WHOSE CLAIM IS IT?: A LOOK AT PUBLIC NUISANCE CLAIMANTS IN E-CIGARETTE LITIGATION

SANAH SHAH

INTRODUCTION

As of November 2023, "10% (1.56 million) [of] high school students and 4.6% (550,000) [of] middle school students reported current use of e-cigarettes."[1] In February 2020, the total number of reported hospitalized e-cigarette or vaping use-associated lung injury ("EVALI") cases reached 2,807 including 68 deaths within the U.S. states and territories.[2] In 2018, the Surgeon General declared youth e-cigarette use an epidemic, citing the dangers of nicotine for adolescent development and the greater appeal e-cigarettes have on youth through kid-friendly flavors, stealth devices, and easier inhalation.[3] After injuries, deaths, and prevention expenditures, many are turning to public nuisance to combat the youth e-cigarette use epidemic.[4]

Any affected individual or entity can be a plaintiff in e-cigarette litigation. Notably, counties, school districts, agencies, and Native American tribes in the e-cigarette litigation have been pursuing private claims of public nuisance despite having the power to bring representative public nuisance claims.[5] This changes the procedural requirements for standing.[6]

As mass tort litigations become increasingly popular, looking at what type of plaintiff brings successful public nuisance claims and how they proceed can offer insight into public nuisance doctrine in mass tort litigations. Public nuisance provides two types of claims: a private (non-representative) claim and a representative claim.[7] Controversy surrounds the application of public nuisance law in these mass product cases.[8] A strong

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[1] FDA, *2023 Findings on Youth E-Cigarette Use*, RESULTS FROM THE ANNUAL NATIONAL YOUTH TOBACCO SURVEY (Nov. 2, 2023), https://www.fda.gov/tobacco-products/youth-and-tobacco/results-annual-national-youth-tobacco-survey#Findings%20on%20Youth%20Use%20for%20E-Cigarette%20Products [https://perma.cc/G36N-5AH3].

[2] CDC, *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, CDC WEB ARCHIVE (Feb. 25, 2020), https://archive.cdc.gov/www_cdc_gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html [https://perma.cc/X4NM-9L6K].

[3] CDC, *Surgeon General's Advisory on E-Cigarette Use Among Youth*, SMOKING & TOBACCO USE (Dec. 2018) https://www.cdc.gov/tobacco/basic_information/e-cigarettes/surgeon-general-advisory/index.html [https://perma.cc/L3K4-R6RQ].

[4] Cyrus Farivar, *School Districts Took on Juul with a Novel Legal Strategy, Now They're Going After Social Media Giants*, FORBES (Apr. 18, 2023), https://www.forbes.com/sites/cyrusfarivar/2023/04/18/school-districts-took-on-juul-with-a-novel-legal-strategy-now-theyre-going-after-social-media-giants/ [https://perma.cc/G6HD-BPD8].

[5] *See In re* Juul Labs, Inc. Mktg. Sales Pracs., & Prod. Liab. Litig., 497 F. Supp. 3d 552 (N.D. Cal. 2020).

[6] Restatement (Second) of Torts § 821C (Am. L. Inst. 1979).

[7] *Id.*

[8] Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 5 (2011) (advancing the "thesis" that "public nuisance law has gone off the rails, and that the ultimate reason for this is that public nuisance is not, and never was, a tort. Public nuisance is properly regarded as a public action").

plaintiff is any that can help rectify a wrong inflicted upon them, but in public nuisance, in which the public is implicated, understanding how damages, abatement, and suits work for these plaintiffs helps narrow down which actor or entity is best positioned to bring a public nuisance claim.[9] Additionally, it can help answer why public entities choose to bring a private claim despite the added procedural hurdles. The question of who should bring the claim depends on what one wants to get out of it: a "day in court," due process, representation, development of substantive law, information disclosure, abatement, or settlement money.[10]

The Juul Multi-District Litigation ("MDL"), *In re Juul Labs, Inc. Marketing, Sales Practices, and Product Liability Litigation*, was a major focal point of public nuisance e-cigarette litigation and consists of different types of plaintiffs: individuals, localities, school districts, and tribes.[11] The structure of a multi-district litigation has its own implications for claimants.[12] This Note will refer to the Juul MDL to analyze these plaintiffs, their claims, and the impact of aggregation. There is also the Judicial Council Coordination Proceeding ("JCCP") that involves consolidated California cases in state court against e-cigarette companies.[13] On December 6, 2022, Juul settled the Juul MDL and JCCP, effectively settling 8,500 personal injury cases, over 1,400 government entity cases, and 34 tribal cases.[14] However, by focusing on the type of plaintiff, this analysis should remain applicable to the e-cigarette landscape. Additionally, some state Attorneys General have brought *parens patriae* suits against Juul in separate multistate efforts.

This Note examines the different types of plaintiffs and litigation and compares them to the tobacco settlement of the 1990s[15] and other mass tort public nuisance litigation, such as the opioid litigation.[16] Part I of this Note will provide an overview of public nuisance doctrine, the tobacco litigation, and the opioid litigation. Part II will examine the plaintiff types and public nuisance claims while referencing the Juul MDL and separate state Juul litigations. Part III will compare these plaintiffs and argue which is best positioned to bring a public nuisance claim based on what has historically been successful or unsuccessful in prior public nuisance-centered litigations, the implications of the MDL structure, and the *parens patriae* power. This Note will argue that state Attorneys General are best positioned to bring public nuisance claims in matters involving e-cigarettes, if they ensure settlement funds flow to all the entities delivering nicotine prevention and cessation programs to combat the youth nicotine use epidemic.

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[9] *See* Restatement (Second) of Torts § 821C (Am. L. Inst. 1979).

[10] Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 53 (2021).

[11] *See In re* Juul Labs, Inc. Mktg. Sales Pracs., & Prod. Liab. Litig., 497 F. Supp. 3d 552 (N.D. Cal. 2020).

[12] *See generally* Gluck & Burch, *supra* note 10, at 1, 15–16.

[13] Case Management Order No. 9: Joint Coordination Order, *In re* Juul Labs, Inc. Mktg. Sales Pracs., & Prod. Liab. Litig., 497 F. Supp. 3d 552 (N.D. Cal. 2021) (No. 19-md-02913).

[14] Dorothy Atkins, *Juul Cuts Deal to End MDL on Eve of Bellwether Trial*, LAW360 (Dec. 6, 2022), https://plus.lexis.com/api/permalink/0076b754-16cb-4c7d-ae90-167c19fdbcbe/?context=1530671 [https://perma.cc/SY33-TSK8] (while Juul settled its lawsuit, the case against Defendant Altria is still ongoing).

[15] U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-851, TOBACCO SETTLEMENT: STATES' USE OF MASTER SETTLEMENT AGREEMENT PAYMENTS 3 (2001).

[16] *See* Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 303, 314 (2021).

I. AN OVERVIEW OF PUBLIC NUISANCE DOCTRINE

Public nuisance is defined as "an unreasonable interference with a right common to the general public."[17] To determine whether there has been an interference with a right, courts look at (1) "[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience"; (2) whether the conduct is proscribed by statute; or (3) "whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."[18] The Second Restatement describes how a "public right" can elevate a problem to constitute a public nuisance:

> Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. . . . Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.[19]

Following the analogy, the polluted stream implicates a private interest in the people's own land; however, once it is identified that everyone's "right to fish" is infringed, it is a public nuisance.[20] Moreover, many people affected will not transform an issue into a public nuisance if no public right is infringed upon.[21]

Liability in nuisance law is predicated on the creation of a condition, and this differentiates it from other forms of liability that punish conduct. A condition can be a public health crisis that stems from conduct leading to an "interference with the public health."[22] This allows public nuisance to apply to many situations because the conduct creating the condition can be intentional, negligent, or strict liability.[23]

A particularly contentious area of public nuisance is regarding who can assert a public nuisance claim. Public nuisance has two types of claims. First, an individual can recover tort damages for an individual action for public nuisance.[24] This requires showing a "harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."[25] To meet the requirement of a special injury for this claim, there needs to be a difference in *kind* and not of *degree*. To illustrate this distinction, the Second Restatement explains:

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[17] Restatement (Second) of Torts § 821B (Am. L. Inst. 1979).
[18] *Id.*
[19] *Id.* cmt. g.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* cmt. e.
[24] Restatement (Second) of Torts § 821C (Am. L. Inst. 1979).
[25] *Id.*

> A builds a bridge that unlawfully obstructs a navigable stream. B, who has a motorboat . . . navigates the stream five times as frequently as any other person in the community, is prevented from passing up the stream by the bridge. B cannot recover in tort for the public nuisance.[26]

This is because *B* suffers the same inconvenience as the rest of the public, just by a greater degree. Had *B* navigated the stream more frequently as part of his fishing business and was obstructed due to the bridge, the loss of income may constitute a difference "in kind."[27] Second, a public official can bring a representative claim to enjoin or abate a nuisance.[28] Having standing to bring a private claim thus allows public entities to get damages, rather than sue to abate or enjoin the action causing the public nuisance.[29]

Typically, public entities bring public nuisance representative claims *parens patriae*, meaning as "parent of the nation."[30] The phenomenon of public entities bringing private claims of public nuisance seen in the Juul MDL is not new. In a case brought by a town involving a public nuisance caused by a dam, Justice Holmes found that "the town complains of public nuisance because of which it has suffered a peculiar and special damage," and a jury awarded damages.[31]

The concept of lawfully sold and used products being the subject of public nuisance claims has also garnered resistance from some scholars and courts. Legal traditionalists criticize extending public nuisance liability to products because traditionally, public nuisance was solely property-focused.[32] Also, they claim injuries from products implicate private, not public rights.[33] Some legal formalists do not see public nuisance as a tort at all, and others take issue with public nuisance being expanded from property to cover other contexts, namely products.[34] The tobacco litigation began a proliferation of product-focused public nuisance claims and the theories have since been tested in the context of opioids,[35] guns,[36] pesticides,[37] climate change,[38] and now e-cigarettes.[39]

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[26] *Id.* cmt. b, illus. 1.
[27] *Id.* cmt. c.
[28] *Id.*
[29] *Id.* cmt. a.
[30] Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 707 (2023).
[31] New Salem v. Eagle Mill Co., 138 Mass. 8, 10 (1884); *see also* Calais v. Dyer, 7 ME. 155, 157 (1830) ("They have certainly been injured; and though the easement belongs to the public, it is the duty of the town to preserve and continue it. The town, therefore, seems entitled to damages.").
[32] Kendrick, *supra* note 16, at 738.
[33] *Id.*
[34] *Id.*; *see, e.g.*, Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 5, 19 (2011), arguing that public nuisance is not a tort, and more correctly regarded as a public action:

> [A]n action brought in court to enforce public rights, closely associated with criminal liability, typically initiated by public officials, focused on eliminating undesirable conditions rather than sanctioning conduct, and implemented primarily through criminal sanctions and mandatory relief, would seem to fall . . . within a generalized notion of a public action.

