



4-2020

Stretching the Law: The Application of Public Nuisance to the Opioid Epidemic

Lindsay Manning
lturner0809@gmail.com

Hannah L. Thompson
hannahsvwy@gmail.com

Follow this and additional works at: <https://scholarsarchive.byu.edu/byuplr>



Part of the [Health Law and Policy Commons](#), and the [Substance Abuse and Addiction Commons](#)

BYU ScholarsArchive Citation

Manning, Lindsay and Thompson, Hannah L. (2020) "Stretching the Law: The Application of Public Nuisance to the Opioid Epidemic," *Brigham Young University Prelaw Review*. Vol. 34 , Article 13.
Available at: <https://scholarsarchive.byu.edu/byuplr/vol34/iss1/13>

This Article is brought to you for free and open access by the Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.

STRETCHING THE LAW: THE APPLICATION OF PUBLIC NUISANCE TO THE OPIOID EPIDEMIC

Lindsay Manning¹ and Hannah Thompson²

Opioid use in the United States increased five-fold in the last decade. Every day ninety Americans die from drug abuse overdose.³ Is it illegal opioid trafficking, or is it a problem within the medical profession? Recent litigation strategies, like those used in the recent landmark case of *Oklahoma v. Johnson and Johnson*, show that opioid production and distribution are being linked to fueling the opioid epidemic. Oklahoma is just one of the states that have concluded that Johnson and Johnson, a large pharmaceutical company, is “overstating” the efficiency of opioids and “understating” the harmful effects of these drugs. Consequently, litigation has begun across the country charging pharmaceutical companies for causing the opioid crisis.⁴

This paper will evaluate the legal theories, in particular public nuisance claims, backing the litigation brought against pharmaceutical companies, as seen in *Oklahoma v Johnson and Johnson*. However, it will not attempt to address whether these claims against pharmaceutical companies are right or wrong. Public nuisance is defined differently in each state, a broad definition of public nuisance will be

1 Lindsay Manning is a Senior at Brigham Young University studying Economics and will be graduating April 2020. She will be attending BYU Law School, Fall 2020.

2 Hannah Thompson is a Junior at Brigham Young University studying Economics. She is planning on graduating April 2021 and attending law school the following fall.

3 *Opioid Abuse*, AM. SOC’Y OF ANESTHESIOLOGISTS, <https://wsc.asahq.org/whensecondscount/pain-management/opioid-treatment/opioid-abuse/> (last visited Jan. 18, 2020).

4 *Oklahoma v. Johnson and Johnson*, 2019 OK CJ-2017-816.

applied as stated in the second restatement of torts as “an unreasonable interference with a right common to the general public.”⁵ This paper will show that public nuisance claims were never intended to apply in a widespread public health crisis affecting society as a whole equally and are therefore not appropriately applied to the opioid crisis. First, this paper will address the varying outcomes in public nuisance lawsuits as they have been applied to public health crises, including the associated controversy that arises from applying public nuisance law. Second, this article will argue that the rulings found in recent opioid trials have incorrectly applied the law of public nuisance to the opioid crisis. Finally, this paper will argue that determinations of liability for public health crises, in particular the opioid crisis, should be defined using alternative legal remedies, namely master settlement agreements, legislation, and toxic torts. Through these proposed remedies, public health crises can be properly litigated.

I. BACKGROUND

Public nuisance has its origins in property and criminal law. Until the 1970s, public nuisance claims were exclusive to property nuisance, generally requiring a special injury to the individual beyond that of the general public. We define property nuisance as an action taken on a landowner’s own property or the property of another which affects the health or safety of either an individual or the public at large. Furthermore, the requirement for special injury asserts the plaintiff must show the nuisance provided injury to himself beyond that of the general public. Subsequent precedent set limits to the vague language surrounding public nuisance, thus providing a way for judges to assess the validity of public nuisance claims.⁶

