

Opioid Litigation and the Scope of Public Nuisance Law

The current mass *parens patriae* litigation filed by governmental entities against the manufacturers of opioid drugs for

reimbursement of the governmental costs of the opioid epidemic has the potential to clarify the modern scope of public nuisance law and establish limits on governmental use of the courts to recover expenditures made in the course of performing government functions. However, if these public nuisance claims are permitted to proceed outside of the doctrine's traditional scope, it may result in the imposition of substantial liability on corporate entities for indirect governmental harms without the safeguards of traditional product liability requirements and defenses. In-house counsel in all sectors should be aware of the ongoing dispute regarding the proper scope of the public nuisance doctrine and the effects that could result from expansion of the doctrine.

The Opioid Epidemic

The rise of the global prescription opioid epidemic is generally considered to have started in the 1990s when an increasing emphasis by health-care providers on managing pain with opioid medications led to a dramatic increase in opioid medication prescriptions, many of which were ultimately misused. At the same time,

the United States experienced an explosion of heroin and illicit, synthetic opioids, which have become popular as recreational drugs, leading to an epidemic of illicit drug use and addiction.

Although the causes of the opioid epidemic are multifaceted, complex, and disputed, the opioid epidemic statistics are clear and staggering. According to the Substance Abuse and Mental Health Services Administration (SAMHSA) National Survey on Drug Use and Health (NSDUH), in 2016, over 11 million Americans misused prescription opioids, nearly 1 million used heroin, and 2.1 million had an opioid-use disorder due to prescription opioids or heroin. According to the National Institute on Drug Abuse, "every day more than 90 Americans die after overdosing on opioids." The Centers for Disease Control and Prevention estimates that the total "economic burden" of prescription opioid misuse in the United States is \$78.5 billion a year.

The opioid epidemic is increasingly being treated by the executive and legislative branches of government as a major health crisis. Last year, President Trump declared the opioid epidemic a public health emergency, and during the January 2018 State of the Union Address, the president identified the opioid epidemic as a major concern and urged lawmakers that "[w]e have to do something about it." Democratic lawmakers also attempted to bring attention to the opioid epidemic at

the State of the Union Address by donning purple ribbons.

Despite the increasing spotlight on the opioid epidemic, many commentators have criticized the legislative and executive branch responses to the opioid crisis—at both the federal and state levels—as being sluggish and ineffective. As mentioned, one side effect of the slow legislative response has been an escalation of state and local governments looking to the courts to provide relief from the spiraling costs of opioid abuse and addiction through public nuisance litigation against the manufacturers of opioid medications.

The Rise of Opioid Litigation

In 2017, an avalanche of states, cities, counties, localities, and Native American tribes across the United States began hiring outside plaintiffs' law firms to pursue litigation against the pharmaceutical companies that produce U.S Food and Drug Administration (FDA) approved painkilling opioid drugs. The result has been a tidal wave of *parens patriae* public nuisance-based lawsuits against these pharmaceutical companies. In 2017 alone, more than 100 such lawsuits were filed, leading to the creation of the multidistrict litigation (MDL), *In re: National Prescription Opiate Litigation*, MDL No. 2804, in the Northern District of Ohio. Today, over 200 opioid cases have been consolidated into the MDL, and the increase in litigation has continued to expand into 2018 with new lawsuits being filed on a daily basis, both in the MDL and outside of it.

The public nuisance opioid lawsuits brought by the governmental plaintiffs each seek millions of dollars from the manufacturers of opioid drugs as reimbursement for the governmental costs of medical care, drug treatment, and law enforcement associated with the opioid epidemic, which



■ James K. Holder is a partner in the San Francisco office of Gordon & Rees, where he handles a broad range of complex business litigation, including product liability, mass torts, and breach of contract disputes, with a focus on the defense of pharmaceuticals and medical devices as well as professional liability matters. Mr. Holder is the New Member Orientation chair of the DRI Drug and Medical Device Committee.

the government plaintiffs allege resulted from a deceptive marketing campaign by the pharmaceutical companies to trivialize the risks of opioids while overstating the benefits of using them for chronic pain.

The tremendous growth of the opioid litigation may be in part due to the failure of the legislative branch to tackle the opioid epidemic at its early stages. At the federal level, the FDA is the gatekeeper for prescription medications and has broad power to regulate the use and advertising of opioid drugs, which have long been under the FDA's control. Despite this, the FDA's current Commissioner, Scott Gottlieb, admits that in the 1990s and early 2000s, the FDA missed key opportunities to "get ahead of" the opioid crisis and "a lot of people didn't do what they needed to do in the past or we wouldn't be in the situation we're in right now."

