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Essay

Nipping it in the Bud: The Promise and Perils of Tort Litigation in Addressing the Health Harms of High-THC Products

Rebekah Ninan[†]

In the last decade use of marijuana has skyrocketed. With the legalization of marijuana in states across the country, a nascent but increasingly powerful cannabis industry has formed. This industry has not only introduced cannabis products into the mainstream, but it has created high-THC products more powerful than anything found in nature or previous black markets. These products, including oils, vapes, and edibles, may have health effects that are unlike any risks that researchers have previously identified with cannabis. Science has started to sound the alarm, but the issue has remained unaddressed in the law. Only two states have introduced any regulations of THC levels, and no legal scholarship has examined how the existence of high-potency marijuana and its health effects may change litigation.

This Essay analyzes the potential claims that plaintiff-side litigators and state attorneys general may pursue against companies creating high-THC products. After explaining the current legal and medical research related to high-THC products, the Essay predicts the likelihood of cannabis litigation succeeding. It does so by analyzing two impactful examples of public health

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litigation: tobacco and opioids. The Essay concludes that litigation can be a useful tool in protecting populations from the harms of high-THC products, but it notes lessons from the tobacco and opioid litigation that plaintiffs can heed to strengthen their lawsuits against the cannabis industry.

INTRODUCTION

Imagine the following scenario: a teenager is in the throes of drug addiction. The drug initially provided “insane euphoria” but now leaves her feeling sad and depressed. She steadily increased her intake and now uses it multiple times per day. After using the drug, she has mysterious bouts of illness where she throws up, sometimes twenty times in two hours. She is also now at increased risk of psychosis. Her parents admit her to a program to get sober.

Hearing this anecdote, one perhaps would think this was a story of a teen dealing with alcoholism or hard drugs. One would be less likely to think this was a story about a teen using marijuana. However, this exact story was chronicled by the New York Times: the dependence of an eighteen-year-old woman who started using high tetrahydrocannabinol (THC) products at the age of fourteen.¹ A parent described in the article initially responded to their teen’s drug use in the same way many would react: “Oh well, it’s just weed.”²

The continued march towards cannabis legalization is a positive trend. The criminalization of marijuana possession, use, and sale imprisoned many and tore apart communities, particularly communities of color.³ Not only does legalization prevent future harms in criminal law, but it allows people to access important medical benefits.⁴

Despite these benefits, cannabis products in certain iterations or accessed by certain populations can harm consumers.⁵ Of particular concern are high-potency THC cannabis products. There is no one definition of when a product becomes high-THC,

1. Christina Caron, *Psychosis, Addiction, Chronic Vomiting: As Weed Becomes More Potent, Teens Are Getting Sick*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/well/mind/teens-thc-cannabis.html> [https://perma.cc/5XRZ-JA2V].

2. *Id.*

3. Charlotte Resing, *Marijuana Legalization Is a Racial Justice Issue*, ACLU (Apr 20, 2019), <https://www.aclu.org/news/criminal-law-reform/marijuana-legalization-racial-justice-issue> [https://perma.cc/H9PE-TPQ8].

4. See Alexandra F. Kritikos, *Medical Cannabis: Time to Act* 11–16, NORC AT THE UNIVERSITY OF CHICAGO (Jan. 2025), <https://heller.brandeis.edu/mass-health-policy-forum/categories/public-health/pdfs/medical-cannabis/medical-cannabis-issue-brief-2.26.25.pdf> [https://perma.cc/BN9E-LFFD].

5. See *infra* Part II.

but it is generally recognized to be cannabis products with a THC concentration above 20%.⁶

As *The Atlantic* stated succinctly in a recent headline: “Marijuana Is Too Strong Now.”⁷ The average marijuana strain from the 1990s and that for which the health effects have generally been studied had a THC level of 5%.⁸ Today, the average strain contains between 18 and 23% THC.⁹ Additionally, concentrated forms of cannabis, such as dabs, oils, vapor pods, and edibles, can contain percentages of THC up to 90%.¹⁰ As one expert puts it, high THC concentrates “are as close to the cannabis plant as strawberries are to frosted strawberry pop tarts.”¹¹

And the health effects of these products are starting to mount. High-THC cannabis products pose unique harms and a higher risk of substance use disorders than lower THC marijuana.¹² This goes against the public narrative of cannabis being a healthy and non-habituating drug, compared to alcohol or tobacco.¹³ Journalists and scientists have noted a swell in reports of people, particularly teens, experiencing dangerous side effects from using cannabis that is too powerful.¹⁴ These side effects

6. Carrie Cuttler et al., *Acute Effects of High-potency Cannabis Flower and Cannabis Concentrates on Everyday Life Memory and Decision Making*, NATURE, 2021, at 1.

7. Malcolm Ferguson, *Marijuana Is Too Strong Now*, THE ATLANTIC (Aug. 29, 2024), <https://www.theatlantic.com/ideas/archive/2024/08/high-potency-marijuana-regulation/679639> [<https://perma.cc/9F4J-NV8N>].

8. Megan Twohey et al., *As America’s Marijuana Use Grows, So Do the Harms*, N.Y. TIMES (Oct. 4, 2024), <https://www.nytimes.com/2024/10/04/us/cannabis-marijuana-risks-addiction.html> [<https://perma.cc/GVC5-TE7Z>].

9. U.S. S. CAUCUS ON INT’L NARCOTICS CONTROL, 117TH CONG., CANNABIS POLICY: PUBLIC HEALTH AND SAFETY ISSUES AND RECOMMENDATIONS 4 (March 3, 2021), <https://www.drugcaucus.senate.gov/reports/cannabis-policy-public-health-and-safety-issues-and-recommendations-2> [<https://perma.cc/2LKX-3DAT>].

10. L. Cinnamon Bidwell et al., *Association of Naturalistic Administration of Cannabis Flower and Concentrates with Intoxication and Impairment*, 77 JAMA PSYCHIATRY 787, 788 (2020).

11. Caron, *supra* note 1 (internal quotation omitted).

12. *See infra* Part II.

13. *See, e.g., Marijuana Is Safer Than Alcohol: It’s Time to Treat It That Way*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/special/marijuana-is-safer> [<https://perma.cc/P9AJ-7YCY>].

14. *See, e.g., Caron, supra* note 1; *see also* Jonathan Ore, *More Than a Bad Trip: Experts Warn About the Risk of Cannabis-induced Psychosis*, CBC (Feb. 18, 2024), <https://www.cbc.ca/radio/whitecoat/cannabis-induced-psychosis-bad-trip-1.7116217> [<https://perma.cc/7HQS-7TU5>].

include marijuana-induced psychoses, chronic vomiting, and permanent psychological alterations.¹⁵

While the cannabis business landscape is diffuse, Big Tobacco and large alcohol companies are entering the market.¹⁶ There is significant pressure to expand the cannabis market, and this pressure will only grow as corporate power in the space increases.¹⁷ In light of the expansion of the cannabis market and national corporations with deeper pockets getting involved, this Essay explores how individuals can recover when they face harms from cannabis producers.

Medicine is just starting to catch up to the new world of high-THC products and the law is even further behind. This Essay addresses the novel problem of high-THC products, a discussion totally absent from the legal literature on cannabis. In particular, the Essay conceptualizes how private litigants or the state in a *parens patriae* role can address the public health impacts of cannabis.

The Essay first provides background on the current legal and medical landscape surrounding cannabis products.¹⁸ This involves an explanation of which states cannabis is legalized in and the unique health impacts of high-THC cannabis. The Essay then explores how the history of tobacco litigation and opioid litigation possibly foretell the future of cannabis litigation both by private litigants and public entities. The history of these two influential litigations indicates that to address cannabis health, there will likely need to be intervention by state attorneys general and further development in the cannabis industry before litigation can be successful.

II. BACKGROUND

As of 2025, thirty-eight states and Washington D.C. have approved comprehensive medical programs for marijuana

15. Caron, *supra* note 1; Ore, *supra* note 14.

16. See Kris Krane, *Cannabis Attracts Big Tobacco, Alcohol, and Pharma. Which Big Industries Will Join Next?*, FORBES (Dec. 19, 2018), <https://www.forbes.com/sites/kriskrane/2018/12/19/cannabis-attracts-big-tobacco-alcohol-and-pharma-which-big-industries-will-join-next> [<https://perma.cc/2D3M-W5TN>].

