THE BANKRUPTCY OF PURDUE PHARMA IN THE WAKE OF BIG TOBACCO

Jacob Hedgpeth

Two distinct public health crises shook the United States from 1954 to 2023: nicotine addiction from tobacco products, and opioid addiction starting with Purdue Pharmaceutical's OxyContin. These crises resulted in millions of deaths and immense costs to the country as a whole. The nicotine crisis ended in a national settlement against four major tobacco manufacturers, which yielded hundreds of millions of dollars for those harmed by these products. The owners of Purdue, however, opted for bankruptcy instead of settlement, keeping the majority of the money made from OxyContin for Purdue's owners, the Sackler family.

These four tobacco giants and Purdue shared an almost identical trajectory before and during the massive civil litigation that eventually forced them into settlement negotiations with thousands of injured plaintiffs. Both engaged in health misinformation campaigns intended to obscure the inherent dangers and addictive potentials of their respective products, both lobbied government actors to secure their markets, and both eventually faced civil litigation from almost every U.S. state. Despite these similarities, Purdue has avoided a settlement, leaving the public without restitution for the harms caused by OxyContin.

This Article proposes that these differences in litigation results were the direct result of the fundamental corporate differences between the publicly owned tobacco companies and the private, family-owned Purdue Pharmaceuticals. Executives in private companies are insulated from public outrage and outside interference in a way that public executives are not. Due to this insulation, private executives in general, and the Purdue executives specifically, can resort to litigation techniques that benefit the bad actors and leave nothing behind for those harmed. These corporate differences meant that the tobacco companies were forced to settle and pay appropriate restitutions to the public that they harmed, while Purdue, was able to—and did—opt for bankruptcy. Purdue's bankruptcy left the public without

compensation for harm done and allowed Purdue's owners to enjoy civil immunity despite their direct role in the opioid crisis.

INTRODUCTION

Between the years of 1954 and 1994, the four most powerful U.S. tobacco companies engaged in widespread, systemic, and unethical marketing practices to secure their market shares and retain a customer base dependent on nicotine.[1] These practices included health misinformation campaigns to hide the dangers associated with nicotine use, suppression of research into a safer and less addictive cigarette, and intense political lobbying to retain unfettered market power.[2] As whistleblowers and investigators brought these practices to light, public outcry and the damages caused by a tobacco health crisis launched three distinct waves of litigation that culminated in multidistrict suits that threatened to bankrupt the tobacco industry.[3] In 1994, those same four tobacco companies, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated, and R.J. Reynolds Tobacco Company (hereinafter the "Big Four"),[4] negotiated a Master Settlement Agreement (MSA) as a direct result of the intense litigation pressure being brought by forty-six state attorneys general. This MSA stipulated a $206 billion settlement, intense marketing restrictions on nicotine products, and the establishment of

1. *Infra*, Part III.
2. *Id.*
3. *Infra*, Part I.
4. NAT'L ASS'N OF ATT'YS GEN., MASTER SETTLEMENT AGREEMENT (1998).

various anti-smoking programs to correct the tobacco public health crisis.[5]

Between the years of 2001 and 2022, the opioid manufacturing industry in general, and Purdue Pharmaceuticals (hereinafter "Purdue") specifically, were engaging in widespread, systemic, unethical marketing practices that almost exactly mirrored the prior practices of the Big Four. Purdue's practices included health misinformation campaigns designed to hide the addictive potential of their opioid wonder drug, OxyContin, and intense political lobbying to gain regulatory approval for their drug and unfettered access to the medical market.[6] Investigators and attorneys approaching the opioid crisis, using techniques learned from the successful suits against the tobacco industry, acted on public outcry by bringing two distinct waves of litigation.[7] These two waves were primarily spearheaded by local and state governments seeking damages for the addiction and harm caused by Purdue's marketing practices. These waves also led to a multidistrict litigation brought by every state in the nation against Purdue *and* against the Sackler family who owned the company in its entirety. Unlike the Big Four, however, the Sackler family rejected settlement agreements proposed by state attorneys general, opting instead to bankrupt their own company and simultaneously grant the family itself civil immunity from all future litigation related to OxyContin and their role in the opioid crisis.

This Article proposes that the root of the difference between the tobacco MSA and the Purdue bankruptcy was not the underlying litigation methods or the way in which the settlements were approached. Rather, Purdue's underlying corporate structure acted as a vehicle by which the Sackler family could bleed their company dry before using the shell of Purdue as a legal shield by which they could retain the vast majority of the money made from OxyContin. Purdue, as a family-owned, private company, was able to weather legal scrutiny and public outrage in a way that was fundamentally different from the response of the tobacco industry in the late 1990s. It was through this corporate structure that the Sackler

5. Barry Meier, *Cigarette Makers and States Draft a $206 Billion Deal*, N.Y. TIMES (Nov. 14, 1998), https://www.nytimes.com/1998/11/14/us/cigarette-makers-and-states-draft-a-206-billion-deal.html [https://perma.cc/J6HW-M9VY].

6. *Infra*, Part III.

7. *Infra*, Part II.

family was able to exhaust Purdue's assets, craft a settlement agreement that had no hope of being negotiated for fair terms, and opt for Purdue's bankruptcy, which will likely lead to an entirely new and underwhelming form of financial and social retribution for the Sacklers.

Parts I and II of this Article outline the histories of the waves of litigation faced by the Big Four and Purdue respectively, focusing on the ways in which litigation was brought and the method by which each ultimate legal decision was made. Part III illustrates the marketing practices used by each set of defendants, focusing on the similarities between the two. Part IV then analyzes the fundamental corporate differences between the Big Four and Purdue. Finally, Part V discusses how, despite the parallels in litigation history and marketing practices, these fundamental corporate differences allowed the Sacklers to truncate their legal liability in an entirely novel way—one that the tobacco industry was incapable of utilizing decades prior.

