State ex rel. Hunter v. Johnson & Johnson[1]

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WHY IT MADE THE LIST

The public nuisance tort cause of action is attractive to plaintiffs because it "elude[s] precise definition,"[2] and thus is so notoriously broad and vague so that public nuisance potentially could be "applied indiscriminately to everything."[3]

> 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. There is general agreement that it is incapable of any exact or comprehensive definition."[4]

Plaintiffs have been pounding the square peg of "public nuisance" into the round hole of product liability since the 1990s, when governments claiming asbestos property damage first attempted to raise this theory.[5] They failed, but other plaintiffs suing over other products kept trying.

Since the right to "abate" a public nuisance is a governmental function, product liability-based nuisance actions are inherently permeated by politics. Waves of public nuisance litigation have tended to target products that are politically unpopular in the jurisdictions acting as plaintiffs. This phenomenon was particularly apparent with the wave of public nuisance suits targeting firearms that occurred around the turn of the century. In that litigation, plaintiffs expressly advocated the public nuisance tort as a judicial avenue to stricter governmental control of firearms, notwithstanding the refusal of the political branches to enact such measures.[6] The majority of public

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1 499 P.3d 719 (Okla. 2021) ("*Hunter*").

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2 City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1110 (Ill. 2004).

3 City of San Diego v. U.S. Gypsum, 35 Cal. Rptr.2d 876, 882 (Cal. App. 1994).

4 W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 86, at 616 (5th ed. 1984). Quoted in, e.g., State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 456 n.17 (R.I. 2008); *Beretta*, 821 N.E.2d at 1110; *In re* Firearm Cases, 24 Cal. Rptr.3d 659, 679 n.22 (Cal. App. 2005); City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 130 (Ill. App. 2005).

5 *E.g.*, Tioga Public School Dist. v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993) (public nuisance would "become a monster that would devour in one gulp the entire law of tort"); Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 521 (Mich. App. 1992); City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986); Town of Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 133 (D.N.H. 1984); County of Johnson v. U.S. Gypsum Co., 580 F. Supp. 284, 294 (E.D. Tenn. 1984).

6 *See* David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175, 1187 (2000) (advocating product-based public nuisance as a means to combat "the proliferation of guns that has for so long defied contrary public policies, common sense, and overwhelming public opinion"). *See Beretta*, 821 N.E.2d at 1122 (pointing out that Mr. Kairys also served as counsel for plaintiffs). Product-related public nuisance litigation has been described as

nuisance lawsuits involving firearms failed.[7] But enough of these suits survived[8] that Congress, and occasional states, prohibited them statutorily.[9] Attempts to employ public nuisance against other politically disfavored products, such as tobacco products,[10] lead paint,[11] and chemicals,[12] as well as subprime lending[13] and climate change,[14] followed.

FDA-regulated prescription medical product manufacturers have also been targeted by litigants claiming that their federally approved and marketed products nonetheless amounted to public nuisances under state law. The first such claim—alleging that the defendants' over-the-counter cold and allergy medications contained ephedrine or pseudoephedrine, which contributed to a "methamphetamine epidemic"—failed

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"enlisting the judiciary to do the work that the other two branches of government cannot or will not do." City of San Francisco v. Exxon Mobil Corp., 2020 WL 3969558, at *20 (Tex. App. June 18, 2020).

[7] District of Columbia v. Beretta U.S.A. Corp., 872 A.2d 633, 650–51 (D.C. 2005); *Beretta*, 821 N.E.2d at 1125–27; Young v. Bryco Arms, 821 N.E.2d 1078, 1084–85 (Ill. 2004); Ganim v. Smith & Wesson Corp., 780 A.2d 98, 131–33 (Conn. 2001); *In re* Firearm Cases, 24 Cal. Rptr. at 679–80; People *ex rel.* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 194–99 (N.Y. App. Div. 2003); Penelas v. Arms Tech., Inc., 778 So.2d 1042, 1045 (Fla. App. 2001); City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3d. Cir. 2002); Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536, 540 (3d Cir. 2001); Prescott v. Slide Fire Sols., LP, 410 F. Supp.3d 1123, 1144 (D. Nev. 2019); Sills v. Smith & Wesson Corp., 2000 WL 33113806, at *7 (Del. Super. Dec. 1, 2000).

