



OKLAHOMA OPIOID RULING: ANOTHER INSTANCE OF IMPROPER JUDICIAL GOVERNANCE THROUGH PUBLIC NUISANCE LITIGATION

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Plaintiffs have long utilized the doctrine of public nuisance as a judicial avenue to force corporations to bear the costs of addressing social harms. In recent years, however, such claims have proliferated as a result of high-profile cases and plaintiffs' success in the courtroom. This success will likely spur additional litigation and solidify the doctrine's place in the plaintiffs' litigation toolbox. This LEGAL BACKGROUNDER first presents an overview of the public nuisance doctrine and its ongoing development. It next examines how the Oklahoma opioid case—the first case in which an opioid defendant was held liable for creating a public nuisance—failed to examine the doctrine's history, a shortcoming that should doom the decision on appeal. The article also provides insight into how this high-profile ruling may give rise to additional public nuisance litigation.

History of the Doctrine of Public Nuisance

The public nuisance doctrine has undergone a bizarre evolution from its humble beginnings as a theory bound in public-property harm to one that now permits plaintiffs—typically states or local governments aided by contingent-fee private attorneys—to bring suits for societal harms like the opioid addiction crisis or climate change. A cause of action for “public nuisance” originated in medieval England as a judicial response to a disruption to the king's land, a common road, or a public water source.¹ Initially, the only remedy was a criminal writ brought by the Crown; over time, the doctrine evolved to permit suits by private citizens for equitable remedies.² In America, public nuisance law developed similarly, with the doctrine's application limited primarily to criminal situations that infringed upon a public right (commonly involving the use of land), for which the remedy was limited to injunctive relief and/or abatement for governmental plaintiffs.³ National and state legislation served the primary function of “solving” societal ills, and the doctrine was not even included in the First Restatement of Torts.⁴

Today, the Restatement (Second) of Torts § 821B defines a public nuisance as “an unreasonable interference with a right common to the general public.” An interference may be “unreasonable” depending on: “(a) Whether the conduct involves a significant interference with the public health, the public safety, the

¹ See Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L. Q.* 755, 767 (2001) (citing William L. Prosser, *Handbook of the Law of Torts* § 72, at 570 (1st ed. 1941)).

² *Id.* at 767-78.

³ Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 *U. CINN. L. REV.* 741, 800-01 (2003). Damages were allowed for private plaintiffs who satisfied the “special injury rule” in proving that the harm suffered by that plaintiff was different in kind from *injuries* suffered by the public.

⁴ See John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 *ECOLOGY L. Q.* 241, 241-42 (1972).

public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.”⁵ Since the 1980s, plaintiffs have used the doctrine against manufacturers of products alleged to have caused public health crises—such as lead paint and tobacco—and the practice has spanned through the twenty-first century.⁶

The claims are gaining both media attention and more success. In the era of tobacco litigation, the only court to review the viability of a public nuisance claim against tobacco companies dismissed it because, under Texas law, the court was “unwilling to accept the state’s invitation to expand a claim for public nuisance beyond its ground in real property.”⁷ In addition to courts’ reliance on precedent and the common law to prevent expansion of the doctrine, its application has in the past been limited by statute as well. For instance, governmental entities began suing firearm manufacturers for causing a public nuisance in the early 2000s. Most of those cases fizzled to an end in 2005, however, when Congress passed the Protection of Lawful Commerce in Arms Act. The statute “effectively foreclosed nearly all municipal civil suits against the gun industry.”⁸ Recently, though, plaintiffs have been more successful. Earlier this year, for example, after a California state court concluded that various paint manufacturers had created a public nuisance by producing lead paint, defendants The Sherwin-Williams Company, ConAgra Grocery Products Company, and NL Industries, Inc. agreed to pay \$305 million to various California counties and cities “to address lead paint-related hazards.”⁹

Thus, the doctrine has been recognized as “surviv[ing] today amid apparently comprehensive federal and state environmental regulations because of its nearly infinite flexibility and adaptability and its inherent capacity to fill gaps in statutory controls.”¹⁰ The public nuisance doctrine is therefore not “new,” but has been applied more frequently in the tort context and will potentially create new precedent distancing it from its history of applying to real property and only authorizing equitable remedies.

