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## A Wanted Opioid-Addiction Challenge: How Should Louisiana Allocate Proceeds from Opioid Litigation?

Addison Hollis

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# **A *Wanted* Opioid-Addiction Challenge: How Should Louisiana Allocate Proceeds from Opioid Litigation?**

*Addison Hollis\**

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\* J.D./D.C.L., 2021. Paul M. Hebert Law Center, Louisiana State University. I would like to thank my advisors, President Thomas Galligan, Jr. and Michael Malinowski, for their support and mentorship. Also, I want to thank my family, especially Sam Chastain, for their limitless love and encouragement.

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## INTRODUCTION

By its very nature, a virus spreads, infects, festers, and devastates at speeds difficult to understand.<sup>1</sup> COVID-19, a virus the world has come to know, reached the United States without stopping before it spread to the very place dear to so many, home to Jazz music, gumbo, and a good time—New Orleans, Louisiana.<sup>2</sup> News stories of the virus infiltrated the lives of Louisiana citizens.<sup>3</sup> State and local governments rolled out mandates never before exercised to reduce the spread of the virus.<sup>4</sup> Schools closed.<sup>5</sup> Businesses closed.<sup>6</sup> Families drew close to one another.<sup>7</sup> The world, the state of Louisiana, and individuals alike *reacted*.<sup>8</sup> Reaction, though it may take many forms, is a natural human response to a crisis.<sup>9</sup> When a pandemic shatters the very threads of a community—through the effects it has on their finances, their health, or their overall wellbeing—communities not only search for information but also strive for solutions.<sup>10</sup> No one can deny that COVID-19 has impacted the lives of so many in the

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1. See *Coronavirus Disease 2019 (COVID-19)*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> [<https://perma.cc/LTK2-3T4S>] (last updated Sept. 1, 2020).

2. See *Coronavirus (COVID-19)*, LA. DEP'T OF HEALTH, <http://ldh.la.gov/Coronavirus/> [<https://perma.cc/GQS2-W7HP>] (last visited Nov. 2, 2020).

3. *Id.*

4. *Id.*

5. See *Covid-19 News*, LA. DEP'T OF HEALTH, <http://ldh.la.gov/index.cfm/newsroom/category/227> [<https://perma.cc/Y99U-DDRS>] (last visited Nov. 2, 2020).

6. *Id.*

7. See generally Mark Ballard & Sam Karlin, *Louisiana issues statewide stay-at-home order to combat coronavirus spread; see details here*, ADVOCATE (Mar. 22, 2020, 1:47 PM), [https://www.theadvocate.com/baton\\_rouge/news/coronavirus/article\\_922869e8-6c6d-11ea-aece-6b6fd5e8f4bd.html](https://www.theadvocate.com/baton_rouge/news/coronavirus/article_922869e8-6c6d-11ea-aece-6b6fd5e8f4bd.html) [<https://perma.cc/66ER-AQ83>].

8. *Covid-19 News*, *supra* note 5; Ballard & Karlin, *supra* note 7.

9. *Covid-19 News*, *supra* note 5; Ballard & Karlin, *supra* note 7.

10. *Covid-19 News*, *supra* note 5; Ballard & Karlin, *supra* note 7.

world. In the Louisiana community, the pandemic has proven ever so incessant.<sup>11</sup>

Sadly, COVID-19 is not the only crisis this state and the rest of the country face.<sup>12</sup> A different sort of virus continues to infest, fester, and devastate—addiction.<sup>13</sup> Addiction, as those individuals with personal experience can attest, spreads as easily and with as much impact as COVID-19.<sup>14</sup> Just like the virus, addiction does not discriminate based on the color of your skin, the neighborhood you grew up in, your undergraduate GPA, or even how hard you may fight against it.<sup>15</sup> Viruses and addiction do three things, and they do it exceptionally well— attack, destroy, and attack again.<sup>16</sup> Bleak as it may sound, there are lessons to be learned from the devastating nature of COVID-19, chief of which is to react.<sup>17</sup> The affected communities have taken numerous selfless measures to protect themselves and their loved ones during this pandemic. The addiction crisis deserves the same relentless response.<sup>18</sup>

The opioid epidemic has taken the lives of hundreds of thousands of Americans since the early 2000s.<sup>19</sup> Determining the party responsible for this epidemic captured the public's attention when state and local governments began litigation against pharmaceutical companies, physicians, and medical distributors.<sup>20</sup> Asking who is responsible for the crisis is an important and necessary step to take in healing the nation that has been so affected by this crisis.<sup>21</sup> Bringing suit against these actors to determine their responsibility merely initiates the rebuilding of the

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11. *Covid-19 News*, *supra* note 5; Ballard & Karlin, *supra* note 7.

12. See *Opioid Overdose: Data Overview*, CDC, <https://www.cdc.gov/drug-overdose/data/index.html> [<https://perma.cc/2JZM-9ENG>] (last updated March 19, 2020); Debra Bruno, *The Opioid Litigation Wars*, WASH. LAW., Jan./Feb. 2020, at 15–18.

13. See *Opioid Overdose: Data Overview*, *supra* note 12; Bruno, *supra* note 12.

14. See *Opioid Overdose: Data Overview*, *supra* note 12; *Coronavirus Disease 2019 (COVID-19)*, *supra* note 1.

15. See *Opioid Overdose: Data Overview*, *supra* note 12; *Coronavirus Disease 2019 (COVID-19)*, *supra* note 1.

16. See *Opioid Overdose: Data Overview*, *supra* note 12; *Coronavirus Disease 2019 (COVID-19)*, *supra* note 1.

17. See *Opioid Overdose: Data Overview*, *supra* note 12; *Coronavirus Disease 2019 (COVID-19)*, *supra* note 1.

18. See *Opioid Overdose: Data Overview*, *supra* note 12; *Coronavirus Disease 2019 (COVID-19)*, *supra* note 1.

19. See *Opioid Overdose: Data Overview*, *supra* note 12; Bruno, *supra* note 12.

20. See generally Bruno, *supra* note 12.

21. *Id.*

communities devastated by addiction.<sup>22</sup> If the plaintiffs are successful in the litigation, state and local governments will then be asked to develop and execute a strategic allocation of the funds they receive from the litigation.<sup>23</sup> Ensuring that programs designed to rehabilitate devastated communities, fight against the ongoing epidemic, and prevent future ones are sufficiently available, adequately well-funded, and effectively applied must be the priority of local and state governments.<sup>24</sup>

Louisiana faces a particular dilemma over the allocation of settlement proceeds.<sup>25</sup> Louisiana's dilemma involves the allocation of settlement proceeds to hundreds of local actors combatting the opioid epidemic plaguing the state.<sup>26</sup> In the near future, a settlement resulting from both an ongoing state suit and federal multidistrict litigation (MDL) involving the opioid epidemic will present Louisiana with a choice. The decision can be either to react to the whims and wants of certain plaintiffs or to plan a proactive approach to the allocation of settlement proceeds that meets the needs of citizens affected by the opioid crisis.<sup>27</sup> In hopes of facilitating a settlement, the opioid MDL consolidates pending federal lawsuits to process complex cases and streamline pretrial motions.<sup>28</sup> When litigants come together, settlement becomes an ideal course of action.<sup>29</sup>

In addition to the state's involvement in the opioid MDL in federal court, Louisiana also filed a state suit against opioid manufacturers in 2017 that is still pending.<sup>30</sup> Moreover, the crisis impacted the lives of Louisiana citizens and drained major funding from the state and local governments through costs such as court-administration expenditures from opioid criminal cases; the costs of distributing drugs that reverse opioid overdoses; increases to police, fire, and EMS budgets to handle the rise in opioid overdoses; Medicaid and Medicare coverage of patients with opioid

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22. *Id.*

23. *Id.*

24. *Id.*

25. Sam Karlin, *As opioid lawsuits balloon in Louisiana, potential settlement dollars face these complexities*, ADVOCATE (June 30, 2019, 8:45 AM), [https://www.theadvocate.com/baton\\_rouge/news/politics/article\\_928d11c8-99d1-11e9-9447-abbab61f21fa.html](https://www.theadvocate.com/baton_rouge/news/politics/article_928d11c8-99d1-11e9-9447-abbab61f21fa.html) [https://perma.cc/495S-LQLR].

26. *Id.*

27. 28 U.S.C. § 1407 (2018); Karlin, *supra* note 25.

28. Karlin, *supra* note 25.

29. Colin Dwyer, *Your Guide To The Massive (And Massively Complex) Opioid Litigation*, NPR (Oct. 15, 2019), <https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation> [https://perma.cc/J7HN-UQLP].

30. *See generally* Karlin, *supra* note 25.

addiction; grants and subsidies to safety net hospitals serving communities that the opioid crisis affected; grants and subsidies allocated to local drug-treatment centers; and criminal prosecution and enforcement costs.<sup>31</sup> According to Louisiana's Department of Health, the state's healthcare cost for opioid abuse—only one portion of the government's expenditures—is approximately \$296 million per year.<sup>32</sup>

At such a high economic and social cost, Louisiana's involvement in the opioid litigation is sensible.<sup>33</sup> The question of where to allocate settlement dollars will be a major issue for Louisiana because of the varied involvement of parish, city, and state actors, as well as the diverse range of affected population groups in the state.<sup>34</sup> The large number of plaintiffs involved in both the opioid MDL and the state lawsuits against the manufacturers and distributors makes this wave of litigation unprecedented. Further, the division of potential settlement or award proceeds is uncertain.<sup>35</sup> Louisiana lacks procedural devices that mandate the proper and efficient allocation of the settlement funds from the opioid MDL.<sup>36</sup> The Louisiana Legislature enacted laws in reaction to the growing opioid-addiction epidemic in the state;<sup>37</sup> however, the current opioid

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31. See generally Elizabeth Weeks & Paula Sanford, *Financial Impact of the Opioid Crisis on Local Government: Quantifying Costs for Litigation and Policymaking*, 67 U. KAN. L. REV. 1061, 1119 (2019).

32. LA. COMM'N ON PREVENTING OPIOID ABUSE, LA. DEP'T OF HEALTH, THE OPIOID EPIDEMIC: EVIDENCE BASED STRATEGIES LEGISLATIVE REPORT 17, <http://ldh.la.gov/assets/docs/BehavioralHealth/Opiods/LCPOAFinalReportPkg20170331.pdf> [<https://perma.cc/9LFV-GHZR>].

