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PUBLIC-PRIVATE LITIGATION FOR HEALTH

Liza Vertinsky* & Reuben Guttman**

Abstract

Public health litigation can be a powerful mechanism for addressing public health harms where alternative interventions have failed. It can draw public attention to corporate misconduct and create a public record of the actions taken and the harms done. In an ideal world, it could achieve compensation for past harms and incentivize deterrence of future misconduct. But the full public health potential of these lawsuits is rarely achieved, even when the suits are brought on behalf of federal, state, and local governments with the ostensible goal of protecting the health of the citizens. The increasing involvement of private attorneys in public litigation only adds to the challenges of using litigation to achieve public health goals.

While there are continuing debates over the desirability of litigation partnerships between state attorneys general (AGs) and private counsel, as a practical matter, the involvement of private law firms in public litigation is unlikely to disappear any time soon. This Article fills a critical gap in the literature on the privatization of public litigation by showing why, despite their shortcomings, arrangements between state and private lawyers have the potential to satisfy public health goals that might otherwise remain out of reach. It provides a theory of legal research and development to show why these arrangements are not only likely to persist but are also most likely to occur in high-impact public health litigation. This Article then examines how the incentives of both state AGs and private law firms influence choices along the litigation pathway in ways that may undermine the potential to achieve public health value. It concludes by proposing a novel impact-based approach to public-private litigation, providing a decision-making framework that AGs can adopt to increase the role of public health objectives in the litigation process.

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** © 2021 Reuben Guttman. Founding member of Guttman, Buschner & Brooks PLLC. This Article draws in part from Mr. Guttman's decades of experience representing numerous whistleblowers under False Claims Acts in various states, working in partnership with state attorneys general.

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INTRODUCTION

Litigation can be a powerful mechanism for addressing public health harms where alternative regulatory approaches, such as administrative oversight and enforcement, and the political will for legislative change fall short.¹ The litigation process can be used to draw public attention to corporate misconduct, create a public record of the actions taken and harms done, achieve compensation for past harm, incentivize deterrence of future misconduct, and encourage legislative and other structural changes.² Yet, the full public health potential of these lawsuits is rarely achieved, even when the suits are brought on behalf of federal, state, and local governments with the ostensible goal of protecting the health of the citizens in their jurisdictions.³ The increasing involvement of private attorneys in litigation of

¹ See, e.g., Lawrence Gostin, *Law and the Public's Health*, 21 ISSUES IN SCI. AND TECH. (Nat'l Acad. of Sciences, Engineering, and Medicine, Ariz. St. Univ.), Spring 2003, at 2 ("Of the 10 great public health achievements of the 20th century, *most were realized, at least in part, through law reform or litigation*: vaccinations, safer workplaces, safer and healthier foods, motor vehicle safety, control of infectious diseases, tobacco control, and fluoridation of drinking water.") (emphasis added); W. E. Parmet & R.A. Daynard, *The New Public Health Litigation*, 21 ANN. REV. PUB. HEALTH 437, 437 (2000) ("One of the most remarkable developments of the last three decades has been the increasing use of litigation as a public health tool."); S. Teret, *Litigating for the Public's Health*, 76 AM. J. PUB. HEALTH 1027 (1986) (explaining that product liability litigation is an important part of public health advocacy); Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. HEALTH POL., POL'Y & LAW 769 (1999) (concluding that "in general, public health goals are more directly achievable through the political process than through litigation," but that some circumstances are well-served by litigation campaigns that "stimulate a national debate" and "move the policy agenda"). For an international, perspective see, for example, LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? (A. Yamin & S. Gloppen eds., Harv. Univ. Press 2011) (examining the potential of strategic litigation to advance the right to health by increasing government accountability); Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 285 (2021).

² See, e.g., T. Ezer & P. Patel, *Strategic Litigation to Advance Public Health*, 20 HEALTH AND HUM. RTS. J. 149 (2018) (exploring the avenues through which strategic litigation can impact public health); Parmet & Daynard, *supra* note 1, at 437 (examining ways in which public health litigation can be used to respond to public health harms); Rebecca L. Haffajee & Michael R. Abrams, *Settling the Score: Maximizing the Public Health Impact of Opioid Litigation*, 80 OHIO ST. L.J. 701, 734 (2019) ("Litigation holds significant public health potential in addressing the opioid crisis if pursued intelligently and thoughtfully."); Alexandra Lahav and Elizabeth Burch, *Information for the Common Good in Mass Torts*, DEPAUL L. REV. (forthcoming 2021) (discussing the powerful role of litigation in creating public record of health and safety harms).

³ For a varied discussion of the role of litigation in achieving public health goals, see, for example, Lawrence O. Gostin, John T. Monahan, Jenny Kaldor, Mary DeBartolo, Eric A. Friedman, Katie Gottschalk, Susan C. Kim, Ala Alwan, Agnes Binagwaho, Gian Luca Burci, Luisa Cabal, Katherine DeLand, Timothy Grant Evans, Eric Goosby, Sara Hossain,

government interests only adds to the challenges of using litigation to achieve public health goals.⁴

While an active debate remains over the desirability of the various partnerships between government lawyers and private law firms that have emerged in many states over the past few decades, public-private partnerships have remained an important part of public health litigation.⁵ Much of the high-profile public health litigation in

Howard Koh, Gorik Ooms, Mirta Roses Periago, Rodrigo Uprimny & Alicia Ely Yamin, *The Legal Determinants of Health: Harnessing the Power of Law for Global Health and Sustainable Development*, 393 LANCET 1857, 1866 (2019) (discussing the potential of well-targeted strategic litigation, “e.g., proceedings that seek systemic change and remedies that extend far beyond individual litigants” to advance public health); Michelle Mello, Jennifer Wood, Scott Burris, Alexander Wagenaar, Jennifer K. Ibrahim & Jeffrey W. Swanson, *Critical Opportunities for Public Health Law: A Call to Action*, 103 AM. J. PUB. HEALTH 1979, 1979 (2003) (arguing that law remains an underutilized resource in public health); Margaret Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 486 (2012) [hereinafter Lemos, *Aggregate Litigation*] (discussing how AGs may be influenced by private incentives that may interfere with the public interest focus of litigation); Timothy D. Lytton, *Using Litigation to Make Public Health Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco and Gun Litigation*, 32 J.L. MED. & ETHICS 556 (2004) (identifying limitations of existing arguments for and against public health litigation); Rebecca L. Haffajee, *The Public Health Value of Opioid Litigation*, 48 J.L. MED. & ETHICS 279, 279 (2020) (exploring opportunities and limits of tort litigation in context of opioids); Peter D. Jacobson & Soheil Soliman, *Litigation as Public Health Policy: Theory or Reality*, 30 J.L. MED. & ETHICS 224, 224 (2002) (examining the pros and cons of litigation as a public health strategy).

⁴ See, e.g., Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L. J. 515 (2016) [hereinafter Lemos, *Privatizing Public Litigation*] (examining the role of private law in achieving public health interests and the trends and implications of different forms of privatization of public litigation).

⁵ The expanding roles of private lawyers in public litigation and, in particular, the relationships between state attorneys general and private law firms, has been explored by a number of scholars, including: Lemos, *Privatizing Public Litigation*, *supra* note 4, at 517 (discussing the privatization of public litigation, where “government litigators aspire to do more, they are increasingly turning to private resources—both human and financial—to support their efforts”); see generally Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 FORDHAM L. REV. 2223 (2018) [hereinafter Gilles, *The Politics of Access*] (exploring state/private enforcement solutions to the problem of forced arbitration and class action bans); Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era*, 98 TEX. L. REV. 489 (2020) [hereinafter Gilles & Friedman, *The New Qui Tam*] (discussing enforcement gap and need for public-private litigation strategies); Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. TIMES (Dec. 18, 2014), <https://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue-.html> [https://perma.cc/W5TF-LLPK] [hereinafter Lipton, *Lawyers Create Big Paydays*] (discussing expanding collaborations between state AGs and private law firms). For a discussion of state practices in allowing for AGs to hire private firms, see Douglas McMeyer, Lise T. Spacapan & Robert W. George, *Contingency Fee*

recent years involves a mix of state attorneys general (AGs) and private lawyers, and where states band together to pursue multi-state litigation against large corporate offenders, private-sector lawyers are inevitably found as part of the joint prosecution effort.⁶

This Article begins by exploring the evolution of these public-private litigation partnerships and the reasons why they are likely to persist. AGs and private law firms have a shared interest in working together to litigate state interests, with AGs leveraging the capacity and resources of the private sector and private law firms benefitting from the enhanced access to the courts that working with AGs can provide.⁷ In an era where courts have created procedural roadblocks that limit the access of private litigants to the courts, AG involvement can be a game-changer in litigation involving threats to public health.⁸ AGs have the authority, the legitimacy, and sometimes the motivation to conduct investigations and pursue cases protecting public health and welfare. But engaging in novel, high-impact public health litigation requires concentrated investments in legal research and development (R&D) and the capacity to carry out lengthy litigation battles. State AGs often lack the resources, time, and staff needed to investigate shifting patterns of corporate misconduct, develop novel legal theories in response, and then implement complex

Plaintiffs' Counsel and the Public Good?, IN-HOUSE DEFENSE QUART. (Winter 2011) (surveying contingency fee practices in different states and finding that most states allow the practice).

⁶ See, e.g., U.S. CHAMBER INST. FOR LEGAL REFORM, *THE NEW LAWSUIT ECOSYSTEM: TRENDS, TARGETS AND PLAYERS* 139–56 (2013) (providing examples of private law firm partnerships with AGs as part of a discussion of litigation trends); U.S. CHAMBER INST. FOR LEGAL REFORM, *LAWSUIT ECOSYSTEM II: NEW TRENDS, TARGETS AND PLAYERS* 95–109 (2014) (discussing plaintiffs' bar alliance with AGs from a corporate defense perspective, concerned with impact on corporate liability). Note that the U.S. Chamber of Commerce has been keeping an active watch on the partnerships between AGs and the plaintiffs' bar as it becomes an important mechanism for litigating public interests. See, e.g., Barry Meier & Richard A. Oppel, Jr., *States' Big Suits Against Industry Bring Battle on Contingency Fees*, N.Y. TIMES (Oct. 15, 1999), <https://www.nytimes.com/1999/10/15/us/states-big-suits-against-industry-bring-battle-on-contingency-fees.html> [<https://perma.cc/7H5F-Q83D>] (discussing the lobbying campaign by Chamber of Commerce seeking state restrictions on use of contingency lawyers).

⁷ See, e.g., Gilles, *The Politics of Access*, *supra* note 5, at 2232 (exploring mutual benefits offered by state/private enforcement arrangements); Lipton, *Lawyers Create Big Paydays*, *supra* note 5 (discussing expanding collaborations between state AGs and private law firms).

⁸ See, e.g., Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J. L. & MED. 187, 187, 193 (2000) (documenting the story of failed private litigant attempts to hold the tobacco industry accountable from 1954 to 1994, followed by a breakthrough when AGs started bringing cases based on state Medicaid costs, where they “broke the logjam of documentary deceit and concealment” and brought about “a sea change” in the litigation).

and sometimes risky litigation strategies.⁹ Private attorneys, in contrast, are constantly searching for new large-scale litigation opportunities. They can provide human and financial resources, and the more sophisticated firms have the incentive and ability to invest in novel litigation opportunities that involve public health harms—at least those of a type and magnitude with the potential to generate large damage awards.¹⁰ Thus, while outsourcing public health litigation to private law firms introduces its own set of challenges and concerns, it can also create mutually beneficial opportunities for the state to leverage private legal R&D and litigation capacity.¹¹

After exploring the potential of such partnerships to achieve public health objectives, this Article examines how the incentives of both state AGs and private law firms influence choices along the litigation pathway in ways that may undermine these objectives. It identifies key litigation decisions that will either directly or indirectly impact public health goals and shows how the private incentives of both public and private actors may lead to suboptimal decisions from a public health perspective. Case selection, the transparency of discovery, decisions to settle, damage modeling, and equitable remedies are now often determined with the involvement of private attorneys and with private litigation norms and objectives in mind.¹² Litigation decisions are made with an eye to speedy resolution and expected profits. Seemingly mundane decisions that arise along the litigation pathway can have a potentially large impact on the public health value achieved in any particular case. Even in the absence of private law firm involvement, the state litigation process and results are often evaluated using limited metrics that heavily weigh damages and

⁹ See, e.g., Gilles, *The Politics of Access*, *supra* note 5, at 2226, 2231–34 (discussing how AGs can use relationships with private law firms to overcome resource constraints); David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of Substitute Attorneys General*, 2010 MICH. ST. L. REV. 423, 427 (2010) (explaining that AGs face shrinking budgets at the same time as they face a growing list of potentially big-ticket claims involving public harms); see generally Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion*, 79 U. CHI. L. REV. 623 (2012) [hereinafter Gilles & Friedman, *After Class*] (exploring the role of private lawyers and public enforcement in *parens patriae* as a means of closing the enforcement gap).

¹⁰ See, e.g., Lipton, *Lawyers Create Big Paydays*, *supra* note 5 (discussing expanding role of private law firms working on contingency fee basis to bring cases in collaboration with state AGs).

¹¹ See, e.g., Gilles, *The Politics of Access*, *supra* note 5, at 2231–34 (arguing for AG use of contingency fee arrangements with private law firms as a way of addressing the resource constraints that AGs face and expanding their enforcement capacity). For an example of the role of entrepreneurial private lawyers in instigating public-private litigation to pursue public interest, see generally Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs' Attorneys in Municipal Gun Litigation*, in *SUING THE GUN INDUSTRY* 129 (Timothy D. Lytton ed., 2005) [hereinafter Erichson, *Private Lawyers, Public Lawsuits*].

¹² See, e.g., Lemos, *Privatizing Public Litigation*, *supra* note 4, at 548–50 (discussing differences in work practices and litigation approaches between state and private attorneys).

fail to account for the value of a robust public record and the potential for structural changes to deter future misconduct.¹³

This Article concludes by proposing a novel approach toward public-private litigation that is designed to increase the public health value of the litigation. We use insights drawn from impact assessments and impact statements employed in other areas of health and safety and environmental regulation to develop an impact-based approach to health litigation. This approach provides a decision-making framework that AGs can adopt to increase the role of public health objectives in the litigation process.

With this final goal in mind, the rest of the Article proceeds as follows. In Part I, we provide a brief overview of the evolution of private firm involvement in state AG litigation and the intertwined evolution of litigation as a mechanism for addressing corporate misconduct that harms public health. In Part II, we situate these arrangements within the academic and policy debates over the privatization of public litigation. We then offer a pragmatic theory of why they are likely to persist and, moreover, why they offer the potential to achieve public health goals. In Part III, we identify some of the tensions between private incentives and public objectives that arise in these public-private litigation processes and show how these tensions may limit the potential public health value of the litigation. Part IV develops an impact-oriented approach to litigation decisions that is designed to increase the alignment of the litigation process and its outcomes with public health goals. This approach is offered as one way of ensuring that the public health impact is prioritized—or at least emphasized—in both the process and outcomes of public health litigation.

Our analysis focuses on state AG litigation arrangements with private law firms for two main reasons. First, many of the lawsuits with the largest potential public health impact, suits we refer to as high-impact, involve state AGs and other government agencies working with private law firms either directly or indirectly via partnerships with other states utilizing private law firms.¹⁴ Second, the public

¹³ See, e.g., Colin Provost, *An Integrated Model of U.S. State Attorney General Behavior in Multi-State Litigation*, 10 STATE POL. & POL'Y QUART. 1, 20 (2010) [hereinafter Provost, *An Integrated Model*] (explaining that state AGs “may incur a political cost by not pursuing fairly easy money” in MDL); Haffajee & Abrams, *supra* note 2 (“This Article argues, contrary to the conventional wisdom on the division between public and private enforcement, that public enforcers often seek large monetary awards for self-interested reasons divorced from the public interest in deterrence.”). The federal system is, generally, not as concerned with the political fallout from its litigation decisions, and for better or worse, this allows for greater freedom in case selection and disposition at the federal level.

¹⁴ See, e.g., Aaron S. Kesselheim & David M. Studdert, *Whistleblower-Initiated Enforcement Actions against Health Care Fraud and Abuse in the United States, 1996 to 2005*, 149 ANNALS OF INTERNAL MED. 342, 342 (2008) (“Nearly all major cases today are *qui tam* actions, involving whistleblowers with inside knowledge of the allegedly illegal schemes.”). See also Ellen M. Gilmer, *Big Law Builds Up State AG Expertise Amid Enforcement Boost*, BLOOMBERG LAW (May 12, 2021, 2:45 AM), <https://news.bloomberglaw.com>

mandate and role of the state AG create opportunities to introduce public interest oversight into the litigation process while continuing to leverage the resources and expertise of private law firms.¹⁵ While we focus our attention on state AGs, the issues we discuss are relevant to public-private partnerships at both federal and local government levels as well, and the divergence of litigation incentives from public health needs—and the consequent need for an impact-based approach—may be present even in the absence of private law firm involvement.¹⁶ Finally, we focus on cases that involve either a direct or indirect public health impact because of the opportunities that these cases present for improving the standard of care, whether by establishing prospective standards of care or by surfacing information that regulators need to improve or revise existing standards of care.¹⁷

I. EVOLUTION OF PUBLIC-PRIVATE HEALTH LITIGATION

A. *The Use of Private Law Firms to Litigate State Interests*

State AGs are important participants in establishing and implementing health policy.¹⁸ All fifty states, plus the District of Columbia and several U.S. territories,

law.com/environment-and-energy/big-law-builds-up-state-ag-expertise-amid-enforcement-boost [https://perma.cc/JFH5-MDL4]; Bobby Harrison, *New Boss Same as Old Boss When It Comes to Mississippi's AG Using Private Lawyers*, MISSISSIPPI TODAY (July 5, 2021), https://mississippitoday.org/2021/07/04/mississippi-still-using-private-lawyers/ [https://perma.cc/4N2A-U67W].

¹⁵ See, e.g., Gilles & Friedman, *After Class*, *supra* note 9, at 671 (discussing oversight role played by AGs in public-private litigation, acting, for example, as a filter in case selection).

¹⁶ See, e.g., Lemos, *Aggregate Litigation*, *supra* note 3, at 486 (discussing how AGs may be influenced by private incentives that create some of the same problems that arise from relying on private lawyers in aggregate litigation).