However, in the 1970s arguments arose for public nuisance law to be applied to a wider range of environmental and social problems. Advocates for this change realized the vague language of

5 RESTATEMENT (SECOND) OF TORTS, § 821B (AM. LAW INST. 1979).

6 *Nuisance*, JUSTIA, [HTTPS://WWW.JUSTIA.COM/REAL-ESTATE/DOCS/NUISANCE/](https://www.justia.com/real-estate/docs/nuisance/) (LAST UPDATED APR. 2018).

the public nuisance law and its possible application to wide-spread health issues. In the second restatement of torts, written in 1972, public nuisance was included, being described simply as “an unreasonable interference with a right common to the general public ... whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience.”⁷ With this more open interpretation of public nuisance describing it as a tort, claims arose over the next four decades seeking damages for social issues such as pollution, lead paint, asbestos, and tobacco. Over the course of the 80s, 90s, and 2000s, the majority of public nuisance claims pertaining to public health issues were dismissed by the state court of appeals and deemed an inappropriate application of the law because of an established precedent requiring a property nuisance and special injury to an individual beyond that of the general public, thus making the cases of large public health crises inapplicable.⁸

However, the recent success in applying public nuisance law to the nation’s ongoing opioid crisis in *Oklahoma v Johnson and Johnson* has revitalized the debate surrounding the interpretation of public nuisance. Johnson and Johnson were required to pay damages totaling more than 500 million dollars for their involvement in fueling the nation’s opioid crisis by marketing potentially harmful drugs. Their actions were viewed as interfering with a right common to the general public and thus a public nuisance.⁹ Since politicians and commentators are now calling the opioid epidemic the most prevalent public health crisis of our day, public nuisance claims are again begin brought to the forefront of opioid litigation. This is perhaps due to the lack of response from legislative bodies and the fact that up to this point no regulations have kept pharmaceutical companies from engaging in aggressive marketing tactics. This paper argues that if the current application of public nuisance law were to continue, it would become a “catch-all” law for issues not

7 Restatement, *supra* note 3.

8 U.S. CHAMBER INST. FOR LEGAL REFORM, *WAKING THE LITIGATION MONSTER: MISUSE OF PUBLIC NUISANCE* (2019).

9 See *Oklahoma v. Johnson and Johnson*.

being addressed fast enough by the legislative bodies or where other applications have failed. However, as the precedent shows, courts are generally reluctant to accept this new application. The following sections will address the major public nuisance cases brought in varying public health crises, why they were either dismissed or accepted, and what remedies would have worked instead. This analysis will then be applied to the current opioid crisis to evaluate the similarities and differences between the preceding litigation.

II. APPLICATION OF PUBLIC NUISANCE

In 1971, a California district court litigated one of the first public nuisance claims since the second restatement of torts, *Diamond v. General Motors*. The plaintiffs, composed of seven million individuals, accused 293 industrial organizations of committing public nuisance for emitting and discharging pollution into the air surrounding the Los Angeles valley. Because the automobiles emitted harmful substances simply from its intended use, the plaintiffs argued that the organizations willfully and maliciously harmed the environment and the health of the general public. The defendants were also accused of being negligent in their manufacturing and sale of automobiles. Accordingly, the plaintiffs sought billions of dollars in damages, as well as an injunction restraining the sale and standards of future automobiles in the Los Angeles County.¹⁰

The court dismissed this claim for several reasons. First, the court rejected the idea that this case was a class action, meaning seven million individuals is too many for a legitimate lawsuit. Second, the court maintained that a private claim required that the public nuisance cause special injury to himself. This meant that each of the seven million plaintiffs would have to show special injury from the pollution. The court cited California Civil Code Section 3493 which provides: “A private person may maintain an action for a public nuisance, if it is especially injurious to himself, but not otherwise.”¹¹

10 See *Diamond v. General Motors Corp.*, 20 Cal. App. 3d 377, (1971).

11 Cal. Civ. Code § 3493 (2015).

Finally, the California state court saw the issue of pollution in the Los Angeles valley better left to the legislature.

