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Opioid Litigation Panel

Rick Mountcastle

Paul Farrell

Eric Eyre

Patrick C. McGinley

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TRANSCRIPT

OPIOID LITIGATION PANEL

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INTRODUCTION

On February 17, 2023, *the University of Richmond Law Review* hosted a symposium entitled *Overlooked America: Addressing Legal Issues in Rural America*. A portion of the event focused on the ongoing opioid epidemic in the United States, including the causes and effects of certain actions taken by players in the pharmaceutical industry. The Opioid Litigation Panel, transcribed below, brought together four of the most prominent leaders in the fight for justice in the opioid epidemic: Mr. Rick Mountcastle, Mr. Paul Farrell, Mr. Eric Eyre, and Professor Patrick McGinley. The *University of Richmond Law Review* was so honored to have these individuals speak at the symposium and is thrilled to publish their powerful discussion below.

Thank you so much to Rick Mountcastle, Paul Farrell, Eric Eyre, and Patrick McGinley for your tireless devotion to your communities and to justice.

Professor Carl Tobias (Moderator): Thank you all for being here. They keep me around as the mascot for the *Law Review*, and I try to serve as best I can. Thanks to all the speakers who came from near and far. We really appreciate that. And thank you to Kelly, the Symposium Editor, and all the members of the *Law Review* for staging this great event.

So, we are just going to have people speak for about ten minutes a piece and then we will have questions among us and questions from the audience. Who wants to go first?

Mr. Rick Mountcastle, Esq.: I guess I'll go first. Hey, this is Rick Mountcastle, and I was a career federal prosecutor. I worked for the Department of Justice for thirty-two plus years. I really loved that job; I really liked being a part of the Department of Justice. But one of the things that has come out from my experiences as the lead prosecutor on the first Purdue case¹ and seeing what has transpired since then through the 2020 settlement,² is that it really is the Department of No Justice. I say that because, in 2007, the prosecution team recommended prosecution of not only the company for what it did, lying about opioids and marketing them the way they did, the way that Bryson described,³ but we also recommended felony prosecutions of the three top executives.

As a prosecutor looking at an organization, what you want to do is you want to work your way up to the top. We knew all along that the Sackler family was really calling the shots, but what we needed was to prosecute those three executives and leverage them into cooperating with us. Because of the political corruption that existed then and continues to exist in Washington (and I know these are very harsh words, but you know I am very passionate about this), what happened and what continues to happen is what I call "Billionaire Justice." There's justice for billionaires and there's justice for everybody else. In this particular case, the Sackler family has taken advantage of their wealth and power and position and have manipulated the justice system into providing them with a special billionaire justice.

All these big cases are reviewed at the Department of Justice by Senior Management there: the Deputy Attorney General, some-

1. *See generally* United States v. Purdue Frederick Co., 495 F. Supp. 2d 569 (W.D. Va. 2007) (accepting plea agreements for Purdue's three top executives at the time of the case: Michael Freidman, Howard R. Udell, and Paul D. Goldenheim).

2. 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/KG3H-7SHJ].

3. The panelists reference Mr. Strachan's Comment, published in this issue, on numerous occasions throughout this discussion. Mr. Strachan's Comment discusses extensively the history of Purdue's involvement in the opioid epidemic as well as the current bankruptcy dispute moving through federal courts. *See generally* Bryson T. Strachan, Comment, *Duped by Dope: The Sackler Family Attempt to Escape Opioid Liability and the Need to Close the Non-Debtor Release Loophole*, 57 UNIV. RICH. L. REV. 1029 (2023).

times the Attorney General, and then on another level of senior managers, all political appointees. Our recommendation for the prosecution of those three top Executives, who could have rolled over on the family members that were calling the shots, was shot down. It was denied because of the politics. The attorneys for the Sackler family were very powerful attorneys, very well heeled. Rudolph Giuliani was one of them, and at the time he was the leading candidate for the Republican nomination for the presidency for the election coming up in 2008.⁴ So, we scrambled and we managed to get them convicted and had at least some individual accountability in the form of the misdemeanor pleas for those three top executives.⁵

Now, fast forward to 2020, and all the death and destruction that continued to happen from 2007 to 2019, from a recidivist drug dealing company.⁶ Think about what the average person on the street, the average criminal, the socioeconomically denied criminal on the street, who is a two-time offender dealing drugs. What would have happened to them? Here, you have a two-time offending company. We've got people that do civil cases to try and hold them accountable. But where's the Department of Justice in holding this two-time criminal company and the people that ran it like a cartel accountable? Where's the Department of Justice in this scenario?

What Mike Quinn, who is the attorney that represented a lot of the victims pro bono in the bankruptcy proceeding, wanted me to make sure to tell you, is that the plea agreement that Purdue signed in 2020 for the conduct that occurred their second time going around as a criminal organization is contingent on the bankruptcy going through and being approved by the courts.⁷ That is an

4. Adam Gabbatt, *Rudy Giuliani Once Had a Real Chance of Becoming President – and He Blew It*, GUARDIAN (Jan. 19, 2020, 3:00 PM), <https://www.theguardian.com/us-news/2020/jan/19/rudy-giuliani-president-white-house-2008> [<https://perma.cc/7WHJ-5VBK>].

5. *Purdue Frederick Co.*, 495 F. Supp. 2d at 576.

6. Purdue and its executives have now been found guilty twice for their criminal involvement in perpetuating the opioid epidemic. The first instance was in 2007. *See id.* The second time was in 2020. Geoff Mulvihill, *OxyContin Maker Purdue Pharma Pleads Guilty in Criminal Case*, AP NEWS (Nov. 24, 2020), <https://apnews.com/article/purdue-pharma-opioid-crisis-guilty-plea-5704ad896e964222a011f053949e0cc0> [<https://perma.cc/P8C6-7WK5>].

7. Press Release, *Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family*, U.S. DEPT OF JUST. (Oct. 21, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigation-s-opioid> [<https://perma.cc/Z755-ZN32>]. (“[T]he global resolution with the company is subject to approval by the bankruptcy court in the Southern District of New York . . .”).

outrageous, unprecedented contingency that the Department of Justice allowed in this case, and that is why I am very, very angry about that.⁸ [This is] special treatment, preferential treatment, for billionaires that everybody else would not get, billionaires who caused the death and suffering of millions of our citizens over the course of a twenty-year period.

I wanted to make that point. Don't let me take up everybody's time, because I know you guys have some great stuff to discuss. So, what are we left with at this point? The Department of Justice could still do the right thing and prosecute the Sacklers. They could do that. The problem is that they have ponied up so much money, they have put up so much money on the table, that it makes it a difficult decision.⁹ Because people like money, and the government likes money. I've spent some time talking to victim's families. They want personal, individual accountability. They want justice, and they want the Sacklers to be prosecuted. Some of them are willing to agree to the settlement and the bankruptcy and all that, but they're only going to get a pittance for having lost a son, or daughter, or other loved one. A couple thousand bucks at the most is nothing. Most of the ones I've talked to want justice. They don't want the Sacklers to walk. They don't want the bankruptcy to go through.

I urge you to look at this issue. It is a very serious issue. It is an issue of corruption in the way justice is administered, and you as future lawyers need to be aware as you go out there and practice, whether it's in private or state or federal government; you need to be aware that this exists in our system.

8. The bankruptcy settlement, which had originally been approved by Judge Drain of the Bankruptcy Court of the Southern District of New York, was overturned by Judge McMahon of the Southern District of New York. See Jan Hoffman, *Judge Overturns Purdue Pharma's Opioid Settlement*, N.Y. TIMES (Dec. 21, 2021), <https://www.nytimes.com/2021/12/16/health/purdue-pharma-opioid-settlement.html> [<https://perma.cc/5T2J-AAD5>]. Judge McMahon cited the agreement's highly controversial nature and the suspicious transfer of funds from company accounts into personal accounts held by the Sacklers in the years preceding Purdue's bankruptcy as part of the reasoning for the decision to overturn. *Id.*

9. Press Release, *supra* note 7 ("The criminal resolution includes the largest penalties ever levied against a pharmaceutical manufacturer, including a criminal fine of \$3.544 billion and an additional \$2 billion in criminal forfeiture. For the \$2 billion forfeiture, the company will pay \$225 million on the effective date of the bankruptcy, and, as further explained below, the department is willing to credit the value conferred by the company to State and local governments under the department's anti-piling on and coordination policy. Purdue has also agreed to a civil settlement in the amount of \$2.8 billion to resolve its civil liability under the False Claims Act. Separately, the Sackler family has agreed to pay \$225 million in damages to resolve its civil False Claims Act liability.").

