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COMMENT

COMBATTING THE OPIOID EPIDEMIC IN TEXAS BY HOLDING BIG PHARMA MANUFACTURERS LIABLE

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I. INTRODUCTION

According to the Centers for Disease Control and Prevention (CDC), an "epidemic" is "an increase, often sudden, in the number of cases of a disease above what is normally expected" in a population of a specific area that "occur[s] when an agent and susceptible hosts are present in adequate numbers, and the agent can be effectively conveyed from a source to the susceptible hosts."[1] The epidemiological history of the United States has been marked by several epidemics that arose when foreign infectious diseases spread rapidly among previously unexposed American populations until vaccinations were developed to eradicate the outbreaks.[2] Although not conventionally thought of as an infectious disease, the present epidemic the United States is combatting is opioid addiction and overdose.[3] Unlike its predecessors, which were halted *by* medical intervention, the current opioid epidemic arose *from* prescribed medical treatment.[4]

As reported for the first time in American history, an individual born in 2017 is more likely to die from an accidental opioid overdose than from a car accident.[5] Shockingly, more Americans aged fifty or younger die from

1. CTRS. FOR DISEASE CONTROL & PREVENTION, PRINCIPLES OF EPIDEMIOLOGY IN PUBLIC HEALTH PRACTICE: AN INTRODUCTION TO APPLIED EPIDEMIOLOGY AND BIOSTATISTICS 1-72 (3d ed. 2006), https://www.cdc.gov/csels/dsepd/ss1978/SS1978.pdf [https://perma.cc/4GCG-77AM] [hereinafter PRINCIPLES OF EPIDEMIOLOGY].

2. *See The Most Dangerous Epidemics in U.S. History*, HEALTHLINE, https://www.healthline.com/health/worst-disease-outbreaks-history#cholera4 [https://perma.cc/9YRC-2TXR] (last updated Sept. 29, 2016) (discussing the origination, impact, vaccination development, and current status of past infectious disease epidemics in the United States, including smallpox, yellow fever, cholera, typhoid fever, influenza, diphtheria, polio, measles, and whooping cough).

3. *Opioid Overdose*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/index.html [https://perma.cc/X3V2-2HBN] (last updated Oct. 23, 2017) (stating the United States is experiencing an opioid overdose epidemic that was responsible for over 33,000 deaths in 2015).

4. *See* NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, ANNUAL SURVEILLANCE REPORT OF DRUG-RELATED RISKS AND OUTCOMES 6 (2017), https://www.cdc.gov/drugoverdose/pdf/pubs/2017-cdc-drug-surveillance-report.pdf [https://perma.cc/SX6R-BHPV] [hereinafter 2017 ANNUAL SURVEILLANCE REPORT] (describing the 1990s origination of the drug overdose epidemic as "driven by increasing deaths from prescription opioids that paralleled a dramatic increase in the prescribing of such drugs for chronic pain"); *Prescription Opioid Overdose Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/data/overdose.html [https://perma.cc/9JC2-XDJF] (last updated Aug. 1, 2017) (recognizing opioid prescribing as the fuel of the drug overdose epidemic and reporting overdoses involving prescription opioids as the cause of death for more than 15,000 individuals in 2015).

5. *Preventable Deaths: Odds of Dying*, NAT'L SAFETY COUNCIL, https://injuryfacts.nsc.org/all-injuries/preventable-death-overview/odds-of-dying/ [https://perma.cc/S883-7HWA]. While

drug overdose than from discharge of a firearm or car accident combined.[6] In fact, death by drug overdose is more prevalent than any other cause of death among Americans under the age of fifty.[7] Recent findings from the CDC estimate that over 64,000 drug overdose deaths occurred in the United States in 2016—an increase of 21% from the previous year[8]—and over 70,000 occurred in 2017.[9]

Equally alarming as the number of drug overdose fatalities in the United States is the number of deaths that can be attributed to the use of opioids. Each day, an average of 130 Americans experience death due to an opioid overdose.[10] In 2015 alone, opioid overdose claimed the lives of more than 33,000 individuals in the United States and accounted for over 60% of all

Americans face a 1-in-103 chance of dying in a motor vehicle crash, their odds of dying due to an accidental opioid overdose are 1-in-96. *See id.* (describing the likelihood of death by overdose versus death by car wreck); *see also* Shanley Pierce, *Odds of Dying: For the First Time, Opioid Overdoses Exceed Car Crashes*, TEX. MED. CTR. (Jan. 17, 2019), http://www.tmc.edu/news/2019/01/odds-of-dying-for-the-first-time-opioid-overdoses-exceed-car-crashes/ [https://perma.cc/D3UC-SA9T] (pointing to illicit fentanyl use as the driving force in America's opioid epidemic and exponential increase in death from drug overdose, which has overtaken injury among the "leading causes of lost life in young people" (quoting John Harvin, M.D., Memorial Hermann–TMC)).

6. *See* PRESIDENT'S COMM'N ON COMBATING DRUG ADDICTION & THE OPIOID CRISIS, OFFICE OF NAT'L DRUG CONTROL POLICY, DRAFT INTERIM REPORT 1 (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/ondcp/commission-interim-report.pdf [https://perma.cc/RNE7-6FH7] [hereinafter DRAFT INTERIM REPORT] (relaying the finding that drug overdoses are responsible for more deaths per year than gun homicides or car accidents combined).

7. Josh Katz, *Drug Deaths in American Are Rising Faster Than Ever*, N.Y. TIMES: THEUPSHOT (June 5, 2017), https://www.nytimes.com/interactive/2017/06/05/upshot/opioid-epidemic-drug-overdose-deaths-are-rising-faster-than-ever.html [https://perma.cc/ZX8Q-DJNR].

8. *Provisional Counts of Drug Overdose Deaths, as of 8/6/2017*, NAT'L CTR. FOR HEALTH STAT., CTRS. FOR DISEASE CONTROL & PREVENTION 1 (Aug. 6, 2017), https://www.cdc.gov/nchs/data/health_policy/monthly-drug-overdose-death-estimates.pdf [https://perma.cc/SL22-357A] (comparing the 52,898 drug overdose deaths occurring during the twelve-month period ending in January 2016 to the 64,070 drug overdose deaths occurring during the twelve-month period ending in January 2017 to find a total increase of 21%).

9. *See Opioids Portal*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/opioids/ [https://perma.cc/7GQ3-4CLB] (last updated Jan. 2, 2019) ("In 2017, more than 70,000 people died from drug overdoses, making it a leading cause of injury-related death in the United States.").

10. *Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/epidemic/index.html [https://perma.cc/5NMD-J7MP] (last updated Dec. 19, 2018) (reporting opioid overdose as the cause of death for 130 Americans every day); *see also* DRAFT INTERIM REPORT, *supra* note 6, at 1 (reporting data from the CDC estimates that 142 Americans are killed every day by drug overdose).

drug overdoses.[11] Of those opioid overdose deaths, nearly *half* involved a prescription opioid medication.[12] In 2016, opioid overdose deaths numbered roughly 42,000, with over 40% resulting from prescription opioid use.[13] During that year, a total of 61,862,364 patients filled or refilled at least one prescription for opioids, and retail pharmacies dispensed over 214 million opioid prescriptions.[14] Although the number of dispensed opioid prescriptions decreased to 191 million in 2017,[15] opioid overdose deaths rose from 2016 to 2017.[16] Since 1999, deaths resulting from overdose of prescription opioids have sextupled.[17] These staggering statistics capture the severity of the opioid crisis.[18] Applying the CDC's terminology to the

11. Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Death–United States, 2010–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445, 1445–46 (2016), https://www.cdc.gov/mmwr/volumes/65/wr/pdfs/mm655051e1.pdf [https://perma.cc/9JCE-LJSE] ("During 2015, a total of 52,404 persons in the United States died from a drug overdose . . . among these deaths, 33,091 (63.1%) involved an opioid . . . .").

12. *Opioid Overdose*, *supra* note 3 (noting the involvement of prescription opioids in close to "half of all opioid overdose deaths").

13. *See* NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, 2018 ANNUAL SURVEILLANCE REPORT OF DRUG-RELATED RISKS AND OUTCOMES 22–23 (2018), https://www.cdc.gov/drugoverdose/pdf/pubs/2018-cdc-drug-surveillance-report.pdf [https://perma.cc/V7L5-K4A7] [hereinafter 2018 ANNUAL SURVEILLANCE REPORT] (providing 17,087 of the 42,249 deaths from opioid overdose involve prescription opioid).

14. *See* 2017 ANNUAL SURVEILLANCE REPORT, *supra* note 4, at 9 (reporting "[a] total of 61,862,364 patients had at least one prescription for opioids filled or refilled" and "[a] total of 214,881,622 opioid prescriptions were dispensed by retail pharmacies" in 2016).

15. *See* 2018 ANNUAL SURVEILLANCE REPORT, *supra* note 13, at 10 (showing in 2017, "[a] total of 191,146,822 opioid prescriptions were dispensed by retail pharmacies"); *see also Prescription Opioids*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/opioids/prescribed.html [https://perma.cc/MPF9-2FPV] (last updated Aug. 29, 2017) ("In recent years, there has been a dramatic increase in the acceptance and use of prescription opioids for the treatment of chronic, non-cancer pain, such as back pain or osteoarthritis, despite serious risks and the lack of evidence about their long-term effectiveness.").

16. *See Opioids Portal*, *supra* note 9 (summarizing CDC data as revealing an increase in opioid overdose deaths from 2016 to 2017).

17. *Understanding the Epidemic*, *supra* note 10 ("In 2017, the number of overdose deaths involving opioids (including prescription opioids and illegal opioids like heroin and illicitly manufactured fentanyl) was [six] times higher than in 1999.").

18. *See* Neha Casturi, *A Modern Day Apocalypse: The Pill Mill Epidemic, How It Took Texas by Storm, and How Texas Is Fighting Back*, 14 TEX. TECH ADMIN. L.J. 445, 446 (2013) (expounding on the rapid rise in overdose deaths from legally obtainable prescription medications, which surpassed overdose deaths of heroin, crack, and powder cocaine collectively in Texas); *see also Synthetic Opioid Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/data/fentanyl.html [https://perma.cc/8JMS-XNVC] (last updated Dec. 16, 2016) (illustrating the severity of the opioid epidemic by reporting an increase of 72.2% in the mortality rate of synthetic opioids, excluding methadone, from 2014 to 2015). *But see* DRAFT INTERIM REPORT, *supra* note 6, at 1 (noting increased

epidemic, one can consider prescription opioid medications as the "agent," patients seeking pain management as the "susceptible hosts," and pharmaceutical opioid manufacturers, prescribing physicians, and pill-providing pharmacies as the "source."[19]

II. FEDERAL AND STATE ACTION AIMED AT COMBATTING THE OPIOID EPIDEMIC

Recognizing the need to counteract the grave public health threat that the opioid epidemic presents and to prevent it from overtaking more American lives, government action at both the federal and state levels has been initiated.[20] Addressing the opioid epidemic nationally, President Trump established the Commission on Combating Drug Addiction and the Opioid Crisis to "combat the scourge of drug abuse, addiction, and overdose (drug addiction), including opioid abuse, addiction, and overdose (opioid crisis)."[21] Led by then-Governor Chris Christie of New Jersey, the Commission's "first and most urgent recommendation" was for the President to "[d]eclare [the opioid epidemic] a national emergency."[22] The Commission reasoned that the President's declaration would bring "intensity to the emergency" and warn every American that if the drug overdose epidemic "has not found you or your family yet, without bold action by everyone, it soon will."[23] Acting upon the Commission's recommendation, President Trump officially declared the opioid crisis a

restrictions on prescription opioid access has caused consumers to increasingly seek illicit "street" opioids, resulting in higher rates of overdose deaths from heroin and/or fentanyl than from prescription opioids in some states).

19. *See* PRINCIPLES OF EPIDEMIOLOGY, *supra* note 1, at 1-72 (describing the role of the agent, susceptible host, and source in the creation and spread of an epidemic).