I. THE TOBACCO MASTER SETTLEMENT AGREEMENT

The MSA negotiated by the tobacco industry's Big Four marked the largest civil settlement agreement in United States history, yielding a net $204 billion to be paid to forty-six states, the District of Columbia, and five U.S. territories over the first twenty-five years of the agreement.[8] The extensive tobacco litigation that culminated in the MSA progressed in three distinct waves and gained initial traction when the U.S. Surgeon General at the time, Luther L. Terry, released the *Surgeon General's Report on Smoking and Health*. This landmark report concluded that smoking was hazardous for public health,[9] and stated that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."[10] This report immediately spurred a wave of civil suits against the various manufacturers of tobacco products.

---

8. Meier, *supra* note 5.

9. PUB. HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, PUB. NO. 1103, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 37 (1964) (stating that "[c]igarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far outweighs all other factors. The data for women, though less extensive, point in the same direction.").

10. *Id.*

This first wave of suits (from 1954 to 1973) was brought largely by individual plaintiffs seeking damages for the harm caused to them from the use of tobacco products.[11] This wave was defeated by the precedents of tort law at the time, which prevented plaintiff recovery on the basis that manufacturers are only strictly liable for defects in their products, not for the inherent hazards associated with the product as properly produced.[12] Those precedents made it extremely difficult for courts to find tobacco companies liable for the harm associated with the use of their products regardless of tobacco's inherent dangers to human health.[13]

The second wave of suits (from 1983 to 1992)[14] saw a majority of plaintiff cases dismissed for the same legal issues presented during the first wave, with courts rejecting both design and manufacturing defect theories of liability.[15] At the end of the second wave, however, the Supreme Court case *Cipollone v. Liggett* marked the first time an individual plaintiff won a judgment against a tobacco company.[16] In that case, the Court held that state law causes of actions were not preempted by mandatory federal cigarette warnings, a holding that paved the way for future plaintiffs to use state-based causes of action in later litigation.[17]

The third wave of suits (beginning in 1994 and ending with the MSA) introduced the effective use of class action lawsuits against tobacco manufacturers.[18] Class actions presented a

11. Justin D. Heminger, *Big Abortion: What the Antiabortion Movement Can Learn from Big Tobacco*, 54 CATH. U. L. REV. 1273, 1280 (2005).

12. *Id.*

13. *See* Greenman v. Yuba Power Products, 377 P.2d 897 (Cal. 1963) (holding that manufacturers are held strictly liable for placing products on the market if they know that (1) the products will likely not be inspected for defects, and (2) the product causes harm to the user); upheld in Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964) (holding that defendant not strictly liable because the plaintiff "made no contention that defendant's cigarettes do not conform to the standard of the cigarette industry," but rather the plaintiff presented evidence "in an attempt to prove not only that smoking defendant's cigarettes caused his cancer, which is required, but also to show the general causative relationship between smoking cigarettes."); and Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir. 1969) (holding that cigarette manufacturers could not be held liable for "the harmful effects of which no developed human skill or foresight can afford knowledge.").

14. Heminger, *supra* note 11, at 1280.

15. *Id.*

16. Cipollone v. Liggett, 505 U.S. 504 (1992).

17. *Id.*

18. Graham E. Kelder, Jr. & Richard Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 72 (1997).

method by which individual plaintiffs, often unable to bring suits on their own due to the cost of bringing a case to trial in their individual capacity, could contribute funds and causes of action to a larger group of plaintiffs represented by one law firm.[19] This allowed individual plaintiffs to pursue damages against the previously untouchable and thoroughly financed major tobacco companies.[20] The Court's holding in *Cipollone*, which officially established a state cause of action for use in tobacco litigation, also promoted this class action method of litigation. By allowing state causes of action, *Cipollone* allowed plaintiff classes to avoid issues previously seen in federal court tobacco litigation, including federal court reluctance to certify classes and difficulties inherent in maintaining a nationwide class.[21] Plaintiffs also litigated under two new theories of liability, arguing that "1) tobacco companies knew, but long hid, their knowledge that nicotine is pharmacologically active and highly addictive; and 2) tobacco companies manipulated nicotine levels in their products to hook unsuspecting smokers."[22] These third wave developments opened the floodgates for state litigation, which was brought by leading firms with extensive resources rather than individual plaintiffs who could be out-financed and out-appealed before a jury trial could be reached.[23] The third wave also saw the introduction of a major suit by the Mississippi Attorney General, which sought restitution for the millions of dollars the state had spent on health care costs for sick and dying smokers.[24] This suit was the first of its kind in that it sought equitable damages based on the idea that the tobacco industry's deceptive marketing constituted a wrong against the public rather than against any one individual plaintiff, and it paved the way for future state attorneys general to bring similar suits on the same grounds.[25]

In the years following Mississippi's 1994 lawsuit, forty-five other state attorneys general filed similar cases of their own, which eventually forced the Big Four to accept a $206 billion MSA in the face of overwhelming litigation.[26] This settlement

19. Restatement (First) of Judgments § 116 (Am. L. Inst. 1942).
20. Kelder, Jr. & Daynard, *supra* note 18.
21. Heminger, *supra* note 11, at 1282.
22. Kelder, Jr. & Daynard, *supra* note 18
23. Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 301.
24. *Id.* at 302.
25. *Id.* at 303.
26. Meier, *supra* note 5.

ended all outstanding health care reimbursement claims against the Big Four and was also binding on the tobacco industry's trade associations, thus allowing for restrictions on the tobacco industry as a whole.[27] In addition to equitable damages payable to the states, the tobacco industry also agreed to restrictions on advertising and marketing, prohibitions on the suppression of health-related research on the dangers of smoking, the establishment of various anti-smoking programs to help correct the tobacco public health crisis, and the publication of all non-privileged documents discovered during the course of the litigation.[28] Soon after the MSA was put into effect, however, a new public health crisis emerged to take the place of nicotine addiction. In 1995, the Food and Drug Administration (FDA) officially approved Purdue's OxyContin and "triggered the first wave of deaths linked to use of legal prescription opioids."[29]

II. THE PURDUE BANKRUPTCY

Purdue's role in the opioid crisis started largely with its introduction of OxyContin in 1995. OxyContin, Purdue's then-newest opioid for pain management, was touted as a non-addictive alternative to traditional opioids due to its novel continuous-release mechanism. This mechanism was said to deliver a continuous dose of OxyContin (hence the name Oxy-Continuous) for twelve hours, which promised to eliminate the highs and troughs of traditional opioid therapy and thus eliminate the potential for addiction when properly prescribed.[30] Sales for OxyContin reached nearly $3 billion by 2009 and largely created a U.S. market for opioids that other drug manufacturers soon also entered.[31] As sales continued to rise, however, doctors reported that OxyContin did not always abate pain for the entire twelve hours as promised by Purdue, and that

27. NAT'L ASS'N OF ATT'YS GEN., *supra* note 4. Four states, Florida, Minnesota, Mississippi, and Texas settled prior to the MSA and are not signatories to the MSA.

