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IN THIS ISSUE

In this series of articles, we highlight the terrific presentations from our committee's inaugural Product Liability Roundtable at J&J World Headquarters. This article provides well-researched and interesting discussions about public nuisance (it arises more than you think).

The Historical Development of Public Nuisance

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ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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The doctrine of public nuisance has evolved considerably beyond its origin in old English common law. Spurred by the evolution of the Restatement of Torts, the cause of action once characterized by infringements of land rights belonging to the English Crown has become a "super tort," masquerading as the solution to various societal ills.[1] Rather than aligning with long-standing liability law, modern public nuisance lawsuits attempt to expand the law by "rest[ing] on the idea that courts have inherent authority to determine that something is a public nuisance based on the court's understanding of the public interest."[2]

II. The History of Public Nuisance

Originating under English common law, a public nuisance claim was a criminal action that required some kind of interference with land or real property.[3] The earliest public nuisance cases addressed wrongful appropriation of the royal domain or interferences with a public highway. By 1327, public nuisance was broadened to include "the rights of the public, [still] represented by the Crown, by such things as interference with the operation of a public market or smoke from a lime-pit that inconvenienced a whole town."[4] An obstruction or infringement on a public right, or "those [rights] likely to be encountered equally by any member of society," became redressable under a public nuisance theory.[5] While public nuisance did not include "damage to private property or other infringements of personal or private rights," it did include a person's use of land "in [any] manner that creates local disturbances, such as the use of property for prostitution, gambling, or drug dealing."[6]

In the traditional scenarios, actions for nuisance "primarily took the form of criminal prosecutions."[7] At that point, the course of action for a public nuisance claim was that (1) the government would file an action to protect the public's right to use land or water, (2) the court would enjoin the activity creating the nuisance, and (3) the person who created the nuisance would be required to abate the nuisance, or pay for the abatement to be performed by the Crown.[8] In later years, civil proceedings allowing for injunctive relief became more common.[9]

Even after the switch from criminal to civil proceedings, only the Crown could bring a public nuisance claim, and "nuisance law

[1] Am. Tort Reform Ass'n., *The Plaintiffs' Lawyer Quest for the Holy Grail: The Public Nuisance "Super Tort"* 1 (2020) (*"Super Tort"*).
[2] Thomas W. Merrill, *The New Public Nuisance: Illegitimate and Dysfunctional*, 132 Yale L.J Forum. 985, 989 (2023).
[3] Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 Yale L.J. 702, 714 (2023).
[4] *Restatement (Second) of Torts* § 821B cmt. A. (1979).
[5] Victor E. Schwartz et. al., *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 Okla. L. Rev. 629, 632 (2010) ("*Game Over?*").
[6] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 632, Am. Tort Reform Ass'n., *Super Tort* 2.
[7] U.S. Chamber Institute for Legal Reform., *Waking the Litigation Monster: The Misuse of Public Nuisance* 4 (Mar. 2019) (*"Waking the Litigation Monster"*).
[8] Am. Tort Reform Ass'n., *Super Tort* 2.
[9] *Id*.

was limited to providing injunctive relief or abatement."[10] English common law boasted a bipartite court system. Courts of law heard claims dealing with contracts or torts and offered remedies in terms of monetary damages. Courts of equity heard claims for specific performance, abatement, or injunctions—not monetary damages. Public nuisance claims were heard in courts of equity, as the only remedies available were injunctions or abatement resulting in the nuisance being eradicated. Additionally, beginning around the sixteenth century and in narrow circumstances, another avenue for recovery developed—a private plaintiff could recover money damages under the special injury rule.[11] The special injury rule requires a private party to suffer injury or damages resulting from a public nuisance, and the injury must be "different in kind, [not just in degree,] from damages all other members of the public suffer."[12]

America adopted the English common law approach to public nuisance and eventually began to use the tort as a "gap-filling role."[13] Regulatory and statutory schemes identifying certain actions as public nuisance became more prevalent and, as a result, there was much less confusion as to acceptable behaviors.[14] At this point, "public nuisance theory was not necessary to define societal boundaries and largely faded from American jurisprudence"; the tort merely served as a potential outlet for the government to protect public rights and limit public harm when needed.[15]

In 1939, the American Law Institute ("ALI") issued the Restatement (First) of Torts. Intended to be a recitation of the state of the law generally as it applied to civil torts, the Restatement was the product of lawyers, judges, and academics trying to define how legal principles applied in contemporary cases. The ALI also utilized the Restatement to advocate for advancements of the law recommended by its members.

The first Restatement of Torts defined public nuisance in an introductory note as "an offense against the State, and as such is subject to abatement or indictment on the motion of the proper governmental agency."[16] As the Restatement did not include a substantive section for public nuisance, the decisions involving these claims continued to be dictated by state criminal law.[17] In fact, the Restatement of Torts was only referenced regarding public nuisance when an opinion discussed the possibility of a special injury to sustain a

[10] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 632.
[11] U.S. Chamber Institute for Legal Reform., *Waking the Litigation Monster* 4.
[12] *Id*.
[13] *Id*. at 5.
[14] *Id*.
[15] Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 546 (2006) (*"The Law of Public Nuisance"*).
[16] *Restatement (First) of Torts* ch. 40, intro. note (1939).
[17] *See generally Kelsey v. Chicago, R. I. & P.R. Co.*, 264 Minn. 49, 117 N.W.2d 559 (1962), *Wilson v. Parent*, 228 Or. 354, 365 P.2d 72 (1961).

private suit.[18] Over time, however, lawyers would try to move public nuisance into the realm of civil claims.