33. *Id.*

34. Karlin, *supra* note 25. The diverse range of affected population groups include providers of addiction treatment, treatment of neonatal abstinence syndrome and birthing facilities, and educational programs for prescriber training. See LA. COMM'N ON PREVENTING OPIOID ABUSE, *supra* note 32.

35. Nicolas P. Terry, *The Opioid Litigation Unicorn*, 70 S.C. L. REV. 637, 658 (2019).

36. Karlin, *supra* note 25.

37. LA. REV. STAT. §§ 40:1001–14; 40:978.1; 40:203.10; 40:1024 (2020). In 2017, the Louisiana Legislature passed statutes implementing a prescription monitoring program in response to Louisiana's status as a high prescribing state. From 2014 to 2016, Louisiana expanded access to an opioid-overdose medication, naloxone. The Louisiana Good Samaritan Law provides that a person who seeks care for an individual who is suffering from an emergency—in this case, an opioid overdose—is free from prosecution despite evidence of the “possession of a controlled dangerous substance.” *Id.* In 2017, the Louisiana Legislature expanded state law to allow the implementation of local needle exchanges in cities, towns, or parishes. *Id.*

litigation presents an opportunity to act proactively and ensure timely and fair allocation of the settlement proceeds.<sup>38</sup>

Louisiana has a history of ignoring local concerns such as public health rehabilitation, as its participation in the Tobacco Master Settlement Agreement (MSA) illustrates.<sup>39</sup> A look at Louisiana's experience with this MSA demonstrates the need to be proactive when dealing with matters of public health because the Tobacco MSA failed to set aside a certain percentage of the settlement funds for public health rehabilitation.<sup>40</sup> Specifically, if the opioid MDL settlement fails to require communities to invest a significant portion of the funds in public health programs, then the MDL plaintiffs should tailor their portion of the settlement to the particular needs of the communities and mandate that a majority of the settlement funds go to initiatives for medication-assisted treatment.<sup>41</sup> Local governments should design these programs to encourage a proactive approach to the public health crisis.<sup>42</sup> They can then distribute the remaining funds to replenish their depleted budgets.<sup>43</sup> The settlement must guarantee an efficient yet fair allocation of the money that Louisiana obtains through opioid litigation.<sup>44</sup> The key to success lies in the Louisiana plaintiffs' ability to construct a settlement so as to impart to impacted individuals a sense of justice.<sup>45</sup>

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38. See *infra* Part III; Karlin, *supra* note 25.

39. See generally Nicolas Terry & Aila Hoss, *Opioid Litigation Proceeds: Cautionary Tales from the Tobacco Settlement*, HEALTH AFFAIRS (May 23, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180517.992650/full/> [https://perma.cc/3NHZ-NPPV].

40. *Id.*

41. See generally Weeks & Sanford, *supra* note 31; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, THE PEW CHARITABLE TRS. (Nov. 22, 2016), <https://www-aws.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/11/medication-assisted-treatment-improves-outcomes-for-patients-with-opioid-use-disorder> [https://perma.cc/GVG8-PUJP].

42. See generally Weeks & Sanford, *supra* note 31; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

43. See generally Terry, *supra* note 35, at 645; LA. COMM'N ON PREVENTING OPIOID ABUSE, *supra* note 32; Weeks & Sanford, *supra* note 31.

44. See generally J. TRAVIS MCILWAIN, LA. SENATE, TOPS FUND AND TOBACCO MASTER SETTLEMENT AGREEMENT, [http://senate.la.gov/Tops/Presentations/TOPS\\_MSA\\_Task%20Force%20SUMMARY%20FINAL.pdf](http://senate.la.gov/Tops/Presentations/TOPS_MSA_Task%20Force%20SUMMARY%20FINAL.pdf) [https://perma.cc/3PCN-TQL3].

45. See generally Weeks & Sanford, *supra* note 31; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

Part I of this Comment provides background on the opioid crisis in the United States and on state and local governments' efforts to place responsibility on the manufacturers and distributors of opioid drugs. Further, Part I introduces the rise of opioid litigation and the shift to a national focus on the role of the court in settlement negotiations. Part II details the pending opioid MDL in Ohio and the state case of *Oklahoma v. Purdue Pharma L.P.* Additionally, Part II describes Louisiana's role in the opioid MDL litigation, as well as the state's general goal in the litigation. Part III illustrates and discusses how the opioid crisis had a heightened effect on Louisiana and argues that Louisiana's response to the crisis was improper. Indeed, Part III examines Louisiana's history of ignoring local interests in developing public-health rehabilitation. Particularly, Part III studies Louisiana's ineffective response to the Tobacco MSA. Part IV recommends that Louisiana avoid repeating its history and suggests that the plaintiffs in the opioid litigation, particularly Louisiana local governments, use a majority of the settlement proceeds to fund rehabilitation programs for those individuals with opioid addiction.

#### I. PUTTING A PRICE ON OPIOID ADDICTION

Americans regularly die from overdoses involving prescription and illicit opioids.<sup>46</sup> The Centers for Disease Control (CDC) reports that the number of opioid overdose deaths has quadrupled since 1999.<sup>47</sup> Currently, 130 Americans die every day from an opioid overdose.<sup>48</sup> Although an estimated 2 million Americans, ages 12 and up, are addicted to opioids, only 400,000 people receive treatment at a specialty facility.<sup>49</sup>

Opioids, a class of drugs found in a plant called "the opium poppy," target the brain to induce the effect of pain relief.<sup>50</sup> There are three

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46. See *Opioid Overdose: Data Overview*, *supra* note 12.

47. *Id.*

48. *Id.*

49. Substance Abuse & Mental Health Servs. Admin., *Key Substance Use and Mental Health Indicators in the United States: Results from the 2018 National Survey on Drug Use and Health*, DEP'T OF HEALTH & HUM. SERVS. (2019), <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf> [<https://perma.cc/UD7D-6X5N>].

50. Opioids include legal prescription medications and illegal drugs such as heroin. See Michael J. Malinowski, *The U.S. Science and Technology "Triple Threat": A Regulatory Treatment Plan for the Nation's Addiction to Prescription Opioids*, 48 U. MEM. L. REV. 1027 (2018); *Opioid Addiction*, JOHNS HOPKINS MED. <https://www.hopkinsmedicine.org/opioids/what-are-opioids.html> [<https://perma.cc/4X2N-KHW4>] (last visited Oct. 21, 2019).



categories of opioids: (1) natural opioids, (2) synthetic opioids, and (3) heroin.<sup>51</sup> Natural opioids include morphine, codeine, oxycodone, hydrocodone, hydromorphone, and oxymorphone.<sup>52</sup> Synthetic opioids are methadone, tramadol, and fentanyl.<sup>53</sup> The last category, heroin, an illegally made street drug, is created from morphine.<sup>54</sup>

The CDC characterizes the opioid epidemic in terms of “Three Waves of Opioid Overdose Deaths.”<sup>55</sup> In the 1990s, the first wave included an increase in opioid prescriptions that led to an increase in prescription-related opioid overdoses.<sup>56</sup> Second, heroin-related overdoses rapidly increased beginning in 2010.<sup>57</sup> Finally, the third wave involved synthetic-overdose deaths, which rose above both heroin and prescription-related opioid deaths in 2013.<sup>58</sup> A basic understanding of opioids reveals that multiple drugs, not one predominant drug, caused the current opioid crisis; however, prescription drugs largely initiated the crisis.<sup>59</sup>

*A. The Opioid Crisis in the United States: Americans in Pain and the Healthcare Industry’s Response*

The use of opioids involves a serious risk of addiction.<sup>60</sup> Although addiction differs for each individual, some studies show that physiological effects may occur anywhere between the first dose and as little as two weeks.<sup>61</sup> For many years, doctors were neither aware of the risks associated with addiction, nor did they believe that opioids were addictive.<sup>62</sup> Nevertheless, the medical profession now recognizes opioid addiction as a serious disorder that leads individuals to use opioids in a manner that is harmful to their physical and mental health.<sup>63</sup> Many people obtain a pleasurable feeling from the pain-relieving effect of the drug, which often leads to a craving for more opioids.<sup>64</sup> Additionally, opioids

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51. See *Opioid Overdose: Data Overview*, *supra* note 12.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Opioid Addiction*, *supra* note 50.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

induce a physiological response of dependence.<sup>65</sup> Dependence on an opioid drug causes withdrawal when an individual stops taking it, which often leads to the misuse and possible overdose.<sup>66</sup>

In 2018, the CDC collected and published the most recent data available detailing the rise in opioid addiction.<sup>67</sup> The CDC statistics concluded that “two out of three drug overdose deaths in 2018 involved an opioid.”<sup>68</sup> Further, the CDC also found that since 1999 over 750,000 people have died from opioid overdose.<sup>69</sup> In 1999, the report identifies a major increase in drug-related deaths, at the same time as the rise of prescription opioids began.<sup>70</sup> Those calculations include all types of opioids; however, the CDC reported that “32% of those deaths involved prescription opioids.”<sup>71</sup> Further, over 70% of the people who died from opioid overdose were previously prescribed legal opioids.<sup>72</sup> Indeed, research states that some patients are unwilling to accept prescription opioids regardless of their pain level, out of fear of becoming addicted to the drug.<sup>73</sup>

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65. *Id.*

66. Linda Gowing et al., *Buprenorphine for managing opioid withdrawal*, COCHRANE DATABASE SYSTEMATIC REVIEWS 3 (2017) (“The signs and symptoms of the opioid withdrawal syndrome include irritability, anxiety, apprehension, muscular and abdominal pains, chills, nausea, diarrhea, yawning, lacrimation, sweating, sneezing, rhinorrhea, general weakness and insomnia. Symptoms of the opioid withdrawal syndrome usually begin two to three half-lives after the last opioid dose, that is, 6 to 12 hours for short acting opioids such as heroin and morphine, and 36 to 48 hours for long acting opioids such as methadone. Following cessation of a short half-life opioid, symptoms reach peak intensity within two to four days, with most of the obvious physical withdrawal signs no longer observable after 7 to 14 days. . . . The first, or acute, phase of withdrawal is followed by a period of six months or so of a secondary or protracted withdrawal syndrome. This protracted syndrome is characterised by a general feeling of reduced well-being which is reflected in measurable abnormal physiological functioning.”).

