

Using Public Nuisance Law to “Solve” the Opioid Crisis Sets a Dangerous Precedent

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KEY TAKEAWAYS

The opioid crisis is a serious problem, but states and trial lawyers are pursuing improper public nuisance claims against companies that followed applicable laws.

When opioids are manufactured, dispensed, prescribed, and used properly, they can provide relief to those suffering from chronic or acute pain.

The solution to this crisis should lie with the political branches of government, not with the courts through ill-advised public nuisance lawsuits.

On November 9, 2021, by a five-to-one vote, the Oklahoma Supreme Court overturned a \$465 million opioid public nuisance judgement that had been rendered in favor of the State of Oklahoma and against Johnson & Johnson by a state court judge following a bench trial.¹ The state filed the lawsuit against Johnson & Johnson, Purdue Pharma, and Teva Pharmaceuticals claiming that they created a public nuisance when they manufactured, marketed, and sold opioids as an effective painkiller, that they were or should have been aware of dangers associated with opioid abuse and addiction, and that they should have warned the public about these dangers. Prior to trial, Purdue Pharma and Teva settled with the state, agreeing to pay \$270 million and \$85 million, respectively.

In overturning the verdict, the Oklahoma Supreme Court majority stated that while the state’s nuisance statutes have been applied to unreasonable

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conduct that interferes with and endangers the public's health and safety, the application of those statutes has been limited to conduct that is criminal or that affects public property. The court continued that "applying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers...." Like gun manufacturers, pharmaceutical companies have no control over those who sell (in the case of guns) or prescribe (in the case of opioids) their products and whether those who obtain them use them properly or abuse them.

This decision followed closely on the heels of a "tentative decision" that was rendered on November 1 by a Superior Court judge in California against several local governments and in favor of four large pharmaceutical companies, concluding that the governments had failed to prove how many medically unnecessary prescriptions had been written as a result of the manufacturers' alleged misleading marketing efforts and whether and how much such prescriptions had contributed to a public nuisance.²

But the news has not been all good for the pharmaceutical companies. On Tuesday, November 22, 2021, a federal jury in Cleveland, Ohio, following a six-week trial presided over by Judge Dan Polster, found that CVS Health, Walmart, and Walgreens, three of the nation's largest pharmacy chains, created a public nuisance that substantially contributed to the opioid crises in two northeastern Ohio counties (Lake and Trumbull) when the pharmacies overlooked so-called red flags when filling certain opioid subscriptions.

Mark Lanier, the well-known trial lawyer who was hired by the counties to represent them in the Cleveland trial, acknowledged that the number of opioid prescriptions had declined in recent years primarily as a result of greater oversight and revised corporate guidelines, that the defendants had dispensed a comparatively small volume of the opioids that ended up in the community, and that many of those who died did so from overdoses of illegal street drugs such as heroin and fentanyl after the supply of prescription opioids dried up.³ Nonetheless, Lanier persuaded the jury that these deaths were the foreseeable result of the pills that the defendants had dispensed and that the defendants therefore should be held responsible for the public nuisance created by opioids.

It will now be up to Judge Polster, whose conduct throughout the trial⁴ seemed to heavily favor the plaintiffs⁵ and who has already been rebuked by the U.S. Court of Appeals for the Sixth Circuit for rulings he made in connection with this case,⁶ to determine how much money to award in damages to the two counties. Judge Polster is also overseeing a vast swath of other pending federal opioid cases, which have been consolidated and transferred

to the Northern District of Ohio and subsequently assigned to him for pre-trial coordination by the Judicial Panel on Multidistrict Litigation under the MDL process.⁷

Last summer, Walgreens, Rite Aid, CVS, and Walmart settled with two New York counties (Nassau and Suffolk) for a combined \$26 million. In the Ohio case, Rite Aid and Giant Eagle, a regional chain, settled before trial for an undisclosed amount of money.⁸ Also last summer, Johnson & Johnson and three large drug distributors (McKesson, Cardinal Health, and AmerisourceBergen) entered into a \$26 billion settlement to resolve claims that had been filed by several states,⁹ although at least one state attorney general, Bob Ferguson of Washington, characterized this eye-popping amount as “not nearly good enough for Washington” and has now gone to trial in his own case in state court in Seattle.¹⁰

These are foreboding signs for those who are involved in the pharmaceutical industry. There are still thousands of lawsuits pending nationwide seeking billions of dollars as reimbursement from opioid manufacturers and pharmacies,¹¹ which are viewed as deep-pocket defendants by state, local, and tribal governments¹² and by the trial lawyers who frequently are filing these cases on behalf of governmental clients seeking reimbursement for the costs of drug treatment, medical care, and associated law enforcement premised on this same public nuisance theory.

