

RESPONSE

HARNESSING THE WIND: A FRAMEWORK FOR PISC ACCOUNTABILITY

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INTRODUCTION

In their Article, Joshua Perry and Timothy Fort argue that healthcare companies that proactively issue public statements of conduct (“PISC”) should be held accountable when their actions deviate from their

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professed values.¹ They frame their inquiry by examining the opioid crisis and the “wicked” accountability problem it presents.²

They lay out a well-reasoned and hard-to-object-to rationale for their inquiry. They note that one pernicious aspect of the wicked problem that they point to is that the very opioids harmful to individual and community health in one setting provide relief to individuals suffering from pain in another setting.³ They identify that the tentacles of the problem wind their way into almost all aspects of the healthcare system.⁴ The opioid epidemic has forced physicians to make judgment calls on whether the person making the request suffers from pain that warrants a medical prescription, or if the person making the request, while suffering, warrants a different intervention, and thus filling the prescription would be medically inappropriate.⁵ These issues also have legal ramifications when litigants attempt to hold physicians accountable because of overprescribing medications.⁶ To illustrate the problem’s breadth, Perry and Fort describe the role other distribution chain participants play in the wicked problem caused by the opioid crisis.⁷ From there, they turn to their primary inquiry of whether there is room for corporate accountability between the divergent approaches of scapegoating or exoneration for healthcare companies’ roles in this wicked problem.⁸

Their Article presents a compelling case for creating such a space between scapegoating and exoneration.⁹ By laying the legal and ethical foundation that *something* should be done, the reader turns to the next

1. Joshua E. Perry & Timothy L. Fort, *PISC in the Wind? Holding Healthcare Organizations Liable for Publicly Issued Statements of Conduct*, 70 AM. U. L. REV. 167, 169 (2020).

2. *Id.* at 169, 175 (describing a “wicked problem” as “a crisis that has many causes, diseases, and social determinants”).

3. *Id.* at 172 (“[W]hile on the one hand opioids are detrimental to individual and community health, on the other they do effectively assist individuals who suffer from pain”); U.S. DEP’T OF HEALTH & HUM. SERVS., PAIN MANAGEMENT BEST PRACTICES INTER-AGENCY TASK FORCE REPORT 25–26 (2019) (indicating that prescription opioid medications can be considered for the management of acute and chronic pain and providing an example of a patient with sickle-cell anemia who takes prescription opioid medication as part of his treatment regimen).

4. Perry & Fort, *supra* note 1, at 174–75.

5. *Id.* at 173.

6. *Id.* at 173–74 (describing how the tension physicians face falls into legal territory when doctors intentionally or unintentionally overprescribe medications and patients voluntarily or involuntarily misuse medication).

7. *Id.* at 174 (e.g., pharmacists, manufacturers, and distributors).

8. *Id.* at 176.

9. *Id.*

page, anticipating a framework or roadmap. Yet, the Article ends with a missed opportunity to advance a strategic proposal that recommends solutions to address this gap in the accountability matrix for many organizations. This Response takes the view—which perhaps the authors tacitly admit given the scope and gravity of the problem—that the aim of their Article stops short. This Response continues the conversation by articulating a framework to hold companies accountable when their conduct fails to align with their PISC.

The PISC accountability framework draws heavily from three distinct scenarios.¹⁰ First, this Response reviews the recent Purdue Pharmaceutical (“Purdue” or “Purdue Pharma”) scandal where the corporation’s espoused philosophy of “[c]ompassion for patients” failed to align with its business practices.¹¹ Next, the Response examines the recently passed No Surprises Act,¹² which prevents hospitals from charging patients undisclosed fees associated with their medical care.¹³ From there, the Response explores a non-healthcare-related scenario.¹⁴ In 2013, Wells Fargo opened as many as two million bank accounts and credit cards without customer permission.¹⁵ All the while, it maintained publicly, “[w]e never take for granted the trust our customers have placed in us, and we understand the important role we play in helping grow the U.S. economy.”¹⁶ From these events and the various legal responses, we articulate a possible framework to take the next step in holding companies accountable when their actions do not reflect their PISC.

I. PURDUE PHARMACEUTICALS AND THE OPIOID CRISIS

The origins of the opioid crisis that authors Perry and Fort refer to can be traced back to 1996 when Purdue Pharma began selling

10. See *infra* Parts I–II.

11. *Purpose Statement and Values*, PURDUE PHARMA, <https://www.purduepharma.com/about/ethics-and-compliance/purpose-statement-values> [https://perma.cc/H2UD-AU3L].

12. H.R. 3630, 116th Cong. (2019).

13. The bill was signed into law as part of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. BB, §§ 101–18 (2020).

14. See *infra* Part II.

15. James Rufus Koren, *Wells Fargo to Pay \$185 Million Settlement for ‘Outrageous’ Sales Culture*, L.A. TIMES (Sept. 8, 2016, 3:10 PM), <https://www.latimes.com/business/la-fi-wells-fargo-settlement-20160907-snap-story.html>.

16. WELLS FARGO & CO., ANNUAL REPORT 2015, at 3 (2015), <https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2015-annual-report.pdf> [https://perma.cc/NS87-JCK6].

OxyContin.¹⁷ Purdue Pharma designed the drug for people suffering from debilitating severe pain and diseases such as cancer.¹⁸ A significant differentiator of OxyContin's approval compared to other drugs was that the U.S. Food and Drug Administration (FDA) authorized Purdue to market the drug using the claim that OxyContin's "long-acting formulation was 'believed to reduce' its appeal to drug abusers compared with shorter-acting painkillers like Percocet and Vicodin."¹⁹ Critics of the FDA's role in the opioid crisis maintain that the agency failed to properly enforce the Federal Food, Drug, and Cosmetic Act²⁰ (FDCA) during the drug's approval in 1995.²¹ A more rigorous review would have led to a more narrowly tailored label that specified the conditions where "the benefits of ER [extended release] oxycodone outweigh the risks, such as relief from severe pain from a life-limiting illness."²² Rather, Purdue was allowed to market the drug with "a broad indication."²³ It was later revealed that the FDA did not base its findings on clinical trials but instead on the theory that "drug abusers [prefer] shorter-acting painkillers because the narcotic they contain[] [is] released faster and . . . [provides] a quicker 'hit.'"²⁴ Nevertheless, the company determined that the FDA's decision was "so valuable" that it became Purdue's "principal selling tool."²⁵ As a result, for over a decade, Purdue trained its sales force to tell physicians that OxyContin was less addictive and

17. Jeanne Whalen, *Purdue Pharma to Stop Promoting OxyContin to U.S. Doctors*, WALL ST. J. (Feb. 10, 2018, 7:06 PM), <https://www.wsj.com/articles/purdue-pharma-to-stop-promoting-oxycotin-to-u-s-doctors-1518307565> [<https://perma.cc/6RS5-Y43G>].

18. See *OxyContin: Balancing Risks and Benefits: Hearing Before the S. Comm. on Health, Educ., Lab., & Pensions*, 107th Cong. 1 (2002) (statement of Sen. Jack Reed, Chairman, S. Comm. on Health, Educ. Lab. & Pensions) (introducing OxyContin as a drug intended "to aid cancer patients and people with moderate to severe pain"); Agreed Statement of Facts at 5, *United States v. Purdue Frederick Co.*, 495 F. Supp. 2d 569 (W.D. Va. 2007) (No. 07CR00029) (discussing medical professionals' concerns about OxyContin's potential to be abused).

19. Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycotin.html>; see also Agreed Statement of Facts, *supra* note 18, at 5.

20. 21 U.S.C. § 301.

21. Andrew Kolodny, *How FDA Failures Contributed to the Opioid Crisis*, 22 AM. MED. ASS'N J. ETHICS 743, 744 (2020).

22. *Id.*

23. *Id.* at 744–45.

24. Meier, *supra* note 19.

25. *Id.*; see Agreed Statement of Facts, *supra* note 18, at 6 (indicating that Purdue permitted its sales representatives to "tell health care providers that OxyContin potentially create[d] less chance for addiction than immediate release opioids").

less prone to abuse than other approved opioids beyond what the FDA had approved.²⁶

Purdue's marketing approach helped create the opioid crisis.²⁷ As evidenced in a confidential Justice Department report, shortly after beginning to market OxyContin, Purdue and the Sackler family learned of medical studies disproving the non-addictive claims.²⁸ They also received numerous reports of OxyContin abuse by patients, drug abusers, and overprescribing by physicians.²⁹ However, given the \$1 billion in annual revenue OxyContin generated, Purdue and the Sackler family concealed much of this information from the government and the public, and they continued to market the opioid aggressively.³⁰

The OxyContin marketing campaign continued unabated until 2007 when Purdue and three of its executives pled guilty to criminal charges of misleading the public about the addictive qualities of OxyContin.³¹ Purdue "agreed to pay \$634.5 million in government penalties and costs to settle the civil litigation."³² In response to the myriad of lawsuits brought by states and cities across the United States against Purdue for fueling addiction by misrepresenting the facts of its drugs, in 2017, the

26. Agreed Statement of Facts, *supra* note 18, at 5–9; Meier, *supra* note 19 (noting that the training took place for over a decade).

27. Andrew Joseph, 'A Blizzard of Prescriptions': Documents Reveal New Details About Purdue's Marketing of OxyContin, STAT (Jan. 15, 2019), <https://www.statnews.com/2019/01/15/massachusetts-purdue-lawsuit-new-details> [https://perma.cc/CC59-FB7P] ("Purdue aggressively pursued tight relationships . . . to expand prescribing by physicians, generate goodwill toward opioid painkillers among medical students and doctors in training, and combat negative reports about opioid addiction.").

28. See Meier, *supra* note 19 ("[I]n 1998, as OxyContin's marketing campaign was taking off, Purdue Pharma learned of a medical journal study that appeared to undercut its central message—that OxyContin, as a long-acting opioid, had less appeal to drug abusers.").

29. *Id.*

30. Barry Meier, *In Guilty Plea, OxyContin Maker to Pay \$600 Million*, N.Y. TIMES (May 10, 2007), <https://www.nytimes.com/2007/05/10/business/11drug-web.html> (noting Purdue's promotion of OxyContin to physicians such as general practitioners who often had little training related to treatment of serious pain).

31. Whalen, *supra* note 17; Meier, *supra* note 19 (noting the executives "each pleaded guilty to a misdemeanor 'misbranding' charge that solely held them liable as Purdue Pharma's 'responsible' executives and did not accuse them of wrongdoing").

32. Whalen, *supra* note 17.

company stated that it was “dedicated to being part of the solution” to the opioid crisis.”³³

Notwithstanding the monetary fine, one year after the 2007 settlement, distributors sent enough pain pills to West Virginia over a five-year period to supply every man, woman, and child with 433 pills each.³⁴ In response to pressure from regulators, politicians, and law enforcement to address the growing epidemic, in 2010, Purdue reformulated OxyContin to make it more difficult to misuse.³⁵ Alarmed by the subsequent decrease in revenue associated with this change and seemingly unphased by the 2007 settlement, the company refocused its sales strategy to make up for slowing profits.³⁶ Purdue targeted its marketing efforts on healthcare providers known to prescribe opioids that “were not for a medically accepted indication, were unsafe, ineffective, and medically unnecessary, and/or were diverted for uses that lacked a legitimate medical purpose.”³⁷ The company also paid kickbacks to some of the highest prescribing healthcare providers and three specialty pharmacies that filled Purdue OxyContin prescriptions that other pharmacies would not fill.³⁸ As part of its refocused strategy, the company frequently sent its marketing representatives to high-

33. See, e.g., Reuters Staff, *NJ Sues OxyContin Maker, Links Marketing to Opioid Crisis*, REUTERS (Oct. 31, 2017), <https://www.reuters.com/article/instant-article/idINL2N1N6124> [<https://perma.cc/H768-CKUZ>] (New Jersey); Nate Raymond, *Montana Sues OxyContin Maker Purdue over Opioid Epidemic*, REUTERS (Dec. 4, 2017), <https://www.reuters.com/article/us-montana-opioids/montana-sues-oxycontin-maker-purdue-over-opioid-epidemic-idUSKBN1DY2K5> [<https://perma.cc/QB22-ACR2>] (Montana).

34. Eric Eyre, *Drug Firms Poured 780M Painkillers into WV amid Rise of Overdoses*, CHARLESTON GAZETTE-MAIL (Dec. 17, 2016), https://www.wvgazettemail.com/news/legal_affairs/drug-firms-poured-m-painkillers-into-wv-amid-rise-of/article_99026dad-8ed5-5075-90fa-adb906a36214.html [<https://perma.cc/BB5U-GQHF>].

35. Associated Press, *Revamped OxyContin Was Supposed to Reduce Abuse, but Has It?*, STAT (July 22, 2019), <https://www.statnews.com/2019/07/22/revamped-oxycontin-was-supposed-to-reduce-abuse-but-has-it>.

36. Corey S. Davis, *The Purdue Pharma Opioid Settlement—Accountability, or Just the Cost of Doing Business?*, 384 NEW ENG. J. MED. 97, 97 (Jan. 14, 2021).

37. *Id.* at 97–98 (indicating that healthcare providers prescribing opioids for medically unnecessary purposes accounted for less than 7% of all prescribers but wrote more opioid prescriptions than the other 93%); see also Press Release, U.S. Dep’t of Just., Plea Agreement with Purdue Pharma L.P. (Oct. 20, 2020), <https://www.justice.gov/opa/press-release/file/1329576/download> [<https://perma.cc/4KQT-NAFH>].