[35] *In re* Nat'l Prescription Opiate Litig., 477 F. Supp. 3d 613, 617 (N.D. Ohio 2020).
[36] City of Chicago v. Beretta U.S.A. Corp., 213 Ill. 2d. 351, 414 (Ill. App. Ct. 2002) (the city and county failed to state a claim sufficient for public nuisance).
[37] *In re* Paraquat Prods. Liab. Litig., No. 3:21-MD-3004-NJR, 2022 WL 451898, at *29 (S.D. Ill. Feb. 14, 2022).
[38] Mayor v. City Council of Baltimore v. BP P.L.C., 31 F.4th 178, 210 (4th Cir. 2022).
[39] *In re* Juul Labs, Inc. Mktg. Sales Pracs., & Prod. Liab. Litig., 497 F. Supp. 3d 552 (N.D. Cal. 2020).

A. PUBLIC NUISANCE IN THE TOBACCO LITIGATION

Public nuisance doctrine first shifted toward a product liability purpose in the tobacco litigation in the 1990s.[40] After decades of individual plaintiff cases failing to take hold, different actors began taking novel approaches.[41] The Attorney General ("AG") of Mississippi, eventually followed by other states, sued to be reimbursed for all the state had expended on treating smoking-related illnesses.[42] This use of the public nuisance doctrine separated the state's interest from individual smokers' interests and asserted that the "industry's deceptive and misleading conduct constituted a wrong against the public as well as against those who actually smoked."[43] This separation meant that "[i]n both tobacco and lead pigment litigation, the plaintiff-state serve[d] as a conduit through which money paid by product manufacturers [would] be delivered to those directly harmed by the manufacturers' products."[44]

The tobacco litigation was regarded as a success in that it brought about the largest settlement in history—over $206 billion from four major tobacco companies to 46 states, Washington, D.C., and 5 territories.[45] One of the most lauded achievements of the tobacco Master Settlement Agreement ("MSA") was releasing previously concealed industry documents to the public.[46] The information-sharing effect of the tobacco litigation permitted the public, regulators, and any relevant actors to "map the extent of the problem, trace its root causes, allocate responsibility, and assign blame."[47] Former Surgeon General C. Everett Koop regarded the information-sharing effect of the tobacco litigation as "one of the most significant public health achievements of the second half of the 20th century."[48]

However, states and territories party to the tobacco MSA have been criticized for failing to use their settlement funds for the MSA's stated purpose of reducing tobacco use.[49] This issue is because the MSA did not direct how the states should have spent their respective settlement allocations.[50] In subsequent mass public nuisance litigations, scholars advocated for different approaches to ensure that large settlements go towards the public health concern they are designed to address.[51]

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[40] Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 303 (2021).

[41] *Id.* at 295.

[42] *Id*. at 302.

[43] *Id*. at 303.

[44] DONALD G. GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION 123 (2010).

[45] U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-851, TOBACCO SETTLEMENT: STATES' USE OF MASTER SETTLEMENT AGREEMENT PAYMENTS 3 (2001).

[46] Engstrom & Rabin, *supra* note 20, at 344.

[47] *Id*. at 355.

[48] Michael V. Ciresi, Roberta B. Walburn & Tara D. Sutton, *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 439, 479 (1999).

[49] Engstrom & Rabin, *supra* note 20, at 343.

[50] *Id.*

[51] Amy Ciarlo & Matta Sannoh, *How States Can Leverage Juul Settlements to Promote Public Health*, Association of State and Territorial Health Officials (Oct. 31, 2023) https://www.astho.org/communications/blog/how-states-can-leverage-juul-settlement-funds-to-promote-public-health/ [https://perma.cc/92R3-R6VN].

This same concern looms over the e-cigarette litigation.[52] Unlike the tobacco litigation which was brought only by state AGs, the Juul litigation is comprised of several lawsuits—the MDL, JCCP, and the state investigations—and is brought by actors other than state AGs. These actors—mainly government entities—are not relying on the state AGs to bring claims on their behalf and simply provide disbursements of settlements. When comparing the Juul MDL with the thirty-three state settlement with Juul, tort and product liability expert Heidi Li Feldman remarked, "the legacy of the tobacco litigation prompted municipalities and school boards to be more on their toes to make sure that harms particular to them were addressed by resolution of any lawsuits against a business."[53] In light of the MSA's failure to properly distribute funds, litigants and courts have begun to pay closer attention to tailoring the means of distribution, the claimant pool, and the purpose of settlement money.[54] Some attribute the proliferation of public nuisance claims for products to the success of the tobacco litigation's settlement, particularly because the tobacco litigation did not actually rule on whether public nuisance is a viable claim for addressing public health crises stemming from products.[55]

It is important to note that while tobacco and e-cigarettes both contain "nicotine," the products differ. Many e-cigarette companies, like Juul, have a stated mission of transitioning adult smokers away from combustible cigarettes which have known negative health consequences.[56] E-cigarettes are recognized by the FDA as posing a "lower-risk alternative for adults who smoke cigarettes" by potentially reducing exposure to harmful chemicals that are known to be present in cigarettes.[57] In this sense, e-cigarettes have social utility to provide those addicted to nicotine with a lower-risk alternative to cigarettes. Similarly, opioids have social utility as a critical prescription medicine in contexts such as palliative care.[58] This fact brought the issue of proving causation to the forefront of public nuisance claims in the opioids litigation and is coming up again in e-cigarette litigation.[59] The problem with proving causation when the product has social utility is it appears that a plaintiff's improper use of the product is what caused the plaintiff's harm.[60] These causation questions in public nuisance involving products with social utility arise repeatedly in public nuisance claims in

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[52] *Id.*

[53] Mark Walsh, *School Districts' Legal Battle with Juul Isn't Over*, EDUCATION WEEK (Sept. 8, 2022), https://www.edweek.org/policy-politics/school-districts-legal-battle-with-juul-isnt-over/2022/09 [https://perma.cc/8564-EVSX].

[54] *Id.*

[55] Michelle L. Richards, *Pills, Public Nuisance, and Parens Patriae: Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. RICH. L. REV. 405, 453 (2020) ("Post-Big Tobacco, *parens patriae* suits have become 'an increasingly popular vehicle for state attorneys general to vindicate the rights of their constituents.' ").

[56] K.C. Chosthwaite, *Message from the Chairman and CEO*, JUUL LABS https://www.juullabs.com/#:~:text=Juul%20Labs%20is%20on%20a,underage%20usage%20of%20our%20products [https://perma.cc/54NL-MT3D] (last visited Mar. 23, 2023) ("Juul Labs is on a mission to transition the world's billion adult smokers away from combustible cigarettes, eliminate their use, and combat underage usage of our products.").

[57] *Nicotine is Why Tobacco Products are Addictive*, FDA (May 31, 2024) https://www.fda.gov/tobacco-products/health-effects-tobacco-use/nicotine-why-tobacco-products-are-addictive [https://perma.cc/WN5F-3HAF].

[58] Engstrom & Rabin, *supra* note 20, at 329.

[59] Richards, *supra* note 28, at 451.

[60] *Id.* at 440.

multidistrict litigation.[61] However, without courts ruling on the merits, there is little resolution to whether causation can be met in public nuisance claims. In turn, this bolsters criticism of public nuisance as a legal strategy in mass tort cases dealing with public health issues.

B. MULTIDISTRICT LITIGATION

Multidistrict litigation is a complex litigation procedure that entails taking related cases in federal courts and consolidating them for pretrial proceedings before a single judge chosen by the Judicial Panel on Multidistrict Litigation.[62] MDLs are different from class actions as class actions include the whole court process and MDLs include only the pretrial process and will be remanded to their respective courts unless terminated.[63] Large amounts of individual cases are consolidated into MDLs for the "convenience of parties and witnesses and [to] promote the just and efficient conduct of such actions."[64] In an MDL, the court will often conduct one or more bellwether trials, which is a trial of a plaintiff selected as a representative of similarly situated plaintiffs.[65] Bellwether trials are non-binding on non-participating claimants and can inform parties by providing a vehicle to test out cases, legal arguments, and legal theories in a trial setting.[66] The informational value comes from parties within non-binding Bellwether trials to see the results of the cases that are actually tried before a judge or jury, and then assess the merits of their own similar claim they aim to argue.[67] Further, this creates informational value for future settlements by showing potential litigants the relative strengths and weaknesses of their claim.[68] Many public nuisance suits are consolidated into large-scale MDLs, as seen with opioids and now e-cigarettes.[69]

As MDLs become more common—70% of federal civil cases were in MDLs in 2021—the procedure has attracted scrutiny.[70] In what has been called the "fiction of remand," the possibility of an MDL being remanded is seen as a failure, and the aim of MDLs becomes settlement.[71] As such, 97% of MDL cases are either settled or resolved by dispositive action and, therefore, are not remanded for trial in their respective courts.[72] The fiction of remand has implications for information-sharing, federalism, and representation.[73] Ultimately, MDLs are settlement-focused and unlikely to result in plaintiffs getting their day in court. This contradicts the original

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[61] Gluck & Burch, *supra* note 10, at 62–63.

[62] 28 U.S.C. § 1407(a).

[63] *Id.*

[64] *Id.*

[65] Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 (2008).

[66] *Id.* at 2337.

[67] *Id.*

[68] *Id.* at 2338, 2341–42.

[69] *In re* Juul Labs, Inc. Mktg. Sales Pracs., & Prod. Liab. Litig., 497 F. Supp. 3d 552 (N.D. Cal. 2020); *In re* Nat'l Prescription Opiate Litig., 477 F. Supp. 3d 613, 617 (N.D. Ohio 2020).

[70] *See* Lawyers for Civil Justice, *70% of Federal Civil Cases are in MDLs as of Year End, FY21*, RULES4MDLS, https://www.rules4mdls.com/copy-of-mdl-cases-surge-to-majorty-of [https://perma.cc/W9SL-W6VU] (last visited Mar. 3, 2023) ("[O]ver 70% of the federal civil caseload (391,953 cases out of 559,653 federal civil cases) resides in Multidistrict Litigations (MDLs) as of the end of fiscal year 2021.").

[71] Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 15–16 (2021).

[72] *Id.* at 16.