Oklahoma State Public Nuisance Opioid Lawsuit

In August 2019, Judge Thad Balkman became the first judge to hold an opioid defendant liable for creating a public nuisance under Oklahoma’s public nuisance statute, 50 O.S. 1981 § 1 *et seq.*¹¹ Plaintiff, the State of Oklahoma, brought the sole claim of public nuisance for Johnson & Johnson’s and two of its subsidiaries’ contributions to the opioid addiction epidemic.¹² The case was originally brought against Purdue, Teva, and Johnson & Johnson, but the state settled with other defendants before the case went to trial in May.¹³ Oklahoma sought over \$17 billion for three years of abatement costs, but Judge Balkman instead ordered that Johnson & Johnson pay the state over \$572 million, which he calculated to be the cost of the first year of a plan to abate the public nuisance caused by the opioid crisis (a number he later reduced

⁵ RESTATEMENT (SECOND) OF TORTS § 821B(2)(a)-(c).

⁶ *See, e.g., In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007) (alleging that manufacturers and sellers of lead pigments from decades prior should be held to have caused a public nuisance in the form of childhood lead exposure and its resultant health hazards); *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997), subsequent mandamus proceeding sub nom. *In re Fraser*, 75 F. Supp. 2d 572 (E.D. Tex. 1999).

⁷ *See id.*, 14 F. Supp. 2d at 973.

⁸ Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1236 (2018).

⁹ July 17, 2019 Press Release – Settlement of Landmark Lead Paint Litigation, <https://www.sccgov.org/sites/cco/leadpaint/Pages/home.aspx>.

¹⁰ Denise E. Antolini, *Suffolk Syndrome: A Case Study in Public Nuisance Law*, 40 S.C. L. REV. 379, 370 (1989).

¹¹ *State of Oklahoma ex rel. Hunter v. Purdue Pharma, L.P., et al.* (Case No. CJ-2017-816, in the District Court of Cleveland County, State of Oklahoma).

¹² *Id.*

¹³ Daniel Siegal, *Okla. Judge Rules J&J Caused Opioid Crisis, Owes \$572M*, Law360 (Aug. 26, 2019), <https://www.law360.com/articles/1187330/okla-judge-rules-j-j-caused-opioid-crisis-owes-572m>.

due to a multi-million-dollar math error).¹⁴ On September 25, 2019, Johnson & Johnson appealed to the Oklahoma Supreme Court, arguing that the ruling “disregard[ed] a century of precedent.”¹⁵ As of December 2019, the appeal remains pending.

Judge Balkman’s ruling, as Johnson & Johnson pointed out in its Motion to Appeal to the Supreme Court of Oklahoma, is an “unprecedented interpretation of Oklahoma public nuisance law,” which historically tied nuisance law to property use.¹⁶ Furthermore, it undermines product liability law and violates the separation of powers by requiring Johnson & Johnson to pay millions of dollars to government programs, essentially taxing the corporation to support the government through a remedy of damages couched as an “abatement plan.”¹⁷

In his ruling, Judge Balkman provided a detailed factual history of the “opioid crisis and epidemic,” focusing in large part on the epidemic’s public health impact and the government’s failure to act. Judge Balkman explained that Johnson & Johnson and two wholly owned subsidiaries were responsible for supplying other opioid manufacturers with active pharmaceutical ingredients to be used in opioid drugs, such as fentanyl, oxycodone, hydrocodone, morphine, codeine, sufentanil, buprenorphine, hydromorphone, and naloxone.¹⁸ But the supply alone was not what led to the nuisance: Judge Balkman also found that the defendants “embarked on a major campaign in which they used branded and unbranded marketing to disseminate the messages that pain was being undertreated and ‘there was a low risk and low danger’ of prescribing opioids to treat chronic, non-malignant pain and overstating the efficacy of opioids as a class of drug.”¹⁹ The defendant allegedly designed this campaign to target doctors and government agencies with false and misleading statements regarding opioids’ efficacy and risk of addiction in an effort to increase opioid use.²⁰ Judge Balkman spent little time on the omission aspect of public nuisance, noting only that defendants did not train sales representatives to look for “red flags” associated with pill mills, such as long lines and people passed out in the waiting area.²¹

