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## **Is Today's Attempt At A Public Nuisance "Super Tort" The Emperor's New Clothes Of Modern Litigation?**

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# Commentary

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## Is Today's Attempt At A Public Nuisance "Super Tort" The Emperor's New Clothes Of Modern Litigation?

by  
**Philip S. Goldberg**

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### Introduction

Over the past fifty years, there has been a concerted effort to turn the centuries-old tort of public nuisance into a cutting-edge "super tort" that would allow local and state governments to impose immense liability on businesses over some of the weightiest political, social and environmental matters of the day. This effort has gained steam in the last ten years, not because the liability theories have proven valid in the courts, but because of a belief the litigation can be leveraged to drive massive settlements even when traditional tort requirements cannot be met.

In these cases, state and local governments are the plaintiffs because they have unique standing to bring public nuisance claims. However, the litigation is usually developed, funded and waged by political activists and private lawyers seeking to advance a policy agenda or collect contingency fees—or both. Suing for the government gives them the veneer of acting in the public interest, which they use against the corporate defendants with the public to help drive settlement.

Most of the new cases can be broken down into two categories. Some are wielded as political tools for imposing policy objectives that are legislative or regulatory in nature. By going to the courts, the activists

seek to avoid the checks and balances of the other branches of government. The most notable of these litigations target the fossil fuel industry. Environmentalists frustrated with Congress and the Environmental Protection Agency for not adopting certain climate policies are teaming with governments to sue oil and gas manufacturers to get courts to regulate greenhouse gas emissions or impose a carbon penalty. These lawsuits have been termed "regulation through litigation."

The other type of public nuisance cases are often referred to as "deep pocket jurisprudence."<sup>1</sup> Governments file public nuisance actions against a company or industry seeking money to pay for social programs, environmental clean-ups or other government expenditures. The most prevalent of these cases today are the spate of lawsuits against pharmaceutical manufacturers, distributors and pharmacies for costs related to treating opioid abuse. Other suits have targeted companies to remove lead paint from older homes and chemical manufacturers to pay for clean-ups of contamination that were not their fault. The governments try to blame the manufacturers even when the manufacturers did not cause the contamination, the chemicals were sold decades earlier, and the products had, and in some cases continue to have, important societal benefits.

In of these situations, the products were legal when sold. Sometimes, the risks at issue were not fully appreciated. Other times, certain risks were known by the manufacturers, governments and others, but the products offered countervailing value to society. Either way, the governments argue the companies should be

liable for selling a product that caused harm. They say the product's price should incorporate its "true" cost to society and those who profited from the products should pay their share for harms caused by them. Traditional liability principles—wrongdoing, proximate causation and a product's utility—take a back seat to their policy agenda or desire for revenue.

This article analyzes trends in today's public nuisance litigation. It shows that, as a legal theory, this litigation has largely failed and continues to do so. Last year, the Oklahoma Supreme Court joined the Illinois, Rhode Island and New Jersey high courts, among others, in categorically rejecting the use of public nuisance for these purposes. This year, more courts have issued similar rulings. Yet, public nuisance litigation continues to proliferate, often in conjunction with public relations efforts against the defendants to raise the businesses stakes of the litigation, drive settlement or get an occasional trial court victory. But at what cost to justice and society?

### **I. Public Nuisance: A Long History of Protecting Against Local, Unlawful Disturbances to Public Land and Waterways**

The tort of public nuisance has a long history in American and English common law, with thousands of court decisions establishing what does and does not constitute a public nuisance.<sup>2</sup> In short, public nuisance is a tort governments can use to stop local disruptive activities that are unlawfully interfering with the public's right to use communal property. The quintessential public nuisance is when something is dumped onto a roadway that blocks the public's use of that road or point source pollution interfering with the use of a river.<sup>3</sup> The court has two remedies it can provide in these cases: make the person stop causing the public nuisance and require the person to abate the harm caused to the communal property.

Over the centuries, courts developed four elements for proving a public nuisance claim: (1) the existence of a public right; (2) unlawful interference with that public right; (3) proximate causation of the public nuisance; and (4) control over the nuisance.<sup>4</sup> The tort remained largely stable and unexciting for much of American jurisprudence.

