OPIOID LITIGATION: WELCOME TO THE NUISANCE JUNGLE

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INTRODUCTION

Nuisance—"the great grab bag, the dust bin, of the law"[1]—is a legal concept that "virtually defies synthesis" and is capable of encompassing everything and anything from "an alarming advertisement to a cockroach baked in a pie."[2] Heavily criticized as the most "impenetrable jungle in the entire law,"[3] the notoriously vague and ill-defined concept of public nuisance[4] has been a viable target for plaintiffs to try and circumvent traditional tort law theories and concepts.[5] As Justice Blackmun of the United States Supreme Court once wrote, "one searches in vain . . . for anything resembling a principle in the common law of nuisance."[6] Currently, attorneys general are attempting to use public nuisance to impose liability on pharmaceutical manufacturers in response to the opioid epidemic.[7] This attempted use is "patently intended to circumvent the boundary between the well-developed body of product liability law and public nuisance law,"[8] and to do so would

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1. Awad v. McColgan, 98 N.W.2d 571, 573 (Mich. 1959), *abrogated by* Mobil Oil Corp. v. Thorn, 258 N.W.2d 30 (Mich. 1977).

2. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1055 n.19 (1992) (Blackmun, J., dissenting) (citation omitted).

3. *Id.* (citation omitted).

4. *See* James K. Holder, *Opening the Door Wider? Opioid Litigation and the Scope of Public Nuisance Law*, IN-HOUSE DEF. Q., Spring 2018, at 33, 34.

5. *See* Victor E. 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, 629–30, 636–37 (2010) [hereinafter Schwartz et al., *Game Over?*].

6. *Lucas*, 505 U.S. at 1055 (Blackmun, J., dissenting).

7. Richard C. Ausness, *The Current State of Opioid Litigation*, 70 S.C. L. REV. 565, 566, 569 (2019).

8. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 837 (2003) [hereinafter Gifford, *Public Nuisance*] (internal quotations omitted).

permit public nuisance to "become a monster that would devour in one gulp the entire law of tort."[9]

This Note will focus on analyzing the historical roots and modern application of the public nuisance doctrine, with the purpose of determining whether public nuisance is an appropriate cause of action in product litigation, or if it is merely an attempt to end-run around traditional tort theories and concepts to impose liability on product manufacturers and distributors. It will specifically address this consideration with regard to imposing liability on pharmaceutical manufacturers for their role in the opioid epidemic, as well as the ramifications of doing so.

Part I will review the origin and evolution of the public nuisance doctrine. It will discuss the history and development of the criminal nuisance doctrine in England and its adoption and transition into an American tort.[10]

Part II will examine the use of public nuisance in several types of product litigation. It will focus on analyzing a variety of court decisions involving the application of public nuisance to different products, such as asbestos, lead paint, tobacco, and firearms.[11] It will conclude by discussing public policy and other issues courts consider when determining whether to permit an expansion of the tort's boundaries.

Part III will provide a background and overview of the opioid epidemic and discuss the rise of opioid litigation in response to the opioid epidemic, along with the state of opioid litigation in 2020. It will specifically explore and examine an Oklahoma District Court decision which held pharmaceutical manufacturer Johnson & Johnson liable for their role in the opioid epidemic—under a public nuisance theory—for damages in excess of $460 million.[12]

Part IV will explain how public nuisance has, in essence, become a super tort capable of imposing super-strict liability on product manufacturers.[13] It will further discuss how public nuisance has, and continues to be,

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9. Tioga Pub. Sch. Dist. v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993).

10. *See* RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

11. *See* Lauren E. Handler & Charles E. Erway III, *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 DEF. COUNS. J. 484, 485–88 (2002).

12. *See* State *ex rel*. Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2019 WL 4019929 (Okla. Dist. Ct. Aug. 26, 2019). Although the initial judgment exceeded $572 million, it was later reduced to roughly $465 million. Nathaniel Weixel, *Oklahoma Judge Reduces Opioid Verdict Against Johnson & Johnson*, THE HILL (Nov. 15, 2019, 5:55 PM), https://thehill.com/policy/healthcare/470739-oklahoma-judge-reduces-opioid-verdict-against-johnson-johnson.

13. *See generally* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 936–50 (2009) (discussing "super-strict liability" in other areas of product litigation) [hereinafter Schwartz et al., *The "No-Fault" Theories*].

inappropriately used as an end-run to circumvent traditional tort theories and concepts.[14]

Finally, the conclusion will discuss how this type of product litigation negatively effects product innovation and public policy.[15] It will also address why a court ruling on this type of litigation amounts to judicial infringement on the legislature's ability to regulate products, and therefore runs afoul to the Separation of Powers Doctrine of the U.S. Constitution.[16]

I. EVOLUTION OF THE PUBLIC NUISANCE DOCTRINE

Public nuisance originated in the twelfth-century English common law with cases involving purprestures—"encroachments upon the royal domain or the public highway."[17] The scope of public nuisance broadened over time to cover a large variety of minor criminal offenses which involved interference with recognized, protected interests of the general public or community at large.[18] These interests broadly included public health, safety, morals, peace, comfort, convenience, and other public rights similar in kind.[19] An interference with a protected right common to the general public was deemed a criminal offense, and any person who committed this offense could be prosecuted by the Crown.[20] In addition to criminal prosecution, the Crown could seek to remedy the nuisance by filing an action for enjoinder or abatement against the individual.[21] Notably, regardless of whether an individual faced criminal prosecution or an action for enjoinder or abatement, only an appropriate public authority—and not a harmed individual—could seek to remedy the nuisance.[22]

In the sixteenth century, an English court held for the first time that an individual person could bring an action in tort for public nuisance.[23] To succeed, the individual was required to show that he or she suffered a

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14. *See* Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 938 (2008) [hereinafter Gifford, *Impersonating the Legislature*].

15. Schwartz et al., *The "No-Fault" Theories*, *supra* note 13, at 957.

16. *Id.*

17. RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (AM. L. INST. 1979).

18. *Id.* at cmt. b.

19. *Id.*

20. Joseph W. Cleary, Comment, *Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just Do Not Work*, 31 U. BALT. L. REV. 273, 277 (2002).

21. RESTATEMENT (SECOND) OF TORTS § 821C cmt. a (AM. L. INST. 1979).

22. *Id.* at cmt. j.

23. *Id.* at cmt. a.

particular harm which was different in kind from the harm suffered by the public at large.[24] Recovery was not available merely because an individual suffered harm that was more severe than the public, but rather the individual harm "must have been different in kind" from the injury to the public in order to recover individual damages.[25] For example, if A built a bridge that unlawfully obstructed B's ability to boat along a publicly navigable stream, B could not recover damages from A under public nuisance for harm resulting from B's inability to boat because the harm B suffered is not different in kind from the harm to the general public.[26] The same would hold true even if B navigated the stream with his boat far more often than any other member of the public because recovery is limited to injuries which are different in kind, not merely more severe.[27] Conversely, if A had dug a trench which unlawfully obstructed a public highway, and B, without warning, drove into the trench and suffered physical harm, B could recover for those damages through public nuisance because physical harm is different in kind from the harm to the general public caused by the obstruction.[28] This ruling was subject to a great deal of scrutiny and was heavily criticized for unnecessarily providing recovery through public nuisance when negligence and other causes of action were better suited and available.[29]

Despite its English origins as a common law crime, public nuisance has largely become an American common law tort.[30] When the criminal law transitioned away from the common law toward a codified statutory system, courts began to recognize the significant overlap between actions which were traditionally deemed a crime, but also constituted a tort.[31] A common law tort action for public nuisance was much easier than, and preferable to, codifying a criminal statute because state legislatures "could not anticipate and explicitly prohibit or regulate through legislation all the particular activities" that may constitute a public nuisance.[32] It seemed equally effective and more

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24. *Id.*

25. Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 544 (2006) [hereinafter Schwartz & Goldberg, *The Law of Public Nuisance*].