The states also missed opportunities to respond to the rising opioid epidemic with legislative action to regulate the medical community. Although the FDA has the power to restrict prescription drug approvals, the broad power to regulate the practice of medicine rests with the states. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). Despite the state's broad authority to regulate the practice of medicine, many of the states did little to prevent physicians from overprescribing opioids, which began in the early 1990s. As a result, the states are now scrambling to find solutions, and a large number of them have turned to the courts to make up for these legislative failures while the opioid crisis is still ongoing.

And recent comments of U.S. District Court Judge Dan Polster, who is overseeing the MDL, seem to confirm that courts believe that they have no choice but to step in:

The federal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government, federal and state, have punted. So it's here.... People aren't interested in depositions, and discovery, and trials. People aren't interested in figuring out the answer to interesting legal questions.... So my objective is to do something meaningful to abate this crisis and to do it in 2018.

Judge Polster's comments reveal the tremendous pressures being placed on the court system in adjudicating public nuisance lawsuits to venture beyond the traditionally limited scope of the public nuisance doctrine to fashion what in reality are legislative solutions to complex issues.

■

The tremendous growth of the opioid litigation may be in part due to the failure of the legislative branch to tackle the opioid epidemic at its early stages.

■

Public Nuisance Law

Public nuisance law is somewhat unique within tort law as it revolves around a type of injury rather than a kind of proscribed conduct, and it focuses on the welfare of the general public rather than the rights of an individual plaintiff. The Restatement (Second) of Torts defines a public nuisance broadly as "an unreasonable interference with a right common to the general public," which includes conditions that endanger public health, safety, or property. The cause of action for public nuisance rests primarily with the state rather than private individuals, and traditionally, the scope of public nuisance claims was limited to interferences with real property or infringement of public rights.

Even within its traditional realm, public nuisance law has often been criticized as a notoriously vague and elastic concept in the common law. William Prosser famously disparaged nuisance law as a "legal garbage can" and stated, "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 alarm-

ing advertisement to a cockroach baked in a pie."

However, the vague and elastic nature of public nuisance law that led to its criticism also makes it attractive to plaintiffs as a way to plead around the particularized requirements of other more strictly defined causes of action. With public nuisance claims, because the focus is different than in a private cause of action, the plaintiffs are able to rely on relaxed evidentiary standards on issues that can derail individual plaintiff lawsuits, such as the statute of limitations, or issues regarding duty, breach, causation, and product identification. In contrast, for defendants, the vagueness of public nuisance law represents a worrying source of undefined potential liability on a possibly massive scale.

Modern Attempts to Revive and Expand Public Nuisance Law

Although public nuisance law traditionally has been a disfavored area of the common law in the United States, over time creative plaintiffs' attorneys have attempted to expand the scope of public nuisance law beyond its traditional boundaries to broaden litigation pursuits. Modern attempts to expand the scope of public nuisance law beyond its traditional realm began in the 1970s when plaintiffs in environmental contamination cases successfully revived public nuisance law, which had been largely dormant, to force industrial landowners to stop polluting and pay for the costs of environmental cleanup. Environmental litigation was seen as an appropriate venue for nuisance law because the litigation is connected to the traditional realm of nuisance law—*i.e.*, real property.

This revival spurred attempts to import public nuisance into other areas, including product liability litigation. The earliest example comes from the California case of *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971), a class action filed on behalf of seven million property owners in Los Angeles County against manufacturers of automobiles, which sought billions in compensation for the societal costs of air pollution. The California trial court and appellate court dismissed the case primarily on the grounds that applying public nuisance on such a

massive scale would effectively supersede legislative and administrative authority over the regulation of automobiles.

In the 1980s and early 1990s, further attempts were made to use public nuisance litigation for mass torts against product manufacturers of asbestos; however, these efforts were unsuccessful because the courts were apprehensive about the potential consequences of extending the scope of public nuisance beyond its traditional scope. For example, in *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993), the Eighth Circuit reasoned that if public nuisance law were permitted to encroach upon other traditional areas of tort law, it would “in effect totally rewrite... tort law... [and] [n] uisance thus would become a monster that would devour in one gulp the entire law of tort...”