III. Changing Notions of Public Nuisance

Beginning in the 1970s, interpretations of the applicability of public nuisance began to change. The first major shift from traditional notions of the doctrine did not happen in a courtroom but, instead, at the American Law Institute. At the ALI's Annual Meeting in 1970, members sounded concerns regarding the narrow definition of public nuisance outlined in the Restatement (First) of Torts.[19] Some members believed the definition should be broadened beyond criminal applications to accommodate developments in the law and to surmount traditional tort law models, especially in the field of environmental protection.[20] After much debate, a new draft version of the Restatement was crafted with the public nuisance rule emerging that "omitted any criminal-law constraint" and rejected the idea that only crime can constitute a public nuisance.[21] With the new language, public nuisance was defined as "unreasonable interference with a right common to the general public":[22]

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) 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.[23]

Further, the new Restatement indicated that standing could be satisfied by an individual if they sued "as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action."[24]

Coupled with the surge in environmentalism, the new Restatement motivated lawyers to utilize public nuisance law in more flexible ways. No longer limited by a preclusion of liability for authorized actions or a lack of individual standing, public nuisance actions were targeted at

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[18] *See generally Embry-Bosse Funeral Home, Inc. v. Webster et al.*, 261 S.W.2d 682 (Ky. 1953), *Page v. Niagara Chem. Div. of Food Mach. & Chem. Corp.*, 68 So. 2d 382 (Fla. 1953).
[19] *Restatement (Second) of Torts* § 821B n. to Institute (Am. L. Inst., Tentative Draft No. 16, 1970).
[20] *Restatement (Second) of Torts* § 821B n. to Institute (Am. L. Inst., Tentative Draft No. 17, 1971), Schwartz, *Game Over?*, 62 Okla. L. Rev. at 637.
[21] Kendrick, 132 Yale L.J at 723.
[22] *Restatement (Second) of Torts* § 821B (1) (1979).
[23] *Id*. at § 821B.
[24] *Id*. at § 821C(2)(c).

conduct that could be considered an unreasonable interference with any public right.[25] With the Second Restatement's broadened approach, lawyers pursued claims for "a[ny] behavior which interferes with the health, safety, peace, comfort or convenience of the general community."[26] While the ability to obtain individual standing increased the number of lawsuits, public nuisance was generally still used in the more traditionally recognized instances of property interference and chemical contamination.[27] Alongside those causes of action, new claims arose involving other factual scenarios including air pollution, the operation of plants and factories, and the emission of low-frequency sound waves.[28] Albeit exciting for ambitious lawyers, these new applications did not arise without doubts—the Restatement itself warned that if certain conduct "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."[29] Consistent with this caveat, courts remained hesitant to allow the law to become all-inclusive.[30]

IV. Public Nuisance in a Products Liability Context

With the benefit of the newly expansive language in the Second Restatement, lawyers began attempting to utilize public nuisance in product liability cases.[31] Some lawyers were motivated by the availability of injunctive relief under public nuisance.[32]

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[25] Schwartz, *The Law of Public Nuisance,* 45 Washburn L.J. at 547-548.

[26] *State ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 792 (Mo. 1980).

[27] *See United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145, 150 (D. Vt. 1972)(stating that the Government's complaint successfully pleaded public nuisance as an interference with "substantial rights to the use and enjoyment of water not polluted with petroleum"); *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1985)(explaining that a property owner brought a public nuisance claim, *inter alia*, regarding ground water and river contamination by a chemical plant).

[28] *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991)(citing that the actions arose out of air pollution produced by a refinery); *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App. 3d 704, 622 N.E.2d 1153 (1993)("[plaintiffs] filed a complaint which alleged [a failure] to properly maintain and operate a sewage treatment plant and thereby created a nuisance"); *Frady v. Portland Gen. Elec. Co.*, 55 Or. App. 344, 637 P.2d 1345 (1981) (proposing nuisance, the complaints alleged "that the vibrations from the sound waves [emitted from turbines] have damaged and continue to damage their homes, cause them to suffer from loss of sleep, emotional distress and mental strain, and interfere with their use and enjoyment of their property.").

[29] *Restatement (Second) of Torts* § 821B cmt. e (1979).

[30] *See Huff v. City of Holyoke*, 386 Mass. 582, 585 436 N.E.2d 952, 955 (1982)(holding that the public right of roadway safety and injuries arising out of a chain stretched across the road by a city employee are redressable by statute and not public nuisance); *Alholm v. Town of Wareham*, 371 Mass. 621, 358 N.E.2d 788 (1976)(determining that a city participating in an open burn and creating smoke could constitute a public nuisance but did not amount to such because the smoke did not cause or relate to the plaintiffs' injuries).

[31] Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 749 (2003).