26. RESTATEMENT (SECOND) OF TORTS § 821C cmt. a (AM. L. INST. 1979).

27. *Id.* at cmt. b, illus. 1.

28. *Id.* at cmt. b.

29. Schwartz & Goldberg, *The Law of Public Nuisance*, *supra* note 25, at 545.

30. Luther J. Strange III, *A Prescription for Disaster: How Local Governments' Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into a Policy-Making Role and Subverts the Equitable Administration of Justice*, 70 S.C. L. REV. 517, 519 (2019).

31. *Id.* at 520.

32. Schwartz et al., *Game Over?*, *supra* note 5, at 633.

appropriate to bring a tort action to abate the "low-level quasi crime[]" rather than impose a criminal penalty given the relatively minor nature of the infraction.[33] Additionally, a tort action was actually more effective because it could reach a corporate defendant, whereas criminal prosecution could not.[34]

American courts have largely adopted the public nuisance theory from English common law and predominantly require that four elements be satisfied to impose tort liability: (1) infringement on a public right; (2) unreasonable conduct; (3) control of the instrumentality causing the public nuisance; and (4) proximate cause.[35] Although courts often dispute over the boundaries of these four elements, even when they are established, the extent of recovery has always been quite limited.[36] Indeed, the "clear and consistent parameters" of public nuisance provide that a public authority may only seek equitable remedies through an action to enjoin or abate the nuisance, for it is a "time-honored" principle limitation that monetary damages are not available to public entities.[37] Although an individual plaintiff who suffered a particular harm different in kind from the harm to the general public is entitled to recover monetary damages for that harm there is no historical basis for extending this right to a public entity.[38]

At the time of the Industrial Revolution, America's shift from an agricultural society to an industrial society introduced many new land uses for which there were very few regulations.[39] As a result, these new land uses carried consequences for the public that the government could not anticipate, and therefore could not regulate.[40] Public nuisance was an available means of redressing the unpleasant effects that industrial operations had on the public, such as air and water pollution.[41] However, the doctrine became largely irrelevant in the 1930s when statutory schemes and zoning laws were implemented to regulate industrial land use.[42] Arguably, in light of the new industrial regulations, "[t]he troubled history of nuisance law should thus have

33. *Id.*

34. *Id.*

35. *Id.* at 633–34.

36. *See id.* at 634–36.

37. *In re* Lead Paint Litig., 924 A.2d 484, 494, 499 (N.J. 2007).

38. *Id.* at 498–99.

39. Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 953.

40. *Id.* at 953–54 (quoting Gifford, *supra* note 8, at 804).

41. *Id.* at 953.

42. *Id.* at 954.

been no more than a footnote in a[] casebook on landuse planning or environmental protection."[43]

The public nuisance theory did in fact remain rather dormant for years, but it was eventually revisited in the 1960s during the drafting of the Restatement (Second) of Torts.[44] At this time, environmental lawyers argued in favor of expanding the doctrine to impose liability on product manufacturers for a public nuisance that resulted from societal use of their product.[45] The lawyers sought to impose liability even if the product manufacturers' conduct was fully regulated and their products were lawful in accord with all existing regulations.[46] The drafters declined to include the lawyers' proposed legal expansion in the Second Restatement, cautioning that if "a defendant's conduct in interfering with a public right does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard."[47] The environmental lawyers also sought to expand the doctrine to provide standing to all individuals of the general public who are harmed by a nuisance to seek recovery for monetary damages.[48] Again, the drafters of the Second Restatement rejected this proposed expansion and maintained the doctrine's traditional requirement of showing a particularized harm to recover monetary damages.[49] Nonetheless, the environmental advocates persisted in pursuing a relaxation of the strict requirements of public nuisance.[50]

II. PUBLIC NUISANCE IN PRODUCT LITIGATION

The advocates' theories served as a foundational basis for a litigation tactic attorneys general use to impose liability on product manufacturers and distributors for harm caused by their products.[51] This increasingly popular tactic involves using public nuisance to impose industry-wide liability on

43. Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENV'T AFF. L. REV. 89, 91 (1998).

44. Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 OKLA. L. REV. 359, 370 (2018) [hereinafter Schwartz et al., *Deep Pocket Jurisprudence*].

45. *Id.*

46. *Id.*

47. RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (AM. L. INST. 1979).

48. Schwartz & Goldberg, *The Law of Public Nuisance*, *supra* note 25, at 548.

49. *Id.*

50. *Id.*

51. *See* Gifford, *Impersonating the Legislature*, *supra* note 14, at 938.

product manufacturers in a variety of high-profile and high-stakes lawsuits.[52] These lawsuits typically target "unpopular" products such as asbestos, lead pigment and paint, tobacco, and firearms.[53] In this context, public nuisance became an attractive cause of action because it was often viewed as vague, undefined, and unique to tort law insofar as it revolved around a particular injury and public welfare rather than individuals and proscribed conduct.[54] Environmental activist William Rodgers explained that public nuisance appeals to plaintiffs because "it is an area of the law that 'straddles the legal universe . . . and generates case law to suit every taste.'"[55]

Government plaintiffs sought to shift the focus away from the strict requirements of a private cause of action and achieve a relaxation in evidentiary standards by bringing an action for public nuisance.[56] In theory, the shift in focus and relaxed evidentiary standards would allow them to overcome issues that commonly derailed a private negligence or product liability action—such as product identification, control over the instrumentality, standing, foreseeability, proximate causation, and statute of limitations—and public nuisance presented a potential theory for successful recovery in law suits which otherwise would have been unsuccessful.[57] For example, if a plaintiff is unable to identify the manufacturer of the specific product that caused their harm, they cannot succeed in a product liability action.[58] An action for public nuisance, however, does not require a showing of specific product identification because it imposes joint and several liability on defendants if their conduct contributed to the nuisance.[59] Similarly, a claim that would otherwise be barred by the statute of limitations may nonetheless proceed under public nuisance if the conduct causing the nuisance was a continuing course of conduct.[60] In this instance, the continuing course of

52. Handler & Erway III, *supra* note 11, at 484.

53. Schwartz & Goldberg, *The Law of Public Nuisance*, *supra* note 25, at 543.

54. Holder, *supra* note 4, at 34.

55. 1 WILLIAM H. RODGERS, ENVIRONMENTAL LAW: AIR AND WATER § 2.4, at 48 (1986); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1055 n.19 (1992) (Blackmun, J., dissenting) (citation omitted).

56. Holder, *supra* note 4, at 34.

57. *See id.*; Gifford, *Public Nuisance*, *supra* note 8, at 751, 754–55; Schwartz et al., *Game Over?*, *supra* note 5, at 629–30, 636–37, 644.

58. *See* Schwartz & Goldberg, *The Law of Public Nuisance*, *supra* note 25, at 557.

59. *See* Michael T. Nilan & David H. Wright, *Public Nuisance—The New Mega Tort*, DRI ANN. MEETING PRESENTATION COURSE MATERIALS (Def. Rsch. Inst., Chi., Ill.), Oct. 20–24, 2010, at 210, http://iframe.dri.org/DRI/course-materials/2010-am/pdfs/10_Nilan.pdf.

