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The Opioid Crisis or Climate Change: Which Is More Likely to Succeed Under the Tobacco Litigation Model?

Elizabeth W. De Leon

Texas A&M University School of Law, eweis@tamu.edu

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THE OPIOID CRISIS OR CLIMATE CHANGE: WHICH IS MORE LIKELY TO SUCCEED UNDER THE TOBACCO LITIGATION MODEL?

*by: Elizabeth W. De Leon**

ABSTRACT

Societal problems can occasionally have legal solutions, and several tools exist to implement change, including litigation and regulation. However, what elements make a societal problem more suitable for litigation or regulation? This Article examines four different societal issues (tobacco use, obesity, opioid addiction, and climate change) to determine whether litigation or regulation is the more appropriate route for success. The tobacco litigation serves as a successful example, while the fast food litigation serves as an unsuccessful example. Six signs of success are derived from the tobacco litigation: a large settlement agreement, evidence of corporate wrongdoing, change in public opinion, the litigation inspiring regulations, new courtroom avenues, and the ability to aggregate claims. The Article concludes that opioid litigation will be more successful under the tobacco litigation model than climate change litigation, because opioid litigation adapts the tobacco model to end the opioid epidemic. Novel solutions include utilizing Multi-District Litigation and the first-ever “negotiation class” that allows all 30,000 American cities to participate in a global settlement agreement with Big Pharma.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. THE SUCCESS OF THE TOBACCO LITIGATION
 - A. *Unsuccessful First Wave—Unforeseeability Defense (1954–1964)*
 - B. *Unsuccessful Second Wave—Free Will Defense (1964–1990)*
 - C. *Successful Third Wave (1990–Present)*
 - 1. Six Signs of Success
 - 2. What Elements Led to This Success?
 - a. *Attorneys General Become the New Plaintiffs*
 - b. *Smoking Gun Documents Disprove Unforeseeability Defense*
 - c. *Free Will Defense Disproved and New Courtroom Avenues*
 - D. *Framework for Future Social Policy Torts*
- III. THE UNSUCCESSFUL FAST FOOD LITIGATION
 - A. *Summary of the Litigation*
 - B. *Applying the Framework to Fast Food*
 - C. *Conclusion and Additions to Framework*
- IV. OPIOID LITIGATION
 - A. *Summary of the Litigation*

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* Staff Editor, Volume 7, Senior Articles Editor, Volume 8, *Texas A&M University Law Review*; J.D. Candidate, 2021, Texas A&M University School of Law. B.A. Honors Arts and Letters, minors in Mathematics and Engineering, 2018, Texas Tech University. I would like to thank my advisor, Professor Casado Perez, for sharing her expertise and encouraging me so this Comment could reach its full potential. I would also like to thank my parents, Jeff and Julie Weis, my sister, Claire Weis, and my husband, Levi De Leon, for their unwavering support, confidence, and patience.

- B. *Applying the Framework*
- C. *Conclusion*
- V. CLIMATE CHANGE LITIGATION
 - A. *Climate Change Suits Against the Government*
 - B. *Climate Change Litigation Against Big Oil*
 - C. *Applying the Framework*
- VI. CONCLUSION

I. INTRODUCTION

“Our purpose was to change the world,” Richard Scruggs, a plaintiffs’ lawyer during the tobacco litigation, commented.¹ This quote shows the powerful goal behind the tobacco litigation and why the suit’s success inspired Deborah Hensler to coin the term “social policy tort.”² The tobacco litigation contains one of the most expensive settlements in American legal history and has an ample platform to analyze present and future social policy torts.³

Social policy torts are a type of litigation seeking “industry-wide changes in corporate products and practices.”⁴ Normally, a judge’s role is limited to dyadic issues between two parties, but social policy torts allow judges to take on polycentric issues usually assigned to legislators.⁵ In these suits, public officials, private attorneys, and advocacy groups take on industries that have avoided liability for their harmful products or practices.⁶ These advocates consider adjudication the first step to encourage new legislation, change public opinion, and uncover the truth about wrongful corporate conduct.⁷ Social policy tort suits differ from social impact litigation, which seeks to wrong pervasive societal harms such as racial segregation, as seen in *Brown v. Board of Education*,⁸ because social policy tort attorneys seek billions of dollars in damages in addition to advocating for societal changes.⁹ The foremost example of a successful social policy tort suit is the tobacco litigation.¹⁰

This Article shows how the ongoing opioid litigation is likely to follow in the tobacco litigation’s successful footsteps, while climate change litigation likely will not. Part II examines why the tobacco litigation was so successful. A framework of six “signs of success” is then derived from the tobacco litigation: a global settlement agreement, evidence of corporate wrongdoing, change in public opinion, the litigation inspiring regulations, new courtroom avenues, and the ability to aggregate claims. Part III analyzes why the fast food litigation was unsuccessful, despite

¹ Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2099 (2004).

² Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493, 495 (2001).

³ Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511, 512 (2001).

⁴ Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMPAR. & INT’L L. 179, 207 (2001).

⁵ See Jeb Barnes, *In Defense of Asbestos Tort Litigation: Rethinking Legal Process Analysis in a World of Uncertainty, Second Bests, and Shared Policy-Making Responsibility*, 34 LAW & SOC. INQUIRY 5, 8 (2009).

⁶ See Hensler, *supra* note 4, at 206–07.

⁷ See generally Barnes, *supra* note 5.

⁸ Lara Bergthold & Felix Schein, *Moving Forward Social Causes Through Impact Litigation*, HUFFPOST (Sept. 10, 2013, 7:17 PM), https://www.huffpost.com/entry/moving-forward-social-causes-through-impact-litigation_b_3582680 [<https://perma.cc/C3WL-8PT9>]; see *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).

⁹ Hensler, *supra* note 4, at 207.

¹⁰ See *id.* at 207–09.

appearing like the tobacco litigation on the surface. Applying the tobacco framework here emphasizes the importance of finding evidence of corporate wrongdoing, suggesting an attenuated causation link between the harm and the corporations' actions will prevent any effective litigation. The fast food litigation also sheds light on corporations utilizing false marketing to appease public opinion, and shows that plaintiffs are less likely to succeed when suing heavily regulated corporations. Part IV applies the tobacco framework to the opioid litigation and analyzes three unique elements of opioid litigation: the Multi-District Litigation ("MDL"), the negotiation class, and a positive public nuisance precedent in state court. Part V analyzes the recent *Juliana v. United States* and the *California v. B.P. P.L.C.* decisions and applies the tobacco framework to the climate change litigation. Part VI explains why the opioid litigation is more likely to succeed under the new tobacco model than the climate change litigation. While both litigations have most or all the signs of success, the opioid litigation is more likely to succeed for three reasons. First, climate change public nuisance suits are currently pending in state court, while a state court already found an opioid manufacturer liable for public nuisance. Second, Big Pharma companies have settled with harmed cities and states in the opioid litigation, but Big Oil has not in the climate change litigation. Third, federal courts are unwilling to adjudicate climate change issues, while a federal court created an MDL and a negotiation class for the opioid litigation. While the opioid crisis is more likely to be resolved with a large global settlement, the results of the climate change litigation surpass the fast food litigation's success rate. Both courts and Big Oil acknowledge that climate change is real and that emissions contribute to climate change, the public more readily believes climate change is occurring, and *Juliana* suggests that the political branches of government can no longer ignore climate change.

II. THE SUCCESS OF THE TOBACCO LITIGATION

The American tobacco litigation model has been so successful that other countries are clamoring to implement similar techniques.¹¹ The World Health Organization deems the American tobacco litigation a success due to the "massive financial recoveries" and how it "shap[ed] and educat[ed] the public."¹² The American Tobacco litigation spanned five decades and did not see success until the 1990s, during the third wave of litigation.¹³ This Part compares the first and second unsuccessful waves of litigation with the third wave of litigation to determine what changes garnered success.

¹¹ D. DOUGLAS BLANKE, WHO, TOWARDS HEALTH WITH JUSTICE: LITIGATION AND PUBLIC INQUIRIES AS TOOLS FOR TOBACCO CONTROL 12 (2002), https://apps.who.int/iris/bitstream/handle/10665/200788/EMRPUB_2002_EN_854.pdf [<https://perma.cc/9WHR-JQWY>] (stating that tobacco is still very much a global issue: "One-third of the world's adults smoke cigarettes, and half of these smokers will die prematurely."); see generally Andrei Sirabi-onian, *Why Tobacco Litigation Has Not Been Successful in the United Kingdom: A Comparative Analysis of Tobacco Litigation in the United States and the United Kingdom*, 25 NW. J. INT'L L. & BUS. 485 (2005); Heather Cooper, *Tobacco Litigation: A Comparative Analysis of the United States and European Community Approaches to Combatting the Hazards Associated with Tobacco Products*, 16 BROOK. J. INT'L L. 275 (1990).

¹² BLANKE, *supra* note 11, at 13.

¹³ *Id.* at 16, 23–24.

A. *Unsuccessful First Wave—Unforeseeability Defense (1954–1964)*

The first tobacco litigation case, *Pritchard v. Liggett & Myers Tobacco Co.*, was filed in 1954.¹⁴ *Pritchard* and other first wave cases were brought by individual plaintiffs on “theories of fraud, negligence, and breach of warranty.”¹⁵ Most plaintiffs had lung cancer and sought monetary damages from the tobacco companies for “medical expenses, lost wages, and pain and suffering.”¹⁶ Judges dismissed almost all the first wave cases before trial, and those cases that did make it to trial were unsuccessful.¹⁷ The tobacco companies’ victories during this era are explained by two tactics: (1) denying the causal link between using tobacco and any disease, like lung cancer, and (2) arguing that they had no duty to warn customers because they had no knowledge or notice of any adverse health consequences related to smoking.¹⁸

The first defense, lack of causation, was based on the alleged absence of scientific evidence linking cancer to cigarette usage. Shortly before *Pritchard* in 1950, scientists began publishing landmark studies linking lung cancer and cigarettes.¹⁹ However, these reports had little effect as cigarette manufacturers denied these findings, and some health professionals found them inconclusive.²⁰ Also, the studies did not affect the public opinion of cigarettes, as “smoking remained a ubiquitous part of popular culture” and “was accepted in almost every setting, from the courts to the Congress to medical offices.”²¹ Because public opinion did not change, this likely affected the result in jury trials.

The 1963 Fifth Circuit case, *Lartigue v. R. J. Reynolds Tobacco Co.*, illustrates the second defense that tobacco companies were not liable because the cancerous side effects of smoking were unforeseeable.²² The case was brought by a widow, whose husband was a heavy smoker and died of lung cancer, on the claims of negligence and breach of warranty.²³ Reynolds and Liggett & Myers, manufacturers of several cigarette brands, pleaded a general denial, along with assumption of the risk and contributory negligence defenses.²⁴ The court explained that a cigarette manufacturer is only strictly liable for foreseeable harm.²⁵ In application, the court stated: “[I]t cannot be said that cigarette smokers who started smoking before the great cancer-smoking debate relied on the tobacco companies’ ‘warranty’ that their cigarettes had no carcinogenic element. . . . [T]he manufacturer is not an insurer against the unknowable.”²⁶

¹⁴ Sirabionian, *supra* note 11, at 486.

¹⁵ *Id.*

¹⁶ BLANKE, *supra* note 11, at 16.

¹⁷ *Id.* at 17.

¹⁸ *Id.*

¹⁹ *Id.* at 16.

²⁰ *Id.*

²¹ *Id.*

²² *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F.2d 19, 40 (5th Cir. 1963).

²³ *Id.* at 22.

²⁴ *Id.*

²⁵ *Id.* at 39.

²⁶ *Id.* at 39–40.

In addition to these defenses, individual plaintiffs could not match the financial superiority and strategy of Big Tobacco's legal teams.²⁷ One of Big Tobacco's tactics was draining the plaintiff's resources early on by making excessive discovery requests.²⁸

B. *Unsuccessful Second Wave—Free Will Defense (1964–1990)*

The beginning of the second wave was marked by the government showing the dangers of tobacco. A 1964 Surgeon General report linked smoking to “deadly diseases, including lung cancer, emphysema, and bronchitis.”²⁹ Also, the report demanded congressional action because it determined smoking “was a ‘health hazard of sufficient importance.’”³⁰ Congress responded by requiring the following label on cigarettes: “Caution: Cigarette Smoking May Be Hazardous to Your Health.”³¹ The Labeling Act preempted state common law claims regarding the adequacy of the warning on cigarette labels or any cigarette advertising.³² The Act preempted the claims because Congress decided that cigarettes were “a lawful product” that could be marketed nationally, so long as the cigarettes had the mandated warning.³³ Therefore, the improved scientific evidence in the Surgeon General's report helped remove the first wave causation defense, but the Labeling Act created an entirely new defense—the common knowledge or free will defense.³⁴

This new defense came from the 1965 Restatement (Second) of Torts.³⁵ Section 402(a) made sellers strictly liable for the physical harm caused by a product they sold if the product was “in a defective condition unreasonably dangerous” to the user.³⁶ Despite causing dangerous health effects, the Restatement indicated that strict liability law should not apply to cigarettes because the adverse health effects are common knowledge, lumping them in the same category as alcohol and butter.³⁷

The public opinion during the second wave reinforced this defense by putting the responsibility on the smoker.³⁸ Juries and courts still believed it was the smoker's lifestyle choice that caused him harm, and therefore Big Tobacco was not liable.³⁹ This is partly because the danger of smoking seemed to be common knowledge; evidence shows that the earliest condemnation of

²⁷ Maria Gabriela Bianchini, *The Tobacco Agreement That Went Up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation*, 87 CALIF. L. REV. 703, 710–11 (1999). Big Tobacco is made up of the “Big Five” companies: Liggett-Myers, R. J. Reynolds and Brown and Williamson, American Tobacco, Brown and Williamson, and Philip Morris. W. W. Yeargin, *Tobacco*, NC PEDIA (2006), <https://www.ncpedia.org/tobacco-part-3-rise-big-tobacco> [https://perma.cc/9Y4C-UP5E].

²⁸ Bianchini, *supra* note 27, at 711.

²⁹ Sirabonian, *supra* note 11, at 487.

³⁰ *Id.*

³¹ *Id.* at 487–88.

³² Paul G. Crist & John M. Majoras, *The “New” Wave in Smoking and Health Litigation—Is Anything Really So New?*, 54 TENN. L. REV. 551, 566–67 (1987).

³³ *Id.* at 568.

³⁴ *See id.* at 577.

³⁵ Sirabonian, *supra* note 11, at 488–89 (noting that the seller would be liable for the harm done, even if the seller “has exercised all possible care in the preparation and sale of his product”).

³⁶ *Id.* at 489.

³⁷ Crist & Majoras, *supra* note 32, at 552–53, 558 (noting it is important that the official comment appeared in 1962, before the Surgeon General's Advisory Committee's Report of 1964, but was affirmed after the Report was published).

³⁸ *Id.* at 552.

³⁹ *Id.*

smoking dates back to 1604.⁴⁰ American law first acknowledged the public's knowledge of the danger of cigarettes in the 1900 Supreme Court case *Austin v. Tennessee*: "cigarette's deleterious effects have become very general and communications are constantly finding their way into public press."⁴¹ If the danger of smoking was common knowledge, it makes sense why individual plaintiffs had such a difficult time defeating this defense. In fact, the second wave's Labeling Act made the situation worse because anyone that smoked cigarettes after reading the warning assumed the risk of smoking.⁴²

C. Successful Third Wave (1990–Present)

1. Six Signs of Success

The tobacco litigation is heeded as the most successful social policy tort lawsuit,⁴³ and Deborah Hensler's creation of the term "social policy tort" was directly inspired by the litigation.⁴⁴ This Article determines six "signs of success," which are rooted in the third wave of the tobacco litigation. The signs are a large global settlement agreement,⁴⁵ evidence of corporate wrongdoing,⁴⁶ change in public opinion,⁴⁷ the litigation inspiring regulations,⁴⁸ new courtroom avenues,⁴⁹ and the ability to aggregate claims.⁵⁰ The signs are explained in more detail below.

The first and main goal of social policy torts is "reimbursement of government expenditures allegedly incurred as a result of injuries due to the manufacturers' practices."⁵¹ The tobacco litigation saw success when Mississippi, Florida, Texas, and Minnesota negotiated settlements with Big Tobacco exceeding \$36 billion.⁵² However, the most successful settlement was the Master Settlement Agreement ("MSA"), an agreement between forty-six state attorneys general, five

⁴⁰ *Id.* at 553–54 ("One of the earliest written efforts encouraging smokers to quit . . . was published in 1604 [by] England's King James I . . . stat[ing] that smoking is 'a custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs.'").

⁴¹ *Id.* at 559 (cleaned up) (quoting *Austin v. Tennessee*, 179 U.S. 343, 348 (1900)).

⁴² See Bianchini, *supra* note 27, at 710.

⁴³ John Gray, *The Use of Public Nuisance Suits to Address Climate Change: Are These Really "Ordinary Tort Cases?"*, in *THE LEGAL IMPACT OF CLIMATE CHANGE* ch. 7 (2010 ed.), 2010 WL 1616860, at *1; see Hensler, *supra* note 2, at 494–95; see Hensler, *supra* note 4, at 207–09.

⁴⁴ See Hensler, *supra* note 2, at 495.

⁴⁵ See *Master Settlement Agreement*, PUB. HEALTH L. CTR., <https://www.publichealthlawcenter.org/topics/commercial-tobacco-control/commercial-tobacco-control-litigation/master-settlement-agreement> [<https://perma.cc/TE5C-JNLM>] [hereinafter PUB. HEALTH].

⁴⁶ See generally Clive Bates & Andy Rowell, *Tobacco Explained: The Truth About the Tobacco Industry . . . in Its Own Words*, WHO, <https://www.who.int/tobacco/media/en/TobaccoExplained.pdf> [<https://perma.cc/E8TL-HK94>].

⁴⁷ See K. Michael Cummings & Robert N. Proctor, *The Changing Public Image of Smoking in the United States: 1964–2014*, 23 *CANCER, EPIDEMIOLOGY, BIOMARKERS & PREVENTION* 32 (2014), <https://doi.org/10.1158/1055-9965.EPI-13-0798>.

⁴⁸ See BLANKE, *supra* note 11, at 11.

⁴⁹ See Barnes, *supra* note 5, at 13–14.

⁵⁰ Paul A. LeBel, "Of Deaths Put on by Cunning and Forced Cause": *Reality Bites the Tobacco Industry*, 38 *WM. & MARY L. REV.* 605, 623–26 (1997); Rustad, *supra* note 3, at 512 (noting that the inability for the tobacco litigation to certify class actions was an obstacle to success).

⁵¹ Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 *SETON HALL L. REV.* 883, 888 (2001).

⁵² Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 *U.C. DAVIS L. REV.* 1, 11 (2000).

U.S. territories, Washington, D.C., and four of the largest American cigarette manufacturers.⁵³ The settlement limited companies' advertising and manufacturing, and required them to pay billions of dollars to the states annually.⁵⁴

Second, social policy torts are not just about financial penalties, and arguably the most important element of success in these suits is uncovering the truth.⁵⁵ A main goal is to foster corporate responsibility,⁵⁶ and a way to achieve this is to reveal companies' wrongdoings to the public so they are forced to change. During the third wave of the tobacco litigation, the Minnesota Attorney General highlighted the importance of discovering the truth by insisting that his state would only settle if the tobacco industry agreed to make the 35 million documents found during discovery public.⁵⁷ This set a precedent, requiring all future tobacco settlements to make internal documents public, which resulted in the MSA containing a similar requirement.⁵⁸ As explained in the next Section, evidence of corporate wrongdoing was also necessary to defeat Big Tobacco's defenses.⁵⁹ Additionally, courts required scientific evidence showing cigarettes caused harm to establish the causation element in successful third wave suits brought by individuals.⁶⁰ The importance of publicizing companies' internal documents is not unique to the tobacco litigation, as it was also recognized as a sign of success in the mass asbestos products litigation.⁶¹

Third, a change of public opinion is important because it affects the outcome of jury trials, and consumers of dangerous products can vote with their wallets to decrease the prevalence of smoking or other harmful actions and results of using the contentious product. There has been a drastic decrease in use of cigarettes: Gallup polls show that in 1954, 45% of those polled smoked a cigarette "in the last week," whereas the total was only 15% in 2019.⁶² Additionally, the appreciation of cigarettes' dangerous effects has increased: in 1994, 36% of those polled designated cigarettes as very harmful, whereas the total was 58% in 2019.⁶³

Fourth, meaningful change can occur when judges allow new courtroom avenues rather than deferring to a different branch of government to solve the issue, such as Congress.⁶⁴ The tobacco litigation spawned new courtroom avenues for individual plaintiffs, including the "addiction-as-injury" theory⁶⁵ and allowed Racketeer Influenced and Corrupt Organizations Act claims, as explained in the next Section, based on uncovered evidence of corporate wrongdoing.⁶⁶

⁵³ PUB. HEALTH, *supra* note 45.