[32] *Id*.

More notably, lawyers began to imagine the "possibility of circumventing the normal doctrinal parameters of strict product liability law and negligence that restrict the expansion of liability for harm caused by products."[33] The earliest attempts to expand public nuisance proved relatively unsuccessful but set the scene for later efforts to evolve the body of law.

i. Early Environmental Applications

The case most often recognized as the first attempt at expanding public nuisance is *Diamond v. Gen Motors Corp.*, 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971). Arising before the publication of the Second Restatement of Torts, *Diamond* "broke new ground by including manufacturers of products among hundreds of defendants facing liability under a public nuisance theory for allegedly causing air pollution."[34]

In *Diamond,* the plaintiff brought a claim "on behalf of himself and all other possessors of real property in, and residents of, the County of Los Angeles," creating a class of over 7 million people.[35] The significant aspect of *Diamond* is the list of defendants. Plaintiffs did not limit their claim to include only polluters; they also included manufacturers and distributors of automobiles.[36] Plaintiffs sought billions of dollars in compensatory and punitive damages, as well as injunctive relief, to restrain the emission of pollution.[37] Not only did the Court deny class certification, but it ultimately held public nuisance law to be "ill-suited for this type of litigation."[38] The Court's three main considerations were: (1) manufacturing a product is lawful, thus the regulation of such activity is a "province of the legislature," (2) an injunction would be wholly disruptive to the lives of those who utilize automobiles, and (3) the class was too large for public nuisance law because it would be practically impossible to plead particular damages for over seven million people.[39] The Court dismissed the case, reasoning that to decide the case would constitute judicial overreach on a body of law best left to the legislature.[40] *Diamond* was unsuccessful, but "the plaintiffs' activism planted the seeds for the public nuisance actions" to come.[41] "[P]ublic nuisance was a less understood cause of action," but lawyers saw promise in the concept. Specifically, due to the potential malleability of the claim and because of its vague, open-ended definition,

[33] *Id*. at 749.
[34] *Id*. at 750.
[35] *Diamond*, 20 Cal. App. 3d at 376.
[36] Schwartz, *The Law of Public Nuisance,* 45 Washburn L.J. at 548.
[37] *Diamond*, 20 Cal. App. 3d at 376.
[38] Schwartz, *The Law of Public Nuisance,* 45 Washburn L.J. at 549.
[39] *Id*.
[40] *Diamond*, 20 Cal. App. 3d at 382-383.
[41] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 637.

public nuisance became the tort of choice for activists challenging widespread societal harm.[42]

ii. Asbestos Litigation

In the 1980s and 1990s, asbestos litigation became the first major attempt to expand public nuisance into product liability.[43] Marking another shift, these asbestos cases retreated from the assertion that certain conduct created a public nuisance but instead posited that products themselves were the public nuisance. In their claims, various schools and municipalities "alleged that asbestos as a product constituted the public nuisance."[44] Courts refused to extend public nuisance in this manner, holding that allowing products themselves to be a public nuisance would burden manufacturers and "give rise to a cause of action . . . regardless of the defendant's degree of culpability or of the availability of other traditional tort theories of recovery."[45] Even though plaintiffs' attorneys attempted to use public nuisance as a catch-all cause of action, "there was very little evidence through the mid-1990s that a claim of public nuisance would ever pose a significant threat to a product manufacturer or distributor."[46] Despite the lack of success, the goal of some creative attorneys to transform public nuisance law did not fade.

Instead, attempts to expand public nuisance doctrine into product liability continued well into the forthcoming years. The next vessel for creative lawyering was the tobacco litigation of the 1990s, where lawyers would again attempt to apply public nuisance to manufacturers of products causing widespread public harm.[47]

iii. Tobacco Litigation

In the beginning, tobacco litigation was based on the more traditional theories of product liability law.[48] For many years, plaintiffs failed in their attempts to recover for harm caused by tobacco products.[49] Despite a lack of success, tobacco manufacturers continued to be sued for billions of

[42] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 637, Kate Markey, *Air Pollution as Public Nuisance: Comparing Modern-Day Greenhouse Gas Abatement with Nineteenth-Century Smoke Abatement*, 120 Mich. L. Rev. 1535, 1540 (2022).
[43] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 637.
[44] *Id*. at 638.
[45] *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).
[46] Gifford, 71 U. Cin. L. Rev. at 752.
[47] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 638.
[48] Gifford, 71 U. Cin. L. Rev. at 754.
[49] First, individual attempts to recover were barred by the concept that harm would be unforeseeable to the manufacturers. As time progressed, plaintiffs hoped for reprieve following the installment of U.S. Surgeon General's warnings on cigarettes and the growing importance of strict liability. However, defendants fought back through aggressive litigation theories and tactics. The second round of recovery attempts were characterized by state and government attempts to recoup state expenditures due to tobacco related illness. This stage is when public nuisance began appearing in complaints. Gifford, 71 U. Cin. L. Rev. at 754-758.