[8] Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1142–44 (Ohio 2002); Gary v. Smith & Wesson Corp., 801 N.E.2d 1222, 1229 (Ind. 2003); Ileto v. Glock, Inc., 349 F.3d 1191, 1211–15 (9th Cir. 2003); James v. Arms Tech., Inc., 820 A.2d 27, 51–53 (N.J. Super. App. Div. 2003); City of Boston v. Smith & Wesson Corp., 2000 WL 1473568, at *14 (Mass. Super. July 13, 2000).

[9] *See* Protection of Lawful Commerce in Arms Act, 15 U.S.C.A. §§ 7901–03 (banning nuisance actions against gunmakers); Ohio Rev. Code § 2307.71(B) (subjecting public nuisance claims to state product liability statute).

[10] Ass'n of Washington Pub. Hosp. Dists. v. Philip Morris, Inc., 241 F.3d 696, 707 (9th Cir. 2001) (rejected); Allegheny Gen. Hosp. v. Philip Morris, Inc., 28 F.3d 429, 446 (3d Cir. 2000) (rejected); *In re* JUUL Labs, Inc., Marketing, Sales Practices, & Products Liability Litigation, 533 F. Supp.3d 858, 877 (N.D. Cal. 2021) (allowed); *In re* JUUL Labs, Inc., Marketing, Sales Practices, & Products Liability Litigation, 497 F. Supp. 3d 552, 649 (N.D. Cal. 2020) (allowed); Texas v. Am. Tobacco Co., 14 F. Supp.2d 956, 972–73 (E.D. Tex. 1997) (rejected); State v. Juul Labs, Inc., 2021 WL 2692131, at *4–5 (Minn. Dist. June 21, 2021) (allowed); State v. Juul Labs, Inc., 2020 WL 8257333, at *3–5 (Colo. Dist. Dec. 14, 2020) (rejected); Evans v. Lorillard Tobacco Co., 2007 WL 796175, at *18–19 (Mass. Super. Feb. 7, 2007) (allowed).

[11] State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 454–56 (R.I. 2008) (rejected); *In re* Lead Paint Litigation, 924 A.2d 484, 502–03 (N.J. 2007) (rejected); City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 116 (Mo. 2007) (rejected); Cnty. of Santa Clara v. Atlantic Richfield Co., 40 Cal. Rptr. 3d 313, 330 (Cal. App. 2006) (allowed); City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 133–37 (Ill. App. 2005) (rejected); Lewis v. Lead Indus. Ass'n, Inc., 793 N.E.2d 869, 878 (Ill. App. 2003) (rejected); Cnty. of Cook v. Philip Morris, Inc., 817 N.E.2d 1039, 1046–48 (Ill. App. 2004) (rejected).

[12] City of Bloomington, Ind. v. Westinghouse Elec. Corp., 891 F.2d 611, 614 (7th Cir. 1989) (rejected); Sample v. Monsanto Co., 283 F. Supp. 2d 1088, 1092–94 (E.D. Mo. 2003) (rejected); *In re* StarLink Corn Prod. Liab. Litig., 212 F. Supp. 2d 828, 847 (N.D. Ill. 2002) (allowed); Town of Westport v. Monsanto Co., 2015 WL 1321466, at *3 (D. Mass. March 24, 2015) (rejected).

[13] City of Cleveland v. Ameriquest Mortg. Sec., Inc., 615 F.3d 496, 503 (6th Cir. 2010) (rejected); Cleveland v. JP Morgan Chase Bank, N.A., 2013 WL 1183332, at *3–6 (Ohio App. March 21, 2013) (rejected); City of Cincinnati v. Deutsche Bank Nat'l Tr. Co., 897 F. Supp. 2d 633, 640–41 (S.D. Ohio 2012) (rejected).

[14] Mayor & City Council of Baltimore v. BP P.L.C., ___ F.4th ___, 2022 WL 1039685, at *13 (4th Cir. Apr. 7, 2022) (noting, but not deciding claim); City of New York v. Chevron Corp., 993 F.3d 81, 96 (2d Cir. 2021) (rejected); Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857 (9th Cir. 2012) (rejected).

because the novel cause of action lacked sufficient causal nexus to the damages claimed by the governmental entity:

> [W]e 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 . . . . And what of the liability of manufacturers in other industries that, if stretched far enough, can be linked to other societal problems? Proximate cause seems an appropriate avenue for limiting liability in this context . . . "where an effect may be a proliferation of lawsuits . . . to address a myriad of societal problems regardless of the distance between the 'causes' of the 'problems' and their alleged consequences."[15]