60. *Id.* at 211.

conduct may toll the statute of limitations period, and the statute would not begin to run until the entire injury is deemed to be complete.[61]

A. Asbestos Litigation

Asbestos litigation marked the first nonenvironmental attempt to use the public nuisance doctrine to impose liability on product manufacturers.[62] These lawsuits—largely brought by school districts and municipalities—alleged that the asbestos itself was a product that should be deemed a public nuisance.[63] The purchasers of asbestos-containing products sought to recover the costs of asbestos abatement, which were essentially the costs of removing the asbestos from the buildings.[64] In *Detroit Board of Education v. Celotex Corp.*, the Michigan Court of Appeals dismissed a class-action lawsuit brought against manufacturers, distributers, and installers of asbestos products.[65] The plaintiffs' cause of action under traditional tort theories of recovery was barred by the statute of limitations, and the court refused to permit a public nuisance claim to circumvent this bar.[66] The court noted that holding product manufacturers as creators of a nuisance was a "totally alien"[67] idea, and further stated:

> We . . . hold that manufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injuries caused by the defect. To hold otherwise would significantly expand, with unpredictable consequences, the remedies already available to persons injured by products, and not merely asbestos products. . . . Statutes of limitation are founded in public needs and public policy, and the public would not be served by neutralizing the limitation period by labeling a products liability claim as a nuisance claim.[68]

Similarly, in *Tioga Public School District. v. U.S. Gypsum Co.*, the Eighth Circuit Court of Appeals rejected a public nuisance claim against an asbestos manufacturer.[69] The court said that permitting the plaintiff's public nuisance

61. *See id.* at 211–12.
62. *See* Schwartz et al., *Game Over?*, *supra* note 5, at 637–38.
63. *Id.* at 638.
64. Schwartz & Goldberg, *The Law of Public Nuisance*, *supra* note 25, at 553.
65. Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 521–22 (Mich. Ct. App. 1992).
66. *Id.* at 521.
67. *Id.*
68. *Id.* at 521 (citation omitted).
69. Tioga Pub. Sch. Dist. v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993).

theory would "give rise to a cause of action . . . regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories[,]" and in effect, would "totally rewrite . . . tort law" and allow nuisance to "become a monster that would devour in one gulp the entire law of tort."[70] Many other courts deciding this issue reached the same result—declining to impose liability on asbestos manufacturers—along a similar line of reasoning.[71]

In short, courts were wholly unwilling to recognize public nuisance as a viable cause of action in the asbestos context, emphasizing the complete lack of precedent for these claims[72] and the troubling effect these claims would have on other areas of tort law.[73]

B. Lead Paint Litigation

In lead paint litigation, plaintiffs brought public nuisance claims against lead paint manufacturers, alleging that the mere presence of lead paint in buildings and old homes constituted a public nuisance.[74] Similar to the asbestos litigation, plaintiffs sought to recover the costs of abatement—removing lead pigment and paint from buildings and homes[75]—as well as reimbursement for the governmental costs of treating exposure-related illnesses.[76] However, courts deciding the cases against lead paint manufacturers did not reach the uniform result that asbestos courts reached—some courts were willing to permit a public nuisance action against lead paint

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70. *Id.* at 921.

71. *See* City of San Diego v. U.S. Gypsum Co., 35 Cal. Rptr. 2d 876, 883 (Cal. Ct. App. 1994) (affirming dismissal of public nuisance claim and stating there was no authority for permitting recovery under public nuisance for a defective product); Cnty. of Johnson Bd. of Educ. v. U.S. Gypsum Co., 580 F. Supp. 284, 294–95 (E.D. Tenn. 1984) (reasoning that if public nuisance were permitted against product manufacturers, almost every product liability claim would become a public nuisance claim); Town of Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 133, 136 (D.N.H. 1984) (finding that nuisance law is inapplicable to claims against product manufacturers); City of Bloomington v. Westinghouse Elec. Corp., 891 F.2d 611, 614 (7th Cir. 1989) (affirming dismissal of public nuisance claim against asbestos manufacturer); City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 648, 656 (D.R.I. 1986) (dismissing public nuisance claim against asbestos manufacturer).

72. *See City of San Diego*, 35 Cal. Rptr. 2d at 883; *Detroit Bd. of Educ.*, 493 N.W.2d at 521; *Hooksett Sch. Dist.*, 617 F. Supp. at 133.

73. *See Tioga Pub. Sch. Dist.*, 984 F.2d at 921; *Cnty. of Johnson Bd. of Educ.*, 580 F. Supp. at 294.

74. Schwartz & Goldberg, *The Law of Public Nuisance*, *supra* note 25, at 559 n.110 ("[I]t is widely accepted that when the paint is allowed to crack or peel, young children that ingest the lead paint chips can contract lead poisoning.").

75. *Id.* at 559.

76. *See* Greg J. Carlson, *Lead Paint: Who Will Bear the Cost of Abating the Latest Public Nuisance?* 59 HASTINGS L.J. 1553, 1563 (2008).

manufacturers,[77] while other courts dismissed the suits and adhered to precedent.[78] In *State v. Lead Industries Ass'n*, the trial court permitted a public nuisance claim to proceed after recognizing the significance of lead paint dangers and acknowledging that both the Legislature, through the Lead Poisoning Prevention Act, as well as the Supreme Court had previously addressed it.[79] The trial court stated:

> Our Supreme Court has recognized the Attorney General's prosecution of a public nuisance action seeking abatement of lead paint from a premises where "significant amounts of lead ha[d] been found to constitute a hazard to the public and to children, in particular." . . . In its affirmance order, the Supreme Court acknowledged the trial justice's finding that the "persistence of the continuing hazard of lead paint presents immediate and irreparable harm to the public so long as that hazard remains unabated."[80]

In *County of Santa Clara v. Atlantic Richfield Co.*, a California appellate court permitted an action for public nuisance against a lead paint manufacturer,[81] distinguishing its case from *City of San Diego v. U.S. Gypsum Co.*, a previous California case which dismissed a public nuisance claim against an asbestos manufacturer.[82] First, the court explained that the allegations in *City of San Diego* were that the asbestos manufacturers produced a defective product, whereas here, liability is premised on the manufacturer's

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77. *See* City of Milwaukee v. NL Indus., Inc., 691 N.W.2d 888, 893–94 (Wis. Ct. App. 2004) (reversing the trial court's order dismissing the city's claim against manufacturers of lead paint under the theory of public nuisance and agreeing with the city and its conclusion that "the very existence of lead paint in a home is a public nuisance, and this remains true regardless of how well a property is maintained"); People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 557 (Cal. Ct. App. 2017) ("[W]e uphold the trial court's imposition of joint and several liability for the nuisance created by defendants' conduct."); State v. Lead Indus. Ass'n, No. PC 99-5226, 2007 WL 711824, at *10, *92 (R.I. Super. Ct. Feb. 26, 2007) (permitting public nuisance suit against lead paint manufacturers to go to a jury).

78. *See* City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126 (Ill. App. Ct. 2005) (declining to impose liability based on public nuisance because the suit belonged in product liability); City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007) (affirming dismissal of the city's claims against lead paint manufacturers under public nuisance); *In re* Lead Paint Litig., 924 A.2d 484 (N.J. 2007) (declining to find that public nuisance claims afford a cause of action against product manufacturers); Sabater *ex rel.* Santana v. Lead Indus. Ass'n, 704 N.Y.S.2d 800 (Sup. Ct. 2000) (holding that a product liability suit against a lead paint manufacturer does not give rise to a cause of action for nuisance), *vacated*, 2001 U.S. Dist. LEXIS 14758 (2001). *But see ConAgra Grocery Prods. Co.*, 227 Cal Rptr. 3d 499 (declining to follow *Benjamin Moore & Co.*, 226 S.W.3d 110).

79. State v. Lead Indus. Ass'n, No. 99-5226, 2001 WL 345830, at *1, *8 (R.I. Sup. Ct. Apr. 2, 2001).

80. *Id.* at *7 (citation omitted).