dollars and, in the later years of litigation, "[o]ne of the myriad legal claims asserted was that the tobacco companies created a public nuisance by selling cigarettes."[50] The first complaint to introduce this new application of public nuisance law was *Moore ex rel. State v. Am. Tobacco Co.*[51] The complaint and the forty others filed in the subsequent three years alleged that the tobacco manufacturers "had caused a harm to the state and had profited from that harm."[52] By proposing public nuisance as the theory of liability, plaintiffs avoided having to prove a product defect or specific causation. It also eliminated the defense of comparative fault.[53] In the end, the tobacco suits were settled by a 1998 global settlement of $246 billion, with the application of public nuisance to tobacco manufacturers remaining largely unadjudicated.[54] In fact, the only ruling on the legal application of public nuisance in the tobacco litigation dismissed the claim as being outside the realm of public nuisance law."[55] In *State of Texas v. Am. Tobacco Co.*, the Court deferred to the statutory definition of public nuisance, citing that a public nuisance is "the use of any place for certain, specific proscribed activities such as gambling, prostitution, and the manufacture of obscene materials."[56] In holding that injunctive relief was only available to specific, statutorily proscribed activities, the Court noted that none of the State's allegations of tobacco-related harm were implicated by the statute.[57] Ultimately, the Court expressly stated that it was "unwilling to accept the state's invitation to expand a claim for public nuisance."[58] While providing an example of innovative legal work, the tobacco cases do not offer a clear conclusion on the viability of public nuisance in product liability cases. While unclear, the settlement may have been motivated by either the potential cost of future litigation alleging more traditional theories or the "relatively untried public nuisance theory [that] could well have contributed to bringing the largest tort settlement of all time."[59]

iv. Firearms Litigation

Regardless of the uncertainty, lawyers persisted. In the late 1990s and spurred by the enormity of the tobacco litigation settlement, firearms litigation became the next attempt to expand public nuisance law. The

[50] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 638.
[51] Gifford, 71 U. Cin. L. Rev. at 759, *Moore ex rel. State v. Am. Tobacco Co.*, No. 94-1429 (Miss. Ch. Ct. Jackson County, filed May 23, 1994).
[52] Gifford, 71 U. Cin. L. Rev. at 759.
[53] *Id*.
[54] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 638.
[55] *State of Texas v. Am. Tobacco Co.,* 14 F. Supp. 2d 956, 973-74 (E.D. Tex. 1997), Schwartz, *Game Over?*, 62 Okla. L. Rev. at 638.
[56] *Texas,* 14 F. Supp. 2d at 972.
[57] *Id*. at 973.
[58] *Id*.
[59] Gifford, 71 U. Cin. L. Rev. at 764.

failure of public nuisance liability in the tobacco litigation was known, yet disregarded, as lawyers believed the tobacco cases illustrated public nuisance as a "vehicle for settlement."[60] With those cases serving as a model, firearm litigation sought to use the theory as a vehicle to reduce gun violence. Gun manufacturers became the subject of suits filed by various cities and counties in attempts to recover expenses "incurred as a result of gun violence."[61] Contrary to the approach taken in the tobacco and asbestos suits, the firearms litigation did not allege that public nuisance resulted from the manufacturing or selling of guns, but rather arose out of "the marketing and distribution practices and policies of the manufacturers."[62] In some cases, plaintiffs actually agreed that positing a public nuisance claim solely based on the lawful manufacturing of firearms "would extend public nuisance liability further than it has been applied in the past."[63]

Courts differed in their approaches to deciding whether public nuisance could be applied in this way. However, a significant approach arose from the Supreme Court of Illinois in *City of Chicago v. Beretta U.S.A. Corp.*[64] In *City of Chicago*, plaintiffs filed suit naming firearm manufacturers, distributors, and dealers as defendants in "an effort to stem the rising tide of gun violence and to recoup some of the expenses that flow from gun crimes."[65] The Court redirected the discussion to focus on "the core elements of the tort: public right, unreasonable conduct, proximate causation, and control."[66] Finding that the gun manufacturers did not interfere with a public right, the Court stated that people are not afforded a public right "to be free from the threat that some individuals may use an otherwise legal product . . . in a manner that may create a risk of harm to another."[67] Then, concluding the conduct in question was not unreasonable, the Court explained that public nuisance

[60] David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 Conn. L. Rev. 1163, 1172 (2000).
[61] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 640.
[62] Schwartz, *The Law of Public Nuisance,* 45 Washburn L.J. at 555.
[63] *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 379, 821 N.E.2d 1099, 1118 (2004).
[64] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 641, *City of Chicago*, 213 Ill. 2d at 358, 821 N.E.2d at 1107.
[65] *City of Chicago*, 213 Ill. 2d at 355, 821 N.E.2d at 1105.
[66] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 641.
[67] *City of Chicago*, 213 Ill. 2d at 374, 821 N.E.2d at 1116. Similarly, in Canada, in the context of a proposed class action against a firearms manufacturer, the Ontario Superior Court of Justice struck a pleading alleging public nuisance caused by the alleged failure to use available technology to prevent firing of weapon by unauthorized users on the basis that the claims were doomed to fail. "A manufacturer of a product cannot be made liable in nuisance for simply distributing its product in its course of business because the product is then misused by others causing harm to the plaintiffs." *Price et al. v. Smith & Wesson Corp.,* 2021 ONSC 1114 at para. 115.