While the claimed "methamphetamine epidemic" in *Ashley* proved insufficient to allow the camel's nose of public nuisance into the tent of FDA-regulated products, subsequent claims of an "opioid epidemic" succeeded in generating a wave of public nuisance claims against various alleged manufacturers and distributors of prescription opioids in both federal and state courts. Given the number of claims filed, the federal litigation became subject to multidistrict litigation.[16] Notwithstanding federalism concerns that weigh against recognition of novel state-law causes of action by federal courts sitting in diversity jurisdiction,[17] federal district courts considering public nuisance claims involving opioids allowed most of these claims to survive and to be litigated.[18] State trial courts have also generally been allowing opioid-related public nuisance claims.[19]

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[15] Ashley County, Arkansas v. Pfizer, Inc., 552 F.3d 659, 671–72 (8th Cir. 2009) (quoting District of Columbia v. Beretta, 872 A.2d at 651).

[16] *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375 (U.S. Jud. Pan. M.D.L. 2017).

[17] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 426 (1996) (diversity jurisdiction "does not carry with it generation of rules of substantive law"); Hicks v. Feiock, 485 U.S. 624, 630 n.3 (1988) ("a federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation"); Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (federal courts are "not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits"); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (federal judges may not "brush[] aside the law of a state in conflict with their views").

[18] *In re* Nat'l Prescription Opiate Litig., 2022 WL 671219, at *17–18 (N.D. Ohio March 7, 2022); *In re* Nat'l Prescription Opiate Litig., 2022 WL 668434, at *28 (N.D. Ohio March 7, 2022); City of Chicago v. Purdue Pharma L.P., 2021 WL 1208971, at *13 (N.D. Ill. March 31, 2021); City & County of San Francisco v. Purdue Pharma L.P., 491 F. Supp. 3d 610, 669, 672–77 (N.D. Cal. 2020); *In re* Nat'l Prescription Opiate Litig., 458 F. Supp. 3d 665, 691–92 (N.D. Ohio 2020), *certification for appeal denied*, 2020 WL 3547011 (N.D. Ohio June 30, 2020); *In re* Nat'l Prescription Opiate Litig., 440 F. Supp. 3d 773, 805–08 (N.D. Ohio 2020), *certification for appeal denied*, 2020 WL 2128450 (N.D. Ohio May 5, 2020), and 2020 WL 2128462 (N.D. Ohio May 5, 2020); *In re* Nat'l Prescription Opiate Litig., 406 F. Supp. 3d 672, 676 (N.D. Ohio 2019); *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2018 WL 6628898, at *15–18 (N.D. Ohio Dec. 19, 2018).

[19] State v. McKesson Corp., 2021 WL 6297481, at *2 (Wash. Super. Sept. 1, 2021); City of Boston v. Purdue Pharma, L.P., 2020 WL 977056, at *5 (Mass. Super. Jan. 31, 2020); City of Boston v. Purdue Pharma, LP, 2020 WL 416406, at *8 (Mass. Super. Jan. 3, 2020); Commonwealth v. Purdue Pharma, L.P., 2019 WL 5495866, at *4–5 (Mass. Super. Sept. 17, 2019); State v. Purdue Pharma L.P., 2019 WL 3991963, at *9–10 (R.I. Super. Aug. 16, 2019); *In re* Opioid Litig., 2019 WL 2996570, at *8 (N.Y. Sup. June 21, 2019); State v. Purdue Pharma L.P., 2019 WL 1590064, at *3–4 (Ark. Cir. Apr. 5, 2019); State v. Purdue Pharma L.P., 2019 WL 2331282, at *5 (Tenn. Cir. Feb. 22, 2019); State v. Purdue Pharma L.P., 2019 WL 11729023, at *4 (Minn. Dist. Jan. 4, 2019); Brooke Cnty. Comm'n v. Purdue Pharma L.P., 2018 WL 11242293, at *7 (W. Va. Cir. Dec. 28, 2018); State v. Purdue Pharma Inc., 2018 WL 4566129, at *13 (N.H. Super. Sept. 18, 2018); State, *ex rel.* Dewine v. Purdue Pharma L.P., 2018 WL 4080052, at *4 (Ohio Com.