This case showed the evolving view of some that the judiciary should be allowed to decide on matters of public policy. It also showed how reluctant courts are to take on this role. In *Diamond v. General Motors* the court did not think that it was appropriate to solve the problem of pollution in the Los Angeles valley. While some argue that the court should be more responsible for public policy due to the corruption, lobbying, and ineffectiveness from legislative bodies, in this situation the court did not think public nuisance was a valid claim to enact these changes.

Despite the reaction of the California state court to a public nuisance claim for a public health crisis, litigation continued against companies seen to be polluting the atmosphere and harming individuals. The new wording of public nuisance law seemed to extend the scope of its application to include all forms of actions hurting a community's public health. Although, in most states the courts rejected these attempts, there are still some cases that have succeeded in using public nuisance law to regulate corporations. In *State v. Schenectady Chemicals*, the state of New York charged the owner of a chemical waste disposal with improperly disposing of the waste, thus being charged for the subsequent damages done to the soil and local water supply. The courts proclaimed: "We do not hesitate in recognizing the seepage of chemical wastes into a public water supply constitutes a public nuisance . . . the attorney general is clearly authorized on behalf of the state to commence legal proceedings to abate a public nuisance."¹²

While this appears to be a success for the new definition of public nuisance, there are some key differences between the decisions made in *Schenectady* and *General Motors* is that in New York. Most importantly is that the courts also cited public policy enacted by legislature determining the actions of the chemical waste site to be illegal prior to the action taking place. Alternatively, in *General Motors* the existing regulations did not criminalize those actions of the industrial organizations. The latter is analogous to the current

12 State v. Schenectady Chemicals, 103 A.D.2d 33 (1984).

opioid situation. Legislation concerning the regulation of opioid drug manufacturers is not as widespread as pollution regulations. In *Johnson and Johnson*, the defendants argue that their practices in marketing, advertising, and selling their opioid medicines were all in accordance to the national and state regulations at that time.¹³ Therefore, similar to California pollution nuisance claims, it is inappropriate for courts to make public policy based on public nuisance claims. Regardless of the actions taken by pharmaceutical companies, public nuisance cannot become a “catch-all” for perceived wrongs not yet regulated by the government. The federal and state government have already created laws for companies producing harmful products through the use of toxic torts. Toxic torts will be discussed in-depth further in this paper, however, they are the current regulations binding producers. If pharmaceutical companies had violated these laws then litigation would be appropriate. However, public nuisance cannot fill the gaps of toxic torts.

B. Lead Paint

The ongoing litigation of the toxicity of lead paint has been at the front of research. Initial litigation failed to hold the paint companies liable in the 1950’s because all regulations that were held by the FDA were being followed, yet the debate has continued. Recently decisions by the state courts in California have found several paint companies liable for public nuisance in the distribution of lead paint in past years, regardless of failed past attempts to apply public nuisance. The FDA laws now applying to lead paint have been updated, and the companies are to pay hundreds of millions of dollars into an “abatement” fund to investigate residential lead paint in the state’s ten most populous counties and remediate any dangerous conditions found there. The companies sold the paint legally, because the paint was following all federal regulations at the time.¹⁴

This application of public nuisance can be misleading because the companies are not being held liable for the actual manufacturing

13 See *Oklahoma v. Johnson and Johnson*.

14 See *People v. ConAgra Grocery Products Co.*, 17 Cal.App.5th 51, (2017).

or selling of the dangerous products, yet they are being held liable for the marketing of the paint, despite the fact that the paint was in accordance with regulations at the time. This can be misleading as to what we view as harmful to consumers. As seen from the result of the case marketing and advertising are the issues of safety and not lead paint. The banning of lead paint was not put into action until 1978, and the company was following all regulations that they were aware of prior to this period. “With its ruling, the California Superior Court became the first and only jurisdiction to accept a product-based public nuisance theory against lead-based paint manufacturers”¹⁵