This changed in the 1970s when the Restatement (Second) of Torts was being drafted. Some environ-

mental lawyers sought to expand the types of conduct that could lead to public nuisance liability. They wanted such liability to attach to any conduct, even when lawful and regulated, so manufacturers and others commercial actors could face broad-based liability whenever people created social or environmental harm with their products or services. Suing individual wrongdoers one-by-one would be inefficient, whereas the presumed "deep-pocketed" manufacturer could address the issue on a macro level. So, they set out to change the purpose and elements of the tort.<sup>5</sup>

Specifically, they tried re-defining "public right" from the right to use public roads and waterways to anything in the public interest. They wanted to get rid of the wrongful conduct requirement so that lawful, beneficial activities and products could give rise to public nuisance claims. They sought to dilute causation to just contributing to the risk that harm may occur. And, they asked courts to add to the available remedies, namely monetary damages for government services.

Most courts greeted these new public nuisance lawsuits with appropriate skepticism. The first test case was *Diamond v. General Motors Corp.*,<sup>6</sup> where plaintiffs sued scores of companies alleged to have contributed to smog in Los Angeles for injunctive relief, compensatory damages and punitive damages. The California court rejected the claim as being far outside the boundaries for public nuisance law, explaining that what the plaintiffs really wanted to do was regulate business activity: "Plaintiff is simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this county, and enforce them with the contempt power of the court."<sup>7</sup>

The 1980s saw the first attempts to use public nuisance to sue product manufacturers over products that had inherent risks and were lawful when sold. Governments and schoolboards filed public nuisance claims to try to make manufacturers pay to remove asbestos and PCBs from buildings and the environment. Again, courts held these allegations were not supported by public nuisance law. They explained that manufacturers "may not be held liable on a nuisance theory" for product-based harms; product liability law governs those risks. Public nuisance is only about stopping people from engaging in activities that are unlawfully interfering with public roads and waterways.

The courts held that if a public nuisance is created with a product, the legal claim “may only be alleged against one who is in control of the nuisance creating instrumentality.”<sup>8</sup> So, say someone blocks a public road by spilling thousands of nails across the roadway. That person is solely responsible for the public nuisance—not the company that manufactured the nails. Otherwise, the courts said, manufacturers of products would be liable whenever someone uses its product to cause a public nuisance regardless of the manufacture’s “degree of culpability.”<sup>9</sup>

The *City of Bloomington v. Westinghouse Electrical Corp.*<sup>10</sup> illustrates this point. Westinghouse was charged with releasing PCBs-containing waste into Bloomington, Indiana’s sewers and landfills. In addition to suing Westinghouse, the city named PCB manufacturer Monsanto in a public nuisance action to abate the PCBs from the land and water. The U.S. Court of Appeals for the Seventh Circuit dismissed Monsanto from the case, explaining that once Monsanto sold the PCBs to Westinghouse, “Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product.”<sup>11</sup>

Yet, despite these failures and the clarity and uniformity in which the courts spoke, some lawyers continued to try to find ways to expand the boundaries of public nuisance law.

## II. Tobacco, Guns and Lead Paint: The First Sustained Wave of Pure Product Public Nuisance Cases

The first “watershed” moment for expanding public nuisance law came in tobacco litigation. In the 1990s, state attorneys general sued manufacturers of tobacco products for reimbursement of state expenditures for Medicaid and other medical programs for smokers. Public nuisance was one of several causes of actions used in the litigation even though the allegations were not tied to public rights to land or water and the governments were not seeking injunctive relief or abatement of any public nuisance. Rather, the states said public nuisance law should allow them to recover monetary damages for the costs of treating individuals because the cases raised matters of public health.

What many people do not realize is that when this novel framing of public nuisance law was tested in

court it was rejected. A federal district court in *Texas v. American Tobacco Co.*<sup>12</sup> explained, “The overly broad definition of the elements of public nuisance urged by the State is simply not found in Texas case law.”<sup>13</sup> Yet, the larger litigation settled for about \$250 billion, and the use of public nuisance became a misleading part of the litigation’s lore.

Soon after, some lawyers were strategizing over suing the firearms industry for costs associated with gun violence, largely as a means of regulating the industry through the courts. The architects behind this litigation acknowledged that public nuisance theory had “legal problems” and “never [won] in court,” but believed they could replicate the use of it in tobacco litigation as a “vehicle for settlement.”<sup>14</sup> Again, the alleged public nuisance was not a condition inhibiting the public’s use of land or water, but marketing practices that were alleged to interfere with public safety.

At the same time, lawyers suing former manufacturers of lead pigment and paint for injuries caused by old paint in homes turned to public nuisance after their product liability claims repeatedly failed. The lead paint industry had effectively taken lead out of interior paint in 1955, and Congress banned residential lead paint in 1978. Nevertheless, in 1999, private lawyers teamed with local and state governments to sue the remaining lead pigment and paint companies to pay the costs of abating lead paint from people’s homes. These claims focused on private properties, not public land or water use, but alleged the collective impact of lead poisoning interfered with public health.

