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## DEEP POCKET JURISPRUDENCE: WHERE TORT LAW SHOULD DRAW THE LINE

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Civil and criminal laws have long been premised on the fundamental principle that one is responsible only for his or her own misdeeds. The wickedness of the wicked will be charged solely against them. There have been times in American courtrooms, though, where this age-old adage has been cast aside. A sympathetic plaintiff has been injured or public lands or waterways have been polluted, but the party responsible for causing the harm is unknown or cannot pay the damages. So the plaintiff sues someone else, often a peripheral or attenuated business, to pay the claim. Maybe this other company made the product the at-fault party used to cause the harm, made similar products, or contracted with the at-fault party for related services. In each scenario, the company in the courtroom did not cause the harm, but dismissing the claim against that defendant would mean the victim would have no recourse. What are courts to do?

Most courts apply the law impartially. Dedicated to the objective pursuit of justice, judges relate the facts to the cause of action and dismiss any defendant that did not factually or legally cause the alleged harm. A handful of courts, however, have taken a different approach: they have changed the law to allow a finding of liability or have admitted unsupported scientific theories to connect the defendant to the plaintiff's alleged harm. These courts generally offer some wordy legal rationale to prop up their rulings, but a few have been surprisingly candid as to why they changed tort law to allow these claims. A New York judge unveiled the truth when he

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acknowledged he was allowing a clean-up action to proceed against a company that did not cause the pollution, saying “[s]omeone must pay to correct the problem.”<sup>1</sup>

In 2014, the Iowa Supreme Court called out these types of end-game oriented rulings as “[d]eep-pocket jurisprudence.”<sup>2</sup> In the case before that court, a plaintiff was suing the manufacturer of a brand-name drug even though he only took generic versions of the drug, which were made and sold by entirely different companies.<sup>3</sup> In dismissing the case, the Iowa Supreme Court stated, “Deep pocket jurisprudence is law without principle.”<sup>4</sup> It then cautioned courts not to extract payments from those who did not cause the harms alleged.

This article examines four areas of tort law where outlier courts have engaged in “deep pocket jurisprudence.” Part I explains the “innovator liability” theories at the heart of the Iowa Supreme Court case. Part II looks at government suits against manufacturers and others in the chain of commerce to pay the costs of environmental or social harms caused not by the companies themselves, but by users of their products. Part III examines attempts to subject businesses to liability for harms caused by employees of independent contractors. Finally, Part IV looks at car accident cases where the true party at fault (such as an uninsured driver) is unable to pay the full claim, so the court allows a speculative design claim to make the car manufacturer pay for some or all of the injuries. The article concludes that deep pocket jurisprudence should be rejected in all forms and that, often, it is the responsibility of the appellate courts to assure a just result.

### *I. Deep Pocket Jurisprudence in Pharmaceutical Innovator Liability Litigation*

Innovator liability theories first surfaced in prescription drug litigation in the 1990s. A creative plaintiff’s lawyer attempted to subject the brand-name manufacturer of a prescription drug to liability for a client’s injury even

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1. See *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 977 (Sup. Ct. 1983), *aff’d*, *State v. Schenectady Chems., Inc.*, 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984).

2. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) (quoting Victor E. Schwartz et al., *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When the Harm Was Allegedly Caused by Generic Drugs Has Severe Side Effects*, 81 *FORDHAM L. REV.* 1835, 1872 (2013)); see also *Kingman v. Dillard’s, Inc.*, 835 F. Supp. 2d 732, 734 (W.D. Mo. 2011) (referring to the need for courts to avoid reliance on deep pocket jurisprudence), *aff’d*, *Kingsman v. Dillard’s, Inc.*, 721 F.3d 613 (8th Cir. 2013).

3. See *Huck*, 850 N.W.2d at 358-61.

4. *Id.* (citing Schwartz et al., *supra* note 2, at 1872).

though the plaintiff acknowledged that he took only the generic forms of the drug, which were made by other companies.<sup>5</sup> Since then, more than a hundred courts have rejected innovator liability, generally finding that under bedrock principles of both product liability and negligence, a manufacturer is not subject to liability for harms caused by a product that it did not make or sell.<sup>6</sup> Starting in 2008, however, a few courts broke from this orthodoxy. For example, a California Court of Appeal recently held that such liability can follow the innovator into perpetuity, even after it stops making the medicine.<sup>7</sup> This court can be commended for its openness: it acknowledged that, in part, its ruling was intended to provide the plaintiff with a deep pocket to sue in the event the generic drug's manufacturer could not be held liable or provide sufficient damages.<sup>8</sup>

#### *A. Innovator Liability and Traditional Tort Law Principles*

The reason innovator liability has been largely rejected is because it conflicts with a basic tenet of American tort law: there must be a legal relationship, or duty, between a plaintiff and defendant for liability to arise from that relationship. A product manufacturer has a duty of care to its own customers to make lawful, non-defective products.<sup>9</sup> Under traditional tort law, a manufacturer does not have a duty, in strict liability or negligence, to people who use other manufacturers' products.<sup>10</sup> The mere fact that the innovator created, designed, or manufactured the initial product does not create such an expansive duty of care. Otherwise, as the courts have explained, innovators would be de facto insurers of categories of products, many of which they never made or sold.<sup>11</sup>

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5. See generally Schwartz et al., *supra* note 2.

6. See James M. Beck & Mark Herrmann, *Scorecard: Innovator Liability in Generic Drug Cases*, DRUG & DEVICE L. (Nov. 12, 2009), <https://www.druganddevicelawblog.com/2009/11/scorecard-non-manufacturer-name-brand.html>.

7. See *infra* Section I.A.

8. See *T.H. v. Novartis Pharm. Corp.*, 199 Cal. Rptr. 3d 768 (Ct. App.), *superseded by grant of review* *H.(T.) v. Novartis Pharm. Corp.*, 371 P.3d 241 (Cal. 2016).

9. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6 (AM. LAW. INST. 1998) (setting forth product liability principles for sellers of prescription drugs).

10. See, e.g., *O'Neil v. Crane Co.*, 266 P.3d 987, 991 (Cal. 2012).

11. See, e.g., *Bell v. Pfizer Inc.*, No. 5:10CV00101, 2011 WL 904161, \*3 (E.D. Ark. Mar. 16, 2011) (“[I]f Bell’s position were adopted, brand-name drug manufactures [sic] would essentially become the insurers of the generic manufacturers. Not only would brand-name manufacturers bear all of the up-front costs associated with developing drugs, navigating the regulatory maze to obtain FDA approval, and then marketing those drugs, but they would also serve as the permanent insurers for the generic manufacturers, who bear none of the up-front costs.”).

Five courts have broken from these tenets over the past few years by accepting innovator liability in the context of prescription drugs.<sup>12</sup> These courts include two California appellate courts; two federal district courts, one interpreting the law of Vermont and the other the law of Illinois; and the Alabama Supreme Court.<sup>13</sup> Generally, these courts have held that users of generic drugs could pursue the manufacturers of the brand-name drugs under the theory of negligent misrepresentation.<sup>14</sup> Traditional negligent misrepresentation law, though, does not apply to these situations. A defendant must have made a false or misleading statement about the product the plaintiff is *purchasing*, which here is a generic drug, in order to be subject to liability for the plaintiff's harms from that product.<sup>15</sup> The tort is specific to the transaction the defendant tried to influence. In these lawsuits, the innovators are not accused of improperly influencing anyone to purchase generic versions of their drugs. Thus, even under the tort of negligent misrepresentation, there is no legal basis or connection between the innovator and plaintiff who bought generic drugs for this liability.

Nevertheless, these courts gave the users of generic drugs a legal work-around: they held that the plaintiffs could base their negligent misrepresentation claims against the brand-name drug manufacturers solely on statements the innovators made about their own drugs years earlier when they were marketing and selling these products.<sup>16</sup> The courts held that if a

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12. See *Dolin v. SmithKline Beecham Corp.*, 62 F. Supp. 3d 705 (N.D. Ill. 2014); *Kellogg v. Wyeth, Inc.*, 762 F. Supp. 2d 694 (D. Vt. 2010); *Novartis Pharm. Corp.*, 199 Cal. Rptr. 3d at 768; *Wyeth, Inc. v. Weeks*, 159 So. 3d 649 (Ala. 2014); *Conte v. Wyeth, Inc.*, 85 Cal. Rptr. 3d 299 (Ct. App. 2008).

13. See cases cited *supra* note 12.

14. See, e.g., *Conte*, 85 Cal. Rptr. 3d at 311 (“[A] defendant that authors and disseminates information about a product manufactured and sold by another may be liable for negligent misrepresentation where the defendant should reasonably expect others to rely on that information and the product causes injury, even though the defendant would not be liable in strict products liability because it did not manufacture or sell the product.”).

15. It is hornbook tort law that in misrepresentation cases, “the defendant is not liable if the plaintiff relies on the information in a type of transaction the defendant does not intend to influence.” DAN B. DOBBS, *THE LAW OF TORTS* § 480, at 1372 (1st ed. 2000). Brand-name drug companies are not making representations or omissions about generic versions of a drug or versions of a drug that a successor company may sell. They are solely informing physicians about their own products, often years before generic drugs enter the market or they sell the product line to another company.

16. See *Weeks*, 159 So. 3d at 677 (finding that it was not “fundamentally unfair” to hold brand-name manufacturers liable for deficiencies in warning when the deficiencies were “merely repeated” by generic manufacturers); Schwartz et al., *supra* note 2, at 1850

brand-name drug manufacturer misrepresented facts leading to those transactions, it was “foreseeable” that patients, even many years later, could be harmed by generic versions of that drug.<sup>17</sup>

To support these conclusions, the courts made three observations. First, physicians may prescribe a generic drug based on what he or she learned about the brand-name drug in the Physician’s Desk Reference and other materials.<sup>18</sup> Second, federal drug law requires generics to have the same labeling as their brand-name counterparts.<sup>19</sup> And third, under state law, a pharmacy often must fill a prescription with an available generic.<sup>20</sup>

As indicated above, more than one hundred courts, including several federal courts of appeals, have rejected these arguments because a duty in tort law requires more to sustain it than mere foreseeability. The U.S. Court of Appeals for the Sixth Circuit explained the fallacy with these rulings: “generic consumers’ injuries are not the foreseeable result of the brand manufacturers’ conduct, but of laws over which the brand manufacturers have no control.”<sup>21</sup> It was Congress, not the brand-name manufacturer, that made the public policy decision to lower barriers of entry for generic drugs.<sup>22</sup> Similarly, state legislatures enacted the laws that require many prescriptions to be filled with available generics.<sup>23</sup> Using these laws as a basis for supplying the duty element, the Sixth Circuit concluded, “stretches foreseeability too far.”<sup>24</sup> As one Florida court put it, “[n]o federal statute or FDA regulation imposes a duty or suggests that a name brand manufacturer is responsible for the labeling of competing generic products.”<sup>25</sup>

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(discussing *Kellogg* and noting that “[i]t was during this time and upon this information . . . that physicians’ knowledge of a drug was shaped”).

17. See, e.g., *Conte*, 85 Cal. Rptr. 3d at 315 (“[W]e find the conclusion inescapable that Wyeth knows or should know that a significant number of patients whose doctors rely on its product information for Reglan are likely to have generic metoclopramide prescribed or dispensed to them.”).

18. See, e.g., *id.* at 307 (stating the claims “premised on misrepresentations in Wyeth’s labeling of Reglan and in a monograph on Reglan it provided for the Physician’s Desk Reference”).

19. See Schwartz et al., *supra* note 2, at 1849-52.

20. See *Kellogg*, 762 F. Supp. 2d at 705 (finding that “[u]sually the prescriber will not know which generic version will be dispensed by the pharmacy”).

21. *In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig.* 756 F.3d 917, 944 (6th Cir. 2014).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Dietrich v. Wyeth, Inc.*, No. 50-2009-CA-021586, 2009 WL 4924722, at \*7 (Fla. Cir. Ct. Dec. 21, 2009).

Courts have been warning against over-reliance on foreseeability since Judge Cardozo's famous 1928 opinion in *Palsgraf v. Long Island Railroad Co.*<sup>26</sup> "We trace the consequences, not indefinitely, but to a certain point. And to aid us in fixing that point we ask what might ordinarily be expected to follow" the alleged misconduct.<sup>27</sup> The California Supreme Court, which currently has an innovator liability case under review, cautioned in another well-known case, *Thing v. La Chusa*, that on clear days "a court can foresee forever."<sup>28</sup> Cutting off such unreasonable liability, the court continued, "establish[es] meaningful rules."<sup>29</sup>

Because of observations like these, foreseeability is supposed to be only one factor in creating a legal duty. Courts must also consider public policy implications and basic fairness, including whether the defendant had control over the risk that allegedly harmed the plaintiff, the relationship of the parties, and the remoteness of the conduct to the alleged harm.<sup>30</sup> When innovator liability first arose in the 1990s, the U.S. Court of Appeals for the Fourth Circuit explained that the tort of negligent misrepresentation requires a relationship where "one party has the right to rely for information upon the other, and the other giving the information owes a duty to give it with care."<sup>31</sup> In cases of innovator liability, the overwhelming number of courts have found there is no qualifying relationship between the plaintiffs and innovator defendants.

The current case before the California Supreme Court highlights the dangers of foreseeing forever. A California Court of Appeal held that the brand-name drug innovator could be subject to liability for harms caused by other companies' generic drugs, even though the innovator completely divested this product line to another manufacturer years before the plaintiff alleges the generic was made, purchased, or caused injury.<sup>32</sup> Even if the innovator misrepresented a fact about its drug years earlier, the law should not countenance such a perpetual duty to all future consumers of anyone's

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26. 162 N.E. 99 (N.Y. 1928).

27. *Id.* at 105.

28. 771 P.2d 814, 830 (Cal. 1989) (en banc).

29. *Id.* at 828.

30. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 358 (5th ed. 1984) [hereinafter PROSSER & KEETON] (noting duty is "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection").

31. *Foster v. Am. Home Prods. Corp.*, 29 F.3d 165, 171 (4th Cir. 1994) (quoting *Weisman v. Connors*, 540 A.2d 783, 790 (Md. 1988) (applying Maryland law)).

32. *T.H. v. Novartis Pharm. Corp.*, 199 Cal. Rptr. 3d 768, 770 (Ct. App.), *superseded by grant of review* *H.(T.) v. Novartis Pharm. Corp.*, 371 P.3d 241 (Cal. 2016).

comparable drug. The conduct is too remote from the harm for there to be liability.