20. *Compare* DRAFT INTERIM REPORT, *supra* note 6, at 2 (discussing the federal efforts of the Commission on Combating Drug Addiction and the Opioid Crisis to understand and overcome the opioid epidemic, such as conducting "listening sessions" to hear recommendations of professionals from an array of medical and addiction-related fields, engaging in dialogue regarding the epidemic with Governors in all fifty states, and analyzing the more than 8,000 comments received by the public during the Commission's first public meeting), *with* Jonathon Churchin, *State Attorneys General Announce Joint Investigation into Opioid Manufacturer Practices*, JURIST (June 17, 2017, 11:51 AM), http://www.jurist.org/paperchase/2017/06/state-attorney-generals-investigate-opioid-drug-companies.php [https://perma.cc/F343-T8ZW] (examining states' bipartisan efforts to investigate what responsibility may be attributed to opioid manufacturers for fueling the opioid epidemic and causing the widespread devastation and death that accompany it).

21. Exec. Order No. 13784, 82 Fed. Reg. 16,283 (Mar. 29, 2017).

22. DRAFT INTERIM REPORT, *supra* note 6, at 2.

23. *Id.*

national emergency on August 10, 2017.[24]

In March 2018, President Trump established his "Initiative to Stop Opioid Abuse and Reduce Drug Supply and Demand" to "confront the driving forces behind the opioid crisis."[25] The initiative was unveiled as a three-part plan: the first aiming to tackle prescribers' over-prescription practices, reduce patients' demand, and heighten the public's awareness of the perils associated with opioid misuse; the second aiming to sever access to illicit opioids by dismantling drug supply chains; and the third aiming to equip struggling addicts with the resources, support, and evidence-based treatment methods conducive to recovery.[26] Approximately six months after launching the initiative, the 115th Congress worked with the President to pass the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (the SUPPORT for Patients and Communities Act)[27] in October of 2018 "[t]o provide for opioid use disorder prevention, recovery, and treatment[.]"[28] This bipartisan, landmark piece of legislation "expand[s] access to substance-use disorder (SUD) prevention and treatment programs"; "increases funding for residential treatment programs for pregnant and postpartum women"; authorizes the American Medical Association's "alternative payment model demonstration project" to make outpatient treatment more accessible "for Medicare beneficiaries with opioid-use disorders"; permits grants from the CDC for states to implement improved prescription drug-monitoring programs; incentivizes medical professionals to enter the SUD field by offering "loan repayment for SUD-treatment professionals"; works to halt the influx by mail of illicit opioids into the country; increases funding for

24. Donald J. Trump, Remarks Prior to a Security Briefing and an Exchange with Reporters in Bedminster, New Jersey (Aug. 10, 2017) (transcript available in 2014 DAILY COMP. PRES. DOC. 2), https://www.gpo.gov/fdsys/pkg/DCPD-201700565/pdf/DCPD-201700565.pdf [https://perma.cc/3P26-DP2X]) ("The opioid crisis is an emergency, and I'm saying officially right now: It is an emergency. It's a national emergency. We're going to spend a lot of time, a lot of effort, and a lot of money on the opioid crisis.").

25. *President Donald J. Trump's Initiative to Stop Opioid Abuse and Reduce Drug Supply and Demand*, WHITEHOUSE.GOV (Mar. 19, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-initiative-stop-opioid-abuse-reduce-drug-supply-demand/ [https://perma.cc/2ZBQ-ZDE5].

26. *See Ending America's Opioid Crisis*, WHITEHOUSE.GOV, https://www.whitehouse.gov/opioids/ [https://perma.cc/V9QW-W5ND] (outlining the President's three-part initiative as part of "the Trump Administration['s] . . . all-of-Government approach to the epidemic").

27. Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, Pub. L. No. 115-271, 132 Stat. 3894 (2018).

28. *Id.*

research initiatives meant to develop non-addictive painkiller alternative treatments; and assigns the Department of Health and Human Services with the task of assessing and reporting on the effect of federal and state laws that restrict opioid prescriptions.[29]

In addition to the passage of the SUPPORT for Patients and Communities Act, other high points accomplished during the first year of the President's opioid initiative included "secur[ing] $6 billion in new funding over two years to fight opioid abuse"; "award[ing] $1.5 billion for State Opioid Response grants"; "seiz[ing] enough fentanyl [at the southern border ports of entry during FY 2018] to kill nearly 90 million Americans"; "shut[ting] down the country's biggest Darknet distributor of drugs"; breaking records for the "DEA's National Take Back Days" by "recovering nearly 3.7 million pounds of unused prescription drugs"; partnering with the Truth Initiative and Ad Council to create "ads highlighting the dangers of opioids" that were viewed by "58[%] of young American[s] and 1.4 billion viewers"; "increase[ing] funding for drug courts by 53[%]"; and developing "job retraining and apprenticeships [for] those recovering from drug addiction."[30] By focusing attention not only on stopping the spread of opioid use but also on expanding the public's understanding of threats related to opioid use and making more readily accessible resources dedicated to recovery treatment, the federal government has made tremendous strides in containing the opioid epidemic.

However, while diagnosing the opioid epidemic as an emergency is the first step, and passing legislation that reduces opioid use and makes recovery more attainable is a noteworthy next step, a complete treatment of the epidemic requires a tactful take-down of the entities who have fueled the

29. Kevin B. O'Reilly, *10 Ways the New Opioids Law Could Help Address the Epidemic*, AMA (Oct. 24, 2018), https://www.ama-assn.org/delivering-care/opioids/10-ways-new-opioids-law-could-help-address-epidemic [https://perma.cc/J5H7-THWL]. Bundled into the Act is the Eliminating Kickbacks in Recovery Act (EKRA), which penalizes Medicare and Medicaid providers with "criminal sanctions (up to $200,000 fine and/or [ten] years imprisonment] for each kickback violation." *See* Eric S. Klein, *The New Anti-Kickback Statute in Town*, DYKEMA: HOMEOSTASIS (Mar. 6, 2019), https://www.healthcareattorneyblog.com/the-new-anti-kickback-statute-in-town_030619 [https://perma.cc/AWF6-2W5T] ("Congress established the Eliminating Kickbacks in Recovery Act of 2018 . . . as part of the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act of 2018.").

30. *President Donald J. Trump's Fight Against the Opioid Epidemic Continues to Help Americans Around the Country*, WHITE HOUSE (Mar. 19, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-fight-opioid-epidemic-continues-help-americans-around-country/ [https://perma.cc/ZJB7-WGFA].

opioid crisis.[31] Texas has experienced local devastation from the opioid epidemic—of the 2,593 Texans who died from drug overdose in 2015,[32] 1,186 suffered an opioid-related death.[33] That number rose in 2016, with 1,375 opioid-related deaths endured throughout the state that year.[34] In fact, four of Texas's cities are ranked among the top twenty-five with the highest opioid abuse rates: Texarkana (ranked tenth), Amarillo (ranked thirteenth), Odessa (ranked fifteenth), and Longview (ranked seventeenth).[35] Paralleling President Trump's declaration of the opioid crisis as a national emergency, the Texas Legislature amended Chapter 168 of the Texas Occupational Code, "Regulation of Pain Management Clinics," to reflect its findings of the magnitude of the crisis in Texas:

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31. *See, e.g.*, Tobacco Control Legal Consortium, *The Master Settlement Agreement: An Overview*, PUB. HEALTH L. CTR. MITCHELL HAMLINE SCH. L. 1, 3 (2015), http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-msa-overview-2015.pdf [https://perma.cc/TB2S-KSKX] (describing a similar approach taken by states to combat the tobacco epidemic of the 1990s, in which states sued leading cigarette manufacturers to recover costs incurred in treating tobacco-related ailments and to impose restrictions on manufacturers' marketing of cigarettes).

32. *Provisional Counts of Drug Overdose Deaths, as of 8/6/2017*, *supra* note 8, at 1 (reporting 2,593 deaths in Texas from drug overdose during the twelve-month period ending in January 2016). See generally *Raising Awareness to Help Save Lives*, DOSE OF REALITY, http://doseofreality.texas.gov/ [https://perma.cc/R3FW-MHUH], for a comprehensive assessment of the opioid epidemic in Texas provided through Attorney General Ken Paxton's "Dose of Reality: Prevent Prescription Painkiller Misuse in Texas" initiative.

33. *Texas Receives $27.4 Million Grant to Combat Opioid Addiction*, TEX. HEALTH & HUM. SERVS. (May 19, 2017), https://hhs.texas.gov/about-hhs/communications-events/news-releases/2017/05/texas-receives-27-4-million-grant-combat-opioid-addiction [https://perma.cc/3PNP-JRUY] ("Of the more than 33,000 opioid-related deaths in the United States in 2015, 1,186 were in Texas."); *see also* Jane C. Maxwell, *Brief Report on the Current Epidemic of Drug Poisoning Deaths*, UNIV. TEX. AUSTIN SCH. SOC. WORK, https://socialwork.utexas.edu/dl/files/cswr/institutes/ari/pdf/opioid-overdose-2014.pdf [https://perma.cc/7GCA-QX4G] (finding the rate from drug overdose deaths involving opioids in Texas increased from 1.5 to 4.2 per 100,000 persons from 2000 to 2014).

34. *Raising Awareness to Help Save Lives*, *supra* note 32.

35. *See* CASTLIGHT HEALTH, THE OPIOID CRISIS IN AMERICA'S WORKFORCE 8 (2016), https://www.wilmingtonnc.gov/home/showdocument?id=5561 [https://perma.cc/SNY5-PYHK] (finding opioid abuse is more prevalent in rural cities of southern states after determining that "[twenty-two] out of the top [twenty-five] cities for opioid abuse rate" fall within that geographic categorization). When analyzing prescription opioid abuse, similar findings were reported: seventeen of the top twenty-five cities are located in the rural south, three of them belonging to Texas (Amarillo, Texarkana, and Killeen). *Id.* at 9. Aiming specifically to address the cost of opioid abuse on employers, quantitated at roughly "$10 billion from absenteeism and presenteeism alone[,]" Castlight's report focused on the prescription opioid abuse practices of close to 1 million American employees insured by employers using Castlight's health benefits platform and relied on data from "medical and pharmacy-based claims . . . . over the five-year period from 2011[–]2015" to more accurately portray for employers "opioid painkiller abuse in the workplace." *Id.* at 2–3.

> The legislature finds that deaths resulting from the use of opioids and other controlled substances constitute a *public health crisis* and that there is a compelling state interest in the [Texas Medical Board] closely regulating the prescribing of opioids and other controlled substances by physicians and their delegates. Accordingly, the legislature finds that inspections and investigations conducted by the board . . . are necessary to adequately regulate the prescribing of opioids and other controlled substances in order to protect the public health and welfare.[36]

Much of the legislative action taken in Texas to address the opioid epidemic has focused on the physicians prescribing opioids and the pharmacists distributing the medication into the hands of Texan patients.[37] For example, health care practitioners who prescribe a Schedule II controlled substance are required to document the prescription on an official or electronic prescription form, which then must be accessed by the dispensing pharmacist to record the date the prescription is filled.[38] Before prescribing or dispensing opioids, the prescriber, pharmacist, or other health care practitioner is under a duty to first access the patient's official prescription form—failure to do so constitutes reason for disciplinary action.[39] Further, the Texas Medical Board is required to "identify prescribing practices that may be potentially harmful and patient prescription patterns that may suggest drug diversion or drug abuse" and is authorized to relay an electronic notification to a prescribing health care provider or a dispensing pharmacist if the information submitted in the official prescription form "indicates a potentially harmful prescribing pattern or practice may be occurring or drug diversion or drug abuse may be occurring."[40]

Although these statutory provisions provide a system of checks on the physicians prescribing and pharmacists dispensing opioids, noticeably absent from their regulatory purview are the pharmaceutical companies who

36. TEX. OCC. CODE ANN. § 168.003 (emphasis added).

37. *See* Casturi, *supra* note 18, at 454–55 (detailing Texas's efforts to combat the opioid epidemic by focusing legislative attention on restricting the operation of pain management clinics and regulating the physicians who own or operate them).

38. TEX. HEALTH & SAFETY CODE ANN. § 481.075.

39. *Id.* § 481.0764.