may only arise out of conduct that interferes with use of land or conduct in violation of a statute—aligning its decision with the historical applications of public nuisance.[68] The Court combined causation and control into one analysis: the gun manufacturer's conduct did not cause the alleged injury because third-party actors broke the causal connection and "even the observance of 'reasonable diligence' would not have prevented the harm because the third parties were 'not under the control of the one guilty of the original wrong.'"[69] In the end, the Court in *City of Chicago* held that the issue the plaintiffs sought to solve was outside of its judicial reach and constituted a policy question best reserved for the legislature due in part to the fact that "the product at issue is already so heavily regulated."[70]

Most cases that reject public nuisance liability for firearm litigation utilized one of the points articulated in *Chicago*.[71] A notable exception to the elemental approach came from the Ohio Supreme Court. In *City of Cincinnati v. Beretta U.S.A. Corp.*, "Ohio became the first and only state whose high Court permitted a public nuisance claim to proceed against a product manufacturer."[72] In *Cincinnati*, a complaint was filed against handgun manufacturers, trade associations, and a handgun distributor in relation to marketing and distribution practices that perpetuated an illegal, underground firearms market.[73] The complaint alleged that "due to their intentional and negligent conduct and their failure to make guns safer, [defendant-appellees] have fostered the criminal misuse of firearms, helped sustain the illegal firearms market in Cincinnati, and have created a public nuisance."[74] The Court held that "under the Restatement's broad definition, a public-nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or

[68] *Id*. at 377, 1117.
[69] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 643, quoting *City of Chicago*, 213 Ill. 2d at 407, 821 N.E.2d at 1134.
[70] *City of Chicago*, 213 Ill. 2d at 384, 821 N.E.2d at 1121. Consistent with the Court's ruling, in 2005, the U.S. legislature enacted the Protection of Lawful Commerce in Arms Act which shields firearm manufacturers from civil liability stemming from misuse of products.
[71] *See Camden County*, 273 F.3d at 541 ("[T]he limited ability of a defendant to exercise control beyond its sphere of immediate activity may explain why public nuisance law has traditionally been confined to real property and violations of public rights."); *City of Philadelphia v. Beretta*, 277 F.3d 415 (3d Cir. 2002)(stating that gun manufacturers are unable to control how third parties use the weapons once they have been shipped out). *See also City of Gary v. Smith and Wesson*, 801 N.E.2d 1222 (Ind. 2003)(holding that public nuisance claims have to arise from unreasonable interference with land use or conduct in violation of a specific statute).
[72] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 653.
[73] *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 417, 768 N.E.2d 1136, 1140 (2002).
[74] *Id*.

sale of the product unreasonably interferes with a right common to the general public."[75] In sum, this Court allowed the claim to proceed due to the sheer gravity of harm caused by the underground market.

Note that legislators recognized the danger in this ruling and amended the Ohio Product Liability Act ("OPLA").[76] The amendment made it clear that public nuisance claims for product claims must be brought under Ohio products liability law. OPLA would later be useful in lead paint litigation and other product liability cases to dismiss any public nuisance claims covered by the act.[77]

Despite plaintiffs' and their lawyers' intentions, firearms litigation has not resolved itself through a hefty settlement like the tobacco litigation. One might think that the fundamental failure of public nuisance liability in both the tobacco and firearms litigation would deter lawyers from continuing their efforts to amalgamate mass torts and the public nuisance doctrine. However, enterprising plaintiffs' counsel have continued to push the boundaries of tort law on public nuisance.

v. Lead Paint Litigation

Also stemming from the purported "success" of the tobacco litigation, lawyers began trying to expand public nuisance into litigation alleging harm from exposure to lead paint in buildings. Although Congress banned lead-based paint in 1978, the health hazards of chipped paint continued. Lead paint litigation initially began in the 1980s as strict products liability, but lawyers quickly realized they "could not satisfy their burden of proof on product defect, proximate cause, and product identification."[78] Lawyers were equally unsuccessful when they began to move their lead paint claims toward alternative liability theories like market share and enterprise liability.[79] In hopes of finally succeeding, lawyers began to allege public nuisance claims against former manufacturers of lead paint and pigment. Cases from Rhode Island and New Jersey provide notable examples of the outcomes of such lawsuits.

In New Jersey, "the City of Newark filed suit against former manufacturers of lead paint and pigment for the costs of assessing and abating lead paint from residences and buildings,

[75] *Id*. at 419, 1142.
[76] *See* Ohio Rev. Code Ann. §§ 2307.71 to 2307.80.
[77] *See City of Toledo v. Sherwin-Williams Co.*, No. CI200606040, 2007 WL 4965044 (Ohio Ct. Com. Pl. Dec. 12, 2007).
[78] Schwartz, *The Law of Public Nuisance,* 45 Washburn L.J. at 557.
[79] *Id*.

providing medical care to those with lead poisoning and educating the public on the hazards of lead paint."[80] Like the reasoning in *City of Chicago*, the New Jersey Court held that the lead paint claims did not meet the four elements: public right, unreasonable conduct, control, and proximate causation. It held that "to permit these complaints to proceed would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance."[81]