*B. The Deep Pocket Jurisprudence Generator for Innovator Liability*

So, why would five courts, including a respected state supreme court, depart so far from hornbook tort law? The answer, in part, is deep pocket jurisprudence. In their rulings, some of these courts openly expressed concerns that users of generic drugs may not have sufficient or viable options for recovery if not allowed to sue the brand-name manufacturers.<sup>33</sup>

The basis for this sentiment, at least for the three most recent rulings, was the 2011 U.S. Supreme Court decision in *PLIVA, Inc. v. Mensing*.<sup>34</sup> In *Mensing*, the Court ruled that federal drug law preempts state failure-to-warn claims against manufacturers of generic drugs.<sup>35</sup> The Court found it would be impossible for a generic drug manufacturer to adhere to federal labeling law to issue the “same” warning as approved for the brand-name drug *and* change those warnings to cure defects a jury determines to exist in a state failure-to-warn suit.<sup>36</sup> As a result, a user of generic drugs would be blocked from suing his or her drug’s manufacturer in many cases.

By contrast, two years earlier in *Wyeth v. Levine*, the Supreme Court held that federal drug law does not preempt many comparable failure-to-warn claims against brand-name drug manufacturers.<sup>37</sup> It reasoned that, unlike generic drug manufacturers, makers of brand-name drugs are allowed to add safety information in response to a jury’s failure-to-warn determination and then seek FDA approval for that change.<sup>38</sup> Accordingly, a brand-name drug user can often move forward with failure-to-warn claims against the drug’s manufacturer.

The tension between these divergent decisions did not go unnoticed. The Supreme Court accepted that it eliminated warning-based recoveries for users of generic drugs: “We recognize that from the perspective of [plaintiffs], finding pre-emption here but not in [*Levine*] makes little sense,” and “[w]e acknowledge the unfortunate hand that federal drug regulation

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33. See *Dolin v. SmithKline Beecham Corp.*, 62 F. Supp. 3d 705, 711-12 (N.D. Ill. 2014); *Novartis*, 199 Cal. Rptr. 3d at 777 n.2; *Wyeth, Inc. v. Weeks*, 159 So. 3d 649, 670 (Ala. 2014).

34. 564 U.S. 604 (2011).

35. *Id.* at 609 (“The question presented is whether federal drug regulations applicable to generic drug manufacturers directly conflict with, and thus pre-empt, these state-law claims. We hold that they do.”).

36. *Id.* at 620-21.

37. 555 U.S. 555, 573 (2009).

38. *Id.*



has dealt” users of generic drugs with respect to failure-to-warn suits.<sup>39</sup> The *Mensing* dissenters (Justices Sotomayor, Ginsburg, Breyer, and Kagan) also highlighted the implications for users of generic drugs, cautioning that “whether a consumer harmed by inadequate warnings can obtain relief turns solely on the happenstance of whether her pharmacist filled her prescription with a brand-name or generic drug.”<sup>40</sup>

The *Mensing* majority continued that the solution is for Congress to change FDA labeling laws so that preemption applies equally to users of generic and brand-name drugs.<sup>41</sup> This is a federal law quandary with a federal law solution. Yet, a handful of courts have responded by giving users of generic drugs a path for recovery under state tort law: to sue the manufacturers of the corresponding brand-name drug under the common law tort of negligent misrepresentation, as discussed above. In their view, *Mensing* undermined cases rejecting innovator liability.<sup>42</sup> After the *Mensing* Court held that federal law pre-empted state failure-to-warn suits against manufacturers of generic drugs, the courts argued that these other rulings were no longer valid because they were decided when consumers of generic drugs could obtain awards from the manufacturers of the drugs they took.<sup>43</sup>

In the years since *Mensing*, innovator liability has remained the outlier view.<sup>44</sup> Dozens of courts have now ruled on this issue; the response from almost all courts has been to apply traditional state product liability and tort law, even when doing so leads to unfortunate results for users of generic drugs.<sup>45</sup> As these courts have explained, *Mensing* had nothing to do with whether innovator liability is a viable theory under state tort law, and they should not “contort” negligent misrepresentation theory to give users of generic drugs avenues for compensation.<sup>46</sup> These courts appreciated that,

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39. *Mensing*, 564 U.S. at 625.

40. *Id.* at 627 (Sotomayor, J., dissenting).

41. *Id.* at 621 (majority opinion).

42. *See Dolin v. SmithKline Beecham Corp.*, 62 F. Supp. 3d 705, 711-12 (N.D. Ill. 2014); *T.H. Novartis Pharm. Corp.*, 199 Cal. Rptr. 3d 768, 777 n.2 (Ct. App.), *superseded by grant of review* *H.(T.) v. Novartis Pharm. Corp.*, 371 P.3d 241 (Cal. 2016); *Wyeth Inc. v. Weeks*, 159 So. 3d 649, 670 (Ala. 2014).

43. *See, e.g., Weeks*, 159 So. 3d at 665 (marginalizing cases “issued before the Supreme Court decided *PLIVA*. Accordingly, the federal court’s conclusion . . . that a generic manufacturer becomes responsible for its own warning label after the ANDA process is incorrect.”).

44. *See Beck & Herrmann, supra* note 6.

45. *See Schwartz et al., supra* note 2.

46. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014). As one federal judge explained, “I cannot find that a decision to hold a manufacturer liable for injury caused by its

regardless of whether one thinks *Mensing* is fair or unfair or whether users of generic drugs should or should not have paths to recovery, innovator liability should still find no support in common law torts.

In fact, a closer look at *Mensing* supports this view. Before *Mensing* reached the Supreme Court, the United States Court of Appeals for the Eighth Circuit dismissed the plaintiff's innovator liability claims.<sup>47</sup> Thus, the Supreme Court issued its preemption ruling in *Mensing* in full light of an earlier denial of innovator liability and decided not to disturb that determination. After the Supreme Court's ruling, the Eighth Circuit affirmed that *Mensing* did not alter its ruling against innovator liability.<sup>48</sup>

For these and other reasons, the Alabama Legislature overrode its state's innovator liability ruling.<sup>49</sup> In the legislative session immediately following the court's ruling in *Weeks*, the Legislature passed a bill making it clear that a manufacturer can be subject to liability only for its own product even when its "design is copied or otherwise used by [another] manufacturer."<sup>50</sup> Legislatures rarely override judicial rulings, and so it was important that this one was done with broad bipartisan support. The bill passed the Alabama Senate 32-0 and the House 86-14.<sup>51</sup> This enactment has curbed momentum for innovator liability in the wake of *Mensing*.

### *C. Innovator Liability, Like Other Attempts at Deep Pocket Jurisprudence, Lacks a Viable Limiting Principle*

As seen in these cases, a hallmark of deep pocket jurisprudence is the lack of any real limiting principle. A court engaging in such jurisprudence seeks to create liability despite the rational rule of law. Courts allowing innovator liability have suggested that federal drug law makes prescription

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competitor's product is rooted in common sense." Phelps v. Wyeth, Inc., No. 09-6168-TC, 2010 WL 2553619, at \*2 (D. Or. May 28, 2010).

47. See *Mensing v. Wyeth, Inc.*, 588 F.3d 603 (8th Cir. 2009), *aff'd in pertinent part and vacated in part on other grounds*, 658 F.3d 867 (8th Cir. 2011).

48. In response to the Supreme Court's ruling in *Mensing*, the Eighth Circuit mistakenly vacated its entire judgment, not just the part affected by the high court's decision. In response to a motion from the brand-name manufacturers to reinstate the part of its earlier ruling against competitor liability, the Eighth Circuit reinstated that part of the opinion. See *Mensing v. Wyeth, Inc.*, 658 F.3d 867 (8th Cir. 2011).

49. See PHIL GOLDBERG, PROGRESSIVE POL'Y INST., SHOWDOWN IN ALABAMA: LITIGATORS VS. INNOVATORS (PPI Policy Brief, Sept. 2015), [http://www.progressivepolicy.org/wp-content/uploads/2015/09/2015.09-Goldberg\\_Showdown-in-Alabama-Litigators-vs-Innovators.pdf](http://www.progressivepolicy.org/wp-content/uploads/2015/09/2015.09-Goldberg_Showdown-in-Alabama-Litigators-vs-Innovators.pdf).

50. ALA. CODE § 6-5-530(a) (2015).

51. GOLDBERG, *supra* note 49, at 2.

drugs unique and, therefore, innovator liability can be limited to drugs regulated by federal law. Tort history, though, has repeatedly demonstrated that once a court introduces a liability-expanding principle against one product or industry, it migrates to others. Future plaintiffs will argue that innovators of other products, not just pharmaceuticals, will be subject to liability for not warning about harms caused by products they did not make.

In fact, in striking down innovator liability for prescription drugs, the Iowa Supreme Court identified this problem. It asked: “Where would such liability stop? If a car seat manufacturer recognized as an industry leader designed a popular car seat, could it be sued for injuries sustained by a consumer using a competitor’s seat that copied the design?”<sup>52</sup> The scenarios where such allegations can be made are vast. What if a foreign company over which the U.S. courts do not have jurisdiction reverse engineers an American manufacturer’s product and sells it with identical packaging, instructions and warnings? What if, instead of FDA law creating the link between the innovator and subsequent generic product, federal patent law is used to link the two? Should anyone who files a patent and divulges the design of a product foresee that a consumer will be injured by a knock-off or modified version of its product, regardless of whether it is before or after the patent expires?

In today’s economy, innovations are frequently copied. Some product copying is legal, as it is common to walk through a supermarket or drugstore aisle and find brand-name products side-by-side with store brand products listing the same ingredients and packaged to resemble the original. Other copying scenarios are not so legal. Foreign companies have a history of creating clones of many products, including Apple’s iPhones and iPods, Chevy automobiles, Nike and Reebok sneakers, Callaway golf clubs, Intel processors, and Duracell batteries.<sup>53</sup> If innovator liability is allowed for pharmaceuticals, plaintiffs’ lawyers in these other contexts will argue that the pervasiveness of generic products, reverse engineering, and counterfeiting makes it foreseeable that other companies will replicate designs and that consumers will be hurt by these and other replicas. The

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52. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014).

53. See Jacob Bogage, *This Car Company Ripped Off Land Rover. Here’s Why It Might Get Away with It*, WASH. POST (July 19, 2016) [http://www.washingtonpost.com/news/the-switch/hp/2016/07/19/this-car-company-ripped-off-land-rover-heres-why-it-might-get-away-with-it/?utm\\_term=.5b45c6547\da](http://www.washingtonpost.com/news/the-switch/hp/2016/07/19/this-car-company-ripped-off-land-rover-heres-why-it-might-get-away-with-it/?utm_term=.5b45c6547\da); Dan Koepfel, *China’s iClone*, POPULAR SCI. (Aug. 7, 2007), <http://www.popsci.com/iclone>.

risk of this liability is not farfetched: some manufacturers have already received complaints about products they did not produce.<sup>54</sup>

The practical complications of innovator liability would be felt by consumers, employees, and businesses alike. In many industries, innovator liability would spur multiple, potentially conflicting warnings. Some manufacturers might provide overly harsh warnings solely designed to reduce liability exposures. Other manufacturers may be more accurate or work with a government agency to identify a proper balance between actual risks and benefits. The resulting confusion would likely cause consumers to discount warnings and fuel the public's contempt for warnings in general.

For prescription drugs, courts have raised public health concerns with innovator liability. In today's post-patent marketplace, generics quickly seize up to ninety percent of the market for a drug.<sup>55</sup> A concern with saddling a company whose sales constitute ten percent of the market with one hundred percent of the liability is that people would have to pay higher prices for brand-name prescriptions during a drug's period of exclusivity so the company could amass resources to pay anticipated innovator liability claims in the future. Further, it will be riskier for brand-name drug manufacturers to innovate important medicines, particularly when a drug may come with major side effects or is designed for small classes of patients and will not drive the large revenues needed to pay for claims involving generics. There are no therapeutic benefits to innovator liability.

The civil justice system for prescription drugs should remain principled. Disproportionate liability is not an accurate measure of deterrence. If labeling or marketing practices overstate benefits or downplay risks, a brand-name manufacturer can be subject to significant liability already, as well as substantial civil fines. Brand-name and generic drugs may be bioequivalent, and federal and state law may encourage the availability of generic drugs, but that does not make brand-name manufacturers their competitors' keepers.

## *II. Deep Pocket Jurisprudence in Government Public Nuisance Litigation*

The effort to turn the tort of public nuisance into deep pocket jurisprudence for environmental and social risks and harms started in the

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54. See Koepfel, *supra* note 53.

55. See IMS INST. FOR HEALTHCARE INFORMATICS, THE USE OF MEDICINES IN THE UNITED STATES: REVIEW OF 2010, at 22 (Apr. 2011), [https://www.imshealth.com/files/web/imsH%20Institute/Reports/The%20Use%20of%20Medicines%20in%20the%20United%20States%202010/Use\\_of\\_Meds\\_in\\_the\\_U.S.\\_Review\\_of\\_2010.pdf](https://www.imshealth.com/files/web/imsH%20Institute/Reports/The%20Use%20of%20Medicines%20in%20the%20United%20States%202010/Use_of_Meds_in_the_U.S._Review_of_2010.pdf).

1960s.<sup>56</sup> The goal of this movement has been to require businesses, rather than individual wrongdoers or taxpayers, to remediate environmental damage *en masse* or pay the costs of social harms, even when the business sued did not cause the harm alleged.<sup>57</sup> As with innovator liability, there is no doctrinal support for creating such liability under traditional tort law. Plaintiffs can succeed only when courts issue end-game oriented rulings.

The tort of public nuisance has roots in centuries-old English common law.<sup>58</sup> It has always had a narrow purpose: to allow governments to use the tort system, rather than criminal or regulatory law, to stop someone from unlawfully interfering with a public right and to make that person repair any damage he or she has caused to the public right.<sup>59</sup> Typical public nuisance suits seek to stop quasi-criminal conduct, including unlawfully blocking a public road or illegally dumping pollutants into a public river.<sup>60</sup> The court can issue an injunction against the action causing the public nuisance and require the payment of abatement costs.

In the late 1960s, when Dean Prosser was drafting the public nuisance chapters of the Restatement (Second), environmental lawyers sought to expand the types of conduct that could lead to public nuisance liability.<sup>61</sup> Instead of quasi-criminal conduct, they wanted public nuisance liability to attach to any conduct, even when fully lawful and regulated.<sup>62</sup> This way,

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56. See Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2006).

57. See Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 838 (2001).

58. See *id.* After the New Deal and growth of government regulation in the 1930s, public nuisance had become a fairly dormant tort in the United States. As a result, many judges were not familiar with its doctrinal roots and scholars conceded that because the term nuisance could mean “all things to all people” there was confusion over how the tort could be used. The environmentalists tried to leverage this confusion in seeking their changes in the Restatement (Second). See PROSSER & KEETON, *supra* note 30, § 86, at 616 (“There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’”).