¹⁷ See, e.g., Michael Frakes & Anupam B. Jena, *Does Medical Malpractice Law Improve Health Care Quality?*, 143 J. PUB. ECON. 142, 142 (2016) (emphasizing the importance of tort litigation as a way of making substantive changes in the standard of care); Michael D. Frakes, *The Surprising Relevance of Medical Malpractice Law*, 82 U. CHI. L. REV. 317, 385 (2015) (arguing that the relationship between medical liability rules and healthcare spending can be substantial once the impact on standards of care is considered).

¹⁸ See, e.g., Lainie Rutkow and Stephen P. Teret, *Role of State Attorneys General in Health Policy*, 304 JAMA 1377 (2010) [hereinafter *Role of Attorneys General*] (examining the roles of state AGs in impacting health policy, including recent activism that focuses on health care reform as well as more traditional roles to address corporate misconduct resulting in harm to public health); Lainie Rutkow and Stephen Teret, *The Role of State Attorneys General to Promote the Public's Health: Theory, Evidence, and Practice*, PUB. HEALTH L. RSCH. (Oct. 2010), http://publichealthlawresearch.org/sites/default/files/downloads/product/The%20Potential%20for%20State%20Attorneys%20General%20to%20Promote%20the%20Public%27s%20Health.pdf [https://perma.cc/RL98-XXTJ] (analyzing the current powers that state AGs have and providing a framework for examining how the use of these powers can benefit the public's health).

have their own attorneys general, forty-three of whom are elected, with the others being appointed or chosen through special elections for terms that vary by state or territory.¹⁹ As the chief law enforcer for the state, as well as its legal advisor, the AG has a significant amount of prosecutorial discretion—including the right to bring civil actions against private individuals, corporations, and even governments, on behalf of the public interest of the state and its citizens.²⁰ This gives the AG the ability to influence health policy and engage in health advocacy in a variety of different ways, one of which is to bring civil suits to address harms to the public health of the state.²¹

Although the AG's discretion in deciding when to bring a lawsuit and what suit to bring may seem expansive, in practice, the AG faces a variety of practical constraints and limitations. In particular, despite the fact that the vast majority of AGs each serve over one million citizens, the AG does not have control over the flow of resources available to fund the AG's activities, hire more staff attorneys, or invest in complex and expensive litigation.²² These constraints on resources may not be a problem when handling routine enforcement of existing regulations in cases with simple fact patterns, where cases can be investigated and tried quickly and easily. But budget constraints limit the ability of the AG to develop and implement novel and complex litigation strategies, particularly those involving the creative application of old common-law theories to new fact patterns requiring intense investigation and lengthy court battles. This limits the AGs' ability to litigate on their own in areas of corporate misconduct where the stakes are highest, the activities most complex and difficult to police, and the regulations either inadequate or challenging to enforce.

¹⁹ For facts about state attorneys general and their jurisdiction, see, for example, *Find My AG*, NAT'L ASS'N OF ATTYS GEN., <https://www.naag.org/find-my-ag/> [<https://perma.cc/U8RP-PYNG>] (last visited July 11, 2021); *Attorney General Elections*, NAT'L ASS'N OF ATTYS GEN., <https://www.naag.org/news-resources/research-data/attorney-general-elections/> [<https://perma.cc/TEP5-VURS>] (last visited July 11, 2021).

²⁰ See, e.g., *What Attorneys General Do*, NAT'L ASS'N OF ATTYS GEN., https://www.naag.org/naag/about_naag/faq/what_does_an_attorney_general_do.php [<https://perma.cc/76FL-LNGC>] (last visited July 1, 2021).

²¹ For a discussion of the unique opportunities that state AGs have to support public health policy solutions, see, for example, Rutkow & Teret, *Role of Attorneys General*, *supra* note 18 (discussing innovative approaches used by AGs to protect health); Jennifer L. Pomeranz & Kelly D. Brownell, *Advancing Public Health Obesity Policy Through State Attorneys General*, 101 AM. J. PUB. HEALTH 425, 426 (2011) (“State attorneys general have a scope of authority that lies at the intersection of law and public policy, creating unique opportunities that may not be available to other government officials.”).

²² See, e.g., Gilles, *The Politics of Access*, *supra* note 5, at 2226, 2231–34 (discussing the enforcement gap for AGs due to limited public resources and advantages of contingency fee arrangements with private counsel); see generally Lemos, *Aggregate Litigation*, *supra* note 3 (discussing AG use of private contingency-fee counsel to compensate for limited time, money, and expertise in litigating certain large-scale projects).

One way that AGs have responded to their resource constraints is through exercising extreme discretion in case selection, at the risk of under-enforcement.²³ Another way is through state statutes or agreements that allow AGs to tap the resources of the private sector. These mechanisms include citizen suit provisions that allow for direct private litigation, like qui tam suits under relevant False Claims Acts, and procurement agreements between the government and private counsel, often on a contingency fee basis.²⁴ While the first mechanism relies solely on private litigation to pursue state interests, the latter mechanism involves partnerships of various sorts between the AG and private law firms. Many states have some kind of False Claims Act that allows for qui tam suits by private citizens against companies that are engaging in fraud against the government,²⁵ and the state AG can choose whether to intervene and work with private counsel or leave the case to the private litigant.²⁶ In addition, under the laws of most states, AGs can hire private law firms to bring cases on their behalf, often on a contingency fee basis, as long as they retain sufficient control over the key decisions in the lawsuit.²⁷ It is these latter two mechanisms—intervening in qui tam suits and hiring private law firms to bring lawsuits on behalf of the AG—that this Article refers to as public-private litigation “partnerships.” The relationships are governed by a mix of statutory and/or contractual requirements that provide the framework within which the public and private participants work together to pursue agreed-upon litigation goals.

For reasons further discussed below, the relative attractiveness of these latter two litigation strategies for both AGs and private plaintiffs firms has increased over time.²⁸ When taking into account the extent to which state AGs join in existing

²³ See, e.g., Gilles & Friedman, *The New Qui Tam*, *supra* note 5, at 510 (discussing how state and AG financial and human resource constraints prevent AG offices from meeting public enforcement action goals); see also Lemos, *Aggregate Litigation*, *supra* note 3, at 511 (“Resource limitations at the state level exacerbate the risk that public suits will generate inadequate recoveries by giving public attorneys incentives to agree to the same sorts of settlements that have drawn fire in the class action context.”).

²⁴ See, e.g., William B. Rubenstein, *On What a “Private Attorney General” Is – And Why It Matters*, 57 VAND. L. REV. 2129, 2142–58 (2004) (discussing different ways in which private law firms may litigate public (and state) interests).

²⁵ More than twenty-three states have enacted State False Claims Acts, which allow for suits where “government funds” have been impacted. See, e.g., *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968). The qui tam provisions of false claims acts, both at the federal and state levels, authorize private individuals (“relators”) to sue on behalf of state entities for fraud in connection with the programs and expenditures of the state entity. If the suit is successful, the relator is entitled to a percentage of the amount recovered by the state entity, along with attorneys’ fees payable by the defendant.

²⁶ See generally Gilles & Friedman, *The New Qui Tam*, *supra* note 5 (exploring the arguments for and against this way of enlarging the role of citizens in prosecuting claims that impact the public interest).

²⁷ See, e.g., Gilles, *The Politics of Access*, *supra* note 5, at 2231–34 (discussing viability of state AGs to procure private counsel on contingency fee basis).

²⁸ See generally Lemos, *Privatizing Public Litigation*, *supra* note 4, at 532–33, 538–46 (analyzing the costs and benefits of partnerships between public and private attorneys).

litigation that involves partnerships between government prosecutors and law firms, whether at the federal or municipal level or in other states with similar legal issues, the role of public-private litigation partnerships in AG enforcement of state interests is even greater.²⁹

B. Tobacco Litigation: A New Paradigm and Its Limits

*Mississippi Attorney General Michael C. Moore took on Big Tobacco and came out smokin’.*³⁰

The modern evolution of what are now mainstream models of public-private litigation involving state AGs working with private law firms has its roots in the highly publicized tobacco litigation of the 1990s that resulted in multi-state settlements by AGs against some of the nation’s largest tobacco companies (the “Tobacco Litigation”).³¹ The Tobacco Litigation has been seen as a turning point in attracting state AGs to get more involved in affirmative public health litigation. But it was by no means the first instance of high-impact multi-state litigation by state AGs, nor was it the only factor pushing AGs into a more aggressive health litigation role. As early as 1907, state AGs banded together, bringing a multi-state antitrust suit against Standard Oil.³² They subsequently formed the National Association of Attorneys General (NAAG) as a forum for sharing information and best practices and coordinating multi-state action.³³ In the 1970s, AGs relied on multi-state action to take on large corporations such as General Motors.³⁴ Prior to the 1980s, however, with a few exceptions like the ones just mentioned, the role of state AGs as litigants was largely a passive role, defending state agencies and state actors in lawsuits brought against the state.

²⁹ Many of the multi-state litigation efforts, such as litigation over tobacco and opioids, are originated by private firms working in collaboration with one or two state AGs, leaving many states—especially those not working with private counsel—to piggyback on the existing case.

³⁰ Gregory W. Traylor, *Big Tobacco, Medicaid-Covered Smokers, and the Substance of the Master Settlement Agreement*, 63 VAND. L. REV. 1081, 1083 (2010). Mississippi, led by its then-state AG Michael Moore, was the first state to bring a suit against tobacco to recover for state Medicaid expenditures caused by the harms of tobacco.

³¹ See generally *The Tobacco Settlement*, STATEAG.ORG, <https://www.stateag.org/initiatives/the-tobacco-settlement> [<https://perma.cc/U4EZ-PDSV>] (last visited Aug. 8, 2021).

³² *State Enforcement Newsletter*, AM. BAR ASS’N (2020), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/committee-newsletters/state-enforcement/state-enforcement-newsletter-spring2020.pdf [<https://perma.cc/5ZMQ-XX5W>].

³³ See generally *About NAAG*, NAT’L ASS’N OF ATTYS GEN., <https://www.naag.org/about-naag/> [<https://perma.cc/D3P3-F5SW>] (last visited Aug. 8, 2021).

³⁴ See, e.g., Elizabeth A. Brumleve, *The Evolution of the Scope and Political Ambition of the State Attorneys General* (Apr. 2016) (Honors Thesis, University of Dayton), https://ecommons.udayton.edu/uhp_theses/76 [<https://perma.cc/QU6A-FXJN>]; Sarah Harney, *The Avengers General*, GOVERNING (Oct. 27, 2010), <https://www.governing.com/archive/the-avenger-general.html> [<https://perma.cc/R248-QQ45>].

In the 1980s, AGs in at least some states began to take on a more significant enforcement role in response to pressures to fill an enforcement gap arising from both (1) barriers to the private consumer litigation that had changed public expectations about the protection of consumer rights and policing corporate misconduct, and (2) a massive wave of federal deregulation that allowed more opportunities for corporate misconduct.³⁵

Changes in public expectations about how consumer rights can and should be protected began in the 1960s, as consumer rights pioneers such as Ralph Nader began an era of consumer activism.³⁶ Private litigation groups were formed to bring consumer cases, and public campaigns were waged to change consumer perceptions that corporations were protective of the health and safety of Americans. In *Unsafe at Any Speed*, Nader challenged the conventional view that car accidents should be attributed to the fault of the driver,³⁷ and at a broader level, challenged the view of corporations and their regulators as protective of the public interest. Nader inspired a wave of consumer activists and trial lawyers to replicate the investigative and litigation strategies that Nader demonstrated could be accomplished even by small, low-budget legal teams.³⁸ Nader and the lawyers he recruited, referred to as “Nader’s Raiders,”³⁹ provided successful models for how dedicated private-sector litigators with limited resources could take on big corporations and their legions of lawyers in court.⁴⁰ The efforts of these consumer activists, combined with a burgeoning trial bar looking for new cases to bring, produced a stream of successful consumer rights cases that led to new standards of consumer protection by holding corporations

³⁵ See generally Provost, *An Integrated Model*, *supra* note 13 (describing an expansion of state AG role in litigating as a means of enforcing consumer interests, in response to a weakening of federal enforcement efforts); Cornell W. Clayton, *Law, Politics, and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 552 (1994) (examining how changes in political context have led to state AGs assuming a more coordinated and proactive role in litigation).

³⁶ See, e.g., Parmet & Daynard, *supra* note 1, at 438.

³⁷ See RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965) (arguing that the reason for most car crashes was because they were not designed with safety in mind).

³⁸ Co-Author Reuben Guttman remembers visiting Nader’s Center for the Study of Responsive Law in 1972, where office furniture included lawn chairs. See also *The Art of Public Interest Litigation*, NADER.ORG, <https://nader.org/2004/01/03/chapter-6-the-art-of-public-interest-litigation/> [<https://perma.cc/4MGL-NH7X>] (last visited July 1, 2021) (recounting Alan B. Morrison’s experiences implementing Nader’s strategies at the private firm Public Citizen Litigation Group, which impacted “so many different areas of law—freedom of information, open government, union democracy, lawyers’ ethics, food safety, occupational safety and health, the constitutional separation of powers”).

³⁹ Julius Duscha, *Nader’s Raiders is their name, and whistle-blowing is there game . . .*, N.Y. TIMES (Mar. 21, 1971), <https://www.nytimes.com/1971/03/21/archives/stop-in-the-public-interest-stop-in-the-public-interest.html> [<https://perma.cc/CX4A-CJF7>] (explaining the term “Nader’s Raiders”).

⁴⁰ See *id.*

accountable for public harms.⁴¹ Nader had shown that bringing consumer protection cases against large corporations that engaged in misconduct was not only possible, even for small law firms, but also potentially profitable. His work, and that of the Nader's Raiders he inspired and trained, provided the private sector with models they could use to bring consumer protection cases, as well as ideas of where and how to look for corporate misconduct and develop novel theories of harm.

Not surprisingly, the consumer activism of groups such as those created by Nader, and the resulting increase in lawsuits against large corporations, led to a backlash from corporations—and their industry organizations—faced with litigation risks. Corporate lobbyists called for legal reforms to address what they presented as a “tort crisis.”⁴² Efforts were made by corporate actors and their supporters to reduce access to the courts by private litigants, and new conservative activist groups were formed to reflect and protect corporate interests in opposition to consumer activism.⁴³ This opposition was successful; business interest weighed in heavily on judicial selection and litigation processes, resulting in legal decisions that significantly worsened the playing field for the consumer protection bar. These legal decisions included changes to the summary judgment standards,⁴⁴ changes that allowed a judge to be the gatekeeper for experts,⁴⁵ decisions curtailing the ability to

⁴¹ Nader's cases and those brought by other groups led to changes in standards of care. *See, e.g.*, Mark Green, *How Ralph Nader Changed America*, NATION (Dec. 1, 2015), <https://www.thenation.com/article/archive/how-ralph-nader-changed-america/> [<https://perma.cc/DP3V-8KZU>].

⁴² *See, e.g.*, NAT'L LEGAL CTR. PUB. INT., A PLAN TO IMPROVE AMERICA'S SYSTEM OF CIVIL JUSTICE FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: WILL IT HELP? WILL IT BE IMPLEMENTED? 1–3 (1992); Dick Thornburgh, *America's Civil Justice Dilemma: The Prospects for Reform*, 55 MD. L. REV. 1074, 1077 (1996) (“The defects in our civil justice system have had a harmful effect on our economic competitiveness and, in turn, on our economic growth and our ability to create and retain jobs. Litigation constitutes a hidden tax on the American economy A good example of this flaw in the tort system is product liability litigation.”).

⁴³ The roadmap for this occurrence is, to some extent, laid out in the Powell Memo of 1971. *See, e.g.*, Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Com., Aug. 23, 1971, <https://scholarlycommons.law.wlu.edu/powellmemo/1> [<https://perma.cc/P9QL-B4EW>]. *See also* Alexander J.S. Colvin and Katherine V.W. Stone, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/> [<https://perma.cc/KQ6P-HM9L>]. For a discussion of how this trend has continued and even increased, *see, for example*, Adam Winkler, *Why Big Business Keeps Winning at the Supreme Court*, THE WASHINGTON POST (June 26, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/06/26/why-big-business-keeps-winning-at-the-supreme-court/> [<https://perma.cc/4F7H-B8C2>].

⁴⁴ *Celotex Corp. v. Catrett*, 477 U.S. 317, 317 (1986).

⁴⁵ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

bring class actions,⁴⁶ decisions making the pleading standards more stringent,⁴⁷ rule changes allowing appeal of class certification,⁴⁸ decisions making discovery “proportional,”⁴⁹ and decisions channeling even public interest cases, including consumer and discrimination claims, into compulsory arbitration.⁵⁰

The plaintiff trial bar and the consumer groups that had been so successful in the 1970s thus increasingly faced a judicial playing field tilted against them, reducing their ability to bring and win consumer rights cases. During this time, the full range of enforcement tools—even those contemplated by the authors of the civil rights laws of the 1960s—was being reduced, limiting the role of the courts as a vehicle for relief.⁵¹ This drop in the ability of private litigators to police corporate misconduct created public and political pressure for state AGs to step in.

Government involvement in tobacco litigation was in part a response to the inability of private plaintiffs to secure relief against large tobacco companies.⁵² Individual suits were filed in the 1950s after studies linking cigarettes to cancer became public based on a variety of product liability, fraud, and negligence theories.⁵³ Tobacco companies threw massive resources into fighting these claims, winning on defenses including “causation” and “assumption of risk” (i.e., that smokers knew of the risks and decided to smoke anyway).⁵⁴ A second wave of private plaintiff lawsuits was brought in the 1980s, alleging that cigarette companies knew but did not disclose the risks of smoking to consumers, but again the tobacco

⁴⁶ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fiberboard Corp.*, 527 U.S. 815 (1999); *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338 (2011).

⁴⁷ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁴⁸ FED. R. CIV. P. 23(f); *See also* Charles R. Flores, *Appealing Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f)*, 4 SETON HALL CIR. REV. 28 (2007).

⁴⁹ *See* FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case . . .”).

⁵⁰ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

⁵¹ For example, much of the NAACP litigation that led to the 1956 decision in *Brown* occurred contemporaneous and subsequent to the promulgation of the Federal Rules of Civil Procedure in 1938. Those rules provided for “notice pleading” as confirmed and explained by the Court’s decision in *Conley v. Gibson*. 355 U.S. 41 47–48 (1957). The Court’s decision in *Twombly* and *Iqbal* created a new standard giving the trial judge more discretion in determining which cases move past the pleading stage. *See Twombly*, 550 U.S. at 556; *Iqbal*, 556 U.S. at 678–680.

⁵² For a full timeline of tobacco litigation, see *Inside the Tobacco Deal: Full Chronology*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/settlement/timeline/fullindex.html> [<https://perma.cc/QY3R-W9C2>] (last visited July 1, 2021).