As the public is well aware, the opioid crisis shows no signs of abating.¹³ It is a serious societal problem, to be sure.¹⁴ More than 100,000 Americans died of drug overdoses—up more than 70 percent from the previous year and more than the combined total of fatalities from car crashes and gun violence—over the past 12 months and for the first time in our nation’s history. While many of these overdose deaths were fentanyl-related, the number of overdose deaths attributable to natural and semi-synthetic opioids, including prescription pain medication, also increased.

The wave of lawsuits that are being filed and the legal theories that are being utilized raise serious questions and have implications that extend well beyond any attempt to “solve” the opioid crisis. What is going on here?

Common-law torts involving products that were defectively designed or manufactured or that fail to warn consumers about known potential dangers are well established, providing plenty of incentives for manufacturers and retailers to avoid such harms and providing redress to consumers who are injured by improper warnings or defectively designed or manufactured products.

But this is different. Nobody claims that the opioids that were produced by these companies or sold by these pharmacies were defective. Nor does

anybody claim that they were dispensed without a doctor's prescription or a label warning of potential side effects. These are not traditional product liability lawsuits;¹⁵ rather, these lawsuits are alleging that the defendants should be made to pay for the ongoing harms caused by a public nuisance that they created with legal, licensed, and heavily regulated products.

What are public nuisance laws, and should they be applied to companies that manufacture and dispense a legitimate, non-defective product that has been deemed safe and efficacious for its intended use by the U.S. Food and Drug Administration (which also regulates advertisements for prescription drugs)¹⁶ and that has been ordered by physicians who have been licensed¹⁷ to prescribe them and who are regulated by the U.S. Drug Enforcement Administration (DEA) and state licensing and regulatory bodies?

Public Nuisance Law: The “impenetrable Jungle”

The tort of nuisance developed as a common-law crime in England early in the 12th century and was later adopted in the United States.¹⁸ Although the precise definition may vary from state to state, the term “public nuisance” generally refers to unreasonable conduct, such as discharging sewage or other toxic effluence, housing diseased animals, or improperly storing explosives in a public area, that interferes with the health, safety, comfort, and peace of the public or other rights held in common by all members of the community.¹⁹

In contrast, the term “private nuisance” refers to unreasonable conduct that adversely affects the private rights or interests of an individual or identifiable group of individuals. Some conduct, of course—such as a factory that discharges noxious material that pollutes the air or water enjoyed not only by the owners of the adjoining properties, but also by the entire town or city—can constitute both a public nuisance and a private nuisance.

The ambiguity surrounding the contours of what constitutes a public nuisance led esteemed scholars William Prosser and W. Page Keaton to refer to public nuisance law as an “impenetrable jungle” that has grown over time.²⁰ This is due in no small measure to the creativity of trial lawyers who have urged judges to expand the definition from conduct that interferes with a right common to all members of the public to conduct that ends up harming a large number of private individuals: in other words, from a tort that is collective in nature to one that is individual in nature. This is significant because a product such as a prescription drug may be used by a lot of people, some (or even many) of whom may suffer harm, but any harm suffered through the use of that product does not interfere with a collective

public right.²¹ In this manner, trial lawyers have managed to persuade a number of judges to effectively eliminate the distinction between a private nuisance and a public nuisance.

How did we arrive at this moment in which public nuisance claims have become the primary vehicle of pursuing opioid claims brought by states and local governments? Much of that starts with the trial lawyers who have helped to make a muddle of private and public nuisance. In the trial lawyers' conception of nuisance claims, almost anything can be couched as a public nuisance, and trial lawyers stand to gain a huge windfall in contingency fees without having to comply with class action rules if they are successful in persuading a state, city, or county government to let them litigate on its behalf. Moreover, because the opioid crisis is ongoing, trial lawyers do not have to worry about statutes of limitations, laches (unreasonable delays), or other defenses that might apply to other tort actions.