59. In the absence of significant regulation, public nuisance became a substitute for governments that “could not anticipate and explicitly prohibit or regulate through legislation all the particular activities that might injure or annoy the general public.” Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 804 (2003).

60. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. LAW. INST. 1979) (providing examples of public nuisances).

61. See *id.*; Antolini, *supra* note 57, at 838 (recounting in detail the specific developments in the 1960s and 1970s that could have led to “breaking the bounds of traditional public nuisance”) (citation omitted).

62. See Antolini, *supra* note 57, at 838.

manufacturers could face broad-based public nuisance liability whenever people created nuisances with their products. The environmental lawyers believed that suing the individual wrongdoers one-by-one would be inefficient, whereas the deep-pocketed manufacturer could address the issue on a macro scale.<sup>63</sup> Public nuisance, however, has proven not to be so malleable. It is strictly an activity-based tort, not a manufacturing one. Thus, the person or entity who wrongfully blocks the roadway or dumps the chemicals is responsible for the public nuisance, not the manufacturer of the materials the wrongdoer used to create the public nuisance.<sup>64</sup>

The first test case for expanding public nuisance theory was an effort to clean up smog in Los Angeles in the 1970s. Plaintiffs sued dozens of companies whose activities and products caused the smog.<sup>65</sup> The purpose of this suit was to regulate emissions through tort liability, however, and was not necessarily deep pocket jurisprudence as defined in this article. In dismissing the lawsuit, the California Court of Appeal explained that there is a “system of statutes and administrative rules” that govern emissions in this country and that engaging in lawful commerce cannot be re-categorized as tortious conduct, even when contributing to a public nuisance.<sup>66</sup> This case reinforced the traditional understanding of public nuisance theory.<sup>67</sup>

The deep pocket jurisprudence variant of public nuisance litigation became evident in a high-profile water pollution case in New York during the 1980s. A defunct waste management firm had illegally dumped materials into a river years earlier, and the school board that owned the property in the 1980s did not have the resources to clean it up.<sup>68</sup> The local government sued the company that contracted with the polluter in the 1950s

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63. Dean Prosser wrote in 1966 that “[a] public or ‘common’ nuisance is always a crime. . . . a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming-house or indecent exposure.” William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997-99 (1966).

64. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. B. Examples of public nuisances include storing explosives in a city, interfering with reasonable community noise levels, and interfering with breathable air by emitting noxious odors into a public area. See *id.*

65. *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639, 641 (Ct. App. 1971).

66. *Id.* at 645. Plaintiffs were “asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of court.” *Id.*

67. The court also rejected the ability of private citizens to bring a public nuisance claim seeking injunctive relief and the use of public nuisance class actions. *Id.* at 642-44.

68. *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 974 (Sup. Ct. 1983), *aff’d*, *State v. Schenectady Chems., Inc.*, 479 N.Y.S.2d 1010 (App. Div. 1984).

and 1960s to dispose of the waste that was dumped unlawfully into the river.<sup>69</sup> This company, though, did not engage in the act of polluting the waterway, never owned or controlled the land where the pollution took place, and did not know of the illegal dumping.<sup>70</sup> Nonetheless, after acknowledging the doctrinal and factual shortcomings of this lawsuit, the court allowed the claim to proceed with the surprising and open-ended observation that “[s]omeone must pay to correct the problem.”<sup>71</sup>

Since the 1980s, there have been several more completely overt attempts at deep pocket public nuisance jurisprudence. These cases did not focus on a discrete site or incidence of harm, but on subjecting manufacturers or entire industries to paying the costs associated with the way people use, misuse, or dispose of products.

Allowing such broad-based liability requires courts to change core elements of public nuisance theory. For example, some suits have attempted to get rid of the requirement that the alleged injury be to a public right, arguing that only a public *interest* need be involved or that an aggregation of private rights is equivalent to a public right.<sup>72</sup> Other suits have alleged that government public nuisance suits, because of their broad-based nature, should not require proximate cause between any defendant’s conduct and a specific public nuisance; rather, they argue that any generalized contribution to the risk of harm should be sufficient to create liability.<sup>73</sup> These attempts to change the tort of public nuisance have largely failed because they are out-of-step with essential characteristics of the tort.<sup>74</sup>

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69. *Id.*

70. *See id.* at 976 (adhering to the expansive definition of “nuisance” as “no more than harm, injury, inconvenience, or annoyance” (quoting *Copart Indus. v. Consol. Edison Co. of N.Y., Inc.*, 362 N.E.2d 968, 970 (N.Y. 1977)).

71. *Id.* at 977.

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That which might benefit (or harm) “the public interest” is a far broader category than that which actually violates “a public right.” For example, while promoting the economy may be in the public interest, there is no public right to a certain standard of living (or even a private right to hold a job). Similarly, while it is in the public interest to promote the health and well-being of citizens generally, there is no common law public right to a certain standard of medical care or housing.

Gifford, *supra* note 59, at 815-16.

73. *See, e.g.,* Thomas *ex rel.* Gramling v. Mallett, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523 (Wis. 2005), *superseded by statute*, S.B. 1, 2011, *as stated in* Clark v. Am. Cyanamid Co., No. 06CV12653, 2015 WL 1257118 (Wis. Cir. Mar. 25, 2014).

74. *See* Schwartz & Goldberg, *supra* note 56, at 561-70.

### A. Suing Product Manufacturers for Harms Caused by Others

A significant shift in these cases started in the 1990s when governments, with the aid and encouragement of private contingency fee lawyers, began suing product manufacturers for environmental and social harms associated with the use, misuse, or disposal of products.<sup>75</sup> For example, gun manufacturers were sued over criminal gun violence, and former manufacturers of lead paint were sued when landlords allowed the paint to deteriorate and become hazardous.<sup>76</sup> Rather than sue the individual tortfeasors, namely the criminals or slumlords in these examples, the governments targeted the manufacturers of products that the wrongdoers used to create the environmental or social harm. The argument was not that the products were defective, but that the manufacturers that made money from selling the products should have to pay their share to remediate the harms caused by them.<sup>77</sup> The governments wanted the products' prices to incorporate their "true" cost to society.<sup>78</sup>

If liable under these theories, manufacturers could be responsible for abating public nuisances around the country, often with few defenses. The traditional tenets of product liability and tort law, including the lack of a manufacturer's wrongdoing, a product's utility, the overall public interest, and the lapse of time since the product was lawfully made and sold, would take a back seat to this desire for a new, deep-pocketed revenue source.

#### 1. Suing Firearm Manufacturers for Criminal Gun Violence

The first widespread effort to expand public nuisance litigation to pay costs of a social harm was municipal litigation against firearm manufacturers over criminal gun violence.<sup>79</sup> The governments generally

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75. See Victor E. Schwartz et al., *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923 (2009).

76. See, e.g., *Miller v. Home Depot, USA, Inc.*, 199 F. Supp. 2d 502, 509-10 (W.D. La. 2001) (treated lumber); *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997) (tobacco); *E.S. Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1494 (N.D. Ala. 1995) (chemicals); *Johnson Cty., Tenn. ex rel. Bd. of Educ. of Tenn. v. U.S. Gypsum Co.* 580 F. Supp. 284, 294 (E.D. Tenn. 1984), *set aside on other grounds*, *Johnson Cty., Tenn. v. U.S. Gypsum Co.*, 664 F. Supp. 1127 (E.D. Tenn. 1985) (asbestos); *City of St. Louis v. Cernicek*, 145 S.W.3d 37, 43 (Mo. Ct. App. 2004) (firearms); *DiCarlo v. Ford Motor Co.*, 409 N.Y.S.2d 417 (App. Div. 1978) (auto manufacturers).

77. See *infra* Section II.A.1.

78. See *infra* Section II.A.1.

79. Professor David Kairys of the Beasley School of Law worked with cities to file public-nuisance claims against gun manufacturers. See David Kairys, *The Origin and*



alleged that it was foreseeable to the manufacturers “that their conduct will cause handguns to be used and possessed illegally and that such conduct produces an ongoing nuisance that has a detrimental effect upon the public health, safety, and welfare of the residents.”<sup>80</sup> Accordingly, the governments alleged, manufacturers should reimburse governments for the “costs of enforcing the law, arming the police force, treating the victims of handgun crimes, implementing social service programs, and improving the social and economic climate” in the individual municipalities.<sup>81</sup>

A few courts initially accepted this novel view of public nuisance theory.<sup>82</sup> In *City of Gary v. Smith & Wesson Corp.*, the Indiana Supreme Court recognized that it was acting without precedent in allowing the claim to proceed.<sup>83</sup> It held that a public nuisance could be an activity that injures or inconveniences others that is grave and foreseeable, regardless of whether a public right is violated or the defendant’s conduct was unreasonable.<sup>84</sup> According to the court, the victims should be compensated in order for the activity to continue. “If the marketplace values the product sufficiently to accept that cost, the manufacturer can price it into the product.”<sup>85</sup>

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*Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163, 1172 (2000) (stating that although tobacco public-nuisance claims “never [won] in court,” they were a “vehicle for settlement” and a model for gun suits).

80. *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 2002-Ohio-2380, 768 N.E.2d 1136, at ¶ 7, *superseded by statute as stated in* *City of Toledo v. Sherwin-Williams Co.*, No. Cl 200606040, 2007 WL 4965044 (Ohio Com. Pl. Dec. 12, 2007).

81. *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 115 (Conn. 2001).

82. *See* *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1232 (Ind. 2003) (allowing a public-nuisance claim to proceed); *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 2d 416, at ¶¶ 12-16, 768 N.E.2d at 1143-44 (allowing a public-nuisance claim to proceed). *But see* *City of Phila. v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002) (dismissing public-nuisance claims under Pennsylvania law); *Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (same under New Jersey law); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1148 (Ill. 2004) (same under Illinois law); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 203 (App. Div. 2003) (same under New York law); *Ganim*, 780 A.2d at 133 (same under Connecticut law); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001) (same under Florida law).

83. 801 N.E.2d 1222, 1232 (Ind. 2003) (“We are not persuaded that a public nuisance necessarily involves either an unlawful activity or the use of land. Defendants cite no Indiana case that establishes this requirement, but point out that all Indiana cases to date have fallen into one of these two categories. We think that is due to the happenstance of how the particular public nuisance actions arose and not to any principle of law.”).

84. *Id.* at 1231.

85. *Id.* at 1234.

In contrast, the Illinois Supreme Court set forth the majority view in a pair of lawsuits, one brought by the City of Chicago and the other by private plaintiffs.<sup>86</sup> The Court performed a full doctrinal analysis of public nuisance theory, looking at the elements and standards of proof that public and private plaintiffs must satisfy to bring a claim.<sup>87</sup> In dismissing the suits, the court reinforced the requirement that a public right must be implicated, stating that the “right to be free from the threat that members of the public may commit crimes against individuals” was not a public right.<sup>88</sup> It may be a personal right or an issue of public concern, but not the kind of public right that public nuisance theory was intended to enforce. The court also held that balancing the harm and utility of guns is a policy question for the legislature, not the courts.<sup>89</sup> Lawfully selling a product is not an activity within traditional boundaries of public nuisance theory.<sup>90</sup>

Many courts also expressed concerns with the lack of a limiting principle for this new liability. As one court concluded, if the mere existence of a public nuisance gave rise to these actions, any number of product liability actions could be converted into public nuisance suits.<sup>91</sup> Said another:

All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or industry makes, markets and/or sells its non-defective, lawful

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86. See *Beretta U.S.A. Corp.*, 821 N.E.2d at 1112 (dismissing public nuisance claim by public plaintiff under the fact pleading standard that the “court must disregard the conclusions that are pleaded and look only to well-pleaded facts to determine whether they are sufficient to state a cause of action against the defendant”); see also *Young v. Bryco Arms*, 821 N.E.2d 1078, 1083 (Ill. 2004) (dismissing public nuisance claim by private plaintiffs).

87. *Beretta U.S.A. Corp.*, 821 N.E.2d at 1110-12.

88. *Id.* at 1114-16 (“We are also reluctant to recognize a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it.”); see also *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) (stating that under New Jersey law, “the scope of nuisance claims has been limited to interference connected with real property or infringement of public rights”).

89. See *Beretta U.S.A. Corp.*, 821 N.E.2d at 1121 (“We are reluctant to interfere in the lawmaking process in the manner suggested by plaintiffs, especially when the product at issue is already so heavily regulated by both the state and federal governments.”).

90. See *id.* at 1117-18.

91. See *Cty. of Johnson v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984).

product or service, and a public nuisance claim would be conceived and a lawsuit born.<sup>92</sup>

A third stated that a finding of liability based on whether a product was used by criminals would be “staggering.”<sup>93</sup>

The firearms litigation largely subsided by 2005, but it was revived in the aftermath of the horrific 2012 shooting at Sandy Hook Elementary School in Connecticut when families of the victims sued the manufacturers of guns used in the assault.<sup>94</sup> The lawsuit did not involve public nuisance theory, but the tort of negligent entrustment.<sup>95</sup> As the Connecticut Superior Court made clear in rejecting the claim, manufacturers are also not subject to liability under negligent entrustment theory for criminal acts committed by others using their guns.<sup>96</sup> Here, the manufacturers did not entrust the teenage shooter in Connecticut with any firearms; he obtained the guns from his mother, who he also shot and killed.<sup>97</sup> Because neither mother nor son could compensate the plaintiffs, the families pursued the manufacturers to pay for their losses. As of this writing, the case remains under review by the Connecticut Supreme Court.<sup>98</sup>

## *2. Suing Former Manufacturers of Lead Pigment and Paint for Lead Poisoning*

Another long-running attempt at deep pocket public nuisance jurisprudence has been the twenty-year attempt to force former lead pigment and paint manufacturers to pay the cost of abating lead paint from older homes. The use of white lead pigment in interior paints was largely

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92. *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (App. Div. 2003).

93. *Ileto v. Glock, Inc.*, 370 F.3d 860, 862 (9th Cir. 2004) (Callahan, J., dissenting); *see also* *Tioga Pub. Sch. Dist. #15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (noting that to hold otherwise would “give rise to a cause of action . . . regardless of the defendant’s degree of culpability or of the availability of other traditional tort law theories of recovery”).

94. *See Soto v. Bushmaster Firearms Int’l, LLC*, FBTCV156048103S, 2016 WL 8115354 (Conn. Super. Ct. Oct. 14, 2016).

95. *See id.* at \*3-4.

96. *See id.* at \*5-10 (“The court does not agree with the plaintiffs’ assertion that the common law recognizes a class as broad as civilians to support a claim for negligent entrustment.”).

97. *Id.* at \*1.