⁵³ *See, e.g.*, Kathleen Michon, *Tobacco Litigation: History and Development*, NOLO, <https://www.nolo.com/legal-encyclopedia/tobacco-litigation-history-and-development-32202.html> [<https://perma.cc/AQ7R-6VRA>] (last visited July 1, 2021) (discussing early suits brought by private plaintiffs against tobacco companies in the 1950s).

⁵⁴ *Id.*

companies were successful in deflecting blame, with defenses including assumption of risk and preemption of state laws by federal laws governing advertisements.⁵⁵ A third and finally successful wave of suits against tobacco companies occurred in the 1990s, after it was revealed that tobacco companies knew but did not disclose the addictive nature of their products.⁵⁶ At this point, state AGs got involved, bringing actions under state consumer protection and antitrust laws alleging significant costs to state public health systems.⁵⁷ These state challenges, made largely on behalf of state Medicaid systems, avoided the difficulties associated with having to prove individual causation and overcame the tobacco defense of assumption of risk. It is this third wave of lawsuits and, in particular, the culmination of some of these suits in the Tobacco Master Settlement Agreement, that are most often referred to as the Tobacco Litigation.

The Tobacco Litigation not only illustrated the power of litigation as a mechanism for challenging the actions of a powerful industry,⁵⁸ but also offered a new paradigm for the use of private law firms working in partnership with state AGs.⁵⁹ An assortment of large private plaintiffs' firms in different states entered into contracts with state AGs to bring suits against the tobacco industry based on state law arguments of public health harm. Together, they were able to develop a variety of legal theories, including state consumer protection and antitrust claims arising from costs imposed on state healthcare systems. They were also able to initiate litigation on behalf of public third-party payors that had sustained economic injury without any plausible argument that they had made the decision to assume any risk.

The late Ron Motley, who served as lead trial counsel for twenty-six state AGs in the Tobacco Litigation that he helped to orchestrate, described the genesis of the Tobacco Litigation as conceived by asbestos lawyers looking for new areas of complex consumer protection litigation who took their idea to the state AGs.⁶⁰ While

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See, e.g.,* LaFrance, *supra* note 8, at 192 (describing the dismal success rate of private state tort claims against the tobacco industry from the 1950s to the 1990s, and suggesting that this was the result of “a decades-long pattern of deliberate concealment, misrepresentation and deception by the tobacco companies,” a trend broken by involvement of state AGs litigating based on state Medicaid costs).

⁵⁸ *See, e.g.,* Steven A. Schroeder, *Tobacco Control in the Wake of the 1998 Master Settlement Agreement*, 350 NEW ENG. J. MED. 293, 293 (2004) (“In the relatively few countries that have antitobacco policies, government has provided the essential leadership; the exception is the United States, where grassroots action and litigation by citizens have generated most of the changes, including changes that were mediated by laws and regulations.”).

⁵⁹ *See, e.g.,* Jacobson & Warner, *supra* note 1, at 770. As one important example, the Tobacco Litigation established a paradigm for suits to recover on behalf of Medicaid systems—a paradigm that permeates the world of False Claims Act litigation against large pharmaceutical companies.

⁶⁰ *See, e.g.,* *Frontline: Inside the Tobacco Deal Interview with Ron Motely* (PBS television broadcast May 12, 1998) <https://www.pbs.org/wgbh/pages/frontline/shows/settle>

governmental entities have long used the services of private counsel, at least through hourly billing relationships, the Tobacco Litigation modified and solidified the paradigm to include private counsel working on a contingency basis for government actors to bring this kind of high-impact litigation.⁶¹ The shift to contingency fee arrangements, with the associated possibility of obtaining multiplier fee recoveries, increased the incentives for private firms to invest in high-impact litigation of state claims.

For the AGs, the Tobacco Litigation offered an opportunity not only to recover some money to compensate for the myriad of state expenses incurred because of the health impact of tobacco but also to restructure the industry to prevent, or at least limit, future harms. While some states settled earlier, in 1998, forty-eight states entered into a Master Tobacco Settlement Agreement (MSA) with four of the largest tobacco companies. At that time, this was the largest civil litigation settlement in U.S. history.⁶² In addition to a minimum payment of \$206 billion spread out over time and across many states, the tobacco companies agreed to advertising restrictions, funded educational programs, and dissolved industry organizations.⁶³ Each of the states involved in the settlement retained the right to enforce the MSA and related consent decree with respect to disputes impacting that state, with the NAAG designated as the responsible party for implementing and coordinating enforcement of the MSA on behalf of participating states.⁶⁴

While the Tobacco Litigation—and the MSA that resulted—were lauded by many as an example of the success of litigation in achieving public health goals, the MSA had its critics even at the time of signing.⁶⁵ The effectiveness of the MSA in reducing harms from tobacco has subsequently been even more broadly

ment/interviews/motley.html [https://perma.cc/7MU8-Y2VM]; *Ron Motley Bio*, Motley Rice LLC, <https://www.motleyrice.com/attorneys/ronald-l-motley> [https://perma.cc/AT62-KGMG] (last visited July 9, 2021).

⁶¹ See *id.*; Erichson, *Private Lawyers, Public Lawsuits*, *supra* note 11, at 130.

⁶² See, e.g., PUBLIC HEALTH LAW CENTER TOBACCO CONTROL LEGAL CONSORTIUM, THE MASTER SETTLEMENT AGREEMENT: AN OVERVIEW (2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/MSA-Overview-2019.pdf> [https://perma.cc/9EWD-G5F9].

⁶³ See, e.g., Gregory W. Traylor, *Big Tobacco, Medicaid-Covered Smokers, and the Substance of the Master Settlement Agreement*, 63 VAND. L. REV. 1082,1099–1101 (2010) (describing both the payment and regulatory provisions of the MSA, including the structure and total value of the monetary settlement, advertising and marketing restrictions, and limits to lobbying).

⁶⁴ See, e.g., PUBLIC HEALTH LAW CENTER TOBACCO CONTROL LEGAL CONSORTIUM, *supra* note 62, at 7.

⁶⁵ See, e.g., LaFrance, *supra* note 8, at 188 (“The position advanced in opposition had basically four points: (1) the State was getting far too little; (2) it was giving up far too much; (3) the structured nature of the settlement meant that the State’s future interests were aligned with, indeed dependent upon, future success in tobacco sales, an exact reversal of existing health policy; and (4) the kinds of determinations underlying the MSA were essentially legislative, and well beyond the adjudicative and enforcement capabilities of a single judge sitting in a lower court of general jurisdiction.”).

questioned.⁶⁶ Although the MSA did impose a large monetary penalty on tobacco companies, the companies remained operational and free to continue producing cigarettes, and the MSA settlement funds were not adequately tied to the goal of reducing the rate of smoking.⁶⁷ Indeed, the funds were largely unrestricted and quickly became deployed by states for purposes other than addressing the harms of tobacco.⁶⁸ The monetary payouts to states might have even created perverse incentives for states to protect the tobacco industry in order to sustain a continuing flow of MSA funds.⁶⁹ While the ambitions for structural change to the tobacco industry were high, interests in securing a large monetary settlement without further delay ultimately dominated in the resolution of these cases.

Despite its limits as a mechanism for controlling the harms of tobacco, the MSA was viewed as a success story by many of the participating AGs. They were able to claim credit for achieving a landmark settlement and for appearing to address widespread public health harms from tobacco, as well as providing a welcome flow of funds to state budgets. After this widely publicized settlement, the model of state AGs working with private law firms, most often on a contingency fee basis, continued to evolve in response to pressures on both private law firms and state AGs. The novelty of the litigation and the magnitude of potential recovery allowed for under contingency fee arrangements impacted the way both AGs and private firms

⁶⁶ See, e.g., Haffajee & Abrams, *supra* note 2, at 703–04 (describing some of the limits of the Tobacco Litigation and implications for thinking about the multi-state opioid litigation).

⁶⁷ See, e.g., Schroeder, *supra* note 58, at 294–95 (“Many tobacco-control elements that had been part of the general settlement were dropped from the MSA; these included the assignment of jurisdiction over tobacco to the FDA, strengthened warnings on packages of tobacco, tighter enforcement of rules banning the sale of tobacco to minors, and strong regulations in support of clean indoor air. The MSA also included language that later hampered efforts aimed at tobacco control.”).

⁶⁸ See, e.g., Haffajee & Abrams, *supra* note 2, at 710 (discussing the limitations of the MSA in the Tobacco Litigation); U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-534T, TOBACCO SETTLEMENT: STATE’S ALLOCATIONS OF PAYMENTS FROM TOBACCO COMPANIES FOR FISCAL YEARS 2000 THROUGH 2005 6 (2007) (finding that, from 2000 to 2005, only 3.5% of total MSA revenues were spent on tobacco control programs, while 22.9% went towards state budget gaps, 7.1% towards “general purposes,” and 6% towards “infrastructure”); Andrew J. Haile and Matthew W. Krueger-Andes, *Landmark Settlements and Unintended Consequences*, 44 U. TOL. L. REV. 102, 103 (Sept. 27, 2012) (“[I]n 2011 the states collectively used less than 2% of their annual MSA payments for smoking control and prevention programs.”).

⁶⁹ See, e.g., Schroeder, *supra* note 58, at 295 (noting that some states have mortgaged their future payments from the MSA through bond issues backed by state tax revenues, creating perverse incentives for these states to keep tobacco companies healthy in order to avoid having to bear the financial obligations they would assume should the tobacco companies forfeit MSA payments).

approached their relationship with each other and their roles in the shared litigation, resulting in a new paradigm of public-private health litigation.⁷⁰

Since the Tobacco Litigation, private plaintiffs' law firms searching for new complex litigation opportunities and state AGs interested in leveraging their enforcement ability in court have continued to work together to litigate state interests, particularly in high-profile litigation such as the multi-state opioid litigation.⁷¹ Building on past experiences, some of the same individuals who took on leadership roles in the tobacco litigation, including some former AGs who are now private lawyers, have been involved in public-private coalitions designed to go after opioid manufacturers.⁷²

C. The Growth in Public-Private Health Litigation

1. Private Law Firms Leveraging Public Access to the Courts

Citizen suits, such as the first and second waves of individual lawsuits brought against tobacco companies, rely directly on private litigation targeting companies that engage in harmful activities such as misrepresenting the safety of a drug or medical device, product defects, or adulteration of the products. Since pursuing these lawsuits is costly and it is difficult for an individual plaintiff to win against large corporate interests, law firms have relied on the ability to aggregate the claims of multiple plaintiffs through class actions to make lawsuits economically viable. But a series of Supreme Court decisions starting in 1999 and continuing into the following decade have created a variety of procedural barriers to class action suits.⁷³ Additional procedural changes, such as the allowance of appeals from orders denying or granting class certification, have added potential delays in the trajectory

⁷⁰ See, e.g., Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 16–18 (2000) [hereinafter Erichson, *Coattail Class Actions*] (examining how the tobacco settlement set the precedent for AG hiring of contingent fee-based private attorneys).

⁷¹ See, e.g., Haffajee & Abrams, *supra* note 2, at 704.

⁷² See, e.g., Esmé E Deprez & Paul Barrett, *The Lawyer Who Beat Big Tobacco Takes On the Opioid Industry*, BLOOMBERG BUSINESSWEEK (Oct. 5, 2017), <https://www.bloomberg.com/news/features/2017-10-05/the-lawyer-who-beat-big-tobacco-takes-on-the-opioid-industry> [<https://perma.cc/7XDL-6N7A>] (“Litigation is a blunt instrument; it’s not a surgical tool,” Moore says. ‘But it provokes interest quicker than anything I’ve ever seen.’”); see also Ronald L. Motley’s *Bio*, MOTLEY RICE <https://www.motleyrice.com/attorneys/ronald-l-motley> [<https://perma.cc/R2ZE-58RK>] (last visited July 7, 2021).

⁷³ Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 733, 745–61 (2013).

of class action cases, requiring the plaintiff firms pursuing class actions to carry costs and attorney's fees on their books for a longer period of time.⁷⁴

One result of the increasing barriers to class actions has been a shift from class actions to the multi-district litigation (MDL) that now predominates in the federal court system.⁷⁵ But MDLs are imperfect substitutes for the class action suits that private plaintiffs' lawyers might have previously relied upon because they lack the efficiencies that made class actions so valuable,⁷⁶ as well as the safeguards that protected individual plaintiffs.⁷⁷

Sector-specific legal barriers have also made it harder for plaintiff firms to bring certain kinds of complex litigation, pushing plaintiff firms specializing in these areas to diversify. The passage of the Public Securities Law Reform Act, for example, along with cases requiring the need to demonstrate loss causation,⁷⁸ have made securities litigation more speculative and costly. This has pushed firms specializing in these complex cases to diversify into new areas such as healthcare litigation.⁷⁹ Meanwhile, private law firms thriving on medical malpractice and consumer fraud have had their business model threatened by damage caps, compulsory arbitration, and barriers imposed on medical malpractice cases, leading them to join the search for alternative litigation areas and strategies.⁸⁰

⁷⁴ See, e.g., Matthew Perlman, *Mylan, Pfizer Want EpiPen Row Paused for Class Cert. Appeal*, LAW360, https://www.law360.com/articles/1255068?utm_source=ios-shared&utm_medium=ios&utm_campaign=ios-shared [<https://perma.cc/AVR3-F5Z8>] (last visited July 7, 2021).

⁷⁵ See, e.g., Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 72 (2017) [hereinafter Burch, *Monopolies in Multidistrict Litigation*] (“And from 2002 to 2015, multidistrict proceedings leapt from sixteen to thirty-nine percent of the federal courts’ entire civil caseload.”).

⁷⁶ While class actions allowed plaintiffs firms to focus on a limited number of class representatives, MDLs require a high volume of individual plaintiffs, each of whom is an individual client.

⁷⁷ See, e.g., Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1449 (2017) (arguing that the role of repeat players in MDLs and the control exercised by lead attorneys can lead to settlements that benefit the leaders and defendant at expense of claimants); ELIZABETH BURCH, *MASS TORT DEALS: BACKROOM BARGAINING IN MDLS* (Cambridge University Press, 2019) [hereinafter BURCH, *MASS TORT DEALS*] (reviewing MDLs and how they may fall short of serving plaintiffs’ interests).

⁷⁸ *Dura Pharmaceuticals v. Broudo*, 544 US 336 (2005).

⁷⁹ In 1995, Congress passed the Public Securities Law Reform Act (PSLRA), which was essentially designed to hinder the ability of small shareholders to bring class action securities cases. See Public Securities Law Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.). The PSLRA created a sixty-day holding period after the initial complaint is filed. The court then chooses as the lead plaintiff—and its law firm—the plaintiff or plaintiff group with the biggest losses. The result of the congressional effort to kill these class actions was to put them in the hands of large institutional investors: first the Taft Hartley Fund and then public pension funds.

⁸⁰ See, e.g., Clifton Barnes, *Tort Reform Slowed but Not Stopped*, 29 ABA J. No. 6 (2005) (discussing trends and impact of medical malpractice tort reform).

In addition to barriers to class actions and legal changes targeted at areas such as securities litigation and medical malpractice, plaintiffs' law firms have faced changes in the law that make it harder for them to bring cases even on behalf of individual private plaintiffs. One of the most significant roadblocks to private litigation is the heightened pleading standard established by the Supreme Court cases of *Bell Atlantic v. Twombly*⁸¹ and *Ashcroft v. Iqbal*.⁸² These cases threw out the decades-old notice pleading standard⁸³ and replaced it with a requirement that plaintiffs provide factual support for a plausible claim for relief without the benefit of discovery.⁸⁴ This change in pleading standards gave the trial court an expanded role in determining which cases could be pursued beyond the initial complaint.⁸⁵

These various barriers to private plaintiff litigation have encouraged private plaintiffs' firms to explore business opportunities for pursuing litigation in partnership with AGs, either through securing the intervention of AGs in *qui tam* suits or on a contract basis in cases brought by AGs. State AGs can bring lawsuits on behalf of state citizens, allowing them to avoid the difficulties of class certification. The increased pleading standards also have less impact on cases brought by state AGs because they can engage in investigations and subpoena information before filing a complaint, allowing them to obtain facts useful in supporting the claims they make. In addition, having the state AG as the plaintiff may add legitimacy to the claim, giving it the aura of plausibility for a judge with the discretion to determine whether the plausibility standard has been satisfied.

Litigating state interests also offers opportunities for addressing issues of causation and developing novel legal theories based on state-based harms. Where causation might be difficult to establish for individual plaintiffs, state-interest claims can be based on state harms such as state Medicaid expenditures.⁸⁶ In later phases

⁸¹ 550 U.S. 544 (2007).

⁸² 556 U.S. 662 (2009). The *Twombly* and *Iqbal* cases overturned a long-established notice pleading standard established in *Conley v. Gibson*. Under the new standard, the court must now engage in a two-pronged analysis. First, the court must strip out all conclusory allegations. Second, assessing only the factual allegations, the court must determine whether the complaint states a plausible claim for relief. *See id.* at 679–81 (describing the correct standard as a “two-pronged approach” and proceeding to identify and reject conclusory allegations before turning to the sufficiency of the remaining factual allegations).

⁸³ *See Conley v. Gibson*, 355 U.S. 41 (1957), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

⁸⁴ *See, e.g., Arthur R. Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1, 19 (Oct. 2010) (“After *Twombly* and *Iqbal*, mere notice of a claim for relief likely does not satisfy the Court’s newly minted demand for a factual showing.”).

⁸⁵ *See, e.g., Henry S. Noyes, The Rise of the Common Law of Federal Pleading: Iqbal, Twombly, and the Application of Judicial Experience*, 56 VILLANOVA L. REV. 857, 858–59 (2012).

⁸⁶ *See, e.g., LaFrance, supra note 8, at 187–93* (providing the historical context for the tobacco litigation brought by state AGs); *Erichson, Coattail Class Actions, supra note 70, at 10* (describing the ways in which state AGs were able to succeed in bringing claims against tobacco industry where private litigants had failed).

of the case, state AGs can avoid negotiations over the admission of expert witnesses by relying instead on the expertise of the state agencies involved in the case.

Finally, where defendants are large and well-resourced and the harms arising from their misconduct are diffused across state lines, private law firms can build coalitions of state AGs and other private law firms to increase both the resources available to litigate and the willingness of the defendants to enter into settlements. Taking these factors into account and adding the opportunities for larger recoveries allowed under contingency fee arrangements, state AGs become valuable targets for private plaintiffs' law firms with the capacity to engage in complex healthcare litigation.