40. *Id.* § 481.0761(h)–(i)); *see also* OCC. §§ 559.0525–.053 (tasking the Texas Medical Board with developing "a continuing education program regarding opioid drug abuse and the delivery, dispensing, and provision of tamper-resistant opioid drugs" and authorizing the Board to require pharmacists to satisfy a portion of the thirty hours of continuing education required to renew their license through attendance at one of the opioid abuse programs).

originally manufactured the opioids and marketed them to health care practitioners across the state.[41]

III. HOLDING OPIOID MANUFACTURERS LIABLE— FROM INVESTIGATION TO LITIGATION

While it is of urgent importance to prevent prescription opioids from being wrongfully prescribed by physicians, dispensed by pharmacists, or abused by patients, it is equally paramount to hold opioid manufacturers liable for their role in perpetuating the opioid crisis. The foregoing discussion will consider Texas's involvement in the multistate, bipartisan investigation into pharmaceutical manufacturers' potential unlawful action in connection to the opioid epidemic, Texas's transition from investigation to litigation, and theories of liability Texas can prevail on in a *parens patriae* lawsuit.

A. *Texas's Role in Multi-State Investigation*

Understanding the need for such a multifaceted approach, several states have banded together to conduct an investigation into the potential unlawful conduct of opioid manufacturers.[42] In June 2017, Texas, led by Attorney General Ken Paxton, joined the bipartisan multi-state investigation with the purpose of assessing "whether manufacturers have engaged in unlawful practices in the marketing and sale of opioids" and have thereby contributed to the devastation of Texas families resulting from opioid abuse and overdose.[43]

Aside from the emotional toll the crisis has caused, the opioid epidemic has placed a detrimental financial burden on the nation.[44] The abuse, dependence, and overdose of prescription opioids cost the United States an

41. *See, e.g.*, Casturi, *supra* note 18, at 454 (describing the focus of Chapter 168 of the Texas Occupations Code on owners of pain management clinics and the medical professionals prescribing pain medications from them, but not on the manufacturers promoting those drugs in the first place).

42. Churchin, *supra* note 20 (summarizing the bipartisan investigation of Illinois, Massachusetts, Pennsylvania, and Texas into opioid manufacturers' marketing and sales practices as a means of combatting the opioid epidemic public health crisis).

43. *AG Paxton Announces Ongoing Investigation to Help Address the Opioid Crisis,* ATT'Y GEN. TEX. (June 15, 2017), https://texasattorneygeneral.gov/news/releases/ag-paxton-announces-ongoing-investigation-to-help-address-the-opioid-crisis [https://perma.cc/DBG3-86AJ].

44. *See* Hilary Homenko, *Rehabilitating Opioid Regulation: A Prescription for the FDA's Next Proposal of an Opioid Risk Evaluation and Mitigation Strategy (REMS)*, 22 HEALTH MATRIX 273, 283 (2012) ("Without prompt changes to the current opioid regulatory scheme, opioid abuse will continue to place an enormous financial burden on society.").

estimated $78.5 billion in 2013—and the opioid epidemic has worsened since then.[45] Costs spent on health care related to opioid abuse have been among the greatest in Texas.[46] Holding liable the pharmaceutical manufacturers who introduced highly addictive opioids into the medical marketplace may be one method of recouping some of these costs.

B. *Turning Texas's Focus to Litigation*

While a preliminary investigation may be necessary, Texas can only fully combat the opioid epidemic by making legal action against Big Pharma its next course of action. Ample precedent exists for Texas to successfully litigate claims of legal misconduct against opioid pharmaceutical manufacturers—including the success of the federal government in holding one of the largest opioid manufacturers liable for misrepresenting the addictiveness of its opioid medication;[47] the current litigation brought forth against Big Pharma by other states and cities around the nation;[48] and the promising parallels that can be drawn from the Big Tobacco litigation of the

45. *Costs of US Prescription Opioid Epidemic Estimated at $78.5 Billion*, WOLTERS KLUWER (Sept. 14, 2016), http://wolterskluwer.com/company/newsroom/news/2016/09/costs-of-us-prescription-opioid-epidemic-estimated-at-usd78.5-billion.html [https://perma.cc/D52N-55AT] (reporting 2013 costs related to the prescription opioid epidemic of $28 billion in health care and substance abuse spending, $20 billion in lost productivity costs in nonfatal cases, $21.5 billion in fatal overdose costs, and $7.7 billion in costs associated with criminal justice).

46. *Health Care Costs from Opioid Abuse: A State-by-State Analysis*, MATRIX GLOBAL ADVISORS, LLC 5 (Apr. 2015), https://drugfree.org/wp-content/uploads/2015/04/Matrix_Opioid Abuse_040415.pdf [https://perma.cc/GD4L-C82K] (ranking Texas as second among the states suffering the greatest health care costs from the opioid epidemic in 2007, with $1,963,623,647 spent).

47. *See generally* OFFICE OF AMBULATORY AFFAIRS, FOOD & DRUG ADMIN, THE ENFORCEMENT STORY: FISCAL YEAR 2007, 6-3–6-4 (2007), https://www.fda.gov/downloads/iceci/enforcementactions/enforcementstory/enforcementstoryarchive/ucm090311.pdf [https://perma.cc/47VE-92YY] (announcing Purdue's agreement to pay $700 million to reconcile the criminal and civil penalties it faced after its illegal marketing schemes involving misrepresentations about the addictiveness of OxyContin were exposed by the Office of Criminal Investigations); Barry Meier, *In Guilty Plea, OxyContin Maker to Pay $600 Million*, N.Y. TIMES (May 10, 2007), http://www.nytimes.com/2007/05/10/business/11drug-web.html [https://perma.cc/Z6LY-S24L] ("The company that makes the narcotic painkiller OxyContin and three current and former executives pleaded guilty today in federal court here to criminal charges that they misled regulators, doctors and patients about the drug's risk of addiction and its potential to be abused.").

48. *E.g.*, Plaintiff's Original Complaint ¶ 16, Cty. of Titus v. Purdue Pharma, L.P., No. 5:17–cv–00189–RWS (E.D. Tex. Nov. 8, 2017) ("As a direct and foreseeable consequence of Defendants' misrepresentations regarding the safety and efficacy of using opioids for chronic pain, Titus County has spent and continues to spend large sums combatting the public health crisis created by Defendants' negligent and fraudulent marketing campaign.").

1990s, which culminated in the implementation of the Master Settlement Agreement.[49]

An analysis of past and present federal and state governmental action against opioid pharmaceutical manufacturers will be useful in articulating the potential paths of legal action that Texas can take to hold Big Pharma liable. Of the potential types of lawsuits which can be brought against opioid manufacturers for their contribution to and perpetuation of the opioid epidemic, including individual suits, class actions, and *parens patriae* lawsuits, the latter have garnered the most success.[50] A *parens patriae* action is brought forth by state officials, asserting protection of its "quasi-sovereign" interests, such as the health and well-being of the state's citizens.[51]

A recurring name in opioid manufacturer litigation is Purdue Pharma, L.P. ("Purdue"), the manufacturer of OxyContin[52]—one of the nation's most prescribed Schedule II[53] class narcotics[54]—and a self-proclaimed "industry leader in pain medication research and abuse-deterrent

49. Alana Semuels, *Are Pharmaceutical Companies to Blame for the Opioid Epidemic?*, ATLANTIC (June 2, 2017), https://www.theatlantic.com/business/archive/2017/06/lawsuit-pharmaceutical-companies-opioids/529020/ [https://perma.cc/S38C-E82X] (discussing how the 1998 tobacco settlement may serve as strong precedent for states' investigation of whether pharmaceutical companies soft-pedaled the addictive nature of opioids and thereby contributed to the opioid epidemic); *see also* Tobacco Control Legal Consortium, *supra* note 31, at 3 (recognizing the success of the Master Settlement Agreement in significantly limiting the advertising, marketing, and promoting of tobacco and in prohibiting tobacco manufacturers from engaging in business practices that conceal the negative effects of smoking).

50. Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1146 (2014) ("*Parens patriae* lawsuits brought against Purdue by state officials have been far more successful than individual suits or class actions.").

51. *Id.* (describing the basis of *parens patriae* litigation as the protection by state officials of the general interest in residents' health and well-being, whether physical or economic—also known as "quasi-sovereign" interests).

52. *Purdue Products*, PURDUE, http://www.purduepharma.com/healthcare-professionals/products/ [https://perma.cc/PX4G-HQTU] (listing OxyContin, containing oxycodone HCl, as one of the prescription opioids manufactured by Purdue Pharma).

53. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.035(b) (referencing Schedule II drugs as substances which have "a high potential for abuse" and "may lead to severe psychological or physical dependence").

54. Diane E. Hoffmann, *Treating Pain v. Reducing Drug Diversion and Abuse: Recalibrating the Balance in Our Drug Control Laws and Policies*, 1 ST. LOUIS U. J. HEALTH L. & POL'Y 231, 273 (2008) (describing the rise of OxyContin availability and abuse from its introduction to the pharmaceutical market in the late 1990s to its rise as "the most prescribed Schedule II narcotic in the country" by the early 2000s); *see also* Gale Scott, *Top 10 Painkillers in US*, MD MAG. (Oct. 6, 2014), http://www.mdmag.com/medical-news/top-10-painkillers-in-us [https://perma.cc/FF2N-9YMC] (ranking the generic and brand forms of OxyContin as the third and seventh most prescribed opioids in 2013, respectively).

technology."[55] Though the company describes itself as "committed to improving patients' lives in meaningful ways by providing effective therapies along with educational tools that support their proper use[,]"[56] Purdue has faced much criticism for its contribution to the widespread abuse of opioid pain medications and the destruction of patient-consumer lives.[57] In September 2017, a coalition of forty-one attorneys general served Purdue with a supplemental investigative subpoena as part of its ongoing multistate investigation into the potentially unlawful practices of opioid manufacturers.[58]

In addition to serving Purdue, the multistate investigation served other top pharmaceutical manufacturers with investigative subpoenas—including Allergan, Endo International, Teva Pharmaceuticals, and Janssen Pharmaceuticals—in order to examine whether the manufacturers were "complicit in creating the epidemic and whether [they] should now be responsible for helping pay for the damage caused to many

55. *About Purdue Pharma*, PURDUE, http://www.purduepharma.com/about/ [https://perma.cc/G7DF-9NDP].

56. *Id.*

57. *See* Ausness, *supra* note 50, at 1146–55 (addressing Purdue's role in the opioid epidemic through an analysis of the individual lawsuits, class actions, and *parens patriae* suits that have been brought against the OxyContin manufacturer); Harriet Ryan et al., *'You Want a Description of Hell?' OxyContin's 12-Hour Problem*, L.A. TIMES (May 5, 2016), http://www.latimes.com/projects/oxycontin-part1/ [https://perma.cc/H6QW-FFPN] (regarding OxyContin as being "widely blamed for setting off the nation's prescription opioid epidemic, which has claimed more than 190,000 lives from overdoses involving OxyContin and other painkillers since 1999"); s*ee also* Press Release, Cigna Corp., Cigna is Committed to Reducing Opioid Use: Removing OxyContin from Group Commercial Drug Lists on 1/1/18 (Oct. 4, 2017), https://www.cigna.com/newsroom/news-releases/2017/pdf/cigna-is-committed-to-reducing-opioid-use-removing-oxycontin-from-group-commercial-drug-lists-on-1118.pdf [https://perma.cc/BB4L-LYRS] (implying Cigna Corporation's focus on helping consumer-patients obtain "effective pain relief while also guarding against opioid misuse" is justification for its decision to remove OxyContin from its list of covered medications, a change which will become effective January 1, 2018).