81. Cnty. of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 328–29 (Cal. Ct. App. 2006).

82. *Id.* at 328; City of San Diego v. U.S. Gypsum Co., 35 Cal. Rptr. 2d 876, 879, 882 (Cal. Ct. App. 1994).

affirmative conduct promoting the lead paint product despite having knowledge of the hazard it would create.[83] The court also noted that in *City of San Diego*, the city sought monetary damages on its own behalf for the damages asbestos products caused to city buildings, whereas here, the plaintiff sought abatement.[84] Based on these differences, the court held that the public nuisance action was valid and further explained that:

> A *representative* public nuisance cause of action seeking *abatement* of a hazard created by affirmative and knowing *promotion of a product for a hazardous use* is *not* essentially a products liability action in the guise of a nuisance action and does not threaten to permit public nuisance to become a monster that would devour in one gulp the entire law of tort. . . . A products liability action does not provide an avenue to prevent future harm from a hazardous condition, and it cannot allow a public entity to act on behalf of a community that has been subjected to a widespread public health hazard.[85]

In *People v. ConAgra Grocery Products Co.*, the defendant manufacturers urged the California appellate court to reconsider its holding in *County of Santa Clara*, arguing that public policy and the national trend among out-of-state cases favor rejecting large-scale public nuisance in cases involving products.[86] The court, unpersuaded by this argument, refused to allow out-of-state rulings to influence its decision and reaffirmed its decision in *County of Santa Clara*.[87]

Notably, however, even when a court is willing to permit a public nuisance action to proceed, other defenses may nonetheless preclude liability. For example, in *City of Milwaukee v. NL Industries, Inc.*, the defendant manufacturers challenged the city's public nuisance claim on causation and public policy grounds.[88] Firstly, the Wisconsin appellate court determined that a public policy determination was inappropriate for early stages of the proceeding and therefore declined to address those grounds.[89] Secondly, the court held that the defendants' participation in causing the public nuisance was a question of fact for the jury and allowed the public nuisance claim to

83. *Cnty. of Santa Clara*, 40 Cal. Rptr. 3d at 328.
84. *Id.*
85. *Id.* at 328–29 (quotations omitted).
86. People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 596–97 (Cal. Ct. App. 2017).
87. *Id.*
88. City of Milwaukee v. NL Indus., Inc., 691 N.W.2d 888, 891–93 (Wis. Ct. App. 2004).
89. *Id.* at 894–95.

proceed.[90] The jury, however, despite finding that lead paint did in fact create public nuisance, ultimately concluded that the defendant manufacturers were not liable because they did not anticipate, or knowingly contribute to, the public nuisance that resulted.[91] Because proof of wrongdoing by the manufacturers is required to impose liability, the lack of proof led to a judgment in favor of the defendants.[92]

In *State v. Lead Industries Ass'n*, the Rhode Island Supreme Court held that the defendants were not liable under public nuisance because they were not in control of the instrumentality causing the nuisance at the time the damages occurred.[93] The court rejected the proposition that a defendant's contribution to the creation of a public nuisance was sufficient for imposing liability, stating that, at a minimum, a defendant must control the nuisance at the time of the damages.[94] The court explained that "control at the time damage occurs is critical in public nuisance cases, especially because the principal remedy is abatement. . . . The party in control . . . is best positioned to abate it and, therefore, is legally responsible."[95]

C. Tobacco Litigation

In tobacco litigation, government plaintiffs brought public nuisance lawsuits against numerous tobacco product manufacturers seeking "'reimbursement of state expenditures for Medicaid and other medical programs' for smokers."[96] The initial hurdle plaintiffs faced under traditional tort theories of recovery—such as negligence and breach of warranty—was that the dangers and risks tobacco users incurred were deemed unforeseeable to manufacturers at the time plaintiffs began smoking.[97] However, as time passed and the risks of smoking became known, Congress passed the Federal Cigarette Labeling and Advertising Act of 1965, which banned television and radio advertisements for cigarettes and imposed an obligation on tobacco manufacturers to include health warnings on their products.[98] Although this

90. *Id.* at 894.

91. City of Milwaukee v. NL Indus., 762 N.W.2d 757, 764 (Wis. Ct. App. 2008).

92. *Id.*

93. State v. Lead Indus. Ass'n, 951 A.2d 428, 435 (R.I. 2008).

94. *Id.* at 450.

95. *Id.* at 449.

96. Schwartz & Goldberg, *The Law of Public Nuisance*, *supra* note 25, at 554 (quoting Handler & Erway III, *supra* note 11, at 487).

97. Gifford, *Public Nuisance*, *supra* note 8, at 754–55.

98. *Id.*

negated the lack of foreseeability issue, plaintiffs were still unable to succeed with these lawsuits because knowledge of the risks of smoking often served as an affirmative defense.[99] In the 1990s, government plaintiffs began to bring public nuisance lawsuits after discovering new revelations that tobacco companies had concealed the risks posed by tobacco and intentionally designed their products to foster addiction.[100] Although one court did reject this type of public nuisance claim,[101] tobacco manufacturers greatly feared the massive potential liability and entered into mass settlement agreements with state attorneys general before a court ever even validated the use of public nuisance.[102] In light of the legislature speaking on and enacting new laws addressing the risks of using tobacco, it is plausible that a court may have been more willing to permit a nuisance action. Nevertheless, by settling the states' claims before a court ruling, tobacco manufacturers foreseeably, although inadvertently, encouraged future attempts to apply public nuisance against product manufacturers in hopes of at least reaching a settlement.[103]

D. Firearm Litigation

The high magnitude of firearm litigation can be largely attributed to the tobacco manufacturer settlement agreement.[104] As one lawyer involved in firearm litigation explained, "[i]nitially, those [tobacco] suits were not treated as overly serious and were seen as having legal problems; they never did win in court, but they became the vehicle for settlement. . . . In any event, they did play some role in my thinking about a possible governmental [firearm] suit."[105] The firearm lawsuits did not seek to restrict a person's rights to buy or possess a gun, nor did they suggest that the manufacture, existence, or sale of guns constituted a nuisance.[106] Rather, the lawsuits alleged that "the [gun]

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99. *Id.* at 756 ("For example, in Horton v. American Tobacco Co., the jury found the defendant at fault, but refused to allow plaintiff to recover any damages even though Mississippi was a pure comparative fault jurisdiction.") (internal quotation marks omitted).

100. *Id.* at 757–58.

101. *See* Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997) (dismissing the State's public nuisance claim against the tobacco manufacturer).

102. Schwartz & Goldberg, *The Law of Public Nuisance*, *supra* note 25, at 554–55 (explaining that state attorneys general and tobacco product manufacturers entered into the "Master Settlement Agreement" which resulted in tobacco manufacturers transferring $246 billion to the states and plaintiffs).

103. *Id.* at 555.

104. David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163, 1172 (2000).

105. *Id.*

106. *Id.* at 1173.

manufacturers, in their marketing and distributing practices and policies, create[d] and contribute[d] to a public nuisance by knowingly mak[ing] handguns easily available for purposes of crime."[107] In other words, plaintiffs alleged that the gun manufacturers' marketing facilitated an illegal secondary market for criminals to obtain firearms which interfered with public health and safety.[108]

Most courts stood in agreement with historical precedent and rejected these public nuisance claims,[109] generally with four lines of reasoning.[110] Firstly, "the lawful sale of products d[id] not meet the requirement that the alleged nuisance interfere[d] with a right common to the general public."[111] Secondly, plaintiffs "fail[ed] to allege that the manufacturers exercise[d] sufficient control over the source of the interference with the public right."[112] Thirdly, "product manufacturers and distributors simply c[ould not] be held liable on a public nuisance theory."[113] Fourthly, "any injuries allegedly suffered by the plaintiff [were] too indirect or remote from the conduct complained of to allow recovery."[114]

Indeed, lack of control, lack of foreseeability, and remoteness of an injury are common difficulties a plaintiff faces in establishing legal causation, and these difficulties often serve as a basis for precluding liability against a defendant in traditional areas of tort law.[115] These same difficulties served as a basis for the Illinois Supreme Court's holding in *City of Chicago v. Beretta U.S.A. Corp.* that the city had no claim against gun manufacturers and distributors for creating a public nuisance.[116] The court held that the defendants' conduct could not be deemed a legal cause of the public nuisance because the nuisance resulted from aggregate criminal acts of individuals to which the defendants had no control over, therefore making the public

107. *Id.*

108. Schwartz & Goldberg, *The Law of Public Nuisance*, *supra* note 25, at 555.

109. *See* City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1111 (Ill. 2004) (dismissing the city's public nuisance claim); Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 539 (3d Cir. 2001) (declining to permit recovery under a public nuisance theory); City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3d Cir. 2002) (dismissing the city's public nuisance claim); Ganim v. Smith and Wesson Corp., 780 A.2d 98 (Conn. 2001) (dismissing public nuisance claims).