28. Lynn M. Barrett, *Opioid Settlements: Some Lessons Learned from Big Tobacco*, 32 NO. 4 HEALTH LAW. 9, 13 (Apr. 2020).

29. Howard Koh, *What Led to the Opioid Crisis – And How to Fix It*, HARV. T.H. CHAN SCH. OF PUB. HEALTH (Feb. 9, 2022), https://www.hsph.harvard.edu/news/features/what-led-to-the-opioid-crisis-and-how-to-fix-it/ [https://perma.cc/N5E3-FUTU].

30. Engstrom & Rabin, *supra* note 23, at 308.

31. *Id. See* Patrick Radden Keefe, *The Family that Built an Empire of Pain*, THE NEW YORKER (Oct. 23, 2017), https://www.newyorker.com/magazine/2017/10/30/the-family-that-built-an-empire-of-pain [https://perma.cc/4YAB-ZXLW].

patients often had to take more than their prescribed doses to subdue their pain.[32] By 2016, even the FDA, which had initially certified the drug as lasting for twelve hours, began to acknowledge that addiction to OxyContin can occur "at recommended doses" and even "in patients appropriately prescribed OxyContin."[33] As more patients became adversely affected by opioid use, individual lawsuits to recover damages caused by the use of OxyContin became more and more frequent.

Much like the progression of tobacco litigation that started in 1954, opioid lawsuits came in distinct waves. The first wave (from 2001 to 2013)[34] consisted of two main types of litigation: (1) individually initiated claims, usually consisting of a single plaintiff seeking compensation for addiction or wrongful death, and (2) public litigation, filed by state attorneys general via *parens patriae* causes of action, similar to those filed by state attorneys general in the third wave of the tobacco lawsuits.

The individually initiated claims often alleged that Purdue had "failed to exercise reasonable care with regard to [OxyContin's] design, marketing, and promotion," and that Purdue supplied inadequate warnings of OxyContin's addictive potential. [35] This type of litigation rarely survived motions for summary judgment, owing in part to the fact that OxyContin was an FDA approved drug and was designed in accordance with that approval.[36] Plaintiffs also struggled to prove that Purdue had supplied inadequate warnings, given the difficulty in showing that an alternate warning that would have made a doctor less likely to prescribe the drug.[37]

The public litigation suits, on the other hand, were brought by state attorneys general alleging that Purdue used coercive and deceptive marketing to sell OxyContin and sought reimbursement for state medical costs associated with addiction and death as a result of OxyContin use in a given state.[38] This type of litigation was far more successful than the individually initiated claims, and dozens of states were able to get settlement

32. Harriet Ryan et al., *'You want a description of hell?' OxyContin's 12-Hour Problem*, L.A. TIMES (May 5, 2016), https://www.latimes.com/projects/oxycontin-part1/ [https://perma.cc/N8U6-JTWH].

33. U.S. FOOD & DRUG ADMIN., FULL PRESCRIBING INFORMATION: OXYCONTIN § 5.1 (rev. 2016).

34. Engstrom & Rabin, *supra* note 23, at 310.

35. *Id.*

36. *Id.* at 311.

37. *Id.* at 311.

38. *Id.* at 314.

amounts ranging from $10 million to $24 million.[39] However, as a condition of each settlement, Purdue admitted no fault of any kind, and all discovered internal company documents and communications were sealed from the public.[40]

The second wave of litigation (from 2014 to the Purdue bankruptcy) began as a result of suits filed by both state and local governments.[41] By 2019, nearly every state was suing Purdue, including more than two dozen states that had filed suits against the Sacklers personally and "thousands of other cases brought by cities and counties and hospitals and school districts and tribes."[42] This second wave of suits was brought upon a range of claims that were far broader and in far greater numbers than those used in the first wave. Resting on causes of action including "public nuisance, RICO, negligence, fraudulent misrepresentation, fraudulent concealment, state statutory violations, and unjust enrichment, the suits [sought] to recoup the social and financial impact of opioid addiction and dependence."[43]

As the litigation mounted, it seemed to be in Purdue's best interest to negotiate for a global settlement, similar to the settlement negotiated by the Big Four in the MSA two decades earlier. David Sackler, a member of the family and active executive within Purdue, met with ten state attorneys general in 2019 with a settlement proposal: the Sacklers would be granted personal immunity from "all potential federal liability," and in exchange they would personally contribute $3 billion, Purdue would declare bankruptcy and be converted into a "public benefit trust," and an additional $3 to $4 billion would be paid to the states funded directly from Purdue's future drug sales.[44] This settlement offer was, in the opinion of New York Attorney General Letitia James, "an insult, plain and simple,"

39. *Id.* at 314–15. West Virginia settled for $10 million in November 2004, followed by twenty-six other states and the District of Columbia for $19.5 million in May 2007, and then Kentucky for $24 million in December 2015 after an eight-year litigation.

40. *Id.*

41. *Id.* at 316.

