

Influenced into Addiction: Using the Multi-District Litigation Against Opioid Companies as a Framework for Social Media Companies

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* J.D. Candidate, The George Washington University Law School, 2024. Thank you to the entire Federal Communications Law Journal Editorial Board and staff members for the time, effort, and patience they devoted to this publication.

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I. INTRODUCTION

As you leisurely scroll through your favorite social networking site, you probably notice that your colleague is on vacation or that there is a new trending TikTok dance. You may even wonder if your device is listening to you after an advertisement for blenders pops up on your phone shortly after a conversation with your partner about needing a new one. Regardless of the type of content that dominates your preferred social networking site's timeline, social media use is likely a common activity for you or someone you know. This is even more likely to be true after the world was abruptly forced into isolation during the COVID-19 pandemic.

During and following the COVID-19 pandemic, social media use increased for everyone, with some of the most significant increases seen in 18 to 24-year-olds.¹ Since 2020, people increasingly depend on social media and other digital platforms for social interaction, news and other journalism coverage, information (and misinformation), and even education on current social movements. Today, access to social networking sites runs parallel with access to information irrespective of time and geographic limitations. But increased access to social networking sites does not mean that people will make the best choices for themselves mentally, emotionally, or physically.

The term "social media addiction" refers to a behavioral addiction that is "characterized as being overly concerned about social media, driven by an uncontrollable urge to log on or use social media, and devoting so much time and effort to social media that it impairs other important life areas."² Its effects on the individual present similar behavioral challenges as opioid addiction.³ In fact, social media companies play a very similar, intentional role in encouraging their users' habitual and excessive scrolling as opioid manufacturers played in their consumers' maladaptive use and abuse of opioid drugs.⁴ Biologically, similar dopamine-driven reward models, which play a key role in substance addiction, are implemented in the algorithms of social media companies, like Instagram and Facebook, to encourage users to

1. Anna Zarra Aldrich, *Finding Social Support Through Social Media During COVID Lockdowns*, UCONN TODAY (June 24, 2022), <https://today.uconn.edu/2022/06/finding-social-support-through-social-media-during-covid-lockdowns/#> [<https://perma.cc/CF5U-XZCV>].

2. Ashish Bhatt et al., *Social Media Addiction*, ADDICTION CTR. (Apr. 3, 2023), <https://www.addictioncenter.com/drugs/social-media-addiction/> [<https://perma.cc/H6AL-DG6F>].

3. Jena Hilliard, *New Study Suggests Excessive Social Media Use is Comparable to Drug Addiction*, ADDICTION CTR. (Sept. 4, 2019), <https://www.addictioncenter.com/news/2019/09/excessive-social-media-use/> [<https://perma.cc/V655-PXCK>] (last visited Sept. 4, 2023).

4. *Id.*

continue using their products.⁵ Social media companies also enjoy similar market structures as opioid manufacturers and retailers, meaning that they may not escape liability by asserting a third party's conduct absolves them. Finally, liberal regulatory regimes under which social media companies currently operate, and under which opioid manufacturers and retailers previously operated, provide another similarity between the two.

The similarities between social media addiction and opioid addiction, the respective roles of social media companies and opioid manufacturers in their respective addiction rates, and the current regulatory regime governing social media companies will be discussed to support the overall thesis that social media companies may face similar multi-district litigation as opioid manufacturers and retailers. This Note will use mass tort litigation pursued against opioid manufacturers and retailers as a framework for hypothesizing the litigation strategy and the likelihood of success in potential litigation against social media companies.

Section I of this Note provides some background information on what social media addiction is, its growing prevalence, and how the failure to implement additional regulations for social media companies and social media use provides no incentives for social media companies to self-regulate. The lack of self-regulation, the similarities in market structures, and the effects on the individual's brain and behavior will be used to draw similarities to opioid manufacturers and distributors prior to the commencement of mass tort litigation against opioid manufacturing and retail companies in 2017.⁶ Section II of this Note provides similar background information as Section I, but instead offers the information in the context of opioid manufacturers and retailers. It will explain what opioid addiction is, how policy and regulatory failures resulted in opioid manufacturers and retailers contributing to the opioid addiction crisis, and it will highlight key aspects of the multi-district litigation against several of the largest opioid manufacturers and retailers. Section III proposes that social media companies may face similar multi-district mass tort litigation as opioid manufacturers and retailers by analyzing the similarities between social media addiction and opioid addiction and the respective market strategy of social media companies and opioid manufacturers in their respective addiction rates. Finally, this Note will offer

5. Trevor Haynes, *Dopamine, Smartphones & You: A Battle for Your Time*, SCIENCE IN THE NEWS (May 1, 2018), <https://sitn.hms.harvard.edu/flash/2018/dopamine-smartphones-battle-time/> [<https://perma.cc/SNL2-A8MG>] (explaining that Instagram's notification algorithms will sometimes withhold "likes" on photos to deliver them in larger bursts. Thus, when one posts content, they may be disappointed to find fewer responses than expected, only to receive them in a larger bunch later on. One's dopamine centers have been primed by those initial negative outcomes to respond robustly to the sudden influx of social appraisal. This use of a variable reward schedule takes advantage of our dopamine-driven desire for social validation, and it optimizes the balance of negative and positive feedback signals until one becomes a habitual user.).

6. See *In Re: National Prescription Opiate Litigation*, MDL No. 2804, Doc. 328 (J.P.M.L. Dec. 5, 2017) (order granting transfer of the 46 actions alleging the improper marketing of and inappropriate distribution of prescription opioid medications).

self-regulating steps that social media companies can implement to avoid future mass tort litigation.

II. SOCIAL MEDIA ADDICTION AND THE EXISTING REGULATIONS

Social media addiction is characterized by the compulsive use of social media.⁷ Social media companies contribute to social media addiction by way of their algorithms, which are designed to predict which content will maintain a user's engagement, and thus, encourage the use of their products for extended periods of time.⁸ Currently, sufficient incentives or regulations do not exist to encourage social media companies to change their practices in a manner that would prohibit or diminish the threat of social media addiction.⁹ The background information presented in this section will be used to understand how social media companies are similarly situated to opioid manufacturers and retailers prior to the commencement of the mass tort litigation in which they were involved.

A. Social Media Addiction Explained

The self-perceived need to be “alone together,” always connected via social media but in fact isolated, has given rise to research on technology-mediated and online behaviors by media scholars and psychologists.¹⁰ Social media refers to interactive websites or Internet applications (apps) that allow users to generate and share content with others, create personalized profiles, and develop online social networks.¹¹ Today, there are over 3.8 billion social media users.¹² Studies show social media use is correlated with increased levels of anxiety, depression, loneliness, and other negative mental health outcomes associated with “salience, mood modification, tolerance, withdrawal, relapse, and conflict with regards to behavioral addictions.”¹³ Overuse of social media is associated with low work performance, less

7. See Bhatt, *supra* note 2.

8. Larissa Sapone, *Moving Fast & Breaking Things: An Analysis of Social Media's Revolutionary Effects on Culture and Its Impending Regulation*, 59 DUQ. L. REV. 362, 365-66 (2021).