For elected, resource-constrained officials, giving trial lawyers free rein to file and conduct lawsuits in the name of the public can prove tempting, giving them the chance to mulct out-of-state companies for their community while earning the ability to tell their constituents that they are doing something to address a real or perceived crisis—which is far easier and less costly than having to enact legislation to deal with a societal problem. But trying to squeeze money out of legitimate companies that have not violated the law and are manufacturing a non-defective, legal product merely because that product has some association with the crisis is a Devil's bargain, as recent opioid case decisions have made clear.

In order to constitute a public nuisance, the challenged conduct must be unreasonable, and any harm must be foreseeable. Here the manufacturers and dispensers of opioids have complied with all applicable laws and regulations. There are at least two intervening third parties²² in this chain of events: the doctors (and it seems there was a passel of them) who misprescribed these drugs and who were negligent in monitoring patient use and the many users who abused them. The proposition that pharmaceutical companies and pharmacies should have foreseen that, although they complied with applicable law, doctors would misprescribe these drugs on a massive scale and that their "patients" would rampantly abuse them is dubious, to say the least.

The responsibility for policing doctors to make sure that they are not overprescribing prescription drugs lies with the DEA and the states, not with drug manufacturers or pharmacies. Even if one could fault the marketing efforts of some of the drug manufacturers regarding the propriety of prescribing opioids to address chronic pain and the associated risks of

addiction, there is no reason whatsoever to blame pharmacies for those efforts. Some pharmacies may suspect that a prescription drug is being overly prescribed, but their ability to question the propriety of a prescribing physician's conduct is limited. Several states have laws specifically requiring pharmacies to fill prescriptions when they have been issued by a licensed physician.²³ Pharmacists have also been sued for refusing to fulfill a prescription for a controlled substance.²⁴

Opioid addiction is obviously a very real public health crisis that has caused great misery and death to many in our country. However, the opioids that are manufactured by established drug manufacturers and dispensed by licensed pharmacies are legitimate products that, when prescribed and used properly, can bring relief to those who suffer from chronic or acute pain. The same can be said of gun manufacturers (gun violence has increased alarmingly and caused misery and death to many); oil companies (climate change is perceived by many as an existential threat); and other retailers who produce and sell legal products that, when used properly by law-abiding citizens, save lives, lift people from poverty, and are of great use to society.²⁵

Expanding the Reach of Public Nuisance Law

Nor is this a new tactic.²⁶ Trial lawyers have been trying to expand the reach of public nuisance laws for some time, with the most aggressive efforts involving the use of public nuisance as an ideological weapon against industries related to climate change and firearms.

In the 1990s, the attorneys general of 46 states, five U.S. territories, and the District of Columbia filed a public nuisance lawsuit against several of the largest cigarette manufacturers. Rather than test the limits of this theory of liability, the defendants settled, agreeing to pay \$246 billion and further agreeing to restrictions on the sale and marketing of tobacco products.²⁷ The unprecedented and unmitigated success of this litigation provided plenty of incentives to trial lawyers to test the boundaries of public nuisance law, and they have taken up that mantle with gusto.

We have already seen states, cities, and localities—represented by trial lawyers who have negotiated hefty contingency fee arrangements—file lawsuits utilizing a public nuisance theory of liability against energy companies, seeking billions of dollars in damages to abate the harm caused by climate change²⁸ even though the Supreme Court of the United States held in *AEP v. Connecticut*, in a 2011 opinion written by Justice Ruth Bader Ginsburg, that the Clean Air Act preempts public nuisance torts against corporations that emit greenhouse gases.²⁹

We have also seen several public nuisance lawsuits filed against firearms manufacturers and distributors even though Congress in 2005 passed the Protection of Lawful Commerce in Arms Act, which, with limited exceptions, provides immunity to firearm and ammunition manufacturers and sellers from civil or administrative claims “resulting from the criminal or unlawful misuse” of firearms or ammunition.³⁰ These lawsuits have met with mixed success.³¹