⁵⁴ *Id.*

⁵⁵ Stanton Glantz, *Lawsuits Against Companies Aren't Just About Getting Money. They're About Revealing the Truth.*, WASH. POST (September 9, 2019, 3:34 PM), <https://www.washingtonpost.com/opinions/2019/09/09/lawsuits-against-companies-arent-just-about-getting-money-theyre-about-revealing-truth/> [<https://perma.cc/M7JR-JMZL>]; see Rustad, *supra* note 3, at 511.

⁵⁶ Erichson, *supra* note 1, at 2102.

⁵⁷ Glantz, *supra* note 55.

⁵⁸ *Id.*

⁵⁹ See Bianchini, *supra* note 27, at 711; Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 531 (1992).

⁶⁰ Sirabonian, *supra* note 11, at 487, 492 n.52, 493.

⁶¹ Barnes, *supra* note 5, at 21.

⁶² *Tobacco and Smoking*, GALLUP, <https://news.gallup.com/poll/1717/tobacco-smoking.aspx> [<https://perma.cc/-84YR-Z69M>].

⁶³ *Id.*

⁶⁴ See Barnes, *supra* note 5, at 14.

⁶⁵ Susan E. Kearns, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336, 1342 (1999).

⁶⁶ See, e.g., *United States v. Philip Morris USA, Inc.*, 499 F. Supp. 2d 1 (D.D.C. 2006) (finding numerous tobacco defendants violated the Racketeer Influenced and Corrupt Organizations Act).

Fifth, social policy tort litigation has the unique goal of making industry-wide changes, a job usually limited to federal and state legislatures.⁶⁷ One author explains that social policy torts utilize adjudication as a first step to influence legislation.⁶⁸ This defining characteristic clearly shows the difference between traditional civil class actions and social policy torts.⁶⁹ For example, in individual tobacco cases the goal is only making the plaintiff whole through damages; whereas the attorneys general negotiating the MSA required substantial reforms, including limiting youth marketing techniques and outdoor advertising.⁷⁰ Also, several states enacted higher taxes on tobacco products, which continues to deter smoking.⁷¹ Another deterrence is the increase of second-hand smoking statutes preventing smoking in certain public areas.⁷² In 2009, the Food and Drug Administration (“FDA”) took over complete regulation of tobacco products.⁷³ The phenomenon of adjudication influencing legislation also occurred in the gun and health-care insurance suits brought by states and municipalities.⁷⁴

Sixth, the ability to certify class actions and aggregate claims is another powerful tool to defeat corporations.⁷⁵ The rationale behind this is that individual plaintiffs often lack the resources to go after the large corporations targeted by social policy torts.⁷⁶ For example, during the tobacco litigation, “a confidential tobacco industry internal legal memo . . . stated, ‘The goal in litigation is not to spend all of our money, but to force the plaintiffs to spend all of their money.’”⁷⁷ Other methods of aggregating claims include states and municipalities suing on behalf of individuals under *parens patriae* standing, which was used during the tobacco litigation,⁷⁸ or creating a negotiation class.⁷⁹

2. What Elements Led to This Success?

Achieving the six signs of success throughout the third wave of tobacco litigation depended on new plaintiffs, new evidence, and new legal avenues.⁸⁰ Plaintiffs finally defeated Big Tobacco

⁶⁷ Hensler, *supra* note 4, at 207.

⁶⁸ Barnes, *supra* note 5, at 6–7.

⁶⁹ Hensler, *supra* note 2, at 498.

⁷⁰ Master Settlement Agreement, § III(a)–(c), <https://www.publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf> [<https://perma.cc/CVY3-8DEG>] (noting that specifically the MSA specified Big Tobacco stop targeting youth with advertising, remove cartoons from their advertising (ex: “Joe Camel”), and limit the use of sponsorships at events where a large percentage of the audience are youth).

⁷¹ See LeBel, *supra* note 50, at 635–42.

⁷² Cummings & Proctor, *supra* note 47, at 33.

⁷³ *Federal Regulation of Tobacco*, PUB. HEALTH L. CTR., <https://www.publichealthlawcenter.org/topics/commercial-tobacco-control/federal-regulation-tobacco> [<https://perma.cc/68JZ-8CUH>].

⁷⁴ See Hensler, *supra* note 2, at 498.

⁷⁵ LeBel, *supra* note 50, at 623–26; see Rustad, *supra* note 3, at 512.

⁷⁶ Bianchini, *supra* note 27, at 710–11.

⁷⁷ *Historic Tobacco Case Revisited: Biggest Litigation Win Ever or a Complete Scam?*, DALL. MORNING NEWS (Apr. 15, 2016, 2:54 PM), <https://www.dallasnews.com/business/2016/04/15/historic-tobacco-case-revisited-biggest-litigation-win-ever-or-a-complete-scam/> [<https://perma.cc/9AQJ-XJAW>].

⁷⁸ John B. Hoke, *Parens Patriae: A Flawed Strategy for State-Initiated Obesity Litigation*, 54 WM. & MARY L. REV. 1753, 1757 (2013).

⁷⁹ Deborah Hensler, *Opioid Negotiation Class May Be Organic Procedure Evolution*, STAN. L. SCH. (Oct. 1, 2019), <https://law.stanford.edu/2019/10/01/opioid-negotiation-class-may-be-organic-procedure-evolution/?sf11018-7564=1> [<https://perma.cc/B6JP-GBZT>].

⁸⁰ BLANKE, *supra* note 11, at 24.

because juries and courts began to focus less on the *effect* of tobacco, and more on the *conduct* of the companies.⁸¹

a. Attorneys General Become the New Plaintiffs

The government's involvement "reach[ed] an all time high" during the third wave of litigation.⁸² The governmental action that impacted this wave had less to do with legislation and more to do with city and state governments filing numerous suits beginning in 1994.⁸³ Leading up to 1998, almost every state filed an action, resulting in several settlement agreements.⁸⁴ The influence and resources of the attorneys general suing on behalf of states far outweighed that of the individual plaintiffs suing in the previous two waves of litigation.⁸⁵ The potential pay-out also far exceeded that of individual damages; in fiscal year 2019, the states that participated in the MSA cumulatively collected \$27.3 billion.⁸⁶

To sue Big Tobacco, state attorneys general relied on the common law doctrine of *parens patriae*.⁸⁷ This doctrine allows "a state attorney general [to] bring an action against a party that has harmed the health or economic well being" of its state citizens.⁸⁸ Because the states were not a direct victim of Big Tobacco, the attorneys general had to plead claims different than the original individual plaintiffs.⁸⁹ On theories of state consumer protection, antitrust,⁹⁰ and state public nuisance laws,⁹¹ states argued that tobacco companies contributed to health problems and created significant costs in state health-care systems.⁹² By using public nuisance and similar claims, states did not have to prove causation related to an individual citizen's illness, and thus eliminated Big Tobacco's previous defenses based on individual actions, such as assumption of the risk and contributory negligence.⁹³ Instead, the states only had to show harm to themselves; for example, the \$50 billion spent in health-care costs caring for smokers between 1976 and 1993.⁹⁴ Additionally, states argued that the costs incurred to help smokers were involuntary, defeating the assumption

⁸¹ *Id.*

⁸² Sirabionian, *supra* note 11, at 490.

⁸³ BLANKE, *supra* note 11, at 25.

⁸⁴ *Id.*

⁸⁵ *Id.* at 12.

⁸⁶ TOBACCO FREE KIDS, BROKEN PROMISES TO OUR CHILDREN: A STATE-BY-STATE LOOK AT THE 1998 TOBACCO SETTLEMENT 20 YEARS LATER 1 (2018), https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/settlement/FY2019/2018_State_Report.pdf [<https://perma.cc/3HR2-QXGG>].

⁸⁷ Hoke, *supra* note 78, at 1757.

⁸⁸ *Id.*

⁸⁹ Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 759 (2003).

⁹⁰ *The Master Settlement Agreement: An Overview*, PUB. HEALTH L. CTR. 1, 2 (Jan. 2019), <https://law.stanford.edu/2019/10/01/opioid-negotiation-class-may-be-organic-procedure-evolution/?sf110187564=1> [<https://perma.cc/KX8G-FWP7>] [hereinafter *An Overview*].

⁹¹ Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 958 (2007).

⁹² *An Overview*, *supra* note 90, at 2.

⁹³ Gifford, *supra* note 89 (noting that the causation issue was eliminated because the state only had to prove economic damage).

⁹⁴ *An Overview*, *supra* note 90, at 1.

of the risk defense.⁹⁵ Payment for these harms is part of the MSA, which paid and continues to pay billions of dollars to state governments to treat and prevent smoking-related illnesses.⁹⁶

b. Smoking Gun Documents Disprove Unforeseeability Defense

Besides increased health-care costs, what happened in 1994 to inspire attorneys general to file these lawsuits? Dr. David A. Kessler, the FDA commissioner at the time, investigated whether tobacco was a “drug” the FDA could regulate.⁹⁷ While the Supreme Court held in a 5–4 decision that tobacco was not a “drug” the FDA could regulate, the fact-finding process resulted in testimony and new documentary evidence showing that Big Tobacco knew tobacco caused cancer and was addictive.⁹⁸ Evidence also emerged in 1994 from two tobacco industry “whistleblowers.”⁹⁹ In documents that became known as the “cigarette papers,” one paralegal and a former tobacco executive leaked damaging documents from Brown & Williamson Corporation to the media and federal regulatory authorities.¹⁰⁰ These two events led to a congressional inquiry, in which seven tobacco chief executive officers testified under oath and “den[ied] that cigarettes addict smokers or cause disease.”¹⁰¹ Contrary to this testimony, Congress already possessed the companies’ internal documents stating the industry “understood the carcinogenic nature of its product since the 1950s” and knew of its addictive nature since the 1960s.¹⁰² This evidence of knowledge directly contradicted the first wave defense that Big Tobacco did not foresee the carcinogenic effects of tobacco use.¹⁰³

c. Free Will Defense Disproved and New Courtroom Avenues

The free will defense was first attacked in 1992 when the Supreme Court decided that the 1965 Labeling Act did not preempt state damage awards regarding “express warranty, intentional fraud and misrepresentation, or conspiracy.”¹⁰⁴ The holding suggests that the label alone was not a sufficient warning for the risks associated with smoking. Additionally, the defense was fully eradicated when documents revealed that the industry knew of the addictive quality of cigarettes, purposefully increased the addictive nature of them, and targeted advertising at children.¹⁰⁵ The loss of this defense also allowed two new courtroom avenues.

Originally pled in *Castano v. American Tobacco Co.*, the first new courtroom avenue was based on Big Tobacco fraudulently concealing tobacco’s addictive quality.¹⁰⁶ This argument became known as the “addiction-as-injury” claim and directly refuted the idea “that smokers voluntarily choose to smoke.”¹⁰⁷ The argument also greatly expanded who can sue because under this

⁹⁵ Gifford, *supra* note 89, at 759.

⁹⁶ *Master Settlement Agreement*, TRUTH INITIATIVE, <https://truthinitiative.org/who-we-are/our-history/master-settlement-agreement> [<https://perma.cc/F4VD-Q4SC>]; PUB. HEALTH, *supra* note 45.

⁹⁷ Sirabionian, *supra* note 11, at 490.

⁹⁸ *Id.* at 490, 492–93.

⁹⁹ BLANKE, *supra* note 11, at 21.

¹⁰⁰ *Id.* at 21 n.16.

¹⁰¹ *Id.* at 22.

¹⁰² Bates & Rowell, *supra* note 46.

¹⁰³ See Bianchini, *supra* note 27, at 710.

¹⁰⁴ *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 531 (1992).

¹⁰⁵ Bates & Rowell, *supra* note 46, at 15, 24.

¹⁰⁶ Kearns, *supra* note 65, at 1341–42.

¹⁰⁷ *Id.* at 1342.

theory, the plaintiff must only be addicted and not actually suffer any health issues.¹⁰⁸ The damages for addiction instead derived from “medical monitoring and emotional distress, along with disgorgement of the industry’s profits.”¹⁰⁹ Focusing on the addictive quality of tobacco defeated Big Tobacco’s previous claims that smokers freely chose to smoke.¹¹⁰ “These ‘assumption of risk’ and ‘comparative fault’ arguments were becoming less persuasive as evidence grew that tobacco was addictive, and that tobacco companies understood, exploited, and even enhanced this addiction.”¹¹¹

Additionally, courts more readily accepted that smoking was not a choice because of Big Tobacco’s child-targeted advertising.¹¹² The general theory was that once children reached adulthood, they were already addicted to cigarettes because childhood advertising removed their ability to choose to smoke as an adult.¹¹³ Data from the late 1990s indicates that “ninety percent of adult smokers became addicted before their nineteenth birthday and a majority of smokers began smoking before they were fourteen years old.”¹¹⁴ The MSA reiterates the importance of this targeted advertising, as creating “policies designed to reduce Youth smoking” was listed as one of the three main uses for the states’ settlement money.¹¹⁵

In 1996, the first individual plaintiff won against a cigarette manufacturer, receiving \$750,000 in damages.¹¹⁶ The verdict was a surprise and relied in part on the new addiction theory.¹¹⁷ Additionally, this was the first suit to reach a jury after Congress and the media released evidence of Big Tobacco’s corporate wrongdoing.¹¹⁸ The plaintiff was a lung cancer survivor but relied on the powerful addiction theory to win the case.¹¹⁹ The power of this new legal theory and evidence discussed in the previous Subsection is very clear because lawsuits brought by individual plaintiffs during the first and second wave failed.¹²⁰ The verdict caused tobacco companies’ stock prices to crash, influencing the companies to settle with U.S. states in 1997 and 1998.¹²¹ Settlements also required tobacco warning labels stating “smoking is addictive.”¹²²

The second new courtroom avenue involved the DOJ bringing Racketeer Influenced and Corrupt Organizations Act (“RICO”) claims against several tobacco companies.¹²³ In 2006, a D.C. federal district court determined that the companies violated RICO by “fraudulently covering up the health risks associated with smoking and marketing their products to children.”¹²⁴ The Fourth

¹⁰⁸ BLANKE, *supra* note 11, at 27–28.

¹⁰⁹ *Id.* at 28.

¹¹⁰ *Id.* at 24.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Michele L. Tyler, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783, 802–03 (1998).

¹¹⁴ *Id.* at 802.

¹¹⁵ *An Overview, supra* note 90, at 3.

¹¹⁶ Myron Levin, *Former Smoker Wins Pivotal Tobacco Case*, L.A. TIMES (Aug. 10, 1996, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1996-08-10-mn-32943-story.html> [<https://perma.cc/ZNQ8-P2AB>].

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See discussion *supra* Sections II.A, II.B.

¹²¹ Sirabionian, *supra* note 11, at 491.

¹²² Myron Levin & Sheryl Stolberg, *Tobacco Company Admits Smoking Leads to Cancer*, L.A. TIMES (Mar. 21, 1997, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1997-03-21-mn-40672-story.html> [<https://perma.cc/S6-AW-WNUS>].

¹²³ See *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 26 (D.D.C. 2006).

¹²⁴ Christopher C. Brewer, *Smoke ‘Em if You Got ‘Em?—Reconsidering the Activist State Attorney General in Light of Climate Change, Tobacco Tactics, & ExxonMobil*, 74 WASH. & LEE L. REV. ONLINE 337, 352 (2018).

Circuit upheld the RICO violation in 2009.¹²⁵ Litigators emphasize that the 1,683 page opinion detailing Phillip Morris's and other tobacco companies' wrongs would have been impossible without the release of the smoking gun documents.¹²⁶ While the RICO prosecution did not encourage the MSA,¹²⁷ it was another way to punish Big Tobacco and ensure the public knew the truth about its harmful products. For example, part of the court ruling required tobacco companies to issue "corrective statements" in the form of advertisements.¹²⁸

D. Framework for Future Social Policy Torts

Examining the tobacco litigation shows what elements influenced the success of the third wave. The first successful element, a large global settlement, was attained because of the states' combined financial resources and ability to sidestep previous defenses, finally leveling the playing field with Big Tobacco in a way that individual plaintiffs could not.¹²⁹ Attorneys general may sue on behalf of their states' citizens through *parens patriae* standing, which requires attorneys general to show that some harm occurred to the health or economic well-being of their states' citizens.¹³⁰ In the case of tobacco, the harm required for standing was shown by exorbitant health-care costs.¹³¹

The second successful element was evidence of an industry's deceptive conduct. Big Tobacco's deceptive conduct was revealed through settlement disclosure requirements, a congressional investigation, whistleblowers releasing documents, and the FDA trying to regulate tobacco.¹³² Litigation could also reveal deceptive conduct through discovery, but litigators admit this is "a long and arduous process."¹³³ There should also be significant causation evidence linking the product to the health or economic harm, which first was discovered during the second wave through the Surgeon General's report linking deadly diseases and smoking.¹³⁴ Additionally, the smoking gun documents in the third wave showed tobacco companies knew of the addictive quality and harmful health effects of cigarettes, and that they purposefully advertised to children and made cigarettes more addictive.¹³⁵

This evidence led to the third successful element, a change in public opinion, which influenced jury decisions. This evidence also backed the fourth element: new courtroom avenues. First, the Supreme Court determined that state claims under the Labeling Act were no longer preempted.¹³⁶ Second, third wave plaintiffs could argue that they did not choose to smoke because of the addictive nature and targeted child marketing.¹³⁷ Third, the smoking gun documents allowed criminal prosecution of Big Tobacco in federal courts under RICO.¹³⁸ The fifth element of success

¹²⁵ See *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095 (D.C. Cir. 2009).

¹²⁶ Brewer, *supra* note 124.

¹²⁷ BLANKE, *supra* note 11, at 25.

¹²⁸ *Big Tobacco Finally Forced to Tell the Truth About Its Deadly Products Through Court-Ordered Ads*, TRUTH INITIATIVE (Nov. 27, 2017), <https://truthinitiative.org/press/press-release/big-tobacco-finally-forced-tell-truth-about-its-deadly-products-through-court> [<https://perma.cc/F9ZW-LK7H>].

¹²⁹ Erichson, *supra* note 52, at 10.

¹³⁰ *Id.*

¹³¹ *An Overview*, *supra* note 90, at 1.

¹³² See discussion *supra* Sections II.C.1, II.C.2.b.

¹³³ Brewer, *supra* note 124, at 353.

¹³⁴ See discussion *supra* Section II.B.

¹³⁵ See Tyler, *supra* note 113.

¹³⁶ See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992).

¹³⁷ See discussion *supra* Section II.C.2.c.

¹³⁸ See *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 26 (D.D.C. 2006).

was influencing a productive body of legislation. The third wave achieved this by including specific provisions in the settlement requiring regulation, prompting second-hand smoke statutes and higher tax legislation.¹³⁹ Last, the tobacco litigation was able to aggregate claims and level the playing field between Big Tobacco and plaintiffs through *parens patriae* standing.¹⁴⁰

III. THE UNSUCCESSFUL FAST FOOD LITIGATION

This Part examines why the fast food litigation of the early 2000s was less successful than the tobacco litigation, despite the social harm from fast food having surface-level similarities to the harm Big Tobacco caused.¹⁴¹

A. Summary of the Litigation

In the 2002 class action *Barber v. McDonald's Corp.*, Cesar Barber, a fifty-six year old obese man, served as lead plaintiff.¹⁴² He argued that fast food chains intentionally withheld nutrition information,¹⁴³ causing him to unknowingly eat unhealthy food regularly since 1975,¹⁴⁴ and that he suffered from two heart attacks and diabetes as a result.¹⁴⁵ Mr. Barber's lawyer, Samuel Hirsch, tabled this case before it reached judgment because he felt that an adult should have a better sense of personal responsibility than the children he represented in his next suit, *Pelman v. McDonald's*.¹⁴⁶ Additionally, *Barber* received media ridicule, claiming that obesity from fast food was only due to a lack of self-control.¹⁴⁷ While *Barber* was not adjudicated, the lawyer's and public's opinion emulates the second wave defenses of free will and common knowledge. The plaintiff chose to eat these foods, and now he must suffer the consequences.

Pelman was a class action suit brought by the parents of two obese teenagers.¹⁴⁸ The arguments were that McDonald's engaged in false advertising and that fast food made the teenagers obese.¹⁴⁹ The judge summarily dismissed the suit, noting that the dangers of fast food are well known and that the advertisements created by McDonald's were not misleading.¹⁵⁰ The judge directly compared the suit to the third wave of the tobacco litigation: "As the successful tobacco class action litigation and settlements have shown . . . the fact that excessive smoking was

¹³⁹ See generally LeBel, *supra* note 50.

¹⁴⁰ See discussion *supra* Section II.C.1.

¹⁴¹ See Andrew M. Dansicker, *The Next Big Thing for Litigators*, 37 MD. BAR J. 12 (2004) (noting that both the tobacco and fast food industries have corporations with deep pockets, market to children, have products with an addictive nature, and have products that cause damage to health).

¹⁴² Christopher S. Carpenter & D. Sebastian Tello-Trillo, *Do "Cheeseburger Bills" Work? Effects of Tort Reform for Fast Food 1* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21170, 2015), <https://www.nber.org/papers/w21170.pdf> [<https://perma.cc/5BZ4-J7AH>] (noting that in addition to McDonald's, Barber sued Burger King, Wendy's, and Kentucky Fried Chicken).