67. *See Opioid Overdose: Data Overview*, *supra* note 12.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Katie Thomas & Charles Ornstein, *Amid Opioid Crisis, Insurers Restrict Pricey, Less Addictive Painkillers*, N.Y. TIMES (Sept. 17, 2017), <https://www.nytimes.com/2017/09/17/health/opioid-painkillers-insurance-companies.html> [<https://perma.cc/Y2UW-SHNU>].

In 2018, the CDC compiled the Drug Surveillance Report on opioid prescribing patterns and statistics.<sup>74</sup> Among the entire population of the United States, 17.4% of people filled at least one prescription for an opioid as directed by a physician in 2018.<sup>75</sup> The worrisome data includes the escalating rates of prescriptions as each year passes.<sup>76</sup> Although the national average is very high, some states surpass others in opioid prescribing rates.<sup>77</sup> Alabama, Arkansas, Louisiana, Mississippi, and Tennessee have the highest rates of opioid prescriptions in America.<sup>78</sup>

A steady rise of prescription-opioid deaths occurred from 1999 to 2016.<sup>79</sup> It is also important to note that a dramatic increase in deaths from synthetic opioids other than methadone also occurred.<sup>80</sup> This demonstrates that though many factors are at play in the current public health crisis, it mainly followed the steady rise in prescription opioid usage.<sup>81</sup> Overall, the national data on opioid addiction indicates that the rise in prescription opioids is associated with the rise in the use of synthetic and illicit opioids.<sup>82</sup>

### *B. The Opioid Crisis in the United States: Americans Looking for Someone to Pay*

The cost of the opioid crisis is nothing less than astronomical, and cities, counties, and states are looking for someone to pay.<sup>83</sup> Estimations of the costs that have accrued since 2001 range from \$50 billion to over \$1 trillion.<sup>84</sup> Further, commentators predict that the costs of healthcare,

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74. CDC, DEP'T OF HEALTH & HUM. SERVS., 2018 ANNUAL SURVEILLANCE REPORT OF DRUG-RELATED RISKS AND OUTCOMES—UNITED STATES (Aug. 31, 2018), <https://www.cdc.gov/drugoverdose/pdf/pubs/2018-cdc-drug-surveillance-report.pdf> [<https://perma.cc/2BH2-FHVD>] [hereinafter 2018 ANNUAL SURVEILLANCE REPORT OF DRUG-RELATED RISKS AND OUTCOMES—UNITED STATES].

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 11.

79. *Id.*

80. *Id.*

81. *Id.*

82. 2018 ANNUAL SURVEILLANCE REPORT OF DRUG-RELATED RISKS AND OUTCOMES—UNITED STATES, *supra* note 74.

83. Dwyer, *supra* note 29.

84. *Id.* (“These numbers can be tough to pin down, but one thing isn’t in dispute: Between the costs of health care, criminal justice, lost productivity and addiction treatment programs, agencies at every level of government have

criminal justice, and addiction-treatment programs will amount to another half trillion this year.<sup>85</sup>

In response to this addiction crisis, various state and local governments have filed lawsuits against opioid manufacturers and distributors.<sup>86</sup> Claims against opioid manufacturers include marketing the widespread use of opioids and minimizing the risks of addiction and overdose.<sup>87</sup> Moreover, claims against opioid distributors include failing to notice, investigate, or report suspicious orders.<sup>88</sup> The plaintiffs seek damages and penalties for the amounts they have paid because of excessive opioid prescriptions.<sup>89</sup> Beginning in the late 1990s, the manufacturers aggressively advertised opioids to a broader range of patients than before, and physicians began prescribing at much higher rates than before.<sup>90</sup> The issue in the opioid litigation is whether the pharmaceutical manufacturers and distributors are responsible for the opioid epidemic.<sup>91</sup>

## II. STATE AND LOCAL GOVERNMENTS HEAR THE CALL TO ACTION

Louisiana state and local governments are plaintiffs in several actions against opioid manufacturers and distributors.<sup>92</sup> Although the state government's suit has not advanced since beginning in 2017, Oklahoma brought a similar lawsuit against the same defendants in 2019.<sup>93</sup> Understanding Oklahoma's experience with this litigation provides valuable insight into Louisiana's possible legal theories and potential success.<sup>94</sup>

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combined to lose tens of billions of dollars trying to combat the crisis. A study published by the National Institutes of Health in 2013 placed the national economic burden at \$78.5 billion. With roughly 70,000 people dying annually from drug overdoses—more than half of them related to opioids—today's cost is likely far higher. Others have placed the financial effects at anywhere from around \$50 billion to upward of \$1 trillion since 2001, with another half-trillion projected by 2020.”).

85. *Id.*

86. Dwyer, *supra* note 29.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Oklahoma *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816, at \*4, (Okla. Dist. Ct. Aug. 26, 2019); Karlin, *supra* note 25.

93. Karlin, *supra* note 25.

94. *Id.*

### A. Oklahoma v. Purdue Pharma L.P.

The success of the Oklahoma state government in *Oklahoma v. Purdue Pharma L.P.* provides some context for the legal claims of plaintiffs in both the federal opioid MDL and state suits like Louisiana's.<sup>95</sup> The Oklahoma government brought a state claim for public nuisance against opioid manufacturers Purdue Pharma L.P. and Johnson & Johnson for their roles in marketing, promoting, and selling the drugs in the state.<sup>96</sup> The nation closely watched the case because it was the first opinion to be on record during this wave of opioid litigation.<sup>97</sup> On August 26, 2019, the parties reached a \$572 million settlement, which surpassed a previous settlement that Oklahoma reached with another pharmaceutical company and which "raise[d] the stakes" in opioid litigation.<sup>98</sup> Notably, the Oklahoma district court found that the manufacturers strategized to increase awareness that prescription opioids were the key to addressing undertreated chronic pain.<sup>99</sup>

The Oklahoma opinion accounted for the branded and unbranded marketing efforts "designed to reach Oklahoma doctors through multiple means and at multiples times over the course of the doctor's professional education and career in Oklahoma."<sup>100</sup> The pharmaceutical companies trained their salespersons to market the drugs "through the use of 'emotional selling' for opioids by convincing physicians that pain was harming patients."<sup>101</sup> The manufacturers developed the term "pseudoaddiction" to persuade physicians that any indication of addiction was not, in reality, a sign of addiction.<sup>102</sup> Instead, the manufacturers recommended that doctors prescribe more opioids to patients who

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95. *Purdue Pharma L.P.*, No. CJ-2017-816, at \*4.

96. *Id.* ("In Oklahoma, nuisance law is defined by statute 50 O.S. 1981 § 1, defines a nuisance as follows: A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or Second. Offends decency; or Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.").

97. *Oklahoma Judge Orders Johnson & Johnson to Pay \$572M for Opioid Abatement*, MEALEY'S EMERGING DRUGS & DEVICES (Aug. 26, 2019).

98. Karlin, *supra* note 25 (quoting Professor Margaret Thomas).

99. *Purdue Pharma L.P.*, No. CJ-2017-816, at \*10.

100. *Id.* at \*4.

101. *Id.* at \*10.

102. *Id.* at \*11.

exhibited such symptoms.<sup>103</sup> Multiple pamphlets, internet sites, and sales pitches instructed physicians and patients on the exaggerated benefits of opioid drugs.<sup>104</sup> The court identified the manufacturer's distribution of misleading marketing materials in Oklahoma as a major contributor to the state's high rate of physicians prescribing opioids.<sup>105</sup> Noting that "the increase in opioid addiction and overdose deaths following the parallel increase in opioid sales in Oklahoma was not a coincidence," the court found the necessary causal link to connect the opioid crisis to the manufacturing companies under Oklahoma's public nuisance law.<sup>106</sup>

Oklahoma law does not limit the doctrine of public nuisance laws to property issues.<sup>107</sup> Precedent from the Oklahoma Supreme Court includes corporate activity in the definition of what constitutes public nuisance.<sup>108</sup> Specifically, the doctrine describes nuisance as "any act which annoys, injures, endangers the comfort, repose, health, or safety of others, or in any way renders other persons insecure in life or in the use of property."<sup>109</sup> The state district court held that Oklahoma met its burden of proving the elements of the public nuisance statute when it found that the manufacturer's actions were a cause-in-fact of the state's injuries, meaning the manufacturers "engaged in false and misleading marketing of both their drugs and opioids generally."<sup>110</sup>

Further, the court approved the state's proposed abatement plan for one year.<sup>111</sup> The plan outlines the targeting programs and funds necessary to abate the opioid crisis in Oklahoma, totaling \$572,102,028.<sup>112</sup> Oklahoma tailored its abatement plan to meet the state's needs.<sup>113</sup> Johns Hopkins, the White House, the Oklahoma Commission, the Surgeon General, and the CDC developed best practices and gathered the data that the state relied on in creating its abatement plan.<sup>114</sup> The Oklahoma lawsuit

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103. *Id.*

104. *Id.* at \*11–13.

105. *Id.* at \*19.

106. *Id.* at \*20.

107. *Id.* at \*22.

108. *Id.* at \*23.

109. *Id.*

110. *Id.* at \*26, \*29.

111. *Id.* at \*30.

112. *Id.* at \*41.

113. *Id.* at \*30.