Trial lawyers also have brought public nuisance theories of liability to bear against vaccines, leading ultimately to action by Congress. As chronicled by the Centers for Disease Control and Prevention:

During the mid-1970s, there was an increased focus on personal health and more people became concerned about vaccine safety. Several lawsuits were filed against vaccine manufacturers and healthcare providers by people who believed they had been injured by the diphtheria, pertussis, tetanus (DPT) vaccine. Damages were awarded despite the lack of scientific evidence to support vaccine injury claims. As a result of these decisions, liability and prices soared, and several vaccine manufacturers halted production. A vaccine shortage resulted and public health officials became concerned about the return of epidemic disease.³²

Congress responded by passing the National Childhood Vaccine Injury Act, which established a compensation fund for those who suffered injuries from certain vaccines while eliminating the potential liability of manufacturers and ensuring a stable supply of those much-needed vaccines.³³

Recently, the Earth Island Institute, an activist environmental group, has filed a series of lawsuits against food, beverage, and consumer goods companies that utilize plastic products and packaging, seeking to hold them responsible for their alleged contribution to polluting oceans and other waterways.³⁴

Where will this end? If courts allow lawsuits premised on a public nuisance theory to proceed in the opioid space against companies that sold licensed, regulated products into channels that included a complex series of intermediates, there will likely be no end to the number of lawsuits filed by trial lawyers and liberal activists against the manufacturers and distributors of lawful products that have the potential, if misused or abused, to cause harm and that, at least in some circles, have become unpopular. As one court succinctly put it:

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 nuisance claim would be conceived and a lawsuit born.³⁵

The end goal of those who are filing such lawsuits—and the likely result of those lawsuits—will be to shake down these companies in order to pad the pockets of trial lawyers and cause manufacturers to stop making and distributors to stop selling legal products that are utilized legitimately by millions of law-abiding people. Unable to prevail at the ballot box or to persuade their elected representatives to pass legislation to help them accomplish their goals, activists are pursuing their agenda of trying to effectively ban things they don't like through the courts. Were that to happen, millions of people who wish to exercise their Second Amendment rights to defend themselves or who seek a prescription for medications that will help to relieve their acute or chronic pain will be left out in the cold.

Conclusion

In 2019, Judge Thomas Moukawsher dismissed a public nuisance lawsuit that had been filed by 37 municipalities in Connecticut against 25 drug companies. In doing so, he stated that were he to allow the case to proceed, it “would risk letting everyone sue almost everyone else about pretty much everything that harms us.” He concluded that “it might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money and moral responsibility. Maybe it would make them pay up and ease straining municipal fiscs across the state. But it's bad law.”³⁶ Precisely so.

The opioid problem, like increasing gun violence, is indeed a crisis and a matter of great societal concern. Yes, there are some real culprits who fueled the problem by committing criminal acts, including doctors who overprescribed opioids even when they were contraindicated and outside the scope of their legitimate medical practice³⁷ and some drug manufacturers who intentionally misbranded drugs³⁸ or bribed physicians to overprescribe opioids.³⁹ But laying the blame at the feet of companies that followed applicable laws and that produced and dispensed a legitimate and highly regulated product is not only a mistake; it sets a dangerous precedent. The “solution” to this crisis should lie with the political branches of government, not with the courts through an unwarranted expansion of the law of public nuisance.