[73] *Id.* at 65, 67, 71.

purpose of public nuisance remedies to enjoin or abate the nuisance, and instead seeks to direct many plaintiffs to negotiate monetary amounts to compensate their respective economic losses via settlement.

The Juul MDL was a consolidation of approximately five thousand cases with approximately ten thousand plaintiffs.[74] It was consolidated in the United States District Court for the Northern District of California with Judge Orrick presiding.[75]

C. BACKGROUND ON THE OPIOID LITIGATION

The opioid overdose epidemic has affected countless lives, localities, and states in the United States.[76] Affected localities, tribes, and states brought suit against pharmaceutical manufacturers, distributors, medical professionals, retail pharmacies, and others under *parens patriae* standing for their alleged roles in the "improper marketing of and inappropriate distribution of various prescription opiate medications into cities, states and towns across the country."[77] The opioid litigation, which took both MDL and separate state litigation forms, offers insight into how public nuisance law fares in a mass product context and in addressing public health issues.

Public nuisance claims were the focus of an MDL centralized in Ohio consisting of over three thousand plaintiffs of different types and hundreds of defendants.[78] Plaintiffs claimed that through aggressive marketing and distribution of highly addictive opiates, defendant drug companies, manufacturers, and pharmacies created an addiction crisis—a public nuisance.[79] The litigation outcomes have been mixed based on which states the cases were tried. In the same month that Oklahoma overturned a landmark settlement[80] and a California bench trial rejected public nuisance claims,[81] the first bellwether to go to jury trial under *In re National Prescription Opiate Litigation* ("opioid MDL") saw two Ohio counties' public nuisance claims win.[82]

The opioid MDL, having consisted of over three thousand cases and several bellwether trials, reached nationwide settlements with key defendant pharmaceutical distributors in 2021 and with defendant pharmacy chains and manufacturers in 2022.[83] In what has been regarded as an unorthodox and

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[74] Christy Bieber & Mike Cetera, *Juul Lawsuit Update February 2024*, FORBES (May 22, 2023, 12:22 PM) https://www.forbes.com/advisor/legal/product-liability/juul-lawsuit-update/ [https://perma.cc/QE6Q-9JPK].

[75] *In re* Juul Labs, Inc. Mktg. Sales Pracs., & Prod. Liab. Litig., 497 F. Supp. 3d 552 (N.D. Cal. 2020).

[76] *Understanding the Opioid Overdose Epidemic*, CDC (Apr. 5, 2024) https://www.cdc.gov/overdose-prevention/about/understanding-the-opioid-overdose-epidemic.html [https://perma.cc/J78K-9EPN].

[77] Transfer Order, *in re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375 (J.P.M.L. Dec. 5, 2017).

[78] *Id.*; *Opioids*, NATIONAL ASSOCIATION ATTORNEYS GENERAL, https://www.naag.org/issues/opioids/ [https://perma.cc/4NYP-TFTU] (last visited June 16, 2024).

[79] *In re* Nat'l Prescription Opiate Litig., 477 F. Supp. 3d 613, 617 (N.D. Ohio 2020).

[80] Brian Mann, *Oklahoma's Supreme Court Tossed out a Landmark $465 Million Opioid Ruling*, NPR (Nov. 9, 2021, 5:06 PM ET), https://www.npr.org/2021/11/09/1054000996/oklahoma-supreme-court-465-million-opioid-ruling [https://perma.cc/5GY9-3H36].

[81] Jan Hoffman, *Opioid Makers Win Major Victory in California Trial*, N.Y. TIMES (Nov. 9, 2021), https://www.nytimes.com/2021/11/02/health/opioids-johnson-ruling-california.html [https://perma.cc/A6Y7-J96J].

[82] Jan Hoffman, *CVS, Walgreens and Walmart Fueled Opioid Crisis, Jury Finds*, N.Y. TIMES (Nov. 23, 2021), https://www.nytimes.com/2021/11/23/health/walmart-cvs-opioid-lawsuit-verdict.html [https://perma.cc/A6Y7-J96J].

[83] Executive Summary of National Opioid Settlements, NATIONAL OPIOID SETTLEMENT (May 6, 2024) https://nationalopioidsettlement.com/executive-summary/ [https://perma.cc/EC2S-TFLY].

controversial introduction to proceedings, Judge Polster, who oversaw the opioid MDL stated:

> What's happening in our country with the opioid crisis is present and ongoing. I did a little math. Since we're losing more than 50,000 of our citizens every year, about 150 Americans are going to die today, just today, while we're meeting. . . . I don't think anyone in this country is interested in a whole lot of fingerpointing at this point, and I'm not either. People aren't interested in depositions, and discovery, and trials. People aren't interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unraveling complicated conspiracy theories. So my objective is to do something meaningful to abate this crisis and to do it in 2018.[84]

He was alluding to settling to quickly abate the opioid overdose epidemic, as evidenced by his attempt to create negotiation classes for settlement purposes.[85] Introducing the MDL with this agenda sets a tone that shapes how parties, private lawyers, and the judge will proceed. It alters the stakes of the issue and ignores that litigation is relevant to settlement in three ways: "as information, as a guide for lawyers, and as risk that it gets resolved in settlement."[86] The priority shifts from getting one's day in court and allocating responsibility for the harms committed to reaching settlements quickly.[87] The agenda of the Juul MDL was not explicitly set this way, but implicit in these mass MDLs was the notion that it will be resolved by a global settlement.[88]

The Juul litigation was similar to the opioid litigation, and the concerns raised in the opioid litigation about different types of plaintiffs are helpful for this analysis. Both MDLs consist of governmental entities bringing public nuisance claims. Both see state AGs bringing separate cases in their respective state courts. Both involve products that purport to do good. The opioids litigation highlighted the issues of federalism, centralization, intrastate disputes, and fee disputes.

II. PLAINTIFFS IN THE E-CIGARETTE LITIGATION

This Part will analyze the different types of plaintiffs complaining of public nuisance that have either brought cases consolidated into the Juul MDL or could potentially bring cases in e-cigarette litigation. Accordingly, this Part covers school districts, individuals, localities, tribes, and state AGs.

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[84] Howard M. Erichson, *MDL and the Allure of Sidestepping Litigation*, 53 GA. L. REV. 1287, 1390 (2019); *see also* Transcript of Proceedings at 6, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD02804 (N.D. Ohio Jan. 9, 2018).

[85] Alison Frankel, *Opioid MDL Judges Oks Novel Negotiating Class as 'Likely to Promote Global Settlement'*, REUTERS (Sept. 12, 2019, 2:20 PM), https://www.reuters.com/article/us-otc-opioids-idINKCN1VX2RE [https://perma.cc/SP92-QE25].

[86] Erichson, *supra* note 84, at 1302.

[87] Gluck & Burch, *supra* note 35, at 53 ("Litigation is about more than just the exchange of funds. Legitimacy, dignity, information production, representation, law development, impartiality, and even decentralization are core components of the system.")

[88] *Id.* at 20 ("Practical administration can lead to heavy-handed and highly creative case management and nearly inescapable pro-settlement stances.").

A. SCHOOL DISTRICTS

In the e-cigarette litigation, school districts are unique claimants because schools are a key place where youth discovered and used e-cigarettes.[89] School districts are considered government entities in the Juul MDL, though many bring private claims of public nuisance.

However, school districts struggle to bring private claims for public nuisance against e-cigarette companies and Juul because it is difficult to define the "public right" with which the companies' products or actions are interfering. Since schools' purpose to provide education, a limited public good, the public right revolves around the quality of education provided. The complexity is in proving that e-cigarette-use interferes with education in a way that implicates the manufacturer.

School districts in the Juul MDL generally defined a "public right" concerning public health and the education provided. The Los Angeles Unified School District ("LAUSD") alleged an "interference in the educational school environments" and "disruption of normal school operations."[90] Broward School District alleged interference with the district's "functions and operations" and claimed the interference "affected the public health, safety, and welfare of Plaintiff's schools."[91] Additionally, Broward alleged that the "conduct violate[d] Florida's public policy against marketing e-cigarette products to minors."[92]

The Broward School District described the interference as "conduct and omissions . . . [that] created substantial annoyance, inconvenience, and injury to Plaintiff by their production, promotion, distribution, and marketing of e-cigarette products, including, but not limited to, JUUL, for use by youth in Plaintiff's school."[93] The LAUSD alleged a similar interference.[94]

LAUSD aimed to connect Juul to harm to the school by describing how schools needed to expend resources to target Juul use through discipline, surveillance, and implementation of an anti-vaping curriculum.[95] The complaint noted that school bathrooms have become a place where students vape, and references a Truth Initiative report that 40% of all teachers and administrators report putting extra surveillance near school bathrooms.[96] Additionally, it cited how some schools have added special vape detection devices, hired tobacco prevention supervisors, held anti-vaping curricula outside of school hours, and used random nicotine tests for students in extracurricular activities.[97] The complaint emphasizes that not only does

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[89] *See Examining JUUL's Role in the Youth Nicotine Epidemic: Part II*: *Hearing Before the Subcomm. on Econ. & Consumer Pol'y of the Comm. on Oversight & Reform*, 116th Cong. (2019).

[90] Complaint at 32, LAUSD v. Juul Labs, Inc., No. CIV DS 1932301 (Cal. Super. Ct. 2019).

[91] Second Amended Complaint & Demand for Jury Trial at 257, School Bd. Broward Cnty. v. Juul Labs, Inc., *In re* Juul Labs, Inc. Mktg. Sales Pracs., & Prod. Liab. Litig., No. 19-md-02913-WHO, 497 F. Supp. 3d 552 (N.D. Cal. 2020).

[92] *Id*. at 258.

[93] *Id.* at 257.

[94] Complaint at 32, LAUSD v. Juul Labs, Inc., No. CIV DS 1932301 (Cal. Super. Ct. 2019) ("[I]ncluding marketing and promoting the use of e-cigarettes by minors and the disruption of normal school operations.").

[95] *Id.* at 28.

[96] *Id.* at 27–28; *see also How are Schools Responding to JUUL and the Youth E-Cigarette Epidemic?*, TRUTH INITIATIVE (Jan. 18, 2019), https://truthinitiative.org/research-resources/emerging-tobacco-products/how-are-schools-responding-juul-and-youth-e-cigarette [https://perma.cc/8ELQ-KNCW].