State ex rel. Hunter v. Johnson & Johnson, the decision discussed here, is the first appellate decision to address whether the public nuisance claims against manufacturers of prescription opioids are valid state-law causes of action. Billions of dollars of potential liability rest on the judicial response to that question. In *Hunter*, the defendants endured a thirty-three-day opioid bench trial in Oklahoma's Cleveland County.[20] That trial resulted in a $465 million verdict against the defendants.[21] Further raising the stakes, "[t]he State cross-appealed contending that [defendant] should be responsible to pay . . . approximately $9.3 billion to fund government programs."[22] In *Hunter*, the Oklahoma Supreme Court held that common-law public nuisance claims could not lie against the product manufacturers of FDA-approved prescription medical products.

DISCUSSION OF THE FACTS, HOLDING, AND RATIONALE

Beginning in the mid-1990s, defendants[23] produced and marketed two FDA-approved opioid analgesic medications.[24] Both drugs were controlled substances classified as "Schedule II" due to their "high potential for abuse."[25] Allegedly, defendants "used branded and unbranded marketing" that "promoted the concept that physicians were undertreating pain."[26] Defendants' marketing allegedly "overstated the benefits of opioid use, downplayed the dangers, and failed to disclose the lack of evidence supporting long-term use."[27]

However, by the time the State of Oklahoma brought suit in 2017, defendants no longer marketed or sold these products.[28] Defendants' share of the Oklahoma market was tiny—defendants' two drugs "amounted to less than 1% of all Oklahoma opioid prescriptions," and defendants "sold only 3% of all prescription opioids statewide."[29]

Pl. Aug. 22, 2018); *In re* Opioid Litig., 2018 WL 4827862, at *10–11 (N.Y. Sup. July 17, 2018); State v. Purdue Pharma L.P., 2018 WL 4468439, at *4 (Alaska Super. July 12, 2018); Commonwealth v. Endo Health Sols. Inc., 2018 WL 3635765, at *6 (Ky. Cir. July 10, 2018); *In re* Opioid Litig., 2018 WL 3115102, at *21 (N.Y. Sup. June 18, 2018); State v. Purdue Pharma L.P., 2018 WL 7892618, at *2 (Wash. Super. May 14, 2018). *But see* People v. Purdue Pharma L.P., 2021 WL 5227329, at *4–9 (Cal. Super. Nov. 1, 2021); State v. Purdue Pharma, L.P., 2021 WL 5873046, at *7–8 (S.D. Cir. Jan. 13, 2021); People v. Johnson & Johnson, 2021 WL 7160515, at *6–7 (Ill. Cir. Jan. 8, 2021); State *ex rel.* Stenehjem v. Perdue Pharma L.P., 2019 WL 224573, at *10–12 (N.D. Dist. May 10, 2019); State *ex rel.* Jennings v. Purdue Pharma L.P., 2019 WL 446382, at *12 (Del. Super. Feb. 4, 2019); Grewal v. Purdue Pharma L.P., 2018 WL 4829660, at *17 (N.J. Super. Ch. Div. Oct. 2, 2018) (all rejecting public nuisance claims in opioid cases).

[20] *Hunter*, 499 P.3d at 722.

[21] State of Oklahoma v. Purdue Pharma L.P., 2019 WL 9241510, at *21 (Okla. Dist. Nov. 15, 2019), *rev'd*, 499 P.3d 719 (Okla. 2021).

[22] *Hunter*, 499 P.3d at 723.

[23] A wholly owned Johnson & Johnson subsidiary was the actual manufacturer. *Id.* at 721. *Hunter* does not distinguish between the defendants.

[24] *Id.*

[25] *Id.* at 721 & n.3.

[26] *Id.* at 721.

[27] *Id.*

[28] *Id.* at 722 (defendants ceased promoting one of the products in 2007, and the second in 2015).

[29] *Id.*

The State of Oklahoma sued defendants in 2017, along with two other, unaffiliated opioid manufacturers. During the litigation, the unaffiliated manufacturers settled for several hundred million dollars, rather than face potential multi-billion-dollar liability.[30] Before trial, the state also "dismissed all claims against J&J except public nuisance."[31] Because public nuisance in Oklahoma "is equitable in nature," doing so deprived the defendants of a jury trial.[32]

Oklahoma's century-old public nuisance statute provided:

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or Second. Offends decency; or Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or Fourth. In any way renders other persons insecure in life, or in the use of property. . . .[33]