38. Davis, *supra* note 36, at 98; Press Release, U.S. Dep’t of Just., Opioid Manufacturer Purdue Pharma Pleads Guilty to Fraud and Kickback Conspiracies (Nov. 24, 2020), <https://www.justice.gov/opa/pr/opioid-manufacturer-purdue-pharma-pleads-guilty-fraud-and-kickback-conspiracies> [<https://perma.cc/7LRE-6YJT>].

volume-prescribing pharmacies to increase the likelihood that Purdue opioids were dispensed.³⁹ Among these were pharmacies that Purdue knew “were writing medically unnecessary prescriptions.”⁴⁰ The company also conspired with an electronic health records company to generate alerts recommending to prescribe OxyContin and other Purdue opioids even when such prescriptions were not medically necessary.⁴¹ All the while, its website maintained that “[w]e are committed to upholding the highest ethical standards throughout our business. As an important stakeholder in pain management, we embrace responsible stewardship and are dedicated to combating opioid abuse, diversion, addiction, and overprescribing. Every decision matters.”⁴² Compounding the gap between its public statements and business practices, Purdue attempted to distance itself from its 2007 criminal charges in 2017 by publicly affirming that it “‘learned from the past’ and that it supports programs to prevent prescription drug abuse.”⁴³

In 2020, Purdue was again indicted and pled guilty to felony charges of defrauding the United States and violating the anti-kickback statute from 2009 to 2017.⁴⁴ The settlement included criminal and civil penalties of about \$8.3 billion.⁴⁵ In addition, the Sackler family agreed to pay \$225 million to settle its False Claims Act⁴⁶ liability as part of the settlement.⁴⁷ “In exchange, the federal government agreed not to pursue any other criminal charges against the company for its actions between May 2007 and October 2020.”⁴⁸ However, the settlement agreement did not contain criminal or civil releases of any individuals,

39. Davis, *supra* note 36, at 98.

40. *Id.*

41. *Id.*

42. GUIDING PRINCIPLES, PURDUE PHARMA, <https://www.purduepharma.com/wp-content/pdfs/Guiding%20Principles.pdf> [<https://perma.cc/P29J-Q22S>].

43. Esmé E. Deprez & Paul Barrett, *The Lawyer Who Beat Big Tobacco Takes on the Opioid Industry*, BLOOMBERG BUSINESSWEEK (Oct. 5, 2017, 4:00 AM), <https://www.bloomberg.com/news/features/2017-10-05/the-lawyer-who-beat-big-tobacco-takes-on-the-opioid-industry> [<https://perma.cc/3ZHZ-WUYK>].

44. Press Release, U.S. Dep’t of Just., *supra* note 38 (noting Purdue paid kickbacks to providers to encourage them to prescribe more of its product).

45. Katie Benner, *Purdue Pharma Pleads Guilty to Role in Opioid Crisis as Part of Deal with Justice Dept.*, N.Y. TIMES (Nov. 24, 2020), <https://www.nytimes.com/2020/11/24/us/politics/purdue-pharma-opioids-guilty-settlement.html>.

46. 31 U.S.C. §§ 3729-33.

47. Sackler Settlement Agreement, *In re Purdue Pharma L.P.*, No. 19-23649 (S.D.N.Y. June 2, 2021), <https://www.justice.gov/opa/press-release/file/1329736/download>.

48. Davis, *supra* note 36, at 98.

including Sackler family members, company executives, or employees.⁴⁹ While the company's board admitted that it regretted its actions and is responsible for the "misconduct detailed by the Department of Justice," members of the Sackler family who served on the board maintained that they "acted ethically and lawfully."⁵⁰

In September of 2019, because of the plethora of lawsuits against Purdue, the company filed for bankruptcy.⁵¹ Many states had resisted the settlement because a large portion of the Sacklers' wealth would be protected from future lawsuits.⁵² Those states dropped their opposition after the Sackler family's pledge of \$4.5 billion over nine years to communities ravaged by OxyContin.⁵³ Yet, within days of reaching the deal, former board member David Sackler stated in court "that the family would walk away from [the] \$4.5 billion pledge" unless the government granted the Sackler family immunity from current and future civil liability claims associated with Purdue.⁵⁴ The government acquiesced to their demands, and on September 1, 2021, a federal judge approved their bankruptcy settlement.⁵⁵

Purdue and the Sackler family's role in the opioid epidemic is a stark example of when a company and individuals' public statement that they "do what is right" bore no relationship to their business practices.⁵⁶ The current mechanism to hold corporations accountable

49. Press Release, U.S. Dep't of Just., *supra* note 38.

50. Meryl Kornfield et al., *Purdue Pharma Agrees to Plead Guilty to Federal Criminal Charges in Settlement over Opioid Crisis*, WASH. POST (Oct. 21, 2020, 7:57 PM), <https://www.washingtonpost.com/national-security/2020/10/21/purdue-pharma-charges>; Benner, *supra* note 45.

51. Jan Hoffman, *Purdue Pharma Is Dissolved and Sacklers Pay \$4.5 Billion to Settle Opioid Claims*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/health/purdue-sacklers-opioids-settlement.html?auth=login-google>.

52. Christopher Rowland, *Members of Sackler Family Move Closer to OxyContin Settlement as Key States Drop Opposition*, WASH. POST (July 8, 2021, 12:36 PM), <https://www.washingtonpost.com/business/2021/07/08/purdue-sackler-bankruptcy-settlement> (noting that Massachusetts, New York, North Carolina, and Pennsylvania were among the most prominent of the fifteen holdout states that may have settled due to a probable loss in bankruptcy court).

53. *Id.*

54. Jan Hoffman, *Sacklers Threaten to Pull out of Opioid Settlement Without Broad Legal Immunity*, N.Y. TIMES (Aug. 17, 2021), <https://www.nytimes.com/2021/08/17/health/sacklers-purdue-opioids-settlement.html>.

55. See Meryl Kornfield, *Bankruptcy Judge Approves Purdue Pharma Plan to Resolve Opioid Claims, Giving Sackler Family Civil Immunity*, WASH. POST (Sept. 1, 2021), <https://www.washingtonpost.com/business/2021/09/01/purdue-pharma-bankruptcy-judge-ruling> (detailing the settlement and bankruptcy plan).

56. *Purpose Statement and Values*, *supra* note 11.

when their business practices deviate from their mission statements is to indict them and levy criminal and civil fines.⁵⁷ This approach is inadequate. The legal actions of 2007 and those finalized in 2021 appear to have done little to change either the company or the family's business practices.⁵⁸ Even more troubling is that these responses fail to acknowledge these companies' responsibility to the public. The courts alone are insufficient to hold companies accountable when their business practices fail to align with their public statements. The legislative response and the widening impact on stakeholders suggest another way to hold responsible and interested parties accountable.

II. THE NO SURPRISES ACT

Surprise hospital bills occur when an out-of-network provider is unexpectedly involved in a patient's care.⁵⁹ For instance, a patient goes to the hospital that accepts their insurance, but they get treated by an emergency room physician who is out-of-network.⁶⁰ Because the physician does not have a contract with the patient's insurer regarding specific services, the physician can charge larger fees, far higher than what the patient's health plan typically pays.⁶¹ For example, "[t]he average surprise charge for an emergency room visit is just above \$600, but patients have received bills larger than \$100,000 from out-of-network providers."⁶² Further, a 2019 study by the Government Accountability Office found that the median price charged by air ambulance providers ranged from \$36,400 to more than \$40,000.⁶³

57. See Perry & Fort, *supra* note 1, at 186–87 (discussing the threat of criminal sanctions and civil liability as incentives that “foster legal compliance and ethics” within corporate culture).

58. Cf. Patrick Radden Keefe, *How Did the Sacklers Pull This off?*, N.Y. TIMES (July 14, 2021), <https://www.nytimes.com/2021/07/14/opinion/sackler-family-opioids-settlement.html> (explaining how Purdue has continued to face criminal charges since 2006 when federal prosecutors were first prepared to charge Purdue).

59. Mihir S. Dekhne et al., “Surprise” out-of-Network Billing in Orthopaedic Surgery: Charges from Surprising Sources, 271 ANNALS OF SURGERY 116, 116 (2020).