58. Press Release, N.Y. State Office of the Attorney Gen., A.G. Schneiderman, Bipartisan Coalition of AGs Expand Multistate Investigation Into Opioid Crisis (Sept. 19, 2017), https://ag.ny.gov/press-release/ag-schneiderman-bipartisan-coalition-ags-expand-multistate-investigation-opioid-crisis [https://perma.cc/8MVX-BQNS] (announcing the multistate coalition of attorneys' general demand for information and documents from opioid manufacturers, and detailing the commitment of the coalition to get "to the bottom of a broken system that has fueled the epidemic and taken far too many lives"); *see also* Nadia Kounang, *41 State Attorneys General Subpoena Opioid Manufacturers*, CNN (Sept. 20, 2017, 11:41 AM), http://www.cnn.com/2017/09/19/health/state-ag-investigation-opioids-subpoenas/index.html [https://perma.cc/3BW2-DKK8] (stating Purdue responded to being served an investigative subpoena by explaining it "share[s] the attorneys' general concern about the opioid crisis and . . . [is] cooperating with their request").

communities."[59] Furthermore, opioid distributors AmerisourceBergen, Cardinal Health, and McKesson received information demand letters from the coalition.[60] Representing Texas in the bipartisan coalition, Attorney General Ken Paxton summarized that the goal of this phase of the investigation is to gather sufficient information for the coalition to "effectively evaluate whether manufacturers and distributors [are] engaged in unlawful practices in the marketing, sale, and distribution of opioids," and to "determine an appropriate course of action once it's determined what role these companies may have played in creating or prolonging the opioid crisis."[61]

IV. THEORIES OF LIABILITY

Focusing on the marketing and sale aspects of pharmaceutical opioid manufacturers' unlawful practices, past and present litigation indicates that the following theories of liability may be viable courses of legal action for Texas to take.[62]

A. *Fraudulent Misrepresentation*

To prevail on a fraudulent misrepresentation claim in Texas, the plaintiff has the burden of proving the following elements: (1) the defendant made a false, material misrepresentation; (2) the defendant knew its representation was false or stated it recklessly as a positive assertion absent any knowledge of its truth; (3) the defendant intended to induce the plaintiff to act upon the representation; and (4) the plaintiff actually and justifiably relied upon the defendant's representation and suffered injury from such reliance.[63]

59. Yuki Noguchi, *41 States to Investigate Pharmaceutical Companies Over Opioids*, NPR (Sept. 19, 2017, 4:02 PM), https://www.npr.org/sections/thetwo-way/2017/09/19/552135830/41-states-to-investigate-pharmaceutical-companies-over-opioids [https://perma.cc/8K3J-TEX4].

60. Kounang, *supra* note 58 (noting these three pharmaceutical distributors managed roughly 90% of the nation's drug distribution and generated over $400 million in revenue in 2016).

61. *AG Paxton: 41-State Investigation Requests Documents from Companies that Manufacture and Distribute Highly Addictive Opioid Drugs,* ATT'Y GEN. TEX. (Sept. 19, 2017), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-41-state-investigation-requests-documents-from-companies-that-man [https://perma.cc/7AJG-PF6X].

62. *E.g.*, Plaintiff's Original Complaint ¶ 134, Cty. of Red River v. Purdue Pharma, L.P., No. 5:17–cv–00185–RWS (E.D. Tex. Nov. 2, 2017) (alleging defendant opioid manufacturers knowingly made false and deceptive misrepresentations regarding the risks and benefits associated with using opioids to treat chronic pain).

63. *See* Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573, 577 (Tex. 2001) (establishing the four elements necessary to prove to prevail on a claim of fraudulent misrepresentation).

Looking at the first element of this claim, the Restatement (Second) of Torts, section 525 offers some guidance as to what type of conduct constitutes a "misrepresentation," explicating that a misrepresentation can be made orally, in writing, or by other conduct amounting to "an assertion not in accordance with the truth."[64] Applying this guidance, Texas can hold Big Pharma opioid manufacturers liable for fraudulent misrepresentation on the theory that manufacturers systematically downplayed the addictive nature of opioids when marketing the drug to prescribing health care professionals.[65] Purdue, for example, trained its sales representatives to relay to prescribers that OxyContin presented a less than 1% risk of addiction, despite a lack of scientific studies addressing addiction from long-term opioid use, to substantiate its bold and deceptive claims.[66] Purdue's aggressive marketing scheme of soft-pedaling the addictive nature of opioids catapulted the pharmaceutical company's commercial success, as the promise of a low addiction risk motivated prescribers to treat long-term chronic-pain sufferers with OxyContin.[67]

Like Texas should, several states have turned to the deceptive marketing tactics of pharmaceutical opioid manufacturers as grounds for their claims of fraudulent misrepresentation.[68] In Ohio, for example, Attorney General Mike DeWine contrasted the historical use of opioids for the treatment of short-term acute pain and palliative care—given that opioids were understood as being too addictive for use as a chronic pain treatment—with the broad use of opioids to treat chronically-pained patients encouraged in the marketing schemes of the Defendant opioid manufacturers, explaining:

64. RESTATEMENT (SECOND) OF TORTS § 525 cmt. b (AM. LAW INST. 1979) ("[W]ords or conduct asserting the existence of a fact constitute a misrepresentation if the fact does not exist.").

65. *See* Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 223 (2009) (recognizing a "systematic effort to minimize the risk of addiction in the use of opioids for the treatment of chronic non-cancer-related pain" as a consistent component of Purdue's marketing and promotion of OxyContin).

66. *See id.* (discussing Purdue's marketing and promotional tactic of claiming that use of OxyContin presented an extremely small risk of addiction).

67. *See id.* (describing the boom of OxyContin sales, from $44 million in 1996—with 316,000 prescriptions dispensed, to nearly $3 billion of combined sales in 2001 and 2002—with more than 14 million prescriptions dispensed).

68. *See, e.g.*, Original Petition ¶ 122, State *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ–2017–816 (Okla. Dist. Ct. June 30, 2017) (seeking to hold opioid manufacturers and distributors liable on grounds of fraud for knowingly asserting false statements regarding the risks of addiction, efficacy, and medical necessity of opioids).

> [B]y the late 1990s, . . . each Defendant began a marketing scheme designed to persuade doctors and patients that opioids can and should be used for chronic pain . . . . [E]ach Defendant spent, and continues to spend, millions of dollars on promotional activities and materials that falsely deny or trivialize the risks of opioids while overstating the benefits of using them for chronic pain. As to the risks, Defendants falsely and misleadingly, and contrary to the language of their drugs' labels: (1) downplayed the serious risk of addiction; (2) promoted the concept of "pseudoaddiction" and thus advocated that the signs of addiction should be treated with more opioids; (3) exaggerated the effectiveness of screening tools in preventing addiction; (4) claimed that opioid dependence and withdrawal are easily managed; (5) denied the risks of higher opioid dosages; and (6) exaggerated the effectiveness of "abuse-deterrent" opioid formulations to prevent abuse and addiction.[69]

Similarly, the Office of the Attorney General of Kentucky asserted a claim of fraudulent misrepresentation against Purdue based on the deceitful marketing methods it utilized to bolster the benefits of OxyContin and to downplay the inherent risks of addiction associated with its drug.[70] Kentucky ultimately prevailed when, in 2015, the parties reached a hefty settlement agreement in which Purdue agreed to make nine installment payments to the Commonwealth of Kentucky totaling $24,000,000.00.[71]

When assessing the second element of fraudulent misrepresentation—that the defendant knew its representation was false or recklessly stated it without knowledge of its truth—section 526 of the Restatement (Second) of Torts explains:

> A misrepresentation is fraudulent if the maker
>
> (a) knows or believes that the matter is not as he represents it to be,
>
> (b) does not have the confidence in the accuracy of his representation that he states or implies, or

69. Complaint: Jury Trial Demanded and Endorsed Hereon ¶ 4, State of Ohio *ex rel.* DeWine v. Purdue Pharma L.P., No. 010396–17 959286 VI (Ohio C.P. Ct. May 31, 2017).

70. *See generally* Ausness, *supra* note 50, at 1150 (discussing Kentucky's claim against Purdue for marketing and promoting OxyContin as being less addictive, despite knowing that such claims were false and misleading).

71. Agreed Judgment and Stipulation of Dismissal with Prejudice ¶ 13, Commonwealth *ex rel.* Conway v. Purdue Pharma, L.P., No. 07–C1–01303 (K.Y. Commw. Cir. Ct. Dec. 22, 2015) (stating the payment terms of the 2015 Settlement Agreement reached between the Commonwealth of Kentucky and Purdue Pharma eight years after the Commonwealth's initial complaint, which required Purdue to pay $24 million to the Commonwealth).

(c) knows that he does not have the basis for his representation that he states or implies.[72]

Imposing a purely objective standard to find that a reasonably prudent individual in the defendant's position would have recognized the falsity of the representation is not sufficient to hold the defendant liable for a fraudulent misrepresentation.[73] However, actual knowledge of falsity is not necessary if the defendant believed the representation was false.[74]

As applicable to states' fraudulent misrepresentation claims for opioid manufacturers' false marketing, a common argument made to satisfy this second element is that manufacturers knew their misrepresented assertions regarding the risks and benefits of opioid drugs were not scientifically supported.[75] For example, the State of Illinois, in its claim of fraudulent misrepresentation against Defendant pharmaceutical opioid manufacturers, alleged that each Defendant not only knew of its misrepresentation of the risks and benefits associated with opioid drugs was unsupported, but also knew such misrepresented assertions "were directly contrary to scientific evidence."[76] Adopting Illinois's approach, Texas can similarly assert that pharmaceutical opioid manufacturers misrepresented the use of opioids in a manner that diminished their addictive nature, knowing their claims were not supported, or even squarely negated, scientific evidence.[77]

72. RESTATEMENT (SECOND) OF TORTS § 526 (AM. LAW. INST. 1977); *see also id.* § 526 cmt. a (clarifying the use of the term "fraudulent" as "referring solely to the maker's knowledge of the untrue character of his representation," and distinguishing this conduct—which courts frequently refer to as "scienter"—from the separate elements of "[i]ntent and expectation of influencing the other's conduct by the misrepresentation").

73. *Id.* § 526 cmt. d.

74. *See id.* § 526 cmt. c ("If the maker of the representation knows the matter to be otherwise than as represented, the fraudulent character of the misrepresentation is clear. However, knowledge of falsity is not essential; it is enough that he believes the representation to be false.").

75. *See, e.g.*, Plaintiff's Original Complaint, *supra* note 62, ¶ 78 (alleging opioid manufacturers and distributers "made claims that were not supported by, or were contrary, to the scientific evidence" to convince physicians to prescribe opioids for treatment of chronic pain).

76. Complaint ¶ 36, People v. Purdue Pharma, L.P., No. 17–L–11 (Ill. Cir. Ct. June 26, 2017) (providing the CDC confirmed Defendants' misrepresentation in its 2016 Guideline for Prescribing Opioids for Chronic Pain, in which the CDC found an absence of evidence indicating "a long-term benefit of opioids in pain and function versus no opioids for chronic pain with outcomes examined at least [one] year later").

77. *See id.* ¶ 38 ("Purdue . . . misrepresented that the potential for addiction even from long-term use of its drugs was relatively small or non-existent, even though that was false and there was no scientific evidence to support it.").

Unlike a claim for negligent misrepresentation, a claim of material misrepresentation carries with it a heightened standard of proof, given that the plaintiff must establish that the defendant acted with an intent to deceive.[78] In assessing whether the intent standard required in the third element of fraudulent misrepresentation has been satisfied, Texas courts apply the reason-to-expect standard of the Restatement (Second) of Torts, section 531[79]—under which liability for fraudulent misrepresentation is warranted if the defrauding party had reason to expect that the plaintiff would act in reliance on the misrepresentation.[80] When assessing the justifiability of a plaintiff's reliance, the court will consider whether the individual characteristics and aptitudes of the plaintiff, and the circumstances present before and at the time of the alleged fraudulent misrepresentation, make actual reliance by the plaintiff "extremely unlikely."[81]

As part of their marketing schemes, opioid manufacturers targeted specific types of health care professionals that were considered more easily persuaded by promotional messages and therefore more likely to prescribe opioids.[82] On one hand, pharmaceutical companies targeted marketing efforts at pain specialists and anesthesiologists because these health care

78. *See* Grant Thornton L.L.P. v. Prospect High Income Fund, 314 S.W.3d 913, 921 (Tex. 2010) (recognizing the heightened difficulty in proving fraud, as opposed to negligent misrepresentation, due to having to establish that defendant acted intentionally to deceive).

79. *See* Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573, 579–80 (Tex. 2001) (confirming "Texas jurisprudence is entirely consistent with section 531's reason-to-expect standard, which requires a degree of certainty that goes beyond mere foreseeability" (first citing Geernaert v. Mitchell, 37 Cal. Rptr. 2d 483, 487 (1995); then citing Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408, 415 (Tex. App.—Dallas 1986, writ ref'd n.r.e.))).