2. *State AGs Leveraging Private Sector Resources*

At the same time as plaintiffs' law firms have looked elsewhere for avenues to pursue large, complex product liability suits, state AGs with growing responsibilities and ambitions have become more interested in exploring new ways of litigating state interests with the use of private sector resources.⁸⁷ As discussed earlier, the drop in the ability of private litigators to police corporate misconduct created public and political pressure for state AGs to step in. There were both public expectations that consumer rights would be protected and pressures on the state AGs to address harms to their citizens in the vacuum left by the thwarting of private plaintiff suits. At the same time as barriers were being erected to prevent consumer litigation, the role of government regulation was also being rolled back. The massive corporate deregulation that took place in the 1980s, along with the formation of barriers that prevented private litigation from being an alternative enforcement mechanism, led the state AGs to take on a greater enforcement role to fill the void.⁸⁸ In the wake of the Tobacco Litigation, state AGs came to see high-impact litigation as an attractive way of showing that they were successfully combatting misconduct that harms the state, and many became adept at claiming credit for the money that could be returned to the state through such litigation.⁸⁹

In many states, the office of the state AG expanded, resulting in a larger number of staff attorneys and a larger budget for launching investigations and bringing cases. However, the capacity of the state AG's office by no means matched the scope of

⁸⁷ See Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1235–36 (2015) (examining growing responsibilities, as well as ambitions and activism, of state AGs).

⁸⁸ See, e.g., Colin Provost, *When is AG Short for Aspiring Governor?*, *Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS 6 (2010) [hereinafter Provost, *When is AG Short for Aspiring Governor?*] (discussing emergence and increase of MDL in part as a response to weakening of federal enforcement in the 70s–80s).

⁸⁹ See Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 855, 855 n.6 (2014) (offering examples) (“In the years since the tobacco litigation, state AGs have become adept at using large monetary recoveries to publicize the financial contributions they make to the state and its citizens.”).

their enforcement role.⁹⁰ The enforcement needs far exceeded the resources available to the AGs. With an existing array of statutory and enforcement obligations, a higher overhead than that of the consumer activists, and a need to generate short-term results in time for election deadlines, the gradual gravitation of the AGs toward a relationship with the private plaintiffs' bar was almost inevitable. The attractiveness of working with private firms on a contingency basis, or intervening in suits initiated by private firms, was twofold: (1) because private counsel would work on a contingency fee basis and advance costs, there was no drain on the AG's budget; and (2) the AG could rapidly launch novel cutting-edge litigation and take credit for its launch and/or conclusion. The private attorneys and the state AGs thus had a shared motivation to work together to litigate state interests, driving the growth in public-private litigation relationships.

II. COMPETING THEORIES OF PUBLIC-PRIVATE LITIGATION

As the confluence of the factors discussed above has pushed both private counsel and state AGs to investigate new ways of working together to bring public litigation,⁹¹ concerns about these public-private models have joined a broader academic and policy debate about the respective roles of the private and public sector in lawmaking. This Section begins by situating arrangements between private law firms and AGs in the litigation of state interest within this broader debate. It then offers as an alternative a pragmatic theory of why these arrangements are likely to persist and why they offer at least the potential for responding to public health harms that might not otherwise be addressed.

A. *The Debate over Privatizing Public Litigation*

There is a longstanding and wide-ranging debate over when, how, and even whether the private sector does and should have a role in public lawmaking.⁹² The

⁹⁰ This is particularly true in the age of electronic discovery, where document production is extensive, and it takes the assembly of "war rooms" of attorneys to review documents.

⁹¹ See generally Gilles, *The Politics of Access*, *supra* note 5.

⁹² The literature includes law and economics arguments about the comparative efficiency of alternative systems of law enforcement, jurisprudential views about lawmaking and the public interest, and pragmatic approaches that recognize the messy, hybrid nature of current enforcement. To list just a few examples, see, for example, John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669 (1986) (examining heavy reliance of the U.S. system on private litigants to enforce public law); see generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010) (discussing when and why private plaintiff-driven litigation has become a dominant model for enforcing federal regulation); see generally THOMAS F. BURKE, *LAWYERS, LAWSUITS AND LEGAL RIGHTS: THE BATTLE OVER*

debate surrounds a number of topics, ranging from very broad views about the privatization of lawmaking and the ways in which private firms may pursue public rights⁹³ to more specific and granular concerns with the ways in which private law firms are hired to pursue state interests and how much they get paid.⁹⁴ While the issues and concerns raised vary, most, if not all, of the arguments against private law firm involvement share common concerns about private actors controlling inherently public functions and using this control for private gain. Often, the debates involve normative assessments of whether and how private law firms might distort the development and enforcement of public law.⁹⁵ In more recent literature, there is a growing (although by no means new) acknowledgment of the hybrid nature of regulatory regimes, with overlapping and intertwined public and private mechanisms of enforcement.⁹⁶

The use of private law firms to litigate state interests falls squarely within the debate over the privatization of public law. Where the AG hires a private law firm

LITIGATION IN AMERICAN SOCIETY (2004) (examining the role of laws that promote private litigation as a mechanism for resolving disputes and the U.S. court-centered public policy approach); Rubenstein, *supra* note 24, at 2142–58 (discussing the public-private distinction in the lawyering literature and exploring the concept of private attorney general, construed broadly as players who mix public and private functions, and providing taxonomy of different types of private attorney general who serve different functions); Wilkins, *supra* note 9, at 425 n.10, 428 (examining a growing tendency by governments at all levels to hire private lawyers to act as “substitute” attorneys general to pursue public claims against private defendants, and arguing for a new “set of institutional arrangements and ethical norms” that can help lawyers “conceptualize and discharge” their competing and “often conflicting public and private responsibilities”). For a discussion of how to think about private “lawmaking,” see, for example, David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 373–74 (2003) and Kimberly N. Brown, *Public Laws and Private Lawmakers*, 93 WASH. U. L. REV. 615, 619–45 (2016). For a foundational discussion of the privatization of public functions, see generally DANIEL GUTTMAN & BARRY WILNER, *THE SHADOW GOVERNMENT: THE GOVERNMENT’S MULTI-BILLION DOLLAR GIVE AWAY OF ITS DECISION-MAKING POWERS TO PRIVATE MANAGEMENT CONSULTANTS, “EXPERTS” AND THINK TANKS* (1976).

⁹³ For a variety of different views on the role of the private sector in lawmaking and litigation, see, for example, Lemos, *Privatizing Public Litigation*, *supra* note 4, at 515–82 (arguing that the increasing use of private resources to fund and conduct public litigation may interfere with the focus of the litigation on the public interest); Snyder, *supra* note 92, at 372, Part VII (arguing that a significant amount of law is privately made and that its legitimacy may depend on competition).

⁹⁴ See, e.g., Erichson, *Coattail Class Actions*, *supra* note 70, at 35–36 (discussing the debate over contingent fee private attorneys in public suits and concerns over skewed incentives). See Lemos, *Privatizing Public Litigation*, *supra* note 4, at 518–19 (discussing the advantages and issues relating to privatizing public litigation).

⁹⁵ See, e.g., Lemos, *Privatizing Public Litigation*, *supra* note 4, at 515–82.

⁹⁶ See, e.g., David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L. J. 530 (2013) (“Indeed, many of our most consequential regulatory regimes have evolved in recent decades into hybrids of public and private enforcement in which multiple enforcers—including federal and state administrative agencies, private litigants, and state attorneys general—operate and interact within complex ecologies of enforcement.”).

to bring litigation on its behalf, there is a concern about the privatization of inherently governmental functions and an underlying assumption that the presence of the private firm will alter the litigation trajectory.⁹⁷ The AGs must retain control over the lawsuits even when they contract out the work, and so, at least theoretically, the decision to bring a case and retain counsel to help litigate it is a public decision made by the AG. But where the idea for the litigation and the R&D to support it are developed by a private law firm that proposes the idea to a state AG, the private law firm is influential in driving case selection. Moreover, although contracts with private counsel require AGs to play a supervisory role in the litigation, the ability to do so effectively is diminished when the information central to the unfolding litigation is developed outside of the AG's office. As the litigation progresses, unless the AG's attorneys are inserted into the litigation process and follow the facts and details of the case, real oversight is hard to accomplish, and the private law firm is effectively in control of the case.

This impact of outsourcing on the litigation pathway, beginning before the case is even selected, raises important concerns about the privatization of a public function. The rule of law is embedded in statute, regulation, and common law. Oftentimes, AG opinions form the basis of how law or regulation is to be interpreted. When an AG chooses to litigate, the act of litigation is itself both an interpretation of the law and an effort to confirm that interpretation through judicial affirmation. Hence, when private lawyers are working with AGs in ways that impact key litigation decisions, they are involved in creating law. In our existing system, private counsel has the right to do this through private litigation. But when litigation is commenced on behalf of a public client, one whose opinion about the application of or extension of law bears some weight, the private law firm is effectively influencing the public lawmaking role.⁹⁸

B. A Pragmatic Approach: Leveraging Legal R&D to Litigate State Interests

While the merits of private law firm involvement in public litigation will no doubt continue as a subject of academic and policy debate, at a pragmatic level, the relationships between AGs and private law firms are likely to persist, if not expand, for the reasons discussed at length in Part I. Given that these arrangements are here to stay, at least for now, this Section develops a pragmatic theory of how they are used to pursue high-impact litigation.

One of the driving factors behind AG interest in private law involvement is the limited resources that enforcement agencies have to monitor corporate misconduct and the limited resources that AGs have to pursue litigation where the public has been harmed. The role of corporate actors in fueling the financial crisis of 2008 and

⁹⁷ See, e.g., David Freeman Engstrom, *Private Enforcement Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. (2014) (providing an empirical examination of private pathways of litigation under False Claims Acts, finding that while private suits may not be inefficient, they do impact the litigation pathway in important ways).

⁹⁸ See, e.g., Lemos, *Privatizing Public Litigation*, *supra* note 4, at 515.

the ongoing opioid epidemic offer salient examples of corporate misconduct that went unchecked for decades before state intervention occurred.⁹⁹ Many more instances of corporate misconduct fly under the radar of agency enforcers and continue unabated. The capacity of enforcement agencies in areas relevant to public health remains far below the need for proper enforcement, leaving the state AGs with a vast territory of public health harms to investigate and pursue.¹⁰⁰ They are faced with a broad array of duties and stakeholder interests and a limited budget and staff, and out of this array of considerations and constraints, they must decide how much time and money to dedicate to affirmative civil enforcement.

While AGs have advantages over private plaintiffs in accessing the courts, they don't necessarily have the resources and expertise to develop the types of novel claims that lead to high-impact litigation or the ability to carry out lengthy and expensive litigation. In contrast, the investments needed to identify and develop novel legal theories and legal strategies, or what we refer to as legal R&D, are a central part of the business model for private plaintiffs' law firms. These firms must continually invest in the development of new legal theories and case strategies and adapt existing theories and strategies to new areas of harm in order to generate business.¹⁰¹

There are at least four types of legal R&D involved in developing novel cases: (1) identifying patterns of misconduct that cause harm for which recovery can be sought; (2) developing legal theories of recovery; (3) finding the facts needed to support the legal theories; and (4) using expert analysis to identify harm, prove causation, and establish measures of harm. All this research becomes the foundation for a carefully constructed complaint and a litigation strategy designed to yield a profitable result for the firm. Expectations about profitability drive R&D decisions about what areas and which cases to investigate and pursue. There are scale

⁹⁹ See, e.g., James G. Hodge, Chelsea L. Gulinson, Leila Barraza, Walter G. Johnson, Drew Hensley & Haley R. Augur, *Exploring Legal and Policy Responses to Opioids: America's Worst Public Health Emergency*, 70 S.C. L. REV. 3, Part II (2019) (exploring inadequacies of the legal responses to the opioid epidemic); Gretchen Morgenson & Louise Story, *In Financial Crisis, No Prosecution of Top Figures*, N.Y. TIMES (Apr. 14, 2011), <https://www.nytimes.com/2011/04/14/business/14prosecute.html> [<https://perma.cc/3S4C-9QLV>] (exploring the inadequacies of regulation before and after the financial crisis of 2008).

¹⁰⁰ See, e.g., Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1214 (1982) ("Public enforcement is, however, frequently inadequate because of budget constraints . . .").

¹⁰¹ See, e.g., Bruce H. Kobayashi and Larry E. Ribstein, *Class Action Lawyers as Lawmakers*, 46 ARIZ. L. REV. 733, 736–37 (2004) (discussing investments made by private law firms in developing new class action cases, suggesting the use of intellectual property protection as a mechanism for protecting this investment and incentivizing the R&D needed to develop these novel cases); Thomas G. Field, Jr., *Lawyers Should Be Cautious When Copying Other Lawyers' Work*, IP MALL, https://ipmall.law.unh.edu/sites/default/files/host_ed_resources/field/22-AttyWork.pdf [<https://perma.cc/UB59-8BJF>] (last visited July 7, 2021) (discussing implications of using other lawyers' research and work product).

economies in much of this activity, allowing firms to recoup up-front costs over time in repeat litigation.

The first component of this legal R&D involves the use of past experience and current research to inform pattern recognition. Plaintiffs' trial firms are constantly looking for patterns of misconduct in new contexts that have become familiar to them as a result of past cases. Here, the role of experience is particularly valuable, and litigation teams will inevitably include seasoned trial lawyers who have been trained to spot patterns of misconduct.

The second component involves the use of experience drawn from prior cases in combination with the development of new legal theories to identify a legal remedy—a remedy that includes adequate potential for recovering sizeable monetary damages. This often involves delving into old common law principles and applying them to new contexts and finding new fact patterns that might fit legal theories developed in other circumstances. For example, the Oklahoma opioid litigation involved the application of age-old theories of nuisance to the marketing and distribution practices of opioid manufacturers and distributors.¹⁰²

The third component involves focusing on the legal remedy. If firms do this, they can invest in culling out the facts from public records and other sources, most of which involves piecing together circumstantial evidence, to support the legal theories.¹⁰³ Plaintiff firms also have the ability to cull facts from existing bodies of litigation that they have undertaken. These firms mostly operate on a contingency basis, so their business model is not, in the short term, securing an economic hourly return on each hour spent accumulating potentially useful data. Nor do they have to show results that are timed to coincide with an election or re-appointment cycle. But ultimately, the investment does need to translate into a lawsuit with an expected payoff large enough to justify the large, up-front investment in R&D.

The fourth component is two-fold: (1) private law firms have the resources to finance the overhead of large cases; and (2) they have existing relationships with experts who can help identify wrongdoing or demonstrate causation and damages. They also have the capacity to scale up their R&D activities rapidly where needed, without facing the kinds of contracting or budget constraints that AGs might encounter.¹⁰⁴

This process of legal R&D can be expensive and time consuming, and the benefits of this work may not be realized in any one case. Often, firms depend on a

¹⁰² See W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, DAVID G. OWEN, PROSSER & KEETON ON TORTS 617 (5th ed. 1984).

¹⁰³ Most complex cases are premised on a massive aggregation of circumstantial evidence often tied together with expert testimony, as permitted under the test for relevant evidence under FED. R. OF EVID. 401.

¹⁰⁴ Consider, for example, a plaintiff's firm that wanted to sue a major retailer because the children's toys produced by the retailer contained lead paint. The law firm could buy toys and send them to a lab for rapid analysis. It could then begin research on the nature and operations of the distribution chain and hire investigators to collect information about sales practices. Meanwhile, the law firm could task associates to develop a memo on legal theories or create a coalition of firms with expertise in toxics or metals litigation.

portfolio of relevantly similar cases when litigating. Private law firms can spread the cost of this legal R&D and the expense of maintaining litigation capacity across multiple lawsuits that rely on similar strategies, benefiting from the prior experience of senior litigators and from scale economies in at least some aspects of the litigation process. Once a litigation team has invested time and money in developing expertise in a particular area, they have an interest in identifying as many cases as possible that share a commonality of legal and factual issues. Once a particular avenue of litigation has concluded, such as the long series of asbestos actions or tobacco litigation, the private plaintiffs' lawyers have incentives to find new areas of corporate misconduct that might be susceptible to relevantly similar legal arguments and strategies. Firms have an institutional memory that is comprised of lawyers who are repeat players in multiple cases over long periods of time and the use of internal firm databases that codify information and trial practices. Relationships with experts in the field become part of this institutional memory or knowledge. The lead lawyers in the Tobacco Litigation, for example, were successful asbestos lawyers who were initially drawn to the tobacco cases because they knew that cigarettes had an asbestos component. But, of even more importance, they had grappled for years with matters of causation, including the battle of scientific experts in proving causation. They thus quickly recognized that finding a third-party-payor client in the form of State Medicaid funds would eliminate the causation hurdles in tobacco cases, just as they had in asbestos cases.

In sum, for the private law firm, partnering with AGs includes the following advantages: (1) eliminating defenses and procedural barriers; (2) legitimizing claims; (3) providing court access for large damage cases absent the rigors of class certification; (4) allowing the use of expert state agencies whose interpretation of statutes is given deference and whose testimony with regard to damages is less likely to be excluded by the trial judge in comparison to testimony from a private expert; and, ultimately, (5) increasing the likelihood of reaching a successful outcome, most often through settlement.¹⁰⁵ For these reasons, enterprising law firms have aggressively pursued the avenue of working on a contract basis for state AGs, some of them pitching potential cases to resource-constrained AGs and agreeing to do the legal work on a contingency fee basis.¹⁰⁶ They have also developed relationships with AGs in the context of False Claims Act cases where they have an interest in encouraging the state AG to intervene. The overall result is an opportunity for AGs to leverage private law firm resources and for private law firms to leverage government access to the courts.

¹⁰⁵ See, e.g., Erichson, *Private Lawyers, Public Lawsuits*, *supra* note 11, at 142–43 (discussing the legal advantages gained by private plaintiffs' lawyers in working with states and pursuing state lawsuits).

¹⁰⁶ See, e.g., Peter Roff, Opinion, *Attorneys General Shouldn't Outsource Legal Work to Private Firms*, WASH. EXAM'R (Aug. 24, 2016), <https://www.washingtonexaminer.com/attorneys-general-shouldnt-outsource-legal-work-to-private-firms> [<https://perma.cc/FD7U-YUY4>] (providing examples of law firms aggressively pitching cases to cash-strapped AGs and performing the resulting legal work on a contingency fee basis).

The ability to leverage private legal R&D does not remove the need for public legal R&D. A law firm's R&D will be focused on opportunities for profitable recovery based on monetary damages and may leave out important areas of public legal interest. While not a substitute for public legal R&D, however, private legal R&D can act as an important supplement to what is often limited public capacity to invest in litigation.