60. Sarah Kliff & Margot Sanger-Katz, *Surprise Medical Bills Cost Americans Millions. Congress Finally Banned Most of Them.*, N.Y. TIMES (Dec. 20, 2020), <https://www.nytimes.com/2020/12/20/upshot/surprise-medical-bills-congress-ban.html>.

61. Ezekiel Emanuel, *No One Likes Surprise Medical Bills. So Why Does Congressional Action Seem so Unlikely?*, WASH. POST (Sept. 4, 2019), <https://www.washingtonpost.com/opinions/2019/09/04/no-one-likes-surprise-medical-bills-so-why-does-congressional-action-seem-so-unlikely/>.

62. Kliff & Sanger-Katz, *supra* note 60.

63. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-292, AIR AMBULANCE: AVAILABLE DATA SHOW PRIVATELY-INSURED PATIENTS ARE AT FINANCIAL RISK (2019).

More than “70% of these transports were furnished out-of-network, [with] most or all costs [falling to insured individuals].”⁶⁴

It is estimated that “[one] of every [six] emergency room visits and inpatient hospital stays involve care from at least one out-of-network provider, resulting in surprise medical bills.”⁶⁵ The ongoing COVID-19 pandemic has intensified public concern about surprise billing due to hospital triage protocols and staffing shortages that increase exposure to out-of-network facilities and providers.⁶⁶ The practice results in patients receiving surprise bills for unpaid services from healthcare providers such as emergency room physicians, radiologists, anesthesiologists, and ambulances they did not choose but owe a full, direct responsibility for payment.⁶⁷

Interestingly enough, addressing surprise medical bills is one of the few healthcare topics with bipartisan congressional support.⁶⁸ In fact, on December 27, 2020, Congress passed the No Surprises Act (“Act”), which protects patients from receiving significant medical bills when they are unwittingly treated by an out-of-network physician, lab, or another type of provider.⁶⁹ In addition, the Act limits the patient’s cost-sharing responsibility to the corresponding in-network amount.⁷⁰ Specifically, in the case of emergency services and surprise bill scenarios, the law states that the patient’s cost-sharing responsibility will be calculated based on the total amount that would have been

64. Press Release, U.S. Dep’t of Health & Hum. Servs., HHS Announces Rule to Protect Consumers from Surprise Medical Bills (July 1, 2021), <https://www.hhs.gov/about/news/2021/07/01/hhs-announces-rule-to-protect-consumers-from-surprise-medical-bills.html> [<https://perma.cc/RGE4-DFS2>].

65. *Id.*

66. Jaime S. King, *Covid-19 and the Need for Health Care Reform*, NEW ENG. J. MED. (June 25, 2020), <https://www.nejm.org/doi/10.1056/NEJMp2000821> [<https://perma.cc/VBC5-NS2P>].

67. See Marcela G. del Carmen & Timothy G. Ferris, *Surprise Billing: Need for Comprehensive Risk Protection Programs*, 271 ANNALS OF SURGERY 119, 119 (2020) (providing background on surprise medical billing and emphasizing legislative responses).

68. Jennifer Haberkorn, *Surprise Medical Bills Could Prompt Rare Bipartisan Action in Congress*, L.A. TIMES (May 21, 2019), <https://www.latimes.com/politics/la-na-pol-congress-surprise-medical-billing-bipartisan-bill-20190521-story.html> (providing that “[w]hile Republicans and Democrats have been at loggerheads over healthcare policy for the last decade, ending surprise medical billing has garnered bipartisan support”).

69. H.R. 3630, 116th Cong. (2019). *But see* Loren Adler et al., *Understanding the No Surprises Act*, BROOKINGS (Feb. 4, 2021), <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2021/02/04/understanding-the-no-surprises-act>.

70. H.R. 3630, at 3–4.

charged for the services by an in-network provider or facility, an amount the law terms the “recognized amount.”⁷¹

While needed, this Act begs the question how did surprise medical billing become standard practice, and who is responsible? According to a Yale University study, surprise medical billing typically results when a company such as EmCare, owned by private equity firm Envision, takes over outsourced hospital emergency rooms.⁷² Envision is the most significant player in this field, “with 6% of the \$41 billion emergency department and hospital-based physician market and 7% of the \$20 billion anesthesiologist market.”⁷³

The study found that after a hospital hires EmCare to run its emergency room, there can be a rise in out-of-network rates by over 81% and almost an 82% increase in surprise billing.⁷⁴ Under these practices, physicians benefit because out-of-network billing allows them to charge significantly more.⁷⁵ As a result, there was an increase in average physician payments of 117%.⁷⁶ In addition to benefiting physicians, the hospital also benefited after EmCare took over managing a hospital’s emergency room.⁷⁷ Facility payments increased by 11%.⁷⁸ These increased payments are driven by a 5% increase in imaging and a 23% increase in physicians’ rate of admitting patients to the hospital.⁷⁹

71. *Id.* at 4–5.

72. See Zack Cooper et al., *Surprise! Out-of-Network Billing for Emergency Care in the United States* 2–3 (Yale Inst. for Soc. Pol’y Stud. Working Paper No. 17, 2017); Emanuel, *supra* note 61 (providing that “Yale University researchers have found that when these companies take over an emergency room, the frequency of surprise billing skyrockets”).

73. Ellie Kincaid, *Envision Healthcare Infiltrated America’s ERs. Now It’s Facing a Backlash*, FORBES (May 15, 2018), <https://www.forbes.com/sites/elliekincaid/2018/05/15/envision-healthcare-infiltrated-americas-ers-now-its-facing-a-backlash/?sh=7f989225284f> [<https://perma.cc/2452-SADR>].

74. *Id.*

75. See Emanuel, *supra* note 61 (demonstrating how hospitals benefit from enhanced bargaining power).

76. Kincaid, *supra* note 73; see Cooper, *supra* note 72, at 4 (explaining that “because patients cannot avoid out-of-network physicians during emergency visits, this increase in price does not lead to a decrease in demand”).

77. Cooper, *supra* note 72, at 4.

78. *Id.*

79. *Id.* (stating that “following the entry of EmCare, physicians were 43% more likely to bill for emergency visits using the highest paying and highest acuity billing code”).

While companies like EmCare profit from these practices, surprise medical bills are financially devastating for patients.⁸⁰ In response, legislators, insurers, patients, and investors are taking action to hold EmCare accountable for its public commitment: “[w]e believe our physician-centric culture and integrated care model benefits providers and patients by improving the quality of care and reducing the total cost of care.”⁸¹

In a 2017 letter to Envision President and CEO Christopher A. Holden, U.S. Senator McCaskill called for an investigation into emergency room visits that went from under \$500 for a hospital physician’s care to upwards of \$1,600 for an EmCare physician’s care.⁸² The Senator also detailed her concerns with the company’s reported practices, writing that “EmCare staffing and management may have contributed to a decline in health care quality and access for patients” in communities around the country.⁸³

In 2018, UnitedHealthcare terminated its agreement with Envision partly because of the company’s “highly questionable billing practices and lack of candor.”⁸⁴ The billing practices included charging, on average, 975% more than what Medicare pays for the same services and charging almost double what United Healthcare sees from hospitals that manage their own emergency rooms.⁸⁵

80. *Id.* at 2; see Lindsey Bomnin & Stephanie Gosk, *Surprise Medical Bills Lead to Liens on Houses and Crippling Debt*, NBC NEWS (Mar. 19, 2019), <https://www.nbcnews.com/health/health-news/surprise-medical-bills-lead-liens-homes-crippling-debt-n984371> (describing some of the serious financial consequences faced by victims of surprise medical bills, including liens on homes and wage garnishment).