17. *'Corporate Capture' and Emerging Cannabis Markets*, TRANSFORM DRUG POLY FOUND. (July 21, 2021), <https://transformdrugs.org/blog/preventing-corporate-capture-of-emerging-cannabis-markets> [<https://perma.cc/NNA6-J2V6>].

18. This paper uses the terms marijuana, cannabis, and THC products interchangeably.

usage.¹⁹ Twenty-three states and Washington D.C. have passed legal recreational use policies.²⁰ At least fifteen states have decriminalized but not legalized cannabis.²¹

However, there is legal complexity due to the conflict between federal and local laws. The possession of marijuana is illegal federally under the Controlled Substances Act.²² Cannabis is still a Schedule One drug federally.²³

Only two states have set limits on the levels of THC allowed in drugs: Vermont and Connecticut cap the THC content of the cannabis flower at 30% and the THC content of concentrates at 60%.²⁴ However, both states “exempt pre-filled vape cartridges from the caps[.]”²⁵

Even as teen drinking and cigarette usage decreases, the use of marijuana vaping is on the rise.²⁶ High-potency marijuana is more dangerous and undercuts existing research about cannabis’s safety profile.²⁷ High-potency marijuana typically refers to

19. Alex Leeds Matthews & Christopher Hickey, *More US States are Regulating Marijuana. See Where It’s Legal Across the Country*, CNN (Oct. 3, 2023), <https://www.cnn.com/2023/04/20/us/states-where-marijuana-is-legal-dg/index.html> [<https://perma.cc/A75W-CN3V>]; LIBR. OF CONG., THE FEDERAL STATUS OF MARIJUANA AND THE POLICY GAP WITH STATES (May 2, 2024), <https://www.congress.gov/crs-product/IF12270> [<https://perma.cc/2KVX-5BJN>].

20. Matthews & Hickey, *supra* note 19; LIBR. OF CONG., THE FEDERAL STATUS OF MARIJUANA AND THE POLICY GAP WITH STATES (May 2, 2024), <https://www.congress.gov/crs-product/IF12270> [<https://perma.cc/2KVX-5BJN>]; *see also* Kate Bryan, *Cannabis Overview*, NAT’L CONF. OF STATE LEGISLATURES (Jun. 20, 2024), <https://www.ncsl.org/civil-and-criminal-justice/cannabis-overview> [<https://perma.cc/6BZA-S2NB>].

21. German Lopez, *15 States Have Decriminalized – But Not Legalized – Marijuana*, VOX (July 10, 2019), <https://www.vox.com/identities/2018/8/20/17938358/marijuana-legalization-decriminalization-states-map> [<https://perma.cc/5MW3-Qz7W>].

22. LIBR. OF CONG., THE SCHEDULE I STATUS OF MARIJUANA (Oct. 7, 2022) <https://crsreports.congress.gov/product/pdf/IN/IN11204> [<https://perma.cc/5D9A-NGWE>].

23. *Drug Scheduling*, DEA, <https://www.dea.gov/drug-information/drug-scheduling> [<https://perma.cc/C95A-3PX9>]; *see also* 21 U.S.C. § 802(32)(A).

24. David Hilzenrath, *Regulators Struggle to Keep Up as Pot Becomes More Potent*, CNN (May 10, 2023), <https://www.cnn.com/2023/05/10/health/legal-pot-partner-kff-health-news/index.html> [<https://perma.cc/ZH7S-NS7P>].

25. *Id.*

26. Jessie Hellmann & Marty Johnson, *Teen Drinking, Cigarette Smoking Down as Marijuana Vaping Rises: Study*, THE HILL (Dec. 18, 2019), <https://thehill.com/policy/healthcare/public-global-health/475054-teen-drinking-cigarette-smoking-down-as-marijuana> [perma.cc/G4VB-953T].

27. *See* Isabella Backman, *Marijuana: Rising THC Concentrations in Cannabis Can Pose Health Risks*, YALE SCH. OF MED. (Aug. 30, 2023), <https://medicine.yale.edu/news-article/not-your-grandmothers-marijuana-rising-thc->

concentrations of THC in cannabis higher than twenty percent.²⁸ Emerging research from scholars emphasizes the particular risk of high-THC drugs because of the dose-dependency of certain health risks.²⁹

High-potency marijuana can be addictive.³⁰ This is particularly important as cannabis is typically viewed as a product with little to no risk of addiction.³¹ However, psychologists increasingly recognize patterns of dependence that only worsen based on the dosage of the THC, with higher potency increasing the likelihood of cannabis use disorder.³² The strength of initial cannabis concentrate used predicts the progression and persistence of cannabis use disorder over the next twelve month time period.³³

There are other emerging health impacts from high THC. Cannabinoid hyperemesis syndrome is a condition that causes heavy vomiting and gastrointestinal distress in heavy marijuana users.³⁴ Cannabis is easier to consume at a high degree with high-THC cannabis products. High-potency cannabis and in particular, dabbing, leads to significantly higher rates of neuro and cardiotoxicity.³⁵ There are also greater acute health effects including more unexpected poisonings and acute psychosis and

concentrations-in-cannabis-can-pose-devastating-health-risks [https://perma.cc/D9GB-HH7J].

28. Cuttler et al., *supra* note 6.

29. See Jacqueline-Marie N. Ferland et al., *Dose Mediates the Protracted Effects of Adolescent THC Exposure on Reward and Stress Reactivity in Males Relevant to Perturbation of the Basolateral Amygdala Transcriptome*, 28 MOLECULAR PSYCHIATRY 2583, 2583–84 (2023).

30. See Elizabeth Stuyt, *The Problem with the Current High Potency THC Marijuana from the Perspective of an Addiction Psychiatrist*, 115 MO. MED. 482, 483 (2018).

31. David Ovalle & Fenit Nirappil, *Marijuana Addiction Is Real. Those Struggling Often Face Skepticism.*, WASH. POST (July 31, 2023), <https://www.washingtonpost.com/health/2023/07/31/marijuana-addiction-legal-recreational-sales> [https://perma.cc/7QK4-FBMU].

32. L. Cinnamon Bidwell et al., *Exploring Cannabis Concentrates on the Legal Market: User Profiles, Product Strength, and Health-related Outcomes*, 8 ADDICTIVE BEHAVS. REPS. 102, 105-06 (2018).

33. Jessica L. Barrington-Trimis et al., *Risk of Persistence and Progression of Use of 5 Cannabis Products After Experimentation Among Adolescents*, JAMA NETWORK OPEN, Jan. 24, 2020, at 7–8.

34. Caron, *supra* note 1.

35. *Cannabis Concentration and Health Risks*, WASH. STATE PREVENTION RSCH. SUBCOMM., 8 (2020), <https://adai.uw.edu/wordpress/wp-content/uploads/2020/11/Cannabis-Concentration-and-Health-Risks-2020.pdf> [https://perma.cc/T7YN-9ACE].

paranoia.³⁶ Adolescents who use high-dose cannabis are more likely to experience psychosis and lifelong psychiatric disorders.³⁷

III. LESSONS FROM PREVIOUS LITIGATION

A. HISTORY OF TOBACCO LITIGATION

Tobacco products and litigation provide a strong comparison for potential cannabis lawsuits. First, the primary use of tobacco products was recreational. Second, the use of cigarettes was highly advertised and a part of popular culture.³⁸ Furthermore, the marketing was concentrated on attracting teens and young users.³⁹ There are also similarities in the method of ingestion—obviously through smoking, but e-cigarettes such as Juul have been critical for the rise of cannabis ingestion through vapes and dabs.⁴⁰ One of the most popular marijuana vape pens, called pax, is owned by the company that spun out Juul.⁴¹

It is important to acknowledge that there are meaningful differences between cannabis and tobacco. The use of tobacco products was far more widespread—by the mid-20th century roughly half of all Americans were habitual tobacco users.⁴² Additionally, the tobacco industry was incredibly important to the

36. *Cannabis Regulations Inadequate Given Rising Health Risks of High-Potency Products*, USC SCHAEFFER CTR. (July 18, 2022), <https://healthpolicy.usc.edu/article/cannabis-regulations-inadequate-given-rising-health-risks-of-high-potency-products> [<https://perma.cc/C96B-C26G>].

37. Nora D. Volkow et al., *Effects of Cannabis Use on Human Behavior, Including Cognition, Motivation and Psychosis: A Review*, 73 JAMA PSYCHIATRY 292, 292 (2016).