III. DIVERGENCE OF PRIVATE AND PUBLIC INTERESTS IN LITIGATION

Litigation can be an important tool for addressing misconduct that harms public health.¹⁰⁷ At its best, litigation can result in prophylactic measures or make-whole remedies, it can surface information that informs public opinion and enlightens consumers, it can inform regulators and legislators and drive regulation or law, and it can promote legislative and regulatory oversight to ensure more diligent compliance. Legislative response to litigation can come in the form of corrective action when the legislator deems that the courts were in error,¹⁰⁸ or where the courts were constrained by existing law.¹⁰⁹ At other times, litigation can uncover public information that drives legislators to provide a new statutory basis for the relief sought in court.¹¹⁰ Complaints, answers, motions, and discovery create, organize, and interpret valuable information that can be analyzed and used by the press, legislators, regulators, and those enforcing compliance of existing regulatory and statutory obligations. Since small corporate derelictions are often symptomatic of more pervasive and significant problems, even cases involving seemingly lesser or

¹⁰⁷ See, e.g., Guttman, *infra* note 110.

¹⁰⁸ See, e.g., *Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of 2009*, EEOC <https://www.eeoc.gov/laws/guidance/equal-pay-act-1963-and-lilly-ledbetter-fair-pay-act-2009> (reacting to the Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 US 618 (2007)).

¹⁰⁹ A good example is *Oil, Chemical & Atomic Workers International Union v. Pena*, 62 F. Supp. 2d. 10 (D.D.C. 1999) where the court was constrained by CERCLA Section 113(h) from ordering an Environmental Impact Statement covering the recycling and distribution into commerce of radioactive nickel from the K25 gaseous diffusion plant at the Oak Ridge National Laboratory. In issuing an opinion dismissing the case, the court took the opportunity to bring to the public's attention the dangers of the proposed project. The court noted: "[I]t is nevertheless startling and worrisome that from that early point on, there has been no opportunity at all for public scrutiny or input on a matter of such grave importance. The lack of public scrutiny is only compounded by the fact that the recycling process which BNFL intends to use is entirely experimental at this stage. The process has not been implemented anywhere on the scale which this project involves. Plaintiffs allege, and the Defendants have not disputed, that there is no data regarding the process' efficacy or track record with regard to safety" *Id.* at 12. Following the Court's opinion, DOE Secretary Richardson canceled the project.

¹¹⁰ See, e.g., Reuben A. Guttman and Kathryn D. Wagner, *The Asbestos Model; Labor and Citizens Groups and a Multi-Pronged Approach to Regulatory Change* published as a Chapter in *Conflict Resolution and Public Policy*, in *CONFLICT RESOLUTION AND PUBLIC POLICY* (Mirriam K. Mills ed. 1990).

discrete claims can surface and organize important information.¹¹¹ Although not a replacement for measures that might prevent the harm before it occurs, in a world of asymmetric information about wrongdoing and limited administrative agency enforcement capacity, litigation can be a necessary catalyst for the development of prophylactic measures that protect public health.¹¹²

Theoretically, public health litigation can be used to achieve public health objectives, but whether it actually serves those objectives, in whole or in part, will depend on the decisions that are made at key stages along the litigation pathway. This Section explores potential areas of divergence of the private incentives and constraints of both the AG and the private law firm from public health objectives at key points in the litigation process that may result in suboptimal decisions and outcomes from a public health perspective. Construed in a positive light, these key points in the litigation are also areas of opportunity to use procedure to increase the public health value of the results.

A. State AG Incentives & Constraints

State AGs have a broad range of powers to exercise. These powers include the authority to issue formal opinions to state agencies and represent them in court, propose legislation, act as public advocates, engage in the protection of consumers, enforce state and federal law, and institute civil suits on behalf of the state.¹¹³ In an ideal world, this gives state AGs a unique opportunity to select and pursue high-impact public health litigation in ways that lead to the most effective forms of public health benefit. This might include publicizing a problem to create legislative change, increasing industry compliance with existing regulations, or raising the standard of care for future industry actors as part of litigation outcomes. However, in reality, AGs are constrained in their actions by a mix of institutional constraints and private

¹¹¹ To offer a medical example, a case exposing off-label marketing of a specific drug can shed light on how internal revenue goals may drive decisions that ultimately impact patient treatment, and a case alleging billing violations stemming from the upcoding of billing records may reveal a breakdown in compliance. These limited derelictions can be symptomatic of pervasive and significant problems that have a broad impact on patient care. See, e.g., U.S. DEP'T OF JUST., *Abbott Labs to Pay \$1.5 Billion to Resolve Criminal & Civil Investigations of Off-label Promotion of Depakote*, JUSTICE (May 7, 2012), <https://www.justice.gov/opa/pr/abbott-labs-pay-15-billion-resolve-criminal-civil-investigations-label-promotion-depakote> [<https://perma.cc/E424-EH3J>]; U.S. DEP'T OF JUST., *GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data*, JUSTICE (July 12, 2012), <https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report#:~:text=Global%20health%20care%20giant%20GlaxoSmithKline,for%20alleged%20false%20price%20reporting> [<https://perma.cc/5VNQ-G29Y>].

¹¹² See, e.g., Parmet & Daynard, *supra* note 1, at 437 (examining ways in which public health litigation can be used to respond to public health harms).

¹¹³ See, e.g., *What Attorneys General Do*, *supra* note 20.

interests. These constraints and interests may lead to litigation decisions that diverge from what is in the long-term public interest.¹¹⁴

When deciding whether, when, and how to bring a lawsuit, AGs must navigate institutional resource constraints such as limited funding, concern about future budgets, and the need to allocate time and resources across various activities. The offices of the state AGs vary in a variety of ways, including not just the political affiliation of the AG and the composition of the office but also the size of their budgets and statutory provisions that impact their relationships with private law firms.¹¹⁵ To give some idea of size and budget differences, in 2013, the state AG of Nebraska had one of the smallest offices, with a budget under \$6,000,000 and a staff of about 100 attorneys and support staff, while the state AG of California had one of the largest offices, with a budget of \$741,778,000 and over 1,100 attorneys.¹¹⁶ While California's office may seem large, even this budget and number of lawyers pales in comparison to the range and scope of enforcement needs occurring in a large state like California.

In addition to resource constraints, AGs need to manage pressure, secure cooperation, and respond to feedback from a variety of constituency groups. These constituents include voters, members of the media, state governors, and client agencies. All these groups have the ability to influence an AG's agenda and may be involved or impacted in any given area of potential litigation interest.

The relationship between AGs and state agencies is particularly important in the context of developing strategies for health litigation. AGs often either represent or initiate suits on behalf of state agencies. They rely on state agencies for their domain-specific expertise as well as their knowledge about the systems and actors involved and the public and private interests at stake in the litigation. Obtaining agency cooperation lends legitimacy to the proceedings and may even be required to make certain kinds of decisions in the litigation process.¹¹⁷ Getting the support of an "expert" agency to testify about causation and damages can also supplant the role of expensive outside experts who face the risk of exclusion by the judge under the existing rules of evidence. The cooperation of state agencies may be hard to secure, however, especially where the misconduct is the result of an agency failure and/or when the parties committing the misconduct have well-established and friendly relationships with the agencies.¹¹⁸

¹¹⁴ See, e.g., Lemos, *Aggregate Litigation*, *supra* note 3, at 486.

¹¹⁵ See, e.g., *Attorney General Office Comparison*, BALLOTPEDIA, https://ballotpedia.org/Attorney_General_office_comparison [<https://perma.cc/8A7P-BTJN>] (last visited July 10, 2021).

¹¹⁶ *Id.*

¹¹⁷ See, e.g., *What Does a State AG Do*, NAT'L. ASS'N OF ATTYS GEN., https://www.naag.org/naag/about_naag/faq/what_does_an_attorney_general_do.php [<https://perma.cc/8A7P-BTJN>] (last visited July 10, 2021).

¹¹⁸ See, e.g., The State of N.J. Dept. of Law and Pub. Safety, *AG Grewal Challenges Federal Refusals to Cooperate with State Investigations of Predatory Practices by Student Loan Servicers and School*, N.J. (Sept. 17, 2019), <https://www.nj.gov/oag/newsreleases19/pr20190917a.html> [<https://perma.cc/SQV8-26MY>].

While agencies play an important gatekeeping role (and in some cases a drag) on AG litigation decisions, public pressures are also influential in determining AG action.¹¹⁹ Indeed, in particularly prominent cases where misconduct has caused massive public and publicized harm, public pressure may be one of the primary factors driving AG action. Public pressures may take a variety of conflicting forms, such as conflicting interests between consumers and state corporate actors in litigating product liability or environmental harms from local manufacturing. Additionally, lobby groups representing special interests may have a disproportionate impact on AG decisions because of their ability to generate focused attention on discrete issues, often with the implicit commitment to provide financial support in the form of campaign contributions.¹²⁰

There are also institutional reasons why state AGs may not be interested in proactively looking for cases to bring. In contrast to private firms, AGs are not tasked with the need to search for new litigation strategies to stay employed. They invariably have more enforcement opportunities than they can pursue, even taking the state of the law as given. Taking on high-risk litigation strategies that challenge the status quo might come at the expense of pursuing known enforcement objectives, a shift of resources that might be difficult to justify in the absence of a strong public policy reason and/or grassroots pressure to pursue a particular area of corporate wrongdoing. The relatively short duration of the average AG tenure also makes pursuing cases with long-term horizons more difficult to motivate and sustain since the AG may not be there to reap the benefits of the suits initiated. Thus, even those state AGs that have the capacity and political support to pursue new areas of corporate misconduct may find it difficult to pursue novel, complex litigation on their own due to a lack of experience and resources.¹²¹

In addition to institutional constraints, the individuals who serve as AGs may be motivated by private interests, such as bolstering their reputations, advancing political ambitions, securing campaign support for reelection, and even securing post-government employment in the private sector.¹²² The state AG position is often

¹¹⁹ See generally Provost, *An Integrated Model*, *supra* note 13 (examining the motivations of state AGs to participate in multi-state lawsuits and showing the importance of political objectives in explaining litigation choices).

¹²⁰ See, e.g., Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 28, 2014), <https://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html> [<https://perma.cc/PN4A-JMK6>] [hereinafter Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*].

¹²¹ See, e.g., Brumleve, *supra* note 34 (examining trends and relationships in the office of the state AGs).

¹²² See, e.g., Lemos, *Aggregate Litigation*, *supra* note 3, at 512, 517 (stating that “Attorneys general may sometimes be motivated by more personal interests as well, such as an interest in building their professional reputations or in pleasing powerful political contributors or constituencies,” but recognizing that claims about “political” attorneys general are often overstated). Note that AGs secure their positions in most states through popular election (forty-three states and Washington D.C.); they are appointed by the

regarded as a stepping stone for individuals with greater political ambitions, providing an additional political agenda that may influence AG decision-making.¹²³ For those not interested in pursuing political ambitions, there is also an active revolving door in which many AGs move into desirable private-sector jobs upon completing their term(s) as AGs.¹²⁴

Where the AG is able and willing to hire private law firms to litigate state interests, private law firm marketing efforts to secure government contracts may further impact AG decision-making. This concern about corporate influence, including private law firm influences on AGs, has been a focal point for critics of public-private litigation.¹²⁵ For example, some plaintiffs' trial firms may make campaign contributions to those state AGs who must run for office, as well as promise financial support for AGs with future political ambitions.¹²⁶ Potential industry defendants may make campaign contributions for different reasons, such as deterring rather than encouraging litigation.¹²⁷ Where AGs have pre-existing relationships with private lawyers, or where private lawyers are able to cultivate new relationships through marketing efforts, these lawyers may have unfair access to state litigation opportunities and can influence AG decision-making in various ways.

AG decision-making is thus subject to a myriad of pressures. These pressures include political pressure to pursue (or not pursue) certain areas of activity, reputational interests and opportunities for credit claiming, impact on the state AG's budget, institutional constraints arising from the need to satisfy multiple constituencies, and trade-offs between alternative ways of spending time and

governor in five states (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming) and four jurisdictions (American Samoa, Guam, Puerto Rico, and the Virgin Islands). In Maine, they are elected by secret ballot of the legislature, and in Tennessee by the state supreme court.

¹²³ See, e.g., Provost, *When is AG Short for Aspiring Governor?*, *supra* note 88, at 597.

¹²⁴ See, e.g., Miranda Litwak & Molley Coleman, *Biden Must Close the Revolving Door Between BigLaw and Government*, AM. PROSPECT (Jan. 13, 2021), <https://prospect.org/cabinet-watch/biden-must-close-the-revolving-door-between-biglaw-and-government/> [<https://perma.cc/Q3GD-Q5E3>]; Dan Packel, *Hire Up: The DC Revolving Door Starts Turning*, AM. LAW. (Dec. 4, 2020) <https://www.law.com/americanlawyer/2020/12/04/hire-up-the-dc-revolving-door-starts-turning/?slreturn=20210610150629> [<https://perma.cc/Q3GD-Q5E3>].

¹²⁵ See, e.g., Eric Lipton, *Courting Favor*, N.Y. TIMES, <https://www.nytimes.com/interactive/2015/us/politics/attorneys-general.html> [<https://perma.cc/VM9V-VJPE>] (last visited, July 15, 2021) [hereinafter Lipton, *Courting Favor*] (containing a series of articles examining the "explosion in lobbying of state attorneys general by corporate interests, including an active role by private law firms"); Editorial Board, *Attorneys General for Sale*, N.Y. TIMES (Nov. 20, 2014), <https://www.nytimes.com/2014/11/21/opinion/attorneys-general-for-sale.html> [<https://perma.cc/Q3GD-Q5E3>] (discussing the pervasive role of lobbying in impacting AG decision-making and calls for reform).

¹²⁶ See, e.g., Lipton, *Lawyers Create Big Paydays*, *supra* note 5.

¹²⁷ See, e.g., Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, *supra* note 120 (discussing the role of law firms in lobbying state AGs on behalf of industry clients concerned about liability, including involvement of former AGs in the lobbying efforts).

resources. In some cases, the time requirement of the case, and its likely resolution, will also be a dominant consideration. The salience of a damage award is an easy metric of success that can also address state budgetary pressures, and a litigation success against a bad actor will often be regarded positively by the public and the media. Usually, these institutional constraints and private interests will tend to push in the direction of litigation that requires minimal outlay of AG resources and promises a low-risk award of damages in cases that involve politically unpopular wrongdoers.

B. Private Law Firm Incentives & Constraints

Even well-intentioned private plaintiffs' lawyers are constrained by business models inherent in the private practice of law. Law firms are businesses focused on expected net profits. Aside from fixed law firm overhead, litigation costs are ever-increasing, and those costs expand as a case progresses past the initial pleading stage to include high-dollar expenditures for depositions, experts, document repositories, and electronic discovery consultants, as well as the cost of travel where required.¹²⁸ Moreover, time invested in one case is time that cannot be invested in other cases; this means that case selection will ultimately depend on expected profitability and the opportunity cost of the case in terms of other cases foregone.

Private law firm business models may also place some value on the reputational benefits of association with a highly publicized case or one with public interest precedent, although the reputational value of a case does not always correlate with either the economic or public health value of the case. Generally, in high-impact public health litigation, the private law firm works on a contingency fee basis, which means that a firm that is doing its job well must invest a large amount of money upfront based on the expectation of a financial recovery that makes the initial investment attractive. This financial model makes issues of cost, timing, and expected return important drivers of litigation decisions.

Profit-driven, time-sensitive incentives will shape key decisions along the entire litigation pathway, starting with case selection and ending with the narrative, settlement agreement, or press release confirming or reporting the resolution of a case and the impact of that resolution. Law firms are often in the position of financing and managing the litigation on behalf of multiple claimants, typically with the hope of receiving a fee that will be much larger than the recovery of any of the individual plaintiffs. In these cases, some commentators have argued that law firms may face financial pressures and interests that diverge from those of the claimants, creating additional opportunities for a divergence of litigation decisions from the

¹²⁸ See, e.g., Paula Hannaford-Agar, *Measuring the Cost of Civil Litigation: Findings from a Survey of Trial Lawyers*, 22 VOIRE DIRE (Spring 2013) (discussing the civil litigation cost model and noting sources of and trends in costs).

public interest.¹²⁹ This is of particular concern in the context of MDLs, where there are no written rules governing the obligations of lead counsel. In MDLs, much of the conduct of these cases is guided by the development of norms created by a relatively small group of lawyers. The result has been to disenfranchise many clients from the daily operations of their litigation.¹³⁰

Many of the law firms that represent or seek to represent AGs are (or hope to be) repeat players in public-private litigation. Plaintiffs' law firms seeking to work with AGs are constantly looking for new case ideas to market to state AGs.¹³¹ In their search, they inevitably focus on cases that promise large expected profits, which will be a function of the expected costs and duration of litigation, the likelihood of settling, the amount that a case is likely to settle for, and the potential damages that can be secured through litigation. They are also interested in cases that offer the potential for joining additional states, which not only offers a greater return but also provides litigation efficiencies as leverage. Cases that either use prior legal R&D or provide the foundation for a future series of cases in the same area also offer opportunities to benefit from litigation efficiencies and increase returns. The cases most likely to advance the public interest will be those advancing new legal theories in new contexts where there is significant unaddressed public harm. But these will also be the cases that are the most costly and risky to bring and will only be financially attractive to the private firms who can bring them if the potential recovery is large enough.

In high-profile areas of litigation, where novel legal theories have already been advanced in other contexts or states, the prospect of working with AGs can attract law firms that bring little new R&D, but rather are interested in copying existing cases and adapting them for the benefit of state and municipal actors who have not yet engaged in suit. Often these are low-cost operations, with efforts to minimize up-front costs in the hope of an easy settlement.¹³²

Ultimately, in most, if not all, cases, the private law firm will be interested in reaching a settlement that maximizes the monetary damages, a priority which may come at the expense of other metrics such as the value of a public record, public

¹²⁹ To the extent that this is an issue, the concern is more paramount regarding multi-district litigation (MDLs) than class actions where the Federal Rule of Civil Procedure 23 lays out very transparent processes for class notice, selection of counsel, and approval of settlements.

¹³⁰ See, e.g., Burch, *Monopolies in Multidistrict Litigation*, *supra* note 75, at 67.

¹³¹ See, Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, *supra* note 120 (“While prospecting for contacts, the private lawyers have also donated tens of thousands of dollars to campaigns of individual attorneys general, as well as party-backed organizations that they run.”); Matthew Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 112 (2013) (discussing private plaintiff innovations and novel litigation strategy that government agencies might not otherwise attempt).