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Endnotes

1. State ex rel. Hunter v. Johnson & Johnson, 2021 OK 54 (2021).
2. Clerk's Certificate of Mailing/Electronic Service at 1, The People of the State of California vs. Purdue Pharma L.P., Case No: 30-2014-00725287-CU-BT-CXC (2021).
3. Jan Hoffman, *CVS, Walgreens and Walmart Fueled Opioid Crisis, Jury Finds*, N.Y. TIMES, Nov. 23, 2021, available at <https://www.nytimes.com/2021/11/23/health/walmart-cvs-opioid-lawsuit-verdict.html>.
4. Editorial Board, Opinion, *A Case of Opioid Tort Abuse*, WALL ST. J., Nov. 9, 2021, available at https://www.wsj.com/articles/the-worst-tort-abuse-ohio-opioid-trial-judge-dan-polster-11636492713?st=q7fqzpm3bgl90f&reflink=article_copyURL_share.
5. See, e.g., O.H. Skinner, *Cleveland Judge Rushes to Judgement on Opioid Case*, WASH. EXAMINER, Nov. 17, 2021, available at <https://www.washingtonexaminer.com/opinion/op-eds/cleveland-judge-rushes-to-judgment-on-opioid-case>; Michael I. Krauss, *Remarkable Refusal to Declare a Mistrial in Opioid Bellwether Case*, FORBES, Oct. 27, 2021, available at <https://www.forbes.com/sites/michaelkrauss/2021/10/27/remarkable-refusal-to-declare-a-mistrial-in-opioid-bellwether-case/?sh=68c8ab60a6f4>; Jan Hoffman, *Opioid Defendants Seek To Disqualify Judge Overseeing 2,300 Cases*, N.Y. TIMES, Sept. 14, 2019, available at <https://perma.cc/A57G-25VV>.
6. Daniel Fisher, *Opioid Judge's 'Negotiation Class' Rejected by Sixth Circuit as Not Permitted by Law*, Legal Newsline, Sept. 24, 2020, available at <https://legalnewsline.com/stories/555458315-opioid-judge-s-negotiation-class-rejected-by-sixth-circuit-as-not-permitted-by-law>; Eric Heisig, *Appeals Court Again Rebukes Cleveland Federal Judge over Opioid Litigation Narrowing Case Against Large Pharmacy Chains*, Cleveland.com, Apr. 5, 2020, available at <https://www.cleveland.com/court-justice/2020/04/appeals-court-again-rebukes-cleveland-federal-judge-over-opioid-litigation-narrowing-case-against-large-pharmacy-chains.html>.
7. This process is set forth in 28 U.S.C. § 1407.
8. Hoffman, *supra* note 3.
9. *Big 3 U.S. Drug Distributors, Johnson & Johnson Reach Landmark \$26 Billion Opioid Settlement*, CNBC, July 21, 2021, available at <https://www.cnn.com/2021/07/21/drug-distributors-jj-reach-landmark-26-billion-opioid-settlement-.html>.
10. Jared Brown, *Trial Begins in Washington State's Case Seeking More than \$38 Billion from Opioid Distributors*, Courthouse News Service, Nov. 15, 2021, available at <https://www.courthousenews.com/trial-begins-in-washington-states-case-seeking-more-than-38-billion-from-opioid-distributors/>; Nate Raymond, *Washington State, in \$95 Billion Opioid Trial, Blames Drug Distributors for Crisis*, Reuters, Nov. 15, 2021, available at <https://www.reuters.com/world/us/mckesson-drug-distributors-face-95-billion-opioid-trial-washington-state-2021-11-15/>.
11. One of the plaintiffs' experts, Dr. Caleb Alexander of Johns Hopkins University School of Medicine, estimates that the cost to "fix" the crisis will exceed \$480 billion. Alison Frankel, *Expert Witness in Opioids MDL: Fixing Crisis Will Cost \$483 Billion*, Reuters, Apr. 18, 2019, available at <https://perma.cc/4XSH-EJSZ>.
12. These legal actions are being filed by governmental bodies under the doctrine of *parens patriae* (Latin for "parent of the people"), which refers to a governmental entity filing a lawsuit in its capacity as a sovereign and a guardian acting on behalf of its citizens and others within its jurisdiction. See generally Michelle L. Richards, *Pills, Public Nuisance, and Parens Patriae: Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. Rich. L. Rev. 405 (2020).
13. Roni Caryn Rabin, *Overdose Deaths Reached Record High as the Pandemic Spread*, N.Y. TIMES, Nov. 17, 2021, available at <https://www.nytimes.com/2021/11/17/health/drug-overdoses-fentanyl-deaths.html>.
14. Council of Econ. Advisers, *The Underestimated Cost of the Opioid Crisis 2–3* (Nov. 2017), available at <https://perma.cc/4YEGFNZR>. (In 2015, the economic costs associated with opioid abuse were estimated at \$504 billion; estimated economic costs of the opioid epidemic focus on health care costs, foregone earnings, and criminal justice costs). See also Altarum, *Economic Toll of Opioid Crisis in U.S. Exceeded \$1 Trillion Since 2001*, February 13, 2018, available at <https://altarum.org/news/economic-toll-opioid-crisis-us-exceeded-1-trillion-2001> (estimating that opioid addiction cost the United States \$1 trillion between 2001 and 2017 and projecting that it could cost an additional \$500 billion over the next three years).
15. See, e.g., State ex rel. Hunter v. Johnson & Johnson, 2021 OK 54, ¶20 (2021) ("The central focus of the State's complaints is that J&J was or should have been aware and that J&J failed to warn of the dangers associated with opioid abuse and addiction in promoting and marketing its opioid products. This classic articulation of tort law duties—to warn of or to make safe—sounds in product-related liability. ¶ Public nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap."); Restatement (Third) of Torts: Lib. for Econ. Harm § 8 cmt. g (Am. Law. Inst. 2020) ("Mass harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake.");
16. U.S. Food and Drug Administration, *Prescription Drug Advertising | Questions and Answers*, available at https://www.fda.gov/drugs/prescription-drug-advertising/prescription-drug-advertising-questions-and-answers#control_advertisements.
17. Juliette Willard, *What Are DEA Numbers and What Are They Used For?*, VERISYS, June 3, 2021, available at <https://verisys.com/what-are-dea-numbers-and-what-are-they-used-for/>.
18. William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 997–98 (1966); Richards, *supra* note 12 at 418.