98. *See* Dave Altimari, *Sandy Hook Gun Case to Be Heard by Reconfigured Supreme Court*, HARTFORD COURANT (Oct. 19, 2017), <http://www.courant.com/news/connecticut/hc-news-sandy-hook-gun-case-20171019-story.html>.

discontinued in the 1950s.<sup>99</sup> When lead-based paint applied before then deteriorated from poor maintenance in later years, it became a health hazard for children who ingested the flaking paint chips.<sup>100</sup> Since the 1970s, many local governments have put in place strict laws requiring landlords to maintain lead-safe housing units and social programs to reduce lead poisoning.<sup>101</sup> These efforts have worked, as communities from Maryland to California have seen significant reductions in lead poisoning from paint, gasoline, and other sources such that lead poisoning is no longer a major public health issue.<sup>102</sup>

The lawsuits against the former manufacturers were initiated in the late 1990s by the nationally known law firm Motley Rice, which partnered with state and local governments in the litigation. Their first suit was filed on behalf of Rhode Island for the costs of abating lead paint in homes throughout the state, which was estimated to cost \$4 billion.<sup>103</sup> The trial court diluted the standards of proof needed to succeed, leading to a verdict for the state.<sup>104</sup> Rather than requiring a violation of a public right, the court allowed liability to be based solely on allegations related to private residences.<sup>105</sup> As in the gun cases, the court did not require the defendants' conduct to be unreasonable; rather, the court relied on the notion that it would be unreasonable for the children to have to bear the cost of their injuries.<sup>106</sup> Finally, the court vitiated the proximate cause requirement, instructing the jury that it "need not find that lead pigment manufactured by

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99. See Petition for Writ of Certiorari, *State v. Lead Indus. Ass'n*, No. 2004-63-MP (R.I. Super. Ct. Mar. 2, 2004), 2004 RI S. Ct. Pleadings LEXIS 4, \*8; Edward Fitzpatrick, *Paint Maker Seeks Ruling on Judge in Lead Case*, PROVIDENCE J., Aug. 19, 2005, at B1.

100. See, e.g., *State v. Lead Indus. Ass'n*, No. 99-5226, 2001 WL 345830, at \*6 (R.I. Super. Apr. 2, 2001). It is widely accepted that when the paint is allowed to crack or peel, children ingesting the paint chips can contract lead poisoning, which can impair cognitive function, stunt growth, and lead to behavioral problems. See *In re Lead Paint*, No. MID-L-2754-01, 2002 WL 31474528, at \*2 (N.J. Super. Ct. Nov. 4, 2002).

101. See DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION* 114-15 (2010) (providing citations to successful laws and studies reporting on the reduction in elevated blood lead levels in those cities and states).

102. See *id.* at 115.

103. See Fitzpatrick, *supra* note 99.

104. See Peter B. Lord, *3 Companies Found Liable in Lead-Paint Nuisance Suit*, PROVIDENCE J., Feb. 23, 2006, at A1.

105. See Peter B. Lord, *Lead-Paint Case Now in Jury's Hands*, PROVIDENCE J., Feb. 14, 2006, at B2 (quoting Judge Michael A. Silverstein).

106. Jury Instructions, *State v. Atl. Richfield Co.*, C.A. No. 99-5226, 1999 Jury Instr. LEXIS 17 at \*12 (R.I. Super. Jan. 1, 1999).

the Defendants, or any of them, is present in particular properties in Rhode Island.”<sup>107</sup> In an interview after the case, a juror said that the jury did not want to find in favor of the plaintiffs, but the jury instructions “didn’t give the paint companies much of a window to crawl through.”<sup>108</sup>

The Rhode Island Supreme Court overturned this ruling.<sup>109</sup> It found that “public nuisance law simply does not provide a remedy for this harm” and affirmed that “[t]he law of public nuisance never before has been applied to products, however harmful.”<sup>110</sup> The New Jersey Supreme Court further explained that allowing the claims “would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance.”<sup>111</sup> As a result, “merely offering an everyday household product for sale can suffice for the purpose of interfering with a common right as we understand it. Such an interpretation would far exceed any cognizable cause of action.”<sup>112</sup> The Missouri Supreme Court further explained that bringing private claims in the name of the government would not lower liability standards to allow such litigation.<sup>113</sup>

After these verdicts, most pending lead paint suits were dismissed or withdrawn.<sup>114</sup> The only remaining suit is in California, where the trial judge

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107. *Id.* at \*17.

108. See Peter Krouse, *Verdict Raises Risk for Paint Companies*, PLAIN DEALER, Apr. 2, 2006, at A1.

109. See *State v. Lead Indus. Ass’n*, 951 A.2d 428 (R.I. 2008); see also *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 112–13 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484, 487 (N.J. 2007); *City of Toledo v. Sherwin-Williams Co.*, No. G-4801-CI-200606040-000 (Ohio Ct. Com. Pl. Dec. 12, 2007); *City of Chi. v. Am. Cyanamid Co.*, 823 N.E.2d 126, 128 (Ill. App. Ct. 2005). Thus far, public-nuisance claims in Wisconsin and California have survived initial appeal. See *Cty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313 (Ct. App. 2006); *City of Milwaukee v. NL Indus., Inc.*, 2005 WI App 7, 278 Wis. 2d 313, 691 N.W.2d 888.

110. *Lead Indus. Ass’n*, 951 A.2d at 435, 456.

111. *Lead Paint Litig.*, 924 A.2d at 494.

112. *Id.* at 501.

113. See, e.g., *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d at 113.

114. Within a week of the Rhode Island ruling, Columbus, Ohio voluntarily dismissed its public nuisance suit against lead paint manufacturers. See *Columbus Drops Nuisance Suit over Lead Paint*, DAYTON BUS. J. (July 10, 2008), <https://www.bizjournals.com/dayton/stories/2008/07/07/daily30.html>; Mark Ferenchik, *City Drops Lead-Paint Suit: Court Rulings Elsewhere Lead to Decision; Ohio Will Pursue Its Case*, COLUMBUS DISPATCH, July 10, 2008, at 1B; *Paintmakers Win Public Nuisance Appeal; Columbus Drops Its Suit*, CHEM. WK. July 14, 2008, at 4. In 2009, Ohio Attorney General Richard Cordray dismissed the State’s final public nuisance suit against the lead paint manufacturers. General Cordray stated in his press release: “I understand and strongly agree that exposure to lead paint is a

endorsed legal work-arounds similar to those rejected in the other states.<sup>115</sup> For example, when the plaintiffs could not show that the defendants acted wrongfully when lead-based paint was sold, the court changed the test and applied a “contemporary knowledge” standard.<sup>116</sup> The court made clear its deep pocket objective, stating that it did not want to “turn a blind eye to the existing problem” of lead poisoning, it was trying to “protect thousands of lives,” and the former manufacturers should have to give the governments the “resources to effectively deal with the problem.”<sup>117</sup> In a bench trial, the judge found against the manufacturers for \$1.15 billion in abatement costs.<sup>118</sup> In 2014, the case was sent to a California Court of Appeal, which issued a decision largely endorsing the lower court’s rulings the week this article was sent to publication.<sup>119</sup> The companies have already expressed their intent to appeal the case to the California Supreme Court.<sup>120</sup>

#### *B. Today’s New Wave of Deep Pocket Public Nuisance Cases*

In the past two years, two new major deep pocket public nuisance initiatives have been launched. The first set of cases, which is reminiscent of the New York court’s insistence that someone must pay to clean up a waterway, targets Monsanto in an effort to abate polychlorinated biphenyls (PCBs) in certain bodies of water. When Monsanto was a chemical company, it manufactured PCBs. It generally sold PCBs to other

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very real problem. . . . But I also know that not every problem can be solved by a lawsuit.” Julie Zeveloff, *New Ohio AG Drops Suit Against Lead Paint Cos.*, LAW 360 (Feb. 6, 2009), <https://www.law360.com/articles/86432>.

115. For example, the trial court eliminated the bedrock tort law requirement that a person can be liable only for harms that he or she caused. The trial court stated that defendants could be liable *without requiring* plaintiffs to “identify the specific location of the nuisance or a specific product sold by each such Defendant.” *People v. Atl. Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at \*44 (Cal. Super. Ct. Mar. 26, 2014). The court made a causation ruling solely on the fact that defendants’ products *could* be in California homes. *Id.* at \*18. The trial court then held defendants jointly and severally liable to bypass the need to identify which properties, if any, have a company’s lead-based paint. *Id.* at \*62.

116. *Id.* at \*54.

117. *Id.* at \*52-53.

118. *Id.* at \*61.

119. *People v. Conagra Grocery Prods. Co.*, No. H040880, 2017 WL 5437485 (Cal. Ct. App. Nov. 14, 2017).

120. See Michael Hiltzik, *In Landmark Ruling, Court Orders Paint Companies to Pay to Clean Lead Paint Out of California Homes*, L.A. TIMES, Nov. 15, 2017, <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-lead-paint-ruling-20171115-story.html> (“The defendant paint companies say they’ll appeal the ruling to the California Supreme Court.”).

manufacturers and did not take part in disposing the chemicals after they were sold. The second set of cases, like the firearm cases discussed above, seek to subject pharmaceutical companies and their downstream business partners to liability for the impact of opioid addiction.

### *1. PCB Public Nuisance Litigation*

Monsanto manufactured PCBs from the 1930s through the 1970s as a component part for a variety of products.<sup>121</sup> They were stable chemicals, resistant to extreme temperature and pressure.<sup>122</sup> PCBs were used widely as insulators in high voltage applications, such as in capacitors and transformers, and were added to paint mixtures and other construction materials as fire retardants.<sup>123</sup> As the component part supplier of PCBs, Monsanto did not control the other companies' final products, where those products were sold, or how they were disposed. PCBs were banned in the late 1970s because of their potential environmental hazards.<sup>124</sup>

In 2015, the Texas-based law firm Baron & Budd started teaming with cities and states along the West Coast to bring public nuisance lawsuits against Monsanto to remediate PCBs that ended up in waterways after being disposed in landfills and other places.<sup>125</sup> Storm water picked up the PCBs from the landfills, flowed through municipal storm water collection systems, and was discharged into large bodies of water.<sup>126</sup> The governments filing these suits include the municipalities of San Diego, San Jose, Oakland, Berkeley, Portland, Spokane, and Seattle, along with the State of Washington.<sup>127</sup> All allege Monsanto should be subject to public nuisance liability because they made PCBs despite knowing they "were toxic to humans and wildlife and had spread throughout the ecosystem."<sup>128</sup> In August 2016, the suits filed by San Jose, Oakland, and Berkeley were dismissed for lack of standing; the federal judge held that the cities did not

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121. See *Questions About Products of the Former Monsanto*, MONSANTO (Apr. 25, 2017), <https://monsanto.com/company/history/articles/former-monsanto-products/>.

122. *Id.*

123. *Id.*

124. See Toxic Substances Control Act, 15 U.S.C. § 2605(e) (1976).

125. John Breslin, *West Coast 'Super Tort' Against Monsanto Could Spread to Other States*, FORBES (Jan. 11, 2017), <https://www.forbes.com/sites/legalnewsline/2017/01/11/west-coast-super-tort-against-monsanto-could-spread-to-other-states/#61da5db176>.

126. *Id.*

127. *Id.*

128. *Id.*

have the requisite property interest in storm water or the San Francisco Bay to bring a claim.<sup>129</sup> The water here was not the cities' to protect.

Within weeks, the California Legislature enacted two laws aimed at laying the foundation for these suits. The first law stated that a "public entity that captures storm water . . . shall be entitled to use the captured water."<sup>130</sup> The second law included a provision giving cities authority to sue over public nuisances on properties entrusted to them by the state.<sup>131</sup> Shortly thereafter, the cities refiled their complaints, citing their new property rights to the storm water and the authority to bring this type of public nuisance action.

In another lawsuit, a federal judge in Washington denied Monsanto's motion to dismiss Spokane's allegations of PCB contamination of its storm water.<sup>132</sup> The court's ruling diverted from traditional public nuisance theory in three ways. First, it held that the "nuisance is an act or omission that causes a specific type of injury, not the fact of the injury itself."<sup>133</sup> Traditionally, the public nuisance is the condition affecting the public right; deciding who is responsible for the nuisance requires examining the wrongful conduct that caused the nuisance.<sup>134</sup> Second, the court held that the nuisance is the "production, marketing, and distribution" of PCBs.<sup>135</sup> These issues, though, should sound solely in product liability, not public nuisance. Third, it held that a manufacturer can be subject to liability for a public nuisance "regardless of the intervening actions by consumers" so long as the future contamination was "at least arguably foreseeable."<sup>136</sup> Shortly thereafter, the State of Washington filed its own public nuisance suit, echoing the familiar deep pocket jurisprudence refrain that the

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129. See Order Granting Motions to Dismiss, *City of San Jose v. Monsanto*, No. 5:15-cv-03178-EJD, 2016 WL 4427492, at \*4 (N.D. Cal. Aug. 22, 2016).

130. Assem. B. 2594, 2015-2016 Reg. Sess. (Cal. 2016).

131. See Sen. B. 859, 2015-2016 Reg. Sess. (Cal. 2016).

132. See *City of Spokane v. Monsanto Co.*, No. 2:15-CV-00201-SMJ, 2016 WL 6275164 (E.D. Wash. 2016).

133. Order Granting in Part and Denying in Part Defendants' Motion to Dismiss for Failure to State a Claim, *Id.* at \*19 (E.D. Wash. Oct. 26, 2016).

134. The Restatement (Second) of Torts envisions that if the conduct of a manufacturer "is not of a kind that subjects him to liability . . . the nuisance exists, but he is not liable for it." RESTATEMENT (SECOND) OF TORTS § 821A cmt. c (AM. LAW. INST. 1979).

135. Order Granting in Part and Denying in Part Defendants' Motion to Dismiss for Failure to State a Claim, *City of Spokane v. Monsanto Co.*, No. 2:15-CV-00201-SMJ, 2016 WL 6275164, at \*20 (E.D. Wash. Oct. 26, 2016).

136. *Id.* at \*8.



company that made the chemicals should share the costs “as we clean up hundreds of contaminated sites and waterways around the state.”<sup>137</sup>

If allowed, this legal theory could be applied to any chemical. It would be irrelevant whether the manufacturer engaged in wrongdoing or that decades passed since the manufacturer stopped making and selling the product.<sup>138</sup> Further, the tortfeasors that engaged in the wrongdoing by not disposing their PCB-containing materials properly are not held accountable at all.

It was in part because of these problems that Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980.<sup>139</sup> This law provides statutory authority for the government to identify potentially responsible parties and require them to pay a share of the clean-up costs.<sup>140</sup> This authority, though, does not exist under government public nuisance theory.