80. Establishing the "reason-to-expect" standard, section 531 states:

> One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.

RESTATEMENT (SECOND) OF TORTS § 531 (AM. LAW INST. 1977).

81. *See Grant Thornton L.L.P.*, 314 S.W.3d at 923 (explaining the court's inquiry when assessing justifiability is whether "given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud[,] it is extremely unlikely that there is actual reliance on the plaintiff's part" (quoting Haralson v. E.F. Hutton Group, Inc., 919 F.2d 1014, 1026 (5th Cir. 1990) (applying Texas law))).

82. *See* Complaint for Damages ¶ 188, City of Parma v. Purdue Pharma, L.P., No. CV–17–884281 (Ohio Ct. C.P. Aug. 9, 2017) (alleging opioid manufacturers determined which health care providers to focus marketing efforts on "based on the potential for persuading a provider to prescribe, ease of in-person access, and the likelihood of higher numbers of prescriptions at higher doses").

providers comprised "the highest-volume prescribers of opioids" and had more extensive knowledge of the risks and benefits of opioids.[83] On the other, opioid manufacturers increased marketing potential by expanding the scope of targeted prescribers to those who were "less informed about opioids and . . . more susceptible to [manufacturers'] marketing messages[,]" including nurse practitioners and physicians assistants.[84]

Applying the reason-to-expect standard, Texas can argue opioid manufacturers focused their deceptive marketing schemes on reaching these specific categories of prescribers with the expectation that they would be more readily swayed by the marketing material and therefore more inclined to prescribe opioids to ailing patients.[85] Such an argument was made in a *parens patriae* suit filed by two county officials on behalf of Californians, in which defendant opioid manufacturers were accused of "target[ing] susceptible prescribers like family doctors[,]" and "convinc[ing] them that opioids were not only appropriate but necessary for the treatment of chronic pain."[86] The complaint alleged the opioid manufacturers, as part of their cunning marketing schemes, "tainted the sources that doctors and patients

83. *See id.* ¶ 189 (analyzing pharmaceutical manufacturers' marketing strategy of focusing opioid promotional efforts on pain specialists and anesthesiologists, given their opioid prescribing patterns and greater education about the risks and benefits of opioids).

84. *See id.* ¶ 190 (noting Endo Pharmaceuticals' marketing plan to target nurse practitioners and physician assistants because this group of prescribers was more responsive to details than physicians and 96% of their prescriptions were written without consulting a physician).

85. *See* Complaint ¶ 6, City of Tacoma v. Purdue Pharma, L.P., No. 3:17–cv–5737 (W.D. Wash. Sept. 13, 2017) ("Despite minimal or arguably no scientific evidence indicating that opioids offer any long-term benefit in treating chronic pain, Defendants misleadingly advertised their opioids as a panacea and pushed hundreds of millions of pills into the marketplace for consumption, fueling a crisis of unprecedented levels."). In addition to the message stressed by opioid manufacturers' aggressive and misleading marketing tactics that treatment of pain with opioids was necessary, a corollary message that potentially influenced prescribers was that treating patients' pain with opioids was an act of compassion and benevolence. *See, e.g.*, Ronald Hirsch, *The Opioid Epidemic: It's Time to Place Blame Where It Belongs*, KEVINMD.COM (Apr. 6, 2016), https://www.kevinmd.com/blog/2016/04/the-opioid-epidemic-its-time-to-place-blame-where-it-belongs.html [https://perma.cc/S86J-TMJF] (relaying one physician's experience in being misled by opioid manufacturers' deceptive marketing tactics, in which he attributed physicians' tendencies to overprescribe opioids to their well-intentioned desire to keep their patients from suffering in pain, and deemed opioid manufacturers, predominantly Purdue, "the real co-conspirators"—stating "[p]hysicians, including myself, believed Purdue and started using Oxy[C]ontin, thinking we were helping patients").

86. Fourth Amended Complaint for Violations of Cal. False Advert. Law, Cal. Unfair Competition Law, & Pub. Nuisance, Seeking Restitution, Civil Penalties, Abatement, & Injunctive Relief ¶ 4, People v. Purdue Pharma, L.P., No. 30–2014–00725287–CU–BT–CXC (Cal. Super. Ct. July 6, 2017) [hereinafter Fourth Amended Complaint].

relied upon for guidance," such as treatment guidelines and medical educational materials.[87]

One counter-argument Texas can anticipate opioid manufacturers to assert is that any allegations of intentional misrepresentation in the marketing of their pain medications are negated by the clear warnings presented on the FDA-approved medication labels themselves.[88] Though approval by the FDA may be one factor to consider in an assessment of whether opioid manufacturers were forthright in their marketing tactics, such a narrow argument fails to acknowledge—let alone, counter—the

87. *Id.* Defendant opioid manufacturers artfully targeted both susceptible prescribers and the medical information content upon which prescribers relied when assessing treatment options. An analogous argument to that set forth by the People of California was asserted in a suit filed on behalf of New Haven, Connecticut residents, in which notable examples were provided to demonstrate defendants' manipulation of guidance material, such as:

> (a) paying off doctors called "Key Opinion Leaders" [(]KOLs[)] to give speeches and write articles advocating the advantages of prescription opioids;
>
> (b) twisting scientific literature; most notably, transforming a five-sentence letter written to the *New England Journal of Medicine* in 1980[,] . . . regarding the relative safety of short-term opioid use by patients in a medical setting, into a false assertion (cited more than 600 times) that long-term opioid use in a non-medical setting has been proven to be "safe" and non-addictive; [and]
>
> (c) infiltrating medical societies and continuing medical education [(]CME[)] programs with the false information that chronic pain can and should be safely treated with prescription opioids[.]

Complaint ¶ 3, City of New Haven v. Purdue Pharma, L.P., No. CV-17-6074956-S (Conn. Super. Ct. Oct. 25, 2017).

88. *See* Defendants Purdue Pharma L.P., Purdue Pharma Inc., & The Purdue Frederick Co., Inc.'s Reply in Support of Demurrer to Plaintiff's Fourth Amended Complaint at 1, People v. Purdue Pharma, L.P, No. 30–2014–00725287–CU–BT–CXC (Cal. Super. Ct. Nov. 17, 2017) (claiming allegations that Purdue deceptively marketed opioids that should not be used in long-term, non-cancer pain treatment "conflict directly with FDA's determinations and would effectively require Purdue to 'stop selling' its products for their approved use, an outcome the Supreme Court has held is impermissible" (citing Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466, 2477 (2013))). In responding to implications of liability for its contribution to the opioid epidemic, Purdue dodged addressing the active steps it took to deceive prescribers. *Id.* at 2. Instead, Purdue justified its promotional tactics by focusing on the FDA's approval of its opioid medication label and touting protection from liability under the preemption doctrine. *Id.* at 1. Purdue matter-of-factly countered the People of California's adverse claims, stating:

> Indeed, the Supremacy Clause of the U.S. Constitution prevents the Counties from invoking State law to require statements about the safety and efficacy of Purdue's medications that differ from what FDA has approved after its independent evaluation of the efficacy and safety information. California courts have applied these principles to hold State law claims preempted when, as here, the plaintiff seeks to require additional warnings that diverge from established federal policy . . . .

Id. (footnote omitted) (citing Dowhal v. SmithKline Beecham Consumer Healthcare, 32 Cal.4th 910, 929 (2004)).

discrepancy between the messages relayed on opioid prescription labels and the messages stressed to susceptible prescribers that downplayed the addictive nature of opioids.[89] By taking a glance at the alarming warnings listed on the opioid prescription labels approved by the FDA, comparing such warnings to the unsubstantiated claims communicated by opioid manufacturers to susceptible prescribers regarding the efficacy of opioids and their minimal risk of addiction, and accounting for the empathetic nature of targeted physicians in wanting to ameliorate their patients' pain, it is clear that opioid manufacturers both intended to fraudulently misrepresent the risks and benefits of opioids to susceptible prescribers and had ample reason to expect that prescribers would act in reliance on the misrepresentations.[90]

In satisfying the fourth and final element of a fraudulent misrepresentation claim, Texas can prove actual and justifiable reliance on opioid manufacturers' fraudulent misrepresentations by focusing on the direct correlation between the influx of deceptive marketing tactics and the astonishing increase in opioid prescriptions written by

89. *Compare id.* at 6 (providing a warning of opioid addiction and abuse on Purdue's OxyContin label that "OXYCONTIN has physiochemical properties expected to make abuse via injection difficult[;] . . . [h]owever, abuse of OXYCONTIN by these routes, as well as by the oral route, is still possible" (alteration in original)), *and OxyContin Full Prescribing Information*, PURDUEPHARMA, http://app.purduepharma.com/xmlpublishing/pi.aspx?id=o [https://perma.cc/K2UB-5YRH] (last updated Sept. 2018) (providing the complete boxed warning on OxyContin's label, which alerts prescribers that "OXYCONTIN exposes patients and other users to the risks of opioid addiction, abuse, and misuse, which can lead to overdose and death," and "OXYCONTIN contains oxycodone, a substance with a high potential for abuse" and increased "risk of adverse outcomes from abuse and misuse" due to its extended-release formula), *with* The People's Opposition to Defendants' Joint Demurrer to Plaintiffs' Fourth Amended Complaint for Failure to State a Claim at 6, People v. Purdue Pharma, L.P, No. 30–2014–00725287–CU–BT–CXC (Cal. Super. Ct. Oct. 27, 2017) (asserting Defendants' understanding that "FDA-approved labeling for their opioids gives them license to make false and misleading statements about the risks of opioids because doctors and patients can always refer to the labeling for the truth" conflicts with well-established California law), *and* Fourth Amended Complaint, *supra* note 86, ¶ 121 ("FDA approval of opioids for certain uses did not give Defendants license to misrepresent the risks and benefits of opioids. Indeed, Defendants' misrepresentations were directly contrary to pronouncements by and guidance from the FDA based on the medical evidence and their own labels.").

90. *See* Plaintiff's Original Complaint, *supra* note 62, ¶ 160 (alleging the marketing efforts of opioid manufacturers were "highly persuasive" because they "tainted virtually every source doctors could rely on for information and prevented them from making informed treatment decisions" and manipulated doctors' beliefs "that opioids represented a means of relieving their patients' suffering and of practicing medicine more compassionately").

prescribers.[91] In 2016 alone, over *289 million* opioid prescriptions were written by prescribers, "enough for *every adult in the United States* to have more than one bottle of pills."[92] Such shocking prescribing rates are indicative of the persuasive power of opioid manufacturers' deceptive marketing tactics and their ability to induce prescribers' reliance on the fraudulent misrepresentations.[93] To demonstrate injury suffered from this reliance, Texas can point to both the economic loss and the loss of human lives resulting from the opioid crisis.[94] In November 2017, the President's Council of Economic Advisers reported that the opioid epidemic cost the United States a confounding $504 billion in 2015 alone, a considerable increase from previous estimates of this cost.[95] As bewildering as these national statistics are, they still do not fully encompass the enormous costs, both economic and personal, suffered by individuals and communities impacted by the opioid crisis.[96] To articulate the individual and community losses suffered from the opioid crisis, Texas can utilize an argument asserted by one of its own counties in a lawsuit recently filed against opioid manufacturers.[97] Upshur County drew attention to the social and public health costs of opioid abuse, stating:

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91. *See* Van Zee, *supra* note 65, at 221 ("When Purdue Pharma introduced OxyContin in 1996, it was aggressively marketed and highly promoted. Sales grew from $48 million in 1996 to almost $1.1 billion in 2000.").

92. *See* Complaint, *supra* note 85, ¶¶ 2–3, 42 (contrasting the "skyrocketed" revenues enjoyed by opioid manufacturers due to the near ten-fold influx of sales of opioids, "the most prescribed class of drugs in America[,]" with the devastating loss and "crippling effects of widespread opioid addiction" that cities have suffered).

93. *See* Van Zee, *supra* note 65, at 225 ("The use of prescriber profiling data to target high-opioid prescribers—coupled with very lucrative incentives for sales representatives—would seem to fuel increased prescribing by some physicians—perhaps the most liberal prescribers of opioids and, in some cases, the least discriminate.").