Over the next decade, a body of case law developed in response to the firearm and lead paint cases. Their applications of public nuisance law was accepted by a few courts, but rejected by most. Key rulings came in the Supreme Courts of Illinois,<sup>15</sup> Rhode Island,<sup>16</sup> New Jersey<sup>17</sup> and Missouri,<sup>18</sup> as well as mid-level appellate and federal district courts around the country. The Rhode Island high court summed up its ruling best when it stated that “public nuisance law simply does not provide a remedy for this harm.” Here are the key reasons why:

**Public Right.** The term “public right” refers to something very specific, *i.e.*, the right of the public to use a shared government resource, namely a public road,

communal space, or waterway. A public nuisance is a dangerous condition that is interfering with the public's ability to use that resource. This concept of "public right," therefore, does not include general notions of public health or safety, including the right to be free from gun violence or lead poisoning.

The Supreme Court of Illinois explained that this definition limits the situations where the tort can be used: "we do not intend to minimize the very real problem of violent crime and the difficult tasks facing law enforcement and other public officials," but there is no "public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm."<sup>19</sup> These risks may invoke private rights or may become matters of public interest, the court continued, but they are not public rights for the purpose of applying the elements of public nuisance law.

For this reason, personal rights or injuries cannot be converted into public rights. Blocking a private driveway cannot be the basis for a public nuisance claim—no matter how many private driveways are blocked. There is no public right to use private driveways. The Connecticut Supreme Court explained it well, saying the inquiry that courts must ask is whether a person exercising a common right, such as the right to use a public road, *would encounter* the nuisance.<sup>20</sup> If so, the public nuisance exists; it does not matter whether anyone is injured by it. Thus, harms to individual people or private properties are completely different from harm to a communal right.

**Unlawful Interference.** Public nuisance also requires a specific type of misconduct: the person must be engaging in an unlawful activity when interfering with the public right. Blocking a public road as part of an illegal protest may be a public nuisance; blocking the road because one's car broke down or as part of a government contract to work on the road is not. Historically, the type of misconduct associated with public nuisance has been quasi-criminal in nature, such as vagrancy or illegally dumping pollutants in a river. These activities have no redeeming qualities, are highly localized, and interfere with an identifiable public resource. Courts have been clear that unless one engages in such misconduct, he or she cannot be liable for a public nuisance—even if one exists.

For these reasons, selling a product or engaging in a business activity licensed by the government does not create public nuisance liability—even if the product or activity comes with a risk of harm. As the New Jersey Supreme Court stated, "In public nuisance terms . . . the conduct of merely offering an everyday household product for sale" does not "suffice for the purpose of interfering with a common right as we understand it."<sup>21</sup> Said another court: "the role of 'creator' of a nuisance, upon whom liability for nuisance-caused injury is imposed, is one to which manufacturers and sellers seem totally alien."<sup>22</sup> Public nuisance is an activity, not manufacturing based tort.

**Proximate Cause:** The defendant's conduct must have proximately caused the public nuisance. The Rhode Island Supreme Court made clear that the causation requirement for public nuisance is the same as any other tort case: "Causation is a basic requirement in any public nuisance action. . . . In addition to proving that defendant is the cause-in-fact of an injury, a plaintiff must demonstrate proximate cause."<sup>23</sup> In product cases, the alleged health, safety or environmental issue is often caused by acts of third parties—sometimes criminal acts. Landlords who allow lead paint on their properties to decay are the cause of lead poisoning, criminals who use guns for illegal purposes are the cause of gun violence, and those who improperly dispose of chemicals are the cause of contamination—not manufacturers. These intervening acts cut off proximate cause.

Because traditional causation standards cannot be met in these cases, government plaintiffs have asked courts to lower causation standards for government public nuisance cases. They want to subject companies to liability for merely contributing to the risk of harm or suggest that the chain of commerce is a viable substitute for the chain of causation. The courts have properly rejected these efforts. As the Missouri Supreme Court stated, "To the extent the city's argument is that the Restatement requires something less than proof of actual causation or should replace actual causation in a public nuisance case, it is incorrect."<sup>24</sup> Otherwise, other courts have noted, people would frame a case "as a public nuisance action rather than a product liability suit"<sup>25</sup> in order to lower liability standards.<sup>26</sup> Liability law does not allow such work-arounds.