38. See *The Cigarette's Powerful Cultural Allure*, NPR (Jan. 11, 2014), <https://www.npr.org/2014/01/11/261608767/the-cigarettes-powerful-cultural-allure> [<https://perma.cc/VX9R-RZ6W>].

39. See Jeffrey K. Stine, *Smoke Gets in Your Eyes: 20th Century Tobacco Advertisements*, NAT'L MUSEUM OF AM. HIST. (Mar. 17, 2014), <https://americanhistory.si.edu/explore/stories/smoke-gets-your-eyes-20th-century-tobacco-advertisements> [<https://perma.cc/ZBP4-Q8QR>].

40. See generally Katherine M. Keyes et al., *Frequency of Adolescent Cannabis Smoking and Vaping in the United States*, 117 ADDICTION 2316 (2022).

41. Nathan Bomey, *Deadly Vaping Crisis Threatens to Ensnare Juul's Lucrative Marijuana Sibling, Pax Labs*, USA TODAY (Oct. 14, 2019), <https://www.usatoday.com/story/money/2019/10/14/the-vaping-crisis-juul-labs-pax-labs-marijuana/3920362002> [<https://perma.cc/8GY8-XBD2>].

42. INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION 41 (2007).

American economy and highly concentrated by the 1960s.⁴³ Further, by the late 20th century, the science was exceedingly clear, and companies had long-known that tobacco was highly addictive and resulted in clear health issues such as lung cancer, cardiovascular disease, increased risk of stroke, and chronic obstructive pulmonary diseases.⁴⁴ Finally, there was significant federal legislation and federal agency regulation surrounding how tobacco had to be produced and labelled that could preempt some state tort law suits.⁴⁵ Cannabis use and the cannabis industry do not have the same proliferation, nor are the effects of high-THC products as clear in the literature or to companies themselves. Nevertheless, the long history of tobacco litigation provides a rich lens through which to compare and predict cannabis litigation.

Tobacco litigation is often organized into three waves.⁴⁶ In the first wave, which occurred between 1954 and 1973,⁴⁷ individual plaintiffs sued tobacco companies in product liability cases.⁴⁸ The cases in this wave were dominated by individuals suing tobacco companies for negligence.⁴⁹ In these cases, tobacco companies succeeded based on two arguments. First, the science on smoking was not conclusive, so tobacco companies argued the plaintiffs' causal link between their injury and tobacco was not sufficient, and, therefore, companies had not acted negligently in creating tobacco products.⁵⁰ Second, patients were aware of the risks of smoking, so they assumed the risk of their injury when they began to use cigarettes.⁵¹ Tobacco companies generally succeeded on these defenses, and juries and courts consistently found cigarette manufacturers non-culpable.⁵²

43. David Levy et al., *The US Cigarette Industry: An Economic and Marketing Perspective*, 2019 TOBACCO REGUL. SCI. 156, 156 (2019).

44. See Allan M. Brandt, *Inventing Conflicts of Interest: A History of Tobacco Industry Tactics*, 102 AM. J. PUB. HEALTH 63, 63 (2012).

45. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 513–17 (1992).

46. See David A. Hyman, *Tobacco Litigation's Third-Wave: Has Justice Gone Up in Smoke?*, 2 J. OF HEALTH CARE L. & POL'Y 34, 35 (1998) ("Most scholars divide litigation against the tobacco companies into three waves.").

47. Stephen D. Sugarman, *Mixed Results from Recent United States Tobacco Litigation*, TORT L. REV. 94, 97 (2002).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Peter F. Riley, *The Product Liability of the Tobacco Industry*, 30 B.C. L. REV. 1103, 1117 (1989)

In the second wave of litigation, claims focused on tobacco companies' knowledge and concealment of cigarettes' addictive and harmful qualities.⁵³ This wave lasted roughly between 1983 and 1992.⁵⁴ Here, tobacco companies prevailed again using assumption of risk arguments and additionally argued that state failure to warn claims were preempted by federal legislation such as the Federal Cigarette Labelling and Advertising Act.⁵⁵ The cases in this wave were focused on failure to warn claims and addiction-based claims.

It was only in the third wave of litigation, during the 1990s, when tobacco companies began to face liability.⁵⁶ The third wave was triggered by reporting from the FDA and ABC News that American cigarette manufacturers were controlling nicotine levels with the intent to addict smokers through dosing.⁵⁷ Armed with damning internal reports showcasing the industry's knowledge and callousness, state attorneys general pursued the tobacco settlement, and ultimately won billions of dollars in the Master Settlement Agreement (MSA).⁵⁸ This agreement required tobacco companies to pay states approximately ten billion dollars a year.⁵⁹ Additionally, companies faced stipulations on issues such as advertising, sponsorship, and youth usage.⁶⁰ During this same time frame, plaintiffs began to win cases both individually and as classes. The tobacco industry also began to settle with plaintiff classes.⁶¹

53. *Id.* at 1118.

54. *U.S. v. Philip Morris: The Big Win Against Big Tobacco*, PUB. HEALTH L. CTR. 38 (Oct. 18, 2016), <https://www.publichealthlawcenter.org/sites/default/files/phlc-tclc-webinar-US-v-Philip-Morris-2016.pdf> [<https://perma.cc/VXY6-RTZC>].

55. *A Study on Liability and the Health Costs of Smoking*, EUROPEAN COMM'N DIRECTORATE-GEN. FOR HEALTH AND FOOD SAFETY 32–33 (Dec. 2009), https://health.ec.europa.eu/system/files/2016-11/tobacco_liability_en_0.pdf, pg. 32 [<https://perma.cc/JE6Y-YFSP>].

56. Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation* (Sept. 18, 2001) (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=283794 [<https://perma.cc/L7ME-QYSY>].

57. Nicholas Florko, *After Decades Fighting Big Tobacco, Cliff Douglas Now Leads a Foundation Funded by His Former Adversaries*, STAT NEWS (May 13, 2024), <https://www.statnews.com/2024/05/13/cliff-douglas-tobacco-control-philip-morris-international-funding> [<https://perma.cc/G5DW-ZUY9>].

58. Walter Jones & Gerard A. Silvestri, *The Master Settlement Agreement and Its Impact on Tobacco Use 10 Years Later*, 137 CHEST 692, 692 (2010).

59. *See generally id.* (describing the MSA and payouts).

60. *Id.* at 692.

61. *See* Richard A. Daynard, *Why Tobacco Litigation?*, TOBACCO CONTROL, Mar. 2003, at 1 (mentioning tobacco settlements).

The history of tobacco litigation shows that powerful industries can become susceptible to lawsuits and demonstrates the importance of public health and public perceptions in industry liability.

B. HISTORY OF OPIOID LITIGATION

Though marijuana can be used in the treatment of disease and abatement of symptoms, it is largely dissimilar from traditional pharmaceutical products. Pharmaceuticals are tightly regulated by the FDA and cannot come to market without extensive clinical trials.⁶² Because of this, state tort claims against pharmaceutical companies are usually preempted, unless the company failed to inform the FDA of risks or did not take action in light of new data indicating adverse events.⁶³ However, the opioid epidemic has been one of the greatest swells of litigation in the last decade and may provide clues for how to sue cannabis manufacturers.

Opioid litigation has gone through two waves. The first wave took place between 2001 and 2013; in this wave, individual claims failed, and government claims had some success.⁶⁴ Plaintiffs typically focused on failure to warn or defective design.⁶⁵ The crux of the cases was that Purdue Pharma, a large opioid manufacturer, “deceived potential users of OxyContin by relaying positive information while downplaying the known adverse and serious health effects.”⁶⁶ Over one thousand lawsuits were initiated between 2001 and 2007, but “they rarely survived motions for summary judgment.”⁶⁷ Failure to warn and defective design claims were difficult to succeed on given that both warning labels and the drug itself were subject to FDA approval,

62. See LIBR. OF CONG., *How FDA Approves Drugs and Regulates Their Safety and Effectiveness* (May 5, 2018), <https://www.congress.gov/crs-product/R41983> [<https://perma.cc/A6KT-7XQV>].

63. See *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618–19 (2011) (discussing preemption in the pharmaceutical labeling context); *Wyeth v. Levine*, 555 U.S. 555, 572–73 (2009) (same).

