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BIAS AND PREJUDGMENT IN THE QUASI-JUDICIAL DECISION-MAKING PROCESS

THE PUBLIC RELEASE OF BODY CAMERA VIDEOS

PUBLIC NUISANCE: MUNICIPALITIES AND THE COMMON GOOD



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Public Nuisance: Municipalities and the Common Good

ERICH EISELT, *IMLA Assistant General Counsel and Director of Affirmative Litigation, Rockville, Maryland*

Long restricted to interferences in the common good which involve real property or illegal activity, public nuisance has increasingly been asserted by municipalities to redress a broader span of injury. The debate about the proper scope of public nuisance in American jurisprudence is vociferous, spotlighted in high-profile combat being waged by local governments across the country.

The Restatement: While not binding law, the Restatement of Torts is accorded great deference in many states.[1] In the context of public nuisance, it has engendered widely differing interpretations, defining public nuisance simply as "an unreasonable interference with a right common to the general public."[2] Factors that make an interference "unreasonable" include:

> (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.[3]

Whether these elements exist in a given fact pattern is subject to great disagreement, as the following will illustrate.

The Gun Battles: More than twenty years ago, firearms became a battleground in the public nuisance war. In 1998, Cincinnati sued a group of manufacturers and distributors, seeking recovery for costs incurred in combating gun violence and diminution in property values. Lower courts dismissed, holding among other things that Ohio's public nuisance law did not extend to scenarios where third parties played a material role in the injury. But the Ohio Supreme Court reversed and remanded, finding that the involvement by third parties did not foreclose the city's nuisance cause of action: "Contrary to appellees' position, it is not fatal to appellant's public nuisance claim that appellees did not control the actual firearms at the moment that harm occurred."[4] *City of Cincinnati v. Beretta U.S.A. Corp*. also held that:

> [U]nder 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 sale of the product unreasonably interferes with a right common to the general public.[5]

City of Cincinnati would prove to be an outlier. More typical was a parallel proceeding in Chicago. The city had enacted restrictions on the sale and possession of certain types of firearms, but surrounding jurisdictions did not impose the same limitations. Manufacturers flooded nearby towns with inventory, where dealers knowingly sold prohibited weapons to Chicago residents, who inevitably transported them into the urban core. In 1998, plaintiffs brought *City of Chicago v. Beretta U.S.A. Corp*., (a case in which IMLA filed an amicus brief) asserting that the "existence of illegal firearms in the City of Chicago constitutes a public nuisance because it violates ordinances and laws designed to protect the public from a threat to its health, welfare and safety," and because the existence of readily available firearms "creates an unreasonable and significant interference" with public safety.[6]

The Illinois Supreme Court ultimately rejected Chicago's arguments. Holding that makers of lawful products could not be liable for downstream acts by third parties, it drew an analogy sometimes cited by later public nuisance defendants:

> If there is a public right to be free from the threat that others may use a lawful product to break the law,

that right would include the right to drive upon the highways, free from the risk of injury posed by drunk drivers. This public right to safe passage on the highways would provide the basis for public nuisance claims against brewers and distillers, distributing companies, and proprietors of bars, taverns, liquor stores, and restaurants with liquor licenses, all of whom could be said to contribute to an interference with the public right.[7]

The Cincinnati and Chicago cases were only two of many nuisance actions brought by local governments in the 1990s to hold the gun industry accountable for misuse of firearms. Capitol Hill soon moved to stop that momentum. In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA).[8] The PLCAA characterized the imposition of liability "on an entire industry for harm that is solely caused by others" as an "abuse of the legal system."[9] It definitively prohibits "civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others."[10] That law has foreclosed most public nuisance gun litigation. But in July 2021, testing the Supremacy Clause, the New York Assembly became the first state legislature in the nation to pass a measure which expressly allows public nuisance civil actions against gun makers and dealers.[11] Not surprisingly, the firearms industry argues that the New York law violates the PLCAA's preemptive reach and contravenes the Second Amendment. Litigation on those issues has already begun.