9. Regulatory Goldilocks: Finding the Just and Right Fit for Content Moderation on Social Platforms, 8 TEX. A&M L. REV. 451, 454 (2021).

10. See generally Daria J. Kuss & Mark D. Griffiths, *Social Networking Sites and Addiction—Ten Lessons Learned*, 14 INT. J. ENVIRON. RES. PUB. HEALTH 311, 311-12 (2011).

11. Anna Vannucci & Christine McCauley Ohannessian, *Social Media Use Subgroups Differentially Predict Psychosocial Well-Being During Early Adolescence*, 48 J. YOUTH & ADOLESCENCE 1469, 1470 (June 29, 2019).

12. Gizem Arıkan et al., *A Two-Generation Study: The Transmission of Attachment and Young Adults' Depression, Anxiety and Social Media Addiction*, 124 ADDICTIVE BEHAVIORS 1 (2022).

13. Daria J. Kuss & Mark D. Griffiths, *Social Networking Sites and Addiction: Ten Lessons Learned*, 14 INT. J. ENVIRON. RES. PUB. HEALTH 311, 319 (Mar. 17, 2017).

healthy social relationships, sleep problems, low life satisfaction, and feelings of jealousy, anxiety, and depression.¹⁴

Addiction is defined as “an inability to stop using a substance or engaging in a behavior even though it may cause psychological or physical harm.”¹⁵ While typical understandings of addiction are usually associated with a substance, as is the case with opioid addiction, clinically, “addiction results from the relationship between a person and the object of their addiction.”¹⁶ As such, social media addiction is characterized by the compulsive use of social media. For the purposes of this Note, the term “social media addiction” will be used to describe “being overly concerned with social media, driven by an uncontrollable urge to use social media, and devoting so much time and effort to social media that it impairs other important life areas.”¹⁷

Among the 3.8 billion users, social media use in as many as five to ten percent of Americans meets the criteria for social media addiction.¹⁸ This presents a growing concern for younger individuals’ excessive use of social media and the Internet. Research already suggests younger generations may be at a heightened risk for developing addictive symptoms because of their excessive engagement with online social networking platforms.¹⁹ So when does social media use become problematic? Although there are no established clinical classification criteria for excessive social media use or social media addiction, studies show that adolescents who spend more than three hours per day using social media may be at heightened risk for mental health problems.²⁰

Chamath Palihapitiya, the former Vice President of User Growth at Meta (formerly Facebook) explained how “the short-term, dopamine-driven feedback loops . . . are destroying how society works” and are turning us into bona fide addicts by leveraging “the very same neural circuitry used by slot machines and cocaine to keep us using the product[s] as much as possible.”²¹ According to a new study by Harvard University, self-disclosure on social

14. Yalin Sun & Yan Zhang, *A Review of Theories and Models Applied in Studies of Social Media Addiction and Implications for Future Research*, 114 ADDICTIVE BEHAVS. 106699, 1 (2021).

15. Adam Felman, *What is Addiction*, MEDICAL NEWS TODAY (last updated May 31, 2023), <https://www.medicalnewstoday.com/articles/323465> [<https://perma.cc/P2HH-C49Q>].

16. Howard J. Schaffer, *What is Addiction?: A Perspective*, HARV. MED. SCH. DIV. ON ADDICTIONS (July 3, 2007), <https://www.divisiononaddiction.org/html/whatisaddiction.htm> [<https://perma.cc/24KZ-4X94>].

17. See Bhatt, *supra* note 2.

18. *Id.*

19. See Kuss, *supra* note 10, at 3538 (citing Enrique Echeburua & Paz de Corral, *Addiction to New Technologies and to Online Social Networking in Young People: A New Challenge*, 22 ADICCIONES 91 (2010), <https://pubmed.ncbi.nlm.nih.gov/20549142/> [<https://perma.cc/HD57-22PV>]).

20. Kira E. Riehm et al., *Associations Between Time Spent Using Social Media and Internalizing and Externalizing Problems Among US Youth*, 76 JAMA PSYCH. FIRST PAGE, 1266-73 (2019).

21. Stanford Graduate School of Business, *View from the Top: Chamath Palihapitiya*, YOUTUBE (Nov. 13, 2017), <https://youtu.be/PMotykw0SIk?si=QqWwqKJ4B9LKVZv6> [<https://perma.cc/EQ5H-K2RP>]; see Haynes, *supra* note 5.

networking sites lights up the same part of the brain that ignites when taking an addictive substance:

The reward area in the brain and its chemical messenger pathways affect decisions and sensations. When someone experiences something rewarding or uses an addictive substance, neurons in the principal dopamine-producing areas in the brain are activated and dopamine levels rise. Therefore, the brain receives a “reward” and associates the drug or activity with positive reinforcement. This is observable in social media usage; when an individual gets a notification, such as a like or mention, the brain receives a rush of dopamine and sends it along reward pathways, causing the individual to feel pleasure. Social media provides an endless amount of immediate rewards in the form of attention from others for relatively minimal effort.²²

Users who may be addicted to using social networking sites can experience symptoms and consequences traditionally associated with substance-related addictions (i.e., salience, mood modification, tolerance, withdrawal, relapse, and conflict).²³ Positive social stimuli will similarly result in a release of dopamine, reinforcing the behavior (scrolling through social media or using social networking sites) that preceded it.²⁴

The concerning effects are compounded when the individual exhibiting overuse of social media is younger. “When children are exposed to social media, they can overstimulate their reward center and increase their reward responsiveness,” says Dr. Ofri Turel.²⁵ He found that excessive and addictive use was associated with structural changes in the brain.²⁶ In fact, the brain’s reward system was actually smaller.²⁷ A smaller system can process associations much faster.²⁸ This highlights one physiological concern for social media addiction in children and adolescents with malleable, developing brains whose reward systems are easily activated and develop faster.²⁹

22. See Bhatt, *supra* note 2.

23. Kuss, Mark D. Griffiths, *Online Social Networking and Addiction—A Review of the Psychological Literature*, INT. J. ENVIRON. RES. PUB. HEALTH 2011, 8, 3528, 3529. <https://pubmed.ncbi.nlm.nih.gov/22016701/> [<https://perma.cc/62H9-C5T7>] (citing Enrique Echeburua, Paz de Corral, *Addiction to New Technologies and to Online Social Networking in Young People: A New Challenge*, ADICCIONES 2010, 22, 91-95. <https://pubmed.ncbi.nlm.nih.gov/20549142/> [<https://perma.cc/A2UC-UTUG>]).