A Rhode Island court's finding on public nuisance in lead paint litigation was similar. In *State v. Lead Industries Ass'n.*, "the alleged public nuisance was the mere presence of lead paint in homes and buildings."[82] The trial court found for the plaintiffs, but the Supreme Court of Rhode Island "categorically rejected the public nuisance claim."[83] Again, the Court found that the claims did not satisfy all four elements of a public nuisance claim. The Court found "no reason to depart from the long-standing principle that a public right is a right of the public to shared resources such as air, water, or public rights of way."[84] Further, it held that even if a public right was alleged, "the state's complaint also fails to allege any facts that would support a conclusion that defendants were in control of the pigment at the time it harmed Rhode Island's children."[85] Due to its stance on the preceding two elements, the Court dismissed the case and held it "need not decide whether defendants' conduct was unreasonable or whether defendants caused an injury to children in Rhode Island."[86]

Thus far, "the assertion of public nuisance claims by governmental entities seems calculated to circumvent the application of well-established product liability doctrines and defenses that would prevent recovery under more traditional causes of action."[87]

vi. Chemical Litigation

Another wave of environmental litigation emerged around the same time as these other types of claims and, arguably, posited the most warranted expansion of public nuisance. Distinct from the outlandish suggestion that just about every manufacturer should be liable for public nuisance, lawyers began to argue that manufacturers of

[80] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 646.
[81] *In re Lead Paint Litig.*, 191 N.J. 405, 421, 924 A.2d 484, 494 (2007).
[82] *State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 455 (R.I. 2008), Schwartz, *The Law of Public Nuisance,* 45 Washburn L.J. at 559.
[83] Schwartz, *Game Over?*, 62 Okla. L. Rev. at 649.
[84] *State v. Lead Indus., Ass'n, Inc*., 951 A.2d at 455.
[85] *Id*.
[86] *Id*.
[87] Gifford, 71 U. Cin. L. Rev. at 773.

chemicals, including polychlorinated biphenyls ("PCBs") and per- and poly-fluoroalkyl substances ("PFAs"), were creating a public nuisance when the chemicals ended up in places they didn't belong. This approach appears to better align with the traditional boundaries of public nuisance, as this type of conduct can be considered an interference with real property. However, courts still seemed to "show[] the proper restraint on . . . public nuisance claim[s]."[88] A brief example of this restraint can be found in *Alaska Native Class v. Exxon Corp.*, where plaintiffs brought a public nuisance claim against Exxon after the Valdez oil spill off the coast of Alaska resulted in environmental damage to the area's waters.[89] The court dismissed the claim and still required the plaintiffs to play by the traditional rules, reiterating private parties can only bring a public nuisance claim when they can prove a specific and particular injury.[90]

Some cases have involved courts expanding public nuisance to meet the desires of hopeful plaintiffs, one example being *State v. Schenectady Chems., Inc.*[91] A suit was brought against Schenectady Chemicals regarding a chemical waste dump site and the harm it presented. However, Schenectady Chemicals did not dispose of their own chemicals; instead, they hired an independent contractor to pick up and dump the unwanted chemicals. The Court was tasked with "decid[ing] if the state, either by statute or common law, can maintain an action to compel a chemical company to pay the costs of cleaning up a dump site . . . when the dumping took place between 15 to 30 years ago at a site owned by an independent contractor hired by the chemical company to dispose of the waste material." In this case, the public nuisance claim survived despite the defendant never owning or controlling the land where the pollution occurred.[92] Even though the Court mentioned that "resolution of the issues raised in society's attempt to ameliorate pollution are to a large extent beyond the ken of the judicial branch," it allowed the claims to proceed due to the fact that "[s]omeone must pay to correct the problem."[93]

Apart from the limited exceptions, most courts still recognize limits on public nuisance claims, evidenced by their "drawing a hard line between those responsible for the polluting

[88] Schwartz, *The Law of Public Nuisance,* 45 Washburn L.J. at 549.
[89] 104 F.3d 1196, 1197 (9th Cir. 1997).
[90] *Id*.
[91] State v. Schenectady Chemicals, Inc., 117 Misc. 2d 960, 967, 459 N.Y.S.2d 971, 976 (Sup. Ct. 1983), aff'd as modified, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (1984).
[92] *Id*.
[93] *Id*.

activity and those who made the products that were made to pollute."[94] This approach is well illustrated by *City of Bloomington v. Westinghouse Electrical Corp.*[95] The City of Bloomington and its Utilities Service Board brought suit against Westinghouse Electrical Company, a buyer of PCBs for purposes of electrical capacitors, and Monsanto, the manufacturer of PCBs. The plaintiffs sued Westinghouse for creating a public nuisance by depositing PCBs into Bloomington's landfills and sewers and also named the PCB manufacturer.[96] The Court did not allow the claim against the manufacturer to proceed, reasoning that product liability was a better fit.[97] The Court held that Monsanto did not have control over the PCBs, and it was Westinghouse's responsibility to ensure proper disposal.[98]