81. ENVISION HEALTHCARE, ANNUAL REPORT 2016, at 1 (2016).

82. Letter from Sen. Claire McCaskill, Ranking Member, U.S. S. Comm. on Homeland Sec. and Governmental Affs., to Christopher A. Holden, President and Chief Exec. Officer, Envision Healthcare Corp., (Sept. 20, 2017), (on file with the U.S. S. Comm. of Homeland Sec. and Governmental Aff.), <https://www.hsgac.senate.gov/imo/media/doc/2017-09-20%20CMC%20Ltr%20to%20EmCare%20re%20Pricing.pdf> [<https://perma.cc/R6BN-NLTW>].

83. *Id.*

84. Defendant’s Motion to Compel Arbitration and Stay the Action and Accompanying Memorandum of Law at 4, *Envision Healthcare Corp. v. United Healthcare Ins. Co.*, 311 F. Supp. 3d 1322 (S.D. Fla. 2018 (No. 18-cv-60530)). See generally *Envision Healthcare Corp. v. United Healthcare Ins. Corp.*, 311 F. Supp. 3d 1322 (S.D. Fla. 2018) (providing the judge’s opinion on the defendant’s Motion to Compel Arbitration and Stay the Action).

85. Defendant’s Motion to Compel Arbitration and Stay the Action and Accompanying Memorandum of Law, *supra* note 84, at 3.

Envision's business practices led to several class actions lawsuits.⁸⁶ For example, in a California-based class action, the class of "all out-of-network patients" alleged that EmCare made no effort to warn patients that the emergency department physicians were out-of-network and then charged excessive rates for emergency services provided.⁸⁷ Envision settled the case out of court.⁸⁸

Investors have also filed a class-action lawsuit against Envision.⁸⁹ They allege that Envision made false and misleading statements and failed to disclose adverse information regarding its business and operations, including that EmCare routinely engaged in surprise medical billing.⁹⁰ In support of their claims, the investors made several reference statements contained in Envision's annual report.⁹¹ Namely, Envision's public claim that "[w]e believe that EmCare is well-positioned to continue to generate significant organic growth due to its integrated service offerings, differentiated, data-driven processes to recruit and retain physicians, scalable technology and sophisticated risk management programs."⁹² The complaint alleges that the statements in Envision's annual report about drivers of growth and revenues from EmCare were likely unstable.⁹³ As a result, "Envision securities traded at artificially inflated prices, with its stock price reaching a high of more than \$130 per share during the class period."⁹⁴

Interestingly enough, the No Surprises Act provides a type of consumer protection that was absent in response to Purdue and the Sackler's role in the opioid epidemic. The legislation expands the kinds of mechanisms available to hold companies accountable.

86. See, e.g., Class Action Complaint at 1, *Bettis v. Envision Healthcare Corp.*, No. 17-cv-01112, (Aug. 4, 2017) (providing an example of a full class action complaint).

87. *Bozarth v. Envision Healthcare Corp.*, No. 17-cv-01935, 2020 U.S. Dist. LEXIS 117294, at *2-8 (C.D. Cal. June 30, 2020).

88. *Id.* at *3.

89. *In re Envision Healthcare Corp. Sec. Litig.*, No. 17-cv-01112, 2019 WL 6168254, at *1 (M.D. Tenn. Nov. 19, 2019).

90. *Id.* at 11, 14; *Robbins Geller Beats Back Motion to Dismiss in Envision Healthcare Securities Case*, ROBBINS GELLER RUDMAN & DOWD LLP, (Nov. 20, 2019), <https://www.rgrdlaw.com/news-item-Motion-to-Dismiss-in-Envision-Healthcare-Securities-Case.html> [<https://perma.cc/45CF-9D5Z>].

91. *In re Envision Healthcare*, 2019 WL 6168254, at *21.

92. *Id.* at 22.

93. *Robbins Geller Beats Back Motion to Dismiss in Envision Healthcare Securities Case*, *supra* note 90.

94. *Id.*

III. WELLS FARGO

For years Wells Fargo had enjoyed a reputation for sound management. American Banker had named Wells Fargo Chairman and CEO John Stumpf “Banker of the Year” and Community Banking Head Carrie Tolstedt, “The Most Powerful Woman in Banking.”⁹⁵ Two years later, Wells Fargo ranked seventh on *Barron’s* list of Most Respected Companies.⁹⁶ To the public, investing community, and customers, Wells Fargo emphasized that

[o]ur vision has nothing to do with transactions, pushing products or getting bigger for the sake of bigness. It’s about building lifelong relationships one customer at a time We strive to be recognized by our stakeholders as setting the standard among the world’s great companies for integrity and principled performance. This is more than just doing the right thing. We also . . . do it in the right way.⁹⁷

Notwithstanding these public-facing statements, “[i]n 2013, rumors circulated that Wells Fargo employees in Southern California were engaging in aggressive tactics to meet their daily cross-selling targets.”⁹⁸ These tactics included opening new accounts and issuing credit cards without customer knowledge and, in some cases, forging the customers’ signature.⁹⁹ Despite initial statements to the contrary, in 2016, Wells Fargo agreed to pay \$185 million to settle a lawsuit filed by

95. Maria Aspan, *Wells Fargo’s John Stumpf, the 2013 Banker of the Year*, AM. BANKER (Nov. 21, 2013), <https://www.americanbanker.com/news/wells-fargos-john-stumpf-the-2013-banker-of-the-year> [<https://perma.cc/43M3-F56K>]; Sara Lepro, *Wells Fargo’s Tolstedt Tops List of Most Powerful Women in Banking*, AM. BANKER (Sept. 24, 2010), <https://www.americanbanker.com/news/wells-fargos-tolstedt-tops-list-of-most-powerful-women-in-banking> [<https://perma.cc/XJ5E-ZYK7>].

96. Vito J. Racanelli, *Apple Tops Barron’s List of Respected Companies*, BARRON’S (June 27, 2015), <https://www.barrons.com/articles/apple-tops-barrons-list-of-respected-companies-1435372737> [<https://perma.cc/R7G3-GAE8>].

97. Brian Tayan, *The Wells Fargo Cross-Selling Scandal*, STAN. CLOSER LOOK SERIES, Jan. 8, 2019, at 1 (quoting Wells Fargo’s Vision and Values statement); see also JOHN G. STUMPF, WELLS FARGO, THE VISION AND VALUES OF WELLS FARGO 4 (2012), <http://www.damicofcg.com/files/74720/Vision%20%26%20Values.pdf> [<https://perma.cc/4E38-FN4V>].