**Control:** A defendant must have *control* over the instrumentality causing the public nuisance at the time

the nuisance is created.<sup>27</sup> Control has long been a “basic element of the tort.”<sup>28</sup> As the New Jersey Supreme Court made clear, “a public nuisance, by definition, is related to conduct, performed in a location with the actor’s control.”<sup>29</sup> When it comes to product cases, courts have explained that “the manufacturer or distributor who has relinquished possession by selling or otherwise distributing the product” does not control the product when the nuisance is created.<sup>30</sup>

**Remedies:** Finally, courts held that governments are not allowed to get monetary damages, including for assisting residents deal with *effects* of a public nuisance. The only remedies available to governments are injunctive relief to make the person stop causing the public nuisance and abatement to make the person remediate the public nuisance. This makes sense. The government’s job is to protect the ability of its people to use the right of way. Once the nuisance has been cleared, this responsibility has been met. If an individual person has sustained a personal injury or harm to his or her property from the public nuisance, then he or she can sue for his or her own damages.

In addition to setting these doctrinal boundaries, courts have expressed significant concern with the impact of allowing claims that do not adhere to these traditional elements. Public nuisance liability does not hinge on whether the risks were known or knowable or whether the effects of the use, misuse or improper disposal of the product created significant local, national or even international matters of public interest. As the Illinois Court of Appeals explained, “Plaintiff is attempting to do what [the law] forbids: making each manufacturer the insurer for all harm attributable to the entire universe of all” of the products produced and sold.<sup>31</sup>

The New Jersey Supreme Court agreed: “were we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance.”<sup>32</sup> Echoed a New York Appellate Division court: “All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nui-

sance claim would be conceived and a lawsuit born.”<sup>33</sup> In light of these decisions, the effort to turn public nuisance into a “super tort” seemed dead.<sup>34</sup>

### III. A Turning Point for Expansive Public Nuisance Claims? How California Courts Breathed New Life in the Decades-Long Pursuit of a “Super Tort”

On a few occasions over the past forty years, local courts have broken with traditional public nuisance law in allowing cases like these to proceed. Often, the courts were frank in their desire to deal with the political, social or environmental issue at hand even though the claims did not fit the purpose or elements of the tort. For example, in the Rhode Island lead paint case, the trial court initially allowed the case to go to trial, saying it wanted to do something about childhood lead poisoning. Generally, when lower courts issued such rulings, state high courts reined them in.

A notable exception occurred with the lead paint litigation in California. The California Supreme Court declined to grant review when its lower courts adopted some of the same misconceptions of public nuisance law that had been broadly rejected by courts around the country, including by the state Supreme Courts in Rhode Island, New Jersey, Illinois and Missouri. This denial of review was surprising because the case had been before the Supreme Court on procedural issues earlier in the litigation, had been a major topic of legal discourse in California for twenty years, and adopted expansions of liability law that were unprecedented.

As in Rhode Island, the trial court said its focus was on not turning “a blind eye” to lead poisoning, not on legal precedent.<sup>35</sup> It said its ruling was intended to “protect thousands of lives,” which could be done only if the former manufacturers gave the governments the “resources to effectively deal with the problem.” Accordingly, when the plaintiffs could not show that the defendants acted wrongfully when lead-based paint was sold, the court changed the test and applied a “contemporary knowledge” standard. When the state could not prove proximate causation, the trial court held that the companies could be liable *without requiring* plaintiffs to “identify the specific location of the nuisance or a specific product sold by each such Defendant.”

A California Court of Appeal affirmed these legal shortcuts.<sup>36</sup> Specifically, it held that matters of public health could satisfy the public right requirement, that promoting a product with actual or constructive knowledge of its risks was sufficient conduct for imposing public nuisance liability, and the three remaining defendants would have to abate lead paint from homes across the state, regardless if any of them sold the paint that was in a particular home. It then approved the establishment of an abatement fund to which the companies would contribute.

Even though the Court of Appeal stretched these elements of public nuisance beyond recognition, it was right about one thing: local governments cannot receive monetary damages in public nuisance cases, just injunctive relief and abatement. “An abatement order is an equitable remedy,” and its “sole purpose is to eliminate the hazard that is causing prospective harm.”<sup>37</sup> Thus, at least the court reinforced that government public nuisance claims are solely about abating the nuisance, not paying governments to mitigate the impact of the alleged nuisance on its citizens.

An interesting, largely untold, side story developed in the establishment of this abatement fund. The trial court initially ruled the defendants had to pay \$1.15 billion into the abatement fund, but the case settled for \$305 million. Why? In the interim, the court ruled that neither the private law firms nor the government in-house law departments could receive contingency fee payments from the abatement fund; those funds could be spent only on abating the alleged nuisance.<sup>38</sup> So, they offered to settle the case for much less, with side payments for legal fees. A cynic might suggest that their legal fees were more important to them than hundreds of millions of dollars of abatement.