## 2. *Opioid Public Nuisance Litigation*

A rapidly growing series of lawsuits, which originated as public nuisance claims, involves governments suing pharmaceutical manufacturers, distributors, and pharmacies over the costs associated with treating and fighting prescription opioid abuse in their communities. Prescribing practices for opioids were liberalized in the 1990s to relieve undertreated pain, but, in the past few years, opioid addiction and abuse has become a national concern. The Center for Disease Control and Prevention found that 33,000 people died in 2015 from opioid overdoses, with multiple communities stating that opioid addiction has become pervasive in their areas.<sup>141</sup> Several years ago, individuals brought personal injury or wrongful death claims against many of the manufacturers of opioids, but courts concluded that responsibility for prescription drug abuse largely rested with the physicians who overprescribed the painkillers and the individuals who took the drugs, many of which were obtained illegally.<sup>142</sup>

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137. Ashley Stewart, *Washington State Sues Monsanto over PCB Contamination*, PUGET SOUND BUS. J. (Dec. 8, 2016), <https://www.bizjournals.com/seattle/news/2016/12/08/washington-state-monsanto-lawsuit-pcb-chemicals.html>.

138. See Peter Hayes, *Is the Public Nuisance Universe Expanding?*, BLOOMBERG BNA (Jan. 31, 2017), <https://www.bna.com/public-nuisance-universe-n57982083122/>.

139. See 42 U.S.C. §§ 9601-9675 (2012).

140. See *id.*

141. See *Opioid Overdose*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/> (last updated Sept. 26, 2017).

142. In Philadelphia, when a plaintiff's lawyer in a wrongful death case against an opioid manufacturer presented on the problem of opioid abuse, the judge for the Court of Common

In reframing opioid litigation under government public nuisance theory, lawyers are echoing themes of the early litigation against firearm manufacturers in hopes of circumventing the responsibility of individual wrongdoers. They are seeking to blame the deep-pocketed prescription drug manufacturers, distributors, and pharmacies for generating a marketplace in which opioid addiction could arise. The lawsuits often do not provide specific factual allegations of tortious conduct; rather, they rely on general notions of wrongdoing to create industry culpability in the minds of the public.<sup>143</sup> Richard Scruggs, a renowned former plaintiffs' attorney, explained this tactic in an analytical piece on opioid litigation. Scruggs suggests the legal theories most likely to resonate are those that "do not hinge on fault," but seek equitable types of relief based on the fact that these entities made money selling opioids.<sup>144</sup>

The initial wave of opioid public nuisance suits targeted the drugs' manufacturers. In 2014, the first lawsuits were filed by Orange and Santa Clara Counties in California.<sup>145</sup> The suits claimed the manufacturers caused the public nuisance of opioid addiction by generating demand for opioids through misrepresenting the long-term risks of addiction to these drugs. In 2015, a judge put the cases on hold on jurisdictional grounds, finding that the FDA had primary jurisdiction because the claims focused on the safety,

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Pleas responded: "Find some legal arguments for me." Max Mitchell, *Can Opiate Litigation Ever Be the New Mass Tort?*, LEGAL INTELLIGENCER (Mar. 31, 2017), <https://www.law.com/thelegalintelligencer/almID/1202782732124>; see also Dani Kass, *Mich. Doctor Charged with Prescribing Unnecessary Opioids*, LAW360 (Aug. 18, 2017), <https://www.law360.com/articles/955743/mich-doctor-charged-with-prescribing-unnecessary-opioids> (explaining how physicians and their assistants developed a scheme to overprescribe opioids).

143. For example, Suffolk and Broome Counties in New York sued opioid manufacturers alleging that their "deceptive marking" of opioids created the public nuisance of addiction. The lawsuit also alleged violations of New York's Consumer Protection Act and common law fraud. The injuries the counties allege are the costs incurred from opioid abuse, such as health care, criminal justice and victimization, as well as lost productivity. See Dan Goldberg, *Erie, Broome, Suffolk Sue Pharma Companies Over Opioid Epidemic*, POLITICO (Feb. 10, 2017), <http://www.politico.com/states/new-york/albany/story/2017/02/erie-broome-suffolk-sue-pharma-companies-over-opioid-epidemic-109492>.

144. See Richard Scruggs, *Are Opioids the New Tobacco?*, LAW360 (Sept. 18, 2017), <https://www.law360.com/articles/962715>. He said that fault is "not important" and that the states should focus "only who should pay as between the general public and the industry whose otherwise legal products caused the epidemic." *Id.*

145. See Scott Glover & Lisa Girion, *Counties Sue Narcotics Makers, Alleging 'Campaign of Deception'*, L.A. TIMES (May 21, 2014), <http://www.latimes.com/local/la-me-rx-big-pharma-suit-20140522-story.html>.

efficacy, and labeling of opioids.<sup>146</sup> A number of similar suits were soon filed around the country. For example, Everett, Washington sued the manufacturer of OxyContin, saying the company had turned a “blind eye” to criminal trafficking of its pills.<sup>147</sup> Everett also expanded the scope of the actions, seeking to force OxyContin’s manufacturer to cover the cost of treating and fighting heroin addiction as well, relying on the somewhat ironic argument that opioid users switched to heroin when OxyContin was reformulated to be more difficult to abuse.<sup>148</sup>

There also has been an effort to include distributors and pharmacies in the litigation. In February 2016, West Virginia filed a public nuisance action against McKesson Corporation, the main distributor of opioids.<sup>149</sup> Since then, several municipalities and counties in West Virginia filed their own, separate public nuisance actions against multiple distributors, as well as several large pharmacy chains. These suits seek damages for both opioid addiction and the larger problem of heroin abuse.<sup>150</sup> The Cherokee Indian Tribe filed a similar suit in its own tribal court.<sup>151</sup> These lawsuits generally claim that distributors and pharmacies should reimburse the governments for the costs related to drug abuse because the companies failed to secure the drug’s distribution chain from the “diversion” of opioids into an illicit

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146. See Lisa Girion, *Judge Halts Counties’ Lawsuit Against 5 Narcotic Drug Manufacturers*, L.A. TIMES (Aug. 27, 2015), <http://www.latimes.com/local/california/la-me-pharma-20150828-story.html>.

147. See Harriet Ryan, *Washington City Sues OxyContin Drugmaker*, L.A. TIMES, Jan. 20, 2017, at 1.

148. See Dani Kass, *Mass. Opioid Substitution Law a Nice Idea, but Falls Short*, LAW360 (Sept. 19, 2017), <https://www.law360.com/articles/958803/mass-opioid-substitution-law-a-nice-idea-but-falls-short> (explaining that Massachusetts, Maryland, Florida and West Virginia have enacted laws to make opioid medications harder to manipulate or crush in ways that they can be snorted).

149. See *West Virginia v. McKesson Corp.*, No. 16-cv-01772, 2016 WL 843443 (S.D. W. Va. Feb. 23, 2016).

150. See *id.* (alleging, for example, that McKesson Corp., the main distributor of opioids, negligently distributed more than 1.2 million doses of opioids to a West Virginia county with a population of under 25,000 people and did not follow its obligation to investigate suspicious orders).

151. First Amended Petition at 2, *Cherokee Nation v. McKesson*, CV-2017-203 (Cherokee Nation Dist. Ct. July 19, 2017) (“As a result, unauthorized opioid users in and around Cherokee Nation have ready access to illicit sources of diverted opioids.”). The defendants are seeking a preliminary injunction against the lawsuit in federal court, saying that the tribal courts do not have jurisdiction over actions by non-Indians outside of Indian County. See Christin Powell, *McKesson, CVS Look to Toss, Pause Cherokee Opioid Suit*, LAW360 (June 13, 2017), <https://www.law360.com/articles/934235/mckesson-cvs-look-to-toss-pause-choerokee-opioid-suit>.

black market. For example, the West Virginia action against McKesson alleges that McKesson should have been able to stop 1.2 million doses of opioids that it distributed from ending up in a small West Virginia county.<sup>152</sup>

The allegations against the distributors and pharmacies, though, rest entirely on generalized notions; none of the pleadings identify any order shipped from a distributor or filled at a pharmacy that was illegal or even improper. To the contrary, seventy percent of the people who abuse prescription pain relievers obtain them from friends or relatives who purchased them legally.<sup>153</sup> In an effort to create culpability, the lawsuits pointed to “voluntary duties” they say the companies adopted as part of their general statements against opioid abuse, as well as potential violations of the Controlled Substance Act (CSA) and other government reporting and regulatory requirements. As indicated above, these allegations are meant to create media attention and culpability in the minds of the public.

To be clear, these allegations of wrongdoing have nothing to do with tort liability.<sup>154</sup> The CSA does not have a private cause of action, and its standards are intentionally vague to facilitate better reporting. For instance, the CSA requires companies to report “suspicious” orders or orders of “unusual” size or frequency,<sup>155</sup> terms that courts have found are not sufficiently well-defined to create notice for liability purposes.<sup>156</sup> Thus, a CSA violation, even if it occurs, may give rise to a government enforcement action and fines, but not liability for all opioid addiction.<sup>157</sup>

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152. See Amended Complaint at ¶ 26, *McKesson* (No. 16-cv-01772).

153. See *Policy Impact: Prescription Painkiller Overdoses*, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL (November 2011), <https://www.cdc.gov/drugoverdose/pdf/PolicyImpact-PrescriptionPainkillerOD-a.pdf>.

154. First Amended Petition, *supra* note 151, at 29, 39 (alleging the defendants “have voluntarily undertaken a duty to protect the public at large against diversions from their supply chains, and to curb the opioid epidemic”).

155. See *Prescription Drugs: More DEA Information About Registrants’ Controlled Substances Roles Could Improve Their Understanding and Help Ensure Access*, Food Drug Cosm. L. Rep. (CCH) ¶ 400,076, at 28-29, 67 (June 25, 2016), 2015 WL 7796261 (reporting that DEA has acknowledged that “short of providing arbitrary thresholds to distributors, it cannot provide more specific suspicious orders guidance because the variables that indicate a suspicious order differ among distributors and their customers”).

156. See, e.g., *Talley v. Danek Med., Inc.*, 179 F.3d 154, 159 (4th Cir. 1999) (violation of statutory requirement that “does not itself articulate a standard of care but rather requires only . . . a report for the administration of a more general underlying standard . . . is not a breach of a standard of care”).

157. See Jeff Overley, *What Attys Need to Know About Trump’s Opioid Policies*, LAW360 (Aug. 9, 2017), <https://www.law360.com/articles/952132/what-attys-need-to-know->

There is no common law duty under tort law to monitor a product, including a prescription drug, after it is sold. Further, when a pharmacy has sought to question a prescription, it has been accused by physicians of “inappropriate interference with the practice of medicine,” and has faced lawsuits from doctors whose prescriptions were denied because the doctors were under investigation.<sup>158</sup>

The momentum for industry-wide opioid litigation picked up steam in May 2017, when Ohio Attorney General Mike DeWine retained outside counsel to sue five opioid manufacturers. In June 2017, several state attorneys general joined together to launch an investigation into how the manufacturers might have contributed to the opioid epidemic. The stated goal of this investigation is “to determine *whether* the manufacturers and distributors have contributed to the opioid crisis,” but several additional state, county and municipal lawsuits are being filed before any such determinations are made.<sup>159</sup> Kentucky Attorney General Andy Beshear, a member of this coalition, has already announced that he intends to file “multiple lawsuits” over the role drugmakers might have played in furthering the epidemic.<sup>160</sup> Elsewhere, as in West Virginia, these lawsuits are being brought by states, counties, and municipalities, sometimes with overlapping jurisdictions. There are now more than sixty opioid lawsuits around the country, with each aimed at some combination of the twenty or

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about-trump-s-opioid-policies (reporting on the Department of Justice’s enforcement actions, including a \$35 million settlement with Mallinckrodt, shutting down a “dark web marketplace,” \$150 million settlement with McKesson Corp., and a \$44 million settlement with Cardinal Health).

158. See Substitute Resolution 12 and Resolution 218 in PROCEEDINGS OF THE AMERICAN MEDICAL ASSOCIATION ORGANIZED MEDICAL STAFF SECTION, 2013 ANNUAL MEETING 12 (2013). Substitute Resolution 12 states that the AMA deems “drug store requirements for verification of the rationale behind prescriptions, including diagnosis, treatment plan, ICD-9 codes, and/or previous medications/therapies that were tried/failed, and for routine pharmacist calls for such verification of this rationale to be inappropriate interference with the practice of medicine and unwarranted.” *Id.* Resolution 218 continues that if “inappropriate pharmacist prescription verification requirements and inquire issues are not resolved promptly” that the AMA will seek legislative and regulatory remedies. *Id.*

159. Christine Powell, *State AGs Widen Probe Into Opioid Makers, Distributors*, LAW360 (Sept. 19, 2017), <https://www.law360.com/articles/965535/state-ag-s-widen-probe-into-opioid-makers-distributors> (emphasis added).

160. See Rachel Graf, *Ky. AG Hires Motley Rice, Others in Opioid Fight*, LAW360 (Sept. 22, 2017), <https://www.law360.com/articles/966930/ky-ag-hires-motley-rice-others-in-opioid-fight> (reporting the Kentucky Attorney General received bids from “at least 53 firms” to assist with the investigation and potential litigation under a pure contingency fee basis).

so opioid manufacturers, more than a dozen distributors and a handful of pharmacy chains.

As Scruggs intimated, the goal of this “profusion” of litigation is not necessarily to win in court.<sup>161</sup> In his view, “the success of the opioid cases will depend upon whether the plaintiffs can muster sufficient legal, political and public relations pressure to force a settlement.”<sup>162</sup> University of Richmond Professor Carl Tobias estimated that if the private contingency fee counsel “can get 14 or 15 states to file against the drugmakers, that will put stress on the companies, cost wise, to defend these suits all over the country,” thereby forcing them to settle.<sup>163</sup> Georgetown University Associate Professor Adriane Fugh-Berman, who has served as an expert witness in several cases against pharmaceutical companies, has suggested that publicity generated by the lawsuits, regardless of the suits’ legal merit, is “a great way to get information into the public domain.”<sup>164</sup> Similarly, University of Florida Professor Lars Noah sees the litigation as “more of a publicity stunt,” saying “[t]hese theories have been tried with other industries that sell consumer goods and courts with rare exceptions have decided it is too much of a stretch.”<sup>165</sup>

### *C. Courts Must Enforce the Elements of Public Nuisance Theory*

The reason manufacturers, along with distributors and retailers, are not subject to liability in these circumstances is because their responsibility is to put lawful, non-defective products into the market. There is not, and ought not be, a duty to police how consumers use or misuse products. Manufacturers cannot deny sales of their products at the retail level, and companies cannot stop end-users from abusing or improperly disposing of

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161. See Scruggs, *supra* note 144 (“The profusion of county and municipal plaintiffs (and a tribal nation) is different from tobacco, where only a few governmental subdivisions sued when their state attorneys general refused to join the litigation.”).

