OKLAHOMA V. PURDUE PHARMA: PUBLIC NUISANCE IN YOUR MEDICINE CABINET

Justin Kaufman†

TABLE OF CONTENTS

† Associate Editor, *Cardozo Law Review*. J.D. Candidate (June 2021), Benjamin N. Cardozo School of Law; B.S., St. John's University, 2016. I would like to thank Professor Alexander A. Reinert for serving as my advisor. I am immensely grateful to the talented *Cardozo Law Review* staff, whose tireless editing made this Case Note possible. A heartfelt thank you to my mom, Susan, and the rest of my family for their unwavering love and support since day one. Prescription opioid abuse hits close to home for many. I hope that those affected find solace in this Oklahoma decision.

INTRODUCTION

Oklahoma v. Purdue Pharma (Opioid Case) marked the first time that a drug manufacturer was declared legally liable for the destruction wrought by prescription painkillers.[1] The landmark decision held Johnson & Johnson (J&J) accountable for causing the opioid epidemic in Oklahoma under a novel application of the public nuisance doctrine.[2] Judge Thad Balkman,[3] who delivered the bench trial decision, concluded that J&J's deceptive and misleading marketing of prescription opioids created a public nuisance that interfered with the rights of Oklahomans.[4] Though the plaintiffs had initially requested over $17 billion, Judge Balkman ordered J&J to pay $465 million—the estimated cost of one year of Oklahoma's Abatement Plan—to abate the public nuisance in

1 Sanya Mansoor, *Johnson & Johnson Was Ordered to Pay $572 Million for its Role in the Opioid Crisis. With Similar Lawsuits Across the Country, That Could Be Just the Beginning*, TIME (Aug. 27, 2019, 11:01 PM), https://time.com/5662827/johnson-opioid-crisis-lawsuits [https://perma.cc/9XKP-Z8PA].

2 Jan Hoffman, *Johnson & Johnson Ordered to Pay $572 Million in Landmark Opioid Trial*, N.Y. TIMES (Aug. 30, 2019), https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html [https://perma.cc/DRT8-342F].

3 Judge Thad Balkman has a unique story. Scenes from the classic movie *Ferris Bueller's Day Off* were filmed in his childhood home in Long Beach, California, where Balkman was class president of Long Beach Polytechnic High in 1989, with Snoop Dogg as his classmate. Regarding his qualifications, one Oklahoma commentator said he was glad when the case was given to Balkman, adding that, "[h]e's been so reasonable all of his life." Wayne Drash, *From Ferris Bueller to Opioid Trial: A Judge's Wild Ride into History*, CNN (Aug. 26, 2019, 11:21 PM), https://www.cnn.com/2019/08/26/health/oklahoma-opioid-judge-thad-balkman-profile/index.html [https://perma.cc/2PTL-96F7].

4 *See* State v. Purdue Pharma, LP, No. CJ-2017-816, 2019 WL 4019929, at *11–12 (Okla. Dist. Ct. Aug. 26, 2019).

Oklahoma, where around 6,000 people have died from opioid overdoses and countless more are struggling with opioid addiction to this day.[5]

This Case Note argues that the Oklahoma Court correctly applied its public nuisance statute in alignment with the Restatement (Second) of Torts (Second Restatement), and landed appropriately within the bounds of the doctrine by ruling that the deceptive marketing of prescription opioids by J&J constituted a public nuisance.[6] This Case Note will also examine concerns that the public nuisance doctrine is being stretched beyond its limits by the plaintiff bar, infringing on the territory of products liability, and that regulating prescription drugs is a complex policy issue best left to the legislative and executive branches. Additionally, many legal scholars—and certainly corporations—fear the rise of massive public nuisance suits, which have been increasing since the addition of public nuisance in the Second Restatement.[7] Despite these concerns, the Opioid Case reflects a shifting momentum in American jurisprudence, where mounting pressure on the judiciary is swinging the

---

5 *Id.* at *12, *20; Hoffman, *supra* note 2. Note that Judge Balkman originally ordered J&J to pay $572 Million, but later corrected that amount due to "miscalculation." *See* Sean Murphy & Ken Miller, *Oklahoma Judge Reduces J&J Order in Opioid Lawsuit by $107M*, ASSOCIATED PRESS (Nov. 15, 2019), https://apnews.com/f2ca0f4bb033450b8efe109312b4aa93 [https://perma.cc/L8K6-EJGN]. According to Merriam-Webster, to abate means "to put an end to" or "reduce in degree or intensity." *Abate*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abate [https://perma.cc/Z2R3-5NLL].

6 *Purdue Pharma*, 2019 WL 4019929, at *12; *see also* RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

7 For critical positions taken by legal scholars, see Richard O. Faulk, *Uncommon Law: Ruminations on Public Nuisance*, 18 MO. ENVTL. L. & POL'Y REV. 1, 3 (2010) (cautioning that the judiciary should defer to the political branches, rather than acting to fill regulatory voids, because courts lack the tools to reach principled results); Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1 (2011) (arguing that public nuisance is not a tort but a public action which must be grounded in statute, and that the courts should not have authority to declare what acts constitute a nuisance, but should only follow law specifically enacted by legislature); JOSHUA K. PAYNE & JESS R. NIX, INSTITUTE FOR LEGAL REFORM, WAKING THE LITIGATION MONSTER: THE MISUSE OF PUBLIC NUISANCE (2019), https://www.instituteforlegalreform.com/uploads/sites/1/The-Misuse-of-Public-Nuisance-Actions-2019-Research.pdf [https://perma.cc/E8PJ-K6MH] (providing a comprehensive overview of the case law which followed the Second Restatement and a critique of the expansion of the public nuisance doctrine).