42. PATRICK RADDEN KEEFE, EMPIRE OF PAIN 393 (2021).

43. Engstrom & Rabin, *supra* note 23, at 316–17.

44. Patrick Radden Keefe, *The Sackler Family's Plan to Keep its Billions*, NEW YORKER (Oct. 4, 2020), https://www.newyorker.com/news/news-desk/the-sackler-familys-plan-to-keep-its-billions [https://perma.cc/LA8A-WAGN]; Laura Strickler, *Purdue Pharma Offers $10-12 Billion to Settle Opioid Claims*, NBC (Aug. 27, 2019), https://www.nbcnews.com/news/us-news/purdue-pharma-offers-10-12-billion-settle-opioid-claims-n1046526 [https://perma.cc/7DKK-E8F5].

since neither Purdue nor the Sacklers would admit any wrongdoing whatsoever.[45] The settlement offer also appeared exceedingly low in consideration of the fact that the family had paid themselves $4.3 billion in OxyContin proceeds between the years of 2008 and 2016 alone.[46] The Sacklers indicated that "if the states did not want to sign off on their generous offer . . . then Purdue would just declare bankruptcy without a deal in place."[47] A bankruptcy proceeding would allow the presiding judge to "freeze all litigation against the company so that it can be restructured," leaving all remaining plaintiffs to split the assets of the company.[48] These assets, according to Purdue's lawyers, would result in "closer to $1 billion for U.S. communities suing the company as opposed to the up to $12 billion in value Purdue attaches to its current proposal."[49] By September, too many prosecutors were opposed to the deal, so the Sacklers declared Purdue's bankruptcy.[50]

As expected, the presiding bankruptcy judge, Robert Drain, immediately froze all litigation against Purdue.[51] But, in an unexpected move, Drain also made the "extraordinary" step, in his own words, to freeze litigation against the Sackler family as

45. Press Release, New York Attorney General's Office, Attorney General James' Statement on Opioid Discussions (Sept. 11, 2019), https://ag.ny.gov/press-release/2019/attorney-general-james-statement-opioid-discussions [https://perma.cc/4W9K-YMXV].

46. Lenny Bernstein & Scott Higham, *Purdue Pharma in Talks over Multibillion-Dollar Deal to Settle More Than 2,000 Opioid Lawsuits*, WASH. POST (Aug. 27, 2019), https://www.washingtonpost.com/health/purdue-pharma-in-talks-over-multibillion-dollar-deal-to-settle-more-than-2000-opioid-lawsuits/2019/08/27/7cf50ed4-c914-11e9-be05-f76ac4ec618c_story.html [https://perma.cc/M8L6-LK2C].

47. KEEFE, *supra* note 42, at 397.

48. *Id.*

49. Mike Spector & Jessica DiNapoli, *Exclusive: OxyContin Maker Prepares Free-Fall Bankruptcy as Settlement Talks Stall*, REUTERS (Sept. 3, 2019), https://www.reuters.com/article/us-purdue-pharma-opioids-exclusive/exclusive-oxycontin-maker-prepares-free-fall-bankruptcy-as-settlement-talks-stall-idUSKCN1VO2QN [https://perma.cc/NEC9-VTGG].

50. Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, N.Y. TIMES (Sept. 15, 2019), https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html [https://perma.cc/5RMR-DUFM].

51. Renae Merle, *Judge Grants Purdue Pharma, Sackler Family Pause in Civil Lawsuits*, WASH. POST (Oct. 11, 2019), https://www.washingtonpost.com/business/2019/10/11/judge-grants-request-sackler-family-owners-opioid-maker-purdue-pharma-halt-civil-lawsuits/ [https://perma.cc/9VQN-FU7Y].

well.[52] This move rested on the idea that the family was "inextricably twined" in any lawsuits with Purdue.[53]

By February of 2020, Judge Drain suggested that such a third-party release, granting both Purdue and the Sacklers freedom from future opioid-related lawsuits, was the only way to reach "true peace."[54] In September of 2021, Drain released his final opinion finding the third-party release proper.[55] As a result, Purdue would be converted into a public trust company, and the Sacklers would be immunized from all future OxyContin-related liability.[56]

III. SIMILARITIES

The Big Four and Purdue relentlessly pursued market domination in their respective fields, and their approaches during this pursuit were remarkably similar. This Part will discuss how the Big Four and Purdue conducted and utilized health misinformation to promote tobacco and OxyContin respectively, used political lobbying to protect their market power, and aggressively litigated in an attempt to strong-arm and suppress any and all civil lawsuits against them.

A. Health Misinformation[57]

In April of 1994, seven top tobacco CEOs testified before Congress that they did not believe that nicotine was addictive.[58] One of these executives was the then CEO of Big Four tobacco manufacturer Brown & Williamson, Thomas E. Sandefur, Jr.[59] Despite Sandefur's testimony to the contrary, a 1994 Mississippi

52. *Id.*

53. Memorandum of Law in Support of Motion for a Preliminary Injunction, Chapter 11, Case No. 19-23649, Sept. 18, 2019.

54. Hearing Transcript, *Purdue Pharma LP*, *Debtor*, U.S. Bankruptcy Court, Southern District of New York, Case No. 19-23649 (RDD), Feb. 21, 2020.

55. *In re* Purdue Pharma, WL 4240974 (Bankr. S.D.N.Y. 2021).

56. *Id.*

57. "Misinformation" within the health context is defined by the U.S. Department of Health and Human Services as "information that is false, inaccurate, or misleading according to the best available evidence at the time." *Health Misinformation*, U.S. DEP'T OF HEALTH AND HUM. SERV., https://www.hhs.gov/surgeongeneral/priorities/health-misinformation/index.html [https://perma.cc/FRM8-TP6T] (last visited Apr. 6, 2023).

58. Philip J. Hilts, *Tobacco Chiefs Say Cigarettes Aren't Addictive*, N.Y. TIMES (Apr. 15, 1994), https://www.nytimes.com/1994/04/15/us/tobacco-chiefs-say-cigarettes-aren-t-addictive.html [https://perma.cc/8K9E-4RL3].