¹⁴³ *Id.*

¹⁴⁴ Brooke Courtney, *Is Obesity Really the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation*, 15 ANNALS HEALTH L. 61, 79 (2006).

¹⁴⁵ Forrest Lee Andrews, *Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry*, 15 ALB. L.J. SCI. & TECH. 153, 160 (2004).

¹⁴⁶ Alyse Meislik, *Weighing in on the Scales of Justice: The Obesity Epidemic and Litigation Against the Food Industry*, 46 ARIZ. L. REV. 781, 792–93 (2004).

¹⁴⁷ Andrews, *supra* note 145, at 160–61.

¹⁴⁸ *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 519–20 (S.D.N.Y. 2003).

¹⁴⁹ *Id.* at 520.

¹⁵⁰ *Id.* at 529, 532, 543.

known to lead to health problems did not vitiate liability when . . . tobacco companies had intentionally altered the nicotine levels of cigarettes to induce addiction.”¹⁵¹ *Barber and Pelman* show that the public believes health issues from fast food result from choice, which aligns closely with the second wave of the tobacco litigation.

Despite these suits mirroring the first and second waves of tobacco litigation, the fast food litigation did not end with a successful third wave. The reasons for the lack of success rely on these key differences: the attenuated causation link, the lack of evidence discussing wrongful conduct of Big Fast Food, marketing strategies employed by Big Fast Food, and more comprehensive legislation of fast food under the FDA.

B. Applying the Framework to Fast Food

The first sign of success is a large settlement agreement. Similar to the first and second waves of tobacco litigation, only individuals (albeit organized as class actions) have brought cases against fast food companies and were met with similar free will defenses.¹⁵² After the failure of the private litigation, citizens have urged attorneys general to sue fast food under the *parens patriae* doctrine,¹⁵³ which was a major turning point for the tobacco litigation. Similar to the tobacco litigation, states have suffered economic harm as a result of obesity; according to an article published in 2012, Americans spent \$190 million in medical costs fighting obesity.¹⁵⁴ However, fast food suits would likely fail because the main theory used in the *parens patriae* standing is not appropriate for obesity suits.¹⁵⁵

The main reason *parens patriae* would fail in the obesity setting is because of the attenuated causal link between the consumption of fast food and the harms caused by obesity.¹⁵⁶ While this type of standing does not require the state to prove the corporation caused individual citizens’ injuries, it still must show that Big Fast Food caused economic harm (obesity health-care costs).¹⁵⁷ In the case of tobacco, scientific evidence made it fairly clear that smoking caused diseases such as lung cancer.¹⁵⁸ Additionally, it was easy to trace the harms to the tobacco defendants because the four parties to the MSA made up almost 100% of the tobacco manufacturing industry, and customers are normally loyal to one brand.¹⁵⁹ In contrast, several factors can cause obesity, including “caloric intake, environment, genetics, diseases, and drug use.”¹⁶⁰ Also, there are far more than four chains in the fast food sphere, and an obese person may eat at several of them.¹⁶¹ For these reasons, the causal link is not tight enough to encourage attorneys general to sue as they did in the tobacco litigation.

¹⁵¹ *Id.* at 532.

¹⁵² See Andrews, *supra* note 145, at 160–61.

¹⁵³ Hoke, *supra* note 78, at 1756–57.

¹⁵⁴ Sharon Begley, *As America’s Waistline Expands, Costs Soar*, REUTERS (April 30, 2012, 5:10 AM), <https://www.reuters.com/article/us-obesity/as-americas-waistline-expands-costs-soar-idUSBRE83T0C820120430> [<https://perma.cc/W5VH-YXLE>].

¹⁵⁵ Hoke, *supra* note 78, at 1757–58.

¹⁵⁶ *Id.* at 1768.

¹⁵⁷ See *id.* at 1760, 1761.

¹⁵⁸ *Id.* at 1766.

¹⁵⁹ *Id.* at 1766–67.

¹⁶⁰ *Id.* at 1767.

¹⁶¹ *Id.* at 1768.

However, fast food settlements have occurred. For example, McDonald's had to settle a suit due to it improperly disclosing its use of trans-fats.¹⁶² Essentially, McDonald's said in 2002 that it would switch to oil without trans-fats but did not actually implement the change until 2003.¹⁶³ This settlement shows that consumer protection suits are more likely to have positive results in fast food litigation, rather than personal injury suits related to health issues. Other plaintiffs have seen success with these types of consumer protection suits in the food industry, but their suits had nothing to do with resulting health issues like obesity, and were not part of a global agreement like the MSA.¹⁶⁴

The second sign of success is evidence of corporate wrongdoing. There is evidence that fast food causes health issues,¹⁶⁵ yet based on the tobacco framework, that alone is not enough. To succeed, plaintiffs must have smoking gun documents showing unfair conduct by the corporation, which is not the case in fast food litigation. Part of the evidence used in the tobacco litigation was uncovered during the suit determining if the FDA could regulate tobacco.¹⁶⁶ In 2009, the FDA began regulating the tobacco industry,¹⁶⁷ whereas fast food was always under its control.¹⁶⁸ That means fast food has one less route to obtain evidence of corporate wrongdoing because a similar investigation is unlikely to occur.

The other important evidence indicating corporate wrongdoing and contributing to the tobacco litigation's success was that cigarette manufacturers knew their products were carcinogenic since the 1950s, despite claiming they were not liable for harm caused to heavy smokers because the resulting lung cancer was unforeseeable.¹⁶⁹ Scientific evidence also allowed plaintiffs to establish causation between Big Tobacco's products and individual health issues.¹⁷⁰ Unlike the tobacco cases, no smoking gun documents exist showing that Big Fast Food knew fast food causes obesity and other weight-related ailments or that it took measures to make fast food more addictive or targeted children.¹⁷¹ Additionally, the causation link is more tenuous between eating fast food and obesity-related health issues, as discussed in the previous Subsection.¹⁷²

¹⁶² See Courtney, *supra* note 144, at 78.

¹⁶³ *Id.*; *McDonald's to Pay \$8.5 Million for Misleading Public About Use of Trans Fat*, DEMOCRACY NOW! (Feb. 16, 2005), https://www.democracynow.org/2005/2/16/mcdonalds_to_pay_8_5_million [<https://perma.cc/5E2B-7G-22>].

¹⁶⁴ Courtney, *supra* note 144, at 78–79.

¹⁶⁵ *Fast Food in the Media: The Rise of the Health-Conscious Consumer*, COMMETRIC (Jan. 4, 2019), <https://com-metric.com/2019/01/04/fast-food-in-the-media-the-rise-of-the-health-conscious-consumer/> [<https://perma.cc/HGE9-GNNZ>].

¹⁶⁶ Sirabionian, *supra* note 11, at 490.

¹⁶⁷ Ned Sharpless & Mitch Zeller, *Achievements in Tobacco Regulation Over the Past Decade and Beyond*, U.S. FOOD & DRUG ADMIN. (Aug. 20, 2019), <https://www.fda.gov/news-events/fda-voices-perspectives-fda-leadership-and-experts/achievements-tobacco-regulation-over-past-decade-and-beyond> [<https://perma.cc/E5RV-THK3>].

¹⁶⁸ See generally Ben Panko, *Where Did the FDA Come From, and What Does It Do?*, SMITHSONIAN MAG. (Feb. 8, 2017), <https://www.smithsonianmag.com/science-nature/origins-FDA-what-does-it-do-180962054/> [<https://perma.cc/FGH4-2AM6>].

¹⁶⁹ Bates & Rowell, *supra* note 46; *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F.2d 19, 39–40 (5th Cir. 1963).

¹⁷⁰ Sirabionian, *supra* note 11, at 487.

¹⁷¹ See Kelly D. Brownell & Kenneth E. Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar Is Big Food?*, 87 MILBANK Q. 259, 262–63 (2009), <https://doi.org/10.1111/j.1468-0009.2009.00555.x> (commenting that while books like *Fast Food Nation* have highlighted questionable industry practices and caused Big Food to react to “claims” of wrongdoing, the real threat is the public disclosure of documents through the legal process, as occurred in the tobacco litigation).

¹⁷² Hoke, *supra* note 78, at 1762.

However, there is evidence that Big Fast Food is using similar tactics. Big Tobacco paid scientists to conduct studies to counteract other studies linking cancer to smoking and required the scientists to memorize a deceptive script stating that the carcinogenic effects of cigarettes were “not proven.”¹⁷³ There is evidence that the food industry also pays scientists for similar jobs.¹⁷⁴ However, this is likely less impactful because of the diversity in the food industry. For example, there is evidence that the food industry paid scientists to counteract studies that soft drinks negatively affect health, which is only one product sold by fast food restaurants.¹⁷⁵ Both industries created grassroots-sounding entities, like The Center for Consumer Freedom for the food industry, to push their own agendas and discount other scientists.¹⁷⁶ The lack of success in fast food litigation shows that evidence of these similar tactics alone is not dispositive. Instead, there needs to be proof of wrongful conduct by a corporation, like targeted child advertising, lying about knowledge of negative health effects, or purposefully making its products more addictive.¹⁷⁷

The third sign of success is a change in public opinion. While the tobacco litigation likely inspired a 30% decrease in overall smoking between 1954 and 2019,¹⁷⁸ the fast food litigation made little to no impact. For example, projected fast food sales increased from \$580 billion in 2010 to \$863 billion in 2019.¹⁷⁹ Between 2013 and 2016, almost 40% of Americans “said they ate fast food in the past 24 hours.”¹⁸⁰ Yet, another 2016 survey stated that 54% of Americans think the U.S. cares more about healthy eating than it did twenty years ago.¹⁸¹ An explanation for this discrepancy is that fast food restaurants have adapted their marketing to address modern concerns of eating healthy.¹⁸²

In 2004, one year after the 2003 *Pelman* case, McDonald’s removed the “super-size” option from its menu,¹⁸³ “provided nutrition information on food packaging, and added healthier options such as salads and fruit to its menu.”¹⁸⁴ In a sense, McDonald’s owned up to its previous actions and the legal allegations by making positive changes. The tobacco industry did something similar. In response to plummeting sales after the first harmful study was released, the cigarette corporations published “A Frank Statement to Cigarette Smokers” in four hundred and forty-eight 1954 newspapers, which “assured Americans that ‘we accept an interest in people’s health as a

¹⁷³ Brownell & Warner, *supra* note 171, at 278, 264–65.

¹⁷⁴ *Id.* at 278.

¹⁷⁵ *Id.* at 279.

¹⁷⁶ *Id.* 279–80.

¹⁷⁷ See discussion *supra* Section II.C.2.

¹⁷⁸ See Brownell & Warner, *supra* note 171, at 286; see also *Tobacco and Smoking*, *supra* note 62.

¹⁷⁹ Alicia Kelso, *10 Story Lines That Defined the Decade in Fast Food*, FORBES (Dec. 17, 2019, 9:45 AM), <https://www.forbes.com/sites/aliciakelso/2019/12/17/10-plus-storylines-that-defined-a-decade-in-fast-food/#4b61b92d24d8> [<https://perma.cc/8W74-6ZJP>].

¹⁸⁰ Jamie Ducharme, *Almost 40% of Americans Eat Fast Food on Any Given Day, Report Says*, TIME (Oct. 3, 2018, 12:01 AM), <https://time.com/5412796/fast-food-americans/> [<https://perma.cc/QD2H-LE2G>].

¹⁸¹ *The New Food Fights: U.S. Public Divides Over Food Science*, PEW RSCH. CTR. (Dec. 1, 2016), <https://www.pewresearch.org/science/2016/12/01/public-views-about-americans-eating-habits/> [<https://perma.cc/QY2Y-U2FZ>].

¹⁸² Danielle Kent, *How Millennials Are Driving Fast Food Innovation*, O’DWYER’S (Mar. 11, 2019), <https://www.odwyerpr.com/story/public/12169/2019-03-11/how-millennials-are-driving-fast-food-innovation.html> [<https://perma.cc/469B-D7FR>].

¹⁸³ Jacob Mattis, *Pelman v. McDonald’s and the Fast Food Craze: Sending a Court to Do a Man’s Job*, U. HOUS. L. CTR. (Mar. 22, 2004), <https://www.law.uh.edu/healthlaw/perspectives/Obesity/040322Pelman.html> [<https://perma.cc/5NXU-RLSB>].

¹⁸⁴ Carpenter & Tello-Trillo, *supra* note 142, at 1.

basic responsibility.”¹⁸⁵ As of 1950 and onward, the tobacco companies released “healthier” alternatives to the traditional cigarette: including low-tar, low-nicotine, and filtered cigarettes,¹⁸⁶ and most recently vapes.¹⁸⁷ Although marketed as safe alternatives, these were not any healthier and,¹⁸⁸ in the case of vapes¹⁸⁹ and asbestos-riddled filtered cigarettes,¹⁹⁰ were sometimes even more dangerous than the original product. Similarly, new “health-foods” at fast food restaurants give consumers a false narrative that they can eat these items as often as they want because they are healthy.¹⁹¹ In fact, studies in 1986, 1991, and 2016 found that fast food has become increasingly unhealthy, with calories, portion sizes, and sodium content all rising over time.¹⁹² Additionally, offering healthy options like salads backfired for the general McDonald’s consumer, who is often more concerned about spending the least money for the most calories.¹⁹³ Salads do not fit this model because they are often the lowest calorie, yet most expensive item on the menu.¹⁹⁴ Therefore, these menu changes are not actually a successful result of the litigation because they do not help address the social issue of obesity, just like the changes tobacco companies made during the first and second litigation waves did not help resolve social harms.

Allow this comparison between the tobacco and fast food litigation to illuminate the importance of discovering evidence of corporate wrongdoing to succeed in litigation. False marketing increased the sales of filtered cigarettes from 2% in 1952 to over 60% of all cigarette sales by 1966.¹⁹⁵ But the “advertised benefits of filters were illusory, however, given that smokers of filtered brands often inhaled as much or more tar, nicotine, and noxious gases as smokers of unfiltered cigarettes.”¹⁹⁶ Later, plaintiffs used evidence that Big Tobacco recognized that filtered cigarettes were an unhealthy alternative back in the 1930s to hold them accountable.¹⁹⁷ For example, a 1995 plaintiff won \$2 million in damages for developing asbestos-related cancer after smoking

¹⁸⁵ Brownell & Warner, *supra* note 171, at 260.

¹⁸⁶ *Id.* at 282.

¹⁸⁷ See Gottschalk et al., *Is Vaping Safer than Smoking Cigarettes?*, NAT’L CTR. HEALTH RSCH., <http://www.center4research.org/vaping-safer-smoking-cigarettes-2/> [<https://perma.cc/3MH7-PCSA>].

¹⁸⁸ Brownell & Warner, *supra* note 171, at 282–83.

¹⁸⁹ Gottschalk et al., *supra* note 187.

¹⁹⁰ Brownell & Warner, *supra* note 171, at 282.

¹⁹¹ See generally David DiSalvo, *Fast Food Is Less Healthy Today than 30 Years Ago, Analysis Finds*, FORBES (Feb. 27, 2019, 11:47 PM), <https://www.forbes.com/sites/daviddisalvo/2019/02/27/fast-food-is-less-healthy-today-than-30-years-ago-analysis-finds/#3dc88545b964> [<https://perma.cc/UFR2-XMCH>].

¹⁹² *Id.*

¹⁹³ Kate Taylor, *McDonald’s Hasn’t Served a Single Salad in Almost Nine Months, and It’s Part of a Strategy Helping the Chain Cash in During the Pandemic*, BUS. INSIDER (Dec 3, 2020, 10:59 AM), <https://www.businessinsider.com/mcdonalds-salads-disappeared-from-menu-april-2020-2020-12> [<https://perma.cc/6SFF-CQ6V>] (Article discusses that McDonald’s is likely to permanently remove salads and that the chain has not served them in the last nine months because no one buys them. That is because patrons prefer to buy the higher-calorie, cheaper items: “Even priced at \$1, double cheeseburgers bring in more revenue than salads or the chicken sandwiches, which cost \$3.19 to \$4.29.”).

¹⁹⁴ See *Which McDonald’s Menu Items Get You the Most Calories/Dollar?*, DATA INTERVIEW QS, https://www.interviewqs.com/blog/mcdonalds_menu_items [<https://perma.cc/CEG4-4BHU>] (showing that apple slices and a side salad were the lowest calorie per dollar).

¹⁹⁵ Cummings & Proctor, *supra* note 47, at 32.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*; see generally Daniel King, *Cigarette Filters*, ABESTOS.COM, <https://www.asbestos.com/products/cigarette-filters/> (last updated Jan. 20, 2020) [<https://perma.cc/827X-5X6C>] (In fact, some filtered cigarettes were even more dangerous than unfiltered cigarettes: “The Lorillard Tobacco Company marketed the original Kent Micronite filter as a high-tech safety feature, but today the brand is remembered for being one of the most dangerous types of cigarette ever manufactured.”).

cigarettes with asbestos-riddled filters that were advertised as safe.¹⁹⁸ The healthy alternatives McDonald's and other fast food chains are now marketing need to be coupled with similar evidence of knowledge and wrongdoing by fast food companies to result in litigative success.

The fourth sign of success is new courtroom avenues. Individual plaintiffs began to succeed in the third wave of the tobacco litigation once evidence illustrated that smoking was not a choice.¹⁹⁹ Evidence included intentional child advertising and manufacturers purposely making their products more addictive.²⁰⁰ This evidence allowed plaintiffs to succeed under the "addiction-as-injury" theory.²⁰¹ Similarly, fast food outlets spend around \$3 billion annually in television advertisements targeting children,²⁰² and McDonald's utilizes characters like Ronald McDonald and others, the equivalent to cigarette cartoons like Joe Camel.²⁰³ However, the difference is it is not illegal to sell fast food to children like it is tobacco, and food is a necessary source of nutrition.²⁰⁴ Additionally, there are few studies confirming the addictive nature of fast food compared to nicotine.²⁰⁵ The *Pelman* judge denied this specific argument because the plaintiffs failed to establish if the food was addictive at all, and if the exposure as a child increased the alleged addictive nature.²⁰⁶

The fifth sign of success is litigation encouraging legislation that helps address the social issue.²⁰⁷ Judges are less likely to adjudicate if the legislature has already adopted comprehensive programs and regulations to address the social issue.²⁰⁸ This seems to be the case with fast food litigation because there was a broad legislative and regulative response to the obesity epidemic.²⁰⁹ Two particular legislative actions, Commonsense Consumption Bills ("CCBs")²¹⁰ and calorie count laws,²¹¹ responded to the social problem while limiting litigation. By 2018, the FDA required compliance from fast food chains meeting certain criteria (such as number of locations, etc.) to display accurate calorie counts so consumers may make informed decisions about their nutritional sources.²¹² The FDA also requires companies to list out the fat and sugar content of each item.²¹³ Unlike vague warning labels of tobacco products, consumers should be able to tell if McDonald's new salad is truly healthy or not based on these data points. Because obesity is largely caused by

¹⁹⁸ King, *supra* note 197.

¹⁹⁹ Kearns, *supra* note 65, at 1342.

²⁰⁰ See Bates & Rowell, *supra* note 46.

²⁰¹ Kearns, *supra* note 65, at 1342.

²⁰² Courtney, *supra* note 144, at 70–71.

²⁰³ *Id.* at 92.

²⁰⁴ Brownell & Warner, *supra* note 171, at 261.

²⁰⁵ *Id.*

²⁰⁶ *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 542–43 (S.D.N.Y. 2003).

²⁰⁷ See Barnes, *supra* note 5, at 7 (noting that litigation can publicize risks of an issue and serve as a template for reform proposals).

²⁰⁸ Gray, *supra* note 43, at *1.

²⁰⁹ See generally Michelle M. Mello et al., *Obesity—The New Frontier of Public Health Law*, 354 NEW ENG. J. MED. 2601 (2006) (explaining multiple state and federal initiatives to address obesity).

²¹⁰ See Jeff Guo, *These 26 States Won't Let You Sue McDonald's for Making You Fat. The Surprising Consequence of Banning Obesity Lawsuits*, WASH. POST (May 28, 2015, 6:30 AM), <https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/28/these-26-states-wont-let-you-sue-mcdonalds-for-making-you-fat-the-surprising-consequence-of-banning-obesity-lawsuits/> [https://perma.cc/DB92-SK8M].

²¹¹ U.S. FOOD & DRUG ADMIN., MENU LABELING RULE: KEY FACTS FOR INDUSTRY, <https://www.fda.gov/media/116000/download> [https://perma.cc/7L27-XQTH].

²¹² *Id.*

²¹³ *Id.*

an excessive consumption of calories,²¹⁴ these regulations combat dangerous elements of these food items.²¹⁵ Although, like the Labeling Act, this would likely allow companies to lodge the free will defense because consumers assume the risk of eating fast food by knowing the calorie count. Therefore, this action limits litigation just as the Labeling Act did, while addressing the social issue of smoking, or obesity in the case of CCBs.