64. Jacob Hedgpeth, *The Bankruptcy of Purdue Pharma in the Wake of Big Tobacco*, 94 U. OF COLO. L. REV. F. 33, 40–41 (2004); see also Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 310 (2021).

65. See Engstrom & Rabin, *supra* note 64.

66. See *id.* at 310–11 n.130 (2021) (citing Complaint with Jury Demand Endorsed Thereon ¶ 21, *Burton v. Purdue Pharma L.P.*, (Ohio Ct. C.P. Scioto Cnty. Apr. 25, 2001) (No. 01CIB005)).

67. *Id.*

leading to preemption claims.⁶⁸ Here, the opioid industry took a similar tack to the tobacco industry by focusing on blaming and stigmatizing individual plaintiffs. The companies emphasized the causation issues for plaintiffs, as the causal link between opioid use and harm was not clear, and plaintiffs on OxyContin often took and abused multiple pain medications at once.⁶⁹ By 2007, the New York Times declared that Purdue Pharma had secured dismissal of hundreds of suits.⁷⁰ There was one settlement of \$75 million to 5,000 individuals, but that settlement was bound to strict confidentiality and didn't even make the news.⁷¹

The second opioid litigation wave began in 2014 and was initiated by states and local governments.⁷² There were wide-ranging claims including “public nuisance, RICO, negligence, fraudulent misrepresentation, fraudulent concealment, state statutory violations, and unjust enrichment.”⁷³ This round of litigation was broader and much more visible than the first wave.⁷⁴ It also expanded the range of defendants, looking beyond Purdue and to the entirety of the system that perpetuated the crisis, including other pharmaceutical firms, distributors, manufacturers, and retailers.⁷⁵ While over 2,700 federal claims were consolidated into an MDL in the Northern District of Ohio, over 370 state and local government actions were in state courts.⁷⁶ Ultimately, a wide negotiation class including both individual plaintiffs and other actors was certified, and a global settlement was reached.⁷⁷ The question of whether that settlement will remain is in the air, now that the Supreme Court has found the court-

68. *Id.*

69. *Id.* at 312.

70. *Id.* at 313–14 (citing Barry Meier, *Narcotic Maker Guilty of Deceit over Marketing*, N.Y. TIMES (May 11, 2007), <https://www.nytimes.com/2007/05/11/business/11drug.html> [<https://perma.cc/3CYB-NVU5>]).

71. *Id.*

72. *Id.* at 316.

73. *Id.*

74. *Id.* at 316–17.

75. *Id.* at 317.

76. *Commitments and Contingencies Disclosure [Abstract]*, SEC (Jun. 28, 2020), <https://www.sec.gov/Archives/edgar/data/200406/000020040620000050/R19.htm> [<https://perma.cc/ZH28-7YTJ>].

77. *Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family*, DEP'T OF JUST. (Oct. 21, 2020), <https://www.justice.gov/archives/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid> [<https://perma.cc/6LGL-BUDY>].

approved reorganization of Purdue Pharma under Chapter 11 of the Bankruptcy Code does not extinguish claims against the Sackler family.⁷⁸

The opioid litigation is yet another example of how the tide can turn against industry and shows how the tactics from the tobacco litigation have become revitalized in modern times.

C. IMPLICATIONS OF PREVIOUS LITIGATION FOR DIFFERENT TYPES OF POTENTIAL CANNABIS LAWSUITS

It is unclear exactly how future cannabis litigation would hypothetically map on to tobacco or opioid litigation. In many ways, we are at a juncture like both the first wave of tobacco litigation and the first wave of opioid litigation.

This Section explains how these factors create different implications based on the type of litigation. First, it explores how the tobacco and opioid litigation informs private litigation by individuals or classes of plaintiffs, concluding that such cases would ultimately focus on personal injury and would run into issues of general and specific causation. Second, the Section outlines how the tobacco and opioid litigation informs public litigation brought by state attorneys general, particularly in terms of how youth marketing claims and public nuisance suits could be used against cannabis companies. Finally, the paper cites five similarities between the opioid and tobacco litigation that scholars have recognized as contributing to their success and traces whether these five factors would be present in potential cannabis litigation.

1. Implications for Private Litigation

Litigation against the cannabis industry could focus on personal injury. This has been the nature of the sparse existing litigation, like *Kirk v. Nutritional Elements, Inc.*, where a man's family sued after the man suffered a psychotic episode from the consumption of an extremely potent edible, over 40 times the dose usually recommended to a beginner consumer.⁷⁹ During this episode, the man killed his wife.⁸⁰ His children sued,

78. See *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 227 (2024).

79. Complaint, *Kirk v. Nutritional Elements, Inc.*, No. 2016 CV 31310 (2d Dist. Colo. Apr. 13, 2016).

80. *Id.*; see also Steven B. Perlmutter, *High Times Ahead: Products Liability in Medical Marijuana*, 29 HEALTH MATRIX: THE J. OF L.-MED. 225, 274–77 (2019) (citing Plaintiffs' First Amended Complaint and Jury Demand at 7, *Kirk v. Nutritional Elements, Inc.*, No. 16-CV-31310 (2d Colo. May 9, 2016)).

claiming that the product itself was defective and that the company did not sufficiently warn of the risks from consumption.⁸¹ In particular, they focused on the potency and the unintuitive design in which a single cookie constituted multiple servings.⁸² The children ultimately received an undisclosed settlement.⁸³

This is also the approach taken in a recent complaint filed in California state court that alleges a teen user suffered cannabis-induced psychosis after repeatedly consuming cannabis products and tested positive for extremely high levels of THC.⁸⁴ This lawsuit's claims are more expansive than those in *Kirk v. Nutritional Elements* as it alleges failure to warn and design defect, but it also brings in claims of breach of implied warranty and fraud.⁸⁵ These claims are based on the argument that defendants made false representations about their THC products when they claimed the products were safe to use and a "better choice" compared to alcohol or other drugs.⁸⁶ This litigation is ongoing as of 2025.

Theories of product liability would allow plaintiffs to claim that either the product was designed in such a way that purchasers would inevitably overconsume or that the defendants failed to warn of risks associated with consuming such high quantities of THC. However, there are a few issues with these theories, as plaintiffs would have to show to show there were actual harms resulting from use of cannabis that was defectively designed or existing risks of which plaintiffs were not warned. Plaintiffs can bring strict product liability claims when there is a failure by the producer to warn consumers of any dangers that may not be apparent to users.⁸⁷ A defectively designed product is one created

81. See *Marijuana Product Liability Lawsuits May Pick Up in 2019*, CANNABIS L. GRP. (Jan. 15, 2019), <https://www.los-angeles-marijuana-lawyer.com/blog/marijuana-product-liability-lawsuits-may-pick-up-in-2019> [https://perma.cc/HXV4-H4Y2] (citing Complaint for Damages and Jury Demand, *Kirk v. Nutritional Elements, Inc.*, No. 2016CV31310 (Cty. of Denver Dist. Colo. Apr. 13, 2016)).

82. See Perlmutter, *supra* note 80, at 274–77 (citing Plaintiffs' First Amended Complaint and Jury Demand at 7, *Kirk v. Nutritional Elements, Inc.*, No. 16-CV-31310 (2d Colo. May 9, 2016)).

83. *Id.*

84. See *generally* Complaint for Damages and Demand for Trial by Jury, *Doe v. Stiiizy Inc.*, No. CV0002999 (Cal. Sup. Ct. Marin Cnty. May 29, 2024).

85. *Id.* ¶¶ 121–51.

86. *Id.* ¶ 113.

87. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (AM. L. INST. 1965).

in a way that is not suitable or safe for its intended use.⁸⁸ There are three tests used to determine whether there was a design defect. First, the consumer expectation test requires that a product must be as safe as a consumer would expect it to be for its intended use: the product cannot be dangerous to an extent beyond that which would be contemplated by an ordinary consumer who purchases it.⁸⁹ Second, the risk utility test requires that the benefits of the product outweigh the social costs of the dangers from the design.⁹⁰ Third, the reasonable alternative design test requires that the product was defective because an alternate design that was safer existed.⁹¹

There are elements that make cannabis litigation generally weaker than opioid or tobacco litigation. Cannabis companies could argue, much as the tobacco companies did in the first wave of litigation, that the science is not clear. First, it is less clear what the long-term effects of cannabis use are compared to tobacco or opioid usage. Second, while a single usage of tobacco does not have risks, high-dose, single-use cannabis experiences could potentially produce harm, as illustrated in the *Kirk* case. This is similar to the way that a single session of excessive alcohol consumption can create an acute health crisis but is different from the health harms of long-term incremental tobacco or opioid usage. Finally, it is less clear whether cannabis is designed to hook users in the way that tobacco or opioids are and whether long-term addictive use creates health harms independent of the addiction itself.