24. See Haynes, *supra* note 5.

25. See Haynes, *supra* note 5.

26. *Id.*

27. *Id.*

28. Jeanne Ricci, *The Growing Case for Social Media Addiction*, THE CAL. STATE UNIV. (June 28, 2018), <https://www.calstate.edu/csuo-system/news/Pages/Social-Media-Addiction.aspx> [<https://perma.cc/T9RP-LCL9>].

29. *Id.*

Another concern arises with productivity deficits. There has been evidence that social media addiction negatively impacts productivity, which may pose direct threats to younger generations who will be entering the workforce in the future and, therefore, the economy.³⁰ Similar to other forms of addiction, social media addiction involves broken reward pathways in the brain, whereby social media provides immediate rewards for minimal effort.³¹ Because the reward pathways in the brain contribute to the ability to maintain focus and motivation, excessive social media use tends to affect productivity in the workforce and create distractions or diminish focus for students.³² Students and teachers often report anecdotal evidence of the effects of excessive social media use on students' abilities to focus and complete their work, and several studies and surveys support their experiences.³³ Although social media addiction is a psychological addiction, as opposed to a substance use disorder (substance addiction), a TEDEd video explains that brain scans of people who are unable to control how excessively they use social media show "a similar impairment of regions [in the brain] that those with drug addiction have."³⁴ In fact, "there is a clear degradation of white matter in the regions [of the brain] that control emotional processing, attention and decision making."³⁵

Social media addiction, like other forms of addiction, may also have negative effects on the healthcare system. Because the research examining social media addiction is still in its infancy, there are few published studies that have documented the costs that social media addiction has on society or the healthcare system. This lack of research is one key distinction between the societal effects of opioid addiction and social media addiction, which will be addressed in subsequent sections. For the purposes of this Note, the increased prevalence of depression and anxiety, combined with access to more social media, can be used to infer that social media addiction may contribute to increased costs on the healthcare system as individuals seek treatment for the psychological effects of social media addiction.

This demonstrates how detrimental social media addiction can be, but the next question is how social media companies are involved. Social media platforms like Facebook, Snapchat, and Instagram target the brain in similar ways as opioids and gambling.³⁶ Social media companies use complex

30. Brigid Brew, *How Social Media Affects Student Productivity*, ST. CLOUD TECH. & CMTY. COLL. (Oct. 20, 2020), <https://sctcc.edu/news/10-20-2020/how-social-media-affects-student-productivity> [<https://perma.cc/MGB3-J2UD>].

31. Kelly McSweeney, *This is Your Brain on Instagram: Effects of Social Media on the Brain*, NOW NORTROP GRUMMAN (Mar. 17, 2019), <https://now.northropgrumman.com/this-is-your-brain-on-instagram-effects-of-social-media-on-the-brain/> [<https://perma.cc/7ACE-W9BB>].

32. See Brew, *supra* note 30.

33. Alfonso Pellegrino et al., *Research Trends in Social Media Addiction and Problematic Social Media Use: A Bibliometric Analysis*, FRONT PSYCH. (Nov. 10, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9707397/> [<https://perma.cc/7PFX-B8AE>].

34. Shannon Brake, *5 Ways Social Media is Changing Your Brain*, TEDEd (Sept. 7, 2014), https://ed.ted.com/best_of_web/qQzsdX2Y#watch [<https://perma.cc/K3PM-RV7Z>].

35. *Id.*

36. See Haynes, *supra* note 5.

mathematical predictive equations to design their algorithms to selectively distinguish specific content for specific users by identifying different preferences of users and predicting which types of content will keep the user's attention for extended periods of time.³⁷ Information on each individual company's internal analytical procedures used to design these equations is not publicly available nor essential to the analysis posed here. The purpose of using these equations to design their algorithms to work in such a manner to induce extended use of the platform is assumed to be an intentional business (marketing and design) decision meant to improve and increase the use of their product.³⁸

B. Current Regulatory Limits on Social Media Companies

In an attempt to encourage interactive computer service providers—which in application has included social media sites—to self-regulate and impose content moderation policies without risking defamation suits, Congress passed Section 230 of the Communications Decency Act.³⁹ Section 230 gives Internet platforms legal protections for the content moderation policies they impose in line with the reasons specified in Section 230(c)(2), including moderation of obscene, lewd, lascivious, filthy, excessively violent, and harassing content.⁴⁰ It states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴¹ Section 230(c)(1) essentially serves as a protection against defamation liability for third-party content (user content) and thereby allows platforms to facilitate discussion from their users without liability for libelous speech.⁴² In practice, it has been used as a broad, all-encompassing defense of immunity by social media companies for anything to do with moderating third-party content.⁴³

37. See Sapone, *supra* note 8.

38. Each individual social media company utilizes unique algorithms for different private business analytics, and that specific data is unavailable publicly. See generally Clodagh O'Brien, *How Do Social Media Algorithms Work*, DIGIT. MKTG. INST. (Jan. 19, 2022), <https://digitalmarketinginstitute.com/blog/how-do-social-media-algorithms-work> [<https://perma.cc/S72A-Y6XD>] (explaining, for example, that Facebook uses an algorithm that directs pages and content to display in a certain order).

39. Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139, 144 (2021) (citing 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)).

40. *Id.* at 141-43; see also 47 U.S.C. § 230(c)(2).

41. 47 U.S.C. § 230(c)(1).

42. See Candeub, *supra* note 39, at 147.

43. *Levitt v. Yelp! Inc.*, No. C-10-1321 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014) (holding section 230(c)(1) immunized Yelp!'s conduct of manipulating review pages by removing some reviews and publishing others against allegations of unfair or fraudulent business).

However, Section 230 was *not* enacted with the intent of immunizing social networking platforms from all uses of their product by third parties.⁴⁴ Notably, Section 230(c) was intended to distinguish Internet platforms as distributors rather than as publishers or speakers of third-party content. However, courts have yet to rule on whether this provision shields Internet platforms from liability for third-party use of their product when the platforms have knowledge that the use is potentially harmful.⁴⁵ As this Note will discuss later, Section 230 may eventually be used by social media companies as a defense against product liability and other mass tort claims for failure to warn of potential harm from the use of their products.

C. *Exploring Other Attempts to Impose Regulations on Social Media Platforms*

Several attempts and suggestions for regulating or inducing self-regulation among social media platforms provide additional information as to where the current regulatory landscape stands with respect to social media platforms.