110. Gifford, *Public Nuisance*, *supra* note 8, at 766.

111. *Id.* (internal quotations omitted).

112. *Id.* (quoting *Camden Cnty. Bd. of Chosen Freeholders*, 273 F.3d at 536).

113. *Id.* at 767.

114. *Id.*

115. *See* Schwartz & Goldberg, *The Law of Public Nuisance*, *supra* note 25, 569 n.180, 578–79; Nilan & Wright, *supra* note 59, at 210.

116. City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1116, 1132–33, 1136 (Ill. 2004).

nuisance unforeseeable.[117] The court further explained that in these instances, it would be inappropriate to impose tort liability on a party even if their conduct contributed to the harm in some remote way.[118]

Most noteworthy, though, is the third line of reasoning—mere refusal to hold product manufacturers and distributors liable on a public nuisance theory—as it has stood as an independent basis for many different courts in rejecting public nuisance cases involving products.[119] This line of reasoning was articulated by the Third Circuit Court of Appeals in *City of Philadelphia v. Beretta U.S.A. Corp.* and *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.*, whereby the court in both cases refused to extend public nuisance law to impose liability on gun manufacturers because "no . . . court has ever allowed a public nuisance claim to proceed against manufacturers [of] lawful products[,]" and doing so would be "unprecedented nationwide."[120]

However, other courts have acknowledged the lack of precedent for permitting these nuisance claims but nonetheless allowed them to proceed.[121] For example, in *City of Boston v. Smith & Wesson Corp.*, the court held that although public nuisance in this context was a legal theory unique to the Commonwealth, this was not a reason for dismissal.[122] In *City of Gary ex rel. King v. Smith & Wesson Corp.*, an Indiana appellate court held that when an activity was regulated by the legislature, an actor cannot be held legally responsible for harm caused by conduct that was in compliance with the regulations.[123] The Supreme Court of Indiana, however, vacated the appellate court decision and held that a lawful activity can be conducted in an unreasonable manner and constitute a nuisance.[124] The Supreme Court recognized that although "there may be major, perhaps insurmountable,

117. *Id.* at 1138.

118. *Id.*

119. *See* Tioga Pub. Sch. Dist. v. U.S. Gypsum Co., 984 F.2d 915, 920 (8th Cir. 1993); City of San Diego v. U.S. Gypsum Co., 35 Cal. Rptr. 2d 876, 883 (Cal. Ct. App. 1994); Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 521 (Mich. Ct. App. 1992); *In re* Lead Paint Litig., 924 A.2d 484, 502 (N.J. 2007).

120. City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 421 (3d Cir. 2002) (quoting Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536, 540–41 (3d Cir. 2001)).

121. *See* City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1233 (Ind. 2003) (permitting the public nuisance suit to go forward but acknowledging that it was acting without precedent in doing so); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1141 (Ohio 2002) (permitting public nuisance claim to proceed); City of Boston v. Smith & Wesson Corp., No. 1999-02590, 2000 WL 1473568, at *14 (Mass. Super. Ct. July 13, 2000) (declining to dismiss the public nuisance suit despite the legal theory being "unique in the Commonwealth").

122. *Smith & Wesson Corp.*, 2000 WL 1473568, at *14.

123. City of Gary *ex rel.* King v. Smith & Wesson Corp., 776 N.E.2d 368, 380–81 (Ind. Ct. App. 2002).

124. *King*, 801 N.E.2d at 1235.

obstacles to establishing some or all of the damage[s]," that does not provide grounds for dismissing the action at the pleading stage.[125]

In sum, the past product litigation manifested inconsistent results, and the scope and applicability of public nuisance in a mass tort context remains largely undefined. As such, different courts, ruling on similar suits, have achieved vastly different results—some dismissed at the outset, some permitted to proceed but failed for lack of proof on the elements, and some successfully impose liability. Public nuisance continues to serve as a vastly dangerous weapon for plaintiffs and creates a potential for undefined, limitless liability for defendants. Presumably, the willingness of some courts to permit public nuisance actions, while acknowledging they do so without precedent,[126] suggests that product manufacturers may be better off pursuing the settlement route of tobacco manufacturers rather than taking a chance against the dangers and uncertainties of the unknown.

III. PHARMACEUTICAL MANUFACTURERS AND OPIOID LITIGATION

A. Opioid Epidemic Overview

In October 2017, President Donald Trump declared the opioid epidemic a public health emergency.[127] As President Trump correctly stated, "[w]e are currently dealing with the worst drug crisis in American history . . . [,] it's just been so long in the making. . . . Addressing it will require all of our effort."[128] Truly, the economical and societal costs have been astronomical. In 2013, the U.S. incurred an estimated cost just short of $80 billion from the opioid epidemic,[129] and, in 2015, that number grew to over $500 billion.[130] Between 2013 and 2015, deaths from opioid overdose increased by sixteen percent per

125. *Id.* at 1240–41.

126. *See id.* at 1233.

127. Greg Allen & Amita Kelly, *Trump Administration Declares Opioid Crisis a Public Health Emergency*, NPR (Oct. 26, 2017, 5:02 AM), https://www.npr.org/2017/10/26/560083795/president-trump-may-declare-opioid-epidemic-national-emergency.

128. *Id.*

129. Evelyn Cheng, *Goldman Sachs Thinks the Opioid Crisis Is So Bad It's Affecting the Economy*, CNBC (July 6, 2017, 11:00 AM), https://www.cnbc.com/2017/07/06/opioid-crisis-keeping-us-from-reaching-full-employment-goldman.html.

130. Darlene Superville, *White House Says Opioid Crisis Cost $504 Billion in 2015, Much Higher Than Once Thought*, PBS NEWS HOUR (Nov. 20, 2017, 2:51 PM), https://www.pbs.org/newshour/nation/white-house-says-opioid-crisis-cost-504-billion-in-2015-much-higher-than-once-thought.

year,[131] and in 2018 and 2019, it is estimated that more than 130 people died from opioid overdose every day.[132] From 2001 to 2017, opioid misuse has been estimated to cost the U.S. $1 trillion and counting.[133]

OxyContin—a synthetic opioid—was first developed by Purdue Pharma in 1995 with the active ingredient oxycodone, which was introduced to the U.S. market in 1939.[134] OxyContin has a time-release feature which eliminates the need for repeated dosing by delivering a higher dosage of the active ingredient, oxycodone, over a twelve-hour period.[135] Purdue Pharma aggressively marketed the drug to physicians as a pain relief and pain management technique, well-suited for individuals who suffer from chronic pain.[136] OxyContin generated sales quickly growing from $48 million in 1996, to $1.1 billion in 2000, all the way up to $3 billion in 2009, becoming the "most prescribed Schedule II narcotic drug in the United States."[137] However, the widespread popularity of the drug has also lead to widespread abuse.[138] For one, it did not take long before drug abusers discovered that the time-release feature could be circumvented by crushing up and snorting the drug, which allowed them to obtain a very quick and powerful high.[139] Additionally, abusers are often able to circumvent legitimate methods of obtaining prescriptions for OxyContin and illicit high quantities of the drug in other

131. *Annual Surveillance Report of Drug-Related Risks and Outcomes*, CTRS. FOR DISEASE CONTROL & PREVENTION 24 (Aug. 31, 2017), https://www.cdc.gov/drugoverdose/pdf/pubs/2017-cdc-drug-surveillance-report.pdf.