This is similar to the ongoing opioid crisis, specifically to the recent case of *Johnson & Johnson v. Oklahoma*, where a company was abiding all FDA regulations. Yet, it was held liable as a public nuisance due to its “aggressive marketing” (as stated by the New York Times) to doctors, and for not properly informing consumers of side effects.¹⁶ Public nuisance claims should not concern themselves with consumer use of a product. The Institute of Legal Reform explains why consumer use is not viable under public nuisance theory; “Allowing what is essentially a claim about a defective product to go forward under a public nuisance theory presents difficult issues of proof regarding causation and redressability.”¹⁷

As they were following all regulations that they were aware of, toxic torts would be the appropriate application. Toxic torts refer to the actual harm that the product caused to the consumer, which would be more applicable than their attempt to use public nuisance through their marketing of opioids. Overall, opioids are the root problem that harms consumers, and which the state is seeking help

15 Morgan Van Buren, *Lead Paint Litigation and the Future of Public Nuisance*, Tyson & Mendes: Blog (Jul. 28, 2014), <https://www.tysonmendes.com/blog-lead-paint/>.

16 Jan Hoffman, *Johnson & Johnson Ordered to Pay \$572 Million in Landmark Opioid Trial*, The New York Times (Aug. 30, 2019) <https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html>.

17 U.S. CHAMBER INST. FOR LEGAL REFORM, *WAKING THE LITIGATION MONSTER: MISUSE OF PUBLIC NUISANCE* (2019).

and assistance for. By targeting the marketing, the root of the problem is not addressed; whereas, a toxic tort would encompass the opioids and the consumer misuse. This remedy is not used due to the specificity needed for a toxic tort claim.

C. Tobacco

While litigants continually bring cases against the tobacco industry, few of those are public nuisance claims. Of these claims made against tobacco companies most were dismissed by the courts due to pending settlement agreements or inapplicability of the law. The legal theories surrounding the tobacco litigation are perhaps the most similar to that of the current opioid litigation due to its significant stretch from the previous standards of special injury and nuisance to a property. With pollution, lead paint, and asbestos litigation, there is a claim for injury to property. However, with the manufacturing of cigarettes or opioid litigation, there is no claim of a misuse of property as the common law states is necessary for a public nuisance action.

In the 1997 case *Texas v. American Tobacco Company*, a count of public nuisance was brought against the American Tobacco Company. The state claimed, similar to the argument in the opioid litigation *Johnson & Johnson v. Oklahoma*, that the “defendants have intentionally interfered with the public’s right to be free from unwarranted injury, disease, and sickness and have caused damage to the public health, the public safety, and the general welfare of the citizens of the State of Texas.”¹⁸ The courts dismissed this claim outright, citing Texas public nuisance law as “the use of any place for certain, specific prescribed activities such as gambling, prostitution, and the manufacture of obscene materials.”¹⁹ This definition of public nuisance law is similar to statutes from other states by including a property nuisance. The defendants argued that since there was no misuse of property, there could be no claim of public nuisance.

The Texas state court said, “The State has not pled a proper claim, because it has failed to plead essential allegations under Texas

18 *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997).

19 *Id.* at 973.

public nuisance law. Specifically, the State failed to plead that Defendants improperly used their own property, or that the State itself has been injured in its use or employment of its property.” Therefore, this specific count of public nuisance was dismissed. The Texas State Court had one final note in saying, “The overly broad definition of the elements of public nuisance urged by the State is simply not found in Texas case law and the Court is unwilling to accept the state’s invitation to expand a claim for public nuisance beyond its ground in real property.”²⁰ This response is similar to the responses we have seen in other public health issues: the courts are reluctant to broaden the definition of public nuisance law.