Mr. Paul Farrell, Esq.: My name is Paul Farrell. I'm at the end of the timeline, but I'm going to jump in the middle because I wanted to say a couple things initially.

Who here has seen *Dopesick*?¹⁰ [Rick Mountcastle] is the prosecutor from *Dopesick*. He is the one that initiated the proceedings and took the first role in this timeline, and he deserves our gratitude. We are grateful for what you've done. He is also from western Virginia at the bottom of the coal fields and what you're looking at here (*gestures to himself, Eric Eyre, and Professor McGinley*) are three West Virginians that lived north of that. We experienced in the Appalachia region the same effects and the same impact [from the opioid epidemic]. This timeline is extraordinary, and this panel is actually extraordinary. This is the first time this group has gotten together, and it spans a time frame that goes from the early 2000s, when Purdue Pharma got hit, to then something extraordinary happened, and that's this guy here sitting next to me. This is Eric Eyre. He's a newspaper reporter, and what he did is he unearthed and published the ARCOS data from the basement of the U.S. Drug Enforcement [Administration] ("DEA").¹¹ In December 2016, the headlines in West Virginia's *Charleston Gazette* read "730 million pills, 1,700 deaths."¹² For reference, every pill that is manufactured and sold to a distributor and then when that pill

10. See generally *Dopesick* (Hulu 2021). *Dopesick* is a 2021 mini-series and winner of two Primetime Emmy Awards that dramatizes the non-fiction book of the same title by Beth Macy. See generally BETH MACY, *DOPE SICK: DEALERS, DOCTORS, AND THE DRUG COMPANY THAT ADDICTED AMERICA* (2018).

11. "ARCOS" stands for "Automation of Reports and Consolidated Orders System." Joel Achenbach, *How An Epic Legal Battle Brought a Secret Drug Database to Light*, WASH. POST (Aug. 2, 2019, 12:13 PM), https://www.washingtonpost.com/health/how-an-epic-legal-battle-brought-a-secret-drug-database-to-light/2019/08/02/3bc594ce-b3d4-11e9-951e-de024209545d_story.html [<https://perma.cc/SUA4-B2SB>] ("ARCOS . . . was established by the Drug Enforcement Administration to track the manufacture and distribution of prescription drugs, including billions of opioid painkillers that have sparked a deadly epidemic. . . . The journey of the ARCOS data into sunlight began with lawsuits by drug-ravaged communities, and took the final steps through legal action by The Washington Post and the Charleston Gazette-Mail of West Virginia.").

12. The actual statistic is even more alarming. "Drug wholesalers showered the state with 780 million hydrocodone and oxycodone pills, while 1,728 West Virginians fatally overdosed on those two painkillers." Eric Eyre, *Drug Firms Poured 780M Painkillers into WV Amid Rise of Overdoses*, CHARLESTON GAZETTE-MAIL, https://www.wvgazette.com/news/legal_affairs/drug-firms-poured-m-painkillers-into-wv-amid-rise-of/article_99026dad-8ed5-5075-90fa-adb906a36214.html [<https://perma.cc/PRH6-5YB6>] (Dec. 27, 2017).

from a distributor is sent to a pharmacy it is tracked by the federal government.¹³

So, in West Virginia, with a population of 1.8 million, over a six-year window they sold us 700 million opium pills.¹⁴ There's a book out there that I want every one of you to read: it's [Eric Eyre's] book.¹⁵ If that's not enough to get you to read his book, he won a Pulitzer Prize for investigative journalism.

Mr. Eric Eyre: I've hired him as my PR man.

Farrell: So, what we've got here is literally the guy they made a [TV series] about, and the guy that they gave a Pulitzer to.

Eyre: And the guy who helped him win the Pulitzer is right here [*gestures to Professor McGinley*].

Farrell: [Professor] Pat McGinley, was my law professor and has been involved in every single one of the civil justice environmental reforms, the coal companies, the fight for people living in poverty in Appalachia. Pat McGinley is the war hero. When you read this book about what happened in West Virginia and the absolute outrage we had when our attorney general settled the case: that's when I jumped in at the end of this timeline and filed the first public nuisance case in the country against the manufacturers, distributors, and pharmacies, which has resulted in some \$50 billion in settlements to date for abatement proceeds across the country.¹⁶

But what I want you all to also see and understand, is that this wasn't just about the money. From Eric getting access to the data, to us in the [multidistrict litigation ("MDL")] getting the ARCOS data, we still couldn't get it out into the public. Big pharma came in and got a protective order that said we could not share with the

13. *Automation of Reports and Consolidated Orders System (ARCOS)*, U.S. DEPT. OF JUST., DRUG ENFT. ADMIN. DIVERSION CONTROL DIV., <https://www.deadiversion.usdoj.gov/arcos/> [<https://perma.cc/2JTQ-KHDY>] ("ARCOS is an automated, comprehensive drug reporting system which monitors the flow of DEA controlled substances from their point of manufacture through commercial distribution channels to point of sale or distribution at the dispensing/retail level - hospitals, retail pharmacies, practitioners, mid-level practitioners, and teaching institutions.").

14. Eyre, *supra* note 12.

15. See generally ERIC EYRE, DEATH IN MUD LICK: A COAL COUNTRY FIGHT AGAINST THE DRUG COMPANIES THAT DELIVERED THE OPIOID EPIDEMIC (2020).

16. Jared S. Hopkins & Andrew M. Harris, *One Man's \$50 Billion Vendetta Against Opioids*, BLOOMBERG (July 23, 2018, 5:00 AM), <https://www.bloomberg.com/news/feature/2018-07-23/lawyer-paul-farrell-s-50-billion-vendetta-against-opioids?leadSource=verify%20wall> [<https://perma.cc/EGY2-ZSWN>].

rest of the country the volume of pills sold in all their communities¹⁷ until Pat McGinley came in and filed a [Freedom of Information Act (“FOIA”)] request on behalf of the *Charleston Gazette* to my client, which was just fortuitous.¹⁸ Then we went to the judge and he appealed it to the Sixth Circuit, and the Sixth Circuit released an opinion that said that this [data] has to be shared with the American people, and that sunshine is the best disinfectant.¹⁹ Because of [Professor McGinley’s] efforts, we were able to publish to the entire country and track every pill so that we could see where the pill mills were, we could see where the outrage happened and we could finally put some type of correlation between the opioid deaths and the volume of pills that were dumped on us.

So, I just wanted to make that first introductory note and let everybody here know that, sitting at this table, are some of my heroes, and I’m happy to have come in just to see you guys again.

Eyre: I just want to talk a little bit about what was going on, on the ground back in around 2012 in West Virginia. Pat is going to talk a little bit about the whole case where we filed a motion to unseal and intervene in the case. Paul mentions the 700 million pills; it was actually more than that, we found out later when we got the DEA data.²⁰

But the thing that was the most striking to me is, on the ground, we had these small towns where it was an absolute avalanche of both hydrocodone and oxycodone. You have probably heard of the

17. See *HD Media Co. v. U.S. Dep’t of Just. (In re Nat’l Prescription Opiate Litig.)*, 927 F.3d 919, 924 (6th Cir. 2019); see generally *Protective Order Re: DEA’s ARCOS/DADS Database, In re Nat’l Prescription Opiate Litig.*, No. 17-MD-2804 (N.D. Ohio Mar. 6, 2018).

18. See generally *HD Media Company, LLC’s Brief in Support of Public Disclosure of ARCOS Data, In re Nat’l Prescription Opiate Litig.*, No. 17-MD-2804 (N.D. Ohio July 9, 2018). The District Court had originally denied public access to nationwide ARCOS data by upholding the protective order. *In re Nat’l Prescription Opiate Litig.*, 325 F. Supp. 3d 833 (N.D. Ohio 2018).