114. *Id.* at \*31. The state chose to focus on the prevention and treatment of, and recovery from, opioid-use disorder. Specific examples of programs and costs include (1) biopsychosocial assessment available to residents in need of treatment, which costs \$232,947,710 per year; (2) supplementary services, which cost \$31,796,011 per year; (3) public medication and disposal programs, which cost

provides an example of plaintiffs succeeding against the opioid manufacturers and distributors.<sup>115</sup> Louisiana's state suit and its opioid MDL will likely follow a similar strategy.<sup>116</sup>

### *B. Federal Opioid MDL*

The ongoing opioid MDL in federal court addresses the responsibility of pharmaceutical manufacturers and distributors for the opioid crisis.<sup>117</sup> The opioid MDL encompasses over 2,000 lawsuits that “cities, towns, counties, Native American tribes, labor unions and a host of others” brought and consolidated in Ohio federal court.<sup>118</sup> Local governments initiated this federal lawsuit and are the plaintiffs in the litigation.<sup>119</sup> Courts agreed to consolidate the cases in Ohio for three main reasons: (1) the presiding judge, Judge Polster, has extensive knowledge and experience in MDL cases; (2) the opioid crisis greatly affected the state; and (3) Ohio is a convenient forum for many of the defendants.<sup>120</sup>

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\$139,883 per year; (4) enabling enrollment in the Screening, Brief Intervention and Referral to Treatment program (SBIRT), which costs \$56,857,054 per year; (5) pain prevention and on-opioid management therapies, which cost \$103,277,835 per year; (6) expanded and targeted naloxone distribution, which costs \$1,585,797 per year; (7) medical case management and consulting, which costs \$3,953,832 per year; (8) developing and disseminating treatment standards and quality improvement for neonatal abstinence syndrome (NAS), which costs \$107,683,000 per year; (9) funding NAS as a required, reportable condition, which costs \$181,983 per year; (10) implementing universal substance-use screening for pregnant women and enabling all OB/GYN practices to enroll in SBIRT practice dissemination program, which cost \$1,969,000 per year; (11) medical treatment for infants suffering from NAS or opioid withdrawal, which costs \$20,608,847; and (12) Oklahoma law-enforcement agencies, licensure boards, and Oklahoma Office of the Chief Medical examiners, which cost \$11,101,076 per year. *Id.* The court approved the state's proposed abatement plan for one year. *Id.* The plan details the targeting programs and funds necessary to abate the opioid crisis in Oklahoma, totaling \$572,102,028. *Id.* However, this plan only outlines the strategy for one year, and it is sure to incur many obstacles along the way. *Id.*

115. *Id.*

116. *See generally* Karlin, *supra* note 25.

117. *Id.*

118. *Id.*

119. *Id.*

120. Courtney Hessler, *Consolidation of 66 Opioid Suits Requested*, HERALD DISPATCH (Oct. 5, 2017), [http://www.herald-dispatch.com/news/consolidation-of-opioid-suits-requested/article\\_9c4df826-c6a6-58fd-9ba8-ac6058aaf2ad.html](http://www.herald-dispatch.com/news/consolidation-of-opioid-suits-requested/article_9c4df826-c6a6-58fd-9ba8-ac6058aaf2ad.html) [<https://perma.cc/6L7N-MT2G>].

On September 11, 2019, the Eastern Division of the United States District Court for the Northern District of Ohio approved the Negotiation Class.<sup>121</sup> The Ohio district court appointed 49 representatives of the Negotiation Class, including the City of Baton Rouge/East Baton Rouge Parish, Louisiana.<sup>122</sup> Many Louisiana parishes filed suit in this federal case.<sup>123</sup> Judge Polster remains focused on settlement as the end goal of the opioid MDL.<sup>124</sup> To avoid any delays, the Ohio district court set a timeline dictating termination of the negotiating class five years from September 11, 2019.<sup>125</sup>

The Louisiana local governments that filed the MDL lawsuit seek to recover funds that they have paid in addressing the opioid crisis.<sup>126</sup> Questions of the amount of any settlement and the division of funds loom in the background of the negotiations.<sup>127</sup> The plaintiffs allege that the manufacturers did not accurately portray the risks of using their opioids and that the distributors did not properly screen or notice suspicious

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121. *National Prescription Opiate Litigation*, U.S. DIST. CT. N. DIST. OF OHIO, <https://www.ohnd.uscourts.gov/mdl-2804> [<https://perma.cc/94TY-2RLN>]. *Frequently Asked Questions*, IN RE: NAT'L PRESCRIPTION OPIATES LITIG., <https://www.opioidsnegotiationclass.info/Home/FAQ> [<https://perma.cc/NWH8-8Z7R>] (“The purpose of the Negotiation Class is to create a cohesive group of cities and counties to negotiate Classwide settlements, on a voluntary basis, with Defendants who make, distribute, or sell opioids nationwide. Class Representatives and Class Counsel will represent the Negotiation Class. Class Members will vote on any Class settlement proposal. If 75% of those Class Members who vote . . . support a proposed Settlement, Class Counsel will ask the Court to approve it. The ultimate purpose of the Negotiation Class is to make settlement easier to obtain. . . . This is a new use of the Class action mechanism under Federal Rule of Civil Procedure 23, reflecting the unique nature of the national opioids litigation. Unlike any mass litigation before, thousands of cities and counties nationwide are pursuing claims against major defendants. The goal is to recover money to help fight the opioids epidemic, provide prevention and treatment services going forward, and change Defendants’ practices.”). Most Louisiana Parishes are involved. To see a complete list of parties involved, use the following link and click on docket # 2591: <http://www.opioidsnegotiationclass.info/> [<https://perma.cc/3RAT-VCLP>].

122. *National Prescription Opiate Litigation*, *supra* note 121.

123. *In Re: National Prescription Opiates Litigation*, NPO LITIG., <http://www.opioidsnegotiationclass.info/> [<https://perma.cc/3RAT-VCLP>]. Most Louisiana Parishes are involved. To see a complete list of parties involved, use the following link and click on docket # 2591: <http://www.opioidsnegotiationclass.info/> [<https://perma.cc/3RAT-VCLP>].

124. *National Prescription Opiate Litigation*, *supra* note 121.

125. *Id.*

126. Karlin, *supra* note 25.

127. *Id.*



orders.<sup>128</sup> Despite the issues surrounding the complexity of the claims, it is important to focus on the unprecedented number of plaintiffs because that number affects the distribution of settlement proceeds.<sup>129</sup> The quantity of plaintiffs multiplied quickly in September when Judge Polster decided to create a Negotiation Class.<sup>130</sup> Further, the plaintiffs alleged inconsistent damages because the opioid crisis affected the different plaintiffs in varying degrees.<sup>131</sup> Also, the concept of allowing lawyers from 49 local governments to negotiate a settlement deal as representatives of all cities and counties in the litigation is an innovative notion, as the size of this lawsuit is unprecedented.<sup>132</sup> If the plaintiffs reach a settlement with the defendants, the Negotiation Class will then vote to approve it.<sup>133</sup> If they approve with enough votes, and Judge Polster also agrees to the deal, then the agreement will be binding on all parties.<sup>134</sup> As this type of settlement procedure in an MDL has never happened before, there is no example model.<sup>135</sup>

Deciding how to divide the settlement among a state's cities, counties or parishes, and tribal authorities presents a difficult legal issue.<sup>136</sup> Although state governments are not plaintiffs in the federal opioid MDL, 37 attorneys general unsuccessfully attempted to disrupt the plan to form the Negotiation Class, as they felt that the class would diminish their bargaining power with the opioid manufacturers and distributors.<sup>137</sup> State governments likely feared that an MDL settlement between local governments and opioid manufacturers and distributors may exhaust the defendants' funds before any chance of settlement in the state cases.<sup>138</sup> Consequently, issues concerning settlement allocation exist between state and local governments.<sup>139</sup> Overall, the large number of plaintiffs with diverse goals creates a significant challenge to the settlement of the case.<sup>140</sup> Conflicts of interest are sure to occur.<sup>141</sup> Accordingly, the terms of the

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128. Terry, *supra* note 35.

129. *Id.*

130. Dwyer, *supra* note 29.

131. Terry, *supra* note 35.

132. Dwyer, *supra* note 29.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

settlement must adequately address the issue of the allocation of settlement proceeds.<sup>142</sup>

Louisiana has a particular interest in ensuring a fair allocation of these proceeds, as the state ranks as one of the most affected in the crisis.<sup>143</sup> Certainly, Louisiana's history of ignoring local interest in the 1998 Tobacco MSA will make the fight for proper allocation that much more contentious.<sup>144</sup>

### III. LOUISIANA'S NEED FOR PUBLIC HEALTH REHABILITATION AND ITS HISTORY OF IGNORING LOCAL CONCERNS

Louisiana is a great candidate to establish a careful plan to distribute the settlement funds in a manner designed to assist as many affected by opioid addiction as possible. Another hurdle, however, exists for Louisiana:<sup>145</sup> the state's history of ignoring local governments in large settlements, most notably during the Tobacco MSA.<sup>146</sup> The opioid crisis significantly affected Louisiana, costing the state millions of dollars in healthcare costs.<sup>147</sup> The plaintiffs in the opioid MDL bore much of the costs of taking care of their constituents suffering from opioid addiction.<sup>148</sup> Louisiana also used funds to supply resources for programs targeting the crisis.<sup>149</sup> Louisiana's healthcare and criminal-justice costs continue to rise exponentially despite legislative efforts in response to the opioid epidemic.<sup>150</sup> Therefore, Louisiana has a need for the plaintiffs to implement a proactive plan for the settlement allocation.<sup>151</sup>

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142. Dwyer, *supra* note 29.

143. BUREAU OF HEALTH INFORMATICS, LA. DEP'T OF HEALTH, LOUISIANA OPIOID SURVEILLANCE INITIATIVE (Mar. 2019), [http://ldh.la.gov/assets/oph/CenterPHI/Opioid\\_Files/NFLIS\\_White\\_Paper\\_062819.pdf](http://ldh.la.gov/assets/oph/CenterPHI/Opioid_Files/NFLIS_White_Paper_062819.pdf) [<https://perma.cc/82TU-45EY>].

144. Terry & Hoss, *supra* note 39.

145. *Id.*; Dwyer, *supra* note 29; Karlin, *supra* note 25.

146. Terry & Hoss, *supra* note 39; LA. REV. STAT. §§ 39:98.1–:99.20 (2019).

147. BUREAU OF HEALTH INFORMATICS, *supra* note 143; LA. COMM'N ON PREVENTING OPIOID ABUSE, *supra* note 32.

148. *National Prescription Opiate Litigation*, *supra* note 121; Dwyer, *supra* note 29.