Banking on Foreclosure: The 2008 mortgage meltdown left many neighborhoods with vacant homes, abandoned by borrowers who had been induced to sign high-risk mortgages. Crime, drug use, and huge declines in property taxes followed. Cities brought nuisance actions against lenders who had promoted the loans, often in obviously discriminatory patterns, and failed to maintain the properties once in foreclosure. Here, the municipal plaintiffs were challenged to demonstrate the nexus between lending and the deterioration in neighborhoods. These cases have proved difficult. In one such action, the Sixth Circuit found Cincinnati's amended pleadings against Wells Fargo to be insufficient:

> The failure to tether the damages to nuisance-related problems on Wells Fargo's properties prevents us from assessing the "directness" of the relationship between the two. That is particularly true for the City's attenuated theories of damage: decreased tax revenue, increased police and fire expenditures, and increased administrative costs…When tied only to a general "policy" of non-conformance, these damages are difficult

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> to connect to Wells Fargo's actions and nearly impossible to disaggregate from other potential causes of these costs.[12]

(Municipalities have sought other avenues to address urban blight caused by foreclosure. IMLA members will be aware of our amicus support for Miami in in its action against Bank of America and others under the Fair Housing Act. That route has thus far brought limited satisfaction; while the Supreme Court affirmed in May 2017 that municipalities have standing to sue under the statute, it nevertheless reversed on the issue of causation, finding that mere foreseeability of foreclosure and its attendant harm is inadequate.)[13]

Painting Over Known Hazards: As indicated above, a major dispute in public nuisance cases is whether causation has been sufficiently demonstrated. That issue was at the heart of another nuisance litigation commenced two decades ago—the effort to make producers liable for the consequences of lead paint in homes and buildings throughout the nation. There, although the products involved were legal, ample evidence indicated that manufacturers knew about the dangers of lead, particularly to children, but aggressively promoted their wares. Many localities sought public nuisance relief.

These included 26 towns and counties in New Jersey, whose cases were consolidated in *In re Lead Paint Litigation*.[14] In 2007, their public nuisance claims were dismissed by the New Jersey Supreme Court:

> Although the complaints initially sought recovery through a wide variety of legal theories, we are called upon to consider only whether these plaintiffs have stated a cognizable claim based on the common law tort of public nuisance. Because we conclude that plaintiffs cannot state a claim consistent with the well-recognized parameters of that tort, and because we further conclude that to find otherwise would be directly contrary to legislative pronouncements governing both lead paint abatement programs and products liability claims, we reverse the judgment of the Appellate Division and remand for dismissal of the complaints.[15]

A decade later, the California Court of Appeals reached a different conclusion about paint makers' liability. Concluding 17 years of litigation, it found that deceptive marketing of a legal but dangerous product which filled a community with latent toxicity was actionable within the ambit of nuisance:

> A rational factfinder could have concluded that defendants' wrongful promotions of lead paint for interior residential use were not unduly remote from the presence of interior residential lead paint placed on those residences during the period of defendants' wrongful promotions and within a reasonable period thereafter. The connection between the long-ago promotions and the current presence of lead paint was not particularly attenuated. Those who were influenced by the promotions to use lead paint on residential interiors in the 10 jurisdictions were the single conduit between defendants' actions and the current hazard. Under these circumstances, the trial court could have reasonably concluded that defendants' promotions, which were a substantial factor in creating the current hazard, were not too remote to be considered a legal cause of the current hazard even if the actions of others in response to those promotions and the passive neglect of owners also played a causal role. The court could therefore have concluded that defendants' promotions were the "legal cause" of the current nuisance.[16]

The case was remanded for calculation of damages, spurring the three paint makers--NL Industries, ConAgra, and Sherwin Williams—to sign a $305 million settlement with the municipalities.[17]