132. *The Opioid Epidemic by the Numbers*, U.S. DEP'T OF HEALTH & HUM. SERVS., (Oct. 2019), https://www.hhs.gov/opioids/sites/default/files/2019-11/Opioids%20Infographic_letterSizePDF_10-02-19.pdf.

133. *Economic Toll of Opioid Crisis in U.S. Exceeded $1 Trillion Since 2001*, ALTARUM (Feb. 13, 2018), https://altarum.org/news/economic-toll-opioid-crisis-us-exceeded-1-trillion-2001.

134. *History of OxyContin*, OXYCONTIN-ABUSE, https://www.oxycontin-abuse.com/OxyContin_History.htm (last visited Sept. 13, 2020).

135. *Id.*

136. *Id.*

137. Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1119 (2014).

138. *Id.*

139. *History of OxyContin*, *supra* note 134.

ways, such as through "pill mills,"[140] "doctor shopping,"[141] and "pharmacy diversion."[142]

B. The Rise of Opioid Litigation

Beginning in the early 2000s, the opioid epidemic opened the door to a floodgate of litigation. Over the past twenty years, opioid litigation shifted from personal injury suits brought by overdose victims to public nuisance suits brought by city and state governments.[143] Similar to tobacco litigation, plaintiffs in opioid litigation have alleged that the drug manufacturers engaged in false, misleading, or fraudulent advertising by concealing or misstating information about the health and safety risks of their products.[144] The plaintiffs alleged that the fraudulent advertising created a public nuisance which forced an expenditure of public funds to address the national health crisis created by opioid manufacturers.[145] As was the case in previous product litigation, plaintiffs in opioid cases faced major difficulties.[146] Firstly, opioid distribution was heavily regulated by the Food and Drug Administration ("FDA") which made it very difficult to show that the products were defective.[147] Secondly, at least some portion of fault for the opioid abuse was attributed to the individual victims who used the drug in an unapproved manner.[148] Thirdly, the manufacturers were not dealing directly with patients, and medical professionals served as intermediaries.[149] The FDA regulations, consumer abuse, and use of intermediaries tended to shift the liability of

140. "A pill mill is a physician, pain management clinic, or pharmacy that prescribes or dispenses prescription narcotics inappropriately or for non-medical purposes. Pill mills are characterized by payment in cash only, no physical exams, treatment with pain medication only, and large crowds waiting to be seen." Ausness, *supra* note 137, at 1119–20.

141. Drug abusers often engage in a technique called "doctor shopping," in which persons will visit multiple physicians at a time seeking to obtain multiple drug prescriptions for their drug of choice. *Id.* at 1120.

142. "Pharmacy diversion" involves robbing or burglarizing drug stores to obtain prescription drugs, as well as pharmacy employees forging prescriptions or taking prescription drugs off the shelves without authorization. *Id.*

143. Anna Stapleton, Comment, *In Defense of the Hare: Primary Jurisdiction Doctrine and Scientific Uncertainty in State-Court Opioid Litigation*, 86 U. CHI. L. REV. 1679, 1698 (2019).

144. *Id.* at 1701.

145. *Id.* at 1702.

146. *See* Michael J. Purcell, Note, *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, 52 COLUM. J.L. & SOC. PROBS. 135, 159 (2018).

147. *Id.*

148. *Id.*

149. *Id.*

external risks away from the drug manufacturers and onto the doctors and patients.[150]

Despite the glaring difficulties in succeeding, government entities nationwide have continued to pursue the litigation, asserting public nuisance as a popular cause of action.[151] As one scholar noted, there are many similarities between opioid litigation and tobacco litigation,[152] such as the alleged concealment of health and safety risks, deceptive advertising, federal regulations, and desire of government plaintiffs to achieve a centralized resolution to a national health crisis.[153] Additionally, states have asserted that drug manufacturers created an illicit secondary market for obtaining illegal opioids, an assertion which is analogous to those brought in firearm litigation.[154] On the other hand, there are also many differences between opioid litigation and previous product litigation which creates great complexities.[155] For example, opioid plaintiffs lack a key piece of evidence that tobacco plaintiffs were able to produce: information from whistleblowers bolstering their assertion that manufacturers intentionally concealed the risks of their products and tailored the products to foster addiction.[156] Another distinction between opioid litigation and tobacco litigation is that the tobacco industry reached over $93 billion in revenue in 2016, where the opioid industry peaked around $8 billion in 2015.[157] Even if a settlement or jury verdict is reached, most opioid manufacturers would likely file bankruptcy if they faced liability similar to that of the tobacco industry.[158]

C. The Current State of Opioid Litigation

In 2019, Johnson & Johnson, one of the top pharmaceutical manufacturers in the world,[159] received an adverse court ruling which marked the first time

150. *See id.*

151. *Id.* at 160.

152. Stapleton, *supra* note 143, at 1706.

153. *Id.* at 1701, 1706–07.

154. *See* Schwartz & Goldberg, *The Law of Public Nuisance*, *supra* note 25, at 555; Schwartz et al., *Deep Pocket Jurisprudence*, *supra* note 44, at 384–85.

155. Nicolas P. Terry, *The Opioid Litigation Unicorn*, 70 S.C. L. REV. 637, 645–46 (2019).

156. *Id.* at 646, 655.

157. *Id.* at 656.

158. *See id.* (discussing settlement, availability of assets, and filing bankruptcy in opioid litigation).

159. Tracy Staton, *Johnson & Johnson*, FIERCE PHARMA (Apr. 28, 2019, 7:00 AM), https://www.fiercepharma.com/special-report/1-johnson-johnson-0 ("Every year Johnson & Johnson far and away tops the list of drug makers ranked by total revenue." In 2018, "for instance, J&J's pharma business brought in $40.7 billion . . . .").

in history that a pharmaceutical company was held legally responsible for the opioid epidemic.[160] The suit was brought by the Oklahoma Attorney General and was premised on the argument that Johnson & Johnson created a public nuisance.[161] Purdue Pharma and Teva Pharmaceuticals, two other defendants initially included in the lawsuit, both reached a settlement with the state prior to trial in the amount of $270 million and $85 million, respectively.[162] The Oklahoma nuisance statute provides that:

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or Second. Offends decency; or Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.[163]

In rendering its ruling, the Oklahoma court first noted that nothing in the statutory language nor Supreme Court precedent limits public nuisances to those affecting property.[164] However, the Oklahoma court continued, even if property use was required, the requirement would be satisfied.[165] The state presented substantial, undisputed evidence that sales representatives incurred marketing training in their homes inside the state—marketing and sales efforts took place in doctors offices, hospitals, and restaurants within the state, company cars traveled on state roads to deliver marketing and sales messages, and messages were sent into thousands of state homes via computers and phones.[166]

The Oklahoma court further determined that Johnson & Johnson's marketing of the drug was false and misleading, clearly qualifying as "the kind of act or omission capable of sustaining liability under Oklahoma's nuisance

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160. Jackie Fortier & Brian Mann, *Johnson & Johnson Ordered to Pay Oklahoma $572 Million in Opioid Trial*, NPR (Aug. 26, 2019, 4:19 PM), https://www.npr.org/sections/health-shots/2019/08/26/754481268/judge-in-opioid-trial-rules-johnson-johnson-must-pay-oklahoma-572-million.

161. State *ex rel*. Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2019 WL 4019929, at *1–2 (Okla. Dist. Ct. Aug. 26, 2019).

162. Fortier & Mann, *supra* note 160.

163. OKLA. STAT. ANN. 50, § 1 (West 1980).

164. *Hunter*, 2019 WL 4019929, at *22–23.

165. *Id.* at *24.