A thirty-three-day trial ensued, with the sole legal question "being whether [defendants were] responsible for creating a public nuisance in the marketing and selling of its opioid products."[34] The judge held defendants liable and ordered them to "abate" the nuisance by paying "$465 million to fund one year of the State's Abatement Plan, which consisted of the district court appropriating money to 21 government programs for services to combat opioid abuse."[35] Defendants' nuisance liability was joint, without regard to their small Oklahoma market share:

> The amount of the judgment against [defendants] was not based on [their] percentage of prescription opioids sold. The district court also did not take into consideration or grant [them] a set-off for the settlements the State had entered into with the other opioid manufacturers. Instead, the district court held [defendants] responsible to abate alleged harms done by all opioids, not just opioids manufactured and sold by [them].[36]

The trial court held defendants liable under Oklahoma public-nuisance statute for "false, misleading, and dangerous marketing campaigns" in opioid marketing.[37] That court held that public nuisance liability in Oklahoma was not "limit[ed]" to activities "that affect property."[38] Alternatively, the court held that defendants "used real and personal property" while creating the nuisance, as their sales representatives "trained in their Oklahoma homes" and "used company cars traveling on State and county roads to disseminate . . . misleading messages."[39]

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[30] *Id.* at 722 & n.11.

[31] *Id.* at 722.

[32] *Id.* at 723; *see id.* at 733 (dissenting, but agreeing that defendants were entitled to a jury trial).

[33] 50 Okla. Stat. §1 (enacted 1910), *quoted* 499 P.3d at 724.

[34] *Hunter*, 499 P.3d at 722.

[35] *Id.* Precise allocations to each specific program are listed, *id*. at n.12.

[36] *Id.* at 722–23.

[37] State of Oklahoma v. Purdue Pharma L.P., 2019 WL 9241510, at *12 (Okla. Dist. Nov. 15, 2019), *rev'd sub nom.* State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719 (Okla. 2021).

[38] *Id.* at *11.

[39] *Id.* at *12 (citations omitted).

In addition, defendants were the "cause-in-fact" and proximate cause of the nuisance—the claimed opioid epidemic in Oklahoma—because "acting in concert with others, [they] embarked on a major campaign to disseminate the messages that pain was being undertreated and 'there was a low risk of abuse and a low danger' of prescribing opioids to treat chronic, non-malignant pain and overstating the efficacy of opioids as a class of drug."[40] The opinion did not specify who those "others" were.[41]

Although the trial court found "the general contours" of the state's abatement plan "reasonable and necessary," it determined that "the State did not present sufficient evidence of the amount of time and costs necessary, beyond year one, to abate the Opioid Crisis."[42] The court refused to grant defendants any credit for the other defendants' settlements—which exceeded half the amount of the judgment—because "there has been no finding of fault entered against any other potential tortfeasor."[43]

On appeal, in opposition to the verdict, defendants argued that the trial court had "improperly expanded nuisance liability" beyond its traditional restriction "to property disputes and a limited class of recognized nuisances 'per se.'"[44] Instead, "the district court transformed this statutory cause of action into an all-purpose regulatory instrument—one that permits judges to singlehandedly enact government programs to combat harms the State attributes to commercial activity."[45] Defendants contended that in Oklahoma public nuisance, both statutory and common-law, "does not regulate the marketing of goods."[46] No Oklahoma precedent had ever extended public nuisance to product-related hazards.[47]

Defendants further argued that appellate precedent throughout the nation supported these traditional limits to public nuisance liability.[48] Precluding public as a product liability theory of liability preserved the element of individualized causation, the learned intermediary doctrine, and reliance, thus "incorporat[ing] protections against arbitrary liability."[49] Liability under Oklahoma's "standardless," century-old nuisance statute risked "creating a form of regulation administered through the courts at odds with the democratic process."[50] Almost any societal ill—climate change, obesity, oceanic plastic pollution—could be characterized as a "public nuisance, and given the

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[40] *Id.* at *4 (citations omitted), 14.

[41] The trial court also rejected defendants' First Amendment defense that their scientific and policy advocacy was protected speech. Not identifying any particular statements, the court found that all "the speech at issue here was clearly commercial in nature," and that twenty years of defendants' speech, from a large number of speakers, was false or misleading. *Id.* at *13–14.

[42] *Id.* at *15.

[43] *Id.* at * 21

[44] Appellants' Brief in Chief, State *ex rel.* Hunter v. Johnson & Johnson, No. 118,474, 2020 WL 7011964, at *15 (Okla., filed Oct. 8, 2020).

[45] *Id.* at *15–16.