19. *HD Media Co.*, 927 F.3d at 924, 933–34. The Court of Appeals opinion stated: The full quote from Justice Brandeis that the district court cited is as follows: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” The question before us is whether it was reasonable for the district court to permit only Plaintiffs to examine the data in the otherwise complete darkness created by the Protective Order, or whether the court abused its discretion by denying Intervenor’s the opportunity to expose the data to the broad daylight of public reporting. For the reasons below, we hold that this denial was an abuse of the district court’s discretion.

Id. at 924 (citation omitted).

20. *Eyre, supra* note 12.

one in Kermit, West Virginia, where they had nearly 9 million pills, mostly hydrocodone but some oxycodone too, pills that were sent there in a two-year period.²¹ It's a town of 400 people.²² How you explain that? I don't know. This is a place where people were lined up hundreds of yards down the street [outside of pharmacies]. The pharmacist there said that he had such an overflow of customers because of "tourism." This is in the southern West Virginia coal fields; they do have an [all-terrain vehicle] trail but that's about it that's going on there. This we found all over the state. There was the town of Williamson; I can't get these numbers exactly but there was around 23 million hydrocodone and oxycodone pills in a three-year period.²³ Williamson has a population of just [3],000 people.²⁴ Another town called Mount Gay that was flooded with pills;²⁵ also Clifton Forge in Virginia. They had these pain pill clinics called "Hope Clinic"; a great name for a pain pill clinic.²⁶ That's the thing that blew me away. Like what Paul said, the places that had the highest volume of pills also had the highest number of overdose rates. Even then, the figure we had for the deaths was grossly under-reported because, they call it Polypharmacy, that had a mixture of different, other pills; those were just hydrocodone and oxycodone.²⁷

21. *Id.*

22. *Id.*

23. The exact statistic was around 20.8 million pills. Laurel Wamsley, *Drug Distributors Shipped 20.8 Million Painkillers to West Virginia Town of 3,000*, NPR: THE TWO-WAY (Jan. 30, 2018, 6:00 PM), <https://www.npr.org/sections/thetwo-way/2018/01/30/581930051/drug-distributors-shipped-20-8-million-painkillers-to-west-virginia-town-of-3-000> [<https://perma.cc/F3LE-NZP2>].

24. *Id.*

25. Emily Halloran, *Top Drop Supplier Sent 731 Opioid Pills Per Person Per Year to Tiny West Virginia Town, House Committee Says*, NEWSWEEK (Feb. 16, 2018, 2:55 PM), <https://www.newsweek.com/opioid-drugs-crisis-pills-investigation-west-virginia-809420> [<https://perma.cc/8FBM-ZXV8>] ("Cardinal Health, sent the pharmacy over 6.5 million hydrocodone and oxycodone pills between 2008 and 2012. The committee found that this equated to an average of 731 opioid pills per year for every man, woman and child in Mount Gay-Shamrock.").

26. Press Release, *HOPE Clinic Physician Pleads Guilty*, U.S. ATT'Y'S OFF. S. DIST. OF W. VA. (Jan. 27, 2020), <https://www.justice.gov/usao-sdww/pr/hope-clinic-physician-pleads-guilty> [<https://perma.cc/2PKL-2A96>].

27. "Polypharmacy" means "the simultaneous use of multiple medications by a single patient for one or more conditions." Justin J. Sherman, Leslie Davis & Kori Daniels, *Addressing the Polypharmacy Conundrum*, U.S. PHARMACIST (June 16, 2017), <https://www.uspharmacist.com/article/addressing-the-polypharmacy-conundrum> [<https://perma.cc/D76G-8HQZ>].

The litigation was filed in 2012 and I got involved in it in 2013. We had a new Attorney General that had come into office.²⁸ We found out that he had a big inaugural party and it turned out that Cardinal Health, one of the biggest distributors, [contributed funds to the event].²⁹ Most of my work has been on the distributors. I don't know if you have heard the names Cardinal Health, McKesson, Amerisource Bergen, but they're all in the top twenty in the Fortune 500.³⁰ I think McKesson is around six or seven; I haven't looked at it recently.³¹ But these are gigantic, huge companies. I think the first time—I don't know about Pat—but the first time I realized that this was a big deal is I walked into this small courtroom. The state had filed a lawsuit in a small county called Boone County in West Virginia. I walked into the courtroom and there was this army of lawyers in the back in the seats, and I heard them talk about, “Oh, I just got my flight in from New York,” “I just came in from Columbus,” “I came in from Pittsburgh.” Right then I knew something really important was happening.

Let me tell you a little bit more about the attorney general because I kind of got off track there. So, the Attorney General of our state, he was running for office in 2012 when the suit was filed. Turned out, he had this inaugural party. We looked at the people who had paid for the inaugural party and it was the Coal Association, the Oil and Gas Association, and then there was this one called Cardinal Health.³² I had never heard of Cardinal Health; I

28. Mr. Eyre is referring to Patrick Morrissey, who is still the Attorney General of West Virginia to this day. Steven Allen Adams, *Morrissey Wins Third Term as Attorney General*, JOURNAL-NEWS (Nov. 3, 2020), https://www.journal-news.net/journal-news/morrissey-wins-third-term-as-attorney-general/article_5d351c0f-251f-5991-ab87-e541d6fe34ff.html [https://perma.cc/L27A-47WF].

29. Specifically, Cardinal Health contributed \$2,500 to his inaugural party. Eric Eyre, *Morrissey Inaugural Took Money from Pain Pill Distributor Involved in AG Lawsuit*, CHARLESTON GAZETTE-MAIL (July 24, 2013), https://www.wvgazette.com/news/morrissey-inaugural-took-money-from-pain-pill-distributor-involved-in-ag-lawsuit/article_9ed06195-e596-5f17-afdc-ee19e9b521ca.html [https://perma.cc/VTT5-6294].

30. McKesson and AmerisourceBergen are numbers nine and ten, respectively. Cardinal Health is number 15. *Fortune 500*, FORTUNE (2022), <https://fortune.com/ranking/fortune500/> [https://perma.cc/K7SH-JCJ8]. “About 92 percent of prescription drugs in the United States are distributed through wholesalers, with three — AmerisourceBergen, Cardinal Health, and McKesson Corporation — accounting for more than 90 percent of wholesale drug distribution in the United States.” Elizabeth Seeley, *The Impact of Pharmaceutical Wholesalers on U.S. Drug Spending*, COMMONWEALTH FUND (July 20, 2022), <https://www.commonwealthfund.org/publications/issue-briefs/2022/jul/impact-pharmaceutical-wholesalers-drug-spending> [https://perma.cc/FAY9-Q5ZM].

31. *Id.*

32. EYRE, *supra* note 15, at 66–67 (“I read the list of donors to him: West Virginia Coal Association, West Virginia Oil & Gas Association, Consol Energy, West Virginia Business

didn't know what they did. Well, it turned out that his wife was the lead lobbyist in Washington, D.C. for Cardinal Health, and she had lobbied against measures that would have blocked the distribution of hydrocodone, specifically.³³

Farrell: Cardinal Health is the number one distributor of opioids in the state of West Virginia.³⁴

Eyre: And number two or three . . . I don't know, Amerisource-Bergen bought Walgreens, right?³⁵

Also, the new Attorney General, his campaign chief was the lawyer for Cardinal Health in West Virginia in that lawsuit.³⁶ So, we had a battle for a couple years over whether he was involved in the litigation, because he said he had recused himself, and that was a long-drawn-out process. But eventually, we started getting hints in some of the filings that said things like "XYZ Pharmacy," or "Larry's Drive Through Pharmacy." They had names like "Med Express," "Larry's Drive Through Pharmacy." We got an inkling that some of these counties and pharmacies in particular were getting flooded with pills. But we really didn't know the whole scope of it because they were filing complaints and updated complaints. It was called the Second Amended Complaint, and that was filed under seal just like a lot of the stuff with Purdue Pharma.³⁷ With the

& Industry Council, West Virginia Beverage Association, West Virginia Health Care Association, Cardinal Health . . .").

