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Southern District of Illinois Latest Court to Cabin Scope of Public Nuisance

by Gregory S. Chernack

What does the keeping of diseased animals or allowing toxic runoff into a river have to do with the marketing and prescribing of legal medications or the promotion of a legal pesticide? At first blush, not much. But to plaintiff lawyers and to a number of judges, all these things can give rise to public nuisance claims. The expansive use of this ancient cause of action—originally narrow in scope—has served as a back door to potentially expand products liability law well beyond its traditional bounds, allowing liability and significant damages in novel situations. Thankfully, a number of courts have pushed back on such an expansion of public nuisance law, recognizing that this cause of action cannot be so unmoored from its origins.

Public nuisance goes back centuries, predating the Magna Carta. Initially only the king had the authority to bring such an action, seeking an injunction or abatement on conditions that infringed on royal property or blocked public roads or waterways. *See* Michelle L. Richards, *Pills, Public Nuisance, and Parens Patriae*, 54 U. Rich. L. Rev. 405, 418 (2020). Over time, the breadth of the cause of action expanded, allowing individuals to bring a claim, but it generally involved conducts that harmed the common rights of the public. *See* Restatement (Second) of Torts § 821B cmt. b.

In recent years, plaintiffs around the nation have used this cause of action to try to raise public nuisance claims against, among others, opioid and pesticide manufacturers and distributors, claiming that these products harmed some common right. Under this theory, plaintiffs could recover even if products were not defective and for which a proper warning was provided because they were alleged to cause harm due to actions taken after they were no longer in the manufacturer's control.

Two recent decisions have taken important steps to limit abuses of this doctrine. Around the United States, municipalities have claimed that drug manufacturers, distributors, and pharmacies have caused a public nuisance regarding the marketing and distribution of opioids. After an Oklahoma judge ordered Johnson & Johnson to pay $465 million to abate a public nuisance in that state, the Oklahoma Supreme Court overturned the judgment. *See State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021). In concluding that public nuisance suits are ill-suited to resolve claims against product manufacturers, the court pointed to three factors: (1) the product's manufacture and distribution rarely violate a public right, (2) a manufacturer generally loses control of its product once sold, and (3) under such a theory, a manufacturer could be held perpetually liable. *Id.* at 726. On the first of these, the court noted that the remedy sought is more in line with a private tort action as opposed to a communal right. *See id.* at 726-27. The court distinguished cases involving pollution in drinking water and diseased animals because there the property-related conditions have no beneficial use; opioids (a lawful product), in contrast, do. *See id.* at 727. On the second, the court noted the absence of a common law duty to monitor a product once sold, *see id.* at 727-

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29, and J&J no long controlled the product at the time the nuisance occurred. Further, the decision imposed liability for harms caused by opioids that it did not manufacture or sell; there was no basis in the law for that. *See id.* at 729. In addition, the remedy (money damages) was not abatement and hence not permitted. *See id.*

The Oklahoma high court's decision properly delineated the differences between public nuisance and products liability law. The former would allow for liability for use of a product well after the manufacturer lost control of it and could create perpetual liability. The court rejected the idea that because a large number of people were allegedly harmed, a public right was infringed. Instead, it recognized that aggregating a large number of individual injuries is what private tort actions address, actions which place important limitations on when liability exists and what type of remedy may be imposed. Ultimately, the Oklahoma court concluded, "[p]ublic nuisance is fundamentally ill-suited to resolve claims against product manufacturers." *Id.* at 726.

Even more recently, a federal judge in the Southern District of Illinois granted a motion to dismiss public nuisance claims against the manufacturer and distributor of Paraquat, a herbicide that has been used for almost 60 years. *In re: Paraquat Prods. Liab. Litig.*, Case No. 3:21-md-3004-NJR, 2022 WL 451898 (S.D. Ill. Feb. 14, 2022). Plaintiffs claimed that the herbicide could cause Parkinson's disease, raising, among other claims, one for public nuisance. Plaintiffs attempted to argue that even though the herbicide was a legal product, the defendants advertised and promoted it despite knowing that it could cause disease. *See id.* at *10. In rejecting this claim, the court noted that it was "more like a products liability cause of action than an action to truly address a public nuisance." *Id.* No assertion was made of interference with a public right; instead the claim involved injuries to individuals. *Id.* Not only did the allegations simply mirror a failure-to-warn claim, but the plaintiffs sought damages, not abatement. *See id.* That Chevron, one of the defendants, had stopped distributing the product decades earlier provided a further basis to reject the claim against it, i.e., any nuisance created by Chevron would have ceased. Finally, because the defendants no longer had control of the product at the time the damage occurred underscored its conclusion. *See id.* at *11.

Ultimately, the court agreed with the Oklahoma Supreme Court in rejecting a theory that could create perpetual liability and that permitting public nuisance claims in these situations "would allow consumers to convert almost every products liability action into a [public] nuisance claim." *Id.* (quoting *Hunter*, 499 P.3d at 729-30). These courts sought to restrict public nuisance law to its more traditional ambit, recognizing that allowing it to subsume traditional products liability law would have a radical impact.

Despite these rulings, other courts have continued to allow plaintiffs to wield public nuisance law as a powerful cudgel. Perhaps the most notorious example of this is the federal opioid MDL in the Northern District of Ohio. There, MDL Judge Dan Polster has allowed public nuisance claims to stand against opioid manufacturers, wholesale distributors, and pharmacies. The potential for massive liability has led many defendants to enter into settlements totaling billions of dollars. In addition, a jury returned a verdict against a number of pharmacy defendants in late 2021, and the MDL court is about to handle the liability phase of that case with a possibility that the pharmacies will face massive exposure potentially totaling billions of dollars. Whether the Sixth Circuit will countenance this use of public nuisance law remains to be seen, but the recent decisions in Oklahoma and Illinois should give the defendants some grounds for hope.