Limitations on public nuisance in this area are very important, as chemicals have become a large part of modern society. If these chemical cases can sustain a public nuisance claim, "public nuisance litigation will soon be brought over any and all chemicals, including many household products we all need."[99]

vii. Opioid Litigation

Currently, the largest target of expanded public nuisance liability is the pharmaceutical industry, specifically through the nationwide opioid crisis. For two decades, state and local governmental entities have commenced public nuisance litigation in an attempt to address the opioid epidemic. Thousands of suits have been filed against pharmaceutical manufacturers, distributors, pharmacies, and Pharmacy Benefit Managers, with plaintiffs seeking costs associated with opioid abuse. [100] By October of 2022, every state and thousands of cities, counties and hospitals submitted claims against the opioid industry.[101] Outcomes of these suits are different across the board: some settle out, some plaintiffs win at trial, and some defendants obtain judgments in their favor. When verdicts are returned in favor of the plaintiff, it is clear that "not all courts have guarded the traditional scope of public nuisance in this area."[102]

There are examples of courts that do respect the traditional application of the public nuisance doctrine and prevent it from being expanded beyond its historical boundaries. For example, in *State ex rel. Hunter v.*

[94] Schwartz, *The Law of Public Nuisance,* 45 Washburn L.J. at 551.
[95] 891 F.2d 611 (7th Cir. 1990).
[96] *Id*. at 613.
[97] *Id*. at 614.
[98] *Id*.
[99] Am. Tort Reform Ass'n., *Super Tort* 11.
[100] Kendrick, 132 Yale L.J at 731.
[101] *Id*. at 732.
[102] U.S. Chamber of Com. Inst. for Legal Reform, *Taming the Litigation Monster: The Continued Threat of Public Nuisance Litigation* 10 (2022).

Johnson & Johnson, the State of Oklahoma, through its Attorney General, sued three opioid manufacturers, asking the Court to hold them liable for public nuisance relating to the opioid drug epidemic. The Oklahoma Supreme Court acknowledged the complex social problem of opioid abuse, but nonetheless held that "public nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap."[103] The Supreme Court concluded that it would not expand public nuisance law to the lawful manufacture of opioids, as doing so would make every product liability action a public nuisance claim.[104] The Court explained there is rarely a violation of any public right in the manufacture and distribution of lawful products, nor does a manufacturer effectively control any product after it has been sold.[105] Further, it reasoned that "[a] manufacturer cannot be held perpetually liable for its products."[106]

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[103] 499 P.3d 719, 725 (Okla. 2021).

[104] *Id*. at 730. In Canada, the British Columbia Court of Appeal expressed similar sentiments in an appeal from an application to strike a claim in a putative class action brought by the Province of British Columbia against various opioid manufacturers and distributors alleging public nuisance. The Court of Appeal struck the public nuisance claim as disclosing no cause of action.

> "Not only would the change to the law be significant, its consequences would be unpredictable, dramatic and potentially problematic. Furthermore, such a change is not necessary. The alleged misconduct engaged in this action falls securely within the law of negligence and fraud, including products liability and misrepresentation. Recognizing that the conduct may also amount to public nuisance would distort the boundaries of legal principle, and alter the foundations of compensation for wrongdoing. Public nuisance would risk becoming the emperor of all wrongs. Public nuisance does not depend upon fault so much as the consequences of action. Recognizing public nuisance in situations analogous to these would open the door to all kinds of claims hitherto regulated by the law of negligence. There is merit in the submission made by Mr. Feder that public nuisance would obliterate products liability law. In my view, these are not matters for a gradual and incremental modification of the common law. If such changes are to be made, those should be by the legislature." The BCCA also briefly reviewed the evolution of public nuisance litigation in the United States in the context of tobacco, firearms and opioid litigation and held that "Much of this public nuisance litigation has proceeded in states with common law or statutory definitions of public nuisance that are consistent with that of the Restatement, which itself is similar in content to expressions of public nuisance in Canadian jurisprudence. Courts have tended to look for either a connection with real property, or that a traditional public right in the strict sense is engaged. It appears to be the outlier, rather than the norm, that public nuisance claims in various states have been allowed to proceed in opioid litigation and like claims. As noted, I find the reasoning of those courts in the United States that have rejected public nuisance in a case like this persuasive."

Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia, 2022 BCCA 366 at paras. 204, 217-218.

[105] *Id*. at 726-727.

[106] *Id*. at 729.

Similarly, in *City of Huntington v. AmerisourceBergen Drug Corp.*, two plaintiffs, the City of Huntington and Cabell County, West Virginia, brought a public nuisance claim against wholesale distributors of prescription opioids.[107] Seeking billions of dollars in abatement, they claimed that "defendants' wholesale distribution of prescription opioids in Huntington and Cabell County created an opioid epidemic, which has caused a public nuisance in those localities."[108] Acknowledging "that there is and has been an opioid epidemic in the City of Huntington and Cabell County, West Virginia," the Court nonetheless held that plaintiffs' claims do not meet the elements of public nuisance under West Virginia law and public nuisance law does not offer the plaintiffs a remedy in this case.[109] The Court cited the Restatement (Third) of Torts which dictates that "public nuisance based on the sale and distribution of a product has been rejected by most courts because the common law of public nuisance is an inept vehicle for addressing such conduct."[110] The Court also recognized that the Supreme Court of Appeals of West Virginia has narrowly construed public nuisance in applying to only "conduct that interferes with public property or resources."[111] In its decision, the Court explained that to use public nuisance in this way would be to overextend the law, and if the Supreme Court of Appeals of West Virginia were faced with this issue, it would come to the same conclusion.[112]