III. LEGAL REMEDIES

A. Master Settlement Agreement

Before public nuisance claims could be brought against tobacco companies on a large scale, a settlement agreement was reached. The Master Settlement Agreement, reached in November, 1998, included forty-six states and five of the largest tobacco manufacturers in the U.S. It included payments of billions of dollars to the states to mitigate the damage done by tobacco products.²¹ Furthermore, injunctions were handed down to limit the extent to which tobacco companies could advertise, market, and promote their products. Tobacco companies engaged in the settlement agreement to end the immense costs of future litigation that could have occurred. And while sceptics criticized the allocation of the money from this settlement, claiming that it hadn’t actually been spent on alleviating the health problems caused by tobacco, the Master Settlements Agreement was successful in ending the large amount of litigation facing tobacco companies.

20 Id. at 973.

21 *Master Settlement Agreement*, Public Health Law Center at Mitchell Hamline School of Law (last visited Feb. 20, 2020) <https://www.publichealthlawcenter.org/topics/commercial-tobacco-control/commercial-tobacco-control-litigation/master-settlement-agreement>.

The option of a master settlement agreement may be appealing to the pharmaceutical companies now facing large amounts of litigation for the opioid crisis. As shown in the preceding paragraphs, the route of public nuisance claims has been unreceptive by the courts. It is unclear if the opioid litigation will find success in using public nuisance claims against drug manufacturers. Therefore, a master settlement agreement, similar in nature to that of the tobacco settlement, could be a good course of action for states and pharmaceutical companies wishing to end the litigation and establish liability for the opioid epidemic. A settlement agreeing to a fixed amount of reparations and injunctions pertaining to the marketing and advertising of these addictive drugs would be in the best interest of both parties as the unpredictability of future litigation is not desirable for the companies.

Potential objections to a master settlements agreement could come from the misallocation of damages received. In the tobacco settlement, many argue that the funds never reached those whose health was affected. Similarly, damages received from the opioid settlement may never be used to fund drug rehabilitation efforts. Furthermore, A master settlement agreement may seem undesirable to pharmaceutical companies because they believe they are in the position to win the litigation against them. However, the recent decision of *Oklahoma v. Johnson & Johnson* shows that the confusing nature of public nuisance law does not guarantee success in any state. If the courts continue to pursue and allow public nuisance claims, it would open the way for each individual court to decide a new definition of public nuisance despite the standing of special injury and property. Therefore, we argue that a better course of action would be to engage in a master settlement agreement.

B. Legislation

Another option would be for legislation to be made creating clearer and stricter regulations for pharmaceutical companies. The reason activists are pushing to broaden the definition of public nuisance is their dissatisfaction with the decisions made by the legislature. For example, in the cases against pollution, litigants were dissatisfied with how relaxed the standards were for emitting pollutants into

the air as well as how slow the legislative branch was at making changes. Similar complaints will be made about any opioid litigation; however, it would be more beneficial for statutes to be made setting clear standards of marketing operations, rather than relying on public nuisance claims. Similar to the case, *State v. Schenectady Chemicals*, public nuisance claims could be brought within the bounds of a state or federal statute. The aforementioned case cited heavily from the Resource Conservation and Recovery Act of 1976, and therefore showed that what those companies were doing was illegal.²² States, however, would probably be reluctant to accept this legal theory because it would mean a violation of due process if they attempted to continue the litigation against pharmaceutical companies. Legislation is necessary if clear standards want to be made as to what practices of opioid drug manufacturers are illegal. Public nuisance will continue to provide only vague and confusing results that vary significantly across the nation and within states. If the judicial branch wants to ascertain judgement against pharmaceutical companies, it must be done within the context of a specific statute or law.