Opioids-The Early Successes: Begun in 2014, the opioid litigation finally began to yield results for government plaintiffs five years later. The first significant breakthrough came in March 2019, when Purdue, the producer of Oxycontin, agreed to pay the State of Oklahoma $270 million to avoid an upcoming televised opioid trial. *State of Oklahoma v. Purdue Pharma L.P.,* brought by then-Attorney General Mike Hunter, alleged that Purdue and other opioid manufacturers had systematically deceived Sooner state physicians into improperly prescribing opioids for long-term chronic pain.[18]

Six months later, on the eve of an October 2019 trial in the Northern District of Ohio, a range of opioid defendants settled lawsuits brought by Ohio's Summit and Cuyahoga counties, agreeing to pay $360 million.[19] And in May 2021, America's three major pharmaceutical distribution companies—Cardinal Health, McKesson, and Amerisource Bergin, proposed a massive $21 billion settlement (the "Distributor Settlement Agreement" or DSA) to silence opioid suits brought by more than 3,000 local governments and 48 states.[20] Here, the plaintiffs' main contention was that the distributors failed to track and report suspicious orders, blindly sending millions of opioid doses into communities around the nation, far in excess of any conceivable legitimate demand. Johnson & Johnson, through its Janssen affiliate, offered a parallel settlement proposal, adding another $5 billion to the DSA total.

For each of these litigations, the primary cause of action driving settlement was public nuisance.

State of Oklahoma continued to trial after Purdue exited. The outcome, ren-

dered in Cleveland County Circuit Court in August 2019, confirmed that public nuisance could be a legitimate weapon for opioid plaintiffs: the State, which had dropped all other causes of action, obtained a $465 million judgment against Johnson & Johnson/Janssen.[21] That decision was based on Circuit Judge Thad Balkman's expansive reading of Oklahoma's public nuisance law:

> The plain text of the statute does not limit public nuisance to the use of real property. Unlike other states' statutes which limit nuisances to the 'habitual use, or the threatened or contemplated habitual use of any place,' Oklahoma's statute simply says 'unlawfully performing an act or omitting to perform a duty.'[22]

He found that J&J's sales and marketing activities ineluctably drove improper use of "Duragesic," the company's high-powered fentanyl product. The result—spikes in death, addiction, incarceration, foster care, unemployment, and social services—constituted a public nuisance under Oklahoma law.

Seeking to add a land-based rationale, Judge Balkman cited voluminous evidence that the company had used Oklahoma's dwellings, offices, and roadways to perpetrate its injurious acts:

> However, and in the alternative, in the event Oklahoma's nuisance law does require the use of property, the State has sufficiently shown that Defendants pervasively, systemically and substantially used real and personal property, private and public, as well as the public roads, buildings and land of the State of Oklahoma, to create this nuisance.[23]

J&J rapidly appealed the decision to the Oklahoma Supreme Court, staying any opioid abatement payments.

The California Setback: While the Oklahoma appeal was being decided, a California court dealt opioid public nuisance its first major defeat. In early November 2021, the case brought in Orange County Superior Court by Oakland and the counties of Santa Clara, Orange, and Los Angeles, was dismissed.[24] The *People of California* decision cited a lack of evidence of inappropriate prescribing and held categorically that "medically appropriate" prescriptions could not generate public nuisance liability:

> Mindful of [statutory] limiting factors, Plaintiffs nevertheless contend: that neither Federal nor California law precludes a finding of liability based on false or misleading marketing and promotion; that Defendants knew increased opioid prescriptions result in increased adverse downstream consequences; and that Defendants' false or misleading marketing and promotion in fact resulted in increased prescriptions, with increased adverse downstream consequences (the "opioid crisis" alleged).