59. *Id.*

lawsuit against Brown & Williamson showed concrete proof that the CEO not only knew of the addictive potential of nicotine, but also promoted the exploitation of that addictive potential.[60] In that lawsuit, former Brown & Williamson paralegal Merrell Williams, Jr. came forward with thousands of confidential records that he had stolen over a four-year period.[61] These documents led to a perjury investigation into the statements of the tobacco CEOs and were used as principal evidence of deception by top tobacco executives.[62] This investigation would ultimately help lead the charge against the Big Four and pave the way for the tobacco MSA.[63]

Williams's whistleblowing inspired other former employees to come forward as well. Jeffrey S. Wigand, vice president of research at Brown & Williamson from 1989 to 1993, was one of the pivotal whistleblowers when it came to the third wave of tobacco lawsuits.[64] As part of a testimony taken during pretrial preparations, Wigand testified that Sandefur repeatedly stated in private conversations that nicotine was addictive and that the company was in the "nicotine delivery business."[65] These statements indicated that Sandefur knew of the addictive properties of nicotine for years prior to his testimony before Congress. Wigand further testified that Sandefur had explicitly stated that "any activity or elusion [allusion] to a safer cigarette would be deathly contrary to the company's position relative to liability issues associated with smoking and health issues."[66]

The Brown & Williamson whistleblowers also inspired Ian Uydess, a former researcher at Big Four tobacco manufacturer Philip Morris, to come forward. Uydess testified via affidavit

60. Myron Levin, *Smoking Gun: The Unlikely Figure Who Rocked the U.S. Tobacco Industry*, L.A. TIMES (June 3, 1996), https://www.latimes.com/archives/la-xpm-1996-06-23-fi-17774-story.html [https://perma.cc/4R4C-B8V2].

61. *Id.*

62. *Id.*

63. *Id.*

64. Bill Carter, *Tobacco Company Sues Former Executive Over CBS Interview*, N.Y. TIMES (Nov. 22, 1995), https://www.nytimes.com/1995/11/22/us/tobacco-company-sues-former-executive-over-cbs-interview.html [https://perma.cc/A4CH-XR6V] (stating Wigand's title at Brown & Williamson); Barnaby J. Feder, *Details of Tobacco Executive's Assertions are Disclosed*, N.Y. TIMES (Jan. 27, 1996), https://www.nytimes.com/1996/01/27/us/details-of-tobacco-executive-s-assertions-are-disclosed.html [https://perma.cc/6ULF-BDS7] (stating Wigand's number of years in role).

65. *Transcript of Pretrial Deposition of Jeffrey S. Wigand*, N.Y. TIMES (Nov. 29, 1995), https://www.wsj.com/edition/resources/documents/bw.htm#RESEARCH [https://perma.cc/9PY2-PNMR].

66. *Id.*

that "to the best of my knowledge, nicotine has always been an important consideration to Philip Morris in the design, development and manufacturing of cigarettes."[67] Uydess further testified that levels of the addictive substance were kept high because internal company research suggested that "a cigarette having satisfactory ('high enough') nicotine levels but marginal flavour, [sic] stood a better chance of being 'accepted' in the market place than a somewhat better tasting product with zero or ultra-low levels of nicotine."[68]

This pattern of health misinformation was the principal vehicle by which the Big Four were able to hook the public at large and retain the incredible profits that the tobacco industry was generating at the time.

Purdue engaged in similar health misinformation campaigns to secure its pharmaceutical market share. Arguably the most effective—and also the most unethical—marketing tactic used by Purdue with regard to OxyContin was changing the stigma associated with prescribing an opioid narcotic for moderate levels of pain. Before the introduction of OxyContin, opioids such as morphine and codeine were seen as end-of-life drugs, but OxyContin was touted—and FDA certified—as an opioid that could be used for moderate pain in addition to severe pain.[69]

Michael Friedman, Purdue's sales and marketing executive (and later CEO) was a major voice in the movement toward destigmatizing the drug in the eyes of prescribing physicians. In a confidential 1994 memo to the Sackler family executives titled "Product Pipeline and Strategy," Friedman stressed the importance of reaching the untapped pain market outside of the traditional cancer realm, stating that it was "imperative that we establish a literature" to support these kinds of claims and dispel "the perception, among physicians, that opioids could be very addictive."[70]

To this end, marketing reps relentlessly touted misleading studies that supported that idea that OxyContin's lacked a

67. Kurt Kleiner, *Tobacco Giant 'Knew Nicotine was Addictive'*, NEW SCIENTIST (Mar. 30, 1996), https://www.newscientist.com/article/mg14920231-200-tobacco-giant-knew-nicotine-was-addictive/ [https://perma.cc/8BAS-QUN7].

68. *Id.*

69. U.S. FOOD & DRUG ADMIN., *supra* note 33.

70. Michael Friedman, *Product Pipeline and Strategy – VERY CONFIDENTIAL*, internal memo (Dec. 1994).

potential for abuse.[71] Before long, Purdue was getting notice from marketing reps in the field that doctors were prescribing the drug with the mistaken understanding that OxyContin was weaker than the stigmatized morphine, when in reality it was twice as powerful.[72] Friedman, when alerted to this misconception, stated that "it would be extremely dangerous at this early stage in the life of the product to tamper with this 'personality' to make physicians think the drug is stronger or equal to morphine . . . we are better off expanding use of OxyContin."[73]

Purdue, Friedman, and two other corporate executives subsequently pled guilty to misdemeanor charges of misbranding in a 2007 federal criminal case, in which they "acknowledged that the company fraudulently marketed OxyContin for six years as a drug that was less prone to abuse, as well as one that also had fewer narcotic side effects."[74] As part of its guilty plea, Purdue signed an agreement in which it promised to improve its past misconduct, self-impose independent monitoring to ensure ethical performance, and "hir[e] new compliance people [and] stressing to sales representatives that they should not make unfounded assertions about the drug."[75] In practice, however, "sales reps continued to market the drug as a safe opioid that would not cause addiction [and] the company continued to distribute literature that made false claims about the safety of opioids."[76]

B. Lobbying

Following the enormous publicity generated by the Surgeon General's 1964 report on Smoking and Health, public outcry over health and wellness prompted regulatory activity to limit the potential harms associated with tobacco use.[77] Among these regulations were the 1966 requirement for warning labels on

71. *See* Jane Porter & Hershel Jick, *Addiction Rare in Patients Treated with Narcotics*, 302 NEW ENG. J. OF MED. 123 (1978); *and* Pamela T.M. Leung et al., *A 1980 Letter on the Risk of Opioid Addiction*, NEW ENG. J. OF MED. (June 1, 2017).