In cannabis litigation, the causation issues would be even more complicated than those in tobacco litigation. First, the science on the health effects of high-dose THC simply is not as clear

88. *Id.* § 402A.

89. *See, e.g.*, *Calles v. Scripto-Tokai Corp.*, 864 N.E.2d 249, 254–55 (Ill. 2007) (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (AM. L. INST. 1965) (The test outlined in section 402A for determining whether a product is “unreasonably dangerous” is known as the consumer-expectation or consumer-contemplation test. This test provides that a product is “unreasonably dangerous” when it is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics”); *see also* W. Kip Viscusi & Clayton J. Masterman, *The Specific Consumer Expectations Test for Product Defects*, 95 IND. L.J. 183 (2020).

90. RESTATEMENT (THIRD) OF TORTS Prod. Liab. Intro. (AM. L. INST. 1998); *see also* David G. Owen, *Risk-Utility Balancing in Design Defect Cases*, 30 U. Mich. L. Reform 239, 239 (1997) https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1981&context=law_facpub [<https://perma.cc/G4JF-Y927>].

91. RESTATEMENT (THIRD) OF TORTS § 2b (AM. L. INST. 1998).

as the science on tobacco was by second or third wave. Because the harms from cannabis seem to be graduated based on dose, but generally not harmful in moderation, there is also a question about whether the cause of the harm was the product itself versus the way an individual consumer used the product. This all creates issues for general causation.

For specific causation, there are two major issues. First, for health impacts such as respiratory distress, fungal infections, and cardiotoxicity, it is difficult to disaggregate the cannabis product from the method of ingesting. For example, many signs of respiratory distress, like wheezing or whistling in the chest, can be an issue with vaping in general, rather than just because of cannabis use.⁹² Therefore, it becomes difficult to hold the producer of THC oils, pods, or dabs responsible when it could be the ingestion vehicle, the vape pen, that is actually causing harm instead of the THC itself.

Second, it will be harder to prove with marijuana than with cigarettes which product caused the long-term harm. While cigarette smokers tend to have loyalty to a specific brand, marijuana users tend to consume a variety of different brands.⁹³ This is likely because of the industry's nascency and lack of consolidation. It could also be because, unlike nicotine consumption through cigarettes, one marijuana consumer may ingest the substance in multiple different forms. There is a further wrinkle that even in areas where cannabis is legal, many users consume a mix of illicitly purchased and legally purchased marijuana, partially through sharing cannabis products at social events and partially because of the increased price of dispensary products.⁹⁴ However, where there is an issue of multiple brands, tobacco litigation provides two paths for addressing it. One method would be having multiple defendants and assigning a different

92. See Carol J. Boyd et al., *Cannabis, Vaping, and Respiratory Symptoms in a Probability Sample of U.S. Youth*, 69 J. OF ADOLESCENT HEALTH 149, 149 (2021).

93. Curt Dalton, *The Marijuana Industry's Biggest Lie - Cannabis Branding Matters to Consumers*, LINKEDIN PULSE (Feb. 6, 2022), <https://www.linkedin.com/pulse/marijuana-industrys-biggest-lie-cannabis-branding-matters-dalton> [https://perma.cc/BKF6-3CY9].

94. See generally Samantha Goodman et al., *Reasons for Purchasing Cannabis From Illegal Sources in Legal Markets: Findings Among Cannabis Consumers in Canada and U.S. States, 2019–2020*, 83 J. OF STUDIES ON ALCOHOL AND DRUGS 392 (2022) (describing motivations behind illegal marijuana purchases).

percentage of fault to each,⁹⁵ while another option would be lawyers specifically bringing cases of plaintiffs who only loyally smoked one brand.⁹⁶

Difficulties with causation can be partially overcome with a signature disease.⁹⁷ Plaintiffs often find it easier to prevail in cases of signature diseases, such as mesothelioma from asbestos exposure, because both the general and specific causation questions are simplified.⁹⁸ If there is only one known cause of the disease, it becomes difficult to argue that the plaintiff's injury was the result of lifestyle choices, environmental factors or other genetic components. One possible condition for which plaintiffs could more easily bring suit is cannabinoid hyperemesis syndrome (CHS). CHS is a condition in which long-term cannabis users present with cyclical vomiting and abdominal pain.⁹⁹ Often the only relief from the vomiting, which can be as much twenty times in the span of two hours, is hot baths or showers.¹⁰⁰ The hypothesized cause is the overstimulation of cannabinoid receptors, like the CB1 and CB2 receptors located in the brain and gastrointestinal tract.¹⁰¹ While in the short term the stimulation of these receptors may decrease nausea, in the long term they become less responsive and less active, leading to CHS.¹⁰² This syndrome is one that is only caused by marijuana use¹⁰³ and is

95. See, e.g., *Engle v. Liggett Grp., Inc.*, 2006 Fla. Lexis 1480, at *5 (Fla. 2006) (holding that “apportionment of fault among the defendants” is highly individualized and not amenable to class treatment and remanding for class members to file individual claims).

96. See, e.g., *Schwarz v. Philip Morris, Inc.*, 235 P.3d 668, 670 (Or. 2010) (implying that plaintiff smoked one brand of cigarettes that ultimately contributed to her death).

97. See Anita Bernstein, *Asbestos Achievements*, 37 SW. U.L. REV. 691, 703 (2008) (“Mesothelioma almost never occurs absent asbestos exposure; it is, or is at least very close to, what epidemiologists call a signature disease.”).

98. *Id.* 706–08.

99. J. Eric Fleming & Sean Lockwood, *Cannabinoid Hyperemesis Syndrome*, 34(10) FED. PRAC. 33, 34 (2017).

100. Caron, *supra* note 1; Fleming & Lockwood, *supra* note 99, at 34.

101. See generally Jonathan A. Galli et al., *Cannabinoid Hyperemesis Syndrome*, 4(4) CURR. DRUG ABUSE REV. 241 (2013) (describing CHS and explaining that, while marijuana use can decrease nausea, it can also sometimes have the opposite effect and cause CHS).

102. See generally *id.*

103. *Cannabis Hyperemesis Syndrome* (CHS), CEDARS SENAI (last accessed Oct. 30, 2025), <https://www.cedars-sinai.org/health-library/diseases-and-conditions/c/cannabinoid-hyperemesis-syndrome.htmlc> [<https://perma.cc/58ZW-NUEZ>].

increasingly common in teens.¹⁰⁴ Because of this direct link, CHS reduces causation burdens by being a “signature disease.”¹⁰⁵ While this would not overcome issues of which brand a plaintiff repeatedly used, it would isolate the injury from the method of ingestion and not enter the complex fray of the causes of psychological harms. This signature disease is a benefit that the cannabis litigation would have over tobacco or opioid litigation.

Another possible place for success for the cannabis plaintiffs that the opioid litigation did not have would be in defective design claims regarding the addictiveness of drugs. It was difficult for opioid litigants to win on that claim because the FDA had approved the design itself.¹⁰⁶ This is even though the crushable nature and release-timing of OxyContin pills made it highly susceptible to abuse.¹⁰⁷ On the other hand, plaintiffs have had some success in alleging that cigarettes were defectively designed. Winning arguments have focused on the easy inhalation of tobacco and the manipulation of nicotine levels to “hook” smokers.¹⁰⁸

Defective design has also been a focus of the Juul litigation,¹⁰⁹ as a “smoother” smoke can make the experience much more pleasurable to first-time users and create repeat customers.¹¹⁰ Juul’s design has also been challenged by parents for looking like a USB stick and thus being difficult to identify as a drug when possessed by minors.¹¹¹ Cannabis producers could face similar claims. Cannabis products, unlike opioid products, will not be protected by FDA approval of the design. Like the

104. See generally J. Antonio Quiros & Miguel Saps, *The Coming Storm: Cannabis Hyperemesis Syndrome in Adolescents*, 68 J. OF ADOLESCENT HEALTH 223 (2021) (discussing the rise of cannabis hyperemesis syndrome in teenagers).