Most significantly, Plaintiffs also

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> contend that they need only prove that the number (and/or the dose and duration) of prescriptions increased, without distinguishing between medically appropriate and medically inappropriate prescriptions.
>
> The Court disagrees. Specifically, the Court finds that even if any of the marketing which caused an increase in the number, dose or duration of opioid prescriptions *did* include false or misleading marketing, any adverse downstream consequences flowing from *medically* appropriate prescriptions cannot constitute an actionable public nuisance. This is so because, as the Federal government and the California Legislature have already determined, and as this Court finds, the social utility of medically appropriate prescriptions outweighs the gravity of the harm inflicted by them and so is not "unreasonable" or, therefore, enjoinable.[25]

Reversal in Oklahoma City: Within weeks after the California dismissal (now on appeal to the Ninth Circuit), a more resounding setback transpired in Oklahoma. Once Judge Balkman's case moved from Norman to Oklahoma City, it faced a hostile judiciary. In mid-November 2021, the Oklahoma Supreme Court reversed *People of Oklahoma*, with the 5-1 majority reining in what it saw as the improper expansion of Oklahoma's public nuisance jurisprudence. It found that the mere use of roads and buildings for sales and marketing purposes was not a property-based predicate for nuisance liability. And it was adamant that public nuisance should not become a vehicle for recovery against those who manufacture, market, or sell lawful products in Oklahoma:

> The issue before this Court is whether the district court correctly determined that J&J's actions in marketing and selling prescription opioids created a public nuisance. We hold it did not. The nature of the nuisance claim pled by the State is the marketing, selling, and overprescribing of opioids manufactured by J&J. This Court has not extended the public nuisance statute to the manufacturing, marketing, and selling of products, and we reject the State's invitation to expand Oklahoma's public nuisance law. . . . The Court applies the nuisance statutes to unlawful conduct that annoys, injures, or endangers the comfort, repose, health, or safety of others. But that conduct has been criminal or property-based conflict. **Applying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers; this is why our Court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products.**[26] (emphasis added).

Juries See Otherwise: Indicative of the changing tides in public nuisance interpretation, two subsequent jury decisions immediately restored vitality to municipal opioid plaintiffs. In late November 2021, a federal jury in Cleveland agreed with Ohio's Lake and Trumbull counties in the national opioid MDL "Track 3" bellwether that CVS, Walgreens, and Walmart were responsible for creating a public nuisance by indiscriminately filling suspicious opioid prescriptions.[27] That case, in which damages will be decided by MDL Judge Polster, is already on appeal to the Sixth Circuit. And in an action brought against all three categories of opioid defendants (manufacturers, distributors, and pharmacies) a New York jury held in favor of Suffolk and Nassau counties, and the State, finding Teva Pharmaceuticals liable for public nuisance on December 30, 2021.[28]

The Continuing Debate: These litigations, and others where public nuisance is alleged, continue to arouse intense debate. Some detractors argue that the cause of action is being distorted into a legal catch-all, deployed by plaintiffs' counsel to conjure illusory but lucrative legal actions. Others assert that remedies already exist, at least where products are involved. Typifying this point of view was a *Wall Street Journal* opinion piece by George Washington Law Professor Jonathan Turley endorsing the Oklahoma opioid reversal and pointing to ready-made alternatives available to opioid plaintiffs in tort law, specifically products liability:

> Public-health nuisances are acts that involve unreasonable conduct exposing others to harm, like keeping diseased animals or improperly storing explosives in a population center. The concept of nuisance is appealing when dealing with unpopular products that cause social harm. Yet the torts system has an elaborate and well-functioning system of product liability. Companies can be held strictly liable for products that are defective in design, manufacture, or warnings. The product-liability tort gives companies an incentive to minimize risks while empowering litigants to seek redress for injuries.[29]

Public nuisance plaintiffs might argue that, at least in the context of pharmaceuticals, the products liability path to injunctive and financial relief is largely illusory. Most state legislatures have passed measures that virtually eliminate manufacturers' product liability risk once the drug in question obtains FDA approval. That immunity can then shield their subsequent behavior. A typical interpretation was provided by Michigan's Court of Appeals as it applied the state's safe-harbor provision and affirmed denial of liability in a 2018 pharmaceutical case:

> MCL 600.2946(5) specifically provides that . . . the manufacturer or seller is not liable, if two conditions are met: (1) the drug was approved for safety and efficacy by the FDA and, (2) the drug and its labeling were in compliance with the FDA's approval at the time the drug left the control of the manufacturer or seller.[30]