98. Tayan, *supra* note 97, at 2.

99. E. Scott Reckard, *Wells Fargo Fires Workers Accused of Cheating on Sales Goals*, L.A. TIMES (Oct. 3, 2013, 12:00 PM PT), <https://www.latimes.com/business/la-xpm-2013-oct-03-la-fi-mo-wells-fargo-workers-fired-20131003-story.html>; E. Scott Reckard, *Wells Fargo’s Pressure-Cooker Sales Culture Comes at a Cost*, L.A. TIMES (Dec. 21, 2013), <https://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html>.

regulators and the city and county of Los Angeles.¹⁰⁰ In addition, the company admitted that employees had opened as many as two million accounts without customer knowledge over five years.¹⁰¹

Unlike Purdue and Envision who actively ignored reports of improper business practices, Wells Fargo took concrete steps to address such allegations. For example, Wells Fargo hired an independent consulting firm to review all accounts opened since 2011 and refunded \$2.6 million to customers for fees associated with those accounts.¹⁰² In addition, 5,300 Wells Fargo employees were terminated over five years.¹⁰³

However, senators did not consider these actions sufficient and proceeded to criticize CEO John Stumpf on the senate floor when he appeared before the Senate Committee on Banking, Housing and Urban Affairs. It was noted that while Wells attempted to make restitution to customers, the Board of Directors had not clawed back significant pay from the CEO or former Community Banking Head Carrie Tolstedt, who retired in the summer with a package of \$124.6 million.¹⁰⁴

100. James Rufus Koren, *Wells Fargo to Pay \$185 Million Settlement for 'Outrageous' Sales Culture*, L.A. TIMES (Sept. 8, 2016, 8:10 PM), <https://www.latimes.com/business/la-fi-wells-fargo-settlement-20160907-snap-story.html> (providing that the fine comprised of \$100 million to the Consumer Financial Protection Bureau, \$35 million to the Office of Comptroller of the Currency, and \$50 million to the city and county of Los Angeles and that the bank refunded customers for fees they incurred on these accounts).

101. *Id.*

102. Tayan, *supra* note 97, at 2–3.

103. *Examining Wells Fargo's Unauthorized Accounts and the Regulatory Response: Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 114th Cong. 6 (2016) [hereinafter *Wells Fargo Hearing*] (statement of John G. Stumpf, Chairman/CEO, Wells Fargo & Co.). The terminated employees represented one percent of Wells Fargo employees working in retail branches, approximately ten percent of whom were at the manager level or above. *Id.* at 8, 18, 155. Acknowledging that employees may have created fake accounts before 2011, the date beginning the original review, Wells Fargo CEO John Stumpf said the company would expand its review of fraudulent accounts to include 2009 and 2010. *Id.* at 6; see Uri Berliner, *Wells Fargo Admits to Nearly Twice as Many Possible Fake Accounts—3.5 Million*, NPR (Aug. 31, 2017, 1:02 PM), <https://www.npr.org/sections/thetwo-way/2017/08/31/547550804/wells-fargo-admits-to-nearly-twice-as-many-possible-fake-accounts-3-5-million> [<https://perma.cc/KWS8-JWXD>] (finding that unauthorized accounts had been found as early as January 2009).

104. *Wells Fargo Hearing*, *supra* note 103, at 3 (detailing the amount of the pay package).

After the Senate's castigation, the company hired external counsel to conduct an independent investigation.¹⁰⁵ As a result, the CEO forfeited \$41 million and the Head of Community Banking forfeited \$19 million in outstanding unvested equity awards.¹⁰⁶ Two weeks later, the CEO resigned without explanation, received no severance, and reiterated his commitment to selling shares during the investigation.¹⁰⁷

At Wells Fargo's 2017 annual meeting, six of the company's fifteen directors resigned after receiving less than seventy-five percent support.¹⁰⁸ In addition to board changes, Wells Fargo continued to scrutinize its business practices. In August 2017, the company increased its estimate of the number of potentially unauthorized customer accounts to 3.5 million and issued an additional \$2.8 million in credits.¹⁰⁹ Concerned about "widespread consumer abuses," the following year, the Federal Reserve took the unprecedented action of placing a strict limit on the company's assets size.¹¹⁰ This limit blocked

105. Press Release, Wells Fargo, Independent Directors of Wells Fargo Conducting Investigation of Retail Banking Sales Practices and Related Matters (Sept. 27, 2016) [hereinafter *Wells Fargo Press Release*], <https://newsroom.wf.com/English/news-releases/news-release-details/2016/Independent-Directors-of-Wells-Fargo-Conducting-Investigation-of-Retail-Banking-Sales-Practices-and-Related-Matters/default.aspx> [<https://perma.cc/4EAN-KC5P>].

106. *Id.*

107. Tayan, *supra* note 97, at 3.

108. *Id.* at 5; Emily Glazer, *Wells Fargo Directors Face Shareholders' Ire*, WALL ST. J., Apr. 26, 2017, at A1; Press Release, Wells Fargo, Wells Fargo Announces Preliminary Voting Results of 2017 Annual Meeting (Apr. 25, 2017), <https://newsroom.wf.com/English/news-releases/news-release-details/2017/Wells-Fargo-Announces-Preliminary-Voting-Results-of-2017-Annual-Meeting/default.aspx> [<https://perma.cc/3CRY-P676>]. Average support in an uncontested director election is ninety-four percent. Tayan, *supra* note 98, at 7 n.41. According to Institutional Shareholder Services, over the ten-year period 2007–2016, approximately twenty-two directors per year among all S&P 500 companies received less than sixty percent support, on average. Glazer, *supra*.

109. Tayan, *supra* note 97, at 6. The increase in additional unauthorized accounts is due to the widespread scope of the review from January 2009 to September 2016 from the prior May 2011 to mid-2015. *Id.* at 7, n.42. The bank, however, noted that its estimate was conservative and likely included properly authorized accounts: "The analysis was data-driven and looked at account usage patterns. Since usage patterns of some authorized accounts opened with a customer's consent can be similar to some unauthorized accounts, it is likely that some properly authorized accounts were included in the population identified as unauthorized accounts." *Id.*

110. Press Release, Federal Reserve Board, Responding to Widespread Consumer Abuses and Compliance Breakdowns by Wells Fargo, Federal Reserve Restricts Wells' Growth until Firm Improves Governance and Controls. Concurrent with Fed Action, Wells to Replace Three Directors by April, One by Year End (Feb. 2, 2018) [hereinafter

the bank from growing past the \$1.95 trillion in assets it had at year-end.¹¹¹ The limit would remain in effect until Wells Fargo could demonstrate improvement in corporate controls.¹¹² As a result of the scandal, cities and states, including Chicago and California, suspended significant portions of their business with the bank.¹¹³

In April 2018, Wells Fargo agreed to a \$1 billion settlement with the Consumer Financial Protection Bureau and to pay \$480 million to settle security class action suits.¹¹⁴ In December 2018, the bank agreed to pay \$5.75 million to settle general consumer claims for cross-selling, auto lending, and mortgage lending violations with the fifty state attorneys general.¹¹⁵ In November of 2020, the SEC brought charges against leadership for misleading investors about key performance metrics.¹¹⁶

Once again, a story we have seen time and time again. A company is caught red-handed violating the law, acting differently in the shadows than what they purported with their public statements. The usual forgiveness campaign begins, the inevitable fines that follow, and did anything change in the end? Finance, like healthcare, is a heavily regulated industry.¹¹⁷ However, what makes healthcare different, is

FRB Press Release], <https://www.federalreserve.gov/newsevents/pressreleases/enforcement20180202a.htm> [<https://perma.cc/59J3-Q2WA>].