94. *See* COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, THE UNDERESTIMATED COST OF THE OPIOID CRISIS 1 (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf [https://perma.cc/NAB4-S8YA] (regarding previous estimates of the costs of the opioid crisis as "greatly understate[d,]" given their "undervaluing [of] the most important component of the loss—fatalities resulting from overdoses").

95. *See id.* at 8 (estimating $431.7 billion in total opioid overdose fatality costs, combined with $72.3 billion in non-fatal consequences of opioid addiction disorders).

96. *See* Plaintiff's Original Complaint, *supra* note 62, ¶ 168(i) (describing the incomprehensible harm communities have suffered due to opioid manufacturers' deceptive marketing tactics, including "lives lost; addictions endured; the creation of an illicit drug market and all its concomitant crime and costs; unrealized economic productivity; and broken families and homes").

97. *See* Complaint and Jury Demand ¶ 148, Cty. of Upshur v. Purdue Pharma, L.P., No. 2:17–cv–00672 (E.D. Tex. Sept. 29, 2017) (describing the cost of the opioid epidemic on Upshur County).

> [P]rescription opioid misuse, abuse, and overdoes have an enormous impact on the health and safety of individuals, as well as communities at large, because the consequences of this epidemic reach far beyond the addicted individual.
>
> Some of the repercussions for residents of Upshur County include job loss, loss of custody of children, physical and mental health problems, homelessness and incarceration, which results in instability in communities often already in economic crisis and contributes to increased demand on community services such as hospitals, courts, child services, treatment centers, and law enforcement.[98]

By proving that Texas physicians and patients actually and justifiably relied on opioid manufacturers' fraudulent misrepresentations and suffered injury due to their reliance, Texas will have fulfilled the final element of its fraudulent misrepresentation claim.

B. *Violation of Texas Deceptive Trade Practices Act*

While a claim of fraudulent misrepresentation largely focuses on prescribers being deceived by pharmaceutical manufacturers, a claim under the Texas Deceptive Trade Practices Act (DTPA) is consumer-focused.[99] The DTPA aims to protect consumers from false, misleading, deceptive and unconscionable business acts or practices, those which "take[] advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree."[100] Under the DTPA, consumers may bring a cause of action for:

> (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is:
>
> (A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and
>
> (B) relied on by a consumer to the consumer's detriment;
>
> (2) breach of an express or implied warranty;

98. *Id.* ¶¶ 149–50.

99. *See* TEX. BUS. & COM. CODE ANN. § 17.44 ("This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect *consumers* against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." (emphasis added)).

100. *Id.* § 17.45(5).

(3) any unconscionable action or course of action by any person; or

(4) the use or employment by any person of an act or practice in violation of Chapter 541, Insurance Code.[101]

To prevail on a claim brought forth under the DTPA, the plaintiff must establish (1) standing as a consumer, (2) breach by the defendant of one of the above provisions of the Act, and (3) injury resulting from the defendant's violation.[102] Furthermore, the plaintiff must establish that the defendant's deceptive trade or business practice was "*made in connection with*" the consumer's transaction.[103]

Turning to the first element of a DTPA claim—establishing the plaintiff's role as a consumer—the Act defines a "consumer" as "an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services[.]"[104] In the health care setting, patients who are prescribed opioids by a physician and who purchase opioids from a distributing pharmacy would be "consumers" of the medication for purposes of the DTPA.[105] With 57.6 opioid prescriptions dispensed per 100 individuals in Texas in 2016, there is evidently no shortage of opioid consumers in the state.[106] As "representative of the public," the Office of the Attorney General's Consumer Protection Division has the authority to intervene in a class action brought by plaintiff-consumers.[107]

In addition to intervening in a consumer class action, the Office of the Attorney General may independently bring forth a *parens patriae* suit against opioid manufacturers by invoking the authority expressly granted to it in under section 17.47 of the

101. *Id.* § 17.50(a).

102. *See* Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 649 (Tex. 1996) (establishing a plaintiff-consumer's burden of proof to prevail on a DTPA claim).

103. *See id.* at 649–50 (citing Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 541 (Tex. 1981)) (limiting the reach of a DTPA claim to those defendants whose practices were connected with the consumer's transaction, and not to those who merely introduced "a particular product into the stream of commerce" at the beginning of a chain of manufacturing and distribution).

104. BUS. & COM. § 17.45(4).

105. *See* 2017 ANNUAL SURVEILLANCE REPORT, *supra* note 4, at 7 (reporting a national opioid prescribing rate of 66.5 opioid prescriptions per 100 persons in 2016).

106. *Id.* at 42.

107. *See* BUS. & COM. § 17.501(c) (describing the role of the Consumer Protection Division in representing the public in class actions brought under the DTPA).

Act.[108] Section 17.47(a) equips the Consumer Protection Division with the authority to act "in the public interest" and "in the name of the state" of Texas to restrain individuals from engaging in any act or practice that violates the Act.[109] When manufacturers or distributors "make unfounded or exaggerated claims about the effectiveness and/or safety of their products," "fail to disclose risks," or engage in other deceptive business practices, the DTPA vests the Attorney General with power to take action on behalf of affected consumers.[110] Relying on this power, the Office of the Attorney announced in May of 2018 that it had filed a lawsuit to hold Purdue Pharma liable for violating the DTPA.[111] In 2007, Attorney General Greg Abbott, acting through the Consumer Protection Division, similarly invoked this power to take action against Purdue Pharma for its alleged violation of the DTPA.[112] Drawing specifically from the language of section 17.47, the state's original petition expressed the belief that its proceedings against Purdue were "in the public interest" due to Purdue's past and anticipated future engagement in unlawful business practices, causing "immediate and irreparable" damage to Texas and its citizens.[113] Seemingly mirroring this language, Texas's 2018 lawsuit against Purdue declared that the proceedings were "in the public interest" because they were filed based on the belief that Purdue and its related entities "have caused and will cause immediate, irreparable injury, loss, and damage to the

108. *See id.* § 17.47(a) (granting the Consumer Protection Division the authority to act on the state's behalf in restraining a person from carrying out any act or practice deemed unlawful under the DTPA).

109. *See id.* (permitting the Consumer Protection Division to serve the public interest by restraining any act or practice believed to be in violation of the DTPA).

110. *Health Care*, ATT'Y GEN. TEX., https://www.texasattorneygeneral.gov/cpd/health-care, [https://perma.cc/WF47-H3N6].

111. *AG Paxton Announces Lawsuit Against Major Opioid Manufacturer Purdue Pharma for Violation of Texas Deceptive Trade Practices Act*, ATT'Y GEN. TEX. (May 15, 2018), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-lawsuit-against-major-opioid-manufacturer-purdue-pharma-violation-texas [https://perma.cc/FCX5-SP5V]; *see* State of Texas's Original Petition ¶ 11.2, State v. Purdue Pharma L.P., No. D–1–GN–18–002403 (345th Dist. Ct., Travis Cty., Tex. May 15, 2018), 2018 WL 2230020 ("Plaintiff alleges violations by Defendants of DTPA § 17.46(a) and DTPA § 17.46(b) from June 2007 to present.").

112. *See* Plaintiff's Original Petition ¶ 2, State v. Purdue Pharma, Inc., No. 07.04195 (68th Dist. Ct., Dallas Cty., Tex. May 8, 2007) (detailing the authority under which Attorney General Greg Abbott brought an action against Purdue for its DTPA-violating business practices).

113. *See id.* ¶ 8 (articulating why the state of Texas's proceedings against Purdue were in the public interest).

State of Texas" by their deceptive marketing and misrepresentation practices.[114]

To fulfill the second element of a DTPA claim, Texas can assert that opioid manufacturers breached DTPA section 17.46(b) when they propagated the deceptive message that opioids were a safe, effective, and compassionate form of long-term treatment for chronic pain by downplaying the addictive risk of consuming opioids and fabricating the appearance of credible scientific support for potential prescribers to rely on.[115] As the foregoing analysis regarding a claim for misrepresentation elaborated, evidence of opioid manufacturers' deceptive representations as to the addictive effects of opioids is rampant.[116] A comparison of the allegations of DTPA breaches set forth in Texas's 2007 lawsuit against Purdue and in the several recent lawsuits brought by individual cities, counties, and states against an array of opioid manufacturers indicates that opioid manufacturers have not been deterred from their deceptive marketing ways.[117]

In Attorney General Abbott's 2007 complaint, Purdue was accused of minimizing the risk of addiction inherent to using OxyContin as a pain management treatment.[118] Purdue represented opioid addiction as "exceedingly rare[,]" repeatedly informing patients and prescribers through promotional materials that fewer than 1% of patients treated with opioids

114. *See* State of Texas's Original Petition, *supra* note 111, ¶ 4.2 (relying on DTPA section 17.47(a) to justify the proceedings against Purdue as advancing the public interest).

115. *See* TEX. BUS. & COM. CODE ANN. § 17.46(b) (declaring various acts and practices "false, misleading, or deceptive" and therefore violative of the DTPA).

116. *See, e.g.*, Van Zee, *supra* note 65, at 223 (discussing Purdue's efforts to misrepresent the addictive nature of OxyContin by, for example, "train[ing] its sales representatives to carry the message that the risk of addiction was 'less than one percent,'" despite ample studies "demonstrat[ing] that in the treatment of chronic non-cancer related pain with opioids, there is a high incidence of prescription drug abuse").

117. *Compare* Plaintiff's Original Petition, *supra* note 112, ¶ 44 ("Although Purdue, in response to public scrutiny of widespread OxyContin abuse, has claimed to implement programs designed to guard against diversion and abuse, it has continued to try to convince doctors that their concerns of addiction, dependence, and abuse are misplaced."), *with* Plaintiff's Original Complaint, *supra* note 48, ¶ 79 ("To convince doctors and patients that opioids are safe, Defendants deceptively trivialized and failed to disclose the risks of long-term opioid use, particularly the risk of addiction, through a series of misrepresentations that have been conclusively debunked by the FDA and CDC.").

118. *See* Plaintiff's Original Petition, *supra* note 112, ¶ 39 ("From its product launch, Purdue knew that OxyContin was prone to abuse, dependence, addiction, and diversion. But the linchpin of Purdue's marketing strategy was to distinguish OxyContin from other opioids and their well known risk of abuse, and to avoid the stigma attached to these other opioids . . . .").

became addicted.[119] In the event that physicians expressed hesitation in prescribing OxyContin due to concerns of addiction, Purdue methodically trained its sales representatives to "avoid and minimize" their apprehensions.[120] The complaint alleged four specific breaches by Purdue of the DTPA, including violations of: (1) section 17.46(b)(2)[121] by "[c]ausing confusion or misunderstanding as to the safety of OxyContin" by evading or downplaying the known "risks of abuse, dependence, addiction and diversion";[122] (2) section 17.46(b)(5)[123] by accrediting OxyContin as having benefits that are not attributable to the drug;[124] (3) section 17.46(b)(7)[125] by misrepresenting "that OxyContin is of a particular standard, quality, or grade";[126] and (4) section 17.46(b)(24)[127] by aggressively marketing OxyContin in a way "sometimes contrary to its label and indications," while neglecting to disclose, warn of, and protect against

119. *See id.* ¶ 42 (describing how Purdue disseminated deceptive marketing messages through promotional materials, such as relaying the message that less than 1% of opioid-consuming patients became addicted in a videotape for patient-viewing, entitled "From One Patient to Another," and in promotional pamphlets); *see, e.g.*, Our Amazing World, *Purdue Pharma OxyContin Commercial*, YOUTUBE (Sept. 22, 2016), https://www.youtube.com/watch?v=Er78Dj5hyeI [https://perma.cc/F7PT-WPSD] (depicting a promotional video utilized by Purdue to market OxyContin in which a physician informs viewers—at about the 0:16 video position—that "the rate of addiction amongst pain patients who are treated by doctors is much less than 1%" and emphasizes—at roughly position 0:30—that opioids "are our best, strongest pain medications [and] should be used much more than they are for patients in pain").

120. *See* Plaintiff's Original Petition, *supra* note 112, ¶¶ 43–44 (elucidating the inconsistency between Purdue's purported implementation of programs meant to protect against diversion and abuse of OxyContin and the measures the opioid manufacturer took to "convince doctors that their concerns of addiction, dependence[,] and abuse [were] misplaced").