33. Eric Eyre, *Morrisey's Wife Lobbied on Opioids for Drug Firm, Disclosures Say*, CHARLESTON GAZETTE-MAIL (Apr. 28, 2018), https://www.wvgazette.com/news/politics/morriseys-wife-lobbied-on-opioids-for-drug-firm-disclosures-say/article_be3d9ee8-00e1-570c-b161-c7b59c7c31d0.html [<https://perma.cc/6QYS-ZJM9>].

34. From 2006 to 2014 there were 1,102,373,598 prescription pain pills supplied to West Virginia. *Drilling into the DEA's Pain Pill Database*, WASH. POST: THE OPIOID FILES, https://www.washingtonpost.com/graphics/2019/investigations/dea-pain-pill-database/?itid=lk_inline_manual_10 [<https://perma.cc/U5EW-4P4P>] (Jan. 17, 2020). Over 261 million of the pills were distributed by Cardinal Health. *Id.*

35. *Id.* The number two and three distributors of opioids in West Virginia are McKesson Corporation and AmeriSourceBergen Drug. *Id.* In 2021, AmeriSourceBergen acquired "the majority of Walgreens Boots Alliance's 'Alliance Healthcare' wholesale distribution business for \$6.5 billion . . ." Bruce Japsen, *Walgreens Completes \$6.5B Sale of European Distribution Business to AmeriSourceBergen*, FORBES (June 2, 2021, 9:20 AM), <https://www.forbes.com/sites/brucejapsen/2021/06/02/walgreens-completes-65b-sale-of-european-distribution-business-to-amerisourcebergen/?sh=11ef1232450b> [<https://perma.cc/397G-QE2N>].

36. EYRE, *supra* note 15, at 75.

37. Kyla Asbury, *Drug Distributors Ask Boone Judge to Keep Pill Records Sealed*, W. VA. REC. (May 13, 2015), <https://wvrecord.com/stories/510588910-newsinator-drug-distributors-ask-boone-judge-to-keep-pill-records-sealed> [<https://perma.cc/KE5P-Y2CE>].

distributors, everything was filed under seal. But then we got this guy (Professor Patrick McGinley) involved, and things changed.

Professor Patrick McGinley: Of course, first I want to say that these are my heroes too. I mean, their work was just amazing. We're talking about a context where, as we heard in the preceding talk,³⁸ 800,000 people have died from opioids, and without them the story wouldn't be out there. No one would really know about it except those people in local communities where prescription opioids were killing people left and right.

When Eric called me, we were really wondering how we obtain sealed court documents from the trial court in southern West Virginia. The complaint filed by the Attorney General on behalf of the people of West Virginia was sealed, and nobody could see it. We decided the best way to do it was direct: to intervene in the ongoing litigation that was kind of stymied. It wasn't moving forward; it had been filed in 2012. We asked the judge to unseal the complaint. We didn't ask the judge to unseal discovery or anything else. We argued that the people of West Virginia [were] entitled to know what their Attorney General is alleging about these major drug companies, three of which were in the top twenty Fortune 500 [there were some others as well, but the three primary distributor defendants were in the top twenty Fortune 500 list].

Long story short, the defense of the distributors was that [the complaint contained] confidential business information and trade secrets. Our response to that was, well, we're looking for old data that was generated from 2006 to 2012. We were in 2016. How does the release of that data publicly affect your ability to compete? Where's the trade secret? At the end of that, before the judge [unsealed] the [complaint], the lawyers for the distributors had a suggestion for how they would settle this and release the complaint. They asked the court to just redact eighteen words. Eric writes about this in his great book. We said, "Eighteen words? They're going to release the complaint, but they just want to redact eighteen words?" What were those words? They were numbers.³⁹

38. Mr. Bryson Strachan, in addition to writing the Comment referenced *supra* note 3, presented on his work at the Symposium in the presentation immediately preceding the panel discussion at the Symposium event.

39. EYRE, *supra* note 15, at 130 ("Those eighteen words the distributors fought to keep secret weren't words, after all. They were numbers. Big numbers. Numbers of pain pills.").

At first, the judge ordered the complaint released.⁴⁰ Eric saw [the numbers] and wrote some stories. We were flabbergasted. It was 200 million pills that were distributed in West Virginia.⁴¹ Eric understood from the complaint that those numbers, which were astronomical in our view, actually came from the Drug Enforcement Administration's ARCOS database that Rick mentioned.⁴²

Eyre: The companies report [pill numbers] to the ARCOS database.

McGinley: Yes, the companies had reported the number of pills that were distributed.⁴³ The pharmacies did, the distributors did. Eric [understood] the Attorney General [obtained the pill number data] from the DEA, and he filed a Freedom of Information Act request with the Attorney General. It was an election year, and the Attorney General had these ties to Big Pharma.⁴⁴ At first it stalled and stalled, and then it got to be around three weeks before the election. All of a sudden, he released them. Eric looked at these, did more research, and published his articles in the middle of December 2018. By the way, my co-counsel, Professor Suzanne Weise [is here], we were taking our first vacation in I don't know how long. We were in Paris. We got internet, and Eric had sent me copies of the drafts of the articles, and I looked and it was like, 780 million pills.⁴⁵ You've got to be kidding me! I honestly said this—and you don't have to believe me—I said, “this is going to win the Pulitzer Prize.”

Professor Suzanne Weise (in audience): He really did say that.

McGinley: Within four weeks, the cases filed in West Virginia against the distributor settled.⁴⁶ That's what Paul was talking

40. Eric Eyre, *WV Judge to Order 'Pill Mill' Court Documents Unsealed*, CHARLESTON GAZETTE-MAIL (Nov. 21, 2017), https://www.wvgazette.com/news/legal_affairs/wv-judge-to-order-pill-mill-court-documents-unsealed/article_d4a1945a-1844-54bd-82cc-fc0afea786f1.html [https://perma.cc/HP87-C8W5].

41. *Id.*

42. See James Jolly, *Fighting the Opioid Epidemic in the Courtroom*, W. VA. COLL. OF L. ADMISSIONS (Nov. 4 2020), <https://admissions.law.wvu.edu/spotlight/fighting-the-opioid-epidemic-in-the-courtroom> [https://perma.cc/X7D6-Q6QH].

43. Companies are required to report such numbers under the Controlled Substances Act. See 21 U.S.C. § 827.

44. See Louis Jacobson, *A Closer Look at Patrick Morrissey's Family Ties to 'Big Pharma'*, POLITIFACT (Mar. 27, 2018), <https://www.politifact.com/article/2018/mar/27/closer-look-patrick-morrisseys-family-ties-big-phar/> [https://perma.cc/C2LF-RYZL].

45. See Eyre, *supra* note 12.

46. Eric Eyre, *Cardinal Health, AmerisourceBergen Agree to Settle WV Pain Pill Lawsuit*, CHARLESTON GAZETTE-MAIL, https://www.wvgazette.com/news/legal_affairs/cardinal-health-amerisourcebergen-agree-to-settle-wv-pain-pill-lawsuit

about earlier. Then Paul and other plaintiffs' lawyers realized that nobody in the country knew that that was going on. It was shocking. Paul and his plaintiff's firm colleagues ultimately filed more than 3,000 suits on behalf of municipal governments, counties, and states, against everyone involved in the opioid supply chain.⁴⁷ Because they all knew. You couldn't deliver 9 million pills into Kermit, West Virginia, population 400, and not know there was something unlawful going on. You couldn't manufacture 780 million pills when ten years ago there was minimal demand for them [and not know]. The pharmacies knew when their sales of Oxycontin and other prescription opioids shot up to the millions for some little mom-and-pop pharmacy. They all knew. The doctors who did the prescribing, most of them knew; some of them were hoodwinked by the ridiculous advertising that opioids weren't addictive.⁴⁸ Preposterous.