149. Dwyer, *supra* note 29.

150. *Id.*

151. Terry & Hoss, *supra* note 39; Karlin, *supra* note 25.

*A. Louisiana: An Ideal Model for Conflict over Settlement Allocation*

Louisiana's opioid prescription rate is among the highest in the United States.<sup>152</sup> In fact, Louisiana physicians wrote 89.5 opioid prescriptions for every 100 people in 2017, although the national average was 58.7.<sup>153</sup> Further, evidence shows a correlation between Louisiana's high prescription rate and opioid-induced deaths.<sup>154</sup> The number of overdose deaths included over 450 Louisiana citizens in 2018, marking a 13.5% increase from 2017.<sup>155</sup>

Although Louisiana reported a decrease in prescription opioid deaths in recent years, the state has not been spared from the cost of the crisis.<sup>156</sup> Louisiana's public health crisis is not limited to prescription opioids.<sup>157</sup> Indeed, the use of fentanyl, heroin, natural and semi-synthetic opioids, and synthetic opioids caused a substantial rise in deaths from 2014 to 2018.<sup>158</sup> Louisiana's unique status as a highly affected state is the result of more than higher-than-normal prescription rates and overdose rates.<sup>159</sup> Further, Louisiana did not have programs in place to specifically combat the public health crisis of rampant opioid addiction among its citizens until the Louisiana Legislature acted in 2017—more than five years after the opioid epidemic first impacted the state.<sup>160</sup> Therefore, Louisiana is in need of a proactive process to ensure the most effective results.

*B. Louisiana's Delayed Response to the Growing Opioid Crisis*

In 2017, Louisiana enacted multiple statutes to reduce the harm caused by the opioid crisis.<sup>161</sup> Certainly, these measures were distinct from Louisiana's traditional mode of criminalizing drug use.<sup>162</sup> For example,

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152. OPIOID STEERING COMM., LA. DEP'T OF HEALTH, LOUISIANA'S OPIOID RESPONSE PLAN 5 (2019), <http://ldh.la.gov/assets/opioid/LaOpioidResponsePlan2019.pdf> [<https://perma.cc/W4T2-6L6R>].

153. 2018 ANNUAL SURVEILLANCE REPORT OF DRUG-RELATED RISKS AND OUTCOMES—UNITED STATES, *supra* note 74.

154. *Id.*

155. OPIOID STEERING COMM., *supra* note 152.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. LA. REV. STAT. §§ 40:1001–14, 40:978.1, 40:203.10, 40:1024 (2019).

161. *Id.*

162. Jonah Seligman, Comment, *Confronting a Crisis: An Appraisal of Legislation in Louisiana Combating the Opioid Epidemic*, 93 TUL. L. REV. 148, 157 (2018). The Louisiana Legislature “signal[ed] a paradigm shift in state drug

the opioid crisis pushed the Louisiana Legislature to implement programs and policies such as opioid prescription monitoring programs, naloxone distribution and access, immunity from prosecution for people who report drug-related emergencies, and needle exchange programs.<sup>163</sup> The legislature implemented these programs after the crisis began significantly affecting Louisiana, which further underscores the state's trend of reactive legislation.<sup>164</sup>

In 2017, the Louisiana Legislature passed statutes implementing a prescription monitoring program in response to Louisiana's status as a high-prescribing state.<sup>165</sup> The program restricts first-time opioid prescriptions for acute pain to a seven-day supply.<sup>166</sup> Additionally, the statute requires prescribers to report any prescription of a controlled substance.<sup>167</sup> The statute also mandates that healthcare providers complete continuing education on prescribing practices.<sup>168</sup> Louisiana's legislature enacted several prescription monitoring statutes to develop, implement, operate, and evaluate "an electronic system for the monitoring of controlled substances and other drugs of concern that are dispensed in the state."<sup>169</sup> The program functions to alert prescribers of possible opioid abusers without disrupting the efficient practice of medicine.<sup>170</sup>

The question of whether the monitoring program fulfills its purpose remains unanswered.<sup>171</sup> The Louisiana Department of Health maintains a digital database that is easily accessible to those wishing to find

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policy—a move away from a longstanding criminalization model toward an embrace of harm reduction strategies." *Id.* The traditional mode of criminalization included "decades of punitive drug laws—whose enforcement failed to prevent or even mitigate the current calamity—rooted in the erroneous notion that substance abuse and misuse are moral failings." *Id.*

163. *Id.*

164. *Id.*

165. LA. REV. STAT. § 40:1002.

166. *Id.* "Acute pain usually comes on suddenly and is caused by something specific. It is sharp in quality. Acute pain usually does not last longer than six months. It goes away when there is no longer an underlying cause for the pain." *Acute v. Chronic Pain*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/articles/12051-acute-vs-chronic-pain> [<https://perma.cc/SQ2A-JF3P>] (last visited Nov. 8, 2019).

167. LA. REV. STAT. § 40:1002.

168. *Id.* §§ 40:1006–08.

169. *Id.* § 40:1002.

170. *Id.*

171. See *Louisiana Opioid Data and Surveillance System*, LA. DEP'T OF HEALTH, <https://lodss.ldh.la.gov/> [<https://perma.cc/DAW3-6MS4>] (last visited Sept. 25, 2019).

information on the effectiveness of the legislation.<sup>172</sup> The interactive site shows a major decrease in the number of opioid prescriptions from 2014 to 2018, indicating the relative success of the legislation.<sup>173</sup>

Despite the relative success of the prescription monitoring program, more needs to be done. Research shows that efforts to monitor the frequency of prescribing behavior have fallen short of curbing the risk of long-term addiction.<sup>174</sup> Further, current data suggests that patients are at risk of long-term addiction after five days of taking opioids.<sup>175</sup> Notably, the seven-day supply limit does not consider this finding from the research.<sup>176</sup> Overall, the prescription drug-monitoring program reduces the amount of opioid prescriptions; however, this reduction occurred after addiction was already reaching a peak in the state. It would have been more effective to implement the program before addiction spiked in Louisiana.<sup>177</sup> In addition to the prescription drug monitoring program, the Louisiana Legislature took steps to combat deaths from opioid overdose.<sup>178</sup>

From 2014 to 2016, Louisiana expanded access to naloxone, a medication that reverses opioid overdoses.<sup>179</sup> The statute implementing this access authorizes emergency responders, friends, and family to administer the antidote if an individual is suffering from an overdose.<sup>180</sup> The naloxone law is an important and necessary step to reducing the number of opioid deaths; however, naloxone does not aid in the long-term

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172. *Id.*

173. *Id.*

174. Anuj Shah et al., *Characteristics of Initial Prescription Episodes and Likelihood of Long-Term Opioid Use—United States, 2006–2015*, CDC: MORBIDITY & MORTALITY WKLY. REP. (Mar. 17, 2017), <https://www.cdc.gov/mmwr/volumes/66/wr/mm6610a1.htm> [<https://perma.cc/4FYN-Q255>].

175. *Id.*

176. *Id.*

177. LA. REV. STAT. §§ 40:1001–14 (2019); *Louisiana Opioid Data and Surveillance System*, *supra* note 171.

178. LA. REV. STAT. § 40:978.1.

179. *Id.*

180. See Act No. 192, 2015 La. Acts 1539 (codified at LA. REV. STAT. § 40:978.1); Act No. 370, 2016 La. Acts 1307; REBEKAH E. GEE, LA. DEP'T OF HEALTH, STANDING ORDER FOR THE DISTRIBUTION OR DISPENSING OF NALOXONE OR OTHER OPIOID ANTAGONISTS (Jan. 7, 2019), <http://ldh.la.gov/assets/docs/BehavioralHealth/Opioids/Naloxonestandingorder.pdf> [<https://perma.cc/88Y6-CJAF>]; REBEKAH E. GEE, LA. DEP'T OF HEALTH, STANDING ORDER FOR THE DISTRIBUTION OR DISPENSING OF NALOXONE OR OTHER OPIOID ANTAGONISTS (Jan. 8, 2019), [http://ldh.la.gov/assets/docs/BayouHealth/Informational\\_Bulletins/17-01/IB17-1\\_revised\\_1.16.18.pdf](http://ldh.la.gov/assets/docs/BayouHealth/Informational_Bulletins/17-01/IB17-1_revised_1.16.18.pdf) [<https://perma.cc/A3PW-AFTD>].

care or rehabilitation of opioid addicts.<sup>181</sup> Also, in 2017 Louisiana legislators enacted laws allowing the implementation of local needle exchanges in cities, towns, and parishes.<sup>182</sup> Needle exchange programs allow for the safe disposal of used needles in exchange for clean needles.<sup>183</sup> The purpose of the program is to reduce harm from the reuse of needles.<sup>184</sup> The state authorized needle exchange programs to avoid risks, like HIV, involved with injecting drugs.<sup>185</sup>

Although these laws seek to combat Louisiana's opioid crisis, the state implemented the programs as reactionary measures around 2017.<sup>186</sup> Opioid addiction in Louisiana reached significant levels by 2012, but some data indicates a much earlier date, as a rise in prescription opioids dates back to 1999.<sup>187</sup> Reactive programs are no doubt important, but they often do little but damage control, as seen with the programs above.<sup>188</sup> For example, the most effective time to implement a prescription monitoring program was in the 1990s when physicians began prescribing opioids at a significantly higher rate.<sup>189</sup> Although the Louisiana Legislature enacted statutes to address opioid addiction, the crisis is still unfolding in Louisiana.<sup>190</sup> Louisiana failed to responsibly ensure the welfare of its citizens ahead of time and only acted in response to the crisis.<sup>191</sup> Louisiana has a duty to act efficiently and equitably to ensure this situation does not happen again.<sup>192</sup> If Louisiana had laws in place to safeguard public health prior to crises like rampant opioid addiction, then the problem might not have developed into the epidemic it is today.<sup>193</sup> Instead, the legislation that

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181. Jed Lipinski, *Overdose: What Happens When the Medics Arrive*, NOLA.COM (May 25, 2016), [https://www.nola.com/entertainment\\_life/health\\_fitness/article\\_d40955ac-f8bb-559b-ae91-f453db959d32.html](https://www.nola.com/entertainment_life/health_fitness/article_d40955ac-f8bb-559b-ae91-f453db959d32.html) [<https://perma.cc/LD4D-Q6Y2>].

182. LA. REV. STAT. § 40:1024.

183. *Id.*

184. *Id.*

185. U.S. DEP'T OF HEALTH & HUM. SERVS., *FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH 4–11* (2016), <https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf> [<https://perma.cc/2BRF-TG3A>].