Regardless, the case’s success created the next watershed moment for this new type of public nuisance litigation. Public nuisance soon became the tort *du jour* for a variety of government lawsuits funded by private interests seeking money for social, political or environmental matters—from climate change to COVID-19. The lawsuits largely followed the California model: companies should be liable for making money selling a product that had knowable risks, and now that those risks have materialized, the companies should have to pay their “share” to remediate the harms. Causation and the other elements of public nuisance law be damned.

#### **IV. The Modern Wave of Expansive Public Nuisance Litigation: The Use of Mass Filings and Public Relations to Drive Settlement and Avoid Appellate Review**

Many of today’s public nuisance cases resemble vigilante litigation—not justice. Private activists and lawyers, along with their government clients, try to leverage the dynamics and inefficiencies of the civil justice system. They also know that manufacturers of consumer products covet their brand reputations and do not want to be seen as culpable for any social problem. By adding more filings and publicly blaming the defendants for the underlying problems—often irrespective of the factual or legal merits—they can drive up the stakes of merely litigating the cases. Their goal is to use these tactics to pressure the companies to settle claims before they can be appealed. Few companies have the fortitude to see these cases to their rightful conclusion.

The climate litigation campaign has been at the forefront of this model. Architects of the litigation include private foundations, academics, media consultants, and for-profit lawyers. They convened in California in 2012 to brainstorm on how to package public nuisance lawsuits against energy producers to achieve climate policy goals, including penalizing the use of fuel.<sup>39</sup> The U.S. Supreme Court had just struck down the first attempt at using the courts to regulate energy in *American Electric Power v. Connecticut*.<sup>40</sup> The advocates talked through legal strategies and “the importance of framing a compelling narrative.” They said “naming” the campaign could help generate “outrage” and create “scandal,” which they hoped would delegitimize the companies politically.<sup>41</sup>

The first of these lawsuits was filed in 2017. Reports have shown the foundations are paying the lawyers, consultants and supporters to wage the litigation.<sup>42</sup> In all, some two dozen governments have signed up for the litigation so far. They acknowledge, at least outside of the courts, that this litigation campaign is intended to regulate the production, sale and use of fossil fuels. One of the first lawyers to file such a lawsuit told a reporter that they were using this litigation “to accomplish what politicians won’t do.”<sup>43</sup> Other lawyers have echoed this comment, saying that imposing the costs of climate adaptation on energy production and use will allow them to get around Congress’s unwillingness to “raise the price” of fuel so the impacts of climate

change will “get priced into” the gas and electricity.<sup>44</sup> It is their way of holding “consumers responsible” for climate change.<sup>45</sup>

The lawyer who represents most current climate plaintiffs has also discussed the importance of public relations to the litigation. In an effort to sway judges and public opinion, he has tried to scandalize the fact that companies knew about potential risks of climate change—something known by governments around the world—and still produced fossil fuels. “If you look at the media roll out for the cases we have filed so far, it’s been amazing,” he said during a presentation at the UCLA Emmet Institute on Climate Change & the Environment.<sup>46</sup> “Stories in the *New York Times*, *Washington Post*, *NPR*... And I will tell you that while we did not write any of those stories, it is not just by happenstance. A lot of work goes into it by some very smart people.”

The litigation is still in its early stages, with the U.S. Supreme Court considering whether to grant a Petition for Certiorari to help determine whether the cases should be heard in state or federal court. So, no court has weighed in yet on whether public nuisance is a viable tort for making any company or industry liable for climate change, particularly given the many other causes of climate change and the impact on energy prices of allowing the litigation. But, it is already clear that their goal is not to prove the elements in court. As one attorney said, they were hoping by getting 10 or 15 cities to sue, it would put “pressure” on the companies to agree to a “massive settlement.”<sup>47</sup>

Opioid public nuisance litigation has followed a similar pattern, though this litigation has led to settlements as a result of these tactics and the willingness of a few trial judges to allow the claims to survive a motion to dismiss and proceed to trial. In these lawsuits, thousands of state and local governments have sued manufacturers, distributors and pharmacies over the costs associated with treating and fighting prescription drug abuse in their communities. The lawyers in this litigation are echoing themes of the early litigation against firearm manufacturers in hopes of circumventing the responsibility of individual wrongdoers. In short, they are blaming companies that sold opioid medications for creating a marketplace in which abuse can arise.