For the purpose of imposing more regulations on social media platforms, some have suggested public provisioning, or treating social media platforms as public utilities.⁴⁶ However, this would mean that social media companies would have to abide by existing free speech doctrines that may render many of their existing policies unconstitutional when imposed by a public utility/government actor.⁴⁷ As a result, social media companies would not be able to moderate content effectively because effective online moderation would likely violate the First Amendment.⁴⁸

Others propose using privacy and consumer protection laws to impose a fiduciary duty model on social media platforms to induce self-regulation.⁴⁹ Under a fiduciary duty model, social media companies that collect or use data

44. VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW (2021), <https://crsreports.congress.gov/product/pdf/R/R46751> [<https://perma.cc/WMX8-3NLH>] (“Section 230 contains findings and policy statements, expressing, among other things, that Congress sought to promote the free development of the Internet, while also ‘remov[ing] disincentives’ to implement ‘blocking and filtering technologies’ that restrict ‘children’s access to . . . inappropriate online material’ and ‘ensur[ing] vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.’”); *see generally* *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023); *and* *Gonzales v. Google LLC*, 143 S. Ct. 1191 (2023) (Just this year, the Supreme Court had the opportunity to opine on whether social media platforms, like Twitter and YouTube, are liable for allowing third parties to post terror-related content on their sites. In both cases, the Court did not reach the Section 230 question and instead ruled on other grounds.).

45. *Id.* at 3.

46. Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 85 (2021).

47. *Id.*

48. *Id.*

49. *Id.* at 92 (referencing Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1209 (2016); and Jack M. Balkin, *The Fiduciary Model of Privacy*, 134 HARV. L. REV. F. 11 (2020)).

as information for their own use would have fiduciary duties towards the users whose data they collect and use, including, among other things, a duty of care.⁵⁰ A fiduciary model is not designed to alter content moderation or user practices; rather, it is designed to be flexible and to change how social media platforms think about their end users and their obligations to their end users.⁵¹ However, given the flexibility in how a fiduciary model can be imposed—by statute, administrative regulation, or through judicial doctrines—this model evidently is not a sufficient means of encouraging self-regulation without other statutes and changes.⁵²

While a common desire to impose regulations seems to stem from pursuing increased transparency of how social media companies operate, many of the proposed methods have limitations or obstacles that impede their use. As such, current attempts and suggestions have been insufficient to induce self-regulation or limits. The overall lack of accountability or enforcement of the excessive and harmful usage of social media platforms allows younger generations to exercise excessive use of social media platforms until they begin to experience addictive behaviors and other negative mental health implications.

Mass tort litigation is already beginning against social media companies. Over twenty-seven personal injury products liability cases filed across twenty-seven districts were consolidated in *In re v. Meta Platforms Inc.*⁵³ The most common claim is that “defendants’ social media platforms are defective because they are designed to maximize user screen time, which can encourage addictive behavior in adolescents.”⁵⁴ The plaintiffs assert that the defendants were aware and failed to warn the public that their platforms were harmful to minors.⁵⁵ These claims mimic several of the claims against opioid manufacturers and retailers in the multi-district litigation that commenced in 2017, in which claimants alleged manufacturers misrepresented the addictive nature of opioid products in marketing campaigns and failed to adequately warn consumers about the potential for addiction.⁵⁶ As the effects of social media addiction on the healthcare system and society continue to be researched and publicized, the growing prevalence of social media addiction, the practices that social media companies exercise in the market, and other political forces may establish the perfect storm for mass tort litigation.

50. *Id.*

51. See Balkin, *supra* note 46, at 92.

52. *Id.* at 93.

53. *In re Soc. Media Adolescent Addiction/Personal Injury Prods. Liab. Litig.*, 637 F. Supp. 3d 1377 (J.P.M.L. Oct. 6, 2022).

54. *Id.* at 1378.

55. *Id.*

56. Rebecca L. Haffajee & Michael R. Abrams, *Settling the Score: Maximizing the Public Health Impact of Opioid Litigation*, 80 OHIO ST. L.J. 701, 705 (2019).

III. THE HISTORY OF LITIGATION AGAINST OPIOID COMPANIES

This section will present background information needed to understand key aspects of the most notable mass tort litigation suits against opioid manufacturers and retailers. It will explain what opioid addiction is and how policy and regulatory failures resulted in opioid manufacturers and retailers contributing to the opioid addiction crisis. This section will ultimately provide the legal framework that will be used to analyze why and how social media companies may similarly encounter mass tort litigation. It will also be used to draw inferences for how their potential litigation strategy may fare.

A. *Opioid Addiction Explained*

Opioid use disorder (opioid addiction) is a complex illness characterized by compulsive use of opioid drugs even when the person wants to stop or when using the drugs negatively affects the person's physical and emotional well-being.⁵⁷ The science behind why only some experience addiction to opioids is not yet known, but the feelings of euphoria that result from opioid use increase the odds that people will continue using them despite negative consequences.⁵⁸ The Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM 5-TR), describes opioid addiction as a problematic pattern of opioid use leading to problems or distress, craving, or a strong desire or urge to use opioids; problems fulfilling obligations at work, school or home; giving up or reducing activities because of opioid use, using opioids in physically hazardous situations, tolerance, as well as five other symptoms listed in the DSM 5-TR.⁵⁹

More than any other form of addiction, opioid addiction is considered a public health crisis.⁶⁰ The opioid addiction public health crisis was exacerbated by the COVID-19 pandemic.⁶¹ The National Center for Health Statistics (NCHS) at the Centers for Disease Control and Prevention (CDC) documented that the number of drug overdose deaths increased in 2021, with

57. *Opioid Use Disorder*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/opioid-use-disorder> [<https://perma.cc/5CHJ-FF42>] (last visited Oct. 20, 2022).

58. *Id.*

59. *Opioid Use Disorder*, AM. PSYCHIATRIC ASS'N (Dec. 31, 2022), <https://www.psychiatry.org/patients-families/opioid-use-disorder> [<https://perma.cc/MHT4-5LXX>].

60. *Id.*

61. See generally Ghose, Rina et al., *Impact of the COVID-19 Pandemic on Opioid Overdose Deaths: a Spatiotemporal Analysis*, J. OF URB. HEALTH: BULLETIN OF THE N.Y. ACAD. OF MED. 2022, 2, vol. 99, 316. doi:10.1007/s11524-022-00610-0 [<https://perma.cc/K4WK-XBN2>]

opioid overdoses constituting the leading category of drug overdoses.⁶² In 2021 alone, 80,411 of the 106,699 overdose deaths involved opioids.⁶³

The effects of substance use disorder, including opioid addiction, on U.S. healthcare expenditures, is equally concerning. Emergency department visits for opioid overdoses rose thirty percent from July 2016 through September 2017.⁶⁴ The costs disproportionately fell on public insurance, which covered a total of 72.1% of opioid-related inpatient stays and 69% of opioid-related hospital stays.⁶⁵ The United States Joint Economic Committee estimates the opioid epidemic cost \$1.04 trillion in 2018, \$985 billion in 2019, and nearly \$1.5 trillion in 2020.⁶⁶ The rise in fatal opioid overdoses in 2021 suggests the total cost is likely to continue to increase.⁶⁷ The economic burden of the opioid addiction crisis on the United States government likely contributed to the multi-district mass tort litigation against opioid manufacturers and retailers.