[97] *Id.* at 27–29 ("A national survey of middle schools and high schools found that 43.3% of schools have had to implement not only an e-cigarette policy but a JUUL-specific policy.").

vaping cause additional expenditures, but it also harms learning because vaping leads to more students becoming sick and therefore absent, which in turn harms students who do not vape because school absences are a determinant of how much revenue school districts are allocated.[98]

While all these consequences of e-cigarettes in schools may be undisputed, the chain of causation tying these harms to the e-cigarette manufacturers is long and relies on non-formalist or non-traditionalist views of public nuisance. Putting aside formalist or traditionalist critiques of public nuisance, the issue of public nuisance when it comes to school districts is a unique setting where youth congregate for much of their time and receive both academic education and socialization.

Once a product gains some traction with the youth population, youth's curiosity or peer pressure can popularize the said product. In this sense, e-cigarette marketing and distribution to youth can create a condition of youth nicotine addiction, which has the consequences of diminishing the quality of education provided. By virtue of how much time youth spend in school compared to other places and the socialization aspect of schools, this condition could mean that school districts face an injury different in kind from other entities. If one accepts the premise that quality education is a public right, then school districts have a solid public nuisance claim.

It is worth briefly noting that the school districts and other claimants in the Juul MDL relied heavily on testimony from the Congressional Hearing examining "Juul's Role in the Youth Nicotine Epidemic."[99] Additionally, the complaints used research compiled by Stanford Research into the impact of tobacco advertising.[100] Therefore, the information relied on was an analysis of Juul's public actions and advertising. The actual information or science behind Juul or e-cigarettes was not revealed.

Seven school districts' claims were tested in the first round of motions to dismiss filed by Juul in the Juul MDL.[101] In addressing the special injury in private claims by school districts, the court stated:

> School districts "adequately allege that JLI's conduct—including a targeted marketing campaign on social media, flavored products such as mango and mint and other actions targeting school-age youth—created and maintained an illicit youth market of school-age youth addicted to nicotine, causing extreme disruption in classrooms and unique harm to schools that is different in kind than the community at large."[102]

This holding suggested the court was willing to hear school districts, though government entities, private claims of public nuisance. However, the

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[98] *Id*. at 31.

[99] *See generally Examining JUUL's Role in the Youth Nicotine Epidemic: Part II*: *Hearing Before the Subcomm. On Econ. & Consumer Pol'y of the Comm. On Oversight & Reform*, 116th Cong. (2019).

[100] *See* Robert K. Jackler, Cindy Chau, Brook D. Getachew, Mackenzie M. Whitcomb, Jeffrey Lee-Heidenreich, Alexander M. Bhatt, Sophia H.S. Kim-O'Sullivan, Zachary A. Hoffman, Laurie M. Jackler & Divya Ramamurthi, *Juul Advertising Over its First Three Years on the Market*, STAN. RSCH. INTO IMPACT TOBACCO ADVERT. (Jan. 31, 2019).

[101] *In re* Juul Labs, Inc. Mktg. Sales Pracs., & Prod. Liab. Litig., 497 F. Supp. 3d 552, 577 (N.D. Cal. 2020).

[102] *Id.* at 650.

Juul MDL reached a settlement before any school district bellwether trials occurred.[103]

One school bellwether trial took place against Altria after its co-defendant, Juul, had reached a settlement, that of San Francisco United School District ("SFUSD").[104] In a pre-trial motion for summary judgment, Altria argued that SFSUD did not have standing under California law to bring a public nuisance claim.[105] Judge Orrick found "[a]t a minimum," SFUSD would be authorized "to sue for public nuisance that damages its property."[106] However, he left the question to whether "property" could encompass SFUSD's alleged harms, such as "use and enjoyment of property that had to be closed off due to vaping or staff time that was shifted away from other purposes to address the vaping crisis" to be determined post-trial.[107] These questions were not decided because Altria settled the following day.[108]

B. INDIVIDUALS

Individuals pursuing private claims of public nuisance face an uphill battle. The Second Restatement specifically includes "physical harm" as a harm "different in kind from that suffered by other members of the public."[109] Therefore, individuals who have suffered from EVALI should be able to show a special injury against an e-cigarette company. Moreover, the Second Restatement states "to enjoin to abate a public nuisance, one must (a) have the right to recover damages."[110] The Second Restatement explains that the reason for the special injury rule and restricting who can sue to abate a public nuisance:

> [L]ies in the difficulty . . . of drawing any satisfactory line for each public nuisance at some point in the varying gradations of degree, together with the belief that avoiding multiplicity of actions invasions of rights common to all of the public should be left to be remedied by . . . public officials.[111]

With numbers reaching into the thousands for EVALI cases, it is unlikely that individuals bringing public nuisance claims citing this injury would succeed in litigation.[112]

Public nuisance law is seen as a lower bar to meet than product liability law due to product liability requirements, such as defective design, failure to warn, or proximate cause.[113] Focusing the claim on the product itself—

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[103] San Francisco United Sch. Dist. v. JUUL Labs, Case No. 19-op-8177 (N.D. Cal. 2023); Atkins, *supra* note 14.

[104] San Francisco United Sch. Dist. v. JUUL Labs, Case No. 19-op-8177 (N.D. Cal. 2023).

[105] *Id.* at 393.

[106] *Id.* at 393–94.

[107] *Id.* at 394.

[108] Hillel Aron, *Judge Grants Final Approval to $300 Million Class Action Settlement with Vaping Giant Juul*, COURTHOUSE NEWS SERVICE (Mar. 15, 2024) https://www.courthousenews.com/judge-grants-final-approval-to-300-million-class-action-settlement-with-vaping-giant-juul/ [https://perma.cc/3LVD-5H96].

[109] Restatement (Second) of Torts § 821C (Am. L. Inst. 1979).

[110] *Id.*

[111] *Id.* at cmt. B.

[112] CDC, *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, CDC WEB ARCHIVE (Feb. 25, 2020), https://archive.cdc.gov/www_cdc_gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html [https://perma.cc/X4NM-9L6K].

[113] Kendrick, *supra* note 16, at 783.

lawfully sold e-cigarette devices—will likely fail. In *In re Paraquat Products Liability Litigation*, individuals included public nuisance among other product liability causes of actions to seek redress for developing Parkinson's disease after exposure to Paraquat, an ingredient in herbicides.[114] The public nuisance cause of action was dismissed, and the court called the public nuisance claims complaining about the website promoting benefits rather than issuing warnings "repetitive" of the plaintiffs' failure to warn claims and better suited as product liability claim.[115] Additionally, the court said the claim "involves injuries to individuals allegedly caused by direct exposure to Paraquat" and not a condition such as "soil or water contaminated with Paraquat caus[ing] their Parkinson's disease."[116] Therefore, the court concluded it did not interfere with a public right.[117]

Individuals claiming public nuisance in the e-cigarette space would likely face the same response as those in the Paraquat litigation. Individuals exposed and injured by e-cigarettes, like Paraquat, would likely be perceived as having suffered a private injury rather than having a right infringed upon that is collective in nature. Even if individuals can bring a strong case, they would also face opponents with enormous resources, greater access to strong legal defense teams, and well-connected corporate interests as support. In the case of Juul, tobacco giant Altria had a 35% stake, which was valued at $12.8 billion at the time of investment.[118] Notably, Altria is a subsidiary of Phillip Morris—one of four defendants in the 1990s tobacco litigation.[119] Engstrom and Rabin refer to the capabilities of tobacco and opioid manufacturers against individuals as having "a distinct David-versus-Goliath quality," as they were "[r]epresented by the most prestigious corporate law firms" and fought cases "vigorously and to the hilt."[120]

The individual plaintiffs in the Juul MDL brought personal injury and product liability claims, not public nuisance claims.[121] Individual plaintiffs were also not represented in any public nuisance claims in the Juul MDL.[122]

For many of the same reasons the individual plaintiff cases failed before the *parens patriae* tobacco litigation, individuals bringing public nuisance claims in the e-cigarette litigation would likely face stigma, disproportionate resources, or obstacles in meeting the special injury requirement. However, the public right issue in the e-cigarette litigation was different because minors were the impacted parties. In tobacco and opioid litigation, plaintiffs were seen to have assumed the risk of the products' harms by using and

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[114] Complaint at 33, Coburn v. Syngenta Crop Protection, LLC., *in re* Paraquat Prod. Liab. Litig., No. 3:21-MD-3004-NJR, 2022 WL 451898 (S.D. Ill. Feb. 14, 2022).

[115] *In re* Paraquat Prods. Liab. Litig., No. 3:21-MD-3004-NJR, 2022 WL 451898, at *29 (S.D. Ill. Feb. 14, 2022).

[116] *Id* at *31.

[117] *Id* at *31–*32.

[118] Angelica LaVito, *Tobacco Giant Altria Takes 35% Stake in Juul, Valuing E-Cigarette Company at $38 Billion*, CNBC (Dec. 20, 2018, 4:43 PM), https://www.cnbc.com/2018/12/20/altria-takes-stake-in-juul-a-pivotal-moment-for-the-e-cigarette-maker.html [https://perma.cc/3R39-NMDG]; *see also Altria's $13 Billion Juul Investment has Lost 95% of its Value*, CNBC (July 28, 2022, 8:34 AM), https://www.cnbc.com/2022/07/28/altrias-13b-juul-investment-has-lost-95percent-of-its-value.html [https://perma.cc/7NRS-7DSZ] (noting that as of July 2022, Juul's valuation dropped from $38 billion to $450 million due to regulatory and legal concerns).

[119] Engstrom & Rabin, *supra* note 20, at 358

[120] *Id.* at 348.

[121] Order of Motion for Class Certification and Related Daubert Motions at 17, *In re* Juul Labs, Inc. Mktg. Sales Pracs., & Prod. Liab. Litig., 497 F. Supp. 3d 552 (N.D. Cal. 2022) (No. 19-md-02913).

[122] *Id.*

misusing the products, leading "defendants [to] argue that the dangers of cigarette smoking were 'common knowledge' and that [plaintiff] either knew or should have known of these risks."[123] In effect, targeted marketing campaigns to youth may be seen more sympathetically in the context of minors rather than adults. However, injuries directly to minors are better suited as personal injury or product liability claims. Individual injuries, regardless of who the "individual" is, contradict the notion of an interference to a public right.