111. Steve Goldstein, *Fed Says Wells Fargo Isn't Allowed to Grow After Wave of Scandals*, MARKETWATCH (Feb. 3, 2018), <https://www.marketwatch.com/story/fed-hits-wells-fargo-after-scandals-says-bank-can-no-longer-add-assets-2018-02-02> [<https://perma.cc/886M-D5YK>].

112. *FRB Press Release*, *supra* note 110.

113. Elizabeth Campbell, *Chicago to Pull \$25 Million from Wells Fargo amid Scandal*, BLOOMBERG (Oct. 4, 2016, 12:00 AM), <https://www.bloomberg.com/news/articles/2016-10-03/chicago-to-pull-25-million-from-wells-fargo-because-of-scandal> [<https://perma.cc/X5Z4-CYML>] (noting additionally the Illinois Treasurer's announcement to suspend \$30 billion in investment activity for Wells Fargo); Michael Corkery & Stacy Cowley, *California Suspends Ties with Wells Fargo*, N.Y. TIMES (Sept. 28, 2016), <https://www.nytimes.com/2016/09/29/business/dealbook/california-wells-fargo-john-stumpf.html>; (reporting that California suspended Wells Fargo's "most highly profitable business relationships" in the state for at least one year).

114. Tayan, *supra* note 98, at 6.

115. *Id.*

116. Press Release, U.S. Sec. and Exch. Comm'n, SEC Charges Wells Fargo in Connection with Investment Recommendation Practices, (Feb. 27, 2020), <https://www.sec.gov/news/press-release/2020-43> [<https://perma.cc/TG2E-AE5E>].

117. See generally Patrick McLaughlin et al., *Regulatory Accumulation in the Financial Sector*, MERCATUS CTR. GEO. MASON UNIV. (Aug. 31, 2017), <https://www.mercatus.org/publications/regulation/regulatory-accumulation-financial-sector> [<https://perma.cc/3LZH-TEFD>] ("The finance and insurance sector is one of the

ultimately the collaboration and coordination of penalties by numerous regulating bodies, with penalties at unprecedented levels. In response to Wells Fargo, what we saw was well beyond the proverbial ‘slap on the wrist’ with accountability brought across all company levels. Executives, employees, and investors all shared some aspects of Wells Fargo’s pain. Does this concerted response present a template to help frame how to deal with future issues in healthcare?

IV. A MULTI-PRONGED APPROACH TO ACCOUNTABILITY

From these disparate responses to companies not living up to their publicly issued values and mission statements, we can begin to identify the criterion appropriate for an accountability framework. For the framework to be effective, it must have a clear goal. Here, we aim to instill a vision of change through a multi-prong system that imposes judicial, legislative, economic, and social “costs” to close the gap between companies’ publicly issued values and actual conduct. These costs are not the ultimate goals but tools to modify behavior, protect the public, and prevent further harm. While some companies may stray and make mistakes, this Response proposes putting them back on the right path by extending accountability beyond the company to include the individual stakeholders responsible for the behavior by imposing appropriate costs to motivate them to change. The extra step is to impose penalties that impact a wider range of stakeholders than those currently exposed. The goal is to widen the scope of stakeholders that feel the primary impact to create a secondary level of those who want to keep these companies in line.

As we saw in all three cases, when companies’ behavior diverges significantly enough from their public statements, civil and criminal remedies, when pursued, hold them legally responsible. However, as evidenced by Purdue’s continued conduct after its first indictment and EmCare’s continued billing practices in the face of the patient, investor, and insurer’s lawsuits, legal responsibility often falls short of accountability. Even more troubling is that in several instances, lawsuits are settled, pleas are made, and “legal responsibility” in admitting fault is often not part of the final agreement.

We chronicled three cases that, in disparate ways, illustrate how various costs were used to try and increase corporate accountability

biggest sectors in the US economy and one of the most heavily regulated by the federal government.”); CONG. RSCH. SERV., R44918, WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK 7–9 (2020) (giving an overview of the regulations that provide oversight for the financial industry).

where there is a gap between words and actions. The piecemeal judicial approach to the opioid epidemic failed to pierce the corporate veil to reach the board of directors, owners, or other individuals who profited from the action and actively perpetuated harmful business practices.¹¹⁸ The legislative action in response to surprise medical billing, while protecting consumers from ongoing harm, does little to hold the individual who implemented the business practices accountable—it merely makes it illegal to continue those practices.¹¹⁹

Similarly, legal action taken by shareholders confines the realm of accountability to the named defendants. The Wells Fargo example offered insight into increased accountability by extending beyond a piecemeal approach.

Our framework refines this fragmented approach to accountability in two fundamental ways. First, it adopts a coordinated approach that uses judicial, legislative, social, economic, and consumer costs to address the gap in a company's public statement and conduct. Next, the framework embraces that a company is composed of individuals—owners, a board of directors, shareholders, and employees. If accountability is only expected from the company but not all stakeholders, closing the gap between public statements and conduct will remain an elusive goal. Our framework recognizes that to be effective, accountability costs must be imposed on the individuals who took action or were complicit and those who should have taken a more proactive approach to monitoring the company and its actions. Using a coordinated variety of levers expands how individuals have something to lose.

An example of the impact we are looking to impose through our framework would be on longstanding Wells Fargo shareholder Warren Buffett's response to the bank's conduct. He was not happy with the impact that the bank's actions had on its shareholders and his position.¹²⁰ During an interview with CNBC, Buffet decried, "The shareholders are paying for something that didn't do them any good whatsoever."¹²¹ In the case of Wells Fargo, one of their most notable

118. *See supra* Part I.

119. *See supra* Part I.

120. Theron Mohamed, *Warren Buffet Slammed Wells Fargo's Fake-Accounts Scandal as a 'Total Disaster' After the Bank Agreed to a \$3 Billion Settlement*, BUS. INSIDER (Feb. 25, 2020, 10:48 AM), <https://markets.businessinsider.com/news/stocks/warren-buffett-calls-wells-fargo-account-fraud-total-disaster-settlement-2020-2> [<https://perma.cc/EP6C-JVJS>].

121. *Id.*

and longstanding shareholders was Warren Buffett.¹²² The coordinated effort and pressure felt from these negative actions had a significant effect and impact on a broad base of investors. In turn, Buffett took notice, and his remarks underscore that at the end of the day, the employees, executives, and the board of directors work for one group: their shareholders. The main goal of our framework is to create a wider base of stakeholders, and, finally, a more attentive group to hold these companies accountable.