186. LA. REV. STAT. §§ 40:1001–14, 40:978.1, 40:203.10, 40:1024.

187. *Louisiana Opioid Data and Surveillance System*, *supra* note 171.

188. *Id.*

189. OPIOID STEERING COMM., *supra* note 152.

190. *See* LA. REV. STAT. §§ 40:1001–14, 40:978.1, 40:203.10, 40:1024.

191. Seligman, *supra* note 162, at 158; OPIOID STEERING COMM., *supra* note 152.

192. Seligman, *supra* note 162, at 158; OPIOID STEERING COMM., *supra* note 152.

193. Seligman, *supra* note 162, at 158; OPIOID STEERING COMM., *supra* note 152.

Louisiana enacted had minimal success in mitigating the crisis.<sup>194</sup> The lesson to be learned from Louisiana's response to the opioid crisis is that reactive policies are necessary responses to the community's needs, but there is also a need for proactive laws and programs to be put in place before a crisis begins.<sup>195</sup>

The state may not be able to go back in time to be more proactive, but the settlement of the opioid litigation will provide Louisiana with an opportunity to address public health concerns in a comprehensive manner by supporting programs that will be directly and meaningfully responsive to real lives consumed by addiction and that will assist in preventing the next public health crisis from happening.<sup>196</sup> With settlement proceeds potentially coming from the opioid MDL, Louisiana has a chance to maximize fair allocation and best utilize the proceeds.<sup>197</sup> Louisiana must combat its tendencies and avoid an unrepresentative settlement of the opioid litigation, like that of the Tobacco MSA.<sup>198</sup>

### *C. Fear of Repeating History: The Tobacco MSA*

Louisiana's experience in the Tobacco MSA reveals the state's custom of disregarding local need for public health rehabilitation programs.<sup>199</sup> In the early 1990s, the country learned that tobacco companies purposefully disguised and fostered cigarette addiction.<sup>200</sup> Subsequently, 46 states and 6 jurisdictions filed lawsuits against the tobacco industry.<sup>201</sup> The states argued that the tobacco industry should pay for the enormous healthcare and prevention costs of smoking-related diseases like lung cancer and

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194. Seligman, *supra* note 162, at 158; OPIOID STEERING COMM., *supra* note 152.

195. Seligman, *supra* note 162; OPIOID STEERING COMM., *supra* note 152.

196. Seligman, *supra* note 162; OPIOID STEERING COMM., *supra* note 152; *Louisiana Opioid Data and Surveillance System*, *supra* note 171.

197. *Louisiana Opioid Data and Surveillance System*, *supra* note 171.

198. See LA. REV. STAT. §§ 39:98.1–:99.20 (2018); *Louisiana Tobacco Settlement Fund Amendment*, BALLOTPEDIA.ORG (Oct. 1999), [https://ballotpedia.org/Louisiana\\_Tobacco\\_Settlement\\_Fund\\_Amendment\\_\(October\\_1999\)](https://ballotpedia.org/Louisiana_Tobacco_Settlement_Fund_Amendment_(October_1999)) [<https://perma.cc/2ZSV-NV5W>].

199. See generally LA. REV. STAT. §§ 39:98.1–:99.20; *Louisiana Tobacco Settlement Fund Amendment*, *supra* note 198. An MSA is the result of a large settlement agreement, whereas an MDL is a complex litigation mechanism.

200. Paul L. Keenan, *Death by 1000 Lawsuits: The Public Litigation in Response to the Opioid Crisis Will Mirror the Global Tobacco Settlement of the 1990s*, 52 NEW ENG. L. REV. 69 (2017).

201. *Id.*

heart disease.<sup>202</sup> States alleged various legal theories, including public nuisance, false advertising, and antitrust violations.<sup>203</sup>

The courts never assessed the legitimacy of these claims because in June 1997, the plaintiffs proposed legislation that offered \$368 billion over 25 years as settlement for the claims.<sup>204</sup> The legislation would have granted the Food and Drug Administration regulatory power and imposed restrictions over the tobacco industry.<sup>205</sup> The tobacco industry lobbied to prevent the proposal from passing, as leaders in the industry negotiated another settlement with state attorneys general.<sup>206</sup> Ultimately, the parties entered a \$246 billion settlement that tobacco companies would pay over a 25-year period.<sup>207</sup> Additionally, the tobacco companies reached a \$40 billion settlement with the four states that did not join the settlement.<sup>208</sup>

At that time, the Tobacco MSA was the largest civil-litigation settlement in history.<sup>209</sup> The MSA directed payments to the states as reimbursement for taxpayer money spent on healthcare expenses linked to illnesses associated with cigarettes and smoking.<sup>210</sup> In exchange for limited liability, the tobacco industry agreed to pay initial payments, annual payments, and bonus payments to cover the costs of litigation.<sup>211</sup> Further, the companies agreed to limit the sale and advertising of their products.<sup>212</sup> The state and local governments and the procedure of mass-tort litigation prompted the tobacco industry to payout instead of enduring additional litigation in the future.<sup>213</sup>

Some indicators of the marginal success of the MSA include the reduced rate of cigarette smoking, restrictions on tobacco marketing, and

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202. *15 Years Later, Where Did All the Cigarette Money Go?*, VPR (Oct. 13, 2013, 5:52 PM), <https://www.vpr.org/post/15-years-later-where-did-all-cigarette-money-go#stream/0> [<https://perma.cc/V263-GH4L>].

203. Keenan, *supra* note 200.

204. See Frank Sloan & Lindsey Chepke, *Litigation, Settlement, and the Public Welfare: Lessons from the Master Settlement Agreement*, 17 WIDENER L. REV. 159, 164–67 (2011).

205. *Id.*

206. *Id.*

207. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 762–63 (2003).

208. *Id.*

209. Keenan, *supra* note 200.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*



increased cash flow for the states.<sup>214</sup> Conversely, the MSA was not completely successful because it did not dictate how states ought to allocate their spending.<sup>215</sup> Instead, states made spending decisions entirely on their own.<sup>216</sup> Consequently, many states used only a portion of the funds on public health programs and funneled the rest into general funds, resulting in only \$11.5 billion spent on public health or tobacco-related programs from 1999 to 2018.<sup>217</sup> Further, despite the CDC's recommendation that states allot \$3.3 billion for tobacco prevention, research shows that by 2018 states allocated \$721.6 million on average, "less than one-quarter of the recommended amount."<sup>218</sup>

#### *D. Fear of Repeating History: Louisiana's Experience with the Tobacco MSA*

Louisiana participated in the Tobacco MSA, and the state allocated funds in the irresponsible manner described above.<sup>219</sup> Louisiana did not use the majority of its funds to combat the public health issue of smoking tobacco.<sup>220</sup> Louisiana voted to "allocate[] seventy-five percent of tobacco monies to a trust fund providing college scholarships, funds for school districts, and health programs."<sup>221</sup> Louisiana's experience in the Tobacco MSA reveals the state's history of disregarding local need for public health

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214. *Fifteen Years After the Tobacco Master Settlement Agreement: Successes and Challenges*, NAT'L ASS'N OF ATT'YS GEN., <https://www.naag.org/publications/naagazette/volume-7-number-11/fifteen-years-after-the-tobacco-master-settlement-agreement-successes-and-challenges.php> [<https://perma.cc/W7PQ-UZBB>] (last visited Oct. 28, 2019).

215. Shital A. Patel, *The Tobacco Litigation Merry-Go-Round: Did the MSA Make it Stop?*, 8 DEPAUL J. HEALTH CARE L. 615, 658–63 (2005); see also *Fifteen Years After the Tobacco Master Settlement Agreement: Successes and Challenges*, *supra* note 214.

216. Patel, *supra* note 215; see also *Fifteen Years After the Tobacco Master Settlement Agreement: Successes and Challenges*, *supra* note 214.

217. See CAMPAIGN FOR TOBACCO-FREE KIDS, TOTAL ANNUAL STATE TOBACCO PREVENTION SPENDING: FY1999–FY2018, [https://www.tobaccofreekids.org/assets/content/what\\_we\\_do/state\\_local\\_issues/settlement/FY2018/FY2018\\_state\\_settlement\\_report.pdf](https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/settlement/FY2018/FY2018_state_settlement_report.pdf) [<https://perma.cc/NQS2-73DV>].

218. Keenan, *supra* note 200.

219. *Id.* at 90.

220. See generally LA. REV. STAT. §§ 39:98.1–:99.20 (2019); see also *Louisiana Tobacco Settlement Fund Amendment*, *supra* note 198.

221. Terry, *supra* note 35.

rehabilitation programs.<sup>222</sup> The allocation of the MSA resources reflects a diversion from the intended public health efforts that the litigation aimed to promote.<sup>223</sup>

The opioid litigation has the potential to result in a settlement like the Tobacco MSA.<sup>224</sup> The claims, strategy, and public health elements are substantially similar.<sup>225</sup> In the opioid litigation, as in the tobacco litigation before, the plaintiffs' claims focus on the responsibility of the industry.<sup>226</sup> For example, the plaintiffs in both cases sought reimbursement for healthcare costs, investment in prevention services, and development of rehabilitation programs.<sup>227</sup> Further, both sets of plaintiffs strategically chose to use mass-tort litigation to force industry response.<sup>228</sup> The use of mass-tort litigation captures the attention of large industry actors because of the risk of massive liability.<sup>229</sup> Lastly, the purpose of both sets of litigation is public health rehabilitation.<sup>230</sup> The addiction to smoking produced tobacco-related diseases that greatly affected the country.<sup>231</sup> Similarly, the opioid crisis resulted in a major rise in drug overdose deaths in the United States.<sup>232</sup> Public health rehabilitation is a central theme in the two groups of litigation.<sup>233</sup> Therefore, it is logical to predict that Louisiana will respond to the inevitable opioid settlement in a way that is similar to how it responded to the tobacco settlement.<sup>234</sup>

Louisiana's response to the Tobacco MSA was to funnel funds away from the public health issue of tobacco addiction.<sup>235</sup> Although Louisiana's allocation of the funds into educational programs substantially aided the state and filled gaps in the state's budget, Louisiana cannot follow the path

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222. See generally LA. REV. STAT. §§ 39:98.1–:99.20; *Louisiana Tobacco Settlement Fund Amendment*, *supra* note 198.