19. See *Public Nuisance*, *Wex Legal Dictionary* (2020); Prosser, *supra* note 18 at 997–99; Sir James Fitzjames Stephen, *General View of the Criminal Law of England* 105 (2d. ed. 1890) (asserting that a public nuisance must inconvenience “the public in the exercise of rights common to all Her Majesty’s subjects”). See *generally* Restatement (Second) of Torts § 821B (Am. Law Inst. 1979) (defining public nuisance as “an unreasonable interference with a right common to the general public”). The Restatement (Second) also provides guidance on circumstances that determine what constitutes an unreasonable interference with a public right. According to the Restatement:

Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

 - (a) Whether the conduct involves a significant interference with the public health, the public safety, the 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.
20. Prosser and Keeton on the Law of Torts § 86, at 616 (W. Page Keeton et al. eds., 5th ed. 1984) (“There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’ It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.”). See *also* F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480 (1949) (stating that a difficulty exists in a definition because the boundaries of nuisance are “blurred”); Stephen, *supra* note 19 at 104–05 (declaring that nuisance is a term that has the broadest possible meaning).
21. See, e.g., *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 448 (R.I. 2008) (stating that the pollution of a stream that bars only a few farmers from retrieving water from that stream does not constitute interference with a public right but that pollution of a stream that bars a community’s right to fish within the stream does constitute a public right; holding that the right to be free from lead-based paint is an individual right and not a communal interest held by the public); *State ex rel. Hunter v. Johnson & Johnson*, 2021 OK 54, ¶24 (2021) (“A public nuisance involves a violation of a public right; a public right is more than an aggregate of private rights by a large number of injured people.”); *City of Chicago v. Am. Cyanamid Co.*, 355 Ill. App. 3d 209, 823 N.E.2d 126, 131 (2005) (holding a public right is not “an assortment of claimed private individual rights”); Donald Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 817 (2003) (“The sheer number of violations does not transform the harm from individual injury to communal injury.”).
22. Dr. Anna Lembke, the chief of addiction medicine and a professor at Stanford University School of Medicine, discusses other third parties involved that may have had a material role in enabling this crisis to proliferate, including hospitals, insurance companies, some patient advocacy groups, and the Center for Medicare and Medicaid Services, a division of the Department of Health and Human Services. See ANNA LEMBKE, *DRUG DEALER, MD: HOW DOCTORS WERE DUPED, PATIENTS GOT HOOKED, AND WHY IT’S SO HARD TO STOP* (2016). To listen to Dr. Lembke discussing these and other issues related to the opioid crisis, see <https://nowcasts.com/blogs/webcast-drug-dealer-md-how-doctors-were-duped-patients-got-hooked-and-why-its-so-hard-stop>. See *also* Richards, *supra* note 12 at 434–35 (discussing the role of the American Pain Society, the Joint Commission on Accreditation of Healthcare Organizations, the Department of Veterans Affairs, the American Medical Association’s Council on Scientific Affairs, and the Federation of State Medical Boards, among others, in encouraging a more aggressive approach to treat and manage pain through the use of opioids).