And not only that: Eric wins a Pulitzer Prize and we're all really happy, but he's not satisfied, nor are his editors. They say: "We got the ARCOS database for West Virginia; how do we get the national database of the DEA?" At that time, Paul and other plaintiffs were litigating, more suits were being filed, and, as Paul said, the judge had imposed a broad protective order. Nothing gets out to the public. Same rationale for barring access from the drug companies: trade secrets, confidential business information. We found out ultimately, from the litigation, that . . . the "confidential business information" was that, if a competitor found out that there's a pharmacy on one corner that sold two million opioid pills last year, another company will want to build another pharmacy on the other corner. That was their argument.

Long story short, Judge [Daniel] Polster, who was the judge presiding over the [MDL], denied our request to intervene and unseal the DEA records. The DEA aligned itself with the drug companies and embraced the confidential business information defense. We

nal-health-amerisourcebergen-agree-to-settle-wv-pain-pill-lawsuit/article_3bb37793-5a00-5ae9-9a32-3b7690b5ff67.html [https://perma.cc/XK4S-4VUY] (Nov. 22, 2017).

47. Geoff Mulvihill & Anthony Izaguirre, *West Virginia Plan: Companies Pay \$1.25B to End Opioid Suits*, SEATTLE TIMES, <https://www.seattletimes.com/business/west-virginia-plan-companies-pay-1-25b-to-end-opioid-suits/> [https://perma.cc/9JWQ-XCAV] (Mar. 2, 2020, 4:28 PM).

48. See generally Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 223 (2009) ("In much of its promotional campaign . . . Perdue claimed that the risk of addiction from OxyContin was extremely small."); MACY, *supra* note 10 (explaining how the American opioid addiction crisis can be traced back to the actions of doctors and drug companies, including advertising).

had to go to the Sixth Circuit. The Justice Department was there; the lawyer on behalf of all the opioid companies that were defendants was there. We argued the case and, in a month and a half we got the decision, and the court says: this has got to be public. There was no finding by the trial judge that a protective order this broad was necessary. The court of appeals remanded; they said redo this. Only that which is absolutely necessary under Rule 26(c) [of the Federal Rules of Civil Procedure] should be off limits [to the public].

Subsequently, the [Charleston] *Gazette Mail* didn't really have the facility to crunch the database, but *The Washington Post* did. What was the number of opioid pills, not just from Purdue Pharma, [they were only less than ten percent of the source of prescription opioids that flooded the country]? How many opioids flooded the country? Well, it was 780 million in West Virginia. What do you think it was, nationwide?

110 billion.⁴⁹ And, a billion in West Virginia after we added on two years.⁵⁰ That was the result of, ultimately, Rick's prosecution, and especially Eric's amazing reporting. Because nobody understood this. Nobody understood that all these overdoses and deaths that were going on in the local community [were] orchestrated, that all of these companies were making billions of dollars of profit and so were the doctors, they were making millions. Nobody understood that.

When Eric's stories came out, as I said, the plaintiffs' lawyers jumped in on behalf of local governments that have had to shoulder trillions of dollars of costs to deal with the opioid epidemic. I also note the use of FOIA, the importance of transparency in government. This epidemic went on for twenty years, and it was concealed by protective orders and settlement agreements where the facts of the case were sealed. It even happened in Rick's case.⁵¹ I'm sure that's just become a way of doing business in courts: they want to settle, to get rid of cases. But not when the public interest is involved. In Rick's case, in the southern West Virginia cases, and in the MDL, the public has an overarching interest, and judges have

49. *Drilling into the DEA's Pain Pill Database*, *supra* note 34.

50. From 2006 to 2014 there were 1,102,373,598 prescription pain pills supplied to West Virginia. *Id.*

51. Benjamin Lesser, Dan Levine, Lisa Girion & Jaimi Dowdell, *How Judges Added to The Grim Toll of Opioids*, REUTERS (June 25, 2019, 1:00 PM) <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/> [<https://perma.cc/9LLB-3AHQ>].

forgotten that. The motivation is: “We want to settle cases and get off the docket.” That’s my takeaway. That really is an amazing revelation and it shows a need for judicial reform.

Mountcastle: I have a question for you guys. In the civil cases, would you agree that you have uncovered and shown criminal conduct on the part of these companies?

McGinley: Absolutely.

Mountcastle: So, companies, corporations, don’t do things by themselves. There are people in those corporations: individuals, CEOs, COOs, CFOs, and others, who actually form these strategies to falsely market, criminally market, these drugs. How many of those people have been individually held accountable?

McGinley: None.

Mountcastle: None.

McGinley: Maybe there’s one in New York.

Eyre: Yeah, there was the one in New York.⁵²

Mountcastle: The three Purdue executives, they got slaps on the wrists, but that’s it.

Farrell: So, I think it’s an interesting dynamic here, for the audience, especially for the law students here, that what you have is a prosecutor on behalf of the federal government that ran into a brick wall, then you had the civil justice system take it and run from there and hit a brick wall, and then you have the freedom of the press come in and open the doors. This is an extraordinary example of how democracy works. So that everybody understands, I was in a courtroom with the Department of Justice, and the DOJ lawyers from Washington, D.C. said, “Hell no, you can’t have access to this data that shows where all the pills in the country went.” I had three corporations in there who literally said, “Judge, if you turn this over to all these greedy trial lawyers, then they’re going to know where the warehouses are and there’s going to be armed robberies and cartels breaking into the warehouses because these are secret locations.” I raised my hand and Judge Polster said, “Mr. Farrell, what do you want?” I said: “Well, I have something to say about that.” I stood up, and I said: “The Department of Justice’s

52. *Combating The Opioid Crisis*, U.S. ATT’Y’S OFF. S. DIST. OF N.Y., <https://www.justice.gov/usao-sdny/combating-opioid-crisis-0> [<https://perma.cc/CB9V-CWSH>].

website already lists every location of the warehouses in the country. Here's exhibit A. This is Cardinal Health's website where they not only have a newsletter that brags about the opening of a new warehouse, but they have job postings for every warehouse in the country."

So, we just went slowly, like death by a thousand paper cuts, and then after getting all of this data and processing it and then evaluating it, to then be told that no, it's top secret, was when the press came in and finally opened it up. Somewhere in here, there's a John Grisham book or a Matt Damon movie. It's an absolutely incredible long story of the people, and you see the little points: the Purdue story, the Pulitzer Prize. Hopefully what we are going to see at the back end is some actual resolution. So what I want everyone to understand, and I know there's probably opioid fatigue in the news, but I want everybody to understand this. Through the [Intercontinental Marketing Services "IMS"] data, the [Centers for Disease Control and Prevention ("CDC")] collected every prescription of opioids for the past twenty years, and what they found is this: people that filled the first prescription, six percent of the population was refilling a year later.⁵³ People that got a one-week prescription and then refilled it for the second week, thirteen percent was refilling a year later.⁵⁴ And those that had a thirty-day prescription that renewed for another prescription on day thirty,(?) nearly thirty percent of the population was refilling it a year later.⁵⁵ The reason for this is because it's opium. It's been around since the Byzantine era. It's addictive; it toppled the Chinese dynasties in the Opium War; it has literally toppled governments. It's what I say was in Pandora's Box when it got opened. It is the most addictive substance God made, subject only to the American pharmaceutical industry who isolated the molecule in the poppy plant, isolated the molecule that is the most addictive and the most euphoric, and then chemically altered it from its morphine state to a hydrocodone state, to oxycodone, to oxymorphone, to fentanyl. It's all the same molecular structure that we're facing today.

My father is a judge in Cabell County, West Virginia. He spends ninety percent of his time in an abuse and neglect docket on

53. Anuj Shah, Corey J. Hayes & Bradley C. Martin, *Characteristics of Initial Prescription Episodes and Likelihood of Long-Term Opioid Use — United States, 2006–2015*, 66 MORBIDITY & MORTALITY WKLY. REP. 265, 267 (2017).