223. Walter J. Jones & Gerard A. Silvestri, *The Master Settlement Agreement and Its Impact on Tobacco Use 10 Years Later*, 137 CHEST 692, 697 (2010).

224. Esmé E. Deprez & Paul Barrett, *The Lawyer Who Beat Big Tobacco Takes On the Opioid Industry*, BLOOMBERG (Oct. 5, 2017), <https://www.bloomberg.com/news/features/2017-10-05/the-lawyer-who-beat-big-tobacco-takes-on-the-opioid-industry> [<https://perma.cc/GU9H-4VPP>].

225. *Id.*

226. *Id.*

227. See Keenan, *supra* note 200.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. See generally Terry & Hoss, *supra* note 39.

235. Terry, *supra* note 35.

of the Tobacco MSA in the opioid settlement.<sup>236</sup> In October 1999, Louisiana citizens voted to amend the Louisiana Constitution to allow for the investment of 75% of settlement funds into “a trust fund for college scholarships, local school districts and health programs.”<sup>237</sup> Also, Louisiana enacted Revised Statutes §§ 39:98.1–:99.20 to set forth the legislation required to distribute and invest settlement money from the Tobacco MSA.<sup>238</sup> The fund is tied to a tax on cigarette sales in the state, which means that as tobacco sales decline or increase, the money channeled into the fund also declines or increases.<sup>239</sup> Unlike the tax on cigarette sales, the opioid settlement will likely not result in any tax on opioid drugs because of their nature as medical necessities in some cases.<sup>240</sup>

In 2011, another amendment to Louisiana’s constitution rebalanced the distribution of the tobacco settlement.<sup>241</sup> Voters adopted this amendment as a way to put more funding into the Taylor Opportunity Program for Students (TOPS) Fund.<sup>242</sup> The amendment caused the state government to reallocate the settlement payout when the Millennium Trust reached \$1.38 billion.<sup>243</sup> The new allocation funneled 75% of the settlement funds—all from the Education Excellence Fund and the Health Excellence Fund—to the TOPS Fund.<sup>244</sup>

Although the tobacco litigation was a response to a public health issue, Louisiana took the unique approach of reallocating the settlement funds to a program unrelated to the origination of the money.<sup>245</sup> Louisiana voters continually support the existence of and funding for TOPS, as demonstrated by the 2011 constitutional amendment; however, TOPS is a state-run program that does not achieve the purpose of combatting the public health issue that the tobacco litigation sought to resolve.<sup>246</sup>

Louisiana’s treatment of the Tobacco MSA demonstrates that the state has a history of failing to reinvest damages in public health initiatives.<sup>247</sup> Given the outcome of the Tobacco MSA, one might reasonably expect that

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236. *Id.*

237. *Louisiana Tobacco Settlement Fund Amendment*, *supra* note 198.

238. LA. REV. STAT. §§ 39:98.1–:99.20 (2019).

239. *Id.*

240. *See generally* Terry, *supra* note 35.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Louisiana Tobacco Settlement Fund Amendment*, *supra* note 198; Dwyer, *supra* note 29.

something similar could happen with the opioid settlement.<sup>248</sup> The Tobacco MSA serves as a lesson that if the plaintiffs in the opioid litigation want to see the purpose of their suit fulfilled, they should explicitly mandate in the settlement that the funds go toward public health rehabilitation.<sup>249</sup> Without such specific language, local governments, municipalities, and other state plaintiffs have every reason to fear that state legislation could take settlement funds awarded to ameliorate the opioid epidemic and divert them away from the programs designed to aid in fighting Louisiana's opioid crisis.<sup>250</sup>

#### IV. LOUISIANA'S KEY TO A JUST AND EQUITABLE OPIOID SETTLEMENT ALLOCATION: DISTINGUISH HISTORY AND PLAN FOR THE FUTURE

The Louisiana local governments involved in the opioid MDL will likely reach a settlement with opioid manufacturers and distributors.<sup>251</sup> Judge Polster, the judge presiding over the opioid MDL, will have to approve the settlement, apportioning an award of damages to each plaintiff.<sup>252</sup> Ideally, the settlement will include a provision specifying the division of proceeds.<sup>253</sup> This provision should require that local governments invest the majority of the damages into public health rehabilitation programs and allocate the remaining amount to cover costs that local governments have already paid.<sup>254</sup> If the settlement does not contain such a provision, then local governments should act to ensure that the settlement allocates funds in this manner.<sup>255</sup> Importantly, those litigants leading the discussion and decision-making on the opioid MDL settlement must distinguish the current opioid litigation from the tobacco litigation to develop a just and equitable allocation of the former's settlement funds.<sup>256</sup> If the local governments mandate settlement allocation to treatment programs for opioid use, then they will successfully

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248. See Dwyer, *supra* note 29; Terry & Hoss, *supra* note 39.

249. See Dwyer, *supra* note 29; Terry & Hoss, *supra* note 39.

250. See Dwyer, *supra* note 29; Terry & Hoss, *supra* note 39.

251. See Karlin, *supra* note 25.

252. See Dwyer, *supra* note 29; Terry & Hoss, *supra* note 39.

253. See Dwyer, *supra* note 29; Terry & Hoss, *supra* note 39.

254. See Dwyer, *supra* note 29; Terry & Hoss, *supra* note 39.

255. See Dwyer, *supra* note 29; Terry & Hoss, *supra* note 39.

256. See Beth Connolly, *Louisiana Expands Access to Addiction Treatment*, THE PEW CHARITABLE TRS. (Aug. 27, 2019), <https://www-aws.pewtrusts.org/en/research-and-analysis/articles/2019/08/27/louisiana-expands-access-to-addiction-treatment> [<https://perma.cc/UVX7-G6VJ>]; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

accomplish two goals: (1) supply their constituents with resources to combat the opioid crisis and (2) proactively implement a program designed to not only mitigate the current addiction crisis, but also prevent another one from occurring.<sup>257</sup>

*A. Step 1: Distinguish Opioid Litigation from Tobacco Litigation*

Despite the similarities between the tobacco litigation and the opioid litigation, there are differences between the two.<sup>258</sup> These critical differences involve doctrinal and evidentiary variance.<sup>259</sup> Those parties deciding the division of the settlement need to be aware of the differences to make a just and equitable allocation.<sup>260</sup> Specifically, there are three key distinctions that set the opioid litigation apart: (1) the small number of defendants and their financial limitations; (2) the complication of illicit drugs; and (3) the status of local governments as the plaintiffs rather than states.<sup>261</sup>

*1. The Small Number of Defendants and Their Financial Limitations*

The opioid litigation has fewer defendants than the tobacco litigation, and those defendants have less resources than their tobacco counterparts. Therefore, the local governments must act strategically to ensure a just and equitable allocation of the settlement funds.<sup>262</sup> Unlike the massive tobacco industry, whose sales in 2016 amounted to \$94.4 billion, prescription opioid sales only reached \$8.5 billion in the same year.<sup>263</sup> Collectively, the opioid industry does not produce near the revenue that the tobacco industry makes today.<sup>264</sup>

Furthermore, Purdue Pharma L.P. and Johnson & Johnson are the sole defendants in the opioid MDL, whereas there were many more defendants in the tobacco litigation.<sup>265</sup> The opioid settlement will be far less comprehensive because of the size of the industry and of the resources of the limited number of defendants. Additionally, Purdue Pharma L.P. filed

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257. See Connolly, *supra* note 256; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

258. See Keenan, *supra* note 200.

259. *Id.*

260. *Id.*

261. Terry & Hoss, *supra* note 39.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

for chapter 11 bankruptcy on September 15, 2019, in an effort to protect the company and its owners from liability.<sup>266</sup> The governments can argue that “police authority to protect their citizens permits them to override the bankruptcy protections claimed by [the owners of Purdue Pharma L.P.]”<sup>267</sup> Local governments may also have an argument that the company’s owners moved billions of dollars into “shell corporations and private accounts,” allowing the plaintiffs to “pierce the bankruptcy shield against litigation.”<sup>268</sup> Still, the defendants’ capital is an issue. Therefore, the massive payout that plaintiffs received in the tobacco litigation is unattainable over such an extended period in the opioid litigation.<sup>269</sup> Some commentators suggest that this difference in capital might explain why some cities opted out of the opioid MDL in hopes of a larger settlement.<sup>270</sup> The size of the plaintiff class and the financial limitations of the defendants are significant differences between the two classes of litigation, but it is not the only variance between them.

## 2. *The Complication of Illicit Drugs*

The tobacco litigation identified a clear route to the cause of tobacco addiction—the tobacco industry.<sup>271</sup> The tobacco industry utilized a direct-to-consumer marketing strategy that made it easier for plaintiffs to designate the industry as the cause of the addiction crisis.<sup>272</sup> By contrast, the prescription opioid crisis does not have an isolated industry to place blame upon.<sup>273</sup> A licensed medical professional had to first prescribe the opioid for it to reach the consumer. The issue of the medical profession’s liability is an ongoing matter. Although the crisis began with prescription opioids, the use of illegal opioids perpetuated it, complicating the determination of the ideal distribution of settlement funds.<sup>274</sup>

Although the opioid manufacturers and distributors are partly responsible for the opioid crisis, local and state governments must also

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266. Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyCotin, Files for Bankruptcy*, N.Y. TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html> [<https://perma.cc/V25A-6F7L>].