Opioid defendants have explicitly relied on products liability safe harbors, as in this argument citing the Ohio Products Liability Act:

> Ohio law is clear, however, that public nuisance * * * actions were intended to be abrogated by the OPLA. *Sherwin Williams*, 2007 WL 4965044. OPLA explicitly abrogates "any public nuisance claim or cause of action at common law in which it is alleged that the * * * promotion, advertising, [or] labeling of a product unreasonably interferes with a right comment to the general public. R.C.2307.71(A)(13).[31]

The issue of causation generates even more argument. In dismissing the localities' opioid action, the California Court of Appeals held causation to be inadequately pleaded, despite voluminous evidence that the industry misled doctors and understated addiction risks. Professor Turley's view is similar, seeing a learned intermediary defense instead of a massive exercise in deceptive promotion by manufacturers. As he puts it, the opioid purveyors provided doctors with "the underlying medical data," and the doctors then acted:

> In the opioid litigation, the companies were producing a lawful, nondefective product. The complaint was that they encouraged overprescription and failed to address the addictive danger adequately. That also highlighted the disconnection with product-liability law. Under common law, courts recognize the defense of the "learned intermediary," namely physicians. Companies gave doctors the underlying medical data on drugs, and doctors decided whether prescribing the drug (or renewing a prescription) was medically warranted. There is no question that doctors have engaged in malpractice in many of these cases of the over-prescription of opioids.[32]

Editorial Comment: As in every litigation, the fact-finder's consideration of causative evidence is critical in public nuisance. Recall that the Oklahoma Supreme Court's reversal in *People of Oklahoma* cited language from the *City of Chicago* firearms decision, implicitly analogizing the opioid crisis to garden variety alcohol production and sale.[33] Without wanting to insert pro-plaintiff commentary, the court's use of that anodyne description avoided the most damning factual elements of the opioid defendants' conduct, beginning with a decade-long series of guilty pleas and Justice Department settlements. A more comparable description of the alcohol industry, had it behaved in

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the same manner as the opioid defendants, might include: distillers spending millions to promote the message that overconsumption rarely causes alcoholism and that 100% grain alcohol is appropriate for all occasions; retailers and bars serving virtually all clientele, in some cases charging customers a premium for failing to verify minimum age and/or ignoring the fact that buyers were already intoxicated, and so on.

Conclusion

The utility of public nuisance as a mechanism for injunctive relief and abatement awards continues to be demonstrated. As noted above, statutory limitations such as drug makers' immunity from some product liability claims require alternate strategies. And other factors will compel plaintiffs to plead public nuisance, particularly where the alleged wrongdoing transpired over decades and was committed by numerous corporate actors, some of whom may have sought bankruptcy protection. Public nuisance can allow for a finding of joint and several liability among a cast of defendants with widely differing financial attributes.[34] And in many instances, public nuisance cases are not subject to statutes of limitation.[35]

Whether applied to redress the communal injuries discussed here, or to even more ubiquitous causes such as climate change, it is evident that public nuisance will only grow as a mechanism used by municipalities to protect the common good. ML