C. LOCALITIES

Counties and cities are public entities. Counties use their budgets—comprised mainly of federal and state funds, property taxes, and enterprise revenues—to fund public protection, public health, and locally-determined priorities.[124] As such, counties can bring representative public nuisance claims, though some have brought private claims.[125]

Combined in "Government Entities" in the Juul MDL are localities.[126] Despite its standing as a public entity, Santa Cruz County brought a private claim for public nuisance.[127] Santa Cruz County alleged special injuries similar to those of school districts and added what it, as a county, needed to expend.[128] Santa Cruz County specified its education campaigns against vaping, advertising, and banning the sale of flavored tobacco products.[129] It also claimed that its school districts had been overwhelmed, and school administrators reached out to the county for assistance and joint projects in schools.[130] Additionally, Santa Cruz County described its efforts to counter the "hazardous waste problem" of Juuls and Juul Pod disposal to prevent toxic waste from entering its waterways and oceans.[131] The court dismissed Juul's motion to dismiss Santa Cruz County's private, public nuisance claim on the grounds that a county, by definition, could not claim any special injuries.[132] The court dismissed Juul's argument and held there was "at least some basis for a special injury that allows Santa Cruz County's non-representative public nuisance claim to survive the pleadings stage."[133] "At least some basis" does not suggest that private claims are a strong strategy for counties bringing private claims.

Other counties are bringing representative public nuisance claims. Denver County's complaint alleges complaints similar to those of the school districts but at the county level: Juul "injuriously interfered with the functions and operations of . . . Denver and affected the public health, safety,

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[123] GIFFORD, *supra* note 23, at 124.

[124] Scott Graves, *County Budgets: Where Does the Money Come From? How Is It Spent?*, CAL. BUDGET & POL'Y CTR. (Apr. 2018), https://calbudgetcenter.org/resources/county-budgets-where-does-the-money-come-from-how-is-it-spent/ [https://perma.cc/87MZ-7JKV].

[125] Second Amended Complaint at 250, County of Santa Cruz v. Juul Labs, Inc. (*In re* Juul Labs, Inc., Mktg. Sales Pracs., & Prod. Liab. Litig.), No. 19-02913, 497 F. Supp. 3d 552 (N.D. Cal 2020).

[126] *In re* Juul Labs, Inc. Mktg. Sales Pracs., & Prod. Liab. Litig., 497 F. Supp. 3d 552, 650 (N.D. Cal. 2020).

[127] Second Amended Complaint at 250, County of Santa Cruz v. Juul Labs, Inc. (*In re* Juul Labs, Inc., Mktg. Sales Pracs., & Prod. Liab. Litig.), No. 19-02913, 497 F. Supp. 3d 552 (N.D. Cal 2020).

[128] *Id.*

[129] *Id.* at 251–52.

[130] *Id.* at 252.

[131] *Id.* at 254.

[132] *In re* Juul Labs, Inc. Mktg. Sales Pracs., & Prod. Liab. Litig., 497 F. Supp. 3d 552, 650 (N.D. Cal. 2020).

[133] *Id.*

and welfare of the Denver community."[134] Denver County additionally alleged that the defendant's conduct violated its public policy expressed through executive orders, statutes, and regulations that prohibit selling nicotine products to minors, possession of nicotine products by minors, and purchase of nicotine products by minors.[135] Denver County noted hazardous waste in its complaint as impacting the county but did not specifically put it in its public nuisance assertion.[136]

The toxic waste issue stands out as a stronger and more unique claim for counties to assert. Toxic waste and its disposal align more closely with traditional public nuisance claims revolving around a property. Aligning with traditional public nuisance doctrine may help avoid criticism by traditionalists, who assert that public nuisance is not suited toward product liability.[137] Nicotine is recognized by the FDA as an acute hazardous waste.[138] This designation means that improper storage and disposal can lead to accidental exposure, nicotine poisoning, or environmental damage.[139] E-cigarette devices also contain lithium-ion batteries, which, when improperly disposed of, have been linked to explosions in recycling trucks and seepage into bodies of water.[140] At the local level, counties must deal with the immediate fallout of improper disposal. Based on a county's geography, this may entail injuries to bodies of water, agriculture, or damage to waste disposal sites. This claim could require tracking e-cigarette messaging, or lack thereof, on proper disposal of its products to assign culpability, because e-cigarette companies are not directly disposing of the products.

The opioid MDL has seen at least two separate county bellwethers win against corporate defendants on public nuisance claims. San Francisco won on its non-representative public nuisance claim against Walgreens, in which the court found the defendant interfered with all five categories of public rights recognized by the California Supreme Court: "the public health, the public safety, the public peace, the public comfort or the public convenience."[141] The interferences included opioid patients overwhelming hospitals, an increase in crime, public health issues stemming from syringes in public, and city emergency service teams responding to daily calls related to opioid overdoses.[142] Unlike the San Francisco County opioid case, which found a public nuisance violation based on the defendant's continued violation of a statute regulating prescription practices, the counties in the Juul MDL premise the interference with a public right.[143] Denver County alleges

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[134] Complaint at 179, Denver v. Juul Labs, Inc., No. 20-cv-00896 (D. Colo. Apr. 4, 2020).
[135] *Id.* at 184.
[136] *Id.* at 172.
[137] *See* Kendrick, *supra* note 16, at 738.
[138] *Tips for Disposal of E-Cigarettes and E-Liquid Waste*, FDA, https://www.coronado.ca.us/DocumentCenter/View/1169/Best-Practices-and-Safe-Disposal-Information-PDF?bidId=#:~:text=Keep%20them%20in%20a%20separate,remove%20the%20liquid%20nicotine%20residue [https://perma.cc/H8VJ-TWNT] (last visited Jan. 20, 2024).
[139] *Id.*
[140] *Id.*
[141] San Francisco v. Purdue Pharma L.P., 620 F. Supp. 3d 936, 1008 (N.D. Cal. Aug. 10, 2022).
[142] *Id*.
[143] *Id.* at 998. The court explained:

> Plaintiff proved that Walgreens engaged in unreasonable conduct by dispensing hundreds of thousands of red flag opioid prescriptions without due diligence in violation of 21 C.F.R. § 1306.04(a) . . . . Plaintiff proved that Walgreens failed to implement an effective suspicious order monitoring system in violation of 21 C.F.R. § 1301.74.

that the conduct violates its public policy, though it does not have a statute prohibiting the marketing specifically.[144]

Additionally, unlike the counties in the opioids MDL, the Juul MDL counties reference the harms suffered by school districts and the economic losses suffered through supporting school districts. While part of a county's duties is to its school districts, the same school districts' harms are cited at multiple levels via the school district, locality, and even the state AG suits. Repeating the same claim by different government entities undercuts the purpose of public nuisance doctrine in preventing duplicity of cases.

D. TRIBES

Tribes are another unique claimant in e-cigarette litigation. Tribes, unlike school districts, do not fall within the purview of counties. Tribes possess sovereign authority, though they have limited governmental power.[145]

American Indians/Alaska Natives ("AI/AN") have consistently had the highest use of commercial tobacco compared to other groups in the United States since 1978.[146] In the 2019 National Youth Tobacco Survey, 40.4% of AI/AN high school students reported e-cigarette use compared to 27.5% of all high school students, and 16.1% of AI/AN middle school students compared to 10.5% of all middle school students in the United States.[147] Dr. Mary Owen, director of the Center of American Indian and Minority Health at the University of Minnesota, attributed the disproportionate rates to how AI/AN "suffer from the effects of historical trauma and stressors in [their] lives and have problems in the areas of poverty, housing, all of these social determinants of health."[148]

The public right interfered with for tribes is the public health of its citizens, particularly its youth. In the Juul MDL, the Fond du Lac Band cited Juul's marketing to youth, formulating Juul Pods to appeal to youth, and "targeting Native American youth, knowing that Native Americans, in general, are more susceptible to addictive substances such as nicotine" as the interference of a public right.[149]

A challenge for tribes bringing private claims comes in framing the special injury. In the Juul MDL, the Cheyenne and Arapaho tribes stated "unique injuries to the culture and social fabric of the Cheyenne and Arapaho Tribes as well as to the ability of the Cheyenne and Arapaho Tribes to protect its citizens."[150] In *In re Exxon Valdez*, Alaskan Natives brought a public

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[144] Complaint at 184, Denver v. Juul Labs, Inc. (*In re* Juul Labs, Inc., Mktg. Sales Pracs., & Prod. Liab. Litig.), No. 20-CV-02906, 497 F. Supp. 3d 552 (N.D. Cal. 2020).

[145] Nina A. Mendelson, *Tribes, Cities, and Children: Emerging Voices in Environmental Litigation*, 34 J. LAND USE & ENV'T. L. 237, 239–40 (2019).

[146]*Commercial Tobacco Use in American Indian and Alaska Native Populations*, FDA (last updated Oct. 31, 2022), https://www.fda.gov/consumers/minority-health-and-health-equity-resources/commercial-tobacco-use-american-indian-and-alaska-native-populations [https://perma.cc/LRS5-KUDT].

[147] *Tobacco Use in the American Indian/Alaskan Native Community*, TRUTH INITIATIVE (May 28, 2020), https://truthinitiative.org/research-resources/targeted-communities/tobacco-use-american-indianalaska-native-community [https://perma.cc/EUR3-666Z].

[148] Jamie Ducharme, *'It's Insidious': How Juul Pitched E-Cigs to Native American Tribes*, TIME (Feb. 6, 2020, 11:38 AM), https://time.com/5778534/juul-native-american-tribes/ [https://perma.cc/P7RH-736W].

[149] Complaint at 68–69, Fond fu Lac Band of Lake Superior Chippewa v. Juul Labs, Inc., No. 19-02913 (N.D. Cal. June 16, 2020).

[150] Complaint & Demand for Jury Trial at 229, *Cheyenne & Arapaho* Tribes *v. Juul* Labs, Inc., No. 19-md-2913 (N.D. Cal. July 7, 2022).

nuisance claim. They sought to recover economic damages for harvest damage for loss of fishing and noneconomic damages for destruction of their "subsistence way of life."[151] The economic claim for harvest damage was resolved through settlement, but damage to their subsistence way of life was not found to be different "in kind" as required for special injury.[152] The court said, "the right to lead subsistence lifestyles is not limited to Alaska Natives."[153] While the AI/AN groups bringing suit seek economic damages and abatement, *In re Exxon Valdez* suggests that courts may not be sympathetic to arguments that the AI/AN population is more susceptible to tobacco addiction, especially given AI/AN people have historical traditions and rituals involving tobacco.