105. See Bernstein, *supra* note 97, at 706–08.

106. *Cornelius v. Cain*, No. CACE 01-020213(02), 2004 WL 48102, at *5 (Fla. Cir. Ct. Jan. 5, 2004) (“There is . . . no evidence of a design defect in OxyContin.”).

107. See Theodore J. Cicero & Matthew S. Ellis, *Abuse-Deterrent Formulations and the Prescription Opioid Abuse Epidemic in the United States*, 72 JAMA PSYCHIATRY 424, 425 (2015).

108. See generally *Mendez v. Philip Morris USA Inc.*, No. 2018-042377-CA-01, 2022 WL 13718690 (Fla. Cir. Ct. Sep. 23, 2022).

109. The Juul litigation has focused on consumer protection claims suing companies for youth marketing of e-cigarette products.

110. See Complaint and Demand for Jury Trial ¶¶ 24–26, *Nessmith v. Juul Labs*, No. 8:19-cv-00884 (D. Fla. Apr. 15, 2019).

111. *Id.* ¶ 22.

Juul litigation, high-THC product producers could face claims that the levels of THC were specifically manipulated to create repeat users.

Plaintiffs can bring strict product liability claims when there is a failure by the producer to warn consumers of any dangers that may not be apparent to users.¹¹² However, this could be a particularly difficult path for marijuana litigants. The issue here is that companies cannot have a responsibility to warn of issues that they are not aware of. The science on the health risks of high-THC products is still evolving. While actual knowledge of a risk is not needed for a failure to warn claim, it still needs to be reasonable that the manufacturer should have known of the risk.¹¹³ Particularly, a manufacturer may not be held liable if the risk was unknowable at the time of sale, particularly for a “state of the art” product.¹¹⁴ Defendants may argue that the risks of high-THC products were unknowable to manufacturers as the legal cannabis market is nascent, research on cannabis is restricted, and manufacturers are creating state-of-the-art products as they are legal for the first time. However, this may be refuted depending on how much weight a court gives the emerging scientific evidence and the lack of warnings added over time. Furthermore, if any evidence emerges of manufacturers suppressing internal evidence, as was the case in the tobacco litigation, this could also lead to liability.

2. The Role of State Attorneys General and Other Public Lawyering

Collective action by surrogate claimants cut short the tobacco and opioid industries’ winning streaks.¹¹⁵ As described above, a turning point in tobacco litigation was when states began suing tobacco companies.¹¹⁶ In *parens patriae* product litigation, the state attorney general is a “super plaintiff.”¹¹⁷ In the tobacco litigation, this was primarily state attorneys general.¹¹⁸

112. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (AM. L. INST. 1965).

113. See Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 922–23 (Mass. 1998).

114. *Id.*

115. Engstrom & Rabin, *supra* note 64, at 349.

116. See *supra* notes 47–61 and accompanying text.

117. See Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 931 (2008).

118. Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1233 (2018) (stating tobacco litigation was “mainly state driven”).

In opioid litigation, in addition to states, many municipalities, tribes and counties successfully sued.¹¹⁹

States were successful in these lawsuits for a few reasons. First, states had the resources necessary to fight large industry power, particularly when they work in tandem with private outside counsel.¹²⁰ Second, putting public officials in the spotlight added moral gravitas to the litigation, rather than the skepticism that the litigation was a money-grab by stigmatized plaintiffs' lawyers.¹²¹ Third, having the state sue, rather than an individual plaintiff, minimized character assassination by the defendant. In previous litigation it also insulated the litigation from an assumption-of-risk defense.¹²² States never smoked, so it moved the framing for the jury away from personal responsibility towards corporate responsibility.¹²³ In potential cannabis litigation, lawsuits by a state or other public entity would similarly confer the benefit of aggregation and greater resources. A cannabis corporation could also not malign a state's personal character or health history.

Unlike tobacco litigation, however, states may be blamed for assuming the risk in cannabis litigation. While tobacco or opioids were controlled by federal regimes, the state as polity chose to legalize a federally illegal substance. This may undercut the argument of such drugs being a public nuisance because it is a nuisance the state itself approved. This defense could be particularly availing for arguments based on the consumer dependency as the federal government defines Schedule I drugs as those with "a high potential for abuse," and marijuana is a Schedule I drug.¹²⁴ Furthermore, assumption of risk arguments may even apply to high-THC products in certain states. Policymakers in Colorado, Washington, Montana, Massachusetts and Florida all

119. Sara Randazzo, *In the Opioid Litigation, It's Now States v. Cities*, WALL ST. J. (Aug. 6, 2019), <https://www.wsj.com/articles/in-the-opioid-litigation-its-now-states-v-cities-11565123075> [<https://perma.cc/DL7X-8QPG>]; *Opioids Investigations, Litigation, and Settlements*, NAT'L ASS'N OF ATT'YS GEN., <https://www.naag.org/issues/opioids> [<https://perma.cc/UG8C-G7V7>] ("More than 3,000 state and local governments have targeted opioid makers and distributors in hopes of recouping billions in tax dollars spent dealing with the opioid epidemic.").

120. Engstrom & Rabin, *supra* note 64, at 339.

121. *Id.* at 349 n.321.

122. *Id.* at 349.

123. See Mike Moore, *The States Are Just Trying to Take Care of Sick Citizens and Protect Children*, 83 A.B.A. J. 53, 53 (1997).

124. See *supra* note 23 and accompanying text.

considered and then failed to enact legislation that set potency limits on THC levels in cannabis products.¹²⁵ This, however, seems to be a novel use of the defense, and there is no guarantee it would be accepted by courts.

States can bring unique suits that may not be enabled by private causes of action. Two examples are claims under consumer protection laws and public nuisance claims. Invoking consumer protection laws as well as violations of statutes legalizing cannabis products may provide a relevant avenue for lawsuits, although this would primarily be to the benefit of states who desire to file suit. Suing on these grounds was one of the major reasons for the state attorneys general success in achieving the tobacco MSA.¹²⁶ Recently, there has been success in this approach in e-cigarettes. Juul reached a \$462 million settlement with New York, the District of Columbia and five other states in April 2023.¹²⁷ These were based primarily on state consumer protection law. To date, Juul has settled with 47 states.¹²⁸ Additionally, Juul has reached massive settlements with classes of plaintiffs. In the Northern District of California, Juul reached a \$255 million settlement with 10,000 plaintiffs who alleged the company deceptively marketed its vape, downplaying risks of addiction and marketing to minors.¹²⁹

In an effort to avoid the pitfalls of the tobacco industry and not see history repeat itself, in legalizing marijuana, many states also included strict rules of where and how cannabis products could be advertised.¹³⁰ Despite this, cannabis products still

125. *Cannabis Regulation Fact Sheet: THC Limits for Adult-use Cannabis Products*, THE NETWORK FOR PUBLIC HEALTH LAW (Nov 30, 2022), <https://www.networkforphl.org/resources/cannabis-regulation-resource-collection> [https://perma.cc/ZV56-YCTN].

126. Cheryl Heaton, *The Tobacco Master Settlement Agreement — Strategic Lessons for Addressing Public Health Problems*, 379 N. ENG. J. MED. 997, 997 (2018).

127. Christina Jewett & Julie Creswell, *Juul Reaches \$462 Million Settlement With New York, California and Other States*, N.Y. TIMES (Apr. 12, 2023), <https://www.nytimes.com/2023/04/12/health/juul-vaping-settlement-new-york-california.html> [https://perma.cc/SF3V-9DD8].

128. *Id.*

129. *U.S. Judge Grant Preliminary Approval to Juul Consumer Settlement*, REUTERS (Jan. 20, 2023), <https://www.reuters.com/business/healthcare-pharmaceuticals/juul-settlement-end-youth-vaping-lawsuits-wins-preliminary-approval-bloomberg-2023-01-20> [https://perma.cc/6LKV-EXHV].

130. See Jen Lamboy, *Cannabis Marketing Guidelines by State*, HYBRID (Jan. 29, 2025), <https://hybridmarketingco.com/cannabis-marketing-guidelines-by-state> [https://perma.cc/58R9-2CWN]; see also Rachel Ann Barry et al.,

appeal to youth. First, both edibles as well as vapes have flavors and packaging reminiscent of popular youth food products. This was a huge issue in the proliferation of e-cigarettes, as flavored tobacco products drew in young users who otherwise did not consume nicotine. Additionally, cannabis advertising, similar to advertising ultimately found problematic when used by Juul, targets youth by using bright colors, young models, and working with social media influencers or free products.¹³¹ This means that even despite regulation, there might be an opportunity for consumer protection suits based on youth marketing.