23. See, e.g., National Women’s Health Center, *Pharmacy Refusal 101*, available at <https://nwlc.org/resources/pharmacy-refusals-101/> (listing state laws); National Conference of State Legislatures, *Pharmacist Conscience Clauses: Law and Information*, available at <https://www.ncsl.org/research/health/pharmacist-conscience-clauses-laws-and-information.aspx> (listing state laws).
24. David B. Brushwood, *Prescriber Alleges Defamation After Pharmacy Refuses to Fill Prescriptions*, *PHARMACY TODAY*, Jan. 2020, at 33, available at [https://www.pharmacytoday.org/article/S1042-0991\(19\)31423-9/pdf](https://www.pharmacytoday.org/article/S1042-0991(19)31423-9/pdf); Joseph L. Fink III, *Prescriber Alleges Defamation Against Pharmacy Chain*, *PHARMACY TIMES*, Nov. 24, 2020, available at <https://www.pharmacytimes.com/view/prescriber-alleges-defamation-against-pharmacy-chain>.
25. The Heritage Foundation, *Defensive Gun Uses in the U.S.*, available at <https://datavisualizations.heritage.org/firearms/defensive-gun-uses-in-the-us/>.
26. *The Plaintiffs’ Lawyer Quest for the Holy Grail: The Public Nuisance Super Tort*, *ATRA*, Apr. 14, 2020, available at <https://www.atra.org/wp-content/uploads/2020/03/Public-Nuisance-Super-Tort.pdf>.
27. Master Settlement Agreement, Pub. Health L. Ctr. Mitchell Hamline Sch. L., available at <https://perma.cc/2C3K-VCHS>; Truth Initiative, *Master Settlement Agreement*, available at <https://truthinitiative.org/who-we-are/our-history/master-settlement-agreement>; *15 Years Later, Where Did All the Cigarette Money Go?*, NPR, Oct. 13, 2013, available at <https://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go>. There also are significant differences between tobacco and opioids, including the fact that tobacco, unlike opioids, has no health benefits and is incapable of being used safely. Further, until the Master Settlement Agreement was put in place, cigarettes were not governed by any regulatory body. Richards, *supra* note 12 at 448–49.
28. Editorial Board, Op-Ed, *The Climate-Change Tort Racket*, *WALL ST. J.*, June 8, 2018, available at <https://www.wsj.com/articles/the-climate-change-tort-racket-1528499384>.
29. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011).
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35. *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 761 N.Y.S.2d 192, 196 (2003).
36. *City of New Haven v. Purdue Pharma, L.P.*, No. X07HHDCV176086134S, 2019 WL 423990 (Conn. Super. Ct. Jan. 8, 2019), judgment entered (Conn. Super. Ct. 2019). Other courts have also concluded that it would be unreasonable to extend the public nuisance doctrine to manufacturers who no longer have control over the alleged nuisance-causing product. See, e.g., *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 821 N.E.2d 1099, 1126 (Ill. 2004) (“the negative consequence of judicially imposing a duty upon commercial enterprises to guard against the criminal misuse of their products by others will be an unprecedented expansion of the law of public nuisance.”); *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (holding defendants liable would cause “[n]uisance [to] become a monster that would devour in one gulp the entire law of tort....”). See also *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001) (“manufacturers may not be held responsible without a more tangible showing that the defendants were a direct link in the causal chain that resulted in the plaintiffs’ injuries, and that defendants were realistically in a position to prevent the wrongs.”) (internal quotation marks and citation omitted); *In re Lead Paint Litig.*, 191 N.J. 405, 924 A.2d 484, 505 (N.J. 2007); *In re Firearm Cases*, 24 Cal. Rptr. 3d 659 (2005).
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