[46] *Id.* at *16.

[47] *Id.* at *17–18 (*citing* State *ex rel.* Wood v. State Capital Co., 103 P. 1021 (Okla. 1909) (holding that allegedly illegal liquor advertising did not qualify as a public nuisance).

[48] *Id.* at *19.

[49] *Id.* at *19–20.

[50] *Id.* at *20 (citation and quotation marks omitted).

lack of any statute of limitations, such litigation could attack conduct that occurred decades ago.[51]

Defendants also raised several constitutional arguments. They argued that the Oklahoma statute was constitutionally void for vagueness, since "[t]he concept of nuisance is elusive," making the statute a sort of "legal garbage can" that "meant all things to all people."[52] Nor did the trial court's strained connection between the defendants' conduct and incidental "use" real property, such as roads and houses, satisfy public nuisance standards that required obstruction of others' use of such property.[53] Further, the "abatement" remedy—judicially ordered "creat[ion] and funding [of] new government programs"—violated the separation of powers recognized by Oklahoma's constitution.[54] Specifically:

> The judgment enacts a public-policy agenda and orders a private actor to fund it. The Oklahoma Constitution, however, commits policymaking and fiscal authority to the Legislature. . . . The Legislature's policymaking and fiscal authority are exclusive. . . . Here, the district court exercised policymaking and fiscal authority reserved for the Legislature by ordering nearly half a billion dollars in targeted government spending.[55]

In addition, defendants argued that what the state called "marketing" was actually First Amendment-protected scientific speech that did not fit within the "narrow" exception for "commercial speech" that merely "proposes a commercial transaction."[56]

Defendants also challenged the trial court's "causation" findings that held them liable for the entire "opioid epidemic," despite their minimal market share. Since that "crisis stemmed from multiple potential causes," including "economic and social changes," "criminal black markets," and "rampant diversion and abuse of" opioid drugs that these defendants had nothing to do with, the state's case failed Oklahoma's "but for" causation standard—"the event would not have occurred but for that conduct."[57] Indeed, the state failed to establish that even "a single Oklahoma physician or patient saw [defendants' marketing] materials."[58] As a result, defendants argued, the state improperly held them liable for the "entire" opioid crisis:

> The State's asserted injury, the opioid-abuse crisis, is not a single, indivisible injury in any sense. It encompasses individual cases of addiction, abuse, and overdose—each with its own causes—that occurred in different places and involved different actors over more than two

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[51] *Id.* at *20–21.

[52] *Id.* at *22 (citations and quotation marks omitted).

[53] *Id.* at *23–24.

[54] *Id.* at *24–28.

[55] *Id.* at *27–28 (citations omitted).

[56] *Id.* at *32–38. Defendants also asserted constitutional arguments based on preemption, excessive fines, and right to a jury trial. *Id.* at *28–29, 39, 46–50.

[57] *Id.* at *29–31.

[58] *Id.* at *30.

> decades. Courts routinely subject such injuries to individualized causation analysis.[59]

Nor could the state hold defendants liable for damages caused by "criminal actors" when it did not even contend that defendants "acted in concert" with them.[60] Similarly, defendants contended that, at minimum, they were entitled to a credit for settlements reached by other parties that the state actually did sue.[61]

In unanimously reversing the district court,[62] the Oklahoma Supreme Court refused to allow product liability-based public nuisance. Nor did it allow tort liability to assume the role of taxation as a response to societal problems.[63] Unlike traditional tort law, the state's claim for "abatement" of a "public nuisance" did not purport to limit the defendants' liability to injuries actually caused by their products:

> The amount of the judgment against [defendants] was not based on [their] percentage of prescription opioids sold. The district court also did not take into consideration or grant [defendants] a set-off for the settlements the State had entered into with the other opioid manufacturers. Instead, the district court held [defendants] responsible to abate alleged harms done by all opioids, not just opioids manufactured and sold by [them].[64]

This disconnect between products, causation, and damages was fatal. The supposed "nuisance" could not be abated since "[t]he abatement is not the opioids themselves," nor was it their promotion and marketing.[65]

> It is instead an award to the State to fund multiple governmental programs for medical treatment and preventive services for opioid abuse, investigatory and regulatory activities, and prosecutions for violations of Oklahoma law regarding opioid distribution and use—activities over which [defendants] ha[ve] no control.[66]

Never had any Oklahoma court "allowed the State to collect a cash payment from a defendant that the district court line-item apportioned to address social, health, and criminal issues arising from conduct alleged to be a nuisance."[67]

Nor did *Hunter* believe that manufacturers of legal products, with no inherent defects, should be liable for damages caused by misuse of their products. "[A] public right to be free from the threat that others may misuse or abuse . . . a lawful product[] would hold manufacturers, distributors, and prescribers potentially liable for all types

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[59] *Id.* at *42 (citations omitted).