Like the 1965 Labeling Act preempting certain causes of action against tobacco companies,²¹⁶ twenty-six states banned bringing obesity lawsuits against fast food companies after *Pelman* and *Barber* via CCBs.²¹⁷ The difference is that CCBs prevent future litigation and do not affect the outcome of *Pelman* and *Barber*. However, the 1965 Act was later reinterpreted to allow certain causes of action,²¹⁸ while the fast food litigation bans are in full force.²¹⁹ CCBs are a type of tort reform preventing lawsuits brought against “food manufacturers, packers, distributors, carriers, holders, sellers, marketers, and advertisers from civil actions” related to health issues surrounding weight gain or obesity.²²⁰ However, the bills still allow suits for adulterated or mislabeled food and false advertising.²²¹ This hurdle shifts the focus on the company’s conduct, just as was required in the tobacco suits. Therefore, if evidence was found showing that Big Fast Food purposefully marketed at children or made its food more addictive, claimants could still sue in states with CCBs.

The last sign of success is the ability to aggregate claims. Unlike tobacco, fast food litigation was able to certify class action suits.²²² The lack of recovery in *Pelman* was based on the merits of the case, not the class itself,²²³ unlike the third wave’s *Engle* and *Castano*, where the class won on the merits but lost due to decertification.²²⁴ This comparison shows that certification alone does not indicate success. Instead, it is important to have some ability to aggregate claims to level the playing field with big companies, such as *parens patriae* standing did for the tobacco litigation.

C. Conclusion and Additions to Framework

In addition to the important elements of the tobacco litigation listed in the previous Sub-section, analyzing fast food will complete the framework this Article is creating to analyze the potential success of the opioid and climate change litigation. First, an attenuated causation link will prevent attorneys general from negotiating a global settlement agreement like the MSA. Second, evidence showing corporate wrongful conduct is required for individual plaintiffs to succeed and persuade judges to allow new litigation avenues. However, evidence of a company employing its own researcher or employing similar Big Tobacco media tactics is not dispositive. Third, litigation may inspire deceptive marketing strategies promoting unhealthy products as healthy. In this

²¹⁴ Courtney, *supra* note 144, at 69.

²¹⁵ U.S. FOOD & DRUG ADMIN., *supra* note 211.

²¹⁶ Sirabonian, *supra* note 11, at 489.

²¹⁷ Guo, *supra* note 210.

²¹⁸ *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 530–31 (1992).

²¹⁹ Guo, *supra* note 210.

²²⁰ *Carpenter & Tello-Trillo*, *supra* note 142, at 2.

²²¹ Courtney, *supra* note 144, at 74.

²²² See generally *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d. 512 (S.D.N.Y. 2003).

²²³ See generally *id.*

²²⁴ See Sirabonian, *supra* note 11, at 494–97.

way, litigation makes societal issues worse rather than better. Fourth, if legislation is more pervasive, it is less likely that litigation will succeed. The fast food and tobacco litigations are almost mirror images of each other. The tobacco litigation began with the Labeling Act preempting claims while the fast food litigation ended with legislation preempting obesity-related claims. Similarly, the FDA was already regulating fast food during the obesity litigation, whereas the FDA did not regulate tobacco until almost twenty years after the MSA. The requirement to list calories is similar to the Labeling Act because it shifts the burden of preventing obesity from the fast food companies to consumers. Last, class certification alone is not dispositive if the claimants cannot win on the merits.

IV. OPIOID LITIGATION

This Part analyzes three elements of the opioid litigation that distinguishes it from the tobacco litigation: it has one of the most complex Multi-District Litigations,²²⁵ it includes the first-ever negotiation class,²²⁶ and a state public nuisance claim returned a positive judgment for plaintiffs.²²⁷ Analyzing these unique factors and applying the tobacco framework shows that the opioid litigation has the potential to succeed under the tobacco model because litigants are adapting the tobacco framework to solve the opioid crisis.

A. Summary of the Litigation

The opioid litigation has proceeded in a similar fashion to the tobacco litigation, although along a faster timeline. The crisis's origins trace back to the 1980s, when the U.S. began looking for effective methods to manage pain.²²⁸ Originally a drug exclusive to cancer treatment and short-term use, opioids became extremely popular in the mid-1990s when opioid-based medications, like Purdue Pharma's OxyContin, flooded the market promising efficacy and low potential for addiction.²²⁹ However, it eventually came to light that opioids did not effectively treat long-term chronic pain.²³⁰ In fact, "with long-term use, people can develop tolerance to the drugs and even become more sensitive to pain."²³¹ The claims of low addiction rates were also untrue.²³² The FDA sent a warning letter to Purdue Pharma in 2003, stating "that its advertisements 'grossly overstate[d] the safety profile'" in regard to addiction.²³³ In 2007, Purdue Pharma pleaded guilty to felony charges for "misbranding" OxyContin by marketing the drug as non-addictive when it knew

²²⁵ Morgan A. McCollum, *Local Government Plaintiffs and the Opioid Multi-District Litigation*, 94 N.Y.U. L. REV. 938, 939–40 (2019) (noting that the opioid MDL is one of the most complex MDLs since the legislation allowing MDLs was enacted in 1968).

²²⁶ Hensler, *supra* note 79.

²²⁷ *Oklahoma Objects to Stay of \$465M Opioid Judgment Against Johnson & Johnson*, LEXIS LEGAL NEWS (Dec. 18, 2019, 8:48 AM), <https://www.lexislegalnews.com/mealeys-drugs-devices/articles/46562/oklahoma-objects-to-stay-of-465m-opioid-judgment-against-johnson-johnson> [<https://perma.cc/W5E6-PW9D>].

²²⁸ Sarah DeWeerd, *Tracing the US Opioid Crisis to Its Roots*, NATURE (Sept. 11, 2019), <https://www.nature.com/articles/d41586-019-02686-2> [<https://perma.cc/V6PS-97WD>].

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ Melissa Healy, *Who's to Blame for the Nation's Opioid Crisis? Massive Trial May Answer that Question*, L.A. TIMES (Sept. 18, 2019, 5:00 AM), <https://www.latimes.com/science/story/2019-09-17/opioid-lawsuit-who-is-to-blame> [<https://perma.cc/2KG3-7LT2>].

it was being abused.²³⁴ The DOJ determined that Purdue Pharma knew people were abusing OxyContin because the company received disturbing reports of the drug being snorted and stolen, and that doctors sold prescriptions.²³⁵ There were also emails between Purdue employees discussing the drug's "credibility problem" after receiving these reports.²³⁶ The DOJ felt obligated to settle with the pharma powerhouse on the charges for \$634.5 million in penalties due to the company's large resources, despite originally charging the company and three Purdue executives with felony and misdemeanor charges that included jail time.²³⁷ The settlement agreement also required independent monitoring of Purdue's practices²³⁸ and resulted in Purdue redeveloping OxyContin's formula to "make it more difficult to crush and inhale."²³⁹ This reduced abuse,²⁴⁰ and OxyContin manufacturers began marketing its products overseas, as America was a dying market.²⁴¹ Two opioid distributors, McKesson and Cardinal Health, settled for close to \$50 million collectively in 2008 after the Drug Enforcement Agency ("DEA") accused them of failing to report suspicious sales of opioids from "rogue [i]nternet pharmac[ies]."²⁴² In 2013, the DEA put a two-year suspension on Cardinal Health's ability to distribute highly-addictive narcotics due to lack of oversight.²⁴³

Despite these cases showing evidence of corporate wrongdoing, which helped kick off the success of the tobacco litigation, 12.6 billion opioid-based pills were produced and distributed in the United States in 2012.²⁴⁴ Additionally, the individual suits during the 2000s were dismissed either because of intervening or superseding causation issues or the assumption of the risk defense.²⁴⁵ The opioid addiction crisis has considerably worsened over the past three to four years.²⁴⁶ In 2012, about 19,000 people died of opioid overdoses, whereas the number increased to 47,600 in 2017.²⁴⁷ The spike in deaths influenced the federal government to establish the "Commission on Combating Drug Addiction and the Opioid Crisis," and the opioid crisis was declared a national

²³⁴ Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html> [<https://perma.cc/D35-X-5ZF5>].

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ 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/GEG2-5FPA>].

²³⁹ DeWeerd, *supra* note 228.

²⁴⁰ *Id.*

²⁴¹ Harriet Ryan et al., *OxyContin Goes Global — "We're Only Just Getting Started"*, L.A. TIMES (Dec. 18, 2016), <https://www.latimes.com/projects/la-me-oxycontin-part3/> [<https://perma.cc/UGL9-NZUM>].

²⁴² Press Release, U.S. Dep't of Just., McKesson Agrees to Pay Record \$150 Million Settlement for Failure to Report Suspicious Orders of Pharmaceutical Drugs (Jan. 17, 2017), <https://www.justice.gov/opa/pr/mckesson-agrees-pay-record-150-million-settlement-failure-report-suspicious-orders> [<https://perma.cc/8WYZ-U34S>] [hereinafter McKesson]; *Cardinal Health Inc., Agrees to Pay \$34 Million to Settle Claims that It Failed to Report Suspicious Sales of Widely-Abused Controlled Substances*, OFFS. U.S. ATT'YS (Oct. 2, 2008), https://www.justice.gov/archives/usao/co/news/2008/October08/10_2_08.html [<https://perma.cc/4HYT-SUYX>].

²⁴³ See Press Release, U.S. Drug Enf't Admin., United States Reaches \$34 Million Settlement With Cardinal Health for Civil Penalties Under the Controlled Substances Act (Dec. 27, 2016), <https://www.dea.gov/press-releases/2016/12/27/united-states-reaches-34-million-settlement-cardinal-health-civil> [<https://perma.cc/5SL6-9DW5>].

²⁴⁴ Healy, *supra* note 233.

²⁴⁵ Michelle L. Richards, *Pills, Public Nuisance, and Parens Patriae: Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. RICH. L. REV. 405, 438–39 (2020).

²⁴⁶ Nicolas P. Terry, *The Opioid Litigation Unicorn*, 70 S.C. L. REV. 637, 651 (2019).

²⁴⁷ Healy, *supra* note 233 (citing a CDC graph of opioid overdose deaths overtime).

emergency in August 2017.²⁴⁸ In September 2017, forty-one attorneys general banded together to investigate Big Pharma's opioid production, marketing, and distribution practices.²⁴⁹

The DOJ and DEA enforced penalties on several Big Pharma corporations in 2017 and 2018. In July 2017, one of the largest generic oxycodone manufacturers, Mallinckrodt, settled with the federal government for \$35 million for allegations of failing to notify the DEA of suspicious orders and for giving "distributors 'an increasingly excessive quantity of oxycodone pills' between 2008 and 2011."²⁵⁰ CVS paid the DOJ over \$5 million in three different settlements regarding allegations of keeping improper records in California and Alabama pharmacies that could have prevented the theft of thousands of hydrocodone doses, as well as for failing to report thefts from New York pharmacies.²⁵¹ McKesson then settled for a record-breaking \$150 million in civil penalties with the DOJ for violating the Controlled Substances Act ("CSA") by failing to stop suspicious orders, similar to its 2008 settlement.²⁵² However, the monetary penalty was almost eight times more than the 2008 settlement, and the 2017 settlement required "McKesson to suspend sales of controlled substances from distribution centers in Colorado, Ohio, Michigan and Florida for multiple years."²⁵³ The DOJ explained that the "staged suspensions are among the most severe sanctions" the DEA has ever enforced on a registered distributor.²⁵⁴ Last, Cardinal Health also settled again in 2017 for failure to maintain adequate records tracking drug movements and the failure to report suspicious orders.²⁵⁵

While these settlements show the federal government acknowledged Big Pharma's wrongdoing, Big Pharma paid the civil penalties to the government, rather than to the citizens in need.²⁵⁶ Additionally, repeat offenses involving the same actions by the same actors show that these settlements are not properly curbing Big Pharma's wrong deeds or even hurting its business. Last, several of the claims in the previous paragraph occurred up to six years before the settlement,²⁵⁷ while the opioid epidemic requires a quick solution because during 2016 and 2017 around 130 Americans died every day from opioid overdoses.²⁵⁸ Citizens seemed unsatisfied with the federal government's approach, as 2,700 lawsuits brought by states, local governments, and tribes are now pending in the federal MDL set in Cleveland, Ohio.²⁵⁹

The opioid MDL is the first unique element to the opioid litigation. An MDL is a pre-trial proceeding allowing one judge to consider pre-trial motions and discovery of multiple cases filed

²⁴⁸ Katherine Spiser Rios, Comment, *Combatting the Opioid Epidemic in Texas by Holding Big Pharma Manufacturers Liable*, 50 ST. MARY'S L.J. 1353, 1357 (2019).

²⁴⁹ Paul L. Keenan, Comment, *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, 70 (2017).

²⁵⁰ Healy, *supra* note 233.

²⁵¹ *Id.*

²⁵² McKesson, *supra* note 242.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Healy, *supra* note 233.

²⁵⁶ *See id.*

²⁵⁷ *See id.*

²⁵⁸ *Opioid Crisis Fast Facts*, CNN HEALTH (Dec. 3, 2020, 9:56 AM) <https://www.cnn.com/2017/09/18/health/opioid-crisis-fast-facts/index.html> [<https://perma.cc/KNJ8-WYQ9>].

²⁵⁹ *See* Nate Raymond & Jonathan Stempel, *Oklahoma Judge Reduces Johnson & Johnson Opioid Payout to \$465 Million*, REUTERS (Nov. 15, 2019, 2:12 PM), <https://www.reuters.com/article/us-usa-opioids-litigation-oklahoma-oklahoma-judge-reduces-johnson-johnson-opioid-payout-to-465-million-idUSKBN1XP27F> [<https://perma.cc/GF9Q-95A3>]; *see also* Andrew Welsh-Huggins, *Ohio Opioid Woes One Reason Drug Lawsuits Brought to State*, ASSOCIATED PRESS (Jan. 14, 2018), <https://apnews.com/04c6fd38893e4d71ba4a9a650fd847d7> [<https://perma.cc/WQ55-7AZD>].

in different courts.²⁶⁰ While an MDL is technically a pre-trial proceeding, about 75% of MDLs are resolved before being remanded to the original trial court.²⁶¹ For example, plaintiffs utilized an MDL to successfully settle harms arising from the 2010 British Petroleum oil spill for four hundred local governments and five gulf states.²⁶² MDLs are also a fantastic environment for encouraging settlement because the judge is expected to work with the parties in finding a resolution.²⁶³ That is particularly true of the opioid MDL, as presiding Judge Polster “has made it very clear that settlement is the ultimate goal of the opioid MDL.”²⁶⁴ He “inform[ed] lawyers that he intended to dispense with legal norms like discovery” and “order[ed] counsel to launch into settlement discussions immediately.”²⁶⁵ In fact, he was pushing so much for a global settlement that the MDL defendants filed a brief requesting the removal of Judge Polster due to bias.²⁶⁶ Judge Polster predictably denied the motion and the Sixth Circuit agreed, stating that he was encouraging settlement because it is the most expedient solution to the epidemic, not out of bias.²⁶⁷ The opioid MDL is also not Judge Polster’s first experience with consolidated cases, as he was appointed to the opioid MDL because of his previous involvement with “damage claims related to dyes used in magnetic resonance imaging procedures.”²⁶⁸ Cleveland, Ohio, was chosen as the location for the MDL due to the state’s familiarity with overdose deaths, as 4,050 Ohioans died of overdoses in 2016.²⁶⁹ For comparison, opioid overdoses killed 4,653 Oklahomans from 2007 to 2017.²⁷⁰ Cleveland is also close to various defendant “drugmakers’ headquarters in Connecticut, New Jersey, New York, Pennsylvania, and Ohio, which is home to drug distributor Cardinal Health.”²⁷¹

Second, the opioid litigation certified the first-ever negotiation class. A negotiation class encourages settlement by binding the plaintiffs to a settlement structure before the negotiation begins.²⁷² The procedure contains four steps:²⁷³ the first being the class certification already completed by Judge Polster.²⁷⁴ The class in the opioid case “seeks to unite the nation’s more than 30,000 cities and counties into one group that would seek global deals with drug manufacturers and distributors,” not just the local governments that already filed suits in the MDL.²⁷⁵ Forty-nine

²⁶⁰ McCollum, *supra* note 225, at 945.

²⁶¹ *Id.*

²⁶² *Id.* at 966–68.

²⁶³ Searcy Law Video, *What Is a Multidistrict Litigation, or MDL?*, YOUTUBE (Dec. 12, 2016), https://www.youtube.com/watch?v=yIQ0NYXRsmQ&ab_channel=SearcyLawVideo [https://perma.cc/953U-5JRE] (timestamp 6:13 until end).

²⁶⁴ McCollum, *supra* note 225, at 945.

²⁶⁵ *Id.*

²⁶⁶ Colin Dwyer, *Your Guide to the Massive (and Massively Complex) Opioid Litigation*, NPR (Oct. 15, 2019, 9:05 AM), <https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation> [https://perma.cc/4F4J-8Q8U].

²⁶⁷ *Id.*

²⁶⁸ Welsh-Huggins, *supra* note 259.

²⁶⁹ *Id.*

²⁷⁰ Sean Murphy, *Judge Orders Drugmaker to Pay \$572 Million in Opioid Lawsuit*, ASSOCIATED PRESS (Aug. 27, 2019), <https://apnews.com/29a69a81c0174c50bda7a190b03d65cc> [https://perma.cc/2JPS-KAYR].

²⁷¹ Welsh-Huggins, *supra* note 259.

²⁷² Hensler, *supra* note 79.

²⁷³ *Id.*

²⁷⁴ Allison Frankel, *Opioid MDL Judges OKs Novel Negotiating Class as ‘Likely to Promote Global Settlement’*, REUTERS (Sept. 12, 2019, 4:34 PM), <https://www.reuters.com/article/us-otc-opioids-idUSKCN1VX2RE> [https://perma.cc/H24M-C2MV].

²⁷⁵ Jeff Overley, *What We Know About Opioid MDL Settlement Talks*, LAW 360 (Aug. 8, 2019, 10:04 PM), <https://www.law360.com/articles/1185293/what-we-know-about-opioid-mdl-settlement-talks> [https://perma.cc/KU5X-8XRH].

class representatives from various U.S. cities and counties will negotiate on behalf of the entire class.²⁷⁶ The second step is sending notices to all the class members, allowing them to opt out by a certain date.²⁷⁷ If a class member takes no action he or she is automatically opted-in.²⁷⁸ Judge Polster set the opt-out deadline as November 22, 2019; with only 500 cities opting out, 98% of the class remains.²⁷⁹ Deborah Hensler commented that the lack of opt-outs suggests the class members think the negotiation class is the best solution to the opioid epidemic.²⁸⁰ Third, once a settlement is reached, class members vote for or against the result.²⁸¹ Fourth, if 75% of class members vote supporting the proposed settlement, class counsel then asks the court to approve it.²⁸²

Judge Polster limited the claims and defendants subject to the negotiation class.²⁸³ RICO claims may be brought against the “Opioid Marketing Enterprise” (“Purdue, Cephalon, Janssen, Endo, and Mallinckrodt”), and “the alleged Opioid Supply Chain Enterprise (Purdue, Cephalon, Endo, Mallinckrodt, Actavis, McKesson, Cardinal, and AmerisourceBergen).”²⁸⁴ CSA claims may be brought against thirteen sets of distribution defendants “(Purdue, Cephalon, Endo, Mallinckrodt, Actavis, Janssen, McKesson, Cardinal, AmerisourceBergen, CVS Rx Services, Inc., Rite-Aid Corporation, Walgreens, and Wal-Mart).”²⁸⁵ These claims seem like a direct callback to the DEA and DOJ settlements, except the negotiation class settlement will send money directly to local governments in need and will hold several defendants accountable at once.²⁸⁶ However, being a class member prevents local governments from seeking their own settlements.²⁸⁷ Once a class member reaches a personalized settlement with one of the class defendants, it just means it cannot recoup costs from that same defendant if a negotiation class reaches a settlement.²⁸⁸ The class will terminate five years from November 2019 if no major settlement talks are in progress.²⁸⁹

Third, an Oklahoma state court returned a judgment awarding \$465 million to plaintiffs for Johnson & Johnson’s participation in the opioid crisis.²⁹⁰ This positive precedent is unique to the

²⁷⁶ *Frequently Asked Questions*, OPIOIDS NEGOT. CLASS (Sept. 28, 2020, 2:24 PM), <https://www.opioidsnegotiationclass.info/Home/FAQ> [<https://perma.cc/256C-SEQY>].

²⁷⁷ Hensler, *supra* note 79.

²⁷⁸ *Frequently Asked Questions*, *supra* note 276.

²⁷⁹ Daniel Fisher, *More than 500 Cities and Counties Reject Opioid Class Action, Will Pursue Lawsuits on Their Own*, LEGAL NEWSLINE (Dec. 4, 2019), <https://legalnewsline.com/stories/520789147-more-than-500-cities-and-counties-reject-opioid-class-action-will-pursue-lawsuits-on-their-own> [<https://perma.cc/S4US-ENND>].