B. Explaining How the Existing Regulations and Policy Standstill Led to Opioid Mass Tort Litigation

Understanding how opioid manufacturers and retailers contributed to the opioid addiction epidemic is essential to understanding how social media companies are becoming similarly situated with respect to the rates of social media addiction. The first suits against opioid manufacturers and retailers began with private parties and eventually progressed into state and local governments finding their own stakes in the lawsuits.⁶⁸

State and local governments joined the litigation for a variety of reasons. Aside from the public health concerns the opioid addiction presented, the civil suits were likely to result in large settlements, which would be used to help offset the cost of opioid addiction to the economy and to state

62. *Id.*

63. Drug Overdose Death Rates, NAT'L INST. ON DRUG ABUSE: TRENDS AND STATS. (Feb. 9, 2023), <https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates> [<https://perma.cc/VY53-49XN>].

64. *Opioid Overdoses Treated in Emergency Departments*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 16, 2018), <https://www.cdc.gov/media/releases/2018/p0306-vs-opioids-overdoses.html> [<https://perma.cc/3VHN-WD5C>].

65. *Value in Opioid Use Disorder Treatment Demonstration*, CTRS. FOR MEDICARE & MEDICAID SERVS. (last updated Oct. 7, 2022), <https://innovation.cms.gov/innovation-models/value-in-treatment-demonstration> [<https://perma.cc/42PV-MLQR>].

66. *The Economic Toll of the Opioid Crisis Reached Nearly \$1.5 Trillion in 2020*, JOINT ECON. COMM. DEMOCRATS (Sept. 28, 2022), <https://www.jec.senate.gov/public/index.cfm/democrats/2022/9/the-economic-toll-of-the-opioid-crisis-reached-nearly-1-5-trillion-in-2020> [<https://perma.cc/GGH6-QUFA>].

67. *Id.*

68. Derek Carr et al., *Reducing Harm Through Litigation Against Opioid Manufacturers? Lessons from the Tobacco Wars*, 133 PUB. HEALTH REP. 207, 207-09 (2018); Nicolas Terry & Aila Hoss, *Opioid Litigation Proceeds: Cautionary Tales from the Tobacco Settlement*, HEALTH AFF. BLOG (May 23, 2018), <https://www.healthaffairs.org/content/forefront/opioid-litigation-proceeds-cautionary-tales-tobacco-settlement> [<https://perma.cc/5MC3-PYSA>].

Medicaid costs.⁶⁹ Litigation also presented the opportunity to discern internal practices and policies of opioid manufacturers and retailers that are otherwise not publicly available through discovery.⁷⁰ Subsequently, once state and local governments obtained more transparency from opioid companies during discovery, state and local officials were empowered to use the information as a political tool to establish a clear scapegoat or wrongdoer in the opioid addiction epidemic. Using this strategy helps fuel policymaking and increases regulations in the opioid manufacturing, prescription, and retail industries. The threats that accompany potential litigation, even if not successfully used to satisfy the aforementioned motives, are generally useful as a deterrent from harmful practices and as an incentive for self-regulation. As such, where policies and regulations were insufficient, litigation served as a tool to move public policy forward and simultaneously procure resources to support a more robust set of interventions to address the opioid addiction crisis.⁷¹

C. How Civil Litigation Played Out Against Opioid Manufacturers and Retailers

This section will describe key aspects of the litigation against some of the large opioid manufacturers and retailers. It will present examples of some of the most notable defendants, the claims against them, and the common defenses they asserted. This section will be used as a framework for how future litigation against social media companies can arise.

Beginning around 2000, individual opioid users first brought (unsuccessful) personal injury lawsuits against pharmaceutical companies for claims of public nuisance, negligence, strict liability in tort, failure to warn, breach of implied warranty, and several other theories of liability.⁷² Since then, almost every state and over 2,000 local government entities have brought similar lawsuits against opioid manufacturers and downstream sellers, several of which were consolidated in December 2017 for the discovery and pretrial motion phase of the litigation for the cases in federal court.⁷³ Among the many civil suits against opioid manufacturers and retailers, common claims included negligent marketing, products liability for failure to warn and defective design, breach of implied warranty, and fraudulent misrepresentation of their product.⁷⁴ Claimants typically accused manufacturers of misrepresenting the addictive nature of opioid products in marketing campaigns and failing to adequately warn consumers about the

69. *Id.*

70. Lance Gable, *Preemption and Privatization in the Opioid Litigation*, 13 NE. UNIV. L. REV. 297, 306 (2021).

71. *Id.* at 305 (citing Brendan Saloner et al., *A Public Health Strategy for the Opioid Crisis*, 133 PUB. HEALTH REP. 24S, 31S (2018)).

72. Richard C. Ausness, *The Future of Opioid Litigation*, 84 BENCH & BAR 20, 20 (2020).

73. *Id.* at 21.

74. Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 WEST VA. L. REV. 1117, 1122-30 (2013).

potential for addiction.⁷⁵ For example, the civil lawsuits against opioid manufacturer Purdue Pharma alleged that Purdue “promoted its opioid drugs to healthcare providers it knew were prescribing opioids for uses that were unsafe, ineffective, and medically unnecessary, and that often led to abuse and diversion.”⁷⁶ State attorneys general for California, the District of Columbia, Hawaii, Maine, and 40 other states in a separate suit also alleged:

Purdue’s illegal and misleading marketing and sales practices played a major role in contributing to the nationwide opioid crisis . . . that Purdue created a public nuisance through its marketing and sale of opioids and misled healthcare professionals and patients about the addictive nature of opioids and their potential for abuse and diversion.⁷⁷

Meanwhile, many of the claims against distributors alleged a failure “to monitor, detect, investigate, and report suspicious orders of prescription drugs, even though reasonably prudent suppliers would have done so and the federal Controlled Substances Act requires suppliers to maintain effective controls against diversion of controlled substances to illicit markets.”⁷⁸ For example, the Department of Justice filed civil suits against AmerisourceBergen Corporation and two of its subsidiaries, AmerisourceBergen Drug Corporation and Integrated Commercialization Solutions, LLC (collectively “AmerisourceBergen”), one of the country’s largest wholesale pharmaceutical distributors, claiming the companies’ distribution of controlled substances to pharmacies and other customers across the country “resulted in at least hundreds of thousands of violations of the Controlled Substances Act (CSA)” and that AmerisourceBergen “had a legal obligation to report suspicious orders to the Drug Enforcement Administration (DEA), and [their] repeated and systemic failure” to do so “ignited an opioid epidemic.”⁷⁹

75. See Haffajee, *supra* note 56, at 705.

76. Press Release, *Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family*, U.S. DEP’T OF JUST., OFF. OF PUB. AFFS. (Oct. 21, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid> [<https://perma.cc/5JY6-3ZLA>].