¹³² See Elysa M. Dishman, *Enforcement Piggybacking and Multistate Actions*, 2019 BYU L. REV. 421 (2020) (discussing of the “piggybacking” that occurs in multi-state litigation).

admissions of misconduct, and prophylactic remedies. While the law firm may well be meeting the terms of its contract in doing so, such contracts invariably fail to articulate all the necessary metrics.

C. Key Decision Points for Public Health Value

The combination of private law firms and state AGs, each with their own institutional constraints and interests, may exacerbate the challenges of keeping the litigation process focused on public goals. The private law firm focuses on the opportunity for profitable litigation, with the certainty, speed, and amount of damages as its metrics, and the AG focuses on a variety of political incentives and institutional constraints that are tied to or impacted by similar metrics of risk, speed, and money. The absence of good metrics to capture the non-monetary aspects of the litigation adds to the problem of prioritizing health impact in decision-making.

In this Section, we identify key decision points in public health litigation where the private incentives and constraints of both public and private lawyers may diverge from the public interest, resulting in a loss of public health value from the litigation. While reasonable people may disagree on how to define the “public health value” of litigation, it should include at least the following fairly uncontroversial objectives: (1) correcting the immediate problem by securing the necessary injunctive relief and damages; (2) exposing the pervasive nature of the problem, including whether it was a manifestation of flaws in governance, agency oversight, or the result of isolated factors that created conflicts with safety or environmental obligations; and (3) creating a transparent record for use by other constituency groups such as regulators, legislators, the press, and healthcare professionals, including doctors and members of the scientific community. Ideally, these factors will lead to a fourth source of public health value, prompting structural changes to industry practices, agency oversight, and consumer or medical community diligence, to avoid future harms. These changes may take the form of court-ordered corrective action, case law altering the standard of care, the identification of needed legislative change, and/or other ways of producing or catalyzing structural change.¹³³

The following are some of the key decision points in the litigation process that can have a potentially significant impact on the public health value of the litigation.

1. Case Selection

AGs have four main sources of new cases: (1) the cases that originate from within the AG’s office either as the result of a policy focus or in reaction to an immediate or well-publicized health and safety concern; (2) False Claims Act cases

¹³³ Measuring this fourth source of value is particularly challenging. *See, e.g.*, Timothy D. Lytton, *Using Litigation to Make Public Health Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco, and Gun Litigation*, 32 J.L., MED. & ETHICS 556 (2004) (discussing some of the challenges in evaluating the impact of litigation on health policy).

filed by private law firms with the potential for the AG to intervene; (3) cases that come from private law firms that pitch ideas to the AG; and (4) decisions to join in collective action with other states that have initiated a case, often in partnership with private counsel. Many AG offices do not have the capacity to engage in extensive legal R&D, at least as a general practice, and instead focus largely on routine enforcement of civil and criminal matters where the law and precedent are clear. High-impact health litigation cases, or at least those requiring extensive resources and legal R&D, are often cases that have either been initiated by a whistleblower under the False Claims Act or cases that have been developed at least in part by private law firms.¹³⁴

Relationships with private counsel can take on at least two forms. In some cases, the AG needs representation in particular areas, such as antitrust or pharmaceutical fraud, and issues a request for proposals (RFP) for a panel of private lawyers with subject matter expertise. In this case, the litigation area is selected by the AG, although the selected panel will have an ongoing relationship with the AG and be able to continually advise the AG on possible litigation opportunities.¹³⁵ In other cases, it is the private lawyer or law firm, or more often an intermediary that has an established relationship with the AG, such as a former AG who now works in private practice, who approaches the AG with a proposal for litigation.¹³⁶ In the latter case, the private law firm is more directly involved in case selection. Where it is the private firm that proposes the case, expected profits, along with the fruits of legal R&D that have been oriented towards finding profitable cases, will be primary factors in case selection.

Regardless of whether the case emerges from within the AG's office or is one proposed by a private law firm, the AG makes the ultimate decision about whether to bring the case. When state AGs are deciding on whether to bring a case, they don't just weigh the institutional costs against the expected public health value. Their case selection will be influenced by factors such as the political costs and benefits, the

¹³⁴ See, e.g., U.S. DEP'T OF JUST., *Justice Department Recovers over \$2.2 Billion from False Claims Act Cases in Fiscal Year 2020*, JUSTICE (Jan. 14, 2021), <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020> [<https://perma.cc/F8UG-BWAQ>] (noting that out of \$1.8 billion recovered from health care fraud litigation in 2020, \$1.6 billion came from suits filed by whistleblowers under the *qui tam* provision of the False Claims Act).

¹³⁵ The AG may flag the area in response to a proliferation of private sector litigation when other AGs have embarked on similar litigation in the field alone or with private counsel. For example, the Private Securities Litigation Reform Act of 1995 created rules for establishing lead plaintiffs—and thus lead counsel—in securities class actions by giving preference to entities that had lost the most money. Pub. L. No. 104-67, § 101(a), 109 Stat. 737, 737–39 (amending 15 U.S.C. §§ 78a–78qq). This created a role for state pension fund lawyers, which were initially recruited by plaintiff securities firms to monitor their holdings and bring suits. Once these suits became the norm with recoveries returning at least some losses to the funds, AGs and (where applicable) State Treasurers began the practice of selecting panels of securities firms to bring such cases.

¹³⁶ See, e.g., Lipton, *Lawyers Create Big Paydays*, *supra* note 5.

amount of money that can be recovered for the state as a way of showing that they are funding their own budget, and the likelihood and magnitude of reputational gain, which may encompass accolades from the press, voters, colleagues, and institutions with stakes in the game.¹³⁷ They may also worry about the potentially negative reactions of pursuing a case, particularly from the industries that will be directly or indirectly impacted.¹³⁸ Decisions not to bring a case may be equally or sometimes even more important than decisions to pursue a case.

If a state AG is simply responding to case ideas provided by private counsel or deciding whether to intervene in a case, the immediate factors that the AG is likely to consider may not be all that different from their private law counterparts. The dominant factors in these situations will be the likelihood of success and the impact of a loss on prospective enforcement efforts, expected damages, whether the AG has the ability to monitor the litigation and secure agency support, and confidence in the abilities of private counsel that has suggested the idea and/or will conduct the litigation. Instead of making decisions about which cases to bring based on a cost-benefit analysis of how best to use scarce state resources to achieve public health value (taking into account opportunities to leverage private legal R&D), case selection can often be more a matter of AG selection among the opportunities engineered by private law firms, with an eye to the risks inherent in the case, the credibility of the lawyers, and the expected monetary returns.

Two important aspects of case selection are the absence of a formal process for justifying decisions not to bring a case where there is public health merit and a lack of any formal procedure for bringing relevant stakeholders to the table when making the decision to pursue or reject such a case. While AGs may discuss a litigation proposal with an expert agency or an agency that has sustained injury, such as a health and welfare fund, AGs do not, as a routine matter, have a standing panel of specialized experts on medicine, the environment, or product safety.¹³⁹ Perhaps as a

¹³⁷ See, e.g., Erichson, *Coattail Class Actions*, *supra* note 70 (discussing the differences in incentives between public and private lawyers); Provost, *An Integrated Model*, *supra* note 13, at 6–97 (describing a confluence of factors that may influence state AGs to pursue or avoid litigation, including political ambitions, public support, policy direction, and economic impact).

¹³⁸ For example, industry groups may fund electoral challenges to sitting AGs. To be clear, just as plaintiffs' lawyers may be developing relationships with AGs, industry groups also attempt to form relationships and can provide campaign support for the incumbent or the opposition. See, e.g., Lipton, *Courting Favor*, *supra* note 125 (listing a series of articles examining the “explosion in lobbying of state attorneys general by corporate interests, including an active role by private law firms”).

¹³⁹ Of course, those who participate in such a panel would have to be cleared of conflicts of interest. Since the Lewis Powell Memo of August 23, 1971, to Eugene B. Sydnor, Chairman, Education Committee, US Chamber of Commerce, the Chamber and its members have made inroads into establishing allies on university campuses through funded research, grants, and support of student organizations. See, e.g., Adam Eichen, *After 48 Years, Democrats Still Haven't Gotten the Memo*, NEW REPUBLIC (July 23, 2019), <https://newrep>

consequence, it can take years to fully appreciate and react to sources of public health harm, as was the case in the opioid litigation, where knowledge of the harms preceded decisions to litigate by decades.¹⁴⁰

2. *The Relationship with Private Counsel*

Where the AG works with private counsel, some of the key litigation decisions will be made by the private lawyers running the day-to-day litigation, while other decisions will reflect dialogue between the law firm(s) and attorneys from the AG's office. A few of the most salient decisions, such as the decision to settle, will reflect the state AG's own individual and institutional incentives and constraints, but even then, private law firm interests are likely to play a pivotal role. The nature and structure of the relationship with private counsel is thus an important aspect of the litigation process.

For False Claims Act cases, the relationship is statutory, and the nature of the collaboration beyond that is left to the parties.¹⁴¹ In contrast, where private law firms are hired by the state to bring suit, the "partnership" will flow from a contracting process that varies by state.¹⁴² In some cases, the state AG is required to engage in a bidding process; in other cases, the state AG can contract directly with the law firm(s) that propose a case.¹⁴³ Just as with any other kind of client development, private plaintiffs' firms will invest funds in developing relationships with state AGs. In some cases, this might even involve making campaign contributions where the state AG is an elected position.¹⁴⁴ Some AGs will have ongoing relationships with

public.com/article/154518/democrats-powell-memo-election-strategy [https://perma.cc/CQD4-2R62] (discussing the successful efforts of a network of billionaires working together "to create an apparatus to shift politics rightward in much the way Powell outlined").

¹⁴⁰ Examples of delay include the settlement with the tobacco industry, where knowledge of harm and failed litigation went on for decades prior to AGs leveraging their cumulative litigation power, and the opioid litigation, which occurred long after initial cases detailing harm. See generally Andrei Sirabonian, Comment, *Why Tobacco Litigation Has Not Been Successful in the United Kingdom: A Comparative Analysis of Tobacco Litigation in the United States and the United Kingdom*, 25 NW. J. INT'L L. & BUS. 485 (2005); Derek Carr, Corey S. Davis & Lainie Rutkow, *Reducing Harm Through Litigation Against Opioid Manufacturers? Lessons from the Tobacco Wars*, 133 PUB. HEALTH REP. 207 (2018).

¹⁴¹ See 31 U.S.C. §§ 3730–33.

¹⁴² See generally *Government Contracts with Private Lawyers*, AM. LEGIS. EXCHANGE COUNCIL, https://www.statelawsuitreform.com/factor_category/government-agency-hirings-of-private-lawyers/ [https://perma.cc/JWP8-8TH3] (last visited July 10, 2021).

¹⁴³ See, e.g., Douglas F. McMeyer, Lise T. Spacapan & Robert W. George, *Contingency Fee Plaintiffs' Counsel and the Public Good?*, HUSCH BLACKWELL (2011), http://www.thenalfa.org/files/Husch_Blackwell_Report_on_Contingency_Fee_Lawyers.pdf [https://perma.cc/Q7UF-HVTV] (providing a critique of alternative contracting practices by states based on survey of AGs and their contracting practices with private contingency fee lawyers).

¹⁴⁴ See, e.g., John O'Brien, *S.C. AG McMaster Taking Contributions from Outside Counsel He Hired*, LEGAL NEWSLINE (Sept. 24, 2009), http://legalnewsline.com/stories/51

private law firms, while others will rely on competitive bidding to satisfy their legal outsourcing needs. Ultimately, the relationship between AGs and private counsel will be governed by a mix of statutory requirements and contracts, along with relational norms and practices and the influence of pre-existing personal relationships that together will influence which private law firms are involved and how litigation decisions are made.

While in the case of procurement, the contracting process could offer an opportunity to structure the litigation process in ways that narrow the divergence of public and private incentives, in practice, many contracts focus primarily on the structure of the fees. The contracts will generally specify that AGs will retain control over key litigation decisions, such as decisions to settle, but often will control little beyond that. Without clear guidelines regarding how information will be shared and how joint decisions will be made, much of the litigation process will end up being run, at least on a day-to-day basis, by the private law firms. Without attention to the right metrics and benchmarks in the contracts, the incentives of the private firm will be skewed towards decisions that increase profits, whether through reducing litigation costs or increasing returns, and control over the day-to-day aspects of the litigation will remain with the private firm with little oversight.

There is an additional set of challenges arising from limitations on quality control in the selection of private law firms and limitations in the ability to monitor private decisions to ensure they take public health interests into account.

3. Deciding Whether to Bring in Other AGs

A key decision point in potentially high-impact litigation is whether to pursue the case alone or in conjunction with other AGs, many of whom may have their own private counsel relationships. In determining whether to engage in interstate partnerships, questions will arise about the allocation of work, with results that can have a significant impact on the outcome of the litigation. Collective action by multiple state AGs often leads to a division of investigation tasks among those AGs. Document review, for example, often involving millions of electronic records, is typically divided among AG offices. Where this division of task and review of discovery occurs, no single office may see the big picture of the case, and each office may similarly be hampered in the ability to use document search commands to look for the fragments of evidence necessary to support or test legal theories. This leads to problems of both fragmentation and accountability. With big legal teams, no single lawyer may grasp the entire scheme of wrongdoing or feel personal responsibility for the outcome. Where multiple law firms are involved in collective actions brought by AGs, there is the added problem that firms competing against each other for fees will expand their legal teams to claim a greater portion of the attorney's fees. This, in turn, will increase the fragmentation of the case, with no single lawyer being in complete command of the facts. Since much of the public

0521545-s-c-ag-mcmaster-taking-contributions-from-outsidecounsel-he-hired [<https://perm.a.cc/UVV9-K4D4>].

health value of litigation lies in how discovery is conducted and how the record is constructed and developed, de-centralization of the pre-trial litigation process can significantly harm public health value.¹⁴⁵

4. *Drafting the Complaint*

The complaint is the introductory pleading that not only triggers the lawsuit but also serves as the important framing narrative for the case. It lays out facts, legal theories, and themes. If the notice pleading standard initially established by the Federal Rules of Civil Procedure and the Court's decision in *Conley v. Gibson*¹⁴⁶ excused plaintiff's counsel from lengthy factual recitations, the subsequent court decisions in *Twombly* and *Iqbal* not only opened the door to lengthy fact-intensive pleadings but also effectively mandated it.¹⁴⁷ As a result, complaints in complex cases can easily exceed a hundred pages.

Drafting the complaint will involve critical decisions about the scope and breadth of the case, such as the causes of action, the parties to include, and the nature of the remedies to seek. Particularly where the judge is the gatekeeper for determining the "plausibility" of the action, the drafters of the complaint must include "context" which may make the action more or less plausible. "Context" may include prior bad acts by the defendant in order to show "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."¹⁴⁸

The complaints in cases of public interest often become more than just pleadings, also serving as de facto white papers to educate policymakers and other stakeholders. They provide relevant members of the community with information, and, particularly in an age of social media, they may prompt witnesses to come forward with supporting evidence. In addition to functioning as a white paper, the complaint serves as an opportunity to create a public record of actions that have created public health harm. In situations where the case is settled quickly after the complaint is filed, it is often the only public record. This record can serve as a catalyst for government regulatory oversight, oversight by private bodies given regulatory authority, and oversight and further investigation by the press.

While the complaint can and does serve all these functions, the drafters of the complaint may not be crafting it with the public value of these functions in mind. For the private lawyer, the private interests in speed, limiting risk, and maximizing expected recovery may push in one of two directions. There may be pressure to construe the claims in a way that is tied most closely to an easily identified and palatable (to the defendant) claim for monetary damages. Or there may be an interest

¹⁴⁵ The litigation process—particularly discovery—is designed to create transparency sufficient for parties to evaluate their risks in front of a jury. Once the parties can calculate their risks and the range of results, they often settle. Hence the pre-trial process has become the real core of the litigation. *See generally* J.C. LORE & REUBEN GUTTMAN, PRETRIAL LITIGATION (Wolters Kluwer forthcoming 2021) (on file with authors).

¹⁴⁶ 355 U.S. 41, 45–48 (1957).

¹⁴⁷ *See supra* Section I.C.1. for a discussion of the implications of *Twombly* and *Iqbal*.

¹⁴⁸ FED. R. EVID. 404(b)(2).

in limiting the number of stakeholders involved in planning the case, given the added time, cost, and potential for differences of opinion that come with including additional decision-makers, such as members of relevant agencies, in the litigation discussions. The result of limiting the scope of the claims and the involvement of potentially relevant stakeholders will be a failure to formulate claims that capture the full reach of the misconduct and the full scope of potential remedies.

In some cases, rather than seeking the claims most likely to lead to a quick settlement, the private law firm may see potential for a large but risky recovery through a creative application of the law that pushes the limits of existing legal theories and precedent. Private law firms looking for new opportunities will often invest in legal R&D to develop such boundary-pushing claims. It is permissible under the Federal Rules of Civil Procedure to assert nonfrivolous claims that extend, modify, or even establish new law.¹⁴⁹ Indeed, the doctrine of *stare decisis* provides an avenue to reach back into the common law to find theories that address new or evolving factual paradigms. A good illustration of this is the pursuit of the opioid industry using a theory of nuisance developed by the Oklahoma AG working with private counsel.¹⁵⁰ Yet state AGs charged with enforcing the law will rightfully be concerned with bringing claims that reflect a reliable reading of the current state of the law. The complaint needs to protect this legitimacy value by making it clear why the suit has been brought and why it involves a violation of the law. The partnership of private law firms and state AGs may involve a push and pull between these tendencies to push boundaries and to give a reliable reading to existing law. In some cases, it can lead to a murky threshold for determining which legal theories to advance, unless these different interests are openly acknowledged and the public interests in legitimacy protected.

5. *Pre-Trial Litigation Decisions and the Public Record*

Decisions made during the pre-trial litigation process will often determine not only the outcome of the case but also the nature and scope of the record that is created and made available to the public.¹⁵¹ For cases decided on motions to dismiss or motions for summary judgment, the motions papers, along with the exhibits and affidavits they incorporate, might be the only public documents summarizing important facts and issues of the case. The added value of the documents as providing a public record of wrongdoing may be neglected by the litigants where the focus is simply on winning the motion.

¹⁴⁹ FED. R. CIV. P. 11(b)(2).