166. *Id.*

law."[167] This determination was based on a factual finding of "unbranded" marketing, which included conduct such as minimizing safety issues of the drug, omitting material information when marketing the drug, broadening product indication, and overstating efficacy and safety claims without a substantial evidentiary basis.[168] The court determined that the entire state—including communities, neighborhoods, and a considerable number of persons—were negatively impacted by these acts or omissions, and that the acts or omissions were a cause-in-fact of the state's injuries.[169] Oklahoma used several witnesses' testimonies to establish that the abatement plan would take over twenty years to work and brought the suit in hopes of recovering over $17 billion.[170] However, the judge found that there was a lack of evidence to establish costs beyond a single year.[171] The court ordered Johnson & Johnson to pay $572 million,[172] equivalent to the cost of the first year of the proposed Oklahoma state abatement plan,[173] and retained jurisdiction over the abatement proceeds and the parties.[174] Johnson & Johnson has appealed this ruling,[175] and Michael Ulmann, Executive Vice President and General Counsel for Johnson & Johnson, stated "[t]his judgment is a misapplication of public nuisance law that has already been rejected by judges in other states . . . . The unprecedented award for the state's 'abatement plan' has sweeping ramifications for many industries and bears no relation to the company's medicines or conduct."[176]

In the National Prescription Opiate Litigation, an Ohio federal district judge is presiding over roughly 2,000 cases that have been consolidated against twenty-two defendants.[177] The trial, which would serve as a landmark federal opioid trial that would test the validity of different legal arguments and evidence, has not yet commenced, and may never commence, as the major

167. *Id.* at *24–25.

168. *Id.* at *25.

169. *Id.* at *29–30.

170. Fortier & Mann, *supra* note 160.

171. *Id.*

172. The judge later discovered that he made a mathematical error in calculating the judgment against Johnson & Johnson, and the initial $572 million was reduced to $465 million. Weixel, *supra* note 12.

173. *Hunter*, 2019 WL 4019929, at *20.

174. *Id.* at *21.

175. Sean Murphy, *Johnson & Johnson Appeals $572M Ruling in Oklahoma Opioid Lawsuit*, INS. J. (Sept. 30, 2019), https://www.insurancejournal.com/news/southcentral/2019/09/30/541584.htm.

176. Fortier & Mann, *supra* note 160.

177. Jan Hoffman, *$260 Million Opioid Settlement Reached at Last Minute with Big Drug Companies*, N.Y. TIMES (Oct. 21, 2019), https://www.nytimes.com/2019/10/21/health/opioid-settlement.html.

drug distributor defendants continue to enter settlement agreements with the state of Ohio.[178] A few of the pharmaceutical manufacturers to settle include: Johnson & Johnson, Teva Pharmaceuticals, Mallinckrodt Pharmaceuticals, Purdue Pharma, McKesson, Cardinal Health, and AmerisourceBergen.[179]

Prior to entering the last-minute settlement agreement with two Ohio counties, a few state attorneys general engaged in negotiations with drug distributors and other corporate defendants in hopes of pursuing a global settlement resolving all opioid lawsuits against them, but they were ultimately unsuccessful.[180] The settlement framework would have required Johnson & Johnson, Teva Pharmaceuticals, Mallinckrodt Pharmaceuticals, Cardinal Health, and AmerisourceBergen to pay state and local governments $48 billion.[181] The proposed settlement agreement was shut down for a number of reasons.[182] Firstly, many local cities and counties rejected the proposed deal because the yearly distribution they were to receive was miniscule in comparison to the true cost of the crisis.[183] Secondly, several county executives stated that they could not wait eighteen years to obtain the money due to them, highlighting that the opioid epidemic was a true national emergency.[184] Thirdly, the smaller entities criticized the settlement agreement that was reached years prior with the tobacco industry, complaining that the states used most, if not all of the settlement money for non-tobacco control-related efforts.[185] Finally, the length of an eighteen-year payout timeline raised concerns that the companies may file bankruptcy.[186]

Lawsuits continue to be filed nationwide seeking redress for the opioid epidemic, drug companies continue to deny any legal liability, and thus trials continue to be scheduled in courts across the country.[187] The stage is set for

178. *See id*.

179. *Id.*

180. *Id.*

181. Ben Kesslen, Laura Strickler & Adiel Kaplan, *Four State AGs Propose $48 Billion Opioid Settlement, but Lawyer for Cities Says Still Not Enough*, NBC NEWS (Oct. 21, 2019, 9:00 AM), https://www.nbcnews.com/news/us-news/drugs-companies-reach-last-minute-settlement-major-federal-opioid-trial-n1069361.

182. *See generally id.*

183. *Id.*

184. Joe Nocera, *Get Real. There Will Be a Global Opioid Settlement*, BLOOMBERG (Oct. 21, 2019, 1:03 PM), https://www.bloomberg.com/opinion/articles/2019-10-21/settle-your-opioid-suits-teva-mckesson-cardinal-and-amerisource.

185. *Id.*; Hoffman, *supra* note 176.

186. Kesslen et al., *supra* note 181.

187. *See* Eric Heisig, *Here's What to Expect from the Opioid Litigation in Cleveland, Other States in 2020*, CLEVELAND.COM (Dec. 27, 2019), https://www.cleveland.com/court-justice/2019/12/heres-what-to-expect-from-the-opioid-litigation-in-cleveland-other-states-in-2020.html.

2021 to serve as a monumental year for opioid litigation, as Johnson & Johnson awaits its appeal to the Supreme Court of Oklahoma,[188] and the uncertainty of the liability to follow that ruling keeps the pressure to settle at an all-time high.[189]

IV. A COURT-CREATED SUPER TORT

The lack of uniformity from the courts applying public nuisance to product litigation presents a grave risk of unknown liability for product manufacturers in the future. This new application of public nuisance, whether applied to asbestos, lead paint, tobacco, firearms, or opioids, inappropriately allows an end-run around traditional tort limitations. Given that it is often sought to be used in high-profile, high-stakes lawsuits, public nuisance serves as one of the most powerful and dangerous doctrines in tort law.

A. Regulation by Litigation: The Role of the Court vs. the Legislature

Aside from the pragmatic feasibility of a successful product liability suit through a public nuisance cause of action, there are other fundamental flaws with commencing this type of litigation.[190] When a prescription drug enters the market, proscribing regulations which balance the benefits of the drug and the potential dangers and side effects can be a tall task.[191] By attempting to expand a common law public nuisance claim to impose liability on manufacturers for a product which complies with federal regulations, litigants are entering murky waters and attempting to place the court in a policy-making role for which they are unfit, and more importantly, prohibited from under the doctrine of the Separation of Powers.[192] Under the Separation of Powers doctrine of the U.S. Constitution, the attorney general, a part of the executive branch, lacks the authority to regulate products.[193] The Constitution specifically delegates the authority to regulate and govern a particular industry to the legislature and the administrative agencies authorized by the

188. Sean Murphy, *Johnson & Johnson Appeals Oklahoma's $572M Opioid Ruling*, ABC NEWS (Sept. 26, 2019, 12:39 PM), https://abcnews.go.com/Health/wireStory/johnson-johnson-appeals-oklahomas-572m-opioid-ruling-65878734.

189. *See* Heisig, *supra* note 187.

190. *See* Strange III, *supra* note 30, at 538.

191. *See id.*

192. *See id.* at 537–38.