Judge Balkman’s order focused on statutory interpretation as opposed to any analysis of the common law history of public nuisance law, which was traditionally limited to interference with a plaintiff’s property. Under the plain text of the Oklahoma statute, “a nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission . . . annoys, injures, or endangers the comfort, repose, health, or safety of others.”²² A nuisance “is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal.”²³ Judge Balkman concluded that the Oklahoma statute defining public nuisance did not contain any property-related limitation for its application. Although Judge Balkman noted that his analysis was supported by Oklahoma Supreme Court precedent stating that “Oklahoma’s nuisance law extends beyond the regulation of real property and encompasses the corporate activity complained of here,”²⁴ he supported his novel application of the statute with reliance on a simplistic textualist analysis,

¹⁴ J. after Non-Jury Trial, *Oklahoma ex rel. Hunter v. Purdue Pharma L.P.*, No. CJ-2017-816 (Okla. Dist. Ct. Cleveland Cnty. Aug. 26, 2019).

¹⁵ See Motion of Appellants, *State of Oklahoma ex rel. Hunter v. Purdue Pharma, L.P., et al.* (Case No. CJ-2017-816, in the District Court of Cleveland County, State of Oklahoma) (Sept. 25, 2019); pp. 2-3.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ *State of Oklahoma ex rel. Hunter v. Purdue Pharma, L.P., et al.* (Case No. CJ-2017-816, in the District Court of Cleveland County, State of Oklahoma) (Aug. 26, 2019); pp. 4-6.

¹⁹ *Id.* at p. 9.

²⁰ *Id.* at pp. 12, 16.

²¹ *Id.* at p. 14.

²² 50 O.S. 1981 § 1 *et seq.*

²³ *Id.*

²⁴ *State of Oklahoma ex rel. Hunter v. Purdue Pharma, L.P., et al.* (Case No. CJ-2017-816, in the District Court of Cleveland County, State of Oklahoma) (Aug. 26, 2019); p. 23.

stating that “there is nothing in this text that suggests an actionable nuisance requires the use of or a connection to real or personal property.”²⁵ Ignoring Oklahoma precedent and historic interpretation of the doctrine, Judge Balkman stated, in the alternative, that if a nuisance *does* require use of property, defendants had pervasively, systemically, and substantially used real and personal property, both public and private, by spreading misleading messages in homes and offices and by sales reps using the public roadways, as well as transmitting messages via cell phone and computer to invade the property of others and exacerbate the nuisance.²⁶

Judge Balkman performed no causation analysis; the Order simply stated the defendants were a “cause in fact” of the nuisance and that there was no intervening or superseding cause.²⁷ Given recent cases similarly invoking the doctrine in other jurisdictions, Judge Balkman’s ruling is not unprecedented, but is unlikely to survive on appeal unless the Supreme Court abandons conflicting precedent. Furthermore, he provided no analysis as to how the “abatement” payments would be used to address the nuisance; rather, the order simply forces Johnson & Johnson to funnel various amounts of money into various government programs to be used in any manner the government chooses.

Future Applications of the Doctrine

Government plaintiffs will continue to pursue public nuisance claims to address perceived health or safety crises that the federal, state, or local governments have been unable or unwilling to solve through traditional means. This is problematic for a number of reasons. Courts are more readily abandoning the limits that judges in the past imposed on the doctrine’s application. Perhaps more importantly, the recent trend in public nuisance litigation may encourage the judiciary to “solve” societal problems by usurping government responsibilities where they view the government as ineffective. As the judge presiding over the opioid multi-district litigation pending in the U.S. District Court for the Northern District of Ohio stated, “developing solutions to combat a social crisis such as the opioid epidemic should not be the task of our judicial branch. It’s the job of the executive and legislative branches, but like it or not we have these cases.”²⁸ Faced with very real societal harms, the temptation to provide even legally unfounded judicial solutions is often too difficult to resist.

²⁵ *Id.* at p. 22.

²⁶ *Id.* at p. 24.

²⁷ *Id.* at p. 29.

²⁸ See Hearing Transcript, *In re: National Prescription Opiate Litig.*, 1:17-md-02804 (N.D. Ohio June 25, 2018).