54. *Id.*

55. *Id.*

children who literally have no place to go. Our foster homes are full. Our foster parents are exhausted. In fact, we take so many babies away from their mothers upon delivery who are addicted that one in five babies born in my hometown are diagnosed with neonatal abstinence syndrome (“NAS”). Understand: one in five babies born in my hometown of Huntington, West Virginia, are addicted to opium,⁵⁶ and they not only can’t go home with their mother, they don’t have a family member that can pass a drug test. There are no more foster homes available for babies. My community got together, and I hope you all look this up. They have Lily’s Place.⁵⁷ It’s a nonprofit center in Huntington, West Virginia, that takes newborn babies who don’t have a home to go to, that are still going through withdrawal, and provides them treatment before they can be safely placed somewhere. That’s the crisis. That’s the tale of this epidemic.

One final point: It’s not over. What we have found in West Virginia is that these babies that are diagnosed with NAS, opiates while they are in utero, are now entering our school systems. And they have behavioral problems.⁵⁸ They have learning disabilities.⁵⁹ We’re going to find that not only did we lose a generation to opiate addiction, but that we have a generation of children who are going

56. Elizabeth Cohen & John Bonifield, *Babies Exposed to Drugs Are Kicked Out of Other Daycares. They Come Here Instead*, CNN, <https://www.cnn.com/2019/08/23/health/babies-born-exposed-to-opioids/index.html> [<https://perma.cc/9UYW-SQXX>] (Aug. 23, 2019, 8:01 AM) (“[A]t Cabell Huntington Hospital . . . [one] out of [five] babies is born to a mother who used opioids while pregnant.”).

57. See generally LILY’S PLACE, <https://lilysplace.org/> [<https://perma.cc/CNS4-8EHQ>] (“At Lily’s Place, our mission is to provide medical care to infants suffering from Neonatal Abstinence Syndrome (NAS) and offer non-judgmental support, education and counseling services to families and caregivers and our community.”); Jamie Null, *Lily’s Place*, W. VA. EXEC. (Feb. 7, 2018), <https://wvexecutive.com/lilys-place/> [<https://perma.cc/N5PK-JYDB>] (“Since 2014, West Virginia—Huntington, in particular—has seen a significant increase in the number of infants born with prenatal exposure to addictive substances with almost one in seven new mothers in Cabell County having abused drugs prior to or during pregnancy. In an effort to address this ever-increasing number, three West Virginia women joined forces in October 2014 to open Lily’s Place, the only Neonatal Abstinence Syndrome (NAS) center in the U.S.”).

58. See Emily J. Ross, Devon L. Graham, Kelli M. Money & Gregg D. Stanwood, *Developmental Consequences of Fetal Exposure to Drugs: What We Know and What We Still Must Learn*, 40 NEUROPSYCHOPHARMACOLOGY 61, 77 fig.3 (2015).

59. *Id.* at 68 (“At the pre- and elementary school ages, these children show motor and cognitive impairments, inattention, hyperactivity, and an increase in ADHD when exposed prenatally to heroin. The damage of prenatal opiate exposure is debilitating and long lasting, and physicians must continue to track cohorts of exposed children to further understand the impact into adulthood.” (citations omitted)).

to need our support and love and care and patience in the school system, because the tail of the dragon is going to be really awful.

McGinley: Just so that you don't get the idea that this epidemic is focused in West Virginia: when Professor Block and Ms. Nicolas had their PowerPoint up, and you saw one of the poorest counties in Virginia?⁶⁰ Those counties in the southwest: that's coal country. That's opioid country. I'm sure what Paul was saying about Huntington and other places in West Virginia is true of those counties, and there are places in Kentucky, in Tennessee, and around the country that are still feeling and will still be feeling the effect of what these companies did for decades.

Mountcastle: Touching on the theme of today's program, rural: In 1995, when Purdue launched Oxycontin, they targeted rural counties.⁶¹ All of the counties that Professor McGinley just mentioned, that was their initial rollout, targeting those counties. They were mostly rural; some of them were in Maine but it was rural Maine. They targeted those counties because those counties had people that worked physical labor. And over the years in coal mining and lumber and farming and all those physical jobs, they had gotten injured. There was a pretty sizable number that were on pain pills, opioids, prior to 1995.⁶² What Purdue did was decide that, hey, they're already prescribing a bunch of opioids. We can come in and replace those single dose opioids with Oxycontin, and

60. Professor Andrew Block and Ms. Antonella Nicholas, of the University of Virginia School of Law, wrote an Article that is published in this Issue and presented at the Symposium. See generally Andrew Block & Antonella Nicholas, *Those Who Need the Most, Get the Least: The Challenge and Opportunity for Helping Rural Virginia*, 57 U. RICH. L. REV. 795 (2023). The PowerPoint slides referenced in text, as well as all slides from the Symposium, can be found on the Law Review website. *Symposium 2023: Overlooked America: Addressing Legal Issues Facing Rural United States*, UNIV. OF RICH. L. REV., <https://lawreview.richmond.edu/2023-overlooked-america-addressing-legal-issues-facing-rural-united-states/> [https://perma.cc/VCW9-UAY5] (navigate to CLE credit link).

61. See *The Role of Purdue Pharma and the Sackler Family in the Opioid Epidemic: Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 23 (2020) (statement of Rep. Gerald E. Connolly, Member, H. Comm. on Oversight & Reform).

62. See Art Van Zee, *supra* note 48, at 222 ("One of the cornerstones of Purdue's marketing plan was the use of sophisticated marketing data to influence physicians' prescribing. Drug companies compile prescriber profiles on individual physicians—detailing the prescribing patterns of physicians nationwide—in an effort to influence doctors' prescribing habits. Through these profiles, a drug company can identify the highest and lowest prescribers of particular drugs in a single zip code, county, state, or the entire country. One of the critical foundations of Purdue's marketing plan for OxyContin was to target the physicians who were the highest prescribers for opioids across the country. The resulting database would help identify physicians with large numbers of chronic-pain patients. Unfortunately, this same database would also identify which physicians were simply the most frequent prescribers of opioids and, in some cases, the least discriminate prescribers.").

we will sell it to them by saying that delayed absorption as provided by Oxycontin tablets is believed to reduce the abuse liability of a drug.⁶³ This is meaningless marketing BS that the [Food and Drug Administration “FDA”], supposedly the watchdog organization, the entity that’s supposed to be making sure that our drugs are safe and effective, approved. The FDA approved that language.⁶⁴

Rural communities were targeted in the initial phase of the opioid rollout, and what we have is what you gentlemen have described today.

Audience Commentator: I would like to make a comment about addiction and dependency. I think you’re referring back to 1995. The medical field, they have changed the word “addiction” into “dependency.” Would you like to make a comment?

Mountcastle: Opioid use disorder is what it is called now.⁶⁵ That’s because the Sacklers decided that the way they would defend themselves would be to blame the addicts and demonize people who they addicted.⁶⁶ You know, talk about a cruel irony: they even considered, at one point, that well, we will get people addicted, but we will also invest and set up these treatment centers so we will get them on both ends.⁶⁷ Don’t get me started.

63. *See id.* at 224.

64. *Id.*

65. *Opioid Use Disorder*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/patients-families/opioid-use-disorder> [<https://perma.cc/WDB3-KMJH>]; OFF. OF NAT’L DRUG CONTROL POL’Y, EXEC. OFF. OF THE PRESIDENT, MEMORANDUM TO HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: CHANGING FEDERAL TERMINOLOGY REGARDING SUBSTANCE USE AND SUBSTANCE USE DISORDERS 3 (2017), <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/Memo%20-%20Changing%20Federal%20Terminology%20Regrading%20Substance%20Use%20and%20Substance%20Use%20Disorders.pdf> [<https://perma.cc/L8NJ-F6FJ>] (“The current Diagnostic and Statistical Manual of Mental Disorders replaced older categories of substance ‘abuse’ and ‘dependence’ with a single classification of ‘substance use disorder.’ Terms such as ‘drug habit’ inaccurately imply that a person is choosing to use substances or can choose to stop. ‘Substance use disorder’ is the clinically accurate term to describe the constellation of impairments caused by repeated misuse of a substance.”).

66. Andrew Joseph, *‘A Blizzard of Prescriptions’: Documents Reveal New Details About Purdue’s Marketing of OxyContin*, STAT (Jan. 15, 2019), <https://www.statnews.com/2019/01/15/massachusetts-purdue-lawsuit-new-details/> [<https://perma.cc/4PZZ-FBEH>].