Accordingly, the pleadings and press releases often try to create culpability in the minds of the public, not

put forth facts meeting elements of a public nuisance claim. Richard Scruggs, a renowned former plaintiffs’ attorney, explained this tactic early in the litigation, saying states should focus only on “who should pay as between the general public and the industry whose otherwise legal products caused the epidemic.”<sup>48</sup> He said success “will depend upon whether the plaintiffs can muster sufficient legal, political and public relations pressure to force a settlement.”

Adding to this pressure is the fact that several trial judges have allowed the cases to proceed, either to trial or to force settlement, regardless of whether the allegations satisfy the elements of public nuisance law. The judge administering the federal multi-district litigation (MDL) was candid about his goals in the first MDL hearing. He said his focus was not on “figuring out the answer to interesting legal questions,” but to “do something meaningful” about prescription drug abuse: “we need some treatment” not “a lot of briefs and we don’t need trials.”<sup>49</sup> In a related case, he acknowledged the claims “do not fit neatly into the legal theories.”<sup>50</sup> But, he still certified “a new form of class certification entitled ‘negotiation class certification’” to promote settlement.<sup>51</sup>

The first opioid public nuisance case to go to trial was in Oklahoma, where the attorney general sued three companies that made, marketed, or sold opioids to pay for all treatment programs in the state. The state settled with Purdue Pharma for \$270 million and Teva Pharmaceuticals for \$85 million. Johnson & Johnson chose to defend itself. It explained that Oklahoma’s public nuisance law governs local land-based disturbances, not manufacturing, marketing, or selling a lawful product. In allowing the case to go to trial, the court set aside this precedent, stating nothing “requires the use of or a connection to real or personal property.”<sup>52</sup> After a bench trial, the court issued a \$465 million verdict,<sup>53</sup> which, as discussed below, the state high court later overturned.

Some of the trial courts hearing other public nuisance cases in recent years have taken similar shortcuts. In allowing an opioid case to go to trial, a New York court held proximate cause does not apply to public nuisance claims.<sup>54</sup> A Pennsylvania trial court allowed a public nuisance claim against a chemical manufacturer, stating the manufacturer should have known the lawful product “would inevitably” escape—despite

precedent that foreseeability of a risk does not create public nuisance liability.<sup>55</sup> And, an Illinois court allowed a public nuisance claim against a fast food restaurant over COVID-19, saying the court, not just public health authorities, could decide which precautions the restaurant should take.<sup>56</sup>

These cases have sparked a robust debate, with some legal commentators applauding the new public nuisance cases and others cautioning against them. Professor David Dana of Northwestern University Pritzker School of Law has articulated the pro-litigation view well, saying that public nuisance lawsuits should be seen as a valid replacement for “regulatory failure and inaction.”<sup>57</sup> His view, shared by New York University School of Law Professor Catherine Sharkey<sup>58</sup> and others, is that courts should be open to regulating through public nuisance litigation “notwithstanding the democratic legitimacy and technological competence objections.”<sup>59</sup> Courts should govern given the impasse in Congress and the Executive branch on many of important issues.

Professors John Goldberg and Ben Zipursky, at Harvard Law School and Fordham University Law School respectively, have cautioned otherwise.<sup>60</sup> “[T]hese suits should fail because they do not fall within the concept of public nuisance as courts have deployed it, and because the admittedly grave problems they aim to address are of a very different kind than those which the law of public nuisance is well suited to address.”<sup>61</sup> “Thinking that one can use clever manipulation of open-ended terms like ‘public right’ and historical oddities like the public nuisance doctrine to solve social problems related to the sale of guns, tobacco, and now opioid-based pharmaceuticals is not part of the solution. It might even be part of the problem.”<sup>62</sup>

Professor Michelle Richards of the University of Detroit Mercy School of Law expounded on this last point, stating even positive public policy changes driven by these lawsuits are “at risk because of a lack of confidence in the manner in which that impact of change came about.”<sup>63</sup>

## V. Most Courts Have Continued the Systematic Rejection of the New, Expanded Public Nuisance Claims

So far, despite the impression one might have from the daily media drumbeat these lawsuits generate, most courts have rejected these new public nuisance lawsuits and have reinforced the longstanding tenets of the tort.

The Oklahoma Supreme Court is the only state high court to issue a ruling in an opioid case, and as alluded to above, it held in a 5-1 ruling that the state’s public nuisance statute does not apply to manufacturing, marketing, and selling products.<sup>64</sup> The court was clear that “[p]ublic nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap.” It continued that “[a]pplying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers.”