²⁸⁰ See Amanda Bronstad, *A ‘Landslide Endorsement’: Less than 2% of Governments Opt Out of Opioid Class Action*, LAW.COM (Dec. 3, 2019, 3:48 PM), <https://www.law.com/2019/12/03/a-landslide-endorsement-541-governments-opt-out-of-opioid-class-action/?slreturn=20210031163354> [<https://perma.cc/J5KG-L8XB>].

²⁸¹ Hensler, *supra* note 79.

²⁸² *Frequently Asked Questions*, *supra* note 276.

²⁸³ See Order Certifying Negotiation Class and Approving Notice, *Cnty. Of Summit, Ohio v. Purdue Pharma L.P.*, No. 1:17-md-02804-DAP at 2 (N.D. Ohio Sept. 11, 2019) [hereinafter Order Certifying Negotiation Class].

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ “The Defendants have insisted throughout on the need for a ‘global settlement,’ that is, a settlement structure that resolves most, if not all, lawsuits against them arising out of the opioid epidemic.” See Memorandum Opinion Certifying Negotiation Class, *Cnty. Of Summit, Ohio v. Purdue Pharma L.P.*, No. 1:17-md-02804-DAP at 2 (N.D. Ohio Sept. 11, 2019). The order proposes a fair allocation process sending money to the class-member counties, stating “[t]he plan proposes distributing 75% of the lump sum to counties, with each county’s share calculated according to three equally-weighted public health factors. The county’s share is then divided among the county and its constituent cities, ideally through negotiated agreement.” *Id.* at 5 (citations omitted).

²⁸⁷ See Order Certifying Negotiation Class, *supra* note 283, at 6.

²⁸⁸ Dwyer, *supra* note 266.

²⁸⁹ Order Certifying Negotiation Class, *supra* note 283, at 8.

²⁹⁰ Raymond & Stempel, *supra* note 259.

opioid litigation because the tobacco public nuisance claims settled before they could reach court.²⁹¹ The impending litigation motivated Teva and Purdue Pharma to settle with Oklahoma for \$85 million and \$270 million, respectively, making Johnson & Johnson the only remaining defendant.²⁹² In a bench trial, Judge Balkman ruled that as the number one narcotics supplier of raw materials in the world's largest opioid market (the U.S.), Johnson & Johnson downplayed the addictive risk of prescription opioids.²⁹³ One example of its false and misleading marketing included "trumpet[ing] the concept of 'pseudoaddiction' to persuade doctors that patients who appeared hooked on opioids actually should be given more opioids for under-treated pain."²⁹⁴ Judge Balkman determined that the false marketing created a public nuisance, a theory typically reserved for real and personal property.²⁹⁵ He theorized that public nuisance is not limited to property-related nuisances, and even if it was, "there [was] sufficient evidence that [Johnson & Johnson] 'pervasively, systemically and substantially used real and personal property'" to create a nuisance.²⁹⁶ Plaintiffs sought close to \$17 billion, estimating it would take twenty years of treatment to solve the Oklahoma opioid epidemic.²⁹⁷ Judge Balkman was not convinced and only found Johnson & Johnson liable for a year of treatment costs.²⁹⁸ Johnson & Johnson is appealing based on an improper interpretation of public nuisance law,²⁹⁹ while plaintiffs are appealing hoping to receive more than one year's damages.³⁰⁰ These appeals are preventing Johnson & Johnson from paying the damages into Oklahoma's state abatement fund.³⁰¹ Unlike the MDL and the negotiation class, this suit follows the tobacco model, as it was brought by the Oklahoma Attorney General under a state public nuisance claim.³⁰²

B. Applying the Framework

The first sign of success from the tobacco litigation framework is the potential for large settlements. The opioid litigation has several factors indicating that it will result in a global settlement like the MSA, albeit the path to reach a settlement is less clear. Attorneys general have already established *parens patriae* standing by filing suits against Big Pharma companies as early

²⁹¹ See Gifford, *supra* note 89, at 761–62.

²⁹² Murphy, *supra* note 270.

²⁹³ Jeff Overley & Emily Field, *4 Key Takeaways as Historic Opioid Ruling Wallops J&J*, LAW360 (Aug. 26, 2019, 10:52 PM), <https://www.law360.com/articles/1163307/4-key-takeaways-as-historic-opioid-ruling-wallops-j-j> [<https://perma.cc/X2CD-YZQZ>].

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ See Randy Ellis, *State Appeals Opioid Verdict Claiming \$465 Million Award Is Not Enough*, OKLAHOMAN (Dec. 17, 2019, 1:19 AM), <https://oklahoman.com/article/5650054/state-appeals-opioid-verdict-claiming-465-million-award-is-not-enough> [<https://perma.cc/WNV6-EZLT>].

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *See id.*

³⁰¹ Selena Simmons-Duffin, *Oklahoma Wanted \$17 Billion to Fight Its Opioid Crisis: What's the Real Cost?*, NPR (Aug. 26, 2019, 5:22 PM), <https://www.npr.org/sections/health-shots/2019/08/26/754485077/oklahoma-wanted-17-billion-to-fight-its-opioid-crisis-whats-the-real-cost> [<https://perma.cc/4BN3-NH53>].

³⁰² See *Johnson & Johnson: Oklahoma Wins \$572MM Judgment in Opioid Trial*, 21 CLASS ACTION REP. 174 (Aug. 30, 2019), http://www.bankrupt.com/CAR_Public/190830.mbx [<https://perma.cc/Y5W3-QJ4X>].

as 2015.³⁰³ The first settlement took place in 2015 between Kentucky and Purdue for \$24 million.³⁰⁴ The suit was based on fraudulent misrepresentation because Purdue downplayed the addictive nature of OxyContin, and the economic harm caused by Purdue and other actors, which totaled over \$70 billion in 2013, was felt all over the United States.³⁰⁵ A newer estimate is that it will cost over \$480 million to fix the national opioid crisis,³⁰⁶ while the financial effects felt since 2001 are estimated at \$50 billion to \$1 trillion, considering “the costs of health care, criminal justice, lost productivity and addiction treatment programs.”³⁰⁷ While, unlike the fast food litigation, the causation link between the financial harms and the actions of Big Pharma is strong enough to inspire forty-eight attorneys general to bring lawsuits, the states have not accomplished a global settlement like the MSA.³⁰⁸ The recent success of a public nuisance claim in an Oklahoma state court against Johnson & Johnson, and Teva and Purdue’s decision to settle shortly before the trial, will likely influence more Big Pharma companies to settle with states.³⁰⁹ The trial also preceded a 2020 settlement of \$8.8 million between pharmaceutical marketing company Endo and Oklahoma.³¹⁰ However, public nuisance law analysis differs state to state and a judge rejected the public nuisance claim brought by North Dakota’s Attorney General earlier in 2019, despite Oklahoma and North Dakota having similar public nuisance laws.³¹¹ These varying results make it more likely that Big Pharma will want to go to trial.

Running parallel to the state public nuisance claims is Judge Polster’s MDL. The first settlement arising out of the MDL occurred in 2019 when opioid manufacturer Teva and distributors McKesson, Cardinal Health, and AmerisourceBergen paid two Ohio counties \$260 million in total.³¹² The settlement transpired at the eleventh hour before the MDL’s first bellwether trial.³¹³ Bellwether trials are an optional settlement tool engaged by MDL judges; they are “test cases” to see how the juries react to plaintiffs’ claims and serve as crucial building blocks to negotiate global settlements.³¹⁴ Therefore, the first bellwether trial did not serve its purpose because it did not go to a jury and only resulted in a settlement with two counties.³¹⁵ Meanwhile, cities, counties, states, and Native American tribes are all clamoring to negotiate their own settlement agreement in the MDL.³¹⁶ This environment is making a global settlement agreement like the MSA less likely. One key difference between the tobacco and opioid crises is that opioids are creating an emergency in

³⁰³ Luther J. Strange III, *A Prescription for Disaster: How Local Governments’ Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into a Policy-Making Role and Subverts the Equitable Administration of Justice*, 70 S.C. L. REV. 517, 530, n.79 (2019).

³⁰⁴ Murphy, *supra* note 270.

³⁰⁵ Rios, *supra* note 248, at 1362–63.

³⁰⁶ Richards, *supra* note 245, at 406.

³⁰⁷ Dwyer, *supra* note 266.

³⁰⁸ Ashley Fuoco Antonelli, *Overwhelmed by All the Multi-Million Dollar Opioid Settlements? Here’s Everything You Need to Know*, ADVISORY BD. (Oct. 30, 2019), <https://www.advisory.com/daily-briefing/2019/10/30/opioid-settlements> [<https://perma.cc/NK2F-C2DS>].

³⁰⁹ See Overley & Field, *supra* note 293.

³¹⁰ Kimberly Chin, *Endo Agrees to Pay \$8.8 Million to Settle Oklahoma Opioid Case*, WALL STREET J. (Jan. 10, 2020, 1:48 PM), <https://www.wsj.com/articles/endo-agrees-to-pay-8-8-million-to-settle-oklahoma-opioid-case-11578682133> [<https://perma.cc/UA9D-W57K>].

³¹¹ Overley & Field, *supra* note 293.

³¹² Jan Hoffman, *\$260 Million Opioid Settlement Reached at Last Minute With Big Drug Companies*, N.Y. TIMES (Oct. 21, 2019), <https://www.nytimes.com/2019/10/21/health/opioid-settlement.html> [<https://perma.cc/933T-9JZW>].

³¹³ Dwyer, *supra* note 266.

³¹⁴ McCollum, *supra* note 225, at 941 n.18, 941–42.

³¹⁵ Dwyer, *supra* note 266.

³¹⁶ McCollum, *supra* note 225, at 940 n.11.

which 150 Americans die every day.³¹⁷ Perhaps plaintiffs feel they must act quickly and do not have time to wait for the resolution Judge Polster promised to fashion in 2018.³¹⁸ And because most settlement agreements come with the promise not to litigate again,³¹⁹ there may not be a way to reach a global agreement once other local governments have settled. Additionally, once local governments agree to individual settlements, they have less incentive to participate in the negotiation class. The tobacco litigation went through a similar hiccup in that the first global settlement in 1997 was not adopted and some states settled prior to the MSA.³²⁰ However, the opioid litigation is much more complex as there are more plaintiffs, defendants, and three competing means to achieving settlements (the state attorneys general claims, the MDL, and the negotiation class).

The negotiation class brings up additional divisions between attorneys general and local governments. Following Judge Polster's class certification, drug distribution defendants and six Ohio cities filed briefs in the Sixth Circuit requesting the class be decertified because it violated Rule 23 of the Federal Rules of Civil Procedure.³²¹ A dozen attorneys general and Washington, D.C., wrote an amicus brief supporting the appeal, arguing that states, not cities, should be suing on behalf of citizens.³²² All parties supporting the appeal feel that because states are suing the same companies in different actions, local governments should not have the sole negotiating power.³²³ Defendants seem willing to work with attorneys general, as four attorneys general were able to convince AmerisourceBergen, McKesson, and Cardinal Health to settle for \$18 billion in 2020 with the MDL plaintiffs, but both MDL attorneys and twenty attorneys general expressed opposition.³²⁴ Recently, an ongoing \$48 billion settlement discussion between attorneys general and five opioid manufacturers was jeopardized when MDL attorneys requested a 7% commission, amounting to \$3.3 billion.³²⁵ Defendants and thirty-six state attorneys general contacted Judge Polster, stating that these fees would severely endanger the possibility of a global settlement, as 7% would allow the private attorneys to receive more money than the states they are representing.³²⁶

However, Judge Polster's negotiation class is an adaptation and improvement on the tobacco model. One criticism of the tobacco MSA is that states misuse the settlement funds.³²⁷ Because all of the MDL opioid plaintiffs are local governments or even American Indian nations,³²⁸

³¹⁷ *Id.* at 939.

³¹⁸ Transcript of Proceedings at 9, 13 *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804-DAP (N.D. Ohio Jan. 9, 2018).

³¹⁹ See Erichson, *supra* note 52, at 31.

³²⁰ *Id.* at 10–11.

³²¹ Jeff Overley, *Opioid MDL 'Negotiation Class' Gets Bombarded at 6th Circ.*, LAW360 (Feb. 7, 2020, 9:51 PM), <https://www.law360.com/articles/1241494> [<https://perma.cc/9QYH-KQNN>].

³²² Kevin Stawicki, *States Rip Opioid Judge for Creating Class Action by 'Decree'*, LAW360 (Feb. 8, 2020, 6:30 PM), <https://www.law360.com/articles/1244576> [<https://perma.cc/VY2G-KQVE>].

³²³ See Overley, *supra* note 319.

³²⁴ Emily Field, *Opioid Cos. Slam Atty Fee Proposal That Could Reach \$3.3B*, LAW360 (Feb. 27, 2020, 9:50 PM), <https://www.law360.com/articles/1248263/opioid-cos-slam-atty-fee-proposal-that-could-reach-3-3b> [<https://perma.cc/TU8D-UP26>].

³²⁵ Tom Hals & Nate Raymond, *Opioid Companies Say Lawyers' Fee Demand Threatens Settlement Talks*, REUTERS (Feb. 27, 2020, 12:23 PM), <https://www.reuters.com/article/us-usa-opioids-litigation/opioid-companies-say-lawyers-fee-demand-threatens-settlement-talks-idUSKCN20L2PK> [<https://perma.cc/XF64-99T2>].

³²⁶ *Id.*

³²⁷ *Who Is Really Benefiting from the Tobacco Settlement Money?*, AM. LUNG ASS'N (Feb. 3, 2016), <https://www.lung.org/blog/who-benefit-tobacco-settlement> [<https://perma.cc/MLN8-98HV>] (noting that the majority of the states misuse settlement funds, including a couple states that directly funded tobacco farming with the settlement money).

³²⁸ Richards, *supra* note 245, at 444.

they are likely suing individually to ensure the funds go directly to their opioid treatment programs. While this is much more complex and will take more time than attorneys general negotiating for the MSA, the litigation is adapting the tobacco model to fit its needs. The ultimate success in resolving a social policy tort is resolving the social issue, and if local governments receiving their own settlements to address the issue locally will better help end the opioid epidemic, that is the ideal settlement plan.

Ohio recently showed that hundreds of local governments, state governors, and attorneys general can work together on opioid settlements.³²⁹ An agreement called “One Ohio” states that the Ohio Attorney General would conduct all the negotiations while guaranteeing a 30% cash payout to all cities that sign the agreement by March 6th, 2020.³³⁰ The state would receive 15% of the funds and the remaining 55% would go toward opioid research and education.³³¹ Although adopting this framework nationally is unlikely to lead to a global settlement, it shows how local communities and attorneys general can work together.

Despite a lack of a united front, there are two tentative settlement agreements. First, there is a tentative MDL settlement of \$1.6 billion involving generic opioid producer Mallinckrodt backed by forty-seven attorneys general that would also resolve the thousands of lawsuits involving Mallinckrodt in the MDL.³³² The tentative settlement agreement would require the American subsidiary of Mallinckrodt, which produces generic opioids, to undergo Chapter 11 bankruptcy.³³³ Once a “bankruptcy judge approves its restructuring plan, an initial payment of \$300 million would be disbursed to plaintiffs to alleviate the opioid crisis, with the remaining \$1.3 billion to be paid out over eight years.”³³⁴

Second, McKinsey & Co., a consulting firm to Purdue, recently settled with forty-seven attorneys general, Washington, D.C., and five U.S. territories for nearly \$600 million.³³⁵ The settlement occurred because a lawsuit uncovered documents showing McKinsey created sales tactics to increase sales of OxyContin and suggested methods to avoid strict regulation from the FDA.³³⁶ This settlement shows how complex the opioid litigation is because not only are producers of opioids like Mallinckrodt culpable, but their consulting firms and even pharmacies selling opioids are as well.³³⁷ Although this settlement and Mallinckrodt’s settlement are only with a single defendant, the agreements are the closest thing to a global settlement that the opioid litigation has produced.

³²⁹ Katie Zezima, *Ohio Tries an Unusual Tactic Toward Opioid Settlement: Working Together*, WASH. POST (Feb. 24, 2020, 7:23 PM), https://www.washingtonpost.com/national/ohio-tries-an-unusual-tactic-toward-opioid-settlement-working-together/2020/02/24/d5923faa-4c48-11ea-9b5c-eac5b16dafa_story.html [https://perma.cc/RDP7-NLXH].

³³⁰ *Id.*

³³¹ *Id.*

³³² Sheila Kaplan & Jan Hoffman, *Mallinckrodt Reaches \$1.6 Billion Deal to Settle Opioid Lawsuits*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/health/mallinckrodt-opioid-settlement.html> [https://perma.cc/Y92L-VTSL].

³³³ *Id.*

³³⁴ *Id.*

³³⁵ Michael Forsythe & Walt Bogdanich, *McKinsey Settles for Nearly \$600 Million Over Role in Opioid Crisis*, N.Y. TIMES (Feb. 3, 2021), <https://www.nytimes.com/2021/02/03/business/mckinsey-opioids-settlement.html> [https://perma.cc/6EDU-JCJX].

³³⁶ *Id.*

³³⁷ *Id.* (“In 2013, the federal government reached a settlement with Walgreens, the pharmacy chain, to crack down on illegal opioid prescriptions. Sales to Walgreens began to fall. According to the Massachusetts lawsuit, McKinsey recommended that Purdue ‘lobby Walgreens’ leaders to loosen up.”).

Purdue is also using bankruptcy as a sort of settlement agreement.³³⁸ This process works by companies filing for Chapter 11 bankruptcy in which the potential litigants become the creditors, requiring a bankruptcy judge to reorganize the companies' assets to pay off the plaintiffs' damages.³³⁹ Recently, a New York bankruptcy judge allowed Purdue to use approximately \$24 million to create an "ad blitz" that will encourage individual plaintiffs to file their opioid claims against Purdue by June 30, 2020.³⁴⁰ As Purdue pours more money into individual claims, that could weaken the possibility of a global settlement.³⁴¹ The bankruptcy judge also approved an \$8.3 billion settlement between Purdue and the DOJ, requiring Purdue to plead guilty to three felonies.³⁴² This could be a step toward a global settlement as Purdue often stated it would not settle with states until the federal claims were resolved.³⁴³

The second sign of success is evidence of corporate wrongdoing. Like the tobacco litigation, smoking gun documents have been uncovered in the opioid litigation to show wrongdoing by Big Pharma, and there also multiple avenues to gain access to internal documents. In the thousands of consolidated cases before Judge Polster, he granted access to market share data after attorneys pressed for the information.³⁴⁴ Additionally, a few companies have gone into bankruptcy proceedings, most notably Purdue Pharma, allowing attorneys general access to thousands of internal documents.³⁴⁵ There may be more evidence to come as the Kentucky Supreme Court declined to review Kentucky's 2015 settlement with Purdue in August 2019, removing the seal on 17 million pages of documents.³⁴⁶

Evidence of wrongdoing has cleared up causation issues. The causation line is less tenuous than the fast food litigation, but not as clear as the tobacco litigation. One reason the causation line is less clear is because more actors are responsible for the drugs reaching consumers, such as doctors prescribing the medicine, pharmacists filling the prescriptions, and insurance companies encouraging pain medicine when other treatments were available.³⁴⁷ Big Pharma could argue that it

³³⁸ Katie Zezima & Katie Mettler, *Drug Manufacturer Mallinckrodt to Pay \$1.6 Billion to Settle Opioid Claims*, WASH. POST (Feb. 25, 2020, 2:21 PM), https://www.washingtonpost.com/national/drug-manufacturer-mallinckrodt-will-pay-16-billion-to-settle-opioid-claims/2020/02/25/e4bb6ebc-57f5-11ea-9b35-def5a027d470_story.html [https://perma.cc/2GKE-QZX2].

³³⁹ See McCollum, *supra* note 225, at 954–56.

³⁴⁰ Zezima & Mettler, *supra* note 338.

³⁴¹ See Valerie Bauman, *Purdue's Opioid Payouts Pit Individuals Against Cities, States*, BLOOMBERG L. (Feb. 20, 2020, 4:31 AM), <https://news.bloomberglaw.com/pharma-and-life-sciences/purdues-opioid-payouts-pit-individuals-against-cities-states> [https://perma.cc/956X-5A2N].

³⁴² Brian Mann, *Federal Judge Approves Landmark \$8.3 Billion Purdue Pharma Opioid Settlement*, NPR (Nov. 17, 2020, 9:27 PM), <https://www.npr.org/2020/11/17/936022386/federal-judge-approves-landmark-8-3-billion-purdue-pharma-opioid-settlement> [https://perma.cc/44MR-MQ7W].

³⁴³ Jan Hoffman & Katie Benner, *Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales*, N.Y. TIMES, <https://www.nytimes.com/2020/10/21/health/purdue-opioids-criminal-charges.html> (Dec. 17, 2020) [https://perma.cc/YF4M-N2F2].