67. David Armstrong, *Document: Facing Blame for Seeding the Opioid Crisis, Purdue Explored its Next Profit Opportunity – Treating Addiction*, STAT (Jan. 30, 2019), <https://www.statnews.com/2019/01/30/purdue-pharma-oxycontin-maker-explored-addiction-treatment/> [<https://perma.cc/V8EE-3CRK>].

Eyre: Rick, wasn't there one where they actually found an email from someone, I don't remember if it was the Sacklers, where they said to "hammer the addict"? I mean, literally, they wrote, "hammer the addicts."⁶⁸

Mountcastle: Yes. So, to answer the question, what it is, is opioid use disorder, because it changes the brain and people don't have any control over it. They're not addicts because they want to be addicts. They have this disorder now, basically this medical condition, where their brain has been altered by the opiates that they have taken.⁶⁹ We have to look at them not as criminals, not as demons, but we have to look at them compassionately, and we have to change how we view people who have opioid use disorder.

McGinley: Paul, can you tell the audience what you discovered, and it's been used in the litigation discussion, among those who are marketing these drugs, when they talked about "the hillbillies"?

Farrell: So, the people that were in charge of the distributors. The distributors are not just delivery trucks. I called it Willy Wonka's golden ticket. If you got the golden ticket to be a distributor of a schedule two narcotic, then you have almost the exclusive ability for the transfer of these large volumes of pills from the manufacturer to the pharmacies. Well, guess what? The pharmacies order more than just the opioids. It's the entire array of things. So, three companies, (McKesson, Cardinal Health, and Amerisource Bergen) own eighty-five percent of the market share of delivering things from those that make it to the pharmacies (chain pharmacies and independent pharmacies).⁷⁰ One of the obligations that they have is to look for unusual orders of size, frequency, or deviation from pattern.⁷¹

So, through discovery, we were able to get the [electronically-stored information "ESI"], the custodial files, of those that are

68. See Joseph, *supra* note 66 ("We have to hammer on the abusers in every way possible," Sackler wrote in an email in February 2001. "They are the culprits and the problem. They are reckless criminals.").

69. Thomas R. Kosten & Tony P. George, *The Neurobiology of Opioid Dependence: Implications for Treatment*, 1 SCI. & PRAC. PERSPS. 13, 14 (2002).

70. *Combating the Opioid Epidemic: Examining Concerns About Distribution and Diversion: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Com.*, 115th Cong. 7-9 (2018) (statement of the Rep. Greg Walden, Member, H. Comm. On Energy & Com.).

71. See generally 21 C.F.R. § 1301.74(b) (under the Controlled Substances Act, pharmaceutical distributors are required to look for and report suspicious orders of unusual size, orders that deviate substantially from a normal pattern, and orders of unusual frequency).

responsible for this control, including the individuals that were responsible for your hometown here. And what they would do was, at times, make light of what was going on. For instance, in Kentucky, they tried to pass a law that restricted opioid [supply] duration to seven days and [with] no automatic refills.⁷² The public policy people at some of these distributor corporations remarked that they're shocked that the people in Kentucky learned to read. In my hometown, the guy that was in charge of watching over the safety and security rewrote the lyrics to The Beverly Hillbillies to the Beverly "Pillbillies," and wrote a parody about this.⁷³ So, all of this has come out through discovery, but the reality of it is that there is no justification for what they did. It was complete manipulation, and they took advantage of rural Appalachia at its lowest point following the collapse of the coal industry, and it has been devastating.

Audience Commentator: If either or any of the lawyers could possibly comment, I want to try and turn this back to the legal implications of the case. The previous speaker [Bryson T. Strachan] had pointed out the issue of whether or not individuals that were not the debtors could be discharged in bankruptcy.⁷⁴ Well—recently, and I'll approach this from a financial standpoint—in the Johnson & Johnson talc case, the Third Circuit ruled that they couldn't even use the bankruptcy court for these types of cases.⁷⁵ I wanted your opinion on what the distinction is between that and this case and whether the bankruptcy court should be able to resolve these cases. And I guess that has some implication for the comments about if they couldn't, I guess there would be more onus on the prosecutors on the criminal side to do something.

72. Alexander M. Dydyk, Daniel C. Sizemore, William Smock, Scott C. Dulebohn & Burdett R. Porter, *Kentucky KASPER and Controlled Substance Prescribing*, NIH, <https://www.ncbi.nlm.nih.gov/books/NBK567726/> [<https://perma.cc/Q8AL-C6RL>] (Nov. 26, 2022) (outlining best practices according to Federal and Kentucky state laws).

73. Meryl Kornfield, *Drug Distributor Employees Emailed a Parody Song About 'Pillbillies,' Documents Show*, WASH. POST (May 23, 2020, 3:35 PM), https://www.washingtonpost.com/national/drug-distributor-employees-emailed-a-parody-song-about-pillbillies-documents-show/2020/05/23/823f148e-9cf4-11ea-a2b3-5c3f2d1586df_story.html [<https://perma.cc/DRY2-V7WA>].

74. See *supra* note 38 and accompanying text.

75. See *generally In re LTL Mgmt., LLC*, 58 F.4th 738 (3d Cir. 2023). In the Johnson & Johnson ("J&J") talc case, the Third Circuit Court of Appeals ruled that J&J could not use the bankruptcy of LTL, a unit J&J created and transferred talc liability to, to obtain bankruptcy protections and resolve more than 40,000 cancer lawsuits against them. See *id.* at 746, 763–64.

Farrell: The bankruptcy question is complex. That's why the publishing of this paper⁷⁶ right now is going to get some attention. In general, if you file bankruptcy, you have the opportunity to reset, to discharge your debts and to continue working, to move forward. We don't put people in jail anymore when they can't pay their bills. Bankruptcy itself has a public policy to it. Well, what happened, and what you're referencing, is that these corporations are attempting to stretch the boundaries of bankruptcy. In Texas, you're allowed to take the liability of a portion of your company and split them off, not a merger, but a "diverger." You can do that in Texas. Johnson & Johnson got in trouble because the talc that we were all spraying on ourselves as kids (you all in law school didn't do that, but as a kid, my grandmother would pour talc all over me after the bath), well, apparently, there are causal connections between it and cervical cancer.⁷⁷ My good friend Mark Lanier tried the case and got this gigantic verdict against Johnson & Johnson. So, what they did in bankruptcy is, they went down to Texas, and they created a splitoff company and transferred all the liabilities to that company, and then they went to North Carolina where the Fourth Circuit has liberal rules to discharge that liability with a reverse burden.⁷⁸ That's what is called the "Texas two-step." That's been rejected.⁷⁹ It was rejected because it defeated the purpose of filing bankruptcy for Johnson & Johnson. I expect what we are going to see in the Second Circuit case with Purdue Pharma is some similar analysis as to whether or not the discharge of the Sackler family effectuates the purpose of the bankruptcy proceedings. In this instance, the analysis is going to be whether or not \$5 billion into the kitty from the Sacklers is more or less better than providing civil suits for the families to go chase them over into Indonesia where they've hidden their assets.

Audience Commentator: Let's say you got the criminal prosecution you wanted, but being kind of a white-collar crime and maybe first offense, would the punishment have tended to be more like a huge fine, which this ends up being, as opposed to jail time? And when you say that the families want justice, is a huge fine enough justice from your viewpoint?

76. See generally Strachan, *supra* note 3.

77. *In re LTL Mgmt.*, 58 F.4th at 746–48.

78. See *id.* at 750–51.

79. See *id.* at 748, 763–64.

Mountcastle: It's hard to say what a sentence would look like if, in fact, say, Richard Sackler, was prosecuted for the crimes that the company pled guilty to, like the bribery or kickback crimes or even the diversion, the drug dealing crime that the company has pled guilty to. He would probably be looking at, because of the amount of money involved, significant jail time under the federal sentencing guidelines. Of course, the judge could decide to reduce that. But from what I understand from the families is that they want to see the guy prosecuted, they want to see him convicted, they'd like to see him in jail. But whatever sentence he gets is going to be up to the judge.