Tobacco and opioid litigation both provide successful examples of public nuisance litigation launched by state attorneys general. This is despite courts being generally “skeptical” of public nuisance claims.¹³² In the MSA and the four bellwether trials, all fifty states settled public nuisance claims against Big Tobacco.¹³³ Similarly, the opioid litigation has resulted in billions of dollars in funding for state, local, and tribal entities from a variety of defendants. The opioid litigation “confirms the role of public nuisance as a de facto apparatus for addressing major public-health issues.”¹³⁴

While product liability and negligence claims focus on individual damages and suffering, public-nuisance cases are much broader and allow for communities to recover for public health crises. For example, harms to the public include state spending on emergency responses, treatment facilities, and community safety.¹³⁵ Hypothetically, public nuisance is an action that reaches “reasonable” activities that impose “unreasonable conditions,” as well as “intentional and unreasonable actions.”¹³⁶

Waiting for the Opportune Moment: The Tobacco Industry and Marijuana Legalization, 92 THE MILBANK Q. 207 (2014).

131. See, e.g., *Cannabis Influencer Marketing; How to Build a High-Impact Strategy That Drives Results*, MEDIAJEL (2025), <https://www.mediajel.com/academy/cannabis-influencer-marketing> [https://perma.cc/WL6K-CWP7] (describing cannabis influencer marketing strategies).

132. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT. L. 1, 54 (2011).

133. *The Master Settlement Agreement*, NAT'L ASS'N OF ATTY'S GEN. (last visited Oct. 30, 2025), <https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement> [https://perma.cc/HV9Y-8JNZ].

134. Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 736 (2023).

135. See David A. Dana, *Public Nuisance Law When Politics Fails*, 83 OHIO STATE L.J. 100 (2022).

136. *Id.* at 755–56.

Therefore, defendants are liable if they were substantially aware of certain consequences or damages to public health or safety that could be deemed unreasonable. Actors can be held accountable even if the actor was initially unaware of the harms. This is “why information about a defendant’s awareness of risks[,]” like the knowledge of the tobacco companies brought to light, can be “central” to public nuisance litigation.¹³⁷ In the opioid litigation, attorneys general benefited from the internal memos and emails of the Sackler family, showing their attempts to downplay the dangers of opioids.¹³⁸

There have already been public nuisance claims tied to cannabis sales and production. New York City sued landlords that allowed unlicensed cannabis dispensaries under public nuisance laws, alleging underage police officers were able to buy marijuana at the stores.¹³⁹ The city sought to enjoin such businesses and fine them for each day of authorization. In 2021, Santa Barbara County filed its first nuisance lawsuit against a cannabis company, stating that the operation’s smell was a public nuisance.¹⁴⁰ The litigation is ongoing but some have criticized the county for suing a company for the result of operations that the county sanctioned with a license.¹⁴¹ One could imagine that a similar argument would arise against state attorneys general as they pursue claims against cannabis manufacturers who were granted permits under state law.

3 Overall Likelihood of Success: Similarities Between Tobacco and Opioid Litigation

Scholars have identified features in common between the tobacco and opioid litigation that led to both being successful in

137. *Id.* at 757.

138. *Id.* at 757, n.287.

139. See Verified Complaint, *City of New York v. The Land and Building Known as 14 First Avenue*, Index No: 450378/2023 (N.Y. Sup. Ct. Feb. 7, 2023).

140. See Complaint for Civil Penalties, Injunctive Relief, and Other Equitable Relief, *Cnty. of Santa Barbara v. Island View Ranch LLC*, 21CV02021 (Sup. Ct. Santa Barbara Cnty. May 21, 2021).

141. See Melinda Burns, *Cannabis: County Files Suit, License Surrendered, Plants Pulled*, SANTA BARBARA INDEP. (Jun 10, 2021), <https://www.independent.com/2021/06/10/cannabis-county-files-suit-license-surrendered-plants-pulled/> [<https://perma.cc/4D74-PVQJ>]; Melinda Burns, *Mixed Messages: County Sues a Carpinteria Valley Cannabis Grower, Then Okays a Permit*, SANTA BARBARA INDEP. (May 18, 2023), https://www.independent.com/2023/05/18/mixed-messages-county-sues-a-carpinteria-valley-cannabis-grower-then-okays-a-permit [<https://perma.cc/7E2U-9BEA>].

securing damages from powerful corporations. Tobacco and opioids 1) were heavily addictive, 2) were sold in extraordinary quantities, 3) were advertised aggressively, 4) made billions in profit for their manufacturers, and 5) caused significant economic damage.¹⁴² This Subsection compares how the cannabis industry maps onto these factors and ultimately concludes that if current trends continue, plaintiffs could be poised to succeed in suing the cannabis industry.

The first factor is whether the product is addictive. As discussed above, despite public belief, cannabis use disorders exist. Not only do they exist, but the likelihood of such a disorder occurring increases as the amount of THC in a product increases. Furthermore, some believe that the cannabis industry is specifically increasing levels of THC in their products to create repeat consumers, or in simpler terms, addicts. This means that high-THC products could be a better target for litigation because high level of THC can contribute to the addictiveness of the product.

The second factor is the popularity of the product. At the height of its popularity, tobacco was used by half of all Americans.¹⁴³ In 2015, over a third of American adults were prescribed opioids.¹⁴⁴ While half of Americans have tried marijuana once, the rate of individuals who have recently or consistently used the drug is lower.¹⁴⁵ Studies show 16% of adults have used the drug in the last month.¹⁴⁶ In states where cannabis is legal, 28% of non-college young adults have used cannabis in the past

142. Engstrom & Rabin, *supra* note 64, at 321–22.

143. Jen Christensen, *US Cigarette Smoking Rate Falls to Historic Low, But E-cigarette Use Keeps Climbing*, CNN (Apr. 27, 2023), <https://www.cnn.com/2023/04/27/health/cigarette-smoking-decline> [https://perma.cc/S2PP-27LX].

144. Beth Han et al., *Prescription Opioid Use, Misuse, and Use Disorders in U.S. Adults: 2015 National Survey on Drug Use and Health*, 167 ANNALS OF INTERNAL MED. 293, 296 (2017).

145. *What Percentage of Americans Smoke Marijuana*, GALLUP (Nov. 1, 2024), <https://news.gallup.com/poll/284135/percentage-americans-smoke-marijuana.aspx> [https://perma.cc/BA8M-K6A7].

146. Anna Jackson & Katherine Schaeffer, *9 Facts About Americans and Marijuana*, PEW RSCH. CTR. (July 8, 2025), <https://www.pewresearch.org/short-reads/2025/07/08/facts-about-marijuana> [https://perma.cc/CW6S-79CP]; see generally *Marijuana and Hallucinogen Use Among Young Adults Reached All-Time High in 2021*, NAT'L INST. ON DRUG ABUSE (Aug. 22, 2022), <https://www.nih.gov/news-events/news-releases/marijuana-hallucinogen-use-among-young-adults-reached-all-time-high-2021> [https://perma.cc/T3HU-27S6] (detailing rising young-adult marijuana usage).

month.¹⁴⁷ An estimated seventeen million use marijuana daily or near-daily.¹⁴⁸ This means that cannabis is not currently on the scale of the other public health crises. However, as more states legalize and public opinion continues to shift, these numbers will likely continue to rise, especially among young adults.¹⁴⁹ This means that while the cannabis industry is not selling at the same level as tobacco and opioids yet, and therefore does not match those products for success of litigation, if current trends continue, cannabis could be pervasive enough to warrant legal attention and plaintiff success.

The third factor is about whether products are aggressively advertised. Cannabis is not yet marketed as broadly as tobacco or opioids, but there are signs that marketing in the industry is becoming more aggressive. Cannabis brands have rapidly increased marketing budgets in light of relaxed regulations and website policies in 2022 and 2023, like Twitter allowing cannabis advertisements with photographs.¹⁵⁰ Some companies have quadrupled their marketing budgets in the last year and overall industry spending on advertising has increased nearly 20%.¹⁵¹ As one cannabis manufacturer co-founder put it, “[t]he train has

147. *In Legalized States, Frequent Cannabis Use Is Now More Common Among Some Young Adults*, COLUM. MAILMAN SCH. OF PUB. HEALTH (Aug. 1, 2023), <https://www.publichealth.columbia.edu/news/legalized-states-frequent-cannabis-use-now-more-common-among-some-young-adults> [https://perma.cc/3YDM-J2XF].