162. *Id.*

163. See Jef Feeley & Jared S. Hopkins, *Big Pharmas’s Tobacco Moment as Star Lawyers Push Opioid Suits*, BLOOMBERG (Aug. 15, 2017), <https://www.bloomberg.com/news/articles/2017-08-15/south-carolina-joins-states-suing-purdue-pharma-over-opioids>.

Professor David Logan explained the incentive for plaintiffs’ lawyers to recruit states: “The more states they have signed up, the bigger their hammer when it comes to decide who should be on the settlement negotiating committee.” *Id.*

164. Nate Hegyi, *Cherokee Nation Sues Wal-Mart, CVS, Walgreens over Tribal Opioid Crisis*, NPR (Apr. 25, 2017), <http://www.npr.org/sections/codeswitch/2017/04/25/485887058/chokeee-nation-sues-wal-mart-cvs-walgreens-over-tribal-opioid-crisis>.

165. Harriet Ryan, *City Devastated by OxyContin Use Sues Purdue Pharma, Claims Drugmaker Put Profits over Citizens’ Welfare*, L.A. TIMES (Jan. 19, 2017), <http://www.latimes.com/local/lanow/la-me-oxycontin-lawsuit-20170118-story.html>.

their products.<sup>166</sup> The obligation to pay for injuries caused by these risks should remain with the wrongdoer, who should not be able to shift the costs of their misdeeds to others, even if those others have deeper pockets.

There is nothing unique about the products discussed in this section. Many products, such as knives, matches, chemicals of all kinds, and even automobiles (which foreseeably may be used in ways that kill or injure if driven by an intoxicated driver) have inherent risks that are permissible and assumed by the consumer.<sup>167</sup> Shifting liability to the manufacturer and others in the stream of commerce based on an open-ended “duty to monitor” would create a government “super tort” that could be invoked at the whim of any county, state, or municipal attorney.<sup>168</sup> Such a super tort is nothing more than unprincipled, deep pocket jurisprudence.<sup>169</sup>

### *III. Deep Pocket Jurisprudence Regarding Liability for Hirers of Independent Contractors*

Deep pocket jurisprudence is also infiltrating the decisions of businesses as to whether to staff certain operations with their own employees or hire independent contractors. From a business perspective, the decision often represents a trade-off between the cost structure and control companies have over their own employees versus the flexibility of retaining specialized workers for discrete tasks.<sup>170</sup> An essential part of this calculus,

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166. See John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 828 (1973) (stating that an auto manufacturer “would be liable for all damages produced by the car, a gun maker would be liable to anyone shot by the gun, anyone cut by a knife could sue the maker”).

167. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 2 (Proposed Final Draft No. 1, 2005).

168. See *Cty. of Johnson, Tenn. ex rel Bd. of Educ. V. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (governments could “convert almost every products liability action into a nuisance claim”).

169. Another unprincipled rationale for expanding public nuisance theory has been “regulation through litigation.” Throughout the past 50 years, there has been a little noticed, but definite trend: when some judges perceive the federal government is pulling back on regulation, they seek to fill this void by regulating through tort law. These judges believe they are the last check against activities that may harm the environment. Former Labor Secretary Robert Reich cautioned against such regulation through litigation as being against democratic government, where regulation is to be expanded (or contracted) by the executive and legislative branches. If these branches of government make the wrong choices, the remedy should be in the hands of voters, not judges.

170. See 2 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 431 (2d ed. 2011) (“The employer’s right to discharge the employee; payment of regular wages, taxes, workers’ compensation insurance and the like; long-term or permanent employment; and detailed

though, is the difference in the liability regime that governs each relationship.<sup>171</sup> A company is generally subject to vicarious liability for injuries caused by its own employees but not for those caused by independent contractors.<sup>172</sup> While courts have recognized limited exceptions to this rule,<sup>173</sup> there have been unfortunate attempts to expand these exceptions far beyond their moorings and into the territory of deep pocket jurisprudence. The common theme in these suits is often that a large business hires a smaller independent contractor who subsequently causes the injury alleged. It is discovered that the independent contractor is judgment-proof or has inadequate resources to compensate the injured plaintiff. The plaintiff then sues the large business to add another, potentially deep pocket to pay the claim.<sup>174</sup>

*A. Liability for Acts of Independent Contractors Has Long Been Limited*

The longstanding rule that companies that hire independent contractors are not vicariously liable for the negligent or intentional acts of the contractor is grounded in principles of basic fairness.<sup>175</sup> Because the hirer

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supervision of the work tend to indicate a master-servant relationship.”); *see also* Rev. Rul. 87-41, 1987-1 C.B. 296 (identifying twenty factors indicative of an employer-employee relationship to aid in making such determinations).

171. *See* 2 DOBBS ET AL., *supra* note 170, § 431 (“Jurists have found it difficult to formulate a crisp and workable definition of independent contractors, but the concept is easy to understand. . . .”); Robert W. Wood, *Defining Employees and Independent Contractors: Don’t Try This at Home!*, BUS. L. TODAY, May-June 2008, at 45, 45 (“The classification of workers can be difficult and consequential. The laws are vague and serve different purposes. They are enforced by different agencies, including the IRS, state unemployment and workers’ compensation agencies, insurance companies, and the courts. These parties use different criteria, have different reasons for making decisions, and reach different decisions regarding the same working relationship.”).

172. *See* 2 DOBBS ET AL., *supra* note 170, § 431 (“As the courts see it, it is the contractor’s business, the contractor’s tort, and the contractor’s liability.”); *see* PROSSER & KEETON, *supra* note 30, § 71, at 509.

173. *See* Deanna N. Conn, *When Contract Should Preempt Tort Remedies: Limits on Vicarious Liability for Acts of Independent Contractors*, 15 FORDHAM J. CORP. & FIN. L. 179, 188-89 (2009) (stating that “the outcome of the employee status determination is often ‘results driven’” and that “courts often ‘stretch’ in applying the various factors to find employee status”).

174. As the Supreme Court explained more than a half century ago: “Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.” *NLRB v. Hearst Publ’ns*, 322 U.S. 111, 121 (1944), *overruled in part* by *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

175. *See* 2 DOBBS ET AL., *supra* note 170, § 431.



has no right of control over the manner in which the work is to be done, it is to be regarded as the contractor's own enterprise, and he, rather than the [hiring company], is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing it.<sup>176</sup>

This relationship is in contrast to the employer-employee relationship, where vicarious liability may be permitted because the employer is in the position to exercise control over its employees and monitor their behavior.<sup>177</sup>

As indicated, courts have recognized a few limited exceptions that may allow such liability to be imposed against the company who hires the independent contractor. These exceptions fall into three general categories: injuries from the hirer's own negligence, injuries during the performance of non-delegable duties, and injuries from inherently dangerous activities.<sup>178</sup> In each situation, there is a principled rationale for extending liability to the company that hires the independent contractor.

In the first category, the hiring company is not truly "innocent" or removed from the negligence that caused harm. A hirer who retains sufficient control over the independent contractor's work or undertakes a specific obligation (such as providing safety equipment or machinery used by the independent contractor) may be subject to vicarious liability for harm caused by the independent contractor.<sup>179</sup> In determining whether the degree of a hirer's retained control is sufficient to impose vicarious liability, courts have considered a variety of factors, including the party's allocation of responsibilities in their contract, the hirer's ability to select or terminate the independent contractor's personnel, and the hirer's supervision or oversight efforts.<sup>180</sup>

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176. PROSSER & KEETON, *supra* note 30, § 71, at 509; *see also* Saiz v. Belen Sch. Dist., 827 P.2d 102, 108 (N.M. 1992) ("The absence of a right of control over the manner in which the work is to be done is the most commonly accepted criterion for distinguishing independent contractors from employees . . .") (citing Prosser & Keeton).

177. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 57 cmt. c (2012) ("[I]n hirer-independent contractor settings, the independent contractor is the person or entity that regularly benefits from the risk-creating enterprise.").

178. *See* PROSSER & KEETON, *supra* note 30, § 71, at 510-15; DOBBS ET AL., *supra* note 170, § 432; *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 57 cmt. f (excluding "collateral negligence" doctrine as a separate category of exceptions to general rule of non-liability for hirers of independent contractors).

179. *See* PROSSER & KEETON, *supra* note 30, § 71, at 510-11; *see also* RESTATEMENT (SECOND) OF TORTS § 411 (AM. LAW. INST. 1979).

180. *See* 2 DOBBS ET AL., *supra* note 170, § 431.

The non-delegable duties exception is limited to situations where the hirer has “a responsibility that should not be considered discharged when the actor, albeit with reasonable care, hires a contractor to perform the work.”<sup>181</sup> For example, a business ordinarily may not immunize itself from its duties as a landowner simply by hiring an independent contractor to perform work on its property.<sup>182</sup> Similarly, the hirer of an independent contractor may not be able to avoid liability arising from duties imposed by statute, such as laws regarding property maintenance or workplace safety, by outsourcing these responsibilities to a contractor.<sup>183</sup>

Finally, the “inherently dangerous activities” exception applies to situations where the nature of the activity is so fraught with risk that the hirer of an independent contractor should not be permitted to avoid its own liability simply by using a contractor for that activity.<sup>184</sup> This situation is generally limited to two situations: abnormally dangerous activities and activities that have a “peculiar” or “special” risk of harm.<sup>185</sup> The high risks of harm associated with an abnormally dangerous activity, such as working with explosives, cannot be avoided even through reasonable care.<sup>186</sup> An activity posing a “peculiar” risk poses “a special danger to those in the vicinity, arising out of the particular situation created, and calling for special precautions.”<sup>187</sup> Hiring an independent contractor to demolish a

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181. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 57 cmt. b.

182. *See id.* § 62 (stating that a land possessor may be subject to vicarious liability for an activity on the land where the possessor “retains possession of the premises during the activity or after the possessor has resumed possession of the land upon the completion of the activity”).

183. *See id.* § 63 (stating that a land possessor may be subject to vicarious liability where “a statute or administrative regulation imposes an obligation on the actor to take specific precautions for the safety of others”).

184. *See* RESTATEMENT (SECOND) OF TORTS § 416 (AM. LAW INST. 1965); *see also* 41 AM. JUR. 2d *Independent Contractors* § 52 (2016) (listing activities); Ellen S. Pryor, *Peculiar Risks in American Tort Law*, 38 PEPP. L. REV. 393, 395-97 (2011) (discussing rule of peculiar risk as applied to hirers of independent contractors).

185. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 58-59; RESTATEMENT (SECOND) OF TORTS §§ 416, 427A.

186. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 58 cmt. b; *see also* RESTATEMENT (SECOND) OF TORTS § 427A.

187. RESTATEMENT (SECOND) OF TORTS § 413 cmt. b; *see also id.* §§ 416, 427 (discussing inherent and peculiar risk exceptions to non-liability for hirers of independent contractors); Pryor, *supra* note 184, at 396. The RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM expresses the peculiar risk exception as one in which there is an inherent risk of harm that may be prevented by the exercise of reasonable care, but if reasonable care is not exercised, the resulting risk “differs from the types of risk usual in the

house with a shared wall is an example of a situation calling for special precautions.<sup>188</sup> The hirer may be subject to liability if the contractor's inadequate shoring of the shared wall damages the adjoining home.<sup>189</sup>

These liability rules have long provided principled, clear lines of responsibility between the hiring companies and their independent contractors.

*B. The Use of Deep Pocket Jurisprudence to Subject Hirers to Vicarious Liability for the Tortious Acts of Independent Contractors*

Unfortunately, some courts have begun to distort these exceptions in order to pin liability on companies that hire independent contractors when the companies have greater financial resources than the contractors to pay claims. Some of these cases have attracted national headlines due to the sheer scope of their financial impact and concern.

A recent, high-profile example surrounds litigation against ride-hailing logistics providers Uber and Lyft.<sup>190</sup> These companies typically do not own or operate the vehicles used to transport passengers; instead, they allow drivers to sign up as independent contractors. A set of cases against Uber and Lyft alleges that the companies are improperly classifying drivers as independent contractors instead of employees.<sup>191</sup> Because of the importance of classification for liability purposes, whether the companies retain sufficient control over the conduct of the drivers to subject them to liability in the event a driver commits a tortious act has become a key issue in the cases.<sup>192</sup> In 2016, Uber agreed to pay up to \$100 million to settle a class action suit challenging its business model of hiring drivers as independent

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community.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 59 cmt. b.

188. See RESTATEMENT (SECOND) OF TORTS § 416, ill. 1.

189. The Restatement (Third) of Torts: Liability for Physical and Emotional Harm identifies the hiring of an independent contractor to transport prisoners as another example of the peculiar risk exception; the hirer would not avoid vicarious liability for the independent contractor's negligence in allowing potentially dangerous prisoners to escape and cause injury to members of the surrounding community. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 59, ill. 3.

190. See *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030 (N.D. Cal. 2016); *O'Connor v. Uber Techs., Inc.*, 211 F. Supp. 3d 1110 (N.D. Cal. 2016); *Suarez v. Uber Techs., Inc.*, Case No. 8:16-cv-166-T-30MAP, 2016 WL 2348706 (M.D. Fla. May 4, 2016); *Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284 (D. Mass. 2016); *Razak v. Uber Techs., Inc.*, Civ. Action No. 16-573, 2016 WL 3960556 (E.D. Pa. July 21, 2016).

191. See cases cited *supra* note 190.

192. See cases cited *supra* note 190.

contractors.<sup>193</sup> As part of the settlement, Uber was able to retain its drivers' classification as independent contractors in both California and Massachusetts.<sup>194</sup>

Plaintiffs alleging injury from an Uber or Lyft driver have also sought to subject the companies to liability as hirers of independent contractors.<sup>195</sup> In 2014, the family of a young boy struck and killed by a driver who was allegedly waiting for the Uber program to "match" him with a passenger sought to hold Uber vicariously liable for the wrongful death.<sup>196</sup> Uber defended the claim on the basis that, as a logistics provider (and not a transportation carrier), it has an express independent contractor relationship with its drivers and should not be subject to liability in these circumstances.<sup>197</sup> This lawsuit remains pending at the time of this writing.

Traditional transportation logistics providers have faced similar lawsuits. In 2015, the Illinois Appellate Court affirmed a trial court's award of \$8 million against a trucking logistics provider after a tractor-trailer driver hired as an independent contractor killed a woman standing by her disabled vehicle on the shoulder of the highway.<sup>198</sup> The logistics provider, Transfreight, was hired by Toyota to ensure a steady supply of automotive parts to its production facilities.<sup>199</sup> Transfreight then contracted with a separate motor carrier to manage pick-up and delivery.<sup>200</sup> The agreement

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193. See Dan Levine, *Uber Drivers Remain Independent Contractors as Lawsuit Settled*, REUTERS (Aug. 22, 2016), <http://www.reuters.com/article/us-uber-tech-drivers-settlement-idUSKCN0XJ07H>; Richard Reibstein, *Ride-Sharing Leaders Settling for Up to \$100 Million – Will The Settlement Withstand Judicial Scrutiny?*, INDEP. CONTRACTOR MISCLASSIFICATION & COMPLIANCE (Apr. 22, 2016), <https://independentcontractorcompliance.com/2016/04/22/uber-tries-to-lyft-itself-out-of-two-independent-contractor-misclassification-lawsuits-by-settling-for-up-to-100-million-but-will-the-settlement-withstand-judicial-scrutin/>.