A. *Pursuing Criminal Accountability*

Our multi-prong accountability framework begins with pursuing all available criminal remedies against all implicated stakeholders. While admittedly not a novel approach, it is sometimes neglected. For example, based on a four-year investigation, Justice Department prosecutors knew in 2006 that Purdue and the Sackler family were aware of “significant” abuse of OxyContin in the first years after the drug’s introduction in 1996 and concealed that information.¹²³ Despite knowing that OxyContin pills were being crushed, snorted, and stolen from pharmacies, Purdue company officials “continued . . . to market OxyContin as less prone to abuse and addiction than other prescription opioids.”¹²⁴

The prosecutors wanted to indict the top three Purdue Pharma executives on felony charges, including conspiracy to defraud the United States, that could have sent the men to prison if convicted.¹²⁵ However, top Justice Department officials in the George W. Bush administration did not support the move, and the government settled the case in 2007.¹²⁶ This failure to hold the company, top executives, and the Sackler family accountable allowed the opioid epidemic to rage for the twenty years and claim more than 500,000 lives.¹²⁷

B. *Pursuing Civil Accountability*

Pursuing civil remedies is another component of the accountability framework. Here, the emphasis is on lawsuits that will motivate a company to realign its business practices to its public statements. For

122. *Id.*

123. Meier, *supra* note 19.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Understanding the Epidemic*, CDC (Mar. 17, 2021), <https://www.cdc.gov/opioids/basics/epidemic.html> [<https://perma.cc/JPG8-N569>].

example, investors suing Envision's EmCare over its surprise billing practices prompted a legislative change.¹²⁸ In addition, to promote full access to civil remedies, bankruptcy loopholes, like those the Sackler family used to shield their assets against future litigation, should be closed.¹²⁹

C. *Legislative Accountability*

Beyond criminal and civil features, the framework draws on legislative measures to hold companies to account. The No Surprises Act forces companies such as Envision to change their practices. This legislative component of the framework is effective because, unlike criminal remedies that focus on the guilty party, the Act focuses on the public. Holding companies accountable by requiring them to comply with laws focused on protecting the public, like the patient bill of rights and airline passenger bill of rights, is absent in a lawsuit-centered approach.¹³⁰

128. Les Masterson, *Investors Sue Envision Healthcare After Surprise Billing Reports*, HEALTHCARE DIVE (Aug. 13, 2017), <https://www.healthcaredive.com/news/investors-sue-envision-healthcare-after-surprise-billing-reports/449185> [<https://perma.cc/GW4Y-4HHL>]; see *supra* Part II.

129. Sujeet Indap, *Purdue's Bankruptcy Deal Shields Sackler Family Owners from Future Opioid Liability*, FIN. TIMES (Aug. 8, 2021) <https://www.ft.com/content/f0d6f014-dfa1-4d93-a11b-d9ede668be11> (stating that a provision within US bankruptcy law known as non-debtor releases shields third parties from future civil lawsuits even if third party has not filed for bankruptcy themselves); see also, Press Release, Elizabeth Warren, Senate, Warren, Nadler, Durbin, Blumenthal, Maloney Announce Legislation to Eliminate Non-Debtor Releases, Prevent Corporations and Private Entities From Escaping Accountability In Bankruptcy Proceedings (July 28, 2021), <https://www.warren.senate.gov/newsroom/press-releases/warren-nadler-durbin-blumenthal-maloney-announce-legislation-to-eliminate-non-debtor-releases-prevent-corporations-and-private-entities-from-escaping-accountability-in-bankruptcy-proceedings> ("This loophole in bankruptcy law has increasingly been used by bad actors who have not filed for bankruptcy to escape personal accountability for their actions by shielding themselves through a bankruptcy proceeding of another corporation or entity.").

130. *Patient's Bill of Rights*, CTRS. FOR MEDICARE & MEDICAID SERVS. <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/Patients-Bill-of-Rights> [<https://perma.cc/8QTP-FZ9U>]; S. 2341, 116th Cong. 2019 (providing private right of action for passengers aggrieved by airline actions and increasing civil penalties on air carriers for violations of passenger protections).

D. Social and Economic Accountability

The final component of the framework holds companies accountable by exerting social and economic pressures on the company and stakeholders. In the Wells Fargo case, California and Illinois severed their relationship with the bank.¹³¹ The financial impact of these moves was devastating. For example, over 18 months, California had done about \$1.65 billion worth of trades.¹³² However, after California ended its relationship with Wells Fargo, the bank lost that trading revenue¹³³ as well as an estimated \$800 million because California no longer buys its debt securities from Wells Fargo.¹³⁴ Finally, because California, the country's largest issuer of municipal debt, no longer uses Wells Fargo to underwrite bonds, the bank lost millions of dollars in banking and underwriting fees.¹³⁵

In response to the Sackler family's role in the opioid epidemic, their name was removed from the Louvre and Tufts University.¹³⁶ As part of the bankruptcy agreement, the Sackler family is barred from putting their name on buildings, hospitals, or other institutions to which they donate money.¹³⁷ In addition, the bankruptcy agreement requires the Sackler family to relinquish control of two private charitable foundations that hold \$175 million in assets.¹³⁸

131. Corkery & Cowley, *supra* note 113 (California); Campbell, *supra* note 113 (Illinois).

132. Jeffrey Pilcher, *Wells Fargo Hits Rock Bottom in Wake of Cross-Selling Debacle*, FIN. BRAND (Nov. 1, 2016), <https://thefinancialbrand.com/61952/wells-fargo-cross-selling-switching-accounts> [<https://perma.cc/M3YQ-JXHW>].

133. *Id.*

134. Merrit Kennedy, *California Imposes Sweeping Sanctions on Wells Fargo amid Scandal*, NPR (Sept. 28, 2016, 7:06 PM), <https://www.npr.org/sections/thetwo-way/2016/09/28/495843612/california-imposes-sweeping-sanctions-on-wells-fargo-amid-scandal> [<https://perma.cc/J37R-M4DP>].

135. Corkery, *supra* note 113.

136. Elizabeth A. Harris, *The Louvre Took down the Sackler Name. Here's Why Other Museums Probably Won't.*, N.Y. TIMES (July 18, 2019), <https://www.nytimes.com/2019/07/18/arts/sackler-family-museums.html>; Kate Taylor, *Sackler Family Members Fight Removal of Name at Tufts, Calling it a 'Breach'*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2019/12/19/us/sackler-opeioids-tufts.html>.

137. Leslie Albrecht, *Sackler Family Banned—Temporarily—from Putting Their Name on Buildings as Part of \$4.5 billion Opioid Settlement*, MARKETWATCH (July 13, 2021), <https://www.marketwatch.com/story/sackler-family-banned-temporarily-from-putting-their-name-on-buildings-as-part-of-4-5-billion-opioid-settlement-11625857196> [<https://perma.cc/R443-234G>].

138. *Id.*

CONCLUSION

Holding companies accountable when they fail to deliver on their publicly issued statements should not be daunting or difficult. It should be expected that a company can be trusted to do what it says it will do. This Response proposes a framework that incorporates Perry and Fort's concept. Our framework posits that accountability extends beyond traditional legal liability. This expanded view is critical to fill the gaps between public statements and accountability with stakeholders. The framework broadens the definition of stakeholders to clearly identify social, judicial, regulatory, and governmental levels to require accountability from more stakeholders. The gaps exposed in this Response are not oversights. Rather, they are significant areas of exposure to companies that fail to meet their obligations.

As discussed in the Wells Fargo example, the number of people impacted increased. The shareholders were not creating the fake accounts. However, they neglected to ask the questions. What accountability should they bear for turning a blind eye to actions that could have been prevented? They have a vested interest, which we argue comes with a corresponding responsibility. We propose to cast a net to a larger group of stakeholders who will feel the impact of these negative actions. Effectively holding everyone involved accountable to perform according to their public statements requires a framework to motivate companies to realign their behavior to fulfill their responsibility to patients, investors, and the public. Fines and criminal charges alone are not enough. Our proposed framework takes a critical step in exploring a more robust accountability approach.