Despite these early defeats, the plaintiffs’ bar nevertheless persisted in asserting public nuisance claims in product liability lawsuits with mixed results, including, most notably, lawsuits against the manufacturers of tobacco products, handguns, and lead paint.

The tobacco public nuisance litigation of the 1990s is perhaps the most famous example of mass public nuisance litigation. In that litigation, 46 states sued the largest tobacco companies for reimbursement of the governmental and societal costs of treating smoking-related diseases. The governmental plaintiffs in the tobacco litigation were successful without a court even determining whether or not those public nuisance claims were viable in the product liability mass tort arena. The sheer size and force of the litigation was enough to spur the tobacco industry to accept the largest civil litigation mass settlement agreement in U.S. history at the preliminary stages of the litigation. The settlement created a massive incentive for the filing of public nuisance-based claims against other product manufacturers.

Based largely on the unmitigated success of the tobacco litigation, in the late 1990s, additional similar, mass public nuisance litigation was filed against handgun manufacturers. In the handgun litigation, states and cities sought reimbursement for the governmental costs of gun crime

by alleging that the handgun industry created a public nuisance by failing to design the guns with sophisticated safety mechanisms to prevent criminal use and that negligent marketing and distribution placed the guns in the hands of criminals. However, in contrast to the tobacco litigation, the handgun manufacturers defended these claims aggressively, and the vast majority of the handgun public nuisance cases were dismissed on several grounds, including the following: (1) the lawful sale of guns did not meet the requirement of a nuisance that interfered with a right common to the general public, (2) the gun manufacturers did not have control over the use of the guns once they had been shipped to licensed distributors and dealers and thus the manufacturers cannot have caused a nuisance; and (3) proximate causation was missing between the criminal misuse of the handguns and the mere manufacture of the guns themselves, which were a lawful and legitimate product when used appropriately.

Despite the failure of public nuisance handgun claims, after more traditional product liability and negligence actions failed, states once again turned to public nuisance law to sue lead paint manufacturers for reimbursement of the governmental costs of treating lead exposure-related illnesses as a result of the paint manufacturers’ promotion of the use of lead-based paints without informing the public of the dangers of lead exposure.

This litigation was also mostly unsuccessful, with the notable exception of California, in which the plaintiffs succeeded at trial in obtaining a judgment that the defendants pay \$1.15 billion to clean up lead paint on older homes in California. In November 2017, the California trial court’s liability finding (but not the amount) was upheld by the court of appeal in *People v. ConAgra Grocery Prods.*, 17 Cal. App. 5th 51 (2017). That ruling has recently been taken up by the California Supreme Court. If the California Supreme Court ultimately rules against the lead paint manufacturers, it would be significant as the first ruling of the highest court of any state to find manufacturers liable under public nuisance law for creating a lead paint hazard. It will also likely be interpreted by the plaintiffs’ bar

as an extraordinary expansion of the public nuisance doctrine that will certainly aid the opioid litigation and pave the way for even more public nuisance suits to be filed.

Evaluating the Opioid Litigation

The current opioid litigation is the most recent mass litigation to raise legal considerations about the proper role and scope of public nuisance law. The pending cases, if fully litigated, may finally reveal whether public nuisance law will be confined to its traditional boundaries, or whether it will be allowed to intrude into other non-traditional areas, such as product liability, potentially creating new, expansive, and uncertain liability for industry. The continued participation of the states and other government entities as plaintiffs in these types of mass tort cases makes them particularly worrisome for in-house counsel. As illustrated by the tobacco litigation, the danger with lawsuits of this scale is always that the litigation can quickly evolve to become not a means to an end, but an end in itself.

Unsurprisingly, the governmental plaintiffs spearheading the opioid litigation have encouraged comparisons between the opioid litigation and the successful tobacco litigation, and they have avoided comparisons to the unsuccessful handgun litigation. For example, the state of Ohio’s opioid litigation complaint claims that the opioid manufacturers’ conduct “borrow[ed] a page from Big Tobacco.” These comments seem to suggest that the states are seeking to try to coerce a mass settlement rather than actually adjudicate the public nuisance claims. As discussed above, courts in the tobacco litigation never ruled on the validity of public nuisance claims against the tobacco manufacturers, but the plaintiffs were nevertheless able to elicit the largest mass settlement in U.S. history.