In *State ex rel. Hunter v. Johnson & Johnson*, the Oklahoma Supreme Court overturned a landmark $465 million settlement regarding opioids.[154] The court stated there was no violation of a public right because "a public right is more than an aggregate of private rights by a large number of injured people."[155] The court additionally declined to extend public nuisance liability to the manufacturing, marketing, and selling of products that work correctly.[156] Following this decision, the Cherokee tribe voluntarily removed its public nuisance claim from its complaint.[157] The Cheyenne and Arapaho tribe, one of three tribal bellwethers scheduled in the Juul MDL, filed suit in the Western District of Oklahoma before its case was consolidated in the Northern District of California.[158]

Notably, tribes were left out of the MSA fund allocation, although the MSA specified that "the Settling States do not purport to waive or release any claims on behalf of Indian tribes."[159] This led to two major tribe lawsuits. The first sought compensation from the tobacco companies for targeting the Native American population and its teenagers.[160] It was dismissed on the grounds that tribes could not recover for money spent on AI/AN healthcare because they are federal funds.[161] The second lawsuit claimed that the tribes should have gotten a share of the MSA. It focused on how AI/AN population numbers in the U.S. Census Report were used to calculate the states' settlement allocations, even though tribes could not receive this money since it would violate tribal sovereignty.[162]

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[151] Alaska Native Class v. Exxon Corp. (*In re* Exxon Valdez), 104 F.3d 1196, 1197 (9th Cir. 1997).
[152] *Id.* at 1197–98.
[153] *Id.* at 1198.
[154] Jan Hoffman, *Oklahoma Supreme Court Throws Out $465 Million Opioid Ruling Against J.&J.*, N.Y. TIMES (Nov. 9, 2021), https://www.nytimes.com/2021/11/09/health/oklahoma-supreme-court-johnson-johnson-opioids.html [https://perma.cc/82MA-VCDL]; *see* Table Bluff Rsrv. (Wiyot Tribe) v. Philip Morris, Inc., 256 F.3d 879 (9th Cir. 2001).
[155] State *ex rel.* Hunter v. Johnson & Johnson, 2021 OK 54, P24 (Nov. 9, 2021).
[156] *Id*. at P34.
[157] Adam Lidgett, *Cherokees Drop 'Public Nuisance' Theory in Opioid Bellwether*, LAW360 (Jan. 11, 2022, 6:55 PM), https://www.law360.com/articles/1454415/cherokees-drop-public-nuisance-theory-in-opioid-bellwether [https://perma.cc/ZJ59-356S].
[158] *In re* Juul Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig., 497 F. Supp. 3d 552 (N.D. Cal. 2020).
[159] Master Settlement Agreement, Section XII(c)(6), STATE OF CAL. DEP'T OF JUST., https://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/1msa.pdf [https://perma.cc/JCD7-769S].
[160] Acoma Pueblo v. Am. Tobacco Co., 2001 WL 37125252 at 1 (D. N.M. Feb. 20, 2001).
[161] Makani Themba-Nixon, Charyn D. Sutton, Lawrence Shorty, Rod Lew, & Lourdes Baezconde-Garbanati, *More Money More Motivation? Master Settlement Agreement and Tobacco Control Funding in Communities of Color*, 4 HEALTH PROMOTION PRAC. 113S, 115S (2004).
[162] *Id.*

E. State Attorney Generals

State AGs are states' chief legal officers and are elected in most states or appointed by the governor. They have the power to represent, defend, and enforce the state and public's legal interests.[163] They can bring claims under their state's specific public nuisance laws, which is important for public nuisance because states have different product liability laws.

Massachusetts AG Maura Healey was the first state AG to investigate the e-cigarette industry over the marketing and sale of e-cigarette devices to minors in 2018 and initiated lawsuits against Juul and Eonsmoke in 2020.[164] Massachusetts was not involved in the thirty-three-state settlement; instead, it later joined seven states in reaching a $462 million multistate settlement in 2023.[165] The Massachusetts complaint defines the interference with a public right as how "Juul engaged in deceptive and unfair marketing and sale of its e-cigarette products to youth, contributing directly to the epidemic of youth nicotine use and addiction, which has resulted in substantial public injuries."[166] The complaint lists four injuries: (1) youth nicotine addiction; (2) health care costs to youth, families, schools, the state, and its subdivisions; (3) "public education costs borne by schools, communities, the Commonwealth, and its subdivisions"; and (4) special public costs in abating the nuisance.[167] The case seeks an injunction and economic recovery for the counties, school districts, and individuals.

North Carolina became the first state to settle with Juul in 2021 for $40 million.[168] The consent order states that the funds will go to education programs, cessation programs, and research.[169] In North Carolina, partisan interests influence how settlement funds are allocated.[170] With the MSA, North Carolina used the funds and saw an all-time low for youth smoking rates in 2011 when $17.3 million was used for tobacco prevention programs.[171] When Republicans won the majority in the General Assembly chambers and governorship, they slashed funding for tobacco prevention and allocated nothing to teen tobacco prevention.[172] In 2021, North Carolina spent $2.2 million on tobacco prevention—2% of the CDC's $99.3 million

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[163] *Powers and Duties*, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/issues/powers-and-duties/ [https://perma.cc/GD6R-54YD].

[164] Office of Attorney General Maura Healey, *AG Healey Announces Investigation into JUUL, Other Online E-Cigarette Retailers Over Marketing and Sale to Minors*, MASS.GOV (July 24, 2018), https://www.mass.gov/news/ag-healey-announces-investigation-into-juul-other-online-e-cigarette-retailers-over-marketing-and-sale-to-minors [https://perma.cc/WG6R-8284]; Office of Attorney General Maura Healey, *Attorney General's Office Lawsuit Against JUUL,* MASS.GOV, https://www.mass.gov/lists/attorney-generals-office-lawsuit-against-juul [https://perma.cc/2GB2-EUKC].

[165] Press Release, Office of the Attorney General Massachusetts, AG's Office Reaches $462M Multistate Settlement with Juul, Secures $41M for Massachusetts (Apr. 12, 2023) https://www.mass.gov/news/ags-office-reaches-462m-multistate-settlement-with-juul-secures-41m-for-massachusetts [https://perma.cc/7KZU-PBH3]; *see generally*, *Juul Litigation Settlement List*, PUBLIC HEALTH LAW CENTER AT MITCHELL HAMLINE SCH. LAW, https://www.publichealthlawcenter.org/resources/juul-litigation-settlement-list [https://perma.cc/BB2V-9DRT] (last visited June 14, 2024).

[166] Complaint at 64, Commonwealth v. Juul Labs, Inc., No. 20-0402, WL 6787752 (Mass. Super. Feb. 12, 2020).

[167] *Id.* at 65.

[168] Anne Blythe, *Juul Settled with North Carolina for $40 million. Now What?*, N.C. HEALTH NEWS (July 1, 2021), https://www.northcarolinahealthnews.org/2021/07/01/juul-settled-with-north-carolina-for-40-million-now-what/ [https://perma.cc/W93E-BQ7U].

[169] Final Consent Judgment at 2, State *ex rel*. Stein v. Juul Labs, Inc., 2021 N.C. Super. Lexis 222.

[170] Blythe, supra note 168.

[171] *Id.*

[172] *Id.*

recommendation.[173] From the first $13 million allotment from the Juul Settlement, $2 million covered litigation costs, $4.4 million went to tobacco cessation programs, $3.3 million covered evidence-based media and education, and $1 million was for data monitoring.[174]

North Carolina's 2021–22 and 2022–23 fiscal budgets allotted $13.4 million to state spending on tobacco prevention, though in 2024, the fiscal budget allotted $13.3 million.[175] This spending brought its state spending rank up from forty-four to twenty-eight.[176] This increase was an improvement; though it is important to note that this all went toward all tobacco cessation programs rather than specific e-cigarette cessation programs and was still low compared to the CDC's $99.3 million recommendation.[177]

In September 2022, Juul agreed to pay a $438.5 million settlement to thirty-three states following the states' two-year investigation into Juul.[178] Connecticut AG William Tong, along with the AGs of Texas and Oregon, led thirty-four states in this investigation and settlement.[179] Tong remarked that the states "have secured hundreds of millions of dollars to help reduce nicotine use and forced Juul to accept a series of strict injunctive terms to end youth marketing and crack down on underage sales."[180]

Connecticut initiated a Civil Investigative Demand ("CID") pursuant to the Connecticut Unfair Trade Practices Act.[181] Most of these states were involved in this CID investigation and did not bring lawsuits with public nuisance claims. CIDs are similar to discovery tools and are usually initiated before lawsuits. AGs can bring CIDs when they suspect an enterprise possesses documentary materials relevant to a racketeering investigation.[182]

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[173] *Id.*

[174] Anne Blythe, *Budget Directs Juul Settlement Funds Toward Tackling Youth Vaping and Nicotine Use*, N.C. HEALTH NEWS (Nov. 19, 2021), https://www.northcarolinahealthnews.org/2021/11/19/juul-settlement-funds-toward-tackling-youth-vaping-and-nicotine-use/ [https://perma.cc/ZTQ7-68ZH].

[175] *State Report: North Carolina*, CAMPAIGN FOR TOBACCO-FREE KIDS (last updated Jan. 8, 2024), https://www.tobaccofreekids.org/what-we-do/us/statereport/north-carolina [https://perma.cc/8RWF-4UUE].

[176] Richard Craver, *Juul Settlement Boosts NC Tobacco-Prevent Efforts in 2022-23, but What Will Happen Going Forward?*, WINSTON-SALEM J. (Jan. 22, 2023), https://journalnow.com/business/local/juul-settlement-boosts-nc-tobacco-prevention-efforts-in-2022-23-but-what-will-happen-going/article_7d5c704c-93a0-11ed-bf02-df5860e1d078.html [https://perma.cc/E3N2-AXMB]; *State Report: North Carolina*, CAMPAIGN FOR TOBACCO-FREE KIDS (last updated Jan. 8, 2024), https://www.tobaccofreekids.org/what-we-do/us/statereport/north-carolina [https://perma.cc/KKW2-UDNN].

[177] CAMPAIGN FOR TOBACCO-FREE KIDS, *supra* note 116.

[178] Elaine S. Povich, *Juul Agrees to Pay Nearly $440M in States' Vaping Investigation*, STATELINE (Sept. 8, 2022, 12:00 AM), https://stateline.org/2022/09/08/juul-agrees-to-pay-nearly-440m-in-states-vaping-investigation/ [https://perma.cc/XHZ9-HCLE] (The thirty-three states are Alabama, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maryland, Maine, Mississippi, Montana, North Dakota, Nebraska, New Hampshire, New Jersey, Nevada, Ohio, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Vermont, Wisconsin and Wyoming).

[179] Office of the Attorney General Connecticut, *Attorney General Tong Leads $438.5 Million Multistate Agreement with JUUL Labs* (Sept. 6, 2022), https://portal.ct.gov/AG/Press-Releases/2022-Press-Releases/AG-Tong-Leads-Multistate-Agreement-With-JUUL-Labs [https://perma.cc/5ENY-QC7K].