121. TEX. BUS. & COM. CODE ANN. § 17.46(b)(2) (declaring unlawful the act of "causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services").

122. Plaintiff's Original Petition, *supra* note 112, ¶ 53(A).

123. BUS. & COM. § 17.46(b)(5) (proclaiming unlawful the act of "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which the person does not").

124. Plaintiff's Original Petition, *supra* note 112, ¶ 53(B).

125. BUS. & COM. § 17.46(b)(7) (holding unlawful the act of "representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another").

126. Plaintiff's Original Petition, *supra* note 112, ¶ 53(C).

127. BUS. & COM. § 17.46(b)(24) (decreeing unlawful the act of "failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed").

OxyContin's health and safety risks, with the intention of inducing consumers into transactions that they would not have partaken in had they received adequate disclosure of such risks.[128]

The 2007 lawsuit brought by Attorney General Greg Abbott ultimately culminated in a settlement agreement between Texas, twenty-five other states, and Purdue, which enabled Purdue to forego admitting to any DTPA violations while still proscribing the deceptive business practices that prompted the lawsuit in the first place.[129] Despite the settlement agreement enjoining Purdue from making "any written or oral claim that is false, misleading[,] or deceptive" while promoting or marketing OxyContin, allegations made in recent lawsuits indicate that Purdue seemingly disregarded the injunction and prompted other opioid manufacturers to follow its deceptive marketing suit.[130] For example, the arguments articulated in a recent federal lawsuit brought forth by McLennan County echoed the assertions made in the 2007 lawsuit, accusing several opioid manufacturers of unlawful business practices and condemning their leading role in the opioid epidemic.[131] The complaint accused defendant-manufacturers of spreading false and deceptive claims about the risks and

128. Plaintiff's Original Petition, *supra* note 112, ¶ 53(D).

129. *See Attorney General Abbott Halts Unlawful Marketing of Pain Killer*, ATT'Y GEN. TEX. (May 10, 2007), https://texasattorneygeneral.gov/oagnews/release.php?id=2003 [https://perma.cc/RMC3-YKME] (providing an overview of the 2007 settlement agreement reached between Purdue, Texas, and twenty-five other states, in which Purdue was proscribed from using off-label marketing to promote OxyContin and from making false and embellished claims regarding OxyContin's treatment qualities).

130. *E.g.*, Complaint ¶ 196, Rusk Cty. v. Purdue Pharma, L.P., No. 2:17–cv–01534 (E.D. Wis. Nov. 11, 2017) (listing examples of opioid manufacturers misrepresenting the risk of opioid addiction, such as Purdue, in 2009, providing veterans with promotional materials that claimed the chance of becoming addicted to opioids for individuals who are not susceptible to addiction is "very unlikely[,]" suggesting that the risk is "immaterial"); *see also* Andrew Joseph, *A Veteran New York Litigator Is Taking on Opioid Makers. They Have a History*, STAT (Oct. 10, 2017), https://www.statnews.com/2017/10/10/opioid-lawsuits-paul-hanly/ [https://perma.cc/NQ8G-KHFC] (expressing the surprise of an opioid litigation attorney—who helped pioneer the lawsuit against Purdue resulting in the 2007 settlement and who is representing cities and counties across five states in current opioid manufacturer lawsuits—that other opioid manufacturers "would be so foolish as to adopt essentially the same marketing tactics that Purdue had adopted"). *But see Addiction, Abuse, Misuse, and Diversion*, OXYCONTIN, https://www.oxycontin.com/abuse-deterrence-studies/addiction-abuse-misuse-diversion-rems.html [https://perma.cc/NZ3S-MHPB] ("Although the risk of addiction in any individual is unknown, it can occur in patients appropriately prescribed OxyContin. Addiction can occur at recommended doses and if the drug is misused or abused[.]").

131. *See* Plaintiff's Original Complaint ¶¶ 16–18, Cty. of McLennan v. Purdue Pharma, L.P., No. 6:17–cv–00298 (W.D. Tex. Oct. 31, 2017) (alleging acts and practices of multiple opioid manufacturer defendants aided the spread of the opioid epidemic in McLennan County).

benefits associated with long-term opioid use throughout McLennan County through direct marketing to doctors and patients and unbranded advertising by "so-called unbiased and independent third parties[.]"[132] These accusations were echoed in Texas's lawsuit against Purdue, alleging that Purdue "disseminat[ed] the message that pain was undertreated; that opioids were non-addictive; that patients deserved to be pain free; and that its opioids were superior to non-opioids for pain relief."[133]

To directly market their branded opioids, manufacturers ran multi-million-dollar advertising campaigns aimed at parading the claimed benefits of opioid use.[134] Manufacturers collectively spent more than $14 million on medical journal advertisements in 2011 alone.[135] The advertisements often depicted chronic pain-ridden patients, recommended the use of opioids for pain treatment, and implied that the drug would enable the patient to carry out a more fulfilling life liberated by pain-relief.[136] A second means by which manufacturers directly marketed the use of their opioids for treatment of chronic pain was through the use of "detailers," sales representatives trained by manufacturers to visit physicians and medical staff to promote direct sales with the potential prescribers.[137] Opioid manufacturers expended an alarming $168 million on "detailing branded opioids to doctors" in 2014, doubling the amount spent in 2000.[138] A

132. *See id.* ¶¶ 41–42 (describing two methods employed by opioid manufacturers to disseminate deceptive information regarding opioid use in McLennan County: (1) direct marketing of branded opioids to doctors and patients and (2) unbranded advertising by purported independent third parties).

133. State of Texas's Original Petition, *supra* note 111, ¶ 10.5.

134. *See* Plaintiff's Original Complaint, *supra* note 131, ¶ 43 (identifying advertising campaigns "touting the purported benefits of their branded drugs" as manufacturers' first technique of direct marketing).

135. *See id.* ¶ 43 ("Defendants spent more than $14 million on medical journal advertising of opioids in 2011, nearly triple what they spent in 2001, including $8.3 million by Purdue, $4.9 million by Janssen, and $1.1 million by Endo.").

136. *See id.* ¶ 44 (recounting one advertisement from a series of so-called "Pain vignettes," ran by Purdue in medical journals in 2012, in which Purdue implied that the use of OxyContin by a writer suffering from osteoarthritis of the hands would improve the writer's ability to work more effectively); *see also* Complaint, *supra* note 130, ¶¶ 207–08 (detailing a patient education guide targeting pain management in older adults that Janssen Pharmaceuticals, Inc. sponsored, which asserts as a "fact" that "opioids are *rarely* addictive when used properly for the management of chronic pain" to combat the "myth" that "[o]pioid medications are always addictive").

137. *See* Plaintiff's Original Complaint, *supra* note 62, ¶ 46 (explaining how manufacturers directly marketed their opioids for chronic pain relief through use of "detailers" who would make "direct sales contacts" with potential prescribers during in-office visits).

138. *See id.* ¶ 46 (noting the massive financial resources opioid manufacturers allocated to marketing by detailers in 2014, with Purdue alone spending $108 million).

further deceptive method of opioid manufacturers' direct marketing was the hosting of small-group speaker programs during which physician-speakers, compensated by the manufacturers, promoted the use of branded opioids to physician-attendees.[139] Though the speakers appeared to be "providing unbiased and medically accurate presentations[,]" in actuality, they were reciting a script prepared by the sponsoring opioid manufacturer that disseminated deceptive information, omitted material data, and allowed prior misrepresentations regarding the risks and benefits of opioid use to remain uncorrected.[140]

To circumvent federal regulation and to avoid penalties applicable to branded advertising after the 2007 settlement, opioid manufacturers invested in *unbranded* advertising, enabling them to "make the same false statements but evade punishment by making these statements about opioids as a whole, not about specific branded opioid drugs."[141] A common method of unbranded advertising was by disseminating messages through "key-opinion leaders" (KOLs)—medical professionals paid by opioid manufacturers to publicly endorse and aggressively promote the view that opioids were safe and effective for the long-term treatment of chronic pain.[142] In their unbranded advertisements spread by KOLs, opioid manufacturers either failed to disclose the risks of addiction inherent to opioid use, or affirmatively denied or curtailed those risks.[143] KOLs were sent to convince prescribers that opioids were not only harmless and effective for long-term use but "*required* in the compassionate treatment of chronic pain."[144] Knowing that prescribers often rely less critically on the

139. *See id.* ¶ 47 (explaining how opioid manufacturers selected physicians to be compensated as speakers and promoters of branded opioids during small-group programs attended by other physicians).

140. *See id.* ¶ 47 (discussing the deceptive nature of opioid manufacturers' small-group programs and how such programs incentivized physicians to promote and prescribe branded opioids).

141. *See* Complaint, *supra* note 130, ¶ 100 (differentiating between branded and unbranded advertising, the latter providing a platform for opioid manufacturers to make deceptive and unsubstantiated claims about the effectiveness and risks of opioids in general without violating the laws regulating branded advertisements).

142. *See id.* ¶¶ 111–12 (recognizing key-opinion leaders as a crucial component of defendant opioid manufacturers' deceptive marketing practices involving unbranded advertisements).

143. *See id.* ¶ 110 (explaining how opioid manufacturers failed to disclose, affirmatively denied, or downplayed "the risks of addiction, abuse, misuse, and overdose" in their unbranded marketing schemes).

144. *See* Plaintiff's Original Complaint, *supra* note 48, ¶ 12 (focusing on the individual and concerted unbranded advertising efforts of opioid manufacturers to disseminate the message, through

professional guidance and opinions of their peers, opioid manufacturers exploited such reliance by cunningly masking their deceptive claims about the risks and benefits associated with long-term opioid use beneath the fabricated appearance of KOLs as a source of neutral and credible support.[145] To further bolster the reliability of KOLs and the façade that opioid treatment for chronic pain presented a menial risk of addiction, opioid manufacturers paid KOLs to publish so-called "scientific" papers in support of the false and unsupported claims that opioids were a safe and effective means of treatment for chronic pain.[146] They then allocated significant funding to the widespread distribution and marketing of KOLs' "studies" and "articles," touting them as "independent medical literature" to deceive prescribing physicians and drive them to treat patients with opioids.[147]

Through direct marketing of branded opioids and unbranded marketing by KOLs, opioid manufacturers orchestrated a network of deception to spread their false and dangerous messages that long-term opioid treatment for chronic pain was safe and effective, to manipulate the sources of information that prescribers relied upon when assessing treatment options, and to catalyze the writing of opioid prescriptions. As the foregoing allegations demonstrate, pharmaceutical opioid manufacturers have engaged in countless actions constituting *per se* deceptive trade practices under DTPA section 17.46(b).[148]

In fabricating the reliability and neutrality of KOLs' promotion of the false notion that opioids are a safe, effective, and necessary treatment option for long-term, chronic pain, opioid manufacturers violated DTPA section 17.46(b)(2) and (3)—causing confusion and misunderstanding as to the approval of opioids and who opioid manufacturers were affiliated with.[149] By affirmatively denying or minimizing the risk of addiction that

seemingly unbiased key-opinion leaders, that opioids were an effective and necessary component of compassionate pain management).

145. *See* Plaintiff's Original Complaint, *supra* note 62, ¶ 56 (distinguishing pro-opioid key-opinion leaders as "one of the most important avenues that Defendants use to spread their false and deceptive statements[,]" given the "false appearance of unbiased and reliable support for chronic opioid therapy" that masks the misleading messages they promote).

146. *See* Complaint, *supra* note 130, ¶ 118 (recognizing key-opinion leaders as a crucial component of defendant opioid manufacturers' deceptive marketing practices involving unbranded advertisements).

147. *Id.*

148. TEX. BUS. & COM. CODE ANN. § 17.46(b).

149. *Id.* §§ 17.46(b)(2)–(3).

long-term opioid use presents, in stark contrast to the CDC's clear warning of such a risk, opioid manufacturers violated DTPA section 17.46(b)(5) and (7)—representing that opioids have certain characteristics or benefits, and are of a particular standard or quality, that they do not have.[150] By failing to disclose the risk of addiction inherent to opioid use and failing to disclose that KOLs, disguised as unbiased physicians' peers, were strategically selected, trained, and compensated to spread misinformation to potential prescribers, opioid manufacturers violated DTPA section 17.46(b)(24)—failing to disclose information known at the time of the transaction with the intent to induce prescribers and patients into transactions into which they would not have entered had they been privy to the information.[151] Finally, opioid manufacturers violated DTPA section 17.46(b)(31), which extends the scope of the DTPA to encompass manufacturers, sellers, distributers, and promoters of synthetic substances intended to produce an effect similar to that of a controlled substance,[152] who "(A) mak[e] a deceptive

150. *Id.* §§ 17.46(b)(5), (7).