³⁴⁴ Robert B. Sickels, *Judge Approves Release of Market Share Data to Assist U.S. Municipalities in Opioid Litigation*, SOMMERS SCHWARTZ, <https://www.sommerspc.com/blog/2018/11/judge-approves-release-of-market-share-data-in-opioid-litigation/> [https://perma.cc/B5ZQ-L93X].

³⁴⁵ Christopher Magan, *Minnesota Will Get Restitution, Documents from Bankrupt Opioid Maker*, BEMIDJI PIONEER (Jan. 17, 2020, 6:00 PM), <https://www.bemidjipioneer.com/news/crime-and-courts/4871089-Minnesota-will-get-restitution-documents-from-bankrupt-opioid-maker> [https://perma.cc/7GC8-6X7Z]; Paul Schott, *CT Lawsuit Against Purdue Pharma Paused Until Spring*, STAMFORD ADVOC. (Dec. 23, 2019, 5:42 PM), <https://www.stamfordadvocate.com/business/article/CT-lawsuit-against-Purdue-Pharma-paused-until-14928320.php> [https://perma.cc/VW2F-Z9Y6].

³⁴⁶ Murphy, *supra* note 270.

³⁴⁷ Terry, *supra* note 246, at 650–51.

is not to blame, as some industry experts criticize doctors overprescribing opioids and the DEA's confusing laws and lack of enforcement for the opioid epidemic.³⁴⁸ However, Big Pharma may be more blameworthy as the evidence from the Oklahoma trial showed Johnson & Johnson funded and participated "in allegedly sham groups like the American Pain Society and others, which worked doggedly to legitimize opioids."³⁴⁹ Additionally, there is evidence that distributors, like McKesson and Cardinal Health, played a large part in enacting a law that prevented the DEA from freezing narcotics shipments.³⁵⁰ Additionally, Big Pharma may be more blameworthy because it acted intentionally while feeding its lies to doctors and insurance companies, who likely only acted negligently. Judge Polster seems to think Big Pharma is most responsible, as the only defendants subject to the negotiation class are opioid manufacturers, marketers, and distributors.³⁵¹

Big Pharma acted similarly to Big Tobacco, considering the evidence of Purdue and Johnson & Johnson marketing the opioids as non-addictive when they knew they were addictive. Additionally, Johnson & Johnson claiming "pseudoaddiction" to influence doctors to prescribe opioids to already addicted patients seems remarkably similar to Big Tobacco purposely making its product more addictive. Last, Purdue's attempt to reduce people abusing its pills had an insignificant effect on the epidemic, similar to Big Tobacco attempting to make "healthier" cigarettes.

The third sign of success is a change in public opinion. It is hard to gauge how the opioid litigation has changed the public since these claims have yet to be seen before a jury.³⁵² Individual plaintiffs still feel that there is a stigma surrounding opioid addiction and that the public still blames individuals, not Big Pharma, for addiction.³⁵³ In 2016, a Harvard poll assigned the following actors blame for the opioid epidemic: 37% users, 34% doctors, 10% pharmaceutical companies, and 7% the FDA.³⁵⁴ This stigma is hard to shake, as 44% of Americans polled by the Associated Press in 2018 believed opioid addiction indicated a lack of willpower.³⁵⁵ It is interesting how the results from this poll differ from the defendants chosen for Judge Polster's negotiation class: drug marketers, manufacturers, and distributors. The lack of understanding regarding opioid addiction makes global settlements even more important because juries might find individual plaintiffs "assumed the risk," as they did during the tobacco litigation.³⁵⁶ However, the litigation has successfully increased overall awareness of the epidemic. Another 2018 Associated Press poll reported that 43% of those polled said the use of opioids is a serious problem in their community, a 10%

³⁴⁸ Scott Higham & Lenny Bernstein, *The Drug Industry's Triumph Over the DEA*, WASH. POST (Oct. 15, 2017), <https://www.washingtonpost.com/graphics/2017/investigations/dea-drug-industry-congress/> [https://perma.cc/TYK4-K7LP].

³⁴⁹ Cara Salvatore, *J&J Can't Quit Deception Playbook, Okla. Says in Closings*, LAW360 (Jul. 15, 2019, 11:13 PM), <https://www.law360.com/articles/1178412/j-j-can-t-quit-deception-playbook-okla-says-in-closings> [https://perma.cc/93WW-PCD8].

³⁵⁰ Higham & Bernstein, *supra* note 348.

³⁵¹ See Order Certifying Negotiation Class, *supra* note 283, at 2.

³⁵² See Overley & Field, *supra* note 293.

³⁵³ Christopher Rowland, *Prescription Opioids Destroyed Families. Now, Victims Worry Addiction Stigma May Keep Them from Getting Justice*, WASH. POST (Dec. 2, 2019, 9:27 AM), https://www.washingtonpost.com/business/economy/prescription-opioids-destroyed-families-now-victims-worry-addiction-stigma-may-keep-them-from-getting-justice/2019/12/02/02f51c9e-0642-11ea-b17d-8b867891d39d_story.html [https://perma.cc/9SVA-8GAC].

³⁵⁴ HARVARD T.H. CHAN SCH. OF PUB. HEALTH & STAT., AMERICANS' ATTITUDES ABOUT PRESCRIPTION PAIN-KILLER ABUSE 11 (2016), <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2016/03/STAT-Harvard-Poll-Mar-2016-Prescription-Painkillers.pdf> [https://perma.cc/XR32-86NE].

³⁵⁵ ASSOCIATED PRESS-NORC, AMERICANS RECOGNIZE THE GROWING PROBLEM OF OPIOID ADDICTION 4 (2018) https://apnorc.org/wp-content/uploads/2020/02/APNORC_Opioids_Report_2018.pdf [https://perma.cc/4S3U-UYD8].

³⁵⁶ See discussion *supra* Sections II.A, II.B.

increase from the 2016 poll.³⁵⁷ It also shows the need for treatment programs because two-thirds of those polled stated their local government is not doing enough.³⁵⁸

The fourth sign of success is new courtroom avenues. Opioid claims have been adjudicated with positive results in front of an Oklahoma state judge, making this element stronger than both the fast food and tobacco cases. While it is helpful that a state court affirmed a public nuisance claim, it is worrisome that so many states are pursuing their own litigation rather than seeking a settlement. There are also new additions to the tobacco model mentioned earlier: MDL and the negotiation class.

The fifth sign of success is creating a body of legislation. Judge Polster has stated, “[c]andidly, the other branches of government, federal and state, have punted.”³⁵⁹ Polster also indicated that he plans to take a legislative rather than a litigative approach in these cases.³⁶⁰ By this, he means that instead of ruling on the legal theories, he hopes to implement new systems and new treatments for those addicted.³⁶¹ The Purdue bankruptcy terms show potential for this type of approach, as one condition requires Purdue to provide “states and local communities, at no or low cost, life-saving opioid overdose reversal medications such as nalmefene and naloxone.”³⁶² It also promised to continue developing these types of drugs through a new company and agreed to “be bound permanently by injunctive relief, including marketing restrictions on the sale and promotion of opioids.”³⁶³ The marketing restrictions sound similar to the marketing limitations the MSA placed on Big Tobacco. However, if the settlements continue in a piecemeal nature, either comprising a single defendant, a single state, or both, they are less likely to have legislative components. This is because the local cities suing likely care more about abatement and less about policy.

The sixth sign of success is the ability to aggregate claims. The opioid litigation may exceed the tobacco litigation under this sign of success because the litigation has spawned three methods to aggregate claims: the MDL, the negotiation class, and attorneys general suing on behalf of citizens.

C. Conclusion

The opioid litigation shows all six signs of success present in the tobacco litigation framework. First, there are multiple pathways for the litigation to end in a global settlement: Judge Polster’s settlement-focused MDL, the negotiation class consisting of 98% of America’s cities, or the attorneys general tobacco model. These methods are working against one another as attorneys general attempt to work with local governments, but the Ohioan model shows promise. While there have been some settlements between defendants and single states, the most promising development is the recent tentative settlement between Mallinckrodt, the MDL plaintiffs, and forty-seven attorneys general. Additionally, the finalized settlement with consulting firm McKinsey, forty-seven attorneys general, D.C., and five U.S. territories also shows that non-producing actors are culpable. While these are not as global as the MSA because each only includes one defendant, a piecemeal

³⁵⁷ ASSOCIATED PRESS-NORC, *supra* note 355, at 2.

³⁵⁸ *Id.* at 5.

³⁵⁹ McCollum, *supra* note 225, at 944.

³⁶⁰ Richards, *supra* note 245, at 444.

³⁶¹ *Id.*

³⁶² *Purdue Pharma Announces Agreement in Principle on Landmark Opioid Litigation Settlement*, PURDUE (Sept. 16, 2019), <https://www.purduepharma.com/news/2019/09/16/purdue-pharma-announces-agreement-in-principle-on-landmark-opioid-litigation-settlement/> [<https://perma.cc/9NMG-G6Y2>].

³⁶³ *Id.*

approach may be the solution to the complex opioid epidemic. This epidemic differs from the tobacco crisis because it has multiple defendants in the form of marketers, manufacturers, and distributors, who all likely have a different level of culpability. Another strong avenue for global settlements unique to the opioid litigation is utilizing Chapter 11 bankruptcy to distribute assets to plaintiffs.

Second, there is evidence of wrongdoing by Big Pharma similar to that of Big Tobacco. The evidence helped show that drug marketers, manufacturers, and distributors are more blameworthy than doctors or the government in the opioid epidemic. This evidence resulted in Purdue pleading guilty to misstatements in 2007, several DEA and DOJ settlements in 2017, an Oklahoma state court finding Johnson & Johnson used misleading marketing in 2019, and Judge Polster making the defendants of the negotiation class solely drug marketers, manufacturers, and distributors. Third, it is evident that public opinion has not changed regarding opioid addicts' blameworthiness, but polls do show an increased awareness of the opioid epidemic. Fourth, the new courtroom avenues of the opioid litigation are the MDL, the negotiation class, and the positive precedent set in the Oklahoma court. Fifth, Judge Polster wants to use legislative remedies to solve the crisis, but all the settlements so far have been monetary. The only exception is Purdue's bankruptcy proceeding requiring the distribution of overdose reversal medications. A global settlement negotiated by attorneys general is more likely to have policy components like the MSA did. Last, the ability to aggregate claims is even stronger here than it was in the tobacco litigation. There are now three methods: the MDL, the negotiation class, and attorneys general suing on behalf of citizens.

The opioid litigation is likely to see success under an adapted tobacco model. It differs from the tobacco model in complexity, but that is mitigated by unique elements like the MDL and the negotiation class. It also improves upon the tobacco model because the local governments bringing suits are able to ensure the settlement money goes to treatment. While the three pathways to a global settlement conflict, Ohio's agreement between cities and the state shows cooperation is possible. The opioid litigation may not resolve with an agreement identical to the MSA, but the recent Mallinckrodt settlement suggests that the litigation may be resolved in a piecemeal fashion—either with single defendants or groups of defendants working in the same sector (i.e., distribution v. marketing) and several plaintiffs or single local governments. Either way, Big Pharma has paid and will pay more for its contribution to the opioid epidemic.

V. CLIMATE CHANGE LITIGATION

“[T]here's one issue that will define the contours of this century more dramatically than any other . . . the urgent and growing threat of a changing climate,” Barack Obama commented during the 2014 United Nations Climate Change Summit.³⁶⁴ Obama was correct, as climate change litigation has judges questioning what the role of the judicial branch is in adjudicating a global issue.

³⁶⁴ President Barack Obama, Remarks at the U.N. Climate Change Summit (Sept. 23, 2014) (transcript available at <https://www.whitehouse.gov/the-press-office/2014/09/23/remarks-president-un-climate-change-summit>) [<https://perma.cc/P65P-DFZX>].

A. Climate Change Suits Against the Government

In 2019, 67% of Americans believed that the federal government was not doing enough to combat global climate change.³⁶⁵ This shared belief is reasonable considering the inaction taken by Congress in the last thirty years, with the last major congressional accomplishment being the 1990 amendments to the Clean Air Act (“CAA”).³⁶⁶ Since then, partisan conflicts have prevented the enactment of meaningful environmental legislation,³⁶⁷ and resulted in the executive branch reversing or weakening environmental strides made by previous administrations.³⁶⁸ Notably, the United States was the only country to reject and withdraw from the 2015 Paris Climate Agreement.³⁶⁹ The lack of beneficial governmental action and political contentions create the perfect backdrop to pursue a solution to climate change in the social policy tort framework.³⁷⁰ Due to climate change being a highly politicized issue, it makes sense to seek a solution in federal court because the judicial branch has the constitutional authority to check the political power of the other branches and make unpopular decisions.³⁷¹

The Supreme Court first recognized climate change in *Massachusetts v. EPA*,³⁷² a 2007 case brought by “[s]tates, local governments, and private organizations” to stop the Environmental Protection Agency (“EPA”) from abdicating its duty under the CAA to regulate greenhouse gas emissions.³⁷³ In a 5–4 decision, the Court determined the plaintiffs had Article III standing: (1) the effect of rising sea levels “already harmed and will continue to harm Massachusetts,” (2) there was a causal link between the vehicle emissions the EPA was required to control and the harm of rising sea levels, and (3) while the EPA regulating emissions will not completely stop the harm of “global warming,” it could reduce the risks.³⁷⁴ The holding did not require the EPA to regulate vehicle emissions under the CAA, but interpreted the statute in such a way that left little deference.³⁷⁵

³⁶⁵ Cary Funk & Meg Hefferon, *U.S. Public Views on Climate and Energy*, PEW RSCH. CTR. (Nov. 25, 2019), <https://www.pewresearch.org/science/2019/11/25/u-s-public-views-on-climate-and-energy/> [<https://perma.cc/5N8Q-F4SD>].

³⁶⁶ Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make It Right?*, 45 ENV'T L. 1139, 1148 (2015).

³⁶⁷ See *id.*; see Nathaniel Levy, *Juliana and the Political Generativity of Climate Litigation*, 43 HARV. ENV'T L. REV. 479, 479–80 (2019); Matthew Schneider, *Where Juliana Went Wrong: Applying the Public Trust Doctrine to Climate Change Adaptation at the State Level*, ENVIRONS ENV'T. L. & POL'Y J. 47, 48 (2017); see Mary Haley Ousley, Note, *Precedent, Politics, or Priorities: Are Courts Stepping Out of Their Traditional Judicial Bounds When Addressing Climate Change?*, 25 HASTINGS ENV'T. L.J. 349, 370–71 (2019).

³⁶⁸ Ousley, *supra* note 367, at 355 (noting that the Trump administration, namely Administrator Scott Pruitt of the Environmental Protection Agency, weakened or reversed climate change regulations through budget cuts, lower environmental standards, urging the withdrawal from the Paris Climate Agreement, and opposing the Clean Power Plan). However, the Biden administration recently rejoined the Paris Climate Agreement. Josh Lederman, *U.S. Rejoins Paris Climate Agreement. Now Comes the Daunting Part.*, NBC NEWS (Feb. 19, 2021, 4:00 AM), <https://www.nbcnews.com/politics/white-house/u-s-rejoins-paris-climate-agreement-now-comes-daunting-part-n1258304> [<https://perma.cc/34BR-SDPE>].

³⁶⁹ *Id.*

³⁷⁰ See generally Barnes, *supra* note 5.

³⁷¹ Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 39 (Aug. 2012); see Ousley, *supra* note 367, at 367–68, 371.

³⁷² Ousley, *supra* note 367, at 357; see *Massachusetts v. EPA*, 549 U.S. 497 (2007).

³⁷³ *Massachusetts*, 549 U.S. at 505.

³⁷⁴ *Id.* at 521–26 (explaining how the plaintiffs met the standards of injury, causation, and redressability of Article III standing).

³⁷⁵ See Jonathan Z. Cannon, *The Significance of Massachusetts v. EPA*, 93 VA. L. REV. BRIEF 53, 59–61 (2007).

First, the Court determined greenhouse gases were “air pollutants” under the CAA.³⁷⁶ Second, the Court severely limited the EPA’s viable explanations for not regulating vehicle emissions,³⁷⁷ determining that the EPA’s “laundry list” of policy reasons not to regulate was arbitrary and capricious.³⁷⁸ Instead, a proper explanation should be rooted in science.³⁷⁹

Massachusetts carves a path toward a successful social policy tort litigation in a few ways. First, it achieved the social policy tort goal of inspiring legislation. After the decision, the EPA began regulating pollution from “tailpipes, smokestacks, and oil and gas development activities.”³⁸⁰ Second, it also inspired the EPA to release a scientific study in 2009 analyzing the harmful effects of carbon dioxide and five other air pollutants.³⁸¹ The study concluded that pollutants may “reasonably be anticipated to endanger health and to endanger public welfare.”³⁸² The EPA’s and the Court’s recognition of a scientific causal link between fossil fuel emissions and harm helps establish the scientific causation element from the tobacco litigation. Third, it recognized Article III standing for climate change litigants,³⁸³ setting positive precedent for future lawsuits like the Oklahoma public nuisance claim did in the opioid litigation.

However, the significance of *Massachusetts* is limited because it shows that the Court can encourage agencies to regulate under already enacted statutes, but does not ensure the Court can provide its own relief to parties harmed by climate change.³⁸⁴ The *Massachusetts* holding allows politically swayed agencies deference, as shown by the former EPA administrator Scott Pruitt publicly doubting if the EPA has the tools under the CAA to address climate change.³⁸⁵ Recently, twenty-one young plaintiffs claimed a right to a stable atmosphere under the Fifth Amendment Due Process Clause and the public trust doctrine in *Juliana v. United States*.³⁸⁶ The *Juliana* plaintiffs are seeking “declaratory relief and an injunction ordering the government to implement a plan to ‘phase out fossil fuel emissions’” and begin carbon dioxide draw down.³⁸⁷ Meaning they are asking the judicial branch to expand the *Massachusetts* holding from *encouraging* to *requiring* legislation.

Juliana “is no ordinary lawsuit.”³⁸⁸ It sues the President and eleven federal agencies for policy choices on a vast amount of topics resulting in a host of harms.³⁸⁹ In 2016, *Juliana* survived a motion to dismiss in an Oregon federal district court.³⁹⁰ The government then appealed and won in the Ninth Circuit.³⁹¹ The suit was dismissed based on the third element of standing: the court

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Massachusetts*, 549 U.S. at 501.

³⁷⁹ *See id.*

³⁸⁰ Ben Levitan, *The Tenth Anniversary of Massachusetts v. EPA*, ENV’T DEF. FUND (Apr. 2, 2017), <http://blogs.edf.org/climate411/2017/04/02/the-tenth-anniversary-of-massachusetts-v-epa/> [<https://perma.cc/QBK5-9TYP>] (mentioning Clean Cars, Clean Trucks, Clean Power Plan, and methane pollution standards).

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *See Massachusetts*, 549 U.S. at 516–26.

³⁸⁴ *See Lazarus, supra* note 366, at 1152, 1154.

³⁸⁵ Levitan, *supra* note 380.

³⁸⁶ *Juliana v. United States*, 947 F.3d 1159, 1164–65 (9th Cir. 2020).

³⁸⁷ *Id.* at 1165.

³⁸⁸ *Juliana v. United States*, 217 F. Supp. 3d 1224, 1234 (D. Or. 2016), *rev’d and remanded*, 947 F.3d 1159 (9th Cir. 2020).

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Juliana*, 947 F.3d at 1175.

felt it was unable to redress the harm.³⁹² While this Article focuses on lawsuits against private actors, and this lawsuit does not have a positive holding, the Ninth Circuit’s opinion could affect all climate change suits. First, the court determined that the government has long known about “the risks of fossil fuel use and increasing carbon dioxide emissions.”³⁹³ The court based its conclusion on the facts that the government issued reports warning about the effects of climate change as early as 1965 and the government actively promoted fossil fuel usage through “beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land.”³⁹⁴

Second, the court stated that “climate change is occurring at an increasingly rapid pace.”³⁹⁵ The court relied on the plaintiffs’ expert evidence showing that: the years with the hottest recorded temperatures occurred in the last decade, with the average temperature increasing each year since 1997; temperatures are already .09 degrees Celsius above pre-industrial temperatures, and the extreme heat is melting polar ice caps.³⁹⁶ These facts led the court to conclude, “[a]bsent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies.”³⁹⁷

Third, the court addressed what types of harms may survive summary judgement under Article III standing.³⁹⁸ It determined that having to evacuate homes due to flooding and water scarcity were concrete and particularized injuries, similar to the rising sea levels harming plaintiffs in *Massachusetts*.³⁹⁹ Fourth, the court determined the causal chain between the harm and the government’s actions was sufficiently established for the purposes of summary judgment.⁴⁰⁰ The court connected the “plaintiffs’ alleged injuries . . . caused by carbon emissions from fossil fuel production, extraction, and transportation” with “a significant portion of those emissions occur[ing] in” America.⁴⁰¹ Additionally, the court reasoned that the federal government actively encouraged fossil fuel usage because about “25% of fossil fuels extracted in the United States come from federal waters and lands, an activity that requires authorization from the federal government.”⁴⁰² The court distinguished *Juliana* from a 2013 Ninth Circuit case where the plaintiffs sued for harms resulting from “local agencies’ failure to regulate five oil refineries.”⁴⁰³ The 2013 plaintiffs’ standing was insufficient because they blamed isolated agency decisions for their injuries, whereas the *Juliana* plaintiffs blamed federal policy decisions over a span of fifty years.⁴⁰⁴

Last, the court determined it was unable to redress the plaintiffs’ injuries.⁴⁰⁵ The first determination was that addressing emissions alone would not solve climate change.⁴⁰⁶ The court distinguished this case from *Massachusetts*, stating that because the State of Massachusetts

³⁹² *Id.* at 1173–74.