193. *See* Gifford, *Impersonating the Legislature*, *supra* note 14, at 964.

legislature,[194] and permitting this type of government litigation effectively infringes on the legislature's regulatory power.[195] When a court imposes liability on a manufacturer for a product which complies with government standards and specifications,[196] in turn, the attorney general—by succeeding in the action—is assuming legislative powers by creating *de facto* regulatory framework that is ultimately approved by the court.[197]

One may be inclined to argue that the current legislative and regulatory schemes have been vastly unsuccessful in addressing the opioid epidemic.[198] Such an argument, however, irrespective of any truth or merit it may have, should have no bearing on this issue—macro-economic regulation in a representative democracy is a task best suited for elected officials.[199] One commentator explained that:

> As imperfect as the functioning of state legislatures in reality may be, the attorney general's appropriate role within the constitutional framework is not to replace the legislatively enacted provisions regulating products with a regulatory scheme, whether resulting from settlement or judicial decree, which implements his or her own vision of social engineering. Nor will public policymaking be improved by a process that prioritizes regulatory goals depending on whether corporations with perceived deep pockets can be blamed for causing a particular public health problem.[200]

Another commentator, Robert B. Reich, President Clinton's former Secretary of Labor, also spoke on the topic, stating that:

> [T]he biggest problem is that these lawsuits are end runs around the democratic process. We used to be a nation of laws, but this new strategy presents novel means of legislating—within settlement negotiations of large civil lawsuits initiated by the executive branch. This is faux legislation,

194. *Id.* at 946.

195. Schwartz et al., *The "No-Fault" Theories*, *supra* note 13, at 957.

196. *Id.*

197. Gifford, *Impersonating the Legislature*, *supra* note 14, at 947.

198. *See* Purcell, *supra* note 146, at 164 (discussing the effectiveness of regulations in combatting the opioid epidemic).

199. Gifford, *Impersonating the Legislature*, *supra* note 14, at 961–62 (citing James A. Henderson, *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 338 (2005)).

200. *Id.* at 969.

> which sacrifices democracy to the discretion of . . . officials operating in secrecy.[201]

In addition to government litigation's interference with legislative power to regulate products, it also interferes with product innovation.[202] For example, when a product, such as a prescription drug, enters the market, it is not because it is completely safe and risk-free.[203] The FDA approves medicines that are unavoidably unsafe, but not unreasonably dangerous, because the benefits of the product outweigh its risks.[204] The FDA's regulatory regime specifically permits introducing these products despite knowledge of the risks, therefore absolving manufacturers of liability for harm caused by the known risks.[205] There is sound public policy supporting the FDA's approval because the overall benefit to consumers at large, accompanied by the ability of manufacturers to provide adequate warnings and instructions, sufficiently allows consumers to make an informed decision whether to assume the risks of the medication.[206] Furthermore, the legislature and regulatory agencies may continue to regulate the product's sale, use, and manufacture as they become aware of additional product risks.[207] Permitting this government litigation supersedes all regulatory oversight and imposes liability absent any manufacturer wrongdoing, regardless of whether the manufacturer acted in good faith and in compliance with proscribed regulations, and regardless of whether the consumer gave consent and assumed the risk of the medication.[208] The cost of this liability will increase the price of medications, interfere with developing knowledge and product innovation, and potentially keep highly beneficial medications off the market.[209]

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201. *Id.* at 915 (alteration in original) (quoting Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22).

202. *See* Schwartz et al., *The "No-Fault" Theories*, *supra* note 13, at 957.

203. *Id.*

204. *Id.*

205. *Id.* at 957–58.

206. *Id*.

207. *Id.* at 960.

208. *Id.* at 957–58, 960.

209. *See id.* at 958–60.

B. Super-Strict Liability

The Restatement (Third) of Torts: Products Liability was carefully drafted to distinguish between different kinds of product defects and to impose different liability standards for each.[210] Strict liability is imposed only when a product contains a manufacturing defect, which occurs when "the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."[211] The drafters noted that the imposition of strict liability in these situations fosters several objectives and is supported by several important fairness concerns.[212] For example, imposing strict liability for manufacturing defects encourages greater investment in product safety, discourages consumption of defective products, and reduces litigation costs for injured plaintiffs.[213] Additionally, strict liability allows deserving plaintiffs to recover without overcoming the difficult burden of proving manufacturer negligence and allows spreading the costs of those injuries among other consumers through price increases.[214] The rationale for imposing strict liability for manufacturing defects is simple—"because the manufacturer is responsible for the production process[,] [the manufacturer] must accept liability when something goes wrong during that process."[215] Thus, strict liability is proper because, between the innocent victim and the manufacturer, the manufacturer is the more culpable party even when it exercises all possible care in manufacturing the product.[216]

However, the objectives and fairness considerations of imposing strict liability are only served in a few specific, enumerated circumstances, and its application is not automatically triggered merely because a potentially innocent person was injured.[217] A product is not defective solely because it is dangerous[218] and "it has never been suggested that everyone who is adversely affected by an injury . . . should be allowed to recover his damages. Recovery must be brought within manageable dimensions."[219]

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210. RESTATEMENT (THIRD) OF TORTS § 2 cmt. a (AM. L. INST. 1998).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Schwartz et al., *The "No-Fault" Theories*, *supra* note 13, at 936.

216. *See generally* RESTATEMENT (THIRD) OF TORTS § 2 (AM. L. INST. 1998).

217. *See* Schwartz et al., *The "No-Fault" Theories*, *supra* note 13, at 935–36.

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

219. Guilmette v. Alexander, 259 A.2d 12, 14–15 (Vt. 1969) (quoting Baldwin v. State, 215 A.2d 492, 494 (Vt. 1965)) (internal quotation marks omitted).

The Third Restatement enumerates two other types of product defects: defective design and defects based on inadequate warnings.[220] These product defects are predicated on a different concept of responsibility, and the rationale for imposing strict liability does not apply.[221] For design defects and warning defects, liability is premised on a risk-utility balancing approach, and the product is deemed to be defective if "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design," and the omission of such renders the product not reasonably safe.[222] In discussing the rationale behind imposing strict liability for manufacturing defects, but not design or warning defects, the Third Restatement provides:

> When a manufacturer sets its quality control at a certain level, it is aware that a given number of products may leave the assembly line in a defective condition and cause injury to innocent victims . . . [a] reasonably designed product still carries with it elements of risk that must be protected against by the user or consumer since some risks cannot be designed out of the product at a reasonable cost. . . . The emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products. Society does not benefit from products that are excessively safe. . . . Society benefits most when the right, or optimal, amount of product safety is achieved.[223]

When product liability law was being developed, courts declined to impose a general duty on manufacturers to pay the costs associated with external risks—risks beyond the scope of the product-manufacturing process.[224] If manufacturers were to be responsible for these risks, manufacturers would be subject to a broader form of strict liability than any other area of tort law or product liability law.[225]

However, courts today are shifting the costs of external risks back onto the manufacturers through public nuisance and "giv[ing] rise to a cause of action . . . regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories of recovery."[226]

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220. *See* RESTATEMENT (THIRD) OF TORTS § 2 (AM. L. INST. 1998).

221. *Id.* at cmt. a.

222. *Id.* § 2.

223. *Id.* at cmt. a.

224. Schwartz et al., *The "No-Fault" Theories*, *supra* note 13, at 936.

225. *Id.* at 935.

226. *Id.* at 941–42 (quoting Tioga Pub. Sch. Dist. v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993)).

CONCLUSION

The application of public nuisance in mass product litigation has largely escaped judicial scrutiny because of its common result—settlement.[227] Insofar as it has been judicially addressed, the majority of courts have been unwilling to expand the traditional boundaries of public nuisance law,[228] leaving product liability law as the "paramount basis of liability" for harm caused by products.[229] Although any action or inaction taken by the legislature may be far from perfect, product regulation requires a complex cost-benefit determination giving vast considerations to fundamental notions of public policy, fairness, and overall societal benefit.[230] The Constitutional framework delegates these policy-making determinations to the legislature and its regulatory agencies, and the judiciary is unfit and ill-equipped for such complexity given the small portion of issues presented in litigation.[231]

227. Gifford, *Impersonating the Legislature*, *supra* note 14, at 968.

228. *Id.*

229. Schwartz et al., *The "No-Fault" Theories*, *supra* note 13, at 960–61 (citation omitted).

230. *See id.* at 960.

231. *See id*. at 961; Gifford, *Impersonating the Legislature*, *supra* note 14, at 947.