72. Engstrom & Rabin, *supra* note 23, at 308.

73. Friedman, *supra* note 70.

74. Barry Meier, *In Guilty Plea, OxyContin Maker to Pay $600 Million*, N.Y. TIMES (May 10, 2007), https://www.nytimes.com/2007/05/10/business/11drug-web.html [https://perma.cc/44WS-E6LV].

75. KEEFE, *supra* note 42, at 294.

76. *Id.*

77. *See* PUB. HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, *supra* note 9.

cigarettes and the 1971 ban on radio and television advertising for tobacco products.[78] In response to these limits on the Big Four's market power, "the tobacco industry subsequently engaged in sophisticated and effective activities to limit the impact of antitobacco policy initiatives."[79] As a result, the anti-smoking activism had a much harder time influencing U.S. regulators, stunting the overall power of the movement.

Like the Big Four, Purdue also engaged in various forms of lobbying with equally effective results. Purdue utilized an extensive, aggressive, and well-funded political lobbying and intimidation scheme to retain unfettered access to the opioid market. The brunt of the aggressive lobbying came from Purdue spokesman Robin Hogen. When then Connecticut Attorney General Richard Blumenthal began an investigation into Purdue's failure to address abuse of OxyContin in July of 2001, Hogen threatened the attorney general in a voicemail, warning that the Blumenthal's election was approaching and stating that "I can assure you that this [investigation] has not helped."[80] This type of boasting occurred throughout Purdue's executive branch. Richard Sackler, for example, boasted about Purdue's political connections, stating in 2001 that "we can get virtually every senator and congressman we want to talk to on the phone in the next [seventy-two] hours."[81]

Behind these open threats and clear political connections was the capital to back it up. Between 2006 and 2015 alone, Purdue and other opioid manufacturers spent over $700 million on lobbying in every state and the District of Columbia. The lobbying was so extreme that one former DEA official described opioid manufacturers as having a "stranglehold" over Congress.[82]

---

78. CTR. FOR DISEASE CONTROL, 2000 SURGEON GENERAL'S REPORT HIGHLIGHTS: WARNING LABELS (2000).

79. Walter J. Jones & Gerard A. Silvestri, *The Master Settlement Agreement and Its Impact on Tobacco Use 10 Years Later*, NCBI (Mar. 2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3021365/ [https://perma.cc/55XJ-9QJC].

80. BARRY MEIER, PAIN KILLER 185 (2018); Transcript of voice message from Hogen, March 15, 2001, cited in Prosecution Memo.

81. KEEFE, *supra* note 42, at 249.

82. Chris McGreal, *Opioid Epidemic: Ex-DEA Official Says Congress is Protecting Drug Makers*, GUARDIAN (Oct. 31, 2016), https://www.theguardian.com/us-news/2016/oct/31/opioid-epidemic-dea-official-congress-big-pharma [https://perma.cc/8H2S-CVYB].

C. Litigation Tactics

When legal pressure began to build against the tobacco industry, the Big Four dug in, dealing with the approaching waves of litigation with the mentality that no one individual could afford to litigate against the wealth and power of the tobacco giants. The Big Four's method was "a lavishly financed and brutally aggressive defense that scares off or exhausts many plaintiffs long before their cases get to trial."[83] Industry leaders instructed their respective general counsels to "[v]igorously defend any case; look upon each as being capable of establishing dangerous precedent and refuse to settle any case for any amount."[84] This concern with the establishment of dangerous precedent turned out to be very well founded, since the precedent from *Cipollone* was the key to the Big Four's eventual downfall.[85]

During the first two waves of tobacco litigation, which stretched from 1950 to 1993, *Cipollone* was the only major suit in which individual plaintiffs won a judgment against tobacco companies for the injuries caused by the use of tobacco products.[86] But even in this success, "neither the family nor the law firm could afford to continue the litigation after the Supreme Court's ruling."[87] This changed during the third wave of tobacco litigation, in which plaintiffs' attorneys began to bring class action lawsuits against the biggest, wealthiest, and previously most untouchable tobacco manufacturers.[88] The first two waves of litigation were brought by solo practitioners who could be out-financed by the wealthy tobacco litigation teams, but the third wave saw an influx of big law firms representing huge classes of individual plaintiffs. These firms possessed the capital necessary to pursue litigation against the tobacco giants.[89]

---

83. Patricia Bellew Gray, *Tobacco Firms Defend Smoker Liability Suits with Heavy Artillery*, WALL ST. J., (Apr. 29, 1987).

84. J.F. Hind, Key Issue #5: External Relationships, Constraints, and Regulatory 12 (1977), https://www.industrydocuments.ucsf.edu/docs/#id=lfnm0050 [https://perma.cc/R6MA-6R8G].

85. Cipollone v. Liggett, 505 U.S. 504 (1992).

86. Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 904–05 (1998) (explaining that of all the cases filed between 1950 and 1995, only the Cipollone case returned a guilty verdict).

87. Cipollone v. Liggett, 505 U.S. 504 (1992).

88. Engstrom & Rabin, *supra* note 23, at 300.

89. *Id.* at 301.