77. Press Release, *Attorney General Becerra Sues Opioid Manufacturer Purdue Pharma for Its Illegal Practices and Role in the Opioid Crisis*, STATE OF CAL. DEP’T OF JUST. (June 3, 2019), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-sues-opioid-manufacturer-purdue-pharma-its-illegal> [<https://perma.cc/E55H-B4RR>].

78. Nora Freeman Engstrom et al., *Suing the Opioid Companies*, STAN. L. SCH. BLOGS: LEGAL AGGREGATE (Aug. 30, 2018), <https://law.stanford.edu/2018/08/30/q-and-a-with-mello-and-engstrom/> [<https://perma.cc/3UP6-MC8S>].

79. Press Release, *Justice Department Files Nationwide Lawsuit Against AmerisourceBergen Corp. and Subsidiaries for Controlled Substances Act Violations*, U.S. DEP’T OF JUST., OFF. OF PUB. AFFS. (Dec. 29, 2022), <https://www.justice.gov/opa/pr/justice-department-files-nationwide-lawsuit-against-amerisourcebergen-corp-and-subsidiaries> [<https://perma.cc/2JQJ-KAYK>].

Among the defenses and limitations asserted by opioid manufacturers, the most common were lack of causation, misuse by a third party or the user, and wrongful conduct.⁸⁰ For lack of causation, defendants often asserted that there lacked evidence of a causal connection between the manufacturer's marketing and promotion of the opioids and the plaintiff's injuries.⁸¹ A few of the claims against manufacturers were also thwarted by lack of causation defenses whereby manufacturers were able to demonstrate that even if their warnings were inadequate, the deficiency would not have and did not influence providers from prescribing their products to patients.⁸²

Another similar defense asserted by opioid manufacturers was misuse by third parties. In cases where plaintiffs (families and estate managers of those deceased by way of overdose) alleged that they died by overdose, a few opioid manufacturers successfully asserted that third parties abused their products.⁸³ This was only successful in jurisdictions where the doctrine of comparative negligence applies, but in multi-district litigation, it did not defeat a sufficient amount of claims to avoid national settlements.⁸⁴ A similar defense of wrongful conduct was successful in a few of the states that adopt the doctrine, whereby plaintiffs who engaged in illegal conduct were barred from recovery for harm caused by their wrongful actions.⁸⁵ However, once state and local government officials got involved in the litigation, many of the defenses did not fare well.⁸⁶

In such cases, the state contends that it has standing to sue to protect its quasi-sovereign interests, or interests distinct from the interests of particular parties.⁸⁷ These suits have been successfully used against tobacco companies, firearms manufacturers, and lead paint manufacturers.⁸⁸ In these cases, the state usually claims negligent marketing has targeted vulnerable segments of the populations and a failure to supervise the distribution of the product at the retail level.⁸⁹ Although many of the major opioid manufacturers and

80. See Ausness, *supra* note 74.

81. See *Koenig v. Purdue Pharma Co.*, 435 F. Supp. 2d 551, 557 (N.D. Tex. 2006); see also *Franz v. Purdue Pharma Co.*, No. 05-CV-201-PB, 2006 WL 455998, at *1 (D.N.H. Feb. 22, 2006).

82. See Ausness, *supra* note 74.

83. See *Labzda v. Purdue Pharma L.P.*, 292 F. Supp. 2d 1346, 1355-56 (S.D. Fla. 2003).

84. *Id.* at 1356.

85. See, e.g., *Pappas v. Clark*, 494 N.W.2d 245 (Iowa Ct. App. 1992); *Orzel v. Scott Drug Co.*, 537 N.W.2d 208 (Mich. 1995).

86. See Ausness, *supra* note 68.

87. *Id.*

88. See Ausness, *supra* note 68 (citing generally *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (App. Div. 2003) (Municipalities, instead of states, brought most of the suits against firearm manufacturers.); see generally *State v. Lead Indus. Ass'n*, 951 A.2d 428, (R.I. 2008); see also Amber E. Dean, Comment, *Lead Paint Public Entity Lawsuits: Has the Broad Stroke of Tobacco and Firearms Litigation Painted a Troubling Picture for Lead Paint Manufacturers?*, 28 Pepp. L. REV. 915 (2001) (explaining public entity lawsuits against lead paint manufacturers resemble the public entity lawsuits against tobacco and firearms manufacturers).

89. See Ausness, *supra* note 68 (citing Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and the Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 942-43 (2008)).

distributors ended up settling the cases in multi-million and multi-billion dollar settlements, states were initially concerned that the misuse defense might break the chain of causation and were thus initially skeptical about pursuing larger settlements.⁹⁰ Class actions against Purdue Pharma demonstrated one example of relying on misuse to break the chain of causation by shifting much of the blame to “pill doctors” who prescribed OxyContin in excessive quantities to their patients.⁹¹ However, even Purdue was forced to settle a number of suits brought by state officials, with some of the most notable ones presented below:

Purdue Pharma: agreed to a civil settlement in the amount of \$2.8 billion to resolve its civil liability under the False Claims Act. Separately, the Sackler family has agreed to pay \$225 million in damages to resolve its civil False Claims Act liability.⁹²

Johnson & Johnson: agreed to a \$5 billion settlement and announced in 2020 it would remove itself from the opioid prescribing business in the U.S.⁹³

AmerisourceBergen, Cardinal Health, and McKesson: all agreed to pay a combined \$21 billion. The three massive wholesalers were alleged to have continued to ship vast quantities of pills to small rural communities despite red flags that drugs like OxyContin were being diverted and sold on the black market.⁹⁴

D. New Policies Since the Litigation Commenced

In the years following the successful suits against opioid manufacturers, retailers, and prescribers, many pharmaceutical companies have agreed to fund new monitoring systems to prevent communities from being flooded with high-risk medications.⁹⁵ The monitoring systems will pick up on patterns where too many pills are going into a community, and distributors for that community will be put on notice.⁹⁶

90. *Id.* at 1163.

91. *Id.*

86. Christine Minhee, *All Major Opioid Manufacturers, Distributors, and Retailers have Offered to Settle*, OPIOID SETTLEMENT TRACKER, <https://www.opioidsettlementtracker.com> [<https://perma.cc/PFU5-Q4XV>] (last visited Sept. 4, 2023).