¹⁵⁰ See, e.g., Judgment of Aug. 26, 2019, after Non-Jury Trial at 1–2, 22–23, Oklahoma *ex rel.* Hunter v. Purdue Pharma LP, No. CJ-2017-816 (Okla. Dist. Ct. June 30, 2017). See also Nancy Henderson, *Righting Wrongs*, OKLAHOMA SUPER LAWYERS MAGAZINE (Nov. 2019), <https://www.superlawyers.com/oklahoma/article/righting-wrongs/be1e3c9e-5534-430b-81de-4c76d12c0350.html> [<https://perma.cc/L7FW-RKE6>].

¹⁵¹ For a broad discussion on the importance of the pre-trial process, see generally LORE & GUTTMAN, *supra* note 145.

Where the case proceeds beyond initial efforts to dismiss and discovery begins, decisions about the scope and confidentiality of the discovery process will be critical in obtaining and determining whether to share private information that can be essential in detecting patterns of wrongdoing and sources of harm.

Three trends in pre-trial litigation create risks for the public record that private law firms and AGs may be disinclined to address: (1) the shift towards MDLs that consolidates claims for pre-trial purposes; (2) an increase in multi-state suits and a resulting fragmentation of the knowledge acquisition; and (3) a shift to blanket confidentiality agreements and a willingness to approve a broad range of non-disclosure agreements.

The first trend of concern is the shift towards the use of MDLs to consolidate cases for pre-trial purposes.¹⁵² The ways in which MDLs consolidate cases and the ways in which decision-making is organized leave little room for considering the public interest value of the record being generated. Rather, the interests of the repeat players in MDL litigation, particularly those most frequently appointed as lead counsel, predominate in setting the norms and rules for the proceedings in ways that often disadvantage the interests of the plaintiffs.¹⁵³

The second trend is for AGs and their private counsel to contract with additional AGs and, if they have any, their counsel to bring multi-state lawsuits.¹⁵⁴ The expansion of the group of claimants can lead to a fragmentation of the work—and, therefore, knowledge acquisition—involved in pre-trial discovery. It can also lead to a lack of investment in the pre-trial documents being generated by reducing individual accountability in the quality of the documents and diluting the individual benefits from investing time in legal R&D.

The third trend, one that is particularly concerning, is the growing use of blanket protective orders that allow defendants to keep the information acquired

¹⁵² See generally BURCH, MASS TORT DEALS, *supra* note 77 (exploring trends towards greater use of MDLs in mass tort litigation and the ways in which MDLs, as they operate in practice, undermine plaintiffs' rights).

¹⁵³ See, e.g., Burch, *Monopolies in Multidistrict Litigation*, *supra* note 75, at 67 (exploring how repeat players in MDLs exert control over the proceedings and establish norms and practices that undermine the interests of the plaintiffs).

¹⁵⁴ See, e.g., Alan Greenblatt, *The Story Behind the Prominent Rise of State AGs*, GOVERNING (May 20, 2015), <https://www.governing.com/archive/gov-attorneys-general-lawsuits-policymaking.html> [<https://perma.cc/3J25-6V99>] (discussing how AGs have banded together to bring multi-state suits over the past few decades); PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA (2015) (exploring the rise in multi-state actions by AGs and their role as “de facto policymakers”); Theresa Defino, Healthcare Compliance Association, *New Enforcement Threat: “Coordinated” AGs Pursuing Settlements Involving Big Breaches*, (Health Care Compliance Ass’n, Report on Patient Privacy 20, no. 12), JDSUPRA (Dec. 18, 2020), <https://www.jdsupra.com/legalnews/new-enforcement-threat-coordinated-ags-63353/> [<https://perma.cc/9DZH-Y9C6>] (discussing how the success of recent multi-state suits relating to data breaches under HIPPA have motivated the AG community to continue to pursue similar multi-state settlements).

during the pre-trial process away from the public.¹⁵⁵ This problem is compounded by the willingness of the plaintiffs, including public plaintiffs like the AGs, to agree to such orders. Even some judges have become inclined to permit blanket confidentiality orders, as illustrated by the wide confidentiality provided in the opioid MDL.¹⁵⁶

Federal Rule of Civil Procedure 26 encourages the parties to negotiate standard confidentiality agreements that will govern the litigation.¹⁵⁷ The notion of confidentiality is designed to facilitate the sharing of documents with restrictions to accommodate matters including patient privacy and trade secrets. Yet, most confidentiality agreements provide defendants with a latitude to mark virtually all documents as confidential, meaning that they can only be seen by the parties.¹⁵⁸ Some confidentiality agreements go so far as to restrict the production of documents, even those that are not confidential, to use only in litigation. This means the documents cannot be shared with litigants in other cases, the news media, or even regulators.¹⁵⁹ As a practical matter, this creates inefficiencies in litigation because such orders preclude similarly injured plaintiffs from investigating their claims or making their litigation more efficient by using discovery from another proceeding.¹⁶⁰ It also limits opportunities for synergies between the judicial and legislative

¹⁵⁵ See, e.g., Lori E. Andrus, *Fighting Protective and Secrecy Orders*, PLAINTIFF MAGAZINE (Aug. 2014), <https://www.plaintiffmagazine.com/recent-issues/item/fighting-protective-and-secrecy-orders-2> [<https://perma.cc/2KSH-524P>]; Susan Burgess, *The Chill of Blanket Orders*, REPORTERS COMMITTEE (2006), <https://www.rcfp.org/journals/the-news-media-and-the-law-summer-2006/chill-blanket-orders/> [<https://perma.cc/PZ6D-WK38>].

¹⁵⁶ See, e.g., Jennifer D. Oliva, *Opioid Multidistrict Litigation Secrecy*, 80 OHIO ST. L.J. 663, 664–65 (2019) (examining how non-disclosure rulings of judges in the opioid MDL negatively impact public health outcomes and are part of a broader trend towards secrecy in MDL proceedings of this kind).

¹⁵⁷ Note that there may also be restrictions on access to documents based on attorney-client privilege and the work-product doctrine, but these are dealt with separately—the documents are not produced but placed on a log presented to the opposing party.

¹⁵⁸ See, e.g., COLLABORATION RSCH. INTEGRITY & TRANSPARENCY, YALE, PREVENTING THE USE OF COURTS TO SHIELD ESSENTIAL HEALTH INFORMATION: RETHINKING CONFIDENTIALITY IN MEDICAL PRODUCT LITIGATION 6–11, 13–20, (2018), https://law.yale.edu/sites/default/files/area/center/crit/crit_report.final_.pdf [<https://perma.cc/N9AB-M9U2>] (exploring the trend of increasing confidentiality of information relevant to medical products litigation and proposing best practices for disclosure). For an example of the harms of an expansive approach, see Oliva, *supra* note 156.

¹⁵⁹ Ironically, the restriction on document reviews conflicts with FRCP 1, which encourages the parties to negotiate efficiencies in the litigation. Courts have long held that the sharing of non-confidential documents among litigants in different cases makes litigation efficient. Indeed, an older version of FRCP provided that the discovery materials were deemed filed in court. When that language was eliminated from FRCP 5, many defendants seized on the opportunity to press for confidentiality agreements restricting the use of even non-confidential information.

¹⁶⁰ This is inconsistent with the intent of Federal Rule of Civil Procedure 1, which states that the rules should be employed to secure the just, speedy, and inexpensive determination of every action and proceeding.

branches of government.¹⁶¹ Lawsuits often rely on information generated during legislative oversight hearings, and legislative oversight is often the product of information generated in litigation.¹⁶²

Private counsel working on contingency have an interest in getting from the filing of a complaint to the resolution of the case as expeditiously as possible. They are reluctant to take on the battles, at the onset of a case, over the scope of the confidentiality agreement, because it will sidetrack the litigation and delay the resolution of the case. AGs are also interested in reaching a settlement in order to reduce litigation risk and obtain a damage award that provides the state with funds and the public with an easy metric of success. The value of the public record is harder to measure and the benefits more diffuse, and it thus fails to receive the protection it deserves.¹⁶³

6. Remedies

There are at least two different ways in which the current public-private litigation approach to remedies limits the public health value of the litigation. The first limitation arises from one of the major weaknesses in the litigation process: the limited attention and resources devoted to damage modeling, particularly where the public health harm is systemic and difficult to isolate. The inadequacy of the damage models reflects at least in part an underinvestment in the tools and information needed to build good systems of data collection and measurement. For the AG, cases should not be seen in isolation but rather as part of an enforcement system. Investing in systems of collecting and organizing data about state expenditures and the cost of harms incurred, such as the state costs of different products or healthcare costs, will increase the likelihood that public health harms will be detected and measured. Investing in different tools for measuring and modeling different types of harm may not be worthwhile for an individual case but doing so becomes worthwhile when the benefits are spread over multiple cases. Private firms will not have this systemic approach to damage modeling but rather will be focused on how much they can earn in fees from a particular case or series of related cases. Moreover, they will not have

¹⁶¹ For an interesting discussion of discovery as regulation, including the role of discovery in creating a robust public record, see, for example, Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71 (2020).

¹⁶² For a discussion of the synergy between litigation and other regulatory strategies, see, for example, Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285 (2021).

¹⁶³ See, e.g., Oliva, *supra* note 156, at 683–98 (discussing the importance of litigation in producing a public record of harm and the public health value lost by broad protective orders in cases such as the multi-district opioid litigation); A. Lahav and E. Burch, *Information for the Common Good in Mass Torts*, DEPAUL L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3703814 [<https://perma.cc/955R-KJ2K>] (discussing the powerful role of litigation in creating a public record of health and safety harms).

the institutional knowledge or authority to find ways of changing data gathering and access practices.

The second problem with the way in which remedies are approached is the emphasis on damages at the expense of other types of remedies. Typically, private lawyers are retained on a percentage-of-the-recovery basis, and their focus is on expected profit—a function of cost, speed, and total monetary damages/settlement amount. But much of the potential public health value of the litigation may come in the form of prophylactic relief, which is difficult, and sometimes impossible, to monetize.¹⁶⁴ Securing non-monetary remedies is challenging since often the most effective measures will involve costly, maybe even prohibitively expensive, changes to the actions and behavior of defendants. What should the remedy be when the business model of the defendant depends on the behavior that is the source of public harm, for example, as in the case of tobacco? Or where the effects of the misconduct outweigh the benefits of the activity, but the effects are diffuse and hard to measure while the benefits are concentrated and easy to identify, like in the case of so many chemical manufacturers?

There is one further area of divergence between the interests of private law firms and the public interest. The private firm's interest in a case is largely focused on the monetary settlement or damages that it might yield. But there is a tremendous future public value in deploying the lessons that can be learned from an existing case. The AG has a continued obligation to address the set of case-specific problems that a current case unmasks, and this will form part of the negotiation over damages or settlement. But the AG also has an opportunity to make the healthcare system better by employing lessons learned from the case, whether by educating relevant agencies on areas where wrongdoing is likely to occur, by changing procurement practices, addressing regulatory loopholes or weaknesses, or even by changing the ways in which payments are made and information is stored. These future-looking roles of litigation will often be neglected when discussing the remedies in any particular case.

7. *Settlement Decisions*

Most high-impact cases brought by AGs settle, as do the vast majority of all civil cases.¹⁶⁵ Both AGs and private lawyers have an interest in settlement. Both parties risk loss if they decide not to settle. To the state AG, loss may impact their political position and their leverage to enforce the law. To private attorneys, loss

¹⁶⁴ Consider, for example, a situation where a drug company markets a two billion-dollar-a-year anti-psychotic with about \$1.5 billion of the revenue stream being off-label. The defendant is willing to settle the case for \$1 billion but does not want to agree to a re-education campaign that will teach the market about the proper use of the drug. The problem is that the re-education campaign may be more valuable than the \$1 billion settlement. *See, e.g.,* Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 *BUFF. L. REV.* 101 (2004) (explaining generally the need for prophylactic remedy when monetary remedies fall short).

¹⁶⁵ *See, e.g.,* LORE & GUTTMAN, *supra* note 145.

may impact their reputation and expected profits. When a case is contracted out, the risk of litigation shifts to the private firm. The firm must balance that risk against the potential for recovery, which is measured by a contingent percentage of the recovery. Unless there is clear guidance on damage modeling, the notion of “litigation risk discount” is used by private counsel to support their decision to settle when the resolution meets the following criteria: (1) the settlement amount they will get exceeds the expected returns from pursuing the case further; (2) the potential for a higher return by pursuing the litigation further does not override the risk of continuing; and (3) the settlement recovery is sufficient to be perceived as a success.¹⁶⁶ The AG will face similar pressures, except perhaps in limited situations where the AG may have a special interest in taking a case to trial, beyond the hope of just winning. AGs may, for example, be willing to risk loss if they believe that the loss will serve as a catalyst for legislative action and if they have a vested interest in securing that action.

Settlement may lead to several lost opportunities to gain public health value from the litigation. First, the value of pre-trial litigation, which includes the value of the public record created and the “whitepapers” that motion documents can serve as, is not considered in private settlement decisions and is likely not adequately considered by the AG. Settling a case early will limit the information that makes it onto the public record, and settling a case at any point may result in decisions to keep aspects of the case private where they would have been made public in a court decision.

Second, the settlement amount often fails to convey any useful information about the nature of the harm or the patterns of misconduct, or to provide legitimacy for the settlement decision. Both functions of the settlement amount in the case are important. Where damage experts are used, their “method” should be transparent and available for the public, including the press, to review and understand. If, for example, a statistical model is used to project the impact of the alleged misconduct, that model should be made a matter of public record. Unless models are made public, the public, regulators, and legislators will not know if the settlement is reasonable. Where the settlement amount is discounted to reflect the uncertainty of who will win, this too should be transparent. Where lawyers decide that a settlement should account for litigation risk, there must be some method or guidance to ascertain that risk.

Third, settlement may allow the litigation to become akin to a parking ticket by failing to be either large enough or transparent enough to reveal and deter the underlying misconduct. The absence of rules that require certain findings to be made public leads to a diminished value of settlements.

¹⁶⁶ See, e.g., Heather D. Heavin & Michaela Keet, *Litigation Risk Analysis: Using Rigorous Projections to Encourage and Inform Settlement*, J. OF ARB. AND MEDIATION (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3148676 [<https://perma.cc/YSN5-68VV>].

In sum, decisions that are made at key stages along the litigation pathway can have an important impact on the ultimate public health value of the litigation, but they are often made without this impact in mind.

This Section has illustrated some of the ways in which the divergence of the private incentives and constraints of both the AG and the private law firm from public health objectives at key points in the litigation process may result in suboptimal outcomes from a public health perspective. The next Part suggests ways in which changes in the procedure for pursuing this type of litigation might be used to increase the realization of public health value from public-private health litigation.

IV. A PUBLIC HEALTH IMPACT APPROACH TO THE LITIGATION PROCESS

In the prior Section, we identified how a divergence of private incentives from public interests may influence decisions made along the litigation trajectory in ways that limit the public health value of health litigation. In this final part, we propose a decision-making framework that AGs can adopt to increase the role of public health objectives in the litigation process. Drawing insights from approaches that have succeeded in improving health and safety in other regulatory areas, we propose the adoption of an impact analysis approach to guide the litigation process and its results.¹⁶⁷ While the analogies to impact assessments and impact statements used in other types of agency decision-making are limited, given the different nature of agency decision-making outside of a litigation framework, we draw useful ideas from these other systems to develop a decision process and set of guidelines suited to the AG—particularly the AG working with private counsel in a public litigation context.

¹⁶⁷ The idea of integrating an assessment of impact into policymaking has been explored in other contexts, such as integrating human rights and attention to equity into policy decisions. *See, e.g.*, Lawrence Gostin & Jonathan M. Mann, *Towards the Development of a Human Rights Impact Assessment for the Formulation and Evaluation of Public Health Policies*, 1 HEALTH AND HUM. RTS 59 (1994); Alan Jenkins, Juhu Thukral, Kevin Hsu, Nerissa Kunakemakorn & Megan Haberle, *Promoting Opportunity Through Impact Statements: A Tool for Policymakers to Assess Equity*, AM. CONST. SOC'Y FOR L. AND POL'Y (2012), <https://www.opportunityagenda.org/explore/resources-publications/promoting-opportunity-through-impact-statements> [<https://perma.cc/X7GD-MX5R>]. Concepts of public health impact assessment are well established in public health. *See, e.g.*, Karen Lock, *Health Impact Assessment*, 320 BRIT. MED. J. 1395 (2000). There are even impact assessment toolkits available for fashioning tailored impact assessments. *See, e.g.*, *Impact Assessment Toolkit*, DEPT. FOR BUS. INNOVATION AND SKILLS (2011), https://www.legislationline.org/download/id/3642/file/UK_Impact%20Assessment%20Toolkit_2011.pdf [<https://perma.cc/KJV8-45VC>]. But we are not aware of any impact-based approaches to the types of decisions that an AG makes during the litigation process.

A. An Impact-Based Approach to the Litigation Process

Impact assessments and reports have been used in administrative decision-making as a way of forcing decision-makers to pay attention to, and make transparent, the impact of their decisions on areas that have been identified as policy priorities. The National Environmental Policy Act of 1969 (NEPA), for example, declares environmental quality to be a national priority that should be explicitly taken into account when federal agencies take any major action that might have an environmental impact.¹⁶⁸ The mechanism that they use to ensure that the environment is considered when federal agencies shape their policies is a requirement imposed on federal agencies to include an Environmental Impact Statement (EIS) in all recommendations for “major federal actions significantly affecting the quality of the human environment.”¹⁶⁹ This requires, at the very least, that agencies make a full disclosure of the environmental impact that their proposed regulation is likely to have. At a state level, impact assessments have also been required when passing state criminal laws.¹⁷⁰ Several states have been contemplating legislation requiring consideration of health effects when making decisions on state plans, projects, or policies, with some even going so far as to consider mandating health impact statements before new regulations are introduced.¹⁷¹

While these kinds of impact analyses focus on assessing the likely impact of a proposed change in law or regulation, impact reports have also been used to summarize the results of industry investigations and provide recommendations for future changes in standards of care. The U.S. Chemical Safety Board (CSB), which was modeled on the National Transportation Safety Board reporting scheme, provides a good illustration of this model. The CSB was created under the Clean Air Act Amendments of 1990 as an independent, non-regulatory federal agency tasked with investigating the causes of major chemical incidents.¹⁷² Their stated mission is to “drive chemical safety change through independent investigations to protect

¹⁶⁸ See, e.g., National Environmental Policy Act of 1969, ch. 55, 42 U.S.C. § 4332(2)(c) (2019).

¹⁶⁹ See, e.g., *id.*; Mary Anne Sullivan, *Four Years of Environmental Impact Statements: A Review of Agency Administration of NEPA*, 8 AKRON L. REV. 545 (1975).