C. Toxic Torts

We also propose that these cases (i.e.: lead paint, opioids, etc.) be tried within the scope of a toxic tort rather than public nuisance. When the public nuisance attacks the marketing of a product, a toxic tort brings us back to the original problem, the product. A toxic tort is "... a legal claim for harm caused by exposure to a dangerous substance—such as a pharmaceutical drug, pesticide, or chemical."²³ However, many people steer away from the application of a toxic tort because of the additional statement within the law that implies "In a toxic tort claim, the plaintiff (the person who sues) alleges that exposure to some dangerous substance caused an injury or illness."²⁴ Many people will avoid this application because a tort is seen as

22 Resource Conservation and Recovery Act, 42 U.S.C §6901 (1976).

23 *Toxic Tort*, Harrell Law Firm, PA, (last visited Feb. 20, 2020) <https://www.hlfpa.com/practice-areas/toxic-tort/>.

24 *Id.*

personal injury, and people find it difficult to sue large companies as an individual. The workload of addressing every individual involved within the scope of the respective health crisis is one that simply cannot be taken on without reform. But, the application of the law, and the solution will remain in addressing the problem in which we originally set out to correct.

IV. CURRENT OPIOID LITIGATION

A. Johnson & Johnson v. Oklahoma

The controversy of public nuisance is applicable more than ever due to the recent case of *Johnson & Johnson v. Oklahoma*. The pharmaceutical company was originally sued for 17 billion dollars in order to provide twenty years of rehabilitation funding for victims of opioid addiction. The State of Oklahoma decided that the company would instead payout 572 million dollars which would cover approximately one year of rehabilitation for those affected by the opioid health crisis.²⁵ There are now approximately 2,000 additional pending cases seeking to employ similar legal strategies. The state had priority settled with other pharmaceutical companies (Purdue and Teva.), which resulted in sole responsibility lying on just one company, Johnson & Johnson.²⁶

The verdict was determined under a public nuisance law and was targeted at the marketing of the drug to doctors, without appropriately relaying the side effects of the products to the doctors. This interpretation is made off of vague statements within the law pertaining to public nuisance. Aggressive marketing of drugs is not illegal under any FDA regulations of federal statutes as of yet. Johnson

25 Martha Bebinger, *Purdue Pharma Agrees to \$270 Million Opioid Settlement with Oklahoma*, NPR (Mar. 26, 2019) <https://www.npr.org/sections/health-shots/2019/03/26/706848006/purdue-pharma-agrees-to-270-million-opioid-settlement-with-oklahoma>.

26 Shannon Van Sant, *Teva Pharmaceuticals Agrees to \$85 Million Settlement with Oklahoma in Opioid Case*, NPR (May 26, 2019) <https://www.npr.org/2019/05/26/727179915/teva-pharmaceuticals-agrees-to-85-million-settlement-with-oklahoma-in-opioid-case>.

& Johnson was following all FDA regulations with the drugs it was making. Ultimately, the problem is consumer abuse of opioids not Johnson & Johnson's marketing of products. Therefore, claiming that the companies marketing is a public nuisance does not address the root problem of opioid addiction. The state of Oklahoma chose to apply a law that did not alter the actual misuse of opioids, which are claimed to be addictive and harming to their state population. The actual public nuisance is the distribution and individual misuse of opioids, not the initial pharmaceutical market of the product.

V. CONCLUSION

The opioid crisis is complex, but that cannot be the reason that it continues to go unaddressed. There is a need for better applications to solve the current epidemic. A public nuisance argument is inappropriate and ineffective in dealing with the seriousness of this nation's health crisis. With proposed solutions of applying toxic torts, master settlement agreements, and legislation to the nation's health crisis, we argue the following benefits: safer pharmaceutical products with more cautious responsibility for providers, standard regulations for all parties involved of the creating and distribution of products, and concise laws applying to our nation's health crisis. This country should protect health and well-being of its citizens, and if opioids are a problem, litigation should focus on the individuals and the specific negative effects of opioids. Public nuisance should only be applied when it does not have to be contorted to fit an argument and allow all the laws to uphold the best interest of the public.