Audience Commentator: So first off, I just had to say hats off and just a note of appreciation for the persistence and commitment to be able to represent those who generally don't get much representation. Thank you. I have a question about the settlements and where are the settlements going. Are there settlements that are going to go to rebuilding communities, not just individual lives? Who's going to decide how that money gets spent, and how do we make sure that the money is deployed in a way that's positive? So that's question one. Second question, would you speak on any thoughts or reflections on what should we learn from this situation to apply to policy and create boundaries for potential future situations along these lines? Are there things that we need to be thinking about?

Eyre: As a reporter, I'm really skeptical about what's going to happen, but there are some guardrails up that are directing the settlement money to prevention and to treatment. Where else, Paul? There are four categories.

Audience Commentator: Is it state governments?

Eyre: No, it's the individual cities, counties, tribes, and the state gets a portion to. Paul will explain more of the guardrails. I'm not saying this is an inappropriate use of the money, but a lot of the counties are talking about using them for jail fees, because we have a regional jail system.⁸⁰ That's one of their ideas. But hopefully we learned lessons from the tobacco settlement, which was significantly more, but very little of that money went to actual smoking

80. See Allen Siegler, *West Virginia Counties Could Spend Their Share of Opioid Settlements on Jails, Not Public Health*, MOUNTAIN STATE SPOTLIGHT (Dec. 15, 2022), <https://mountainstatespotlight.org/2022/12/15/west-virginia-regional-jails-opioid-settlement/> [http://perma.cc/UX9X-3LFZ].

prevention.⁸¹ Every settlement they have, they have agreements that they sign that Paul can talk about.

Farrell: I could probably spend an entire hour of a [continuing legal education credit “CLE”] outlining this. In general, when we filed the first cases, we went to the cities and counties in West Virginia initially because the Attorney General settled the case and we said he didn’t have that authority. The pitch was: this isn’t tobacco. Because what happened with the tobacco settlements is that not only were the settlements with the attorneys general and then the attorneys general lost control of the money to the legislature, but most of the states have passed what are called TPAC laws, which means that the money any attorney general gets in future litigation doesn’t go to the attorney general.⁸² It goes to the legislature to their general budget. So, if we were to settle these cases through the attorney generals, the money would go to the general budget of each state and then you lose control over it. We tried to prevent that by having a community solution to a community problem and represent the communities so that they had their own seat at the table. After two years of litigation, all fifty attorneys general came running in and decided that it was their case and not ours.

Since we’ve reached an impasse or *détente*, I’m going to be as polite as I can. The fifty attorneys general met in Denver, and they, in their infinite wisdom as guardians of the morality of our people, decided that they were going to split up every settlement that happened nationwide by state population.⁸³ I said, theoretically, to the Texas Attorney General: You’re ranked, like forty-seventh in opioid pills per person, and what about Virginia, Kentucky, Alabama, Mississippi? Anyway, I lost that argument.

So, what happens with every dollar that comes into these national settlements is it is first divided. You know when you dump

81. See Aneri Pattani, *States Differ on How Best to Spend \$26B From Settlement in Opioid Cases*, NPR (Nov. 22, 2022), <https://www.npr.org/sections/health-shots/2022/11/22/1137000211/opioid-settlement-funds-who-gets-what> [<https://perma.cc/6QVZ-LPWX>].

82. Colloquially referred to as Transparency in Private Attorney Contracting (“TPAC”) reforms. See generally, W. VA. CODE § 5-3-3A (2020).

83. See Brian Mann, *State Attorneys General Reach A \$26 Billion National Opioid Settlement*, NPR (July 21, 2021), <https://www.npr.org/2021/07/21/1018881195/state-attorneys-general-26-billion-opioid-settlement> [<https://perma.cc/Z3HY-SWDS>]; *Opioids*, NAT’L ASS’N OF ATT’YS GEN., <https://www.naag.org/issues/opioids/> [<https://perma.cc/6F6N-SWQS>]; see, e.g., Press Release, *Michigan’s \$81 Million Opioid Settlement Distribution Set to Begin*, MICH. DEP’T ATT’Y GEN. (Jan. 13, 2023), <https://www.michigan.gov/ag/news/press-releases/2023/01/13/michigan-81-million-opioid-settlement-distribution-set-to-begin> [<https://perma.cc/HLK7-B6P4>].

the coins at the bank? It's divided amongst the fifty states in some allocation, then within each state, each state has the autonomy to decide what to do with the money. In some states, what happens is that the money goes with so many pennies to the state government, so many pennies and nickels and dimes to cities and counties, and then the middle is the abatement bucket. What we have successfully created is an abatement fund in each and every state that has guardrails on how that money is being spent.⁸⁴ In North Carolina, they have one version of it; in Ohio, they have a different version of it; in Virginia, you have your own version of it. In every state, the city, county, and state officials have gotten together and reached some type of agreement where some of the money is going to go to reimburse the jail costs, some of the money is going to go to reimburse the governor, but the Corpus of these settlements for the most part is being reserved into an abatement trust with guard rails designed by Johns Hopkins [Department of Epidemiology] to be able to treat the opioid epidemic, not just talking about those that are addicted not but for the future and for the children [affected by the epidemic] as well.⁸⁵

It's not perfect, but it's not tobacco. The money isn't being just dumped into the general coffers of the legislature. It does have parameters and guardrails on how it is being spent.

Mountcastle: Just to follow up on that. I don't have to be so polite with the attorneys general like he does.

They put out these press releases on these settlements, and they have these big numbers, billions, for example, CVS is five billion dollars.⁸⁶ What they don't put in there, and a lot of these settlements are like this, is that the money is payable from CVS—I

84. See Sam Mermin, Rebekah Falkner & Katie Green, *Understanding Opioid Settlement Spending Plans Across States: Key Components and Approaches*, NAT'L ACAD. FOR STATE HEALTH POL'Y (Dec. 8, 2022), <https://nashp.org/understanding-opioid-settlement-spending-plans-across-states-key-components-and-approaches/> [<https://perma.cc/49J3-Z9PV>].

85. See *id.*, *Coalition Releases Principles to Guide State and Local Spending of Forthcoming Opioid Litigation Settlement Funds*, JOHN HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Jan. 27, 2021), <https://publichealth.jhu.edu/2021/coalition-releases-principles-to-guide-state-and-local-spending-of-forthcoming-opioid-litigation-settlement-funds/> [<https://perma.cc/9DYU-EHF9>].

86. Press Release, *Attorney General Bonta Announces \$5 Billion Settlement Agreement with CVS to Address Opioid Crisis*, CAL. OFF. OF ATT'Y GEN. (Jan. 3, 2023), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-5-billion-settlement-agreement-cvs-address> [<https://perma.cc/T4B7-5C8A>].

think—over ten years.⁸⁷ So, a lot of these big numbers that these attorneys general like to throw out in their press releases that get reported in the Press: they're payable over time. Purdue's five or six billion that they're proposing to pay is payable over eighteen years.⁸⁸ So now maybe that big number that gets the Attorney General some headlines doesn't look so big anymore, does it? Just a thought.

Tobias: We thank you for the wonderful presentation. I think, in terms of time, we need to go to the next presentation. But thank you so much, thank you.

87. *See id.*; Ayana Archie, *CVS and Walgreens Agree to Pay \$10 billion to Settle Lawsuits Linked to Opioid Sales*, NPR (Dec. 13, 2022), <https://www.npr.org/2022/12/13/1142416718/cvs-walgreens-opioid-crisis-settlement> [<https://perma.cc/MX3Q-KUTV>].

88. Press Release, *Attorney General Tong Compels Purdue Pharma and Sackler Family to Pay \$6 Billion to Victims, Survivors and States*, CONN. OFF. OF ATT'Y GEN. (Mar. 3, 2022), <https://portal.ct.gov/ag/press-releases/2022-press-releases/ag-tong-compels-purdue-and-sacklers-to-pay-six-billion-to-victims-survivors-and-states> [<https://perma.cc/QLQ3-L7H6>].