194. See Levine, *supra* note 193.

195. See Complaint for Damages & Demand for Trial by Jury, *Liu v. Uber Techs., Inc.*, No. CGC-14-536979 (Cal. Super. Ct. Jan. 27, 2014); Answer and Affirmative Defenses of Uber Techs., Inc., Rasier LLC, and Rasier-CA LLC to Plaintiffs' Complaint at 6, *Liu v. Uber Techs., Inc.*, No. CGC-14-536979 (Cal. Super. Ct. Jan. 27, 2014); Josh Constine, *Uber's Denial of Liability in Girl's Death Raises Accident Accountability Questions*, TECHCRUNCH (Jan. 2, 2014), <http://techcrunch.com/2014/01/02/should-car-services-provide-insurance-whenever-their-driver-app-is-open/>; Kale Williams, *Uber Denies Fault in S.F. Crash That Killed Girl*, SFGATE (May 7, 2014), <http://www.sfgate.com/bayarea/article/Uber-denies-fault-in-S-F-crash-that-killed-girl-5458290.php>.

196. See sources cited *supra* note 195.

197. See sources cited *supra* note 195.

198. See *McHale v. W.D. Trucking, Inc.*, 2015 IL App (1st) 132625, ¶ 1, 39 N.E.3d 595, 604-05 (Ill. App. Ct. 2015).

199. See *id.* ¶ 7, 39 N.E.3d at 605-06.

200. See *id.*

between Transfreight and the motor carrier expressly defined the independent contractor relationship and assigned the motor carrier responsibility for providing the actual “transportation services” as well as supervising the loading and unloading of the trailers.<sup>201</sup> The motor carrier also retained “sole and exclusive control over the manner in which [it] and its employees perform[ed] the Transportation Services.”<sup>202</sup> Nevertheless, the plaintiff named Transfreight in the suit, as the motor carrier maintained only \$1 million in liability insurance.<sup>203</sup>

The jury’s verdict holding Transfreight and the motor carrier jointly responsible for the \$8 million wrongful death award was predicated on a finding that Transfreight retained enough control over the motor carrier to subject Transfreight to vicarious liability.<sup>204</sup> While the appellate court observed that the “jury heard ample evidence showing Transfreight did not have the right to control” the motor carrier’s employee, it chose not to substitute its judgment for that of the jury and allowed the finding of liability to stand.<sup>205</sup> In doing so, the court allowed the award against the deep pocket defendant.

In a case outside the transportation industry, the Washington Supreme Court held that a fugitive injured by the negligence of a bounty hunter could sue the bail-bonding company that retained the independent contractor who, in turn, hired the bounty hunter.<sup>206</sup> The bounty hunter struck the fugitive with his car, causing serious injuries.<sup>207</sup> The Court concluded that the bail-bonding company could be subject to vicarious liability under the peculiar risk exception because there is a high risk of harm in bail bond recovery.<sup>208</sup>

A dissenting justice, however, explained that this is not a situation envisioned by the peculiar risk exception.<sup>209</sup> “The peculiar risk exception exists because certain activities pose a risk that people are not commonly subjected to and thus do not anticipate the need for taking precautions,” but when the independent contractor “chooses to voluntarily participate in the activity anyway, the risk is no longer ‘peculiar’ as to that individual.”<sup>210</sup>

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201. *Id.* ¶ 9, 39 N.E.2d at 606.

202. *Id.* ¶ 6, 39 N.E.2d at 605.

203. *See id.* ¶ 14, 39 N.E.2d at 608.

204. *See id.* ¶¶ 70, 71, 39 N.E.2d at 620-21.

205. *Id.* ¶ 65, 39 N.E.2d at 618.

206. *See Stout v. Warren*, 290 P.3d 972 (Wash. 2012).

207. *See id.* at 976.

208. *See id.* at 982.

209. *See id.* (Owens, J., dissenting).

210. *Id.*

Under the majority's holding, vicarious liability would be allowed for any risk that is unusual in some way or "not a normal, routine matter of customary human activity."<sup>211</sup> The majority's standard is exceedingly broad and lacks a viable, clearly delineated limiting principle.

There have been many other attempts to sidestep the general rule of non-liability for hirers of independent contractors in the search for deep pockets to pay claims.<sup>212</sup> For example, suits have claimed that activities such as garage door repair work,<sup>213</sup> floor refinishing,<sup>214</sup> power washer use,<sup>215</sup> hauling logs,<sup>216</sup> and working at a plant<sup>217</sup> are "inherently dangerous" and should therefore permit vicarious liability against the hirer of the independent contractor that performed them.<sup>218</sup> Suits have further sought to expand the scope of the general rule exception for non-delegable duties.<sup>219</sup> A common denominator in the successful attempts to impose broad new vicarious liability against the hirer of an independent contractor is result-driven, deep pocket jurisprudence.

#### *IV. Deep Pocket Jurisprudence in Car Accident Cases*

Deep pocket jurisprudence is regularly the hidden foundation for product liability claims in automobile cases. A common example is where a drunk

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211. *Id.* at 977 (majority opinion) (quoting RESTATEMENT (SECOND) OF TORTS § 413 cmt. b (AM. LAW. INST. 1977)).

212. *See, e.g.,* Valenti v. NET Props. Mgmt., Inc., 710 A.2d 399, 400 (N.H. 1998) (stating that the general rule of non-liability for hirers of independent contractors is now "so riddled with exceptions" that the "exceptions ... have practically subsumed the rule") (citations omitted).

213. *See* Lammert v. Lesco Auto Sales, 936 S.W.2d 846, 851 (Mo. Ct. App. 1996).

214. *See* Montano v. O'Connell, 589 N.Y.S.2d 26, 27 (App. Div. 1992).

215. *See* Bowles v. Weld Tire & Wheel, Inc., 41 S.W.3d 18, 25 (Mo. Ct. App. 2001).

216. *See* Doak v. Green, 677 So. 2d 301, 302 (Fla. Dist. Ct. App. 1996).

217. *See* Burger v. Midland Cogeneration Venture, 507 N.W.2d 827, 829 (Mich. Ct. App. 1993).

218. Courts have split on the inherently dangerous nature of other activities. *Compare* Brandenburg v. Briarwood Forestry Servs., LLC, 2014 WI 37, ¶ 64, 354 Wis.2d 413, 847 N.W.2d 395, 412 (holding that independent contractor's spraying of herbicide was inherently dangerous activity) *with* Wilson v. Greg Williams Farm, Inc., 2014 Ark. App. 334, at 6, 436 S.W.3d 485, 489 (holding that independent contractor's aerial application of herbicide was not inherently dangerous activity).

219. *See* Randall Noe Chrysler Dodge, LLP v. Oakley Tire Co., 308 S.W.3d 542, 546-47 (Tex. Ct. App. 2010) (independent contractor's job of painting a building with a spray apparatus was not a nondelegable duty); Baboghlian v. Swift Elec. Supply Co., 964 A.2d 304, 309 (N.J. 2009) (property owner did not have a nondelegable duty to obtain a permit and inspect independent contractor's installation of fire alarm system).

driver, who lacks sufficient insurance, hits another car, causing severe injuries, and the victim sues the manufacturer of his or her own car for compensation.<sup>220</sup> To justify recovery, the victim alleges the manufacturer failed to design a car that would protect against or mitigate injury in the event of such a collision.<sup>221</sup> The design defect theory may be highly speculative, but is supported by the plaintiff's "experts."<sup>222</sup> Some courts, particularly when the plaintiff's injuries are severe, have failed to act as good science gatekeepers and have ignored the standards controlling the admission of these "experts'" testimonies. They allow novel or unsubstantiated opinions to facilitate recovery, as the deep-pocket automobile manufacturer ends up paying the at-fault party's liability.<sup>223</sup>

The desire for innocent car accident victims to be compensated is understandable, but not at the expense of turning a blind eye to the law and the need for liability to be based only on credible scientific evidence. The downside of deep pocket jurisprudence in such situations is that it forces companies to re-design their cars based on faulty scientific conclusions, which could have major, negative impacts on overall public safety.<sup>224</sup>

#### *A. Automobile Design Liability Should Remain Principled*

Starting with the landmark case *MacPherson v. Buick Motor Co.*,<sup>225</sup> car owners and passengers have been able to sue automobile manufacturers directly when an alleged product defect causes injury. Judge Cardozo, in this famed 1916 opinion, removed the privity of contract requirement between a car owner and its manufacturer that had previously blocked these

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220. See Ellen M. Bublick, *The Tort-Proof Plaintiff: The Drunk in the Automobile, Crashworthiness Claims, and the Restatement (Third) of Torts*, 74 BROOK. L. REV. 707, 707 (2009) ("State courts face a difficult challenge when they review crashworthiness claims that arise in conjunction with drunk driving.").

221. See *id.*

222. See William Petrus, *Injury Causation Experts Prevent Cases from Crashing*, TRIAL, Aug. 2000, at 54, 54 ("[W]hen handling a vehicle crashworthiness case, expert testimony detailing exactly how and why a plaintiff suffered injuries is essential."); see also Jeffrey F. Ghent, *Liability of Manufacturer, Seller, or Distributor of Motor Vehicle for Defect Which Merely Enhances Injury from Accident Otherwise Caused*, 42 A.L.R. 3d 560 (1972) ("If the case is complex, the attorney may have to become a quasi-expert on motor vehicle design.").

223. See Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 220-26 (2006) (discussing importance of courts fulfilling their "gatekeeper" function with respect to the admission of scientific expert evidence).

224. See *infra* Section IV.A.

225. 111 N.E. 1050 (N.Y. 1916).

suits.<sup>226</sup> The car defect in *MacPherson* was easy to understand; the wooden spokes on one of the wheels crumbled into fragments, and MacPherson was thrown from the car and seriously injured.<sup>227</sup> Judge Cardozo explained that the evidence showed a defect in the wheel that could have been discovered by a reasonable inspection.<sup>228</sup> For the next half-century, liability rules for automobile manufacturers remained relatively consistent: if a manufacturer's negligence resulted in defective brakes, steering wheels, or any other part of the car, and that defect led to an injury, the manufacturer could be subject to liability.<sup>229</sup>

During the 1960s, liability for car manufacturers shifted with the advent of products liability theories. The application of products liability was relatively straight-forward with respect to manufacturing defects such as the one in *MacPherson*, but courts struggled to apply these concepts to design and warning defects.<sup>230</sup> At the same time, states began to recognize a new duty in tort law that required automobile manufacturers to make their cars "reasonably crashworthy."<sup>231</sup> As a result, the manufacturer could be found liable, both when a defect caused the crash and when a crash was caused by an independent wrongdoer (such as a drunk driver) so long as some defect in the vehicle did not adequately protect the car's passengers. To apportion

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226. *See id.* at 1055 ("Both by its relation to the work and by the nature of its business, [the manufacturer] is charged with a stricter duty."); *see also* R. Ben Hogan, *The Crashworthiness Doctrine*, 18 AM. J. TRIAL ADVOC. 37, 37 (1994) ("Modern product liability law, and ultimately crashworthiness law, traces its history to *MacPherson v. Buick Motor Co.*").

227. *MacPherson*, 111 N.E. at 1051.

228. *Id.* at 1051, 1055 ("[Manufacturer] was not at liberty to put the finished product on the market without subjecting the component parts to ordinary and simple tests.").

229. *See* Hogan, *supra* note 226, at 37-38 (discussing development of automotive design liability); G. Franco Mondini, *The Doctrine of "Crashworthiness" in Texas: Movement Toward a Workable Solution*, 15 ST. MARY'S L.J. 889, 891-93 (1984) (discussing history of crashworthiness doctrine beginning in 1960s).

230. *See, e.g.*, *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 185-86 (Mich. 1984) ("Imposing a negligence standard for design defect litigation is only to define in a coherent fashion what our litigants in this case are in fact arguing and what our jurors are in essence analyzing.").

231. *See* Mondini, *supra* note 229, at 893 (referring to "doctrine variously known as 'crashworthiness,' enhanced injury, or second-collision"); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 16 cmt. a (AM. LAW. INST. 1998) ("A manufacturer has a duty to design and manufacture its product so as reasonably to reduce the foreseeable harm that may occur in an accident brought about by causes other than a product defect."); Thomas V. Harris, *Enhanced Injury Theory: An Analytic Framework*, 62 N.C. L. REV. 643, 645 (1984) (noting the then "undeveloped state of enhanced injury theory" and the "need to formulate rules in a logical and evenhanded manner").



fault, courts began to look at all causes of an injury, assessing who was at fault for the crash itself and whether a design defect caused or failed to properly mitigate injuries caused to the plaintiff in the “secondary collision” between the plaintiff and the inside of the car.<sup>232</sup>

Determining whether a design defect exists for either purpose often involves a risk utility or other comparable test. The inquiry is often determining whether there was a “reasonable alternative design” for that part of the vehicle or whether the manufacturer was negligent in how it designed the part that allegedly failed.<sup>233</sup> Given the complex, technical nature of today’s automobiles, proof of such a design defect often relies on expert evidence.<sup>234</sup> A court’s improper application of admissibility standards for expert evidence, therefore, can have a significant impact on liability. Should the court allow novel, unsubstantiated expert testimony, a jury may award a severely injured, innocent plaintiff a large recovery, not only against the actual wrongdoer but also the automobile manufacturer, making it the de facto insurer of its products.<sup>235</sup> Some courts have defended their deep pocket jurisprudence decisions on the basis that the manufacturer was best able to afford the cost of injuries.<sup>236</sup>

#### *B. Automobile Cases Predicated on Deep Pocket Jurisprudence*

In recent years, several appellate courts have identified and stopped deep pocket evidentiary and legal rulings by their trial courts. As dispassionate reviewers of the facts and law, they have overturned decisions where local

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232. See Ralph Nader & Joseph A. Page, *Automobile Design and the Judicial Process*, 55 CAL. L. REV. 645, 655-59 (1967) (discussing early “second collision” cases).

233. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (stating “reasonable alternative design” requirement to demonstrate product design defect); *id.* § 16 cmt. b (“In connection with a design defect claim in the context of increased harm, the plaintiff must establish that a reasonable alternative design would have reduced plaintiff’s harm.”).