267. *Id.*

268. *Id.*

269. Terry & Hoss, *supra* note 39.

270. *Id.*

271. *Id.*

272. See Malinowski, *supra* note 50.

273. *Id.*

274. See Terry & Hoss, *supra* note 39.

confront the use of illegal opioids.<sup>275</sup> Research shows that the use of illicit opioid drugs typically begins with developing a dependence on legally prescribed opioids.<sup>276</sup> Still, questions exist as to whether the settlement funds should be distributed only to repair the damage from opioids, or whether funds should be distributed to combat future damages that include abuse of illicit opioids.<sup>277</sup> Commentators and scholars reasonably fear that true recovery from the opioid crisis requires more than a recovery of damages already caused.<sup>278</sup> Instead, governments will need to conduct research that targets programs that have been successful at rehabilitation and will likely continue to be successful with more funding.<sup>279</sup>

### 3. *The Local Governments are the Plaintiffs—Not the States*

State governments formed the Negotiation Class in the tobacco litigation.<sup>280</sup> By contrast, it is local governments consolidating their claims in the opioid MDL. Accordingly, the opioid settlement funds must focus on local needs rather than state needs.<sup>281</sup> The plaintiffs in the opioid litigation are a multitude of cities, counties or parishes, and tribal authorities.<sup>282</sup> The opioid crisis caused the plaintiffs to experience different losses at different rates.<sup>283</sup> The variations in loss create a large problem with settlement division and budget planning among local governments.<sup>284</sup> Further deepening the division issue, data is not readily available on the impact of the opioid crisis on local government. Researchers recently began quantifying the effect and found that local governments incurred major costs in an attempt to fulfill their responsibility to constituents affected by the opioid crisis.<sup>285</sup> To develop a representative and just allocation of the settlement proceeds, each local government should publish data on its spending on opioid-related programs.<sup>286</sup> The publication must include data that reflects the individual local

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275. *Id.*

276. *See* 2018 ANNUAL SURVEILLANCE REPORT OF DRUG-RELATED RISKS AND OUTCOMES—UNITED STATES, *supra* note 74.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *See* Keenan, *supra* note 200.

282. Terry & Hoss, *supra* note 39.

283. *See* Weeks & Sanford, *supra* note 31.

284. *Id.*

285. *Id.*

286. *Id.*

government's expenditures on opioid-related issues throughout the crisis.<sup>287</sup>

For example, local governments likely incurred court-administration costs to track crimes associated with opioids.<sup>288</sup> The local governments can also produce documentation of naloxone costs because local entities paid for "the cost of acquiring and storing the drug as well as training employees on its use."<sup>289</sup> Although the state and federal government bears the bulk of healthcare costs associated with the opioid crisis through Medicare, Medicaid, and other health plans for state or federal employees, local governments usually pay for gaps in coverage by compensating local hospitals for services provided to the indigent.<sup>290</sup>

Still, calculating the costs of the opioid crisis on local governments remains a difficult task, as most research combines the local costs with the state costs.<sup>291</sup> Separating the two sets of costs is important to compute an accurate and representative division of the settlement funds, especially because many state governments have also filed separate lawsuits against the opioid manufacturers and distributors.<sup>292</sup> State governments will also need to calculate the costs that they have suffered as a result of the crisis.<sup>293</sup> Undoubtedly, state governments will want local governments to divert settlement funds back to the state to recoup any money that local governments received from the state to serve affected citizens.<sup>294</sup> If the state governments want to be repaid, then local governments could use this repayment to their advantage.<sup>295</sup> For example, state governments control Medicaid spending.<sup>296</sup> As proposed in the next section, medication-assisted treatment programs could benefit from an expansion of Medicaid coverage of therapy drugs such as buprenorphine.<sup>297</sup> State governments should direct any settlement proceeds they collect from local governments

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287. *Id.*

288. *Id.*

289. *Id.* at 1116.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. See Weeks & Sanford, *supra* note 31; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

296. See Weeks & Sanford, *supra* note 31; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

297. See Weeks & Sanford, *supra* note 31; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.



to the state budget's coverage of these highly effective drugs instead of using the funds to fill gaps in the budget.<sup>298</sup>

The Louisiana budget, like most state budgets, can always benefit from more money.<sup>299</sup> Some commentators argue that Louisiana should repeat its history in the Tobacco MSA and allocate funds back to education.<sup>300</sup> The local government will have the choice to invest the money in any area of their budget that they deem appropriate.<sup>301</sup> Alternatively, local governments could use a majority of the funds to fill budget holes, following the logic that Louisiana should fix what it already has in place instead of developing new programs.<sup>302</sup> Nevertheless, community leaders will also have the opportunity—and some would argue the duty—to use the funds in a manner that combats the very issue of the litigation: the opioid crisis.<sup>303</sup> If Louisiana wants a fair shot at preventing the next addiction crisis, then it must channel the proceeds from opioid litigation to first treat opioid addiction.<sup>304</sup>

*B. Step 2: Proactively Implement MAT Programs: Mitigate and Prevent*

Treatment begins with rehabilitation.<sup>305</sup> To support public health rehabilitation, Louisiana plaintiffs in the opioid MDL should allocate a majority of the funds from the opioid settlement to medication-assisted treatment (MAT) to mitigate the past and present damage that the opioid crisis caused and to prevent future crises as well.<sup>306</sup> MAT is considered the most effective rehabilitation treatment for opioid-use disorders.<sup>307</sup> MAT combines nondrug therapies with drug therapies targeted to relieve symptoms of opioid withdrawal and reduce the addictive effect of the drugs.<sup>308</sup> Treatment involves an individualized plan for each patient, complete with counseling and cognitive-behavior therapy, because the combination of drug therapies and behavioral-health treatment produces

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298. See Weeks & Sanford, *supra* note 31; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

299. See Terry & Hoss, *supra* note 39.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. See *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

307. *Id.*

308. *Id.*

better results for patients.<sup>309</sup> Some examples of behavioral-health therapy include modifying addictive behaviors, encouraging the use of non-addictive prescription medicine, and treating patients overall mental health. Further, MAT promotes that:

Psychosocial treatment begins with an assessment of a patient's psychosocial needs and the development of a patient-specific treatment plan. Treatment may include one or more of the following: individual or group counseling; connection to family support systems, including family therapy; referrals to community-based services; contingency management—an evidence-based intervention that provides tangible rewards (often vouchers to exchange for retail goods and services) for positive behaviors such as abstaining from opioids; [and] mutual help programs, such as the Narcotics Anonymous 12-step facilitation therapy, may also be offered as an ancillary service.<sup>310</sup>

The drug therapies used in MAT include methadone, buprenorphine, and naltrexone.<sup>311</sup> Physicians must administer the drugs in a certified opioid treatment program (OTP), “a facility where patients can take medications under the supervision of staff and receive other care services.”<sup>312</sup> These types of facilities do not exist in many Louisiana parishes. Clinicians can prescribe buprenorphine to treat opioid-use disorder if they qualify for a waiver under the Drug Addiction Treatment Act of 2000.<sup>313</sup> As required under law, a prescriber must have psychiatric certifications in advanced addictions or qualifications in addiction medicine.<sup>314</sup> If the prescriber does not have these credentials, then they can complete an eight-hour training course.<sup>315</sup> The course is offered online or in person.<sup>316</sup> Once a physician obtains the waiver, the physician can treat addiction patients with and prescribe buprenorphine in any outpatient practice facility.<sup>317</sup>

MAT is not readily available to Louisiana citizens because there are very few community-based providers that offer this type of care.<sup>318</sup> A new

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309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

Louisiana treatment program has not been opened in over 10 years despite efforts from the American Society of Addiction Medicine and the National Council for Behavioral Health to advocate for MAT programs.<sup>319</sup> Research shows that MAT programs not only increase the survival rates of individuals going through withdrawal of opioid drugs, but they also “increas[e] the chances a person will remain in treatment and learn the skills and build the networks necessary for long-term recovery.”<sup>320</sup>

As necessary and beneficial as MAT programs will be to Louisiana communities, they are also costly.<sup>321</sup> Costs of MAT include obtaining and administering the medication used in opioid-use therapy either in an OTP or with a buprenorphine waiver.<sup>322</sup> The settlement proceeds will present Louisiana with an opportunity to increase local access to MAT programs.<sup>323</sup> Allocating settlement funds to aid local governments in supporting MAT would combat the rise of opioid-related overdoses in the state.<sup>324</sup> Thus, Louisiana local governments should assign a majority of the settlement funds to support MAT programs.<sup>325</sup>

The main objective of local governments funding MAT should be twofold: (1) increase the number of physicians in their parish who obtain buprenorphine waivers and (2) use the remaining funds to supply MAT programs with the necessary resources to be effective.<sup>326</sup> By increasing the number of local physicians who can prescribe buprenorphine for opioid-use disorders and by supplying funds to MAT programs, local governments will be in a much better position to battle the opioid crisis.<sup>327</sup> Further, MAT programs will act as safeguards against future crises.<sup>328</sup> If the government actively supports its citizens with well-funded public

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319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. See Connolly, *supra* note 256; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

324. See Connolly, *supra* note 256; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

325. See Connolly, *supra* note 256; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

326. See Connolly, *supra* note 256; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

327. See Connolly, *supra* note 256; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

328. See Connolly, *supra* note 256; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

health programs, disasters such as the opioid crisis will be much less likely to occur.<sup>329</sup>

### CONCLUSION

The opioid crisis exhausts funding in Louisiana.<sup>330</sup> The question of where to funnel settlement dollars will be a major issue for Louisiana because of the varied involvement of state, city, and parish actors, as well as the diverse range of affected populations in the state.<sup>331</sup> Because of the unprecedented nature of the large number of plaintiffs involved in the opioid MDL, in addition to the state lawsuits brought against the opioid manufacturers and distributors, uncertainty exists in the division of potential settlement or award proceeds.<sup>332</sup> Louisiana's legislation on the Tobacco MSA illustrates the state's past practice of ignoring local concerns and public health rehabilitation.<sup>333</sup> A study of Louisiana's involvement in the tobacco settlement supports the need to be proactive and explicit when allocating settlement funds to public health programs.<sup>334</sup> Local governments must mandate that at least a majority of the settlement go to treatment programs for opioid use.<sup>335</sup> The key to successfully ending the current crisis is to supply citizens with readily available resources to break the cycle of addiction and prevent overdose.<sup>336</sup> If done correctly, a proactive implementation of a public health program may stop the next public health crisis from occurring.<sup>337</sup> Such an approach will save Louisiana lives now and in the future from the dangers of opioid addiction.<sup>338</sup>

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329. See Connolly, *supra* note 256; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

330. LA. COMM'N ON PREVENTING OPIOID ABUSE, *supra* note 32.

331. Karlin, *supra* note 25.

332. Terry, *supra* note 35.

333. See generally Terry & Hoss, *supra* note 39.

334. *Id.*

335. See Connolly, *supra* note 256; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

336. Connolly, *supra* note 256; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

337. Connolly, *supra* note 256; *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, *supra* note 41.

338. See *supra* Part IV.