93. *Id.*

94. *Id.*

95. Elizabeth Williams & Heather Saunders, *A Look at Changes in Opioid Prescribing Patterns in Medicaid from 2016 to 2019*, KAISER FAM. FOUND. (Feb. 17, 2023), <https://www.kff.org/medicaid/issue-brief/a-look-at-changes-in-opioid-prescribing-patterns-in-medicicaid-from-2016-to-2019/> [<https://perma.cc/F67A-8KY3>].

96. *Id.*

Since the opioid epidemic was declared a public health emergency on October 26, 2017, states have also enacted limits on opioid prescriptions for acute pain, including limits on prescription length and daily dosage requirements.⁹⁷ The Centers for Medicare & Medicaid Services (CMS) also enacted preauthorization approval provisions for certain opioids to disincentivize unnecessary prescribing practices.⁹⁸ In 2018, a Kaiser Family Foundation survey of state Medicaid programs found nearly all states and the District of Columbia had implemented at least one opioid-focused pharmacy management policy, with forty states expecting to implement additional opioid-focused strategies the following year.⁹⁹ In 2019, CMS codified the framework for several opioid overutilization policies, including required drug management programs under Medicare Part D for all Part D sponsors and additional safety alerts at the time of dispensing an opioid drug.¹⁰⁰ By 2022, the CDC issued an updated Clinical Practice Guideline for Prescribing Opioids for Pain, which was intended to provide recommendations for clinicians providing pain care and how to assess the risk and address the harms of opioid use.¹⁰¹ The added oversight and policy changes that followed the mass tort litigation against many opioid companies will likely encourage self-regulation among entities in a manner not previously imposed on the companies.

IV. ANALYSIS¹⁰²

The similarities between social media addiction and opioid addiction, as well as their effects on individuals, younger generations, and society,

97. *Id.*

98. Press Release, *CMS Names an E-Prescribing Standard to Reduce Provider Burden and Expedite Patient Access to Needed Medications*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Dec. 29, 2020), <https://www.cms.gov/newsroom/news-alert/cms-names-e-prescribing-standard-reduce-provider-burden-and-expedite-patient-access-needed> [<https://perma.cc/G64Q-XM3L>].

99. Kathleen Gifford et al., *States Focus on Quality and Outcomes Amid Waiver Changes: Results from a 50-State Medicaid Budget Survey for State Fiscal Years 2019 and 2019*, KAISER FAM. FOUND. (Oct. 25, 2018), <https://www.kff.org/medicaid/report/states-focus-on-quality-and-outcomes-amid-waiver-changes-results-from-a-50-state-medicaid-budget-survey-for-state-fiscal-years-2018-and-2019/> [<https://perma.cc/6PTP-SMUN>].

100. *Improving Drug Utilization Review Controls in Part D*, CTRS. FOR MEDICARE & MEDICAID SERVS. (last modified May 11, 2023, 4:45 PM), <https://www.cms.gov/medicare/prescription-drug-coverage/prescriptiondrugcovcontra/rxutilization> [<https://perma.cc/8VRF-3NKA>].

101. Deborah Dowell et al., *CDC Clinical Practice Guideline for Prescribing Opioids for Pain – United States, 2022*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Nov. 4, 2022), <http://dx.doi.org/10.15585/mmwr.rr7103a1> [<https://perma.cc/Z8U5-MUWT>].

102. Roman McGee, *Mental Health and Social Media: Analyzing the Shift in Future Liability for Social media Platforms*, 24 N.C. J.L. & TECH. 101, (2022). This article addresses a similar issue to this Note, and focuses on a specific case in which a social media company was unable to shield itself from liability for a car accident that resulted from individual's use of the social media filter. The main difference that this Note presents is an analogy between social media companies and addiction, and opioid companies and addiction in the context of mass-tort litigation. This Note and the Article reach different conclusions, but a similar issue is shared between both the Article and this Note.

provide some support for the possibility of future mass tort litigation. Social media companies' market role and practices contribute to the growing rates of social media addiction in a similar manner as opioid manufacturers. Finally, key aspects of the civil and criminal litigation against opioid manufacturers and retailers can be applied in potential litigation against social media companies to suggest a need for social media companies to self-regulate.

A. The Similar Addictive Effects of Opioid Addiction and Social Media Addiction Provide Some Support for Potential Future Litigation

As previously discussed, social media use creates similar addictive effects on the individual as opioid use by utilizing similar dopamine-mediated feedback signals that essentially establish the action of using opioids or social media as a reward.¹⁰³ When the action that is associated with a reward requires minimal effort, as is the case with taking opioids or scrolling through a social media platform, ease of use encourages continuous use and eventually results in uncontrollable or habitual use of the product.¹⁰⁴ The addictive behaviors and symptoms that are associated with habitual or addictive opioid use are like those associated with social media use.¹⁰⁵ This similar manifestation of addictive behaviors presents one reason in support of the potential for social media companies to face similarly scaled multi-district litigation.¹⁰⁶

The lack of research and documentation on the costs and effects of social media addiction on state Medicaid programs and society may hinder state and local officials from engaging in litigation against social media companies. Unlike opioid addiction, where the costs of inpatient hospitalizations and treatment are well documented, similar research has not yet uncovered the costs to the healthcare system, the economy, and the future workforce in terms of productivity. This may weaken the argument that state and local actors may engage in multi-district litigation against social media companies.

103. See Haynes, *supra* note 5.

104. See Haynes, *supra* note 5.

105. See Brake, *supra*, note 34.

106. In October 2023, Arizona and nearly 30 other states filed a lawsuit in the Northern District of California against Meta Platforms regarding the harmful effects of its marketing on the mental health of youths. Though the suit is still in its early stages, it argues a similar product liability framework as proposed in this Note. See Complaint, *Arizona v. Meta Platforms, Inc.*, No. 4:23CV05448, 2023 WL 7002550 (N.D. Cal. Oct. 24, 2023).