234. See *id.* § 16 cmt. b, cmt. c (stating need for competent expert evidence to prove an automotive design defect).

235. See Kelly Carbeta-Scandy, *Litigating Enhanced Injury Cases: Complex Issues, Empty Precedents, and Unpredictable Results*, 54 U. CIN. L. REV. 1257, 1288-92 (1986) (discussing case example that “exemplifies the extreme unfairness to manufacturers when a court delivers a crashworthiness case to the jury as a design defect case and allows recovery for all the consequences of an accident in which the manufacturer played no role in precipitating”).

236. See *infra* Section IV.B; *cf.* *Passwaters v. Gen. Motors Corp.*, 454 F.2d 1270, 1277 (8th Cir. 1972) (stating in automobile design defect case that the “acceptance of strict liability is based on policy considerations of spreading the risk to the manufacturer as the party financially best able to afford the cost of injuries”).

judges and juries granted recoveries that impeded, not facilitated, the even-handed pursuit of justice.

*1. The Virginia Supreme Court's Trilogy of Expert Evidence Cases*

From 2013 to 2016, the Virginia Supreme Court decided three cases that, together, restored the rule of law in Virginia with respect to expert evidence in car accident cases. In the first two cases, *Funkhouser v. Ford Motor Co.*<sup>237</sup> and *Hyundai Motor Co., Ltd. v. Duncan*,<sup>238</sup> the court declared motions in limine proper to establish fundamental principles for admissibility of expert evidence. First, in *Funkhouser*, two young children climbed into their parents' minivan that was turned off and parked in the garage when the minivan caught fire.<sup>239</sup> The court ruled that the accident did not speak for itself; the expert must identify the defect he alleged caused the fire, and his testimony must be based on facts relevant to that defect, not on dissimilar car fires.<sup>240</sup>

Second, in *Duncan*, the court clarified that scientific testimony cannot be based on unsubstantiated assumptions. In order to testify as to the viability of a reasonable alternative design, the expert must have an evidentiary basis for his or her theory.<sup>241</sup> In this case, the plaintiff was involved in a one-car accident, where he lost control of the car, swerved off the road, and hit a tree.<sup>242</sup> He alleged that if the sensors for the vehicle's side airbags were located in a different place, they would have been triggered and he may have sustained lesser injuries.<sup>243</sup> But the expert never tested the location that he suggested for the sensors and could not determine whether people in other types of crashes would be injured if the sensor were moved to that location.<sup>244</sup> Automobile designs often involve trade-offs in an attempt to

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237. 736 S.E.2d 309 (Va. 2013).

238. 766 S.E.2d 893 (Va. 2015).

239. 736 S.E.2d at 311.

240. *Id.* at 315-16.

241. *Duncan*, 736 S.E.2d at 897 (finding that the expert's "opinion that the 2008 Tiburon was unreasonably dangerous was without sufficient evidentiary support because it was premised upon his assumption that the side airbag would have deployed if the sensor was at his proposed location—an assumption that clearly lacked a sufficient factual basis and disregarded the variables he acknowledged as bearing upon the sensor location determination.").

242. *Id.* at 894.

243. *Id.* at 894-95.

244. *Id.* at 895 ("While [the expert] believed the best location for the sensor was at the B-pillar, he testified he did no testing to determine if the side airbag would have deployed in Gage's accident had the sensor been placed at *any* other location.").

balance safety, utility, and cost, and these trade-offs must be considered. The alternative design must work, be cost-effective, and provide overall risk utility benefits to the consuming public.

In the third case, despite these clear rulings, a Virginia trial court engaged in deep pocket jurisprudence when it allowed an expert to testify that a ragtop convertible could be deemed defective if it did not protect a woman from being injured in a rollover collision.<sup>245</sup> In *Holiday Motor Corp. v. Walters*, the plaintiff was driving a Miata ragtop convertible and suffered serious injuries when a pool fell off the truck in front of her.<sup>246</sup> The plaintiff swerved to avoid the pool, causing the vehicle to roll over several times.<sup>247</sup> The driver of the truck never stopped.<sup>248</sup> With no one else to sue for her substantial injuries, she sued Mazda even though the Federal Motor Vehicle Safety Standards, which sets roof crush resistance standards for vehicles, specifically exempts ragtop convertibles.<sup>249</sup> Without the frame of a hardtop roof, the essential structure for rollover protection is missing, a known trade-off inherent to ragtop convertibles.<sup>250</sup>

To support her design defect theory, the court permitted an expert to testify that the small latches that hold the ragtop to the windshield are, in essence, linchpins for providing rollover protection comparable to “a sedan with a permanent roof structure.”<sup>251</sup> The expert alleged that the latches became disengaged during the accident, which is why the ragtop and windshield failed to protect the plaintiff.<sup>252</sup> The expert did not include reliance on any engineering papers, literature, or written standards, nor did he perform any testing or analysis of the latching system for the convertible or any other comparable vehicle.<sup>253</sup> The lack of a systematic approach to these scientific theories is not surprising given that there is no body of science that can prove that a ragtop convertible could reasonably provide rollover protection. Nevertheless, after the circuit court denied the defendant’s motion in limine to exclude the expert’s testimony, the trial

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245. *Holiday Motor Corp. v. Walters*, 790 S.E.2d 447, 450-53 (Va. 2016).

246. *Id.* at 449.

247. *Id.*

248. *Id.*

249. See 49 C.F.R. § 571.216 (2009); see also *Death Rates Aren’t Higher in Convertibles, but a Roof Still Is Safer*, STATUS REP (May 31, 2007), <http://www.iihs.org/iihs/sr/statusreport/article/42/6/3>.

250. See *Chrysler Corp. v. Dep’t of Transp.*, 472 F.2d 659, 679 (6th Cir. 1972) (noting “it is obvious that a soft top convertible is inherently incapable of passing” a rollover test).

251. *Holiday Motor Corp.* 790 S.E.2d at 452.

252. *Id.* at 458.

253. See *id.* at 452.

judge allowed the jury to hear the testimony, leading to a \$20 million verdict.<sup>254</sup>

The Virginia Supreme Court overturned the ruling, explaining the lack “of a permanent roof structure necessarily diminishes the level of occupant rollover protection” and that this feature is not only “characteristic of a convertible . . . it is ‘the unique feature of the vehicle.’”<sup>255</sup> Consequently, “imposing a duty upon manufacturers of convertible soft tops to provide occupant rollover protection defies both ‘common sense’ and ‘good policy.’”<sup>256</sup> In reaching this conclusion, the court rejected the testimony of the automotive engineer as being “pure speculation” based on “unfounded assumptions” and not supported by “testing or analysis.”<sup>257</sup>

There is a particular danger in cases such as this one, where a plaintiff is seriously injured, the party at fault is not before the court, and an expert devises a plausible-enough-sounding theory for finding an alternative, deeper pocket for compensation.

## *2. The Kentucky Supreme Court Stops a Deep Pocket Punitive Damage Award that Would Have Undermined Government Safety Standards*

Factual and legal theories for a case that stretch credulity can also be used as the basis for punitive damage awards, not solely for design defect claims. In *Nissan Motor Co., Ltd. v. Maddox*,<sup>258</sup> which involved a head-on collision caused “by a drunk driver who was driving on the wrong side of the road,” the trial court entered a judgment against Nissan that included \$2.5 million in punitive damages.<sup>259</sup> The reason this case epitomizes deep-pocket jurisprudence is that the trial court allowed the plaintiff to subject Nissan to punitive damages, ironically, *because* Nissan diligently adhered to federal safety standards. The plaintiff’s counsel, taking a page out of DC Comics’ upside-down *Bizarro World*, argued that Nissan’s stellar safety ratings for the seat belt design at issue were actually *proof* that Nissan flagrantly disregarded her safety.

In the case, it was undisputed that the 2001 Nissan Pathfinder in which the plaintiff was a passenger met or exceeded all applicable government safety standards for seat belt restraint systems. This included both the

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254. *See id.* at 449, 458-59.

255. *Id.* at 456 (quoting *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1074 (4th Cir. 1974)).

256. *Id.* at 457 (quoting *Jeld-Wen, Inc. v. Gamble*, 501 S.E.2d 393, 397 (Va. 1998)).

257. *Id.* at 458-59.

258. 486 S.W.3d 838 (Ky. 2015).

259. *Id.* at 839.

mandatory Federal Motor Vehicle Safety Standards and the voluntary, more stringent safety standards under the New Car Assessment Program. The right front passenger restraint system, which the plaintiff was utilizing, received five stars, the highest possible rating.<sup>260</sup> The lower court allowed the plaintiff to rhetorically use this safety record as clear and convincing evidence of Nissan's outrageous or malicious conduct toward her. The plaintiff, who weighed 240 pounds, claimed that the passenger restraint system recklessly disregarded the safety of large occupants because it was designed to maximize protection for the 171-pound test dummies used in the safety tests.<sup>261</sup> As a result, she claimed, the seat belt assembly could not sustain her weight, causing her to submarine under the lap belt.<sup>262</sup> Her lawyer's theme for seeking punitive damages was "stars over safety."<sup>263</sup>

The Kentucky Supreme Court reversed this ruling in 2015, stating that the "undisputed evidence demonstrates that Nissan designed its 2001 Pathfinder . . . to withstand the most rigorous frontal crash testing offered" and that this fact established a level of due care precluding any punitive award.<sup>264</sup> The court explained that although the plaintiff's injuries "were monumental, the evidence presented at trial fails to indicate that such an outcome was the result of Nissan's reckless or wanton disregard for [the plaintiff] or those similarly situated."<sup>265</sup> Here, the pursuit of deep pocket jurisprudence, if it was allowed to stand, could have seriously undermined adherence to government safety standards.

### *3. The Illinois Supreme Court Reverses a Deep Pocket Award that Could Have Led to More Dangerous Designs*

A set of deep pocket jurisprudence cases that can be challenging to identify and correct involve car features designed to maximize safety for most people, but which nonetheless may have led to injury in the case at bar. In these cases, the only person before the court is someone alleging injury from the design, not the many people who may have benefited from it. Consequently, the "fix" offered by a plaintiff's experts may be enticing because it would have legitimately avoided the plaintiff's injuries. But, if implemented, the plaintiff's fix would jeopardize the health and safety of far more people. Accordingly, there is no design defect to correct.

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260. *Id.* at 841.

261. *Id.* at 841, 845.

262. *Id.* at 842.

263. *Id.* at 839.

264. *Id.* at 843.

265. *Id.* at 845.

A car safety feature that has been the subject of several lawsuits in recent years is a front car seat designed to “yield” or be flexible during a crash in order to absorb some of the force, rather than be rigid and direct more force at the occupant. The Illinois Supreme Court addressed this issue in *Mikolajczyk v. Ford Motor Co.*,<sup>266</sup> where a drunk driver who “shared two pints of gin with a friend before getting behind the wheel” of his car crashed “into the rear of a 1996 Ford Escort . . . stopped at a red light.”<sup>267</sup> The driver of the Escort died after allegedly striking his head on the car’s backseat when his “yielding seat” flattened backwards.<sup>268</sup> In addition to suing the drunk driver, the wife sued Ford arguing the yielding seat was “unreasonably dangerous.”<sup>269</sup> The plaintiff’s experts, though, admitted that a yielding seat design is actually safer in many circumstances, such as when an occupant is out-of-position in the seat.<sup>270</sup> Nevertheless, the jury returned a \$27 million verdict, finding Ford and the designer of the car seat forty percent at-fault and the drunk driver sixty percent at-fault.<sup>271</sup> The Illinois high court reversed the lower court’s decision due to faulty jury instructions and remanded it for a new trial.<sup>272</sup>

The Colorado Supreme Court reached a similar decision in *Walker v. Ford Motor Co.*<sup>273</sup> In this case, the court rejected the trial court’s jury instructions regarding a “consumer expectations” standard for assessing an alleged car seat design defect that resulted in a \$3 million verdict against Ford.<sup>274</sup> The court held that the proper standard for evaluating alleged design defects is a risk-utility analysis because it requires the jury to engage in a balancing test and not decide a case based on any single factor in isolation.<sup>275</sup>

The key to avoiding the deep pocket jurisprudence trap in these cases is to make sure the jury can assess the overall value of the feature when determining whether a product has a design defect. States that follow the risk-utility test for design defects, for example, have found that weighing

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266. 901 N.E.2d 329 (Ill. 2008).

267. *Id.* at 333.

268. *See id.*

269. *Id.*

270. *Mikolajczyk v. Ford Motor Co.*, 870 N.E.2d 885, 892 (Ill. App. Ct. 2007), *rev’d on other grounds*, 901 N.E.2d 329 (Ill. 2008).

271. *Id.* at 893.

272. *Mikolajczyk*, 901 N.E.2d at 360.

273. No. 15SC899, 2017 WL 5248198 (Colo. Nov. 13, 2017).

274. *Id.* at \*2, \*5.

275. *Id.* at \*4-5.

the overall value of a design is essential for complex, technical products.<sup>276</sup> The test directs juries to consider the technology available to the manufacturer at the time and how the proposed modification would affect the product's usefulness, desirability, and affordability. It also helps avoid evaluating product safety in hindsight and with regard only to the injured plaintiff before them. In short, a balancing test of some kind, such as the risk-utility test, can give juries a rudder for steering through expert testimony so that they do not impose liability on manufacturers that responsibly design products to safely meet consumer needs.

### *Conclusion*

Experience shows that deep pocket jurisprudence is most likely to occur when (a) the victim is truly innocent and therefore highly sympathetic, or the damage is done to the environment; (b) the injuries or contamination are severe; (c) the true wrongdoer is unavailable for the litigation, does not have sufficient funds to pay the claim, or would not be able to address the problem on a large-scale basis; and (d) the risk of harm was arguably foreseeable to the defendant. Rhetorically, the plaintiffs argue that because the deep-pocketed defendant profited from its business, it should shoulder the costs of the harm.

The natural impulse to want to help a severely injured victim or remediate extensive environmental damage is certainly understandable. Courts, though, must be grounded by the rule of law. Legal doctrines such as negligent misrepresentation, public nuisance, vicarious liability, and products liability all have elements that must be proved based on credible facts and sound scientific analysis. Courts must refrain from becoming mere compensation mechanisms for transferring money from businesses to injured people. Rather, they must remain places where justice can be achieved and where businesses are only required to pay victims that they wrongfully injured or to clean up environmental harms that they wrongfully caused. Liability rules must remain based on sound principles of law, not deep pocket jurisprudence.

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276. See Aaron Twerski & James A. Henderson, Jr., *Manufacturer's Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. 1061, 1067 (2009) ("[V]irtually every major torts scholar who had looked carefully at the issue of design defect over the past several decades had embraced risk-utility balancing and had rejected the consumer expectations test as unworkable and unwise.").