[60] *Id.* at *39–40.

[61] *Id.* at *44–46.

[62] The single justice who would have permitted any public nuisance recovery agreed that the district court erred in not limiting recovery to injuries directly caused by the defendant's products. 499 P.3d at 732, 747–48 (Edmondson, J., dissenting).

[63] 499 P.3d at 722 (describing the judgment as "the district court appropriating money to 21 government programs for services to combat opioid abuse") (footnote omitted).

[64] *Id.* at 722–23.

[65] *Id.* at 729.

[66] *Id.*

[67] *Id.*

of use and misuse of prescription medications."[68] Nor did "[a] manufacturer . . . have a duty to people who use other manufacturers' products."[69]

Also key in *Hunter* was the defendants' lack of control over the alleged harm-causing conduct—an essential element of public nuisance. Unlike pollution cases or inappropriate uses of property interfering with their neighbors, product manufacturers do not "control" how others use—or misuse—their products after sale.

> The State asks this Court to broadly extend the application of the nuisance statute . . . to a situation where a manufacturer sold a product (for over 20 years) that was later alleged to constitute a nuisance. A product manufacturer's responsibility is to put a lawful, non-defective product into the market. There is no common law tort duty to monitor how a consumer uses or misuses a product after it is sold. Without control, a manufacturer also cannot remove or abate the nuisance—which is the remedy the State seeks from [defendants] in this case.[70]

Without control, there cannot be causation. "[T]he alleged nuisance in this case is several times removed from [defendants'] initial manufacture and distribution" of their products.[71] Prescription drugs, and particularly controlled substances, are not only legal, but "highly regulated."[72]

> Multiple agencies and boards across different jurisdictions oversee and enforce statutes and regulations that control the developing, testing, producing, manufacturing, distributing, labeling, advertising, prescribing, selling, possessing, and reselling of prescription opioids.[73]

The distribution of these products was set by "legislation governing prescription opioids over which [defendants] ha[ve] no control."[74] Even less could the defendants "control how individuals used other pharmaceutical companies' [products]."[75] The public nuisance theory that *Hunter* repudiated was worse than even market liability, since the state sought to make these defendants pay for "alleged losses caused by" other manufacturers' products comprising some 97% of the market, and for illegal drug sales beyond that.[76]

The Oklahoma Supreme Court in *Hunter* thus refused to supplant existing product liability limitations with the state's unprecedented public nuisance theory. It recognized that "[e]xtending public nuisance law to the manufacturing, marketing, and selling of products . . . would allow consumers to convert almost every products liability action into a public nuisance claim."[77] *Hunter* followed extensive precedent from "[o]ther jurisdictions [that] have refused to allow products-based public nuisance

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[68] *Id.* at 727.

[69] *Id.* at 729 (footnote omitted).

[70] *Id.* at 728 (citation and footnote omitted).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* at 729.

[76] *Id.*

[77] *Id.* at 730 (citation and quotation marks omitted).

claims," finding "a clear national trend to limit public nuisance to land or property use."[78] Significantly, the decision also quoted extensively from the Third Restatement of Torts, which explicitly disapproves of public nuisance as a product-related tort:

> Tort suits seeking to recover for public nuisance have occasionally been brought against the makers of products that have caused harm, such as tobacco, firearms, and lead paint. These cases vary in the theory of damages on which they seek recovery, but often involve claims for economic losses the plaintiffs have suffered on account of the defendant's activities. . . . Liability on such theories has been rejected by most courts, and **is excluded by this Section, because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue**. 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.[79]

Hunter is the first appellate court to cite this section of the Third Restatement.[80] The current restatement thus confirmed that "[p]ublic nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap."[81] *Hunter* thus concluded that, as a legal theory, "[p]ublic nuisance is fundamentally ill-suited to resolve claims against product manufacturers."[82]

Nor was *Hunter* willing to countenance "perpetual" liability to governmental units against which the statute of limitations did not run.