However, despite the massive potential liability threat in the opioid litigation, the states may not be able to achieve an early settlement without a court ruling on the viability of the public nuisance claims, due to the favorable results the defense bar achieved in the handgun litigation. The opioid litigation defendants might also be emboldened by the favorable result in the

similar public nuisance litigation against drug manufacturers that stemmed from another drug epidemic in America: the methamphetamine drug epidemic.

In *Ashley County v. Pfizer*, 552 F.3d 659 (8th Cir. 2009), 20 individual counties in Arkansas sued the manufacturer of an over-the-counter cold medicine that incorporated ephedrine for public nuisance on the grounds that the manufacturer did not take adequate steps to prevent the cold medicine from being converted by criminals into methamphetamine. The lawsuit sought to hold the cold medicine manufacturer liable for the costs of the government services necessary to deal with the methamphetamine drug epidemic, including law enforcement, drug treatment, inmate housing, and family services.

The cold medicine lawsuit was dismissed at the pleading stage, due to a lack of proximate cause between the manufacture of the cold medicine and the resulting societal harm. The Eighth Circuit affirmed, holding that “criminal actions of the methamphetamine cooks... are sufficient to stand as the cause of the injury..., and they are totally independent of the Defendants’ actions of selling cold medicine to retail stores...” *Id.* at 670. The Eighth Circuit cited the handgun cases to support its reasoning and explained, “we are very reluctant to open Pandora’s Box to the avalanche of actions that would follow if we found this case to state a cause of action.” *Id.* at 671.

Given the malleability of the public nuisance doctrine, the opioid litigation defendants will need to rely heavily on the judiciary’s past reticence to expand public nuisance beyond its historical confines to avoid the possibility that the doctrine will be used to overwhelm the carefully prescribed confines of tort law and create potentially unlimited exposure. Although the defense position continues to hold persuasive weight, the sheer amount of pressure that is being brought to bear on the courts and the defendants in the current opioid litigation raises the possibility that such judicial reticence may at some point yield, and although the vast majority of courts have rejected the expansion of public nuisance law, at least one California court has embraced the concept,

suggesting at least the possibility that at some point other courts may relax the restrictions on the scope of public nuisance law.

Meanwhile, defendants, in addition to the standing, redressability, and political question arguments, have been forced, in the opioid litigation, to further develop

■

Given the malleability of the public nuisance doctrine, the opioid litigation defendants will need to rely heavily on the judiciary’s past reticence to expand public nuisance beyond its historical confines to avoid the possibility that the doctrine will be used to overwhelm the carefully prescribed confines of tort law and create potentially unlimited exposure.

■

several key defenses intended to prevent the states from establishing proximate cause. These defenses include the following: (1) the opioid drugs are FDA-approved and regulated for limited uses and with specific warnings (unlike tobacco products); (2) opioids are not sold directly to consumers but are only legally available by prescription from a doctor, aka, a learned intermediary; (3) if the opioid drugs are used as intended under a doctor’s supervision, the opioids relieve a patient’s pain and

thereby improve health; and (4) the opioid epidemic is the result of criminal misuse of the drugs, which constitutes an intervening event breaking any causal chain between the manufacturer’s conduct and the complained of harm (also known as the *in pari delicto* doctrine).

Other defenses that have been used by defendants against public nuisance claims include: (1) the remoteness doctrine, which bars recovery in tort for indirect harm suffered as a result of injuries sustained by another person; (2) the economic loss doctrine, which provides that a party that suffers only economic harm may only recover contractual damages as opposed to tort damages; and (3) the municipal cost recovery rule, (also known as the “free public services” doctrine), which prevents governmental entities from recovering from a tortfeasor the costs of public services occasioned by the tortfeasor’s wrong, based on the theory that governmental taxation is intended to allocate the cost of public services to the public as a whole, and imposing such liability on individual actors would amount to taxation without legislation.

Summary

Governmental entities’ attempts to use public nuisance law to pursue legislative agendas and reimbursements for governmental costs through the court system show no signs of abating. The current opioid litigation is only the latest attempt by governmental plaintiffs to use the vague standards of the public nuisance doctrine to litigate societal costs against defendants on a broad scale.

The pending opioid litigation may ultimately determine whether modern public nuisance law will continue to be confined to its traditional boundaries, or whether it will be allowed to intrude into other realms, leading to potentially expansive liability and unpredictable results on a vast spectrum in different areas. Given some court signals that the public nuisance doctrine may at some point be expanded, in-house counsel will need to continue to develop these and other defenses to rebut such claims should the courts decide to open the door further to public nuisance litigation. 