Notes

1. Restatement 50-State Survey 10.30.19.pdf (primerus.com) (https://www.primerus.com/files/ Restatement%2050-State%20Survey%2010.30.19.pdf)
2. Restatement Of Torts, § 821 (b).
3. *Id.*
4. City of Cincinnati v. Beretta U.S.A. Corp., 95 Ohio St.3d 416, 768 N.E.2d 1136 (Ohio 2002).
5. *Id.* at 419.
6. City of Chicago v. Beretta U.S.A. Corp., 213 Ill.2d 351, 821 N.E.2d 1099 (Ill. 2004), r*ehearing denied* Jan. 24, 2005.
7. *Id.* at 376.
8. P.L. 109-92 (2005), *codified at* 15 U.S.C. § 7901 et seq.
9. *Id.*
10. *Id.*
11. N.Y. S.B. 7196 (July 6, 2021).
12. City of Cincinnati v. Deutsche Bank National Trust Co., 863 F.3d 474 (6th Cir. 2017).
13. Bank of America Corp. v. City of Miami, 137 S.Ct. 1296 (2017).
14. In re Lead Paint Litigation, 191 N.J. 405, 924 A.2d 484 (N.J. 2007).
15. *Id.*
16. People of the State of California v. ConAgra Grocery Products Co., 17 Cal. App.5th 51 (Ca. Ct. App. Nov. 14, 2017)
17. Joshua Schneyer, "Paint makers reach $305 million settlement in California, ending marathon lead poisoning lawsuit." Reuters, July 17, 2019 (https://www.reuters.com/article/us-usa-lead-settlement/paint-makers-reach-305-million-settlement-in-california-ending-marathon-lead-poisoning-lawsuit-idUSKCN1UC26J)
18. State of Oklahoma ex. rel. Mike Hunter v. Purdue Pharma L.P., no. CJ 2017-816 (Cleveland Cnty. Cir. Ct. Aug. 26, 2019).
19. County of Summit v. Purdue Pharma L.P., no. 18-op-45090 (N.D. Ohio June 17, 2019).
20. https://www.attorneygeneral.gov/wp-content/uploads/2021/07/2021-07-21-Final-Distributor-Settlement-Agreement.pdf. ("DSA").
21. State of Oklahoma, supra note 18.
22. *Id.*
23. *Id.*
24. People of California v. Purdue Pharma, L.P., no. 14-cv-725287 (Sup. Ct. Orange Cnty. Nov. 1. 2021).
25. Id
26. State ex rel. Attorney General of Oklahoma v. Johnson & Johnson, no. 118474 / 2021 Ok 54 (Nov. 9, 2021).
27. County of Lake v. Purdue Pharma L.P., no. 18-op-45032 (N.D. Ohio Nov. 23, 2021); County of Trumbull v. Purdue Pharma, L.P., no. 18-op-45079 (N.D. Ohio Nov. 23, 2021).
28. *In re Opioid Litigation*, no. 400000/2017 (Sup. Ct. Suffolk Cnty. Dec. 30, 2021).
29. Jonathan Turley, "Opioids, Guns and Public Nuisance - Why the Oklahoma Supreme Court was right to reject the state state's claim against a lawful product," Wall Street Journal, Nov. 14, 2021.
30. *Trees v. Pfizer, Inc.*, 2018 Mich. App. LEXIS 3757, at *11 (Mich. Ct. App. 2018).
31. State ex rel DeWine v. Purdue Pharma L.P., Ohio Ct. Com. Pl. cv 17-cl-000261 (Motion to Dismiss, Sept. 17, 2019).
32. *Turley*, supra note 29.
33. In the context of firearms, a hypothetical comparator might be the industry's advertising that AR-15s and similar automatic weapons are no more dangerous than BB guns and are great gifts for young people.
34. "Accordingly, the Court finds that O.R.C. § 2703.22 does not bar joint and several liability for abatement of a nuisance. Put differently, there is nothing in this statute that precludes application of the doctrine of joint and several liability on Defendants." In re National Prescription Opiate Litigation, no. 17-md-2804 (N.D. Oh. Sept. 17, 2019).
35. "[T]here is no statute of limitations in an action brought by a public entity to abate a public nuisance. . . " *(Beck Development Co., Inc. v. Southern Pacific Transp. Co.*, 44 Cal.App.4th 1160 (Cal. Ct. App. 1996); "A well-settled rule in Ohio is that no length of time can legalize a public nuisance and that therefore the statute of limitations does not run against an action to abate such a nuisance." 72 Ohio Jur. 3d Nuisances § 22; "Public nuisance, being an action to protect public rights, is generally assumed to have no statute of limitations. See Restatement (Second) Of Torts § 821C cmt. (e) (1979)."