> Nuisance claims against products manufacturers sidestep any statute of limitations. In this case, the district court held J&J responsible for products that entered the stream of commerce more than 20 years ago, shifting the wrong from the manufacturing, marketing, or selling of a product to its continuing presence in the marketplace.[83]

"Oklahoma law has rejected such endless liability in all other traditional tort law theories. We again reject perpetual liability here."[84]

The Oklahoma Supreme closed in *Hunter* with a forceful rejection of the idea that courts, through litigation, can and should endeavor to solve societal problems:

> The State presented us with a novel theory—public nuisance liability for the marketing and selling of a legal product, based upon the acts not of one manufacturer, but an industry. However, we are unconvinced that such actions amount to a public nuisance under Oklahoma law. . . . The

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[78] *Id.* (citations and quotation marks omitted).

[79] *Id.* at 725–26 (quoting and following Restatement (Third) of Torts: Liability for Economic Harm § 8, comment g (ALI 2020) (emphasis added).

[80] By contrast, *Nat'l Prescription Opiate* dismissed defense reliance on this comment as "misplaced" because that section supposedly "applies only to claims for economic loss brought by a private party." 2022 WL 671219, at *25. The Reporters Notes to comment g refute that distinction, citing several state high court decisions with state or municipal plaintiffs as "representative": State v. Lead Industries, Ass'n, Inc., 951 A.2d 428; *Lead Paint*, 924 A.2d 484; Chicago v. Beretta, 821 N.E.2d 1099; and *Ganim*, 780 A.2d 98.

[81] 499 P.3d at 725 (citation omitted).

[82] *Id.* at 726.

[83] *Id.* at 729 (citation omitted).

[84] *Id.* (footnote omitted).

> district court's expansion of public nuisance law allows courts to manage public policy matters that should be dealt with by the legislative and executive branches; the branches that are more capable than courts to balance the competing interests at play in societal problems. Further, [a judge] stepping into the shoes of the Legislature by creating and funding government programs designed to address social and health issues goes too far. This Court defers the policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law.[85]

IMPACT

The dynamic of opioid litigation, and of governmentally prosecuted product liability-based public nuisance claims generally, makes any option other than settlement extremely perilous. The sheer amount of potential liability—over $9 billion in *Hunter*—discourages defendants from obtaining appellate review of trial court decisions permitting such claims to proceed. Governmental plaintiffs in such litigation chose where to file suit, and thus influenced who the trial judges deciding that question in the first instance would be. Before *Hunter*, every decision allowing such public nuisance in opioid litigation was non-appealable, and none of the judges entering those orders saw fit to certify any of their opinions for interlocutory appeal. Settlement pressure on opioid defendants is strong, since claims brought by governmental units seek recovery of damages for the entire citizenry, as *Hunter* exemplifies. It is not surprising that the successful appellant in *Hunter* was Johnson & Johnson, the largest pharmaceutical company in the world, and thus the defendant least susceptible to this existential settlement pressure.

Hunter powerfully demonstrates that the precedential and policy bases for product liability-based public nuisance litigation are weak and not terribly persuasive. Public nuisance, as defined in the Second Restatement, is widely recognized as a legal morass; and the Third Restatement explicitly rejects product risks as a valid basis for imposition of nuisance-based liability. Oklahoma has joined seven other states with high-court precedent rejecting public nuisance as a "blunt and capricious method of regulation."[86] Only two state high courts have ever embraced public nuisance in the product liability context, and in one of those states (Ohio) the state legislature abolished the claim.[87] Probably influenced by Supreme Court precedent that federal courts should not predict novel expansion of state tort law,[88] only one federal appellate court has ever predicted that a state (California) would recognize product liability-based public nuisance as a state-law cause of action, and it was proven wrong.[89] Provided that defendants in opioid litigation can withstand intense settlement pressure, *Hunter* demonstrates that the chances are good that appellate courts will continue to

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[85] *Id.* at 731.

[86] *Firearm Cases*, 24 Cal. Rptr.3d at 682.

[87] *See supra*, note 10 (citing Ohio statute).

[88] *See supra* note 18.

[89] Two years after the Ninth Circuit predicted California would allow public nuisance against firearms manufacturers in *Ileto*, 349 F.3d at 1211–15, a California appellate court rejected the same theory against the same products. *Firearm Cases*, 24 Cal. Rptr.3d at 679-80.

reject public nuisance as a liability theory against manufacturers of FDA-approved prescription medical products.