³⁹³ *Id.* at 1166.

³⁹⁴ *Id.* at 1166–67.

³⁹⁵ *Id.* at 1166.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *See id.* at 1168.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 1169.

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 1171–74.

⁴⁰⁶ *Id.* at 1170.

brought a procedural due process claim the threshold was lower for redressability.⁴⁰⁷ Therefore, it was sufficient that the EPA's regulation of vehicle emissions may only help rather than solve climate change.⁴⁰⁸ *Juliana* relied on a substantive due process claim, so the bar was higher.⁴⁰⁹ The second determination was that enforcing the requested remedial plan to address climate change would violate separation of powers.⁴¹⁰ The court explained that the judicial branch could not create or supervise the creation of policy, but that it must defer this power to the executive and legislative branches.⁴¹¹ While the court acknowledged that climate change is a "clear and present danger" that must be addressed, the judiciary is not the appropriate forum for creating change.⁴¹² The opinion concluded that the record makes it increasingly difficult for "the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions."⁴¹³ Some legal scholars hope that the Supreme Court may review *Juliana* because the Ninth Circuit conflated the third element of Article III standing with the political question doctrine.⁴¹⁴

Juliana provides hope for pursuing damages against Big Oil in several ways. First, if the court acknowledged the government knew fossil fuels caused climate change and its wrongdoing contributed to climate change, it makes it easier to show that Big Oil also had knowledge and conducted itself similarly. Second, the court acknowledged scientific evidence that climate change is occurring, making it more difficult for Big Oil to deny the scientific causation link between its emission of fossil fuels and the harms of climate change. Third, the court stated that flooding and water scarcity are concrete harms,⁴¹⁵ harms which almost every American community has experienced,⁴¹⁶ increasing the plaintiff pool. Fourth, the court determined that a causal link existed between policy decisions made over fifty years ago and the pleaded harms. The court also considered the government's actions to authorize drilling. Similarly, Big Oil has conducted business for over 100 years and has even more actively participated in fossil fuel extraction than the government.⁴¹⁷ Last, the redressability will be less of an issue when suing Big Oil directly. Ordering a company to pay restitution for damages or enforcing injunctions to stop certain business practices are not the non-justiciable policy decisions addressed in *Juliana*. However, Big Oil may still have a chance at overcoming a lawsuit if the court believes stopping the industry's practices, which only relate to emissions from one source, will not solve climate change. For example, the *Juliana* court pointed out that experts think several solutions must be combined to address the problem, including reforestation, energy-efficient lighting, public transportation, and even hydrogen-powered aircraft.⁴¹⁸ The next Subsection predicts the potential success of climate change claims against Big Oil in light of *Juliana*.

⁴⁰⁷ *Id.* at 1171.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 1171–72.

⁴¹² *Id.* at 1174.

⁴¹³ *Id.* at 1175.

⁴¹⁴ See CPR's Connect the Dots, *Youths' Climate Case Dismissed. Now What?*, CTR. FOR PROGRESSIVE REFORM (Feb. 3, 2020) (downloaded using Apple Podcasts).

⁴¹⁵ *Juliana*, 947 F.3d at 1168.

⁴¹⁶ See Ellie Kincaid, *California Isn't the Only State with Water Problems*, BUS. INSIDER (Apr. 21, 2015, 4:56 PM), <https://www.businessinsider.com/americas-about-to-hit-a-water-crisis-2015-4> [<https://perma.cc/99RG-Z87Z>].

⁴¹⁷ See *History of Oil*, EKT INTERACTIVE, <https://ektinteractive.com/history-of-oil/> [<https://perma.cc/4FV3-7GK2>].

⁴¹⁸ *Juliana*, 947 F.3d at 1170–71.

B. Climate Change Litigation Against Big Oil

The globe is addicted to fossil fuels.⁴¹⁹ America's addiction is only getting worse, as natural gas production has increased 60% between 2008 to 2017, and we are expanding "oil and gas extraction four times faster than any other nation."⁴²⁰ Similar to the harm caused by tobacco and opioids, this addiction has resulted in coastal communities having to pay approximately \$400 billion to adapt their infrastructures to the rising sea levels,⁴²¹ and 62% of Americans state that climate change is affecting their local communities.⁴²² Local and state governments have stepped into a role the federal government has refused, as evidenced by seventeen states pledging to uphold the Paris Agreement; twelve U.S. cities joined C40, "a global network of cities committed to the Paris Agreement and decreasing emissions"; and 400 U.S. mayors committed to implementing climate change policies.⁴²³ Additionally, local and state governments began suing Big Oil for damages.⁴²⁴

The impetus for these suits against Big Oil is similar to the tobacco litigation: evidence of corporate wrongdoing.⁴²⁵ In 2015, media outlets launched investigations disclosing Exxon "understood the science of global warming, predicted its catastrophic consequences, and then spent millions to promote misinformation."⁴²⁶ In addition to denying climate change on its own, it funded research supporting climate change denial,⁴²⁷ similar to Big Tobacco supporting research unlinking lung cancer and tobacco use.⁴²⁸ The media reports prompted the Massachusetts, U.S. Virgin Islands, and New York attorneys general to investigate Exxon in 2015 and 2016.⁴²⁹ The three attorneys general began serving Exxon with subpoenas and a civil investigative demand ("CID"), and Exxon responded with lawsuits in state and federal court causing the U.S. Virgin Islands to drop its investigation.⁴³⁰ Despite attempts to derail the investigations, federal courts in Massachusetts and New York required Exxon to comply with the investigation in 2018.⁴³¹ The two remaining attorneys general filed complaints against Exxon alleging investor fraud.⁴³² In 2019, a New York district court determined that Exxon did not commit investor fraud but concluded that

⁴¹⁹ See Nathanael Johnson, *New Evidence Shows We're Still Way Too Addicted to Fossil Fuels*, GRIST (July 19, 2018), <https://grist.org/article/new-evidence-shows-were-still-way-too-addicted-to-fossil-fuels/> [https://perma.cc/4N-AJ-5EZX].

⁴²⁰ *Juliana*, 947 F.3d at 1166.

⁴²¹ Jacqueline Gallant, *Big Oil Can't Shirk Its Responsibility to Communities*, CONSERVATION L. FOUND. (Aug. 2, 2019), <https://www.clf.org/blog/big-oil-responsibility-communities/> [https://perma.cc/VBV2-XXRH].

⁴²² Funk & Hefferon, *supra* note 365.

⁴²³ Ousley, *supra* note 367, at 356.

⁴²⁴ See generally David Hasemyer, *Fossil Fuels on Trial: Where the Major Climate Change Lawsuits Stand Today*, INSIDE CLIMATE NEWS (Jan. 17, 2020), <https://insideclimatenews.org/news/17012020/climate-change-fossil-fuel-company-lawsuits-timeline-exxon-children-california-cities-attorney-general/> [https://perma.cc/6LXJ-FPYA].

⁴²⁵ See *id.*

⁴²⁶ Hasemyer, *supra* note 424; Sara Jerving et al., *What Exxon Knew About the Earth's Melting Arctic*, L.A. TIMES (Oct. 9, 2015), <https://graphics.latimes.com/exxon-arctic/> [https://perma.cc/6TWN-YBWW].

⁴²⁷ Dana Nuccitelli, *Two-Faced Exxon: The Misinformation Campaign Against Its Own Scientists*, GUARDIAN (Nov. 25, 2015), <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2015/nov/25/two-faced-exxon-the-misinformation-campaign-against-its-own-scientists> [https://perma.cc/7NCE-B3PQ].

⁴²⁸ Brownell & Warner, *supra* note 171, at 278, 264–65.

⁴²⁹ Hasemyer, *supra* note 424.

⁴³⁰ *Id.*

⁴³¹ *Exxon Mobil Corp. v. Attorney Gen.*, 94 N.E.3d 786, 802 (Mass. 2018); *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 713–14 (S.D.N.Y. 2018).

⁴³² Hasemyer, *supra* note 424.

“[n]othing in this opinion is intended to absolve ExxonMobil from responsibility for contributing to climate change”⁴³³ Exxon also did not dispute that “its operations produce greenhouse gases or that greenhouse gases contribute to climate change.”⁴³⁴ The Massachusetts case has yet to be adjudicated.⁴³⁵ The judge stated that the case was more suited for state court because the issue was consumer protection law, “not claims of environmental violations that could be preempted by federal law.”⁴³⁶ Exxon was also recently denied a more favorable state forum of Texas in a different climate dispute.⁴³⁷ These recent decisions suggest plaintiffs will have a more neutral forum to adjudicate their claims.

The uncovered evidence and impending consequences of rising sea levels inspired numerous cities to file lawsuits against several Big Oil companies under the public nuisance theory used in both the tobacco and the opioid litigation in 2017 and 2018.⁴³⁸ The eight California cities and counties, Colorado cities, Washington state cities, and the entire State of Rhode Island sued in state court and hope to remain there.⁴³⁹ A common tactic used by Big Oil in previous suits was to remove to federal court, where the judge would often defer to Congress or the EPA.⁴⁴⁰ For example, a 2012 Ninth Circuit case, *Native Village of Kivalina v. ExxonMobil Corp.*, held that an Alaskan village’s public nuisance claim against Exxon was preempted by the CAA.⁴⁴¹ Oakland’s and San Francisco’s recent cases were moved to federal court and ultimately dismissed but not before Judge Alsup required a climate change tutorial for the courtroom.⁴⁴² The tutorial consisted of two parts and was presented by both sides: the history of climate change and the best currently available climate change science.⁴⁴³ The presentation resulted in Judge Alsup stating the court accepted the science behind climate change but climate change remedies were best handled by the other branches.⁴⁴⁴ Despite the dismissal, the courtroom presentation gained notable publicity from the *New York Times*, *The Guardian*, and other media outlets.⁴⁴⁵ Additionally, Judge Alsup’s ingenious method to have both sides present evidence of climate change resulted in BP, Chevron Corporation, ConocoPhillips, and Shell filing documents admitting knowledge of fossil fuels leading to a sea-level increase.⁴⁴⁶ Exxon filed separately but still admitted that human activities, including the combustion of oil and natural gas, lead to climate change.⁴⁴⁷ Therefore, *Kivalina* centered on the

⁴³³ *People v. Exxon Mobil Corp.*, No. 452044/2018, 2019 WL 6795771, at *2 (N.Y. Sup. Ct. Dec. 10, 2019).

⁴³⁴ *Id.*

⁴³⁵ Erik Larson, *Exxon Loses Jurisdiction Fight in Massachusetts Climate Suit*, BLOOMBERG GREEN, <https://www.bloomberg.com/news/articles/2020-03-17/massachusetts-can-keep-exxon-suit-in-state-court-judge-says> (Mar. 17, 2020, 3:03 PM) [<https://perma.cc/PJ9E-F8QN>].

⁴³⁶ *Id.*

⁴³⁷ Murry Cohen, *City of San Francisco v. Exxon — Bad Judgment or Judicial Misconduct?*, LAW.COM (Aug. 7, 2020, 5:22 PM), <https://www.law.com/texaslawyer/2020/08/07/city-of-san-francisco-v-exxon-bad-judgment-or-judicial-misconduct/?slreturn=20210105171454> [<https://perma.cc/K3BD-TP6K>].

⁴³⁸ Hasemyer, *supra* note 424.

⁴³⁹ *Id.*

⁴⁴⁰ *See* *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011).

⁴⁴¹ *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857–58 (9th Cir. 2012).

⁴⁴² Ousley, *supra* note 367, at 361–62.

⁴⁴³ *Id.* at 362.

⁴⁴⁴ *Id.*; *see* Order Granting Motion to Dismiss Amended Complaints, *City of Oakland v. BP P.L.C.*, No. 3:17-cv-06011-WHA at 12 (N.D. Cal. June 25, 2018) [hereinafter Order Granting Motion to Dismiss].

⁴⁴⁵ Ousley, *supra* note 367, at 362–63.

⁴⁴⁶ Order Granting Motion to Dismiss, *supra* note 444, at 6; *see generally* Notice of Submission, *California v. BP P.L.C.*, no. 3:17-cv-06011-WHA (N.D. Cal. Mar. 21, 2018).

⁴⁴⁷ Exxon Mobil Corporation’s Response to March 21, 2018 Notice to Defendants Re Tutorial, *California v. BP P.L.C.*, No. 3:17-cv-06011-WHA at 2 (N.D. Cal. Apr. 4, 2018).

legal issue of “whether these producers of fossil fuels should pay for anticipated harm that will eventually flow from a rise in sea level,” not whether climate change is actually occurring.⁴⁴⁸

This case is also important because the plaintiffs figured out how to argue around Big Oil’s previous preemption defense. The plaintiffs did not bring claims for the emissions, but rather “for having put fossil fuels into the flow of international commerce.”⁴⁴⁹ The court commented that it was not enough to distinguish domestic sales from emissions because the ultimate harm is caused by the emissions, not the extraction and sale of fossil fuels.⁴⁵⁰ Instead, the important element was that, “unlike *AEP* and *Kivalina*, which sought only to reach domestic conduct, plaintiffs’ claims here attack behavior worldwide.”⁴⁵¹ This distinction is important because these “foreign emissions are out of the EPA and CAA’s reach.”⁴⁵²

However, Judge Alsup still dismissed the case for the same reason as *Juliana*’s dismissal, determining that the judiciary is the incorrect branch to address climate change.⁴⁵³ The judge’s dismissal is surprising because the plaintiffs’ requested remedy was money to pay for seawalls and other climate change abatement infrastructure, not a policy-making injunction, like the remedy in *Juliana*.⁴⁵⁴ Several steps led the court to this holding. First, the plaintiffs’ choice to include global implications and the focus on coastal flooding precluded its public nuisance claim from proceeding in state court because foreign governance and navigable waters are “uniquely federal.”⁴⁵⁵ Second, the federal common law of an intentional nuisance balances the benefit of action with the harm.⁴⁵⁶ The court reasoned that while it is “true that carbon dioxide released from fossil fuels has caused (and will continue to cause) global warming,” everyone has benefitted from the “development of our modern world . . . fueled by oil.”⁴⁵⁷ Big Oil’s actions were therefore reasonable, and the public nuisance claim failed.⁴⁵⁸ This reasoning makes sense when comparing fossil fuels to tobacco and opioids, both of which had little benefit to society, one being a recreational drug and the other being a drug that provides pain relief. For both products, it is impossible to make an argument that everyone benefitted from them in the same way as fossil fuels. The minor benefits of smoking⁴⁵⁹ and opioids⁴⁶⁰ in no way outweigh the harms already discussed in this Article.

⁴⁴⁸ Order Granting Motion to Dismiss, *supra* note 444, at 6.

⁴⁴⁹ *California v. BP P.L.C.*, Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 1064293, at *4 (N.D. Cal. Feb. 27, 2018).

⁴⁵⁰ Order Granting Motion to Dismiss, *supra* note 444, at 9.

⁴⁵¹ *California*, 2018 WL 1064293, at *4 (*AEP* and *Kivalina* focused on domestic emissions from power plants and Exxon, respectively. The court in *California* determined that “[e]missions from domestic sources are certainly regulated by the Clean Air Act, but plaintiffs here have fixated on an earlier moment in the train of industry, the earlier moment of production and sale of fossil fuels, not their combustion.” Suing the producers for allowing a dangerous product to enter the market while downplaying its risks was considered worldwide behavior outside the reach of the Clean Air Act and the EPA because “[w]hile some of the fuel produced by defendants is certainly consumed in the United States (emissions from which are regulated by the Clean Air Act), greenhouse gases emanating from overseas sources are equally guilty (perhaps more so) of causing plaintiffs’ harm.”).

⁴⁵² *Id.*

⁴⁵³ Order Granting Motion to Dismiss, *supra* note 444, at 15–16.

⁴⁵⁴ *California*, 2018 WL 1064293, at *1.

⁴⁵⁵ Order Granting Motion to Dismiss, *supra* note 444, at 5.

⁴⁵⁶ *Id.* at 8.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ See Christopher Wanjek, *5 Health Benefits of Smoking*, LIVE SCI. (July 19, 2011), <https://www.livescience.com/15115-5-health-benefits-smoking-disease.html> [<https://perma.cc/FXM9-9ZV3>].

⁴⁶⁰ See generally *Assessing Benefits and Harms of Opioid Therapy*, CTR. FOR DISEASE CONTROL, https://www.cdc.gov/drugoverdose/pdf/Assessing_Benefits_Harms_of_Opioid_Therapy-a.pdf

Third, the court did not agree that the following exception to the benefit/burden rule applied to this case: “the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.”⁴⁶¹ It determined that granting the plaintiffs’ remedy of \$2 billion for each city would establish precedent leading other plaintiffs to file suit, making it infeasible for Big Oil to operate.⁴⁶² Therefore, the court determined it must weigh the benefits and deny the public nuisance claim.⁴⁶³ Perhaps the motivation behind the tobacco suits was to make it so those companies can no longer operate and create the dangerous product. Similarly, opioid lawsuits sent Purdue Pharma into bankruptcy.⁴⁶⁴ Disrupting Big Oil’s business to this degree may not be an option to solve climate change without viable and widespread alternative energy sources.⁴⁶⁵ As of 2019, climate change litigants’ requested damages equaling approximately \$200 billion.⁴⁶⁶ A Columbia law student determined that the combined assets of Big Oil will not cover these damages.⁴⁶⁷

Fourth, the court took issue with the cities asking for preemptive abatement because it determined that Big Oil would still be in business when the cities build the infrastructure, and the plaintiffs should sue at that time.⁴⁶⁸ The court also considered that “[t]he United States Army Corps of Engineers has already proposed projects to address the problem and is likely to help protect plaintiffs’ property and residents.”⁴⁶⁹ Although the court agrees that the harm would occur,⁴⁷⁰ it concluded that the harm does not reach the level of imminence of the opioid and tobacco harms where people were already dying and the funding for health-care costs were already incurred and were undoubtedly going to continue.⁴⁷¹ However, compare to *Juliana*, which allowed standing for having to evacuate homes for flooding or scarcity of water.⁴⁷² Surely, the cities that need this infrastructure built can show that at some point a natural disaster caused their citizens to evacuate their homes, or they have already incurred costs for other abatement methods besides the infrastructure they are requesting money for. In *Juliana*, the remedy was a policy-enforcing injunction, and the harm considered concrete and actualized by the court was evacuating homes.⁴⁷³ Therefore, the harm does not have to exactly match up with the remedy as suggested here.

Fifth, the court said the outcome of the public nuisance claim did not really matter because “these claims are foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems.”⁴⁷⁴ The court’s reasoning is laid out below:

[<https://perma.cc/GLF3-ELF2>] (explaining the need for opioid prescribers to assess the benefits of opioid therapy prior to providing prescription opioids to a patient).

⁴⁶¹ Order Granting Motion to Dismiss, *supra* note 444, at 13.

⁴⁶² *Id.* at 14.

⁴⁶³ *Id.*

⁴⁶⁴ Magan, *supra* note 345.

⁴⁶⁵ See Drew DeSilver, *Renewable Energy Is Growing Fast in the U.S., but Fossil Fuels Still Dominate*, PEW RSCH. CTR. (Jan. 15, 2020), <https://www.pewresearch.org/fact-tank/2020/01/15/renewable-energy-is-growing-fast-in-the-u-s-but-fossil-fuels-still-dominate/> [<https://perma.cc/MMW3-HUEC>].

⁴⁶⁶ Reeva Dua, *Driving on Empty: The Fate of Fossil Fuel Companies in Climate Nuisance Litigation*, 4 COLUM. HUM. RTS. L. REV. ONLINE 1, 13 (2019).

⁴⁶⁷ *Id.* at 18–20.

⁴⁶⁸ Order Granting Motion to Dismiss, *supra* note 444, at 9 n.8.

⁴⁶⁹ *Id.* at 8 n.8.

⁴⁷⁰ *Id.* at 6.

⁴⁷¹ See *supra* Sections II.C.2.a, IV.B.

⁴⁷² *Juliana v. United States*, 947 F.3d 1159, 1168 (9th Cir. 2020).

⁴⁷³ *Id.* at 1165, 1168.

⁴⁷⁴ Order Granting Motion to Dismiss, *supra* note 444, at 10.