¹⁷⁰ Some states require racial impact statements when proposing criminal laws that show how the proposed law might have consequences with a disparate impact on minorities, requiring that this information be shared before legislators vote on the law. See, e.g., Maggie Clark, *Should More States Require Racial Impact Statements for New Laws?*, PEW TR. BLOG (July 30, 2013), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/07/30/should-more-states-require-racial-impact-statements-for-new-laws> [<https://perma.cc/5YQ3-9VG4>].

¹⁷¹ See, e.g., *Health Impact Assessment Legislation in the States*, HEALTH IMPACT PROJECT (Feb. 2015), [https://www.pewtrusts.org/~media/assets/2015/01/hia_and_legislation_issue_brief.pdf](https://www.pewtrusts.org/~/media/assets/2015/01/hia_and_legislation_issue_brief.pdf) [<https://perma.cc/V7P5-UHS5>].

¹⁷² U.S. CHEM. SAFETY BD., <https://www.csb.gov/> [<https://perma.cc/37YS-8FVU>] (last visited July 8, 2021).

people and the environment.”¹⁷³ Each investigation is disclosed to the public, updates are provided, and, at the conclusion of the investigation, a public report is made available that documents the factors contributing to the harm and provides recommendations on future changes to industry standards designed to avoid that harm.¹⁷⁴ The reports are collected in a publicly available and searchable database.¹⁷⁵

These types of impact statements may—as in the case of an EIS—trigger some level of accountability under the Administrative Procedure Act (APA) at the federal level or state law equivalents of the APA at the state level.¹⁷⁶ While these reporting mechanisms provide useful models for transparent decision-making, it is not our intent to create new causes of action against those that engage in civil prosecutorial decision-making. Instead, we borrow the idea of impact assessments as a way of guiding key decisions during the litigation process, creating internal accountability for the decisions that are made, and promoting public accounting, guidance, and transparency only once the litigation is finished.

We suggest that adopting a form of internal impact assessment to guide key decisions during the litigation process and requiring a public impact report at the end—whether this be upon the decision not to pursue a case, the settlement of the case, or the conclusion of litigation—could be used to incorporate best practices into litigation decisions and make transparent the reasoning and consequences of the decisions that are made. An internal impact analysis would be initiated at the point of case selection and then again added to certain critical points of the litigation that have material effects on the likely outcome and are subject to a divergence of private incentives from public health outcomes. A public impact report would be required at the conclusion of any case that has resulted in at least the filing of a complaint. Thus, from the moment of case selection, the AG should set in motion a process that will culminate in either an internal record if the case is not filed or a public impact statement at the conclusion of the litigation once a complaint is filed.

¹⁷³ *Id.*

¹⁷⁴ *History*, U.S. CHEM. SAFETY BD., <https://www.csb.gov/about-the-csb/history/> [<https://perma.cc/W69T-TS9L>] (last visited July 8, 2021) (“The legislative history [behind the creation of the CSB] states: ‘[T]he investigations conducted by agencies with dual responsibilities tend to focus on violations of existing rules as the cause of the accident almost to the exclusion of other contributing factors for which no enforcement or compliance actions can be taken. The purpose of an accident investigation (as authorized here) is to determine the cause or causes of an accident whether or not those causes were in violation of any current and enforceable requirement.’”).

¹⁷⁵ *Completed Investigations*, U.S. CHEM. SAFETY BD., <https://www.csb.gov/investigations/completed-investigations/?Type=2> [<https://perma.cc/FXR2-DANK>] (last visited July 8, 2021).

¹⁷⁶ For a discussion of whether and how impact statements may trigger review under the APA, see, for example, Thomas E. Shea, *The Judicial Standard for Review of Environmental Impact Statement Threshold Decisions*, 9 B.C. ENV’T. AFFS. L. REV. 63 (1980).

This approach could be used to establish performance benchmarks at critical stages of the litigation process with public health interests in mind. It could also be used to create an internal database to capture lessons learned during the litigation process and an external database of the final reports to influence future industry and enforcement behavior. Additionally, it could be used to establish certain procedural requirements or standards that protect particularly important decisions from a public health standpoint, such as decisions about secrecy and required stipulations as to wrongdoing in settlements. Limiting the discretion of the decision-makers in these key areas as a procedural matter could help the AG in the long run by removing these decisions as bargaining points in negotiations over settlement.

B. Implementing the Approach

The objectives for this impact analysis framework are to: (1) create an internal database of information gathered during the litigation process as a way of building institutional knowledge; (2) create an external database in the form of impact statements to serve as a public record and to inform future decision-making; (3) provide a set of guidelines to inform AG involvement in the litigation process; ensuring they take the public impact of litigation decisions into account; and (4) require the development and use of metrics beyond dollar amounts of settlements to evaluate settlement proposals and to inform the structuring of remedies.

This impact analysis framework would, as further described below, begin with an impact analysis that informs case selection and strategy. It would provide contracting guidelines and public health metrics to guide the process and require an impact study to guide remedy design and settlement decisions. It would conclude with a public impact report.

1. Impact Analysis to Inform Case Selection and Strategy

Since it is both impossible and undesirable for a state AG to use litigation to address every instance of illegal conduct that causes public health harm, careful case selection is a critical first step in the litigation process. The challenge here is to identify cases that yield substantial public health value while also addressing legitimate constraints on both the private law firm and the state AG (within budget for the state AG and expected profit for the private law firm). When evaluating public health value, this type of case selection would be an expected value, construed broadly and considering consequential results and damages, like the potential for positive change to the law, deterrence of misconduct, and changes in future procurement practices by the government.¹⁷⁷

¹⁷⁷ It is noteworthy that a drug that is marketed off-label or that is not medically necessary may cause direct damages to the government in terms of payment for that drug. Yet, there may be other damages incurred by the government if the drug causes injury that requires treatment whose costs will be borne by the state. Too often, damage modeling does

Impact analysis would take place first at the point of case selection. The impact analysis would involve (a) identifying and bringing together state actors whose constituents are substantially harmed by the misconduct; (b) evaluating the alternative legal claims and their likelihood of success; (c) assessing the total magnitude of the harm; and (d) determining what the expected public benefits of bringing the case will be.

An impact analysis should be done by the AG, and the results retained in an internal database, even for cases that are ultimately not brought. This will create a knowledge bank of information about existing and potential wrongdoing that can be drawn upon when determining enforcement priorities. It will also create an internal record of decisions that can be used to identify and respond to potential instances of regulatory capture involving decisions not to pursue cases that are otherwise in the public interest to pursue.¹⁷⁸

Just as medical practitioners have developed the use of checklists to establish best practices in patient care, part of this impact approach could include the use of a questionnaire that frames the considerations that should go into the decision of whether to pursue a case. By identifying the factors that should be considered in case selection, the questionnaire will frame the decision-making process in a way that reflects public costs and benefits from the litigation. In addition to ensuring that decisions involve the requisite balancing of considerations, the answers to the questionnaire become a source of future knowledge. By saving these questionnaires and any relevant supporting data in an internal database, the decisions about case selection as well as the case ideas themselves will become a knowledge bank for future AGs and their staff.

To determine the real potential impact of a case, it is essential to include an accurate assessment of legally addressable harm, and this may require including a broad set of stakeholders at the table for initial case decisions. Considering all the constituents that should be involved in the impact analysis of a case requires AGs to adopt a broader view of the stakeholders impacted by public health litigation. As an example, in the case of healthcare fraud cases—many of which involve states intervening in *qui tam* suits initiated by private parties—the state AG often evaluates the claims with a focus largely confined to Medicaid fraud and without consideration of other state-funded constituents who are also the subjects of wrongful harm, such as the employees covered by state employee health and pension boards.¹⁷⁹

not account for the full range of damages. Only in the opioid litigation has the government embarked on an effort that acknowledges that misbranding or unlawful marketing can cause damages beyond the direct cost of the product.

¹⁷⁸ See, e.g., Eric Lipton, *Energy Firms in Secretive Alliance with Attorneys General*, N.Y. TIMES (Dec. 6, 2014), <https://www.nytimes.com/2014/12/07/us/politics/energy-firms-in-secretive-alliance-with-attorneys-general.html> [https://perma.cc/3TMG-SW43]; Stephenson, *supra* note 131, at 110.

¹⁷⁹ *Qui Tam* cases under the False Claims Act create a unique set of procedural issues in that the cases are filed under seal and investigations conducted while a case is sealed. Hence the orbit of those whom the AG may consult is constrained by court order, most likely to government bodies.

If the case appears to be one with a net positive public health impact, the next step is to consider the nature of the claims that are going to be asserted. Private interests in reaching a quick monetary settlement might suggest a different, perhaps narrower, set of claims that capture a slice of the misconduct, but public interests will take into account the positive public health impact of alternative claim scopes on the litigation as a whole. This will include an interest in creating a robust public record of public health harms, an interest in the deterrence and precedential impacts associated with alternative claims, and consideration of remedies that are likely to include real structural change.

In developing a standardized format for an impact study of litigation, one of the biggest challenges is the design of metrics for determining how to value different factors, such as risk, ability to monitor, expected resources diverted, and alternative ways of addressing harm in the analysis. The impact study will also need to consider alternative remedies up front, with some way of incorporating different and sometimes competing goals, such as the likelihood of recovering damages, general deterrence, or changing future procurement practices.

2. Guidelines for the Contracting Process with Private Firms

Private law firms may work with AGs either through a statutory relationship under the state False Claims Act or through a contractual arrangement where the AG hires the law firm to conduct the litigation. While there has been a great deal of discussion about the process AGs use or should use to incentivize private law firms to bring public cases, less attention has focused on the resulting contracts beyond the scrutiny of the payment structures. State AGs can outsource the litigation, but they must retain control over the proceedings. The nature of this control and the ways in which it is exercised during the litigation process are rarely defined in any detail. Yet this contract offers an opportunity to think about how to structure the partnership in ways that will best align private interests with public health objectives.

The contract between the AG and the private law firm thus plays an important role in the process of impact assessment. The first step is to fashion metrics that capture the public health value of different decisions and to use these metrics as part of the measure of performance within the contract. If part of the goal is to establish a robust public record, for example, consideration should be given to how that value is measured and reflected in the incentive structures that the contract creates.

Even if the contract includes detailed metrics, however, they will not be of much help without an effective system of monitoring and regular engagement by the AG's office in the litigation process. Given the important role that complex litigation can play as a form of affirmative public health strategy, state AGs should seek to include attorneys who have a background or some training in complex litigation strategies as part of their team. Having staff available who are familiar with the litigation process and can work closely with private firms on complex litigation matters will allow AGs to play a greater role in monitoring public-private litigation processes.

Ensuring that members of the AG's office remain involved in the litigation is important not just to ensure monitoring but also to benefit from in-depth learning about the practices that are causing harm and the sources of this practice. By contracting out the litigation process in ways that do not keep them involved in the details of the litigation, AGs distance themselves from the workings of the industries and companies that are engaging in misconduct. Litigation is, in part, a process of learning about how corporate actors function, and often the misconduct of one player implicates others in ways that could and should be factored into enforcement strategies.¹⁸⁰

3. *Public Health Metrics for the Process and Its Outcomes*

Many of the decisions that are made early in a case, such as the formulation of the claims that will be included in the complaint, the scope of the alleged harm that will be included, and early decisions about the discovery process, have important implications for public health. While private law firms and state AGs may be interested in a streamlined suit with a quick discovery process and a likely settlement offer, there may be a public benefit in engaging in extensive discovery with the public record in mind and an interest in pursuing broader remedies. The value of creating and making public a detailed record of corporate wrongdoing has been widely recognized by public health advocates and scholars, for example, but this value is often neglected by the parties bringing the case.¹⁸¹ In addition to recognizing the public health impact of different litigation decisions, there needs to be some way of incorporating these procedural sources of public health value into the litigation decision-making in a systematic and documented way. This includes (a) establishing metrics that capture different aspects of the public health value of a procedural decision, such as a measure of value for limiting a confidentiality order or expanding the scope of discovery; (b) finding ways of applying these metrics and deriving

¹⁸⁰ Consider, for example, the nursing home industry and its relationship to pharmaceutical companies and long-term care pharmacies. Some nursing homes have been known to reduce their staff to increase profits. One way of compensating for understaffing can be to sedate the patients. This creates a mutually beneficial relationship between the nursing homes and pharmaceutical companies that market drugs like Risperdal, Depakote, Seroquel used off-label to sedate elderly patients. The nursing home industry and the pharmaceutical companies have a shared interest in encouraging off-label sales of these drugs, and long-term care pharmacies facilitate the process of getting these drugs into the nursing homes. If government lawyers remain distanced from the litigation, they may miss the broader picture of contributing factors to the overuse of psychotropic drugs in nursing homes and thus miss an opportunity to address the misconduct not just by nursing homes but also by pharmaceutical companies and long-term care pharmacies or vice versa. *See* Complaint, United States, *ex rel.*, McCoyd v. Abbott Laboratories, No.1:07-cv-00081 (W.D. Va. Oct 31, 2007), Doc. 54.

¹⁸¹ *See, e.g.*, Oliva, *supra* note 156; Brief of Amici Curiae in Support of Settlement with Favorable Public Health Outcomes at 17–18; *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio May 9, 2019), ECF No. 1626.

measures in any given case; and (c) identifying decision points in the litigation process where consideration of these metrics is required.

As part of this process of establishing broader metrics, one approach might be to establish a checklist of considerations and certain performance benchmarks to guide key decisions. Items to include in this checklist can be formulated based on the critical decisions that must be made at each key decision point in the litigation process discussed in the prior Section. Inclusion of the item serves as an indication that the item has significance even if the value is hard to quantify. For example, the checklist would include questions to be asked at the time of deciding claim scope, such as: Have you considered the broadest and narrowest claims? Have you explored the implications of how you formulate the claims for future law change? Another set of questions would be directed to the time of deciding pre-trial motions and another set to decisions about discovery.

The checklist of considerations might include certain requirements on actions as well, such as a requirement to ensure that there is a public stipulation to wrongdoing where there is misconduct as part of any settlement that is reached. Having certain requirements in place as a procedural matter has the advantage of taking them off the bargaining table during negotiations, making them more attainable than they might otherwise be.

4. Impact Study to Guide Remedy Design and Decisions to Settle

One of the most persistent challenges in public-private health litigation is the absence of good remedy models to guide the outcomes of these suits, whether through court order, or most often, through settlement. While the opioid litigations offer new opportunities for making public health a central focus of settlement structures, there is little guidance as to what those settlements should look like. One commentator, looking back on lessons learned from the tobacco settlement, suggested that AGs do the following:

[T]ask a team of independent experts to determine now the best ways to monitor the pharmaceutical industry and treat opioid abuse . . . [since] the skills needed to pursue difficult litigation and negotiate a meaningful settlement are different to the ones needed to figure out how to reform complex pharmaceutical marketing and not waste settlement funds that come to states.¹⁸²

The need to invest in damage modeling was emphasized earlier. This includes investments both in systems of data collection, such as government spending on faulty products and the harm caused by them, and in tools to measure and analyze harm. The AG can benefit from scale economies in related classes of cases that

¹⁸² See, e.g., James E. Tierney, *It's Time to Take on Big Opioid Like We Did with Big Tobacco*, BUZZFEED NEWS (Jan. 10, 2018), <https://www.buzzfeednews.com/article/james-tierney/its-time-to-take-on-big-opioid> [<https://perma.cc/FXR2-DANK>].

utilize similar damage models by developing remedy models for classes of cases instead of individual cases. In addition to damages, remedies need to encompass structural change. An important aspect of structural change is the need to address distortions in the standard of care that industry defendants may have created.¹⁸³ Many cases involving public health harms rely on a showing that the defendants have departed from established standards of care. But there is no guarantee that the established standard of care reflects best practices; it simply reflects practices that are prevalent in the industry. AGs need to play a role in resetting or adjusting the standard of care where existing practices have lowered it.

5. Ending with a Public Impact Report

The Chemical Health and Safety Board Impact Reports provide a great illustration of how enforcement efforts can be translated into future changes in industry risk mitigation and improved industry standards of care through the use of public impact reports. The idea behind publishing final reports that summarize the findings of the investigation is to make the broader industry and the public aware of the health and safety risks of the conduct at issue and to put the industry on notice that this behavior is not acceptable in the future.

This report should accomplish the following goals: (a) document why the choice was made to pursue the case; (b) lend transparency to the facts of the case, including information and evidence secured in discovery; (c) point out where standards of care, laws, and regulations have been violated while lending transparency to those schemes used to circumvent requirements; (d) point out breakdowns in regulatory oversight that may have allowed the violations to occur; (e) make recommendations for changes in oversight or the amendment of law and/or regulation; and (f) issue guidance to consumers and the relevant professionals so that they may be alert to similar violations.

In addition, having a public report that describes the case and its outcome will serve as a mechanism for increasing the accountability of the AG and will provide an opportunity for the AG to claim credit for metrics beyond monetary damages. Knowing that they will have to prepare and publish such a report will serve as a discipline on the entire litigation process. It will require AGs to be prepared to justify the decisions that are made and encourage the AGs to build metrics into the contracts with their private law firm partners that encourage the private attorneys to act in a way that is consistent with these justifications.

¹⁸³ The problems are different for different sectors of the health care system. First, all pharmaceutical marketing derelictions involve two things: (1) actual economic harm, and (2) distortion of the standard of care. Consider kickbacks. You can measure damages by projecting the number of scripts that were tainted by proscribed payments. And some effort is made to do this, although there is no guidance on the discount for litigation risk, so any settlement number with good optics is acceptable. The problem is that after-time kickbacks create a standard of care, and after time you can't tell what created the standard.

CONCLUSION

While the theoretical debate over when and how private law firms should litigate state interests continues to rage, in practice, much of the high-impact public health litigation continues to involve partnerships between federal and state AGs and private law firms working together to litigate state interests. In this Article, we have explored why these partnerships are likely to persist and the opportunities that they offer for reaching public health harms that might otherwise remain unaddressed. But we have also shown why the resulting litigation, while offering opportunities to achieve public health goals, is likely to produce suboptimal results from a public health perspective.

Rather than take the limitations of the litigation process as a given, the Article provides a novel way of increasing the role of public health considerations throughout the litigation process. Drawing ideas from impact analysis models that have worked well in other areas of regulating health and safety, the Article develops an impact-based approach to litigation that could increase the likelihood that public-private litigation partnerships positively impact public health. Given the central role that public-private litigation has played in exposing some of the most egregious forms of harm to public health, maximizing the public health impact of the litigation process should be treated as a public health imperative.