148. Carla K. Johnson, *Daily Marijuana Use is Now More Common Than Daily Alcohol Use in the U.S., New Study Finds*, PBS NEWS (May 22, 2024), <https://www.pbs.org/newshour/health/daily-marijuana-use-is-now-more-common-than-daily-alcohol-use-in-the-u-s-new-study-finds> [https://perma.cc/R862-WP7Y].

149. *See generally Marijuana and Hallucinogen Use, Binge Drinking Reached Historic Highs Among Adults 35 to 50*, NAT’L INST. ON DRUG ABUSE (Aug. 17, 2023), <https://nida.nih.gov/news-events/news-releases/2023/08/marijuana-and-hallucinogen-use-binge-drinking-reached-historic-highs-among-adults-35-to-50> [https://perma.cc/DTD4-W5SB] (describing increasing marijuana use among young adults).

150. Kimeko McCoy, *How Advertisers Are Building Up Their Cannabis Ad Budgets as Marijuana Regulations Loosen*, DIGIDAY (May 8, 2023), <https://digiday.com/marketing/how-advertisers-are-building-up-their-cannabis-ad-budgets-as-marijuana-regulations-loosen> [https://perma.cc/3USS-GEWX].

151. *See id.* (“[Cannabis company] Kiva has quadrupled its digital marketing budget since last year.”); Michelle Simakis, *This Year’s 4/20 Poised to Be the Biggest Yet*, CANNABIS BUS. TIMES (Apr. 16, 2024), <https://www.cannabis-businesstimes.com/business-issues-benchmarks/cannabis-sales-trends/news/15686749/this-years-4-20-poised-to-be-the-biggest-yet> [https://perma.cc/USAU-DPU7] (explaining that 2023 “adult-use cannabis sales . . . were . . . up by 19% compared to 2022”).

left the station. I feel like it's coming one way or another.”¹⁵² This is a factor that indicates that now or in the imminent future, plaintiffs could succeed in suing the cannabis industry.

The fourth factor is about the size of the industry itself: yet again, this factor shows that while the cannabis industry is not powerful enough to sue yet, it could be a source of deep pockets in the near future, making plaintiffs more likely to pursue it and juries more likely to punish it. As the cannabis industry grows, it will continue to gain a stronghold of corporate power. The recreational cannabis market reached \$39.1 billion in 2024.¹⁵³ The annual growth rate of the industry is estimated to be about 16% until at least 2030.¹⁵⁴ Tobacco and alcohol companies are entering the recreational cannabis market, with Altria acquiring a 45% stake in the Cronos group for \$1.8 billion.¹⁵⁵

The final factor, economic damage, makes the cannabis industry harder to sue than the tobacco or opioid industry, particularly under a public nuisance cause of action. Cannabis is different from the tobacco and opioid litigation as it has not yet caused millions in economic damage. There is also not evidence that it necessarily will—while the outcomes are severe, potential health impacts like psychosis and cannabinoid hyperemesis syndrome are still relatively infrequent. Furthermore, because it is not legal across the entire country, the damage that cannabis can inflict is limited compared to tobacco and opioids, which both created national crises.

A factor which is not pointed out directly as a similarity by scholars but which is clearly evident in both the tobacco and opioid litigation is the role of company knowledge and information suppression. As described above, the turning point into the successful third wave of tobacco litigation was the trove of documents revealing industry knowledge of the risks and extensive disinformation campaigns.¹⁵⁶ Similarly, Purdue Pharma was

152. McCoy, *supra* note 150.

153. *Cannabis Market Trends and Company Analysis 2025-2033 Featuring Canopy Growth, Tilray Brands, Curaleaf, Aurora, Jazz Pharma, Green Thumb Industries, Trulieve, Cresco Labs, Organigram, TerraAscend*, YAHOO FIN. (Oct. 10, 2025), <https://finance.yahoo.com/news/cannabis-market-trends-company-analysis-150700946.html> [<https://perma.cc/782Q-34MN>].

154. *Id.*

155. *Cronos Group's \$1.8 Billion Investment from Altria Has Closed. Now What?*, FOX BUS. (Mar. 17, 2019), <https://www.foxbusiness.com/markets/cronos-groups-1-8-billion-investment-from-altria-has-closed-now-what> [<https://perma.cc/2VEV-GM2A>].

156. *See supra* notes 53–55 and accompanying text.

criticized and ultimately found liable for its decision to (1) not change a design it knew was leading to greater risk of addiction and (2) repeatedly assuring federal agencies and physicians across the country that there was no harm from its product.¹⁵⁷ In the tobacco litigation, these documents were revealed from earlier rounds of litigation and via whistleblowers.¹⁵⁸ In the opioid litigation, much of the relevant information was revealed during investigations of federal agencies like the Drug Enforcement Administration.¹⁵⁹

There has been no such exposé of major cannabis companies, in part because negative research is still emerging. However, cannabis companies have started to sponsor their own scientific research¹⁶⁰ and media campaigns to market their products as safe.¹⁶¹ Cannabis companies are following corporate social responsibility tactics employed by the tobacco industry to maintain positive public relations while influencing politics and regulation, including attempts to “address the harms of cannabis legalization” and youth programming.¹⁶² Simultaneously, in the complaint against California manufacturer STIIIZY described above, the plaintiffs allege,

[d]efendants worked together to pitch news stories or other media content designed to downplay the risks of cannabis vaping, suggesting that any concern was overblown. Those tactics mimic those used by the tobacco industry to sow seeds of doubt and confusion among the public, to initiate new users, and to

157. Rebecca L. Haffajee & Michelle M. Mello, *Drug Companies' Liability for the Opioid Epidemic*, 377 NEW ENG. J. MED. 2301, 2301 (2017).

158. See generally MICHAEL OREY, ASSUMING THE RISK: THE MAVERICKS, THE LAWYERS, AND THE WHISTLE-BLOWERS WHO BEAT BIG TOBACCO (1999) (detailing tobacco industry knowledge about the dangers of tobacco).

159. See *Follow the Post's Investigation of the Opioid Epidemic*, WASH. POST (Feb. 3, 2023), <https://www.washingtonpost.com/national/2019/07/20/opioid-files> [<https://perma.cc/3SSD-4BPD>].

160. See Shaun Khoo, *Cash from Cannabis Companies Creates Conflicted Researchers*, STAT10 (Feb 3, 2020), <https://www.statnews.com/2020/02/03/cash-from-cannabis-companies-creates-conflicted-researchers> [<https://perma.cc/25B2-5GN6>].

161. See Theodore L. Caputi, *The Medical Marijuana Industry and Use of “Research as Marketing”*, 110 AM. J. PUB. HEALTH 174, 174–75 (2020).

162. Tanner Wakefield et al., *Content Analysis of the Corporate Social Responsibility Practices of 9 Major Cannabis Companies in Canada and the US*, JAMA NETWORK OPEN, Aug 23, 2022, at 9.

keep customers buying Defendants' products and to avoid regulation or legislative efforts to control sales.¹⁶³

The complaint doesn't further detail these allegations, but it could be a harbinger of things to come in litigation against the cannabis industry and information that may emerge about any tactics to control public perception.

The similarities between the cannabis industry and tobacco and opioid industries seem to indicate that the cannabis industry will soon be primed as a target for successful litigation, even if a plaintiff who sued today may face an uphill battle. While there may be evidentiary challenges, the socio-political forces that drove the tobacco and opioid litigation are beginning to appear for the cannabis industry.

CONCLUSION

The health effects of high-THC cannabis are mounting, particularly in young populations. While no existing product is a perfect analogy to cannabis, the history of the tobacco litigation and opioid litigation indicate that the day of successful cannabis litigation may be in the near future. While there are challenges to bringing such a claim, traditional product liability claims like manufacturing defect, design defect and failure to warn provide possible paths to plaintiff success. Ultimately litigation will only be one piece of the puzzle in addressing public health concerns around high-THC cannabis products.

163. Complaint for Damages and Demand for Trial by Jury ¶ 109, *Doe v. Stiiizy Inc.*, No. CV0002999 (Cal. Sup. Ct. Marin Cnty. May 29, 2024).