Here, plaintiffs seek to impose liability on five companies for their production and sale of fossil fuels worldwide. These claims—through which plaintiffs request billions of dollars to abate the localized effects of an inherently global phenomenon—undoubtedly implicate the interests of countless governments, both foreign and domestic. The challenged conduct is, as far as the complaints allege, lawful in every nation. And, as the United States aptly notes, many foreign governments actively support the very activities targeted by plaintiffs' claims. Nevertheless, plaintiffs would have a single judge or jury in California impose an abatement fund as a result of such overseas behavior. Because this relief would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil, we must exercise great caution.⁴⁷⁵

“As explained above, plaintiffs' claims require a balancing of policy concerns—including the harmful effects of greenhouse gas emissions, our industrialized society's dependence on fossil fuels, and national security.”⁴⁷⁶ Therefore, my prediction mentioned in Section V.A was incorrect. The fact that plaintiffs were suing Big Oil for the narrow remedy of funding local abatements, rather than the government for the broad remedy of enforcing policy, did not affect the justiciability analysis. However, Judge Alsup issued this opinion in 2018, prior to the 2020 *Juliana* decision, and decided it in a district court within the Ninth Circuit's jurisdiction.⁴⁷⁷ The cities appealed Judge Alsup's holding, so perhaps there will be a different outcome post-*Juliana*.⁴⁷⁸ In fact, King County near Seattle, Washington, stayed its federal proceedings pending a decision in the Ninth Circuit regarding Judge Alsup's holding.⁴⁷⁹

City of New York v. B.P. P.L.C., a public nuisance claim in federal court, was also dismissed in 2018 for the same reasons as *California v. B.P. P.L.C.* discussed above.⁴⁸⁰ However, part of the opinion provides hope for the public nuisance claims recently allowed in state court for the state of Rhode Island,⁴⁸¹ the city of Baltimore, Maryland,⁴⁸² six California cities and counties,⁴⁸³ and Boulder, Colorado.⁴⁸⁴ *New York* stated that the CAA would not preempt the state public nuisance claims.⁴⁸⁵ Therefore, plaintiffs do not have to rely on the foreign implication argument to overcome the CAA in state court. The removal of the global component from their argument makes it harder for the court to defer to the executive and legislative branches, because the issue is no longer related to foreign policy.⁴⁸⁶ Litigants and legal scholars are hopeful that the state claims will be

⁴⁷⁵ *Id.* at 11 (citations omitted).

⁴⁷⁶ *Id.* at 10.

⁴⁷⁷ *Id.* at 1.

⁴⁷⁸ Hasemyer, *supra* note 424; see David Hasemyer, *2 City Lawsuits Against Big Oil Dismissed, but That's Not the End of It*, INSIDE CLIMATE NEWS (Jun. 26, 2018), <https://insideclimatenews.org/news/27062018/california-cities-climate-change-lawsuits-dismissed-fossil-fuels-industry-rising-sea-levels/> [<https://perma.cc/S9ZQ-W3ZY>] [hereinafter *2 City Lawsuits*].

⁴⁷⁹ King Cnty. v. BP P.L.C., No. C18-758-RSL, 2018 WL 9440497, at *2 (W.D. Wash. Oct. 17, 2018).

⁴⁸⁰ *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018).

⁴⁸¹ *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 152 (D.R.I. 2019).

⁴⁸² *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 574 (D. Md. 2019).

⁴⁸³ *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018).

⁴⁸⁴ *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 981 (D. Colo. 2019).

⁴⁸⁵ *BP P.L.C.*, 325 F. Supp. 3d at 474.

⁴⁸⁶ See *California v. BP P.L.C.*, Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018).

much more successful than the federal ones, as public nuisance claims tend to be much more favorable to plaintiffs at the state level.⁴⁸⁷ One cited example is a recent California public nuisance claim against lead paint manufacturers that resulted in a \$1 billion payout.⁴⁸⁸ However, relying on this case is an issue because of the benefit/burden analysis required in intentional public nuisance cases, as lead paint surely does not proffer the same benefit as fossil fuels.

However, there is still a chance these cases could end up in federal court, as all of the defendants have appealed.⁴⁸⁹ Judge Martinez of Boulder, Colorado, stated that while a climate change case could “benefit from a uniform standard of decision, [the defendants] have not met their burden of showing that federal jurisdiction exists,” and remanded the case to state court.⁴⁹⁰ Judge Martinez’s statement directly conflicts with *California*, allowing the same Big Oil defendants to remove to federal court because “[a] patchwork of fifty different answers to the same fundamental global issue would be unworkable.”⁴⁹¹ With some circuits allowing the cases to proceed in state courts, and others not, there is a potential for a circuit split requiring guidance from the Supreme Court.

C. Applying the Framework

Examining the current state of the climate change litigation requires applying the six signs of success from the tobacco suit. The first sign of success is the possibility of a large settlement agreement. For the longest time, Big Oil has hidden behind the federal court deferring to the other branches and the preemption of public nuisance claims under the CAA. *Juliana, California*, and *New York* suggest that the federal courts are still likely to defer to the other branches of government. Therefore, new hope is rooted in the public nuisance claims proceeding in state court because an increased likelihood of the courts holding Big Oil accountable will convince the companies to settle. However, there are issues with the state cases because of the benefit/burden analysis under intentional public nuisance claims. Fossil fuels are unlike tobacco, opioids, and lead paint in that they have benefitted everyone in society. The exception to the benefit/burden analysis requires Big Oil’s conduct cause serious harm and that “the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.”⁴⁹² In other words, a court will only avoid the benefit/burden analysis if paying for a plaintiff’s and future plaintiff’s damages does not prevent Big Oil from continuing operations. Calculations suggest that paying the \$200 billion in current pleaded damages is not feasible for Big Oil. However, what if the damages were non-monetary? Plaintiffs could instead require Big Oil to take affirmative measures to help prevent global warming from surpassing two degrees Celsius by expanding its renewable

⁴⁸⁷ See 2 *City Lawsuits*, *supra* note 478; Dino Grandoni, *The Energy 202: Here’s Why Lawyers Suing Oil Companies Are Following the Opioid Cases*, POWER POST (Sept. 3, 2019), <https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2019/09/03/the-energy-202-here-s-why-lawyers-suing-oil-companies-are-following-the-opioid-cases/5d6d4c86602ff171a5d7338f/> [https://perma.cc/3JEQ-RKTX].

⁴⁸⁸ 2 *City Lawsuits*, *supra* note 478.

⁴⁸⁹ Meera Gajjar, *Another Climate Suit Remanded to State Court as Jurisdiction Fights Ripen*, 40 No. 05 WESTLAW J. ENV’T. 1, 1 (2019).

⁴⁹⁰ Bd. of Cnty. Comm’rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 981 (D. Colo. 2019).

⁴⁹¹ *California*, 2018 WL 1064293, at *2.

⁴⁹² Order Granting Motion to Dismiss, *supra* note 444, at 13.

portfolio by a required increasing percentage each year and lessening emissions by a certain percentage each year.⁴⁹³ This solution could either be pursued through public nuisance litigation or a settlement agreement following the MSA's regulatory components without the yearly payments. Adhering to an injunction or settlement requirements would prevent the infrastructure abatements from even being required because lessening the global temperature would prevent the flooding, which current climate litigants are suing Big Oil to abate, from even occurring.⁴⁹⁴ However, without pleading a non-monetary injunction it is unclear if the state suits will even be successful because the courts are not willing to risk Big Oil becoming non-operational. It is also unclear if the suits will remain in state court due to the circuit split. On the flip side, courts may see non-monetary injunctions as a form of policy-making. Without the threat of plaintiffs succeeding in court, Big Oil is unlikely to negotiate a settlement.

The second sign of success is evidence of corporate wrongdoing. A positive element of climate change litigation is that courts and Big Oil now accept that climate change is occurring and agree it is scientifically supported.⁴⁹⁵ Additionally, suits are pending regarding Exxon's knowledge of climate change.⁴⁹⁶ Recently, Boulder, Colorado's state case added a civil conspiracy claim against Exxon and Suncor for "promot[ing] the use of fossil fuels while dismissing the consequences of climate change."⁴⁹⁷ While an investor fraud suit against Exxon failed, another is pending and two attorneys general investigations into the company were allowed to proceed.⁴⁹⁸ Discovery of incriminating documents between the two investigations and the pending litigations could also influence Big Oil or Exxon alone to negotiate settlement agreements.

The third sign of success is a change in public opinion. The climate litigation so far has influenced a change in public opinion regarding the responsibility of Big Oil and the validity of climate change. Similar to fast food companies' "healthy" marketing, public backlash in the 2000s encouraged BP to completely overhaul its brand to "Beyond Petroleum," complete with a new green logo and a promise to diversify its portfolio with renewable projects.⁴⁹⁹ This marketing ploy did not stick around as the green logo is gone along with its large wind farm project, and BP has the measly goal of 15% renewables by 2040.⁵⁰⁰ However, recent events suggest BP should have stuck to the green marketing.⁵⁰¹ In addition to courts agreeing there is scientific evidence of climate change, Harvard, Yale, University of Michigan, and New York University law students protested the firm Paul Weiss at four separate recruiting events for representing Exxon in the current litigation.⁵⁰² Also, activists like Greta Thunberg, a teenage Swedish environmental activist, "has electrified millions of students around the world with her climate school-strike movement."⁵⁰³ "The

⁴⁹³ Dua, *supra* note 466, at 27.

⁴⁹⁴ *See id.*

⁴⁹⁵ *See supra* Section V.B.

⁴⁹⁶ Hasemyer, *supra* note 424.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ Eric Reguly, *In the Age of Greta, Big Oil Blew It by Not Becoming Big Energy*, GLOBE & MAIL (Oct. 11, 2019), <https://www.theglobeandmail.com/business/commentary/article-in-the-age-of-greta-big-oil-blew-it-by-not-becoming-big-energy/> [<https://perma.cc/N4RU-AH6F>].

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

⁵⁰² Callie Teitelbaum, *University Law Students Protest Paul, Weiss Recruiting Event in Support of #DropExxon Campaign*, MICH. DAILY (Feb. 19, 2020, 9:54 PM), <https://www.michigandaily.com/section/campus-life/exxon-protest> [<https://perma.cc/RGV7-ALUM>].

⁵⁰³ Reguly, *supra* note 499.

strikes, along with the Extinction Rebellion's civil disobedience campaign, are aimed at compelling governments and big polluters to take action to prevent ecological collapse, and are doing a credible job in turning the oil companies into pariahs."⁵⁰⁴ These public displays seem to be hurting business as Suncor, the largest Alberta oil-sands operator, is having trouble finding investors.⁵⁰⁵ Last, the heavy publicity surrounding cases such as *Juliana* and the climate change tutorial from *California* is likely to sway the public's opinion regarding the culpability of Big Oil and the validity of climate change. If public pressure mounts, that could sway Big Oil to make internal changes like BP did years ago. However, the fear is that these changes would only be empty marketing promises.

The fourth sign of success is new courtroom avenues. The climate change litigation shows this sign of success because of the suits regarding Exxon's investor fraud, similar to the RICO claims in Big Tobacco, and the potential for the new state cases. The fifth sign of success is influencing a body of legislation. *Massachusetts* encouraged the EPA to regulate emissions and *Juliana* holds that it would be hard for the other branches to ignore climate change and to deny that the government played a role in exacerbating it.⁵⁰⁶ The ability of this Ninth Circuit opinion to influence legislation was low under Trump's administration, which ignored the holding of *Massachusetts*, a Supreme Court decision.⁵⁰⁷ However, there may be a possibility of more legislation as President Biden has recently rejoined the Paris Climate Agreement and his administration has pledged to create "new emissions-cutting target, known as a Nationally Determined Contribution, which will determine the scope of the country's ambitious goals over the next decade."⁵⁰⁸

The sixth sign of success is the ability to aggregate claims. This sign is apparent because cities are suing on behalf of their citizens. However, *California* presents some issues in regard to identifying a plaintiff's imminent harm. The court determined that the city's pleaded harm was not imminent because it had yet to build the abatements it was seeking money for, and another government entity was already helping with the abatements.⁵⁰⁹ In the *New York* case that was dismissed, this timing issue was not discussed, likely because the city pleaded damages based on abatements implemented after hurricane Sandy.⁵¹⁰ Therefore, so long as parties plead with harm already incurred, as the *New York* and *Juliana* plaintiffs did, the harm element should be satisfied.

In conclusion, the public nuisance cases recently remanded to state court, evidence of Exxon's knowledge of climate change, courts recognizing that climate change is backed by science, the change in public opinion, and cities representing its citizens are all evidence of climate change being a successful social policy tort. All of these components have worked together to diminish Big Oil's power and to bring public attention to this issue. However, because the *Juliana* case pled that a suitable environment is a fundamental right and the district court recognized it as such,⁵¹¹ climate change could also fall into the social impact litigation category of cases like *Brown*

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020).

⁵⁰⁷ Levitan, *supra* note 380.

⁵⁰⁸ Lederman, *supra* note 368.

⁵⁰⁹ Order Granting Motion to Dismiss, *supra* note 444, at 8, 9 n.8.

⁵¹⁰ *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 469 (S.D.N.Y. 2018).

⁵¹¹ *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020). "Rather, [Plaintiffs] ask the Court to declare the United States' current environmental policy infringes their fundamental rights, direct the agencies to conduct a consumption-based inventory of United States CO2 emissions, and use that inventory to 'prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2 so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and in the future will depend.' . . . This Court could issue the requested declaration without

v. Board and Roe v. Wade.⁵¹² This is because the solution to climate change is not Big Oil funding cities' abatement structures; instead, that is just one component. In fact, the need for abatement could be completely prevented if policy is enacted to prevent the increase in global temperature.⁵¹³ The fact that a successful settlement agreement similar to the MSA could be enacted between local governments and Big Oil without requiring large payouts suggests that this problem is better solved with policy rather than the large payouts usually required for a successful social policy tort. Climate change litigation is different from opioid litigation because most of the opioid suits are based on harm already incurred that can only be resolved with funding for treatment programs⁵¹⁴ in conjunction with regulations preventing additional harm. Another difference is that fossil fuels are still an essential product,⁵¹⁵ so turning Big Oil non-operational is not an option like it was for the tobacco or opioid suits. Last, local abatement of potential rising waters is only one small component of solving climate change. Other countries have recognized this by enacting carbon taxes⁵¹⁶ and participating in policies such as the Paris Climate Agreement.⁵¹⁷ Another solution is allowing the market to lower emissions.⁵¹⁸ In 2019, greenhouse gas emissions dropped 2% because natural gas was cheaper than coal.⁵¹⁹ While this alone does not solve climate change, it shows that there might be better options besides social policy tort litigation. Overall, the climate change litigation has played a positive role in getting the public and courts to accept the scientific evidence backing climate change. The suits also damaged Big Oil's reputation and made the courts acknowledge that the government contributed to climate change. However, climate change is not likely to succeed under the tobacco model because it is unlikely to result in a settlement agreement like the MSA, and seems like it would have more success under the social impact model.

VI. CONCLUSION

The opioid crisis and climate change have elements indicating potential success under the tobacco litigation model. Citizens took both social issues to court after feeling the government was not doing enough to right substantial harms caused by corporations. Additionally, both litigations led to an increase in public awareness and evidence of corporate wrongdoing. While both show promise, the opioid litigation is more likely to succeed under the tobacco litigation model. First, climate change public nuisance suits are currently pending in state court, whereas a drug manufacturer was found liable for public nuisance in a state court. Second, harmed cities and states have

directing any individual agency to take any particular action.” *Id.* at 1239. “[T]his Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem, it states a claim for a due process violation, [t]o hold otherwise would be to say that the Constitution affords no protection against a government’s knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right.” *Id.* at 1250.

⁵¹² Bergthold & Schein, *supra* note 8.

⁵¹³ Dua, *supra* note 466, at 27.

⁵¹⁴ See ASSOCIATED PRESS-NORC, *supra* note 355, at 5; Dwyer, *supra* note 266.

⁵¹⁵ See DeSilver, *supra* note 465.

⁵¹⁶ Reguly, *supra* note 499.

⁵¹⁷ Ousley, *supra* note 367, at 352.

⁵¹⁸ Nicholas Kusnetz, *U.S. Emissions Dropped in 2019: Here's Why in 6 Charts*, INSIDE CLIMATE NEWS (Jan. 7, 2020), <https://insideclimatenews.org/news/07012020/infographic-united-states-emissions-2019-climate-change-greenhouse-gas-coal-transportation/> [<https://perma.cc/T63R-YFW9>].

⁵¹⁹ *Id.*

reached settlements in the opioid litigation, but not in the climate change litigation. Third, federal courts are unwilling to adjudicate climate change issues, while a federal court created an MDL and the negotiation class for the opioid litigation. These three differences show that the opioid litigation seems more like the third wave of the tobacco litigation, while climate change may be stuck in the first or second wave.

A few key differences between the social issues explain why the opioid litigation is more likely to succeed under the tobacco litigation model. The first is that America still relies on Big Oil's products, so it is not feasible to bankrupt or make the companies non-operational. In contrast, 90% of Purdue's business was manufacturing and selling OxyContin.⁵²⁰ While some of the opioid defendants make beneficial products, the opioid plaintiffs got around that fact by only damaging the responsible subsidiary company. For example, Johnson & Johnson's subsidiaries Noramco and Tasmanian Alkaloids were the companies growing poppies to supply opioid manufacturers, and Mallinckrodt only filed bankruptcy for its American subsidiary for its tentative settlement agreement.⁵²¹ The second difference is that Big Oil and the federal government are almost equally blamed for climate change, while there is evidence that opioid defendants lobbied for laws to diminish the DEA's enforcement tools. This leads to the third difference—the politicization of climate change makes it nearly impossible for a court to be willing to adjudicate, whereas the opioid crisis is not politicized. Despite the climate-change plaintiffs showing discrete, local harms (like rising sea levels), courts still believe issuing damages to one local government will have global effects.

However, climate change must be distinguished from fast food. Climate-change litigants have made significant strides. Courts and Big Oil both acknowledge that climate change is ongoing, is backed by scientific evidence, and emissions contributed to the problem. A federal court allowed a climate change demonstration in court, and another granted standing for a class action of children to sue the government. Although the Ninth Circuit dismissed *Juliana*, the court still agreed that climate change was occurring and suggested the other branches of government can no longer ignore it. Recent public nuisance claims brought by local governments that were remanded to state court show promise, but the reality is that localized abatement of harms will not solve climate change. In fact, paying for abatement structures may distract from the more direct solution: lowering the global temperature. The plaintiffs behind *Juliana* had a great idea to seek the refuge of the judicial branch in hopes to succeed under the social impact model as seen in *Brown v. Board*.⁵²² The hope is that the Supreme Court will consider a stable climate a fundamental right, as the Oregon district court did in *Juliana*, and determine that the government violates the due process clause if it ignores its “special duty . . . to use [its] statutory and regulatory authority to reduce greenhouse gas emissions” or if it makes decisions that directly infringe on the fundamental right.⁵²³ While the Court has not been as policy oriented as it was in the 1960s when *Brown* was decided, the hope is that the circuit split regarding whether climate change public nuisance claims belong in state or federal court will catch the Court's attention. Additionally, the fact that the Ninth

⁵²⁰ Meier, *supra* note 238.

⁵²¹ Kaplan & Hoffman, *supra* note 332.

⁵²² Bergthold & Schein, *supra* note 8.

⁵²³ See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250–52 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020). The Plaintiffs in *Juliana* relied on the *DeShaney* danger-creation theory to show that the executive and legislative branches allegedly violated the due process clause. *Id.* at 1250–51. “A plaintiff asserting a danger-creation due process claim must show (1) the government's acts created the danger to the plaintiff; (2) the government knew its acts caused that danger; and (3) the government with deliberate indifference failed to act to prevent the alleged harm.” *Id.*

Circuit may have conflated the third element of standing with the political question doctrine may force the Supreme Court to grant certiorari.⁵²⁴

The opioid crisis is more likely to succeed under the tobacco litigation model because plaintiffs are adapting the model to meet their needs. A major critique of the MSA was that the funds were not properly distributed to local cities. The opioid litigation is mending that by including local governments in the opioid MDL and allowing 98% of American cities to participate in the first negotiation class. Settlements in Oklahoma, Ohio, and Kentucky already funneled funds straight into abatement.⁵²⁵ The tentative \$1.6 billion settlement with Mallinckrodt and forty-seven attorneys general suggests litigants have worked out how to utilize the MDL, the negotiation class, and the attorneys' general suits to ensure Big Pharma repays every harmed community. Repaying those harmed, whether through a global settlement or several settlements, is the ultimate goal of social policy torts and the tobacco litigation model.

⁵²⁴ *Youths' Climate Case Dismissed. Now What?*, *supra* note 414.

⁵²⁵ See Chin, *supra* note 310; *Kentucky Settles Lawsuit with OxyContin Maker for \$24 Million*, CBS NEWS (Dec. 13, 2015, 5:11 PM), <https://www.cbsnews.com/news/kentucky-settles-lawsuit-with-oxycontin-maker-for-24-million/> [<https://perma.cc/9FPV-AWPF>]; Zezima, *supra* note 329.