[180] *Id.*

[181] Civil Investigative Demand, Connecticut Department of Consumer Protection (July 20, 2019).

[182] 18 U.S.C.§ 1968, the Code states:

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be

Counties, school districts, individuals, and tribes do not have the power to initiate CIDs.

Hawaii—one of the thirty-three states in the settlement—initiated a *parens patriae* action alleging public nuisance in 2020.[183] The complaint defined the interference as an "unreasonable interference with the public health and safety, and the public's enjoyment of its right not to be injured by wrongful conduct."[184] The complaint listed actions the state took to combat the issue: assigning employees to monitor school bathrooms, spending time and resources for school disciplinary actions, training teachers, educating students, investigating, and educating health officials.[185] Much of the state's alleged actions and expenses were focused on addressing the use of Juuls in Hawaiian schools. As a result of the settlement, Hawaii's claims against Juul were resolved.[186]

Concerns about the allocation of the settlement funds, especially after the MSA, loom. Health groups penned a joint letter titled to the AGs of Connecticut, Oregon, and Texas to urge the states to use all the settlement funds for tobacco prevention and cessation.[187] The letter called out the failure of states to use the MSA funds for its intended uses: in 2022, only $718.5 million out of the $27 billion states collected was used on youth tobacco prevention and cessation programs.[188] It concluded by urging the states to translate their stated intentions into action.[189]

Maine opted out of the thirty-four-state settlement, leaving a potential $11.8 million allocation.[190] The settlement included a provision that waived the rights of potential claimants in the states to pursue their own lawsuits.[191] Maine AG Aaron Frey stated he was "unwilling to waive the rights of other entities who are also trying to hold Juul accountable for its deception."[192] This provision reflects a tension between states and local government entities bringing similar lawsuits.

In addition to the settlement money, Juul agreed to marketing and sales limitations such as refraining from youth marketing, funding education programs, social media advertising, giving free samples, and using cartoons.[193] These restrictions were criticized as actions that Juul has already taken. Desmond Jenson, attorney for Mitchell Hamlin's Public Health Law Center, remarked, "the most important difference between the Juul

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served upon such person, a civil investigative demand requiring such person to produce such material for examination.

[183] Complaint, Hawai'i v. Juul Labs, Inc., No. 1CCV-20-0000933 (1st Cir. June 29, 2020).

[184] *Id.* at 138.

[185] *Id.* at 138–39.

[186] Press Release, Office of the Governor David Y. Ige, Attorney General Shikada, 34 States Reach $438.5 Million Agreement with Juul Labs (Sept. 6, 2022), https://ag.hawaii.gov/wp-content/uploads/2022/09/News-Release-2022-33.pdf [https://perma.cc/M4JA-GCWD].

[187] Letter from Am. Cancer Soc'y Cancer Action Network, Am. Heart Ass'n, Am. Lung Ass'n, Ams. for Nonsmokers' Rts., Campaign for Tobacco-Free Kids & Truth Initiative, to William Tong, Attorney General of Connecticut, Ellen Rosenbaum, Attorney General of Oregon, Ken Paxton, Attorney General of Texas (Sept. 27, 2022) (on file with author).

[188] *Id.*

[189] *Id.*

[190] Rose Lundy, *Maine to Walk Away from Multi-Million Dollar Juul Settlement*, MAINE MONITOR (Sept. 23, 2022), https://www.themainemonitor.org/maine-to-walk-away-from-multi-million-dollar-juul-settlement/ [https://perma.cc/V45J-CZ2C].

[191] *Id*.; Final Consent Judgment at 30, State *ex rel*. Stein v. Juul Labs, Inc., 2021 N.C. Super. Lexis 222.

[192] *Id.*

[193] Office of the Attorney General of Connecticut, *supra* note 120.

settlements and the MSA is that the MSA placed marketing and sales restrictions on cigarette manufacturers that didn't already exist at the time."[194] He also criticized the settlement for not including provisions for Juul's internal document disclosure.[195] Document disclosure was a key component of the MSA which later led to the U.S. Department of Justice case in 2006 that brought to light that the tobacco companies conspired to hide the negative effects of smoking.[196] Two state AG settlements—Minnesota and North Carolina—required document disclosure on Juul and Altria's marketing and advertising documents.[197] North Carolina further delegated resources to create a university partnership to publish the disclosed documents and research the health effects of e-cigarettes based on the information.[198]

III. WHO SHOULD BRING THE CLAIM?

Everyone deserves their day in court and the right to bring a claim. When public entities and states all bring similar public nuisance claims in different courts, issues arise. The question of "who should bring the claim" depends on what relief is sought: a day in court, due process, development of substantive law, information disclosure, abatement, or settlement money.

In e-cigarette public nuisance claims, state AGs are likely the strongest plaintiffs: (1) school districts, localities, tribes, and individuals in a mass consolidated MDL are not given the representation and "day in court" that an individual state AG lawsuit gets; (2) protective orders limit the information-sharing function of litigation; (3) settlement allotments are reduced by plaintiff's attorneys' contingency fees; (4) public entity resources usually do not match those of the corporate defendants; and (5) state AGs are best positioned to redistribute earnings to these entities.

At every level, public nuisance claims address youth smoking and expenses related to schools. Counties and states require extra time and resources to aid overwhelmed schools, and school districts discuss their time and resources in mitigating the problem in schools. This issue raises questions about the multiplicity of these actions, which the special injury rule and *parens patriae* standing were designed to constrain. Rather than have every public entity with control over schools bring claims, a state can redistribute the damages to the public entities.

Schools, localities, and tribes have a distinct feature that state AGs do not have in their own cases: their claims can be focused locally on their respective issues. Every state is comprised of diverse subparts and populations and inevitably, a state AG's *parens patriae* claim cannot resolve all the different localized consequences sourced from the e-cigarette crisis.

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[194] Emily Field, *What Ch. 11 May Mean for Juul As It Fights to Stay on Market*, LAW360 (Oct. 5, 2022), https://plus.lexis.com/api/permalink/eff119f2-e09f-4d50-b6d7-636a9ba68a4e/?context=1530671 [https://perma.cc/MM4X-BJX5].

[195] *Id.*

[196] *Id.*

[197] Consent Judgement at 27–31, Minnesota v. Juul Labs, No. 27-CV-19-19888, 2023 Minn. Dist. LEXIS 15319 (C. Minn. May 16, 2023).

[198] University Communications, *University Collaboration to Create Public Depository of Nearly 4 Million Documents Associated with North Carolina Caping Settlement*, U.N.C. NEWS (Jan. 31, 2024) https://uncnews.unc.edu/2024/01/31/university-collaboration-to-create-public-depository-of-nearly-4-million-documents-associated-with-north-carolina-vaping-settlement/ [https://perma.cc/6BQC-NAAT].

The failure of the MSA to reach the affected localities is a key reason many entities are bringing suit now. However, a comprehensive plan to allocate settlement money to these entities results in a more efficient and potentially more rewarding outcome.

State AGs in the opioids litigation challenged localities' abilities to sue through a letter to the court claiming that Judge Polster's concept of a negotiation class "inverts the relationship between each State and its political subdivisions" and violates principles of federalism.[199] Former AGs wrote an open letter criticizing the "barrage of opioid-related lawsuits on behalf of local governments, making it harder for the state-led effort to convince the industry to agree to a comprehensive settlement."[200] The letter goes on that "local lawsuits allege public-nuisance . . . claims typically asserted by attorneys general, but without the statutory enforcement authority that attorneys general possess," referring to AGs powers making it so "[t]hey need only prove that unfair or deceptive conduct occurred—not that it caused their states specific financial damage."[201] In total, it advocates for settlements to go to state AGs and public health systems.[202] Defendants in the opioids litigation also objected to an MDL bellwether saying their previous settlements preclude the localities' federal suits.[203]

These intrastate disputes have implications for information sharing and remedies. Intending to avoid the fund allocation failures of the MSA, localities filed their own suits, and state AGs explored other options, such as supporting ballot measures that would hold all opioid settlement funds in Ohio or putting settlement money into a state university to prevent it from going to the state treasury Oklahoma.[204] State AGs, localities, tribes, and school districts do not trust one another to ensure settlement money goes towards abating the issue.

Moreover, over 97% of cases in MDLs are resolved via settlement or dispositive action.[205] This is because of the "fiction of remand" in which being transferred back to its original jurisdiction is seen as a failure.[206] MDLs are criticized for their lack of ability to contribute substantive law in public nuisance cases because they do not reach a stage where the case is being tried on the merits: "It is no coincidence that the two states that have squarely addressed whether public nuisance extends to opioids are the ones where state litigation has occurred."[207]

Unlike in the opioids MDL in which several bellwethers have taken place, allowing parties to argue in either bench or jury trials, the Juul MDL was settled by Juul in the month before the first bellwether was scheduled,

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[199] Gluck & Burch, *supra* note 35, at 43.

[200] George Jepsen & Perry Zinn Rowthorn, *Leave Opioid Lawsuits to State Attorneys General*, WALL ST. J. (Mar. 3, 2019, 4:44 PM), https://www.wsj.com/articles/leave-opioid-lawsuits-to-state-attorneys-general-11551649471 [https://perma.cc/P4PB-BJ8J].

[201] *Id.*

[202] *Id.*

[203] Gluck & Burch, *supra* note 35, at 44.

[204] *Id.* at 45.

[205] *Id.* at 16.

[206] *Id.* at 15–16.

