <https://www.nolo.com/legal-encyclopedia/tobacco-litigation-history-and-development-32202.html> [<https://perma.cc/4529-DB7K>].

139. Deynard, *supra* note 137.

140. *Id.*

141. *Id.*

142. Richard C. Ausness, *Public Tort Litigation, Public Benefit or Public Nuisance?*, 77 TEMPLE L. REV. 825, 837 (2004).

143. *Id.* at 827.

bringing about settlements, as these companies are hesitant to incur the bad publicity and significant litigation costs of fighting state and municipal governments.<sup>144</sup>

Collective, coordinated state actions against pharmaceutical companies would only bolster the bargaining power of governments, as they would entail more bad publicity for pharmaceutical companies and create the potential for substantial verdicts against manufacturers. Because of this increased bargaining power, coordinated actions would bring about more substantial settlements, avoiding outcomes such as the 2015 Kentucky settlement, in which Purdue Pharma settled with the state for only \$24 million and admitted no wrongdoing, despite the state's alleged damages of up to one billion dollars.<sup>145</sup>

Underlying this issue is the reality that those states hit hardest by the opioid epidemic, particularly those in Appalachia, are among the poorest in state fiscal health.<sup>146</sup> The utility of resource pooling in light of these states' poor fiscal health underscores the value of a potential collective action among states in the fight against those who unlawfully market opioid medications.

Forcing pharmaceutical companies to face massive financial consequences for their nationwide aggressive and unlawful marketing tactics<sup>147</sup> will incentivize these companies to exercise enhanced caution in manufacturing and promoting their drugs. Additionally, the publicity that such an action would bring about would significantly heighten public awareness of the opioid epidemic and its causes, increasing

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144. Ausness, *supra* note 9, at 1165.

145. Associated Press, *Kentucky Settles Lawsuit with OxyContin Maker for \$24 Million*, CBSNEWS (Dec. 23, 2015), <http://www.cbsnews.com/news/kentucky-settles-lawsuit-with-oxycontin-maker-for-24-million/> [https://perma.cc/82U3-BWMU].

146. CTRS. FOR DISEASE CONTROL AND PREVENTION, DRUG OVERDOSE DEATH DATA (2016), <https://www.cdc.gov/drugoverdose/data/statedeaths.html> [https://perma.cc/X559-C4RU]; MERCATUS CENTER, RANKING THE STATES BY FISCAL CONDITION 2016 EDITION, (2016), <https://www.mercatus.org/statefiscalrankings> [https://perma.cc/RJ5B-L7FX].

147. Howard G. Birnbaum et al., *Societal Costs of Prescription Opioid Abuse, Dependence, and Misuse in the United States*, AM. ACAD. OF PAIN MED., <http://www.asam.org/docs/advocacy/societal-costs-of-prescription-opioid-abuse-dependence-and-misuse-in-the-united-states.pdf> (last visited Mar. 19, 2017) [https://perma.cc/T56A-Q8UV]; see *Foister v. Purdue Pharma, L.P.*, 295 F. Supp. 2d 693 (E.D. Ky. 2003).

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scrutiny of pharmaceutical corporations' practices and driving home the dangers of non-medical use of prescription opioids to the broader public. Importantly, unlike suits by individual plaintiffs who abused drugs and who often face obstacles arising from their own intervening wrongful conduct, government plaintiffs, as innocent actors, are insulated from wrongful conduct defenses, enhancing the overall effectiveness of this strategy. Although some companies may defend these suits by claiming that plaintiff drug users are supervening actors in creating the alleged harm,<sup>148</sup> recent cases indicate that the risk of crushing liability will nonetheless prove sufficient to bring about settlements.<sup>149</sup> Additionally, a multistate settlement agreement could serve the interests of pharmaceutical companies by reducing litigation costs arising from many small suits by condensing governments' claims into a single resolution.

Although a settlement analogous to the MSA may help curb the opioid crisis in a feasible and mutually beneficial manner, a word of caution is in order. While some have praised the tobacco MSA as a public health success, others have criticized the government's use of MSA funds. States have used more than one-quarter of MSA funds on non-public health related matters, with only a small portion of this percentage being used to curb tobacco use.<sup>150</sup> Astonishingly, seven states have used MSA funds to support tobacco grower assistance programs.<sup>151</sup> If governments and pharmaceutical companies pursue a multistate opioid settlement agreement, such an agreement would, ideally, be more tailored towards solving the opioid crisis, rather than supporting state general funds or the opioid industry itself.

## CONCLUSION

The opioid epidemic is exacting enormous social and economic costs on the American public and its governing

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148. Ausness, *supra* note 9, at 1149.

149. *Id.* at 1165 (noting that *parens patriae* suits of this nature tend to result in settlements).

150. Walter J. Jones & Gerard A. Silvestri, *The MSA and Its Impact on Tobacco Use 10 Years Later*, 135 CHEST 692, 695 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3021365/pdf/chest.09-0982.pdf> [<https://perma.cc/LG4B-HKN8>].

151. *Id.*

bodies. If America is to successfully combat its opioid epidemic, civil courts must play a vital role. Foremost among the problems faced by plaintiffs in suits alleging damages related to drug addiction are issues of causation and a lack of applicable case law. Limiting the use of the wrongful conduct rule in suits over injuries arising out of prescription drug addiction is supported by both addiction science and case law. Additionally, pursuing a multistate settlement agreement between states and the pharmaceutical industry may lead to the most socially beneficial and mutually favorable resolution to civil claims arising out of the opioid crisis. Adoption of these sound strategies would place American courts at the forefront of the vital battle against opioid addiction in the United States, mitigating this public health crisis.