The court then looked at the elements and remedies of public nuisance actions, concluding there is no public right to be free from opioid addiction and any public nuisance caused by opioid abuse would occur at the local, not manufacturing level. The court also reiterated that monetary damages for treating opioid addiction is not a remedy governments can seek. The purpose of public nuisance litigation is to stop and remediate a public nuisance, and “opioid use and addiction[] would not cease to exist even if the defendant pays for the abatement plan.”<sup>65</sup>

Many other courts have reached these same conclusions, including federal courts in West Virginia, Illinois and New York, and state trial courts in Delaware, North Dakota, South Dakota and California. Some of the cases (West Virginia, North Dakota, South Dakota and California) also involved opioid abuse.<sup>66</sup> The Illinois case involved a federally approved product used by farmers to protect crops.<sup>67</sup> And the New York and Delaware cases focused on the whether product manufacturers can be subject to liability for selling products with inherent environmental risks because those products escaped into the environment, including at the hands of third parties.<sup>68</sup>

The courts made several points reinforcing the longstanding tenets of public nuisance law:

First, public nuisance does not apply to “the marketing and sale” of a product, only the “misuse, or interference with, public property or resources.”<sup>69</sup> In the environmental cases, after the manufacturer “introduce[s] into the stream of commerce through lawful sales a lawful product,” it is not responsible for a public nuisance created with its products.<sup>70</sup> It “does not carry on the nuisance-creating activity and neither controls nor directs the nuisance-creating activity.”<sup>71</sup>

Second, public nuisance liability does not hinge on whether the product or activity is associated with risks or the company knew or should have known of those risks. As one court stated, it is not sufficient to allege the company “knew of the dangers” but “failed to tackle the problem.”<sup>72</sup> A manufacturer is not liable for choosing to carry out its daily business activities. Otherwise, another court added, this theory could be used “against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product.”<sup>73</sup>

Third, governments cannot recover monetary damages in public nuisance actions. In many of these new cases, governments are not seeking relief from any public nuisance—just money to deal with the *effects* of a social, political or environmental problem. As one court explained, “the distinction between abatement of nuisances and recovery of damages for injuries . . . is both apparent and vast.”<sup>74</sup> Monetary awards—“whether styled as damages or abatement damages—is not properly an element of equitable abatement relief.” Governments cannot “seek damages for their alleged injuries rather than abatement of any true public nuisance.”<sup>75</sup>

Finally, in issuing these rulings, many of these courts joined the chorus of concerned courts cautioning against converting the tort of public nuisance into a “super tort.”

The phrase “opening the floodgates of litigation” is a canard often ridiculed with good cause. But here, it is applicable. To apply the law of public nuisance to the sale, marketing and distribution of products would invite litigation against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product. . . . If suits of this nature were permitted any product that involves a risk of harm would be open to suit under a public nuisance theory regardless of whether the product were misused or mishandled.<sup>76</sup>

These jurists understood, like the courts a generation ago, that “[t]o permit otherwise would risk letting everyone sue almost everyone else about pretty much everything that harms us.”<sup>77</sup> They have acknowledged

that “it might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money. . . . But it’s bad law.”<sup>78</sup>

## VI. Conclusion

The effort by some to expand public nuisance litigation to create liability over the production, sale and use of legal products is not a proper use of our courts of law. The plaintiffs’ mantra that the companies “must have done something wrong,” “they knew better” or “they can afford it” are not acceptable principles of liability law. Many of these products and activities are already governed by a regulatory regime to manage their risks. Sometimes that regulatory regime will result in banning a product, but that does not mean a company is liable in public nuisance law for selling the product when it was legal to do so.

Further, these litigations can actually undermine, not advance, the political, social or environmental issues the cases raise. Courts have limited tools. They can look at only a small slice of the issues and parties and cannot make nuanced policy decisions over climate change, prescription drugs or COVID-19. Thus, their rulings can end up tying the hands of legislators and regulators to balance competing factors and do what is needed.

That is why more than twenty years ago Professor Robert Reich, President Clinton’s Secretary of Labor, termed these types of lawsuits “faux legislation, which sacrifices democracy.”<sup>79</sup> Public nuisance, like all of tort law, has boundaries that serve important objectives. It is not and should not be a “super tort” for reengineering society.

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## Endnotes

1. See Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 OKLA. L. REV. 359 (2017).
2. See Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 804 (2003).
3. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (Am. LAW. INST. 1979) (providing examples).
4. Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2006).