In addition, the question of whether public nuisance law applies in opioid cases has been certified by the Sixth Circuit to the Supreme Court of Ohio and by the Fourth Circuit to the Supreme Court of Appeals of West Virginia. Hopefully the answer to these questions will align with the true nature of the tort, help clear any ambiguities and revert public nuisance back to its rightful place in the law. As of now, it seems as though the opioid litigation may yield the closest resemblance to the tobacco litigation. Both areas have yielded large settlements "mostly secured through out-of-court negotiations and occurring against the backdrop of an uneven trial record."[113]

viii. Climate Change Litigation

A recent development in public nuisance litigation is a slew of cases

[107] 609 F. Supp. 3d 408, 413 (S.D.W. Va. 2022).
[108] *Id*.
[109] *Id*. at 419.
[110] *Id*. at 472.
[111] *Id*.
[112] *Id*. at 452. The trial court's decision on public nuisance is now on appeal to the Fourth U.S. Circuit Court of Appeals, which has certified the question of the application of public nuisance to the Supreme Court of Appeals of West Virginia.
[113] Kendrick, 132 Yale L.J at 735-736.

brought by states, counties, and municipalities alleging climate change damage by oil manufacturers, refiners, and industry groups.[114] Although the vast majority of these lawsuits are currently snagged in lengthy procedural battles to determine whether to proceed in state or federal court, at least one recent case was decided on the merits to dismiss public nuisance claims on state law grounds.[115] In *City of Baltimore v. B.P.*, the plaintiff brought public nuisance (among many other) claims seeking to hold various oil manufacturing defendants liable for climate change harms caused by greenhouse gas emissions from human consumption of fossil fuels.[116] The Court dismissed the City's public nuisance claims, reasoning, among other things, there was no "tight nexus" between the product and the alleged harm and that "thus far in Maryland, public nuisance theory has only been applied to cases involving a defendant's use of land."[117]

Time will tell if courts in other jurisdictions will follow suit.

Conclusion

Despite the lack of success thus far, lawyers are unlikely to waver in their creative attempts to expand public nuisance.[118] As noted in the Restatement (Third of Torts), however, "[m]ass 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."[119] "To allow plaintiffs to hold manufacturers of mass products liable under a public nuisance theory would be to fundamentally alter the nature of the tort."[120] Additionally, the history of the tort does not contemplate that the doctrine should be used against lawfully manufactured products or as a solution to deep-rooted social evils. If suits cannot be sustained through "well-established theories of recovery, courts should not permit [plaintiffs] to move their crusades into the utterly uncharted territory of public nuisance."[121] If courts allow lawyers to uproot and expand public nuisance doctrine,

[114] *See, e.g.*, *City of Chicago v. BP p.l.c.,* Case No. 2024-CH-01024 (Ill. Cir. Ct. Feb.20, 2024); *Bucks County v. BP p.l.c.*, Case No. 2024-01836-0000 (Pa. C.C.P. Mar. 25, 2024); *County of Multnomah v. Exxon Mobil Corp.*, Case No. 23-CV-25164 (Or. Cir. Ct. June 22, 2023); *City of Baltimore v. B.P. p.l.c.,* Case No. 24-C-18-004219 (Baltimore Cir. Ct. July 20, 2018); *City of New York v. BP p.l.c.*, Case No. 1:18-cv-00182 (S.D.N.Y. Jan. 9, 2018).

[115] *City of Baltimore v. B.P. p.l.c.,* Case No. 24-C-18-004219 (Baltimore Cir. Ct. July 10, 2024).

[116] *Id.*

[117] *Id.* at 20-23.

[118] For example, fast food restaurants have been a recent prospective target of expanded public nuisance law, purporting to hold defendants liable for obesity and obesity related expenses. Jennifer Pomeranz et al., *Innovative Legal Approaches to Address Obesity,* Millbank Q. 185 (2009). Public nuisance has also been discussed as potential theory of liability to recover for modern eavesdropping related to Google Home devices, Apple's Siri, and Amazon's Alexa. Julia Keller, 77 Vand. L. Rev., *Eavesdropping: The Forgotten Public Nuisance in the Age of Alexa* 169, 171 (2024).

[119] *Restatement (Third) of Torts* § 8, cmt. g (2020).

[120] Gifford, 71 U. Cin. L. Rev. at 834.

[121] Gifford, 71 U. Cin. L. Rev. at 837.

public nuisance will become "a monster that would devour in one gulp the entire law of tort."[122] Instead, "contested issues of social policy should be resolved by democratically accountable institutions," and the new public nuisance should be left to the legislature to handle.[123]

[122] *Tioga Pub. Sch. Dis. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Circ. 1993).

[123] Merrill, 132 Yale L.J Forum at 991.

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