[207] *Id.* at 63. The states referred to are North Dakota, which declined to extend public nuisance to the sale of goods, and Oklahoma, which reached a settlement that was later overturned by the Oklahoma Supreme Court. *Id.*

though there was one bellwether trial against defendant Altria.[208] While a settlement still reflects a positive outcome and compensation towards economic losses, it does not allow parties to test their legal theories in the courtroom. The purported purpose of bellwether trials to provide a non-committal forum to test out legal theories and inform non-participating plaintiffs did not take place in the Juul MDL. This purpose also means that the settlements do not account for how the parties' claims would have fared in a trial—another purported purpose of bellwether trials. Although less relevant to the actual parties, the development of public nuisance doctrine or any legal theories against e-cigarette products does not take place without trials. With Juul losing its place as the most popular e-cigarette product among youth to disposable e-cigarette products, the development of substantive law surrounding public nuisance doctrine and understanding which arguments are persuasive against e-cigarette companies is important going forward in the fight against the youth e-cigarette use epidemic.[209]

Representation in MDLs is also in question. Consolidating thousands of different lawsuits consisting of different plaintiffs into an MDL sacrifices any nuances unique plaintiffs may have. Moreover, representation is diminished when, despite coming into the MDL with their own counsel, judges appoint lead plaintiff's attorneys to do the pre-trial work, serve as lead counsel, and serve on committees.[210] In MDLs, lead plaintiff's attorneys are usually those with MDL experience rather than connection to the matter.[211]

Many governmental entities suing in the Juul MDL did so with private lawyers who assumed the cost of bringing and litigating cases on a contingency fee basis.[212] Without private lawyers providing funding, many plaintiffs would not be able to bear the litigation costs. On the other hand, private lawyer fees cut into the settlement award. When settlement is the goal from the outset and trial is seen as a failure, lawyers and clients' interests may diverge: "[a]gency risks are greatest when deals are negotiated by lawyers whose franchise existence or scope depends upon whether they succeed in striking a deal."[213] In the Juul MDL, it remains unknown what proportion of the settlement allocation will go to private lawyers. If the plaintiffs' goal is a piece of the settlement without an eye toward abatement or injunction remedies, then private lawyers successfully offer them access. If the goal is an adjudication on the merits, then the structure of an MDL works against them. State AGs can also utilize private outside counsel though it is less likely when state AGs can team up with other state AGs.[214]

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[208] San Francisco United Sch. Dist. v. JUUL Labs, Case No. 19-op-8177 (N.D. Cal. 2023); Atkins, *supra* note 14.

[209] Jamie Ducharme, *Juul Is No Longer U.S. Teenagers' Preferred E-Cigarette. Puff Bar Seems to Have Taken Over*, TIME (Sept. 30, 2021, 1:00 PM), https://time.com/6103004/puff-bar-teen-vaping/ [https://perma.cc/XX2N-4QUK].

[210] Gluck, *supra* note 35, at 13.

[211] *Id.*

[212] Mike Crowley, *PENNCREST Awarded More than $50,000 in Vaping Lawsuit*, YAHOO! NEWS (Mar. 21, 2023, 8:59 PM), https://news.yahoo.com/penncrest-awarded-more-50-000-035900682.html?soc_src=social-sh&soc_trk=ma [https://perma.cc/45G7-JG9A] (agreement with plaintiffs' attorney "calls for 25 percent of any settlement proceeds collected after Jan. 1, 2021, to be paid in attorneys' fees with the possibility of additional fees for expenses associated with the case.").

[213] Erichson, *supra* note 45, at 1302.

[214] Nick Cordova, *Parens Patriae and State Attorneys General: A Solution to our Nation's Opioid Litigation?*, 44 HARV. J. L. & PUB. POL'Y 339, 358 (2021).

Information disclosure is a significant value of litigation. Federal Rules of Civil Procedure Rule 26 enumerates the duty to disclose absent "good cause" or a court order.[215] In MDLs, information may never get disclosed due to the common use of blanket stipulated protection orders. In criticizing the court's use of a protective order in the opioid MDL, the Sixth Circuit questioned whether a motivation was using public disclosure as "a bargaining chip in settlement discussions," which would constitute an improper factor.[216] In an investigative piece, Reuters found that "over the past 20 years, judges sealed evidence relevant to public health and safety in about half of the 115 biggest defective-product cases consolidated before federal judges in . . . MDLs."[217] A major point of information disclosure came from the Oklahoma AG's public nuisance claim against Johnson & Johnson, which led to 33 days of televised trial testimonies, 874 exhibits, and 42 witnesses.[218] The parties in the Juul MDL entered into a stipulated protective order in December 2019.[219] With the Juul MDL headed down the same trajectory as the opioids MDL in terms of information sharing, the impetus was on state AGs to push their own claims to trial or to pursue settlement provisions that mandate disclosure. Only one school bellwether trial took place in the Juul MDL, and it settled during pretrial proceedings. Though only one state AG case reached trial against Juul, it yielded the highest settlement per capita of any state and was one of two states to mandate document disclosure in its settlement agreement.[220]

Most importantly, for purposes of this Note, public entities' private public nuisance claims are constrained by defining an interference to a public right and proving a special injury. Historically, private claims of public nuisance have not fared well in products-related suits. Public entities in the Juul MDL may have gotten some redress through the settlement, but pursuing private rather than representative claims increased their procedural hurdles for standing resulting in settlements before any trial proceedings. An efficient allocation of damages from state AG cases to public entities would have a similar result without these public entities bringing cases.

School districts making a private claim for public nuisance must define the public right being interfered with as interference with education. School districts' complaints describe the additional expenditures schools have taken to combat Juul use at school and diminished education quality. However, it is a challenge for school districts to connect the use of e-cigarette devices in schools to Juul itself. Likewise, counties' complaints about their expenditures to schools for the same reasons have the same barrier: connecting the public right being interfered with to Juul.

Tribes describe the public health of youth and adults as being interfered with by Juul. Tribes will have to confront the high prevalence of tobacco use among these groups before Juul, which complicates assigning culpability to

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[215] FED. R. CIV. P. 26.

[216] Gluck & Burch, *supra* note 35, at 66.

[217] Benjamin Lesser, Dan Levine, Lisa Girion & Jaimi Dowdell, *How Judges Added to the Grim Toll of Opioids*, REUTERS (June 25, 2019, 1:00 PM), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges [https://perma.cc/NRX3-RSX5].

[218] Gluck & Burch, *supra* note 35 at 66.

[219] Protective Order, *In re* Juul Labs, Inc., Mktg. Sales Pracs., & Prods. Liab. Litig., 497 F. Supp. 3d 552 (N.D. Cal. 2019) (No. 19-02913).

[220] Consent Judgement at 27, Minnesota v. Juul Labs, No. 27-CV-19-19888, 2023 Minn. Dist. LEXIS 15319 (C. Minn. May 16, 2023).

Juul, specifically. All these entities must also describe a special injury that positions their injury as different "in kind" from others. In this regard, both tribes and individuals will have to face arguments that their decision to use a Juul means they assumed the risk.

State AGs, in *parens patria* actions, do not face the same stigma. State Attorneys General also have no procedural burden of describing a special injury. This lack of a burden allows them to meet standing requirements more efficiently than these entities. States are also uniquely positioned as representative of their school districts, counties, tribes, and individuals which means states can allocate resources to address each complaint.

The issue of many separate litigations raises specific concerns about Juul's viability to pay. Faced with uncertain FDA regulations testing its menthol and tobacco flavors and litigation, Juul risks bankruptcy, putting its ability to pay settlements into question.[221]

While outside the scope of this Note, there has been extensive scholarship about whether public nuisance claims or litigation, in general, should even be pursued for public health or social issues.[222] The FDA conducted a probe into Juul and could ban Juuls outright.[223] However, many parties in the Juul MDL do not see agency actions as a solution to the issue: "injuries [p]laintiffs have suffered and will continue to suffer cannot be addressed by agency or regulatory action. There are no rules the FDA could make or actions the agency could take that would provide [p]laintiffs the relief they seek."[224] It is up to plaintiffs to decide whether to pursue litigation. The 1990s tobacco litigation helped catalyze regulatory action through document disclosure and public awareness.[225] Likewise, pursuing litigation against e-cigarette companies may help remedy the injuries plaintiffs have sustained or even catalyze change itself.

CONCLUSION

Public nuisance claims in mass product litigations are met with controversy and mixed responses. The tobacco litigation tells us that state AGs could win large settlements using public nuisance theory; cases since then have been mixed. Public nuisance claims in large MDLs, whether private or representative, are unlikely to answer the question of the viability of public nuisance claims by public entities due to issues common to MDLs, such as information secrecy, lack of representativeness, and lack of trials. Additionally, a major sting of public nuisance is lost when the goal is a settlement at the expense of document disclosure, abatement settlement

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[221] Field, *supra* note 133.

[222] *See generally* Engstrom & Rabin, *supra* note 20; Thomas W. Merrill, *Public Nuisance as Risk Regulation*, 17 J. L. ECON. & POL'Y 347 (2022) (suggesting the function of public nuisance is covered by administrative agencies, rendering public nuisance obsolete); David A. Dana, *Public Nuisance Law When Politics Fails*, 83 OHIO STATE L. J. 61, 61 (2022) ("Public nuisance law is not a panacea, but it can play a constructive role in dealing with public harm when politics fails.").

[223] Anna Edney & William Turton, *Juul Devices Cited in Seizure Reports That Started FDA Probe*, BLOOMBERG (Aug. 29, 2019, 11:23 A.M.), https://www.bloomberg.com/news/articles/2019-08-29/juul-devices-cited-in-seizure-reports-that-triggered-fda-probe?utm_source=website&utm_medium=share&utm_campaign=copy [https://perma.cc/EJ2B-9MD8].

[224] Second Amended Complaint at 258, Santa Cruz v. Juul Labs, Inc. (*In re* Juul Labs, Inc., Mktg. Sales Pracs., & Prod. Liab. Litig.), No. 19-md-02913, 497 F. Supp. 3d 552 (N.D. Cal. 2020).

[225] Engstrom & Rabin, *supra* note 20, at 350.

provisions, or the development of substantive law. State AGs can attempt to fill this role in their individual cases by being relentless against early settlement or including aggressive clauses in settlement agreements demanding document disclosure and stringent regulation against the marketing of Juul products. Additionally, any monetary compensation earned from their cases must address the public rights that have been affected. Ultimately, the tools at their disposal differentiate state AGs from the other governmental entities bringing public nuisance claims in e-cigarette litigation. State AGs in the thirty-three-state settlement used CID to investigate Juul, and other state AGs brought *parens patriae* actions against Juul.

Even though the majority of plaintiffs in the Juul MDL did not have their arguments tried in court, the Juul MDL resulted in a settlement. Moreover, many other e-cigarette companies are also perpetuating the youth nicotine epidemic. In 2023, school districts filed lawsuits against social media companies citing students' mental health concerns. The school districts are using similar claims against these social media giants as they alleged against Juul.[226] Provided they meet the procedural requirements, anyone can bring a public nuisance claim, although considerations of multiplicity of actions and positioning as most efficient distributor point to state AGs being the ideal plaintiff in e-cigarette litigation. Without courts outlawing the use of public nuisance claims in product cases, public nuisance doctrine in mass tort product cases is here to stay.

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[226] Golriz Chrostowski, *Analysis: Schools Repurpose Juul Claims Against Meta, Tiktok*, BLOOMBERG LAW (Jan. 30, 2023, 9:49 AM), https://www.bloomberglaw.com/bloomberglawnews/bloomberg-law-analysis/X6Q43EKO000000?bna_news_filter=bloomberg-law-analysis#jcite [https://perma.cc/9AMH-42A9].