5. See Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 791 (2001) (discussing these efforts to break the bounds of public nuisance).
6. 97 Cal. Rptr. 639, 639 (Ct. App. 1971).
7. *Id.* at 382–83.
8. *Corp. of Mercer Univ. v. Nat'l Gypsum Co.*, No. 85-126-3-MAC, 1986 U.S. Dist. LEXIS 28425, 1986 WL 12447, at \*6 (M.D. Ga. Mar. 9, 1986); see also *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986); *Town of Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D.N.H. 1984); *County of Johnson v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984).
9. *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).
10. 891 F.2d 611 (7th Cir. 1990).
11. *Id.* at 614.
12. 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997).
13. *Id.* at 973.
14. David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 *CONN. L. REV.* 1163, 1163, 1172 (2000).
15. See *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1112 (Ill. 2004); *Young v. Bryco Arms*, 821 N.E.2d 1078, 1083 (Ill. 2004) (dismissing public nuisance claim by private plaintiffs).
16. See *State v. Lead Indus. Ass'n*, 951 A.2d 428, 434–35 (R.I. 2008).
17. *In re Lead Paint Litig.*, 924 A.2d 484, 487 (N.J. 2007).
18. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 112–13 (Mo. 2007).
19. *Chicago*, 821 N.E.2d at 1114–16 (“We are also reluctant to recognize a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it.”); see also *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) (“[T]he scope of nuisance claims has been limited to interference connected with real property or infringement of public rights.”).
20. *Higgins v. Conn. Light & Power Co.*, 30 A.2d 388, 391 (Conn. 1943) (cleaned up).
21. *In re Lead Paint Litig.*, 924 A.2d at 501.
22. *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1993).
23. *Lead Indus. Ass'n*, 951 A.2d at 450.
24. *City of St. Louis*, 226 S.W.3d at 114.
25. See *City of Chicago v. Am. Cyanamid Co.*, No. 02 CH 16212, 2003 WL 23315567, at \*4 (Ill. Cir. Ct. Oct. 7, 2003).
26. See, e.g., *City of St. Louis*, 226 S.W.3d at 113.
27. *State v. Lead Indus. Ass'n*, 951 A.2d at 449.
28. *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986).
29. *In re Lead Paint Litig.*, 924 A.2d at 499.
30. Gifford, 71 *U. CIN. L. REV.* at 820.
31. *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126 (Ill. Ct. App. 2005).
32. *In re Lead Paint Litig.*, 924 A.2d at 494.
33. *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (App. Div. 2003).
34. See Victor Schwartz, Phil Goldberg & Corey Schaecher, *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 *OKLA. L. REV.* 629 (2010).
35. *People v. Atl. Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at \*52–53 (Cal. Super. Ct. Mar. 26, 2014).
36. *People v. Conagra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499 (Ct. App. 2017).
37. *Id.* at 132.
38. *People v. Conagra Grocery Prods. Co.*, No. 2000-1-CV-788657 (Tentative Ruling re: Motion for Attorneys’ Fees and Costs) (on file with author).

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44. Julia Caulfield, *Local Lawsuits Asks Oil and Gas to Help Pay for Climate Change*, KOTO, Dec. 14, 2020.
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50. *County of Summit v. Purdue Pharma L.P.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 19, 2018).
51. Order Certifying Negotiating Class and Approving Notice, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio Sept. 11, 2019).
52. *State of Oklahoma v. Purdue Pharma L.P.*, 2019 WL 4019929, at \*11 (Okla. Dist. Aug. 26, 2019) (Judgment After Non-Jury Trial), *rev’d sub nom. State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021).
53. See *id.*
54. See *In re Opioid Litig.*, 2018 N.Y. Slip Op. 31228 (N.Y. Sup. Ct. June 18, 2018).
55. *Commonwealth v. Monsanto Co.*, No. 668 MD 2020, 2021 Pa. Commw. LEXIS 591, 2021 WL 6139209, at \*17 (Pa. Commw. Ct. Dec. 30, 2021).
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64. *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021).
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66. See, e.g., *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 3:17-01362, 2022 U.S. Dist. LEXIS 117322, 2022 WL 2399876 (S.D.W.V. July 4, 2022).

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70. *Suez Water New York Inc.*, 578 F. Supp. 3d at 550.
71. *Id.* at 546.
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73. *City of Huntington*, 2022 U.S. Dist. LEXIS 117322, 2022 WL 2399876, at \*59.
74. *Id.* at 68 (cleaned up).
75. *In re Paraquat Prods. Liab. Litig.*, 2022 U.S. Dist. LEXIS 26303, 2022 WL 451898, at \*10.
76. *City of Huntington*, 2022 U.S. Dist. LEXIS 117322, 2022 WL 2399876, at \*59.
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