B. The Role that Social Media Companies Play in the Rates of Social Media Addiction Resembles the Role Opioid Manufacturers Played in the Opioid Addiction Crisis

Opioid manufacturers designed and marketed their products in ways that enabled and increased rates of opioid addiction.¹⁰⁷ Many failed to warn prescribers and consumers of the potential harmful effects of their products, and at times, they even misled consumers and prescribers about the harms of their products.¹⁰⁸ In congruence, social media companies collect user data to enable their algorithms to accurately predict and display content that will induce excessive use of the platform by each user.¹⁰⁹

The evidence offered against opioid manufacturers, with respect to their misrepresentation in their marketing and failure to warn of harmful consequences, provides a useful analogy to demonstrate how opioid manufacturers' contribution to the opioid crisis was intentional. Specifically, claimants argued defective design claims based on the excessive amount of oxycodone in the large dose pills, the manufacturer's failure to add an antagonist substance to the pills, or that the time-release mechanism was defective because it was not tamper-proof.¹¹⁰ This evidence functioned as confirmation that the opioid manufacturers had knowledge that the dosage in which they were manufacturing the opioids was significantly more dangerous and addictive than they disclosed, yet they took no steps to remedy or warn.¹¹¹ Likewise, the evidence of algorithms utilizing the same neural circuitry/interval reward pathways that opioids, slot machines, and other forms of addiction harness may establish the inference that social media companies intentionally design their platforms to encourage excessive, and even addictive, uses of their product—without taking steps to remedy or warn users. In short, it can be shown that both opioid manufacturers and social media companies have knowledge that the products pose risks of harm to their consumers/users, yet they took insufficient action to rectify or warn the public.

The role that social media companies and opioid companies occupy in their respective forms of addiction establishes the strongest justification for the hypothesis that social media companies may face similar mass tort litigation as opioid companies. In particular, the effects that social media addiction has on younger generations may create at least political incentives for state and local government officials to undertake litigation against social media companies for their defective design of addictive platforms and for their failure to warn younger users of the harms associated with their product.

However, an aspect of social media companies' market structure makes them even more vulnerable than opioid manufacturers—the absence of a middle party (i.e., a prescriber). In the cases of private suits against

107. See Ausness, *supra* note 74.

108. See Ausness, *supra* note 74 at 1140-41.

109. See Sapone, *supra* note 8.

110. See Ausness, *supra* note 74.

111. See Ausness, *supra* note 74 at 1140-41.

manufacturers, opioid manufacturers were able to successfully assert the lack of causation defense by showing the prescribers severed the chain of causation.¹¹² Namely, manufacturers asserted that even if they had defective designs or failures to warn of harm, this did not stop prescribers from continuing to prescribe the opioids, notwithstanding their knowledge of the harm associated with opioids.¹¹³ As such, courts that adopted the contributory negligence doctrine found the plaintiffs lacked causation in showing that their injuries were due to the marketing practices of the manufacturers.¹¹⁴

Unfortunately for social media companies, there is no “prescriber” of social media content that would allow them to assert a lack of causation defense. However, social media companies may try to weaponize Section 230(c) to assert that they are not liable for misuse by third parties (the users). While a general misuse defense has some weight, Section 230 likely does not. Because Congress’s intent when enacting Section 230 was not to create complete blanket immunity in every context, it cannot be said that Section 230 is meant to shield social media companies from the harms of excessive use of their product. This claim has no basis in defamation or obscenity principles and thus will likely not fall within the protections of Section 230. As their main go-to defense will likely not be expanded to this context, social media companies may be at an increased risk of litigation, as opposed to opioid manufacturers, who had other actors involved in the harmful prescribing of opioids. The best litigation strategy that social media companies will likely pursue, similar to opioid manufacturers, will be to oppose consolidation and centralization of actions against them in light of their algorithms being trade secrets and confidential.

C. Current Regulations for Social Media Companies Incentivize the Use of Litigation to Advance Regulatory and Policy Goals

Currently, there are minimal limits on a social media company’s use of addictive algorithms to encourage excessive use of their platform. Social media companies are free to continue with their practices and have no incentives to self-regulate in light of the immunizing protections that Section 230 has been interpreted to afford them. This presents the political motive for state and local governments to use litigation for similar reasons, outside of economic gain, as was pursued in the multi-district opioid litigation. States may see litigation as a means of advancing policy goals by using discovery and other evidence-gathering processes to expose the current practices and internal business models of social media companies. This increased transparency will likely spark the political motive to regulate as they uncover harmful practices that encourage excessive and addictive use of social media platforms. It may also spur other regulations with respect to how social media

112. See Ausness, *supra* note 74 at 1149

113. *Id.*

114. *Id.* at 1133.

companies are allowed to collect and utilize user data in order to present specifically catered content and advertisements.

The potential claims against social media companies, due to their role in the rate of social media addiction, are very similar to the claims advanced against opioid manufacturers, prescribers, and retailers. Most importantly, social media companies must undertake self-regulating practices to decrease the potential for mass tort litigation.

D. Using the Post-Opioid Settlement Policies to Avoid Mass Tort Litigation Based on Prior Authorization and Prescription Monitoring Policies

A more robust self-regulation model is needed for social media companies to protect themselves from future litigation. By examining some of the policies that were implemented following the opioid settlements, a few practices or changes can be extracted to decrease their likelihood of litigation.

Like the preauthorization approval and prescription monitoring programs for prescribing opioids in order to detect potential harmful or red-flag practices, social media companies can enforce screen time limits on all users, or at least all users under a certain age, and provide notice when an individual user's usage/practices are indicative of excessive use. Social media operators (such as Meta) already have data on users' behavioral practices. They could start using their behavioral data to identify excessive users and provide strategies to limit time spent on their products. This is already being used in the online gambling industry and could easily be applied by social networking sites.¹¹⁵

V. CONCLUSION

The trend of the various multi-district litigation against opioid manufacturers and retailers provides an analogous framework to support the notion that social media platforms are poised to see similar multi-district litigation for their role in the rise of social media addiction. The pandemic's forced isolation paved the way for social media companies to play a substantial role in the increase in social media addiction rates, especially among younger generations. The similar addiction-indicative behaviors and negative mental health outcomes that are associated with both social media addiction and opioid addiction justify analyzing the multi-district litigation against opioid manufacturers and retailers in a manner that can be applied to social media companies. The role and market structure that social media companies and opioid manufacturers similarly occupy, and thus, contribute to each addiction further supports the logic behind using the multi-district litigation against opioid manufacturers to hypothesize how similar litigation may play out against social media companies.

115. Michael Auer & Mark D. Griffiths, *Voluntary Limit Setting and Player Choice in Most Intense Online Gamblers: An Empirical Study of Gambling Behaviour*, 29 J. GAMBL. STUD. 647, 647-60 (2013).

Finally, the shortcomings of current regulatory approaches and the growing political pressure all function to establish congruent contexts that could set the framework for similar litigation against social media companies. This Note discussed how social media companies, unlike opioid manufacturers and retailers, do not have a “middleman provider/pharmacist” or some additional third party beyond the users to assert third-party doctrines of immunity, which signals that social media companies may also not fare well in mass tort litigation, regardless of their potential defenses. Finally, this Note offered self-regulating steps that social media companies can implement to avoid future mass tort litigation based on the policy changes that followed the multi-district opioid addiction crisis litigation.