Decades later, Purdue again followed the Big Four's approach when it came to fighting suits. Purdue's general counsel, Howard Udell, was reportedly "spending $3 million a month on litigation" by 2003.[90] In April of that year, Udell "crowed that 'no OxyContin plaintiff has prevailed in any of the lawsuits Purdue has been forced to defend.'"[91]

Much of Purdue's litigation costs went to settling cases that had the potential for a successful trial. When local governments and plaintiff classes brought such suits, Purdue opted for massive settlements where the company would admit no wrongdoing and all discovered documents would be sealed. Letting a case go to trial would result in all discovered classified documents and communications becoming public record, and Purdue wanted to avoid this at all costs. By way of example, "in 2007, Purdue paid $75 million to settle the claims of some 5,000 individuals, who were represented by the New York law firm Simmons Hanly Conroy. But the settlement was shielded by a strict confidentiality provision, and the fact of the payment didn't make news."[92] This type of dug-in litigation was effective until the point at which, similar to the fate of the Big Four, the waves of lawsuits threatened to bankrupt the company.

Both the tobacco industry and Purdue used sheer financial force to crush potential litigation before it could matriculate. In the litigation against the Big Four, the MSA was made possible by hundreds of plaintiffs from across the country bringing suits together, which brought litigation to a scale that even the Big Four were unable to settle with finances alone. Similarly, in the litigation against Purdue, the bankruptcy now facing the courts was only made possible with the combined pressure from hundreds of individual plaintiffs and local and state governments. This combined pressure again brought litigation to a scale that Purdue was unable to crush with pure financial strength.

IV. FUNDAMENTAL CORPORATE DIFFERENCES

Despite the clear similarities between the Big Four and Purdue, the waves of litigation resulted in vastly different outcomes for the litigants harmed by these corporations. This Article proposes that fundamental corporate differences were

90. KEEFE, *supra* note 42, at 247.
91. Engstrom & Rabin, *supra* note 23, at 313.
92. *Id.* at 314.

the root of these results, and that both direct and indirect protections afforded to corporate entities are a result of well-settled U.S. corporate law.

The tone at the top of a company, according to compliance law, sets the tone for the rest of the company when it comes to the ethical culture that the top executives want to pursue.[93] In other words, an unethical executive leadership often promotes unethical business dealings. By design, public companies have mechanisms by which these unethical executives are ordinarily rooted out of their roles of power and replaced by executives that better represent the interests of the shareholders and the public at large.[94]

Corporations, duly organized under Delaware corporate law, are owned by the shareholders that hold stock in that corporation.[95] The shareholders of any given corporation are required to elect a board of directors to oversee the operations of that corporation.[96] The board of directors are then themselves responsible for appointing a CEO and other chief executives.[97] Under this corporate structure, chief executives are always subject to removal by the board, and board members are always subject to removal by the shareholders.[98] Because of the ultimate power of the shareholders, board members and chief executives have a strong incentive to make decisions favorable to those shareholders. In the vast majority of corporations, favorable decisions are those that increase profit. The Big Four, as publicly held corporations, were subject to these same incentives. As a result, the shareholders behind the Big Four elected boards that would seek profit, and those boards appointed chief executives who would prioritize profits above all else. Under these powerful incentives, the chief executives within the Big Four disregarded public health concerns in the never-ending search for profits.[99] Since the tone at the top sets the tone for the rest of the company, the Big Four easily fell into a pattern of promoting systematic unethical sales and marketing behavior in hopes of increasing corporate profits for the shareholders.[100]

---

93. CORP. COMPL. HDBK. 5616414 ¶ 12.06 (2015) WL 5616414.
94. *Id.*
95. 8 Del.C. § 101 (1998).
96. 8 Del.C. § 141 (2020).
97. *Id.*
98. *Id.*
99. *See supra* Part III.
100. *Id.*

This corporate incentive structure, however, works in both directions. Once public outcry surrounding the tobacco industry began to mount, litigation and liability threatened the profits that the shareholders were so eager to maintain. A prime example of this shifting incentive structure can be seen in the case of the seven tobacco CEOs who were put on trial for perjury.[101] Once found guilty, these CEOs were forced to quit the industry and were soon replaced by boards of directors seeking to placate an unhappy base of shareholders.[102]

The Big Four's incentive structure also greatly reduced their negotiation power in civil litigation. The MSA presented an opportunity for the Big Four to settle all litigation against them, and thus limit the liability that they would be subject to going forward. The shareholders likely saw the MSA as an easy way to preserve the remaining value of their stock and were quick to accept its terms with little negotiation. As a result, the MSA was incredibly wide-reaching and effective tool by which the public and the government could receive restitution for harms caused by tobacco products.[103]

Purdue, a company also organized as a corporation, is subject to the same corporate law as the Big Four. Its board of directors and chief executives, however, were not subject to the same replacement mechanisms as the boards and chief executives of the Big Four. As a private, family-owned corporation, the members of the Sackler family were the shareholders of Purdue.[104] As such, the family could elect their own board of directors, which they filled primarily with the family members themselves.[105] The CEO and other chief executives were either family members or family loyalists under no threat of removal regardless of public scrutiny or impending lawsuits. "Inside Purdue . . . power was determined entirely by one's relationship to the family."[106] With no threat of removal by shareholders, the board was free to elect any executives they chose.

Within a public company, an unethical tone at the top is usually corrected naturally through public intervention in the

---

101. Myron Levin, *All 7 Tobacco Executives in Perjury Probe Have Quit the Industry*, L.A. TIMES (June 1, 1996), https://www.latimes.com/archives/la-xpm-1996-06-01-fi-10679-story.html [https://perma.cc/5QLZ-XX8F].