151. *Id.* § 17.46(b)(24).

152. A "synthetic substance" is:

> an artificial substance that produces and is intended by the manufacturer to produce when consumed or ingested an effect similar to or in excess of the effect produced by the consumption or ingestion of a controlled substance or controlled substance analogue, as those terms are defined by [s]ection 481.002.

TEX. HEALTH & SAFETY CODE ANN. § 481.1191.

The term "controlled substance" encompasses "a substance, including a drug, an adulterant, and a dilutant, listed in Schedules I through V or Penalty Group 1, 1-A, 2, 2-A, 3, or 4." *Id.* § 481.002(5). Because DTPA section 17.46(b)(31) is applicable to the manufacturing, selling, distributing, and promoting of synthetic substances, only manufacturers of synthetic opioids that produce and are intended to produce an effect similar to or greater than that of a controlled substance can be subjected to subsection (31). *See* BUS. & COM. § 17.46(b)(31) (specifying the applicability of subsection (31) to synthetic substances); *see also* HEALTH & SAFETY § 481.102(2)–(3) (classifying opioid pain medications fentanyl, oxycodone, and hydrocodone as Penalty Group 1 substances—alongside heroin and cocaine—and thereby qualifying them as controlled substances under the DTPA).

Synthetic opioids, including fentanyl, tramadol, and methadone, are chemically created in the laboratory setting and are commonly used for pain management and anesthesia. Anaya Mandal, *Opioid Types*, NEWS MED., https://www.news-medical.net/health/Opioid-Types.aspx [https://perma.cc/B5HM-PMD9] (last updated Oct. 13, 2013). Fentanyl, for example, is a synthetic opioid distributed by Janssen Pharmaceuticals under the brand-name "Duragesic," which is used to "manage pain severe enough to require daily around-the-clock, long-term treatment with an opioid." *Patient Information–Medication Guide and Instructions*, DURAGESIC, https://www.duragesic.com/patient-information.html [https://perma.cc/3HXE-KGNZ] (last updated Mar. 14, 2017). Fentanyl delivers a potency fifty times greater than heroin and 100 times greater than morphine. *Synthetic Opioid Data*, *supra* note 18. Of the ten prescribers who made the most Medicare claims for fentanyl in 2016, three are Texas physicians—fourth was an interventional pain medicine specialist from Fort Worth who made 1,321

representation or designation about the synthetic substance; or (B) caus[e] confusion or misunderstanding as to the effects the synthetic substance causes when consumed or ingested[.]"[153] By downplaying the addictive effect of consuming opioids for long-term pain treatment when marketing the drugs, synthetic opioid manufacturers breached subsection (31).[154]

The final component of a viable DTPA claim is to establish injury resulting from the defendant's DTPA breach. In addition to the assertions of social and economic injury discussed in the previous claim for fraudulent misrepresentation, the following points are illustrative of the substantial injury Texas has suffered due to the opioid epidemic and the Big Pharma agents who fueled it. In 2016 alone, accidental opioid poisoning claimed the lives of 1,107 Texans.[155] The impact of opioid manufacturers' deceptive marketing techniques and resulting economic and social injury has been largely localized to Bexar County—which comprises a mere 5% of Texas's population, yet shoulders 66% of Texas's opioid-related

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claims; eighth was a pain medicine specialist from Wichita Falls who made 1,213 claims, and tenth was a pain medicine specialist from Arlington who made 1,189 claims. *Fentanyl*, PROPUBLICA, https://projects.propublica.org/checkup/drugs/4638 [https://perma.cc/W7K3-8GR9].

Closely related to synthetic opioids are semisynthetic opioids, such as hydrocodone and oxycodone, which are derived in part from natural opioids. Mandal, *supra*. Among overdose deaths attributable to prescription opioids, oxycodone—brand-named OxyContin by Purdue—and hydrocodone are two of the most commonly involved drugs. *When the Prescription Becomes the Problem*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/opioids/prescribed.html [https://perma.cc/D42H-QZAY] (last updated Aug. 29, 2017). In considering statutory governance over semi-synthetic opioids intended to produce an effect similar to or greater than the effect of certain controlled substances, a liberal construction of DTPA section 17.46(b)(31) could entail extending its governance to deceptive trade practices involving semi-synthetic opioids. *See* BUS. & COM. § 17.44(a) (requiring a liberal construction and application of the DTPA to further its underlying purposes).

OxyContin, for instance, operates as an extended-release opioid that presents "a greater risk for overdose and death due to the larger amount of oxycodone present." *OxyContin Full Prescribing Information*, *supra* note 89. In addition to having a high oxycodone concentration, the conversion factors for switching pediatric patients above the age of eleven from some opioid analgesic controlled substances to OxyContin suggest OxyContin produces an effect greater than the controlled substances. When swapping hydrocodone or morphine for OxyContin, the conversion rates are 0.9 and 0.5 respectively—establishing that a smaller dosage of OxyContin is expected to yield an effect similar or greater to the effect generated by each controlled substance. *Id.* Extending DTPA section 17.46(b)(31) to include both synthetic and semi-synthetic substances would permit Purdue to be held liable under subsection (31) for causing confusion as to the addictive effect of OxyContin. BUS. & COM. § 17.46(b)(31).

153. BUS. & COM. § 17.46(b)(31).

154. *Id.*

155. Tex. Dep't State Health Serv's (@TexasDSHS), TWITTER (Oct. 27, 2017, 9:56 AM), https://twitter.com/texasdshs/status/923956634904420352 [https://perma.cc/3WTS-GNR4].

issues.[156] Among these issues is the fact that 25% of Texas newborns suffering from neonatal abstinence syndrome (NAS), a condition caused by fetal exposure to addictive substances in the womb and resulting in withdrawals upon birth, are born in Bexar County—exemplifying the ruthless impact the opioid epidemic has both on lives ending and those just beginning.[157] These social costs, and the extensive financial costs of extended care, hospitalization, treatment, and enforcement that accompany the opioid epidemic, are what prompted Bexar County to "sue all opioid drug manufacturers, promoters and distributors responsible for causing and contributing to an epidemic of opioid addiction" in the county.[158] Recognizing the injuries suffered in Bexar County as a microcosm of those experienced statewide, Texas can satisfy the injury component of a DTPA claim and successfully hold opioid manufacturers liable for the "false, misleading, [and] deceptive acts or practices" they have relied on.[159]

V. CONCLUSION

Fraudulent misrepresentation and violation of the DTPA are only two of several theories of legal liability Texas can, and should, rely upon to hold opioid manufacturers liable for their contribution to the opioid epidemic and the widespread devastation they continue to cause in Texas communities.[160] The juxtaposition emanating from the opioid epidemic

156. Adrian Garcia, *Bexar County Suing Opioid Industry to Combat Epidemic*, KSAT (Oct. 3, 2017, 5:52 PM) https://www.ksat.com/news/bexar-county-suing-opioid-industry-to-combat-epidemic [https://perma.cc/E3X7-NHE3].

157. Brittney Martin, *Bexar County Highest in State for Babies Going Through Drug Withdrawal*, SAN ANTONIO EXPRESS NEWS (May 31, 2017, 11:05 PM), http://www.expressnews.com/news/local/article/Bexar-County-highest-in-state-for-babies-going-11186935.php [https://perma.cc/P94G-D6JJ]. Given that Texas only collects data in cases of NAS occurring in Medicaid-funded deliveries, "NAS is likely underreported in Texas." *See id.* ("Despite hosting only 8.5[%] of the Medicaid-funded births in Texas in 2015, Bexar County had 25[%] of the state's babies going through drug withdrawals.").

158. *See* Comm'rs Court, *Item 54*, BEXAR COUNTY (Oct. 3, 2017), http://bexarcountytx.swagit.com/play/10032017-618/#6 [https://perma.cc/7W3M-G5WG] (urging the Bexar County Commissioners Court to authorize action against opioid manufacturers, which would enable Bexar County to "lead the state of Texas in going forward against the drug companies who misled the public" (02:36) and to recuperate the devastating costs of the opioid epidemic); *see also* Homenko, *supra* note 44, at 283 ("In 2003, the annual direct cost of health care for an opioid abuser was on average $15,884, compared to $1,830 for a non-abuser.").

159. BUS. & COM. § 17.46(b).

160. *See e.g.*, Complaint ¶ 6, City of Everett v. Purdue Pharma, L.P., No. 17–2–00469 31 (Wash. Super. Ct. Jan. 19, 2017) (attempting to hold Purdue liable for its intentional, reckless, and/or negligent failure to prevent the diversion of OxyContin into the black market).

between the big profits that Big Pharma has raked in and the death and financial ruin that communities have suffered cannot be overstated.[161] Opioid manufacturers continuously chose to value profits over the welfare of consumers, actively engaging in deceptive marketing schemes to push their pills at any cost.[162] Bringing forth a *parens patriae* lawsuit on behalf of the State of Texas will hold opioid manufacturers liable for their leading role in the opioid epidemic and will enable Texas communities to recover the costs they have spent, and will continue to spend, battling the public health crisis that opioid manufacturers have profited from.[163] While no dollar amount can be placed on the value of lives lost from opioid overdose,[164] financial accountability on the part of opioid manufacturers would be a step forward in overcoming the opioid epidemic.[165]

161. *See* Ken Lammers, Jr., *Rise of the Pills*, 15 U.D.C. L. REV. 91, 100 (2011) (discussing the "moneyed American interests" driving the manufacturing, promotion, and prescribing of opioids—as exemplified by how the $600 million fine imposed on Purdue "in 2007 for purposefully and falsely marketing OxyContin as less addictive than it was" does not stop the drug company from aggressively marketing its product); Crime Stories with Nancy Grace, *'My Child Died': Opioid Plague Hits America*, STITCHER (Nov. 26, 2017), https://www.stitcher.com/podcast/mrw-productions-llc/crime-stories-with-nancy-grace/e/52382114 [https://perma.cc/9SUJ-FBBL] ("Altogether, the number of opioid overdose deaths in 2016 surpassed the number of deaths caused by the AIDS epidemic at its peak in 1995.").

162. *See* Complaint, *supra* note 160, ¶ 11 ("In short, Purdue's improper actions of placing profits over the welfare of the citizens of Everett have caused and will continue to cause substantial damages to Everett."). Purdue expressly agreed not to misrepresent OxyContin's risk of abuse or addiction as part of its $19.5 million settlement with Texas and twenty-five other states in 2007. *See* Final Judgment & Agreed Permanent Injunction ¶ 8, State v. Purdue Pharma, Inc., No. 07–04195 (68th Dist. Ct., Dallas Cty., Tex. May 8, 2007). Yet in 2011, Purdue sponsored a CME program touting the theory of pseudoaddiction, advising attendees to not make the assumption that a patient is suffering from addiction "even if he persistently asks for a specific drug, seems desperate, hoards medicine, or 'overindulges in unapproved escalating doses[,]'" and implying that "prescribing a high-dose, long-acting opioid" is the correct course of treatment for the patient's pseudo addiction. Fourth Amended Complaint, *supra* note 86, ¶ 54(e).

163. *See* Plaintiff's Original Complaint, *supra* note 62, ¶ 16 (regarding the large sums spent battling the opioid epidemic as a direct and foreseeable result of opioid manufacturers' fraudulent marketing scheme).

164. *See The Opioid Epidemic in the U.S.*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.hhs.gov/sites/default/files/2017-opioids-infographic.pdf [https://perma.cc/NB3Z-CQCG] (last updated May 2017) (reporting 15,281 deaths resulted from overdose of commonly prescribed opioids in 2015).

165. *See* Ausness, *supra* note 50, at 1146 (recognizing *parens patriae* lawsuits as a successful means of protecting the wellbeing of citizens and a promising avenue for holding opioid manufacturers liable).