102. *Id.*

103. Barrett, *supra* note 28, at 13.

104. Keefe, *supra* note 44.

105. *Id.*

106. KEEFE, *supra* note 42, at 156.

form of shareholder reform, as seen in the replacement of the tobacco CEOs. Purdue, as a privately held company, acted instead as a negative feedback loop, wherein the most unethical of the executives were rewarded for their conduct. A public addiction health crisis is incredibly profitable for those fueling it. Richard Sackler, arguably the most powerful family member and executive inside Purdue, made it known early on that "there is absolutely nothing that is ethical and legal that we won't do to make the greatest sales force on earth even more successful."[107] This curious use of double negatives may have been a hint at the soon-to-come myriad of unethical marketing techniques and general indifference shown by the company.[108]

Unlike the Big Four, Purdue enjoyed immense negotiating power in civil litigation. With no threat of removal by unhappy shareholders, the family members in board and executive positions within the company were free to weather the mounting storm of legal trouble and maintain a stubborn, immovable, and cold exterior when faced with public outrage.[109] These protections were the principal vehicle by which the family negotiated settlement agreements. The executives presented terms that were heavily skewed toward their own interests because they were also the company's shareholders. When settlement negotiations came to a standstill with attorneys general unable to accept the skewed terms, it was entirely within the power of the Sacklers to bankrupt the company in the hopes of freezing all civil litigation. These were all steps uniquely available to Purdue, and unavailable to the Big Four of the tobacco industry.[110]

V. DIFFERENCES IN LITIGATION RESULTS

These fundamental corporate differences were at play during the settlement negotiations faced by the Big Four and Purdue. Both defendants were directly involved in a public health crisis, both used lobbying to prevent governmental action as a result of that crisis, both used their vast financial resources to stop litigation before it could ever go to trial, and both eventually had to face judgment as a direct result of public

107. *Id.* at 207.
108. *See supra* Part III.
109. KEEFE, *supra* note 42, at 397.
110. *See supra* Part III.

outrage and an overwhelming multidistrict litigation.[111] And yet, the Big Four settled for $206 billion while Purdue went bankrupt, immunizing the company—and the Sackler family—from financial liability.[112] This was the direct result of the different corporate structures employed by the two sets of defendants. The Sacklers, as the family behind the privately-owned multi-billion-dollar business, had unilateral negotiating power to which the Big Four did not have access. It was this negotiating power that allowed the family to skirt the legal system and retain the majority of their accrued wealth.[113]

These fundamental corporate differences also explain why the Sacklers were more willing to embrace bankruptcy as a solution to litigation than the Big Four. The value of publicly traded stock is usually directly correlated with the performance of the corporation. Thus, shareholders have an incentive to promote the success of the company, or risk losing the value of their holdings. Furthermore, shareholders receive dividends from the profits of the company.[114] A bankrupt company is often unable to pay its creditors, let alone its dividends. For these reasons, the shareholders behind the Big Four had every financial incentive to keep their corporations afloat.

The Sacklers differed from the tobacco executives in that they retained ownership of Purdue. Long before settlement negotiations, the Sacklers were already using their executive power to pay themselves outsized profits from the company's previous revenues.[115] And when the company was pushed into bankruptcy, the Sacklers had already taken as much out of the company as was legally possible.[116] For these reasons, the Sacklers could not be forced into a settlement in the way that the Big Four had been decades before.

Those harmed by Purdue, however, are not without hope of a better outcome. On December 16, 2021, Judge Colleen McMahon of the U.S. District Court for Southern New York vacated Judge Drain's bankruptcy agreement.[117] Judge McMahon's opinion focused on the Sackler family's transfer of billions of dollars to offshore accounts, which effectively bled Purdue dry before the Sacklers jumped ship during bankruptcy

---

111. *Id.*
112. Merle, *supra* note 51.
113. Keefe, *supra* note 44.
114. 8 Del. C. § 170 (2010).
115. *See supra* Part III.
116. *Id.*
117. *In re* Purdue Pharma, WL 5979108 (S.D.N.Y. 2021).

proceedings.[118] In her opinion, Judge McMahon stated, "The great unsettled question in this case is whether the Bankruptcy Court—or any court—is statutorily authorized to grant such releases. This issue has split the federal Circuits for decades."[119] With federal courts now weighing in, the legal system has the opportunity to ensure that wealthy families are not able to abuse the bankruptcy system to avoid personal liability for acts made as owners of a liable company.

A certificate of appealability was granted on January 7, 2022, to the U.S. Second Circuit Court of Appeals which will be the next to weigh in on the legality of Judge Drain's bankruptcy agreement.[120] How any higher appellate courts weigh on the issue will establish the legality, or the illegality, of holding the Sackler family immune from liability for their role in the opioid crisis. In hopes of finding an equitable outcome for those harmed by Purdue and the Sackler family, either the appellate court or lawmakers would serve the interests of both the legal system and the public at large by de-insulating the Sackler family from liability. These decision-makers should ensure that the Sacklers be required to pay what they rightfully owe for their role in the opioid crisis, or risk allowing a similar unequitable result in future cases such as this one. This change could come through a modification to Delaware corporate law or via a new and binding legal precedent. Regardless of the route, decision-makers should ensure that rich and powerful families such as the Sacklers cannot use the legal system to avoid liability in the future.

CONCLUSION

The Big Four tobacco settlement and the Purdue bankruptcy, given their parallel legal trajectories and the history of the two companies up to the point of their eventual legal outcomes, should have reached similar results. Both companies participated in similar marketing schemes to promote their products at the expense of public health. Both companies had similar financial resources with which to litigate

118. *Id.*; *see also* Geoff Mulvihill, *Judge Rejects Purdue Pharma's Sweeping Opioid Settlement*, AP NEWS (Dec. 16, 2021), https://apnews.com/article/business-health-lawsuits-opioids-colleen-mcmahon-1e96ea41f783d8f5db0a024fbb304c1f [https://perma.cc/7LZZ-ZYUZ].

119. *In re* Purdue Pharma WL 5979108 (S.D.N.Y. 2021).

120. *Id.*

claims as a result of their respective public health crises. And both companies placed financial gain above public health.

When it came to the end of their respective multidistrict litigations, however, differences in fundamental corporate structures gave Purdue a way to avoid true legal justice when it came to its role in the opioid crisis, while the Big Four were forced into a massive and costly settlement agreement. Without the restraints that usually bind executives of public companies, the Sacklers were free to bleed their company dry before using it as a shield to escape further civil liability and retain the billions of dollars that their company made over two decades of selling OxyContin. This was a route through which only the executives of a privately held company could escape, and this lapse in legal and social accountability may well lead to an entirely new and underwhelming form of financial and social retribution in cases that will undoubtedly follow in Purdue's footsteps.