needle toward expanding public nuisance doctrine in favor of governmental plaintiffs seeking abatement.[8]

Part I of this Case Note provides background on the opioid epidemic. Part II explores the history and development of the public nuisance doctrine, tracing it back to the twelfth century and into modern American law.[9] Part III summarizes the relevant facts of the Opioid Case. Part IV analyzes the Opioid Case against the backdrop of other decisions across various jurisdictions, and demonstrates that the court was correct in holding J&J liable for public nuisance. Part V examines and rebuts common arguments against expanding public nuisance and determines that public nuisance was a workable theory in the Opioid Case. These arguments include separation of powers concerns—that the political branches are better equipped to regulate major public policy matters like prescription drugs—as well as concerns that expanding public nuisance doctrine to apply to lawful consumer products will overtake the products liability doctrine. Part VI discusses the aftermath of the Opioid Case, including the enormous National Prescription Opiate Litigation,[10] which is pending against several major pharmaceutical companies. This Case Note concludes with thoughts on the Opioid Case and the potential impact it may have on the public nuisance doctrine.

I. THE OPIOID EPIDEMIC

The opioid epidemic does not discriminate based on gender, ethnicity, age, or economic status, nor does it affect only certain segments of the population.[11] Today, one in three Americans knows someone who has struggled with addiction to opioid drugs.[12] From 1999 to 2018, almost

---

8 *See generally* Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941 (2007).

9 RESTATEMENT (SECOND) OF TORTS § 821B; Faulk & Gray, *supra* note 8, at 951, 955.

10 Nat'l Prescription Opiate Litig., No. 1:17-MD-2804 (N.D. Ohio), https://www.ohnd.uscourts.gov/mdl-2804.

11 Celina B. Realuyo, *The New Opium War: A National Emergency*, 8 PRISM 132, 137 (2019).

12 *Nearly One in Three People Know Someone Addicted to Opioids; More than Half of Millennials believe it is Easy to Get Illegal Opioids*, AM. PSYCHIATRIC ASS'N (May 7, 2018), https://www.psychiatry.org/newsroom/news-releases/nearly-one-in-three-people-know-

450,000 people died as a result of opioid overdoses.[13] In fact, Americans are more likely to die from an opioid overdose than to perish in a car crash.[14] These alarming statistics paint only part of the picture, as they fail to account for the true suffering experienced by families, friends, communities, and the nation as a result of what has been coined the "opioid epidemic." The nationwide cost of this epidemic extends beyond fatalities. In 2015, the economic costs associated with opioid abuse were estimated at $504 billion.[15] The opioid epidemic has been declared a national Public Health Emergency, with billions of dollars being spent to combat addiction in American communities.[16] As America reflects on the devastation caused by this national crisis, it is natural to wonder who is to blame.

The first major wave of overdose deaths began in the 1990s, coinciding with the spike in prescription opioid sales.[17] Pharmaceutical companies worked tirelessly to minimize concerns over addiction and to reassure medical professionals across the country that such harms would not result from rising prescription rates.[18] Their efforts paid off; opioid prescription rates rose rapidly for years, peaking in 2012 at over 255 million prescriptions—equal to 81.3 prescriptions per 100 persons

someone-addicted-to-opioids-more-than-half-of-millennials-believe-it-is-easy-to-get-illegal-opioids [https://perma.cc/D8NS-R5EX].

13 *Opioid Overdose*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/epidemic/index.html [https://perma.cc/22Z2-U5PA].

14 *Preventable Deaths: Odds of Dying*, NAT'L SAFETY COUNCIL, https://injuryfacts.nsc.org/all-injuries/preventable-death-overview/odds-of-dying [https://perma.cc/VLQ6-AVSA]; *see also* Ian Stewart, *Report: Americans Are Now More Likely To Die Of An Opioid Overdose Than On The Road*, NPR (Jan. 14, 2019, 12:01 AM), https://www.npr.org/2019/01/14/684695273/report-americans-are-now-more-likely-to-die-of-an-opioid-overdose-than-on-the-ro [https://perma.cc/FB7G-U876].

15 COUNCIL OF ECON. ADVISERS, THE UNDERESTIMATED COST OF THE OPIOID CRISIS 2–3 (Nov. 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf [https://perma.cc/4YEG-FNZR] (estimated economic costs of the opioid epidemic focus on healthcare costs, foregone earnings, and criminal justice costs).

16 Realuyo, *supra* note 11, at 137.

17 *Opioid Overdose*, *supra* note 13.

18 *What is the U.S. Opioid Epidemic?*, U.S. DEP'T OF HEALTH & HUM. SERVICES, https://www.hhs.gov/opioids/about-the-epidemic/index.html (last updated Sept. 4, 2019) [https://perma.cc/RTS6-B6MN].

nationally.[19] In some states and counties, there were more opioid prescriptions than there were people, which allowed these dangerous drugs to flow from patients' medicine cabinets into the hands of friends and family, or onto the black market.[20] Today, thousands of suits have been filed by states and local municipalities that were shattered by pharmaceutical companies and then left to pick up the pieces, while corporations largely evaded responsibility.[21] The Opioid Case discussed herein represents an unprecedented step in the fight to abate the nationwide opioid epidemic.

II. HISTORY OF THE PUBLIC NUISANCE DOCTRINE

In order to understand the legal theory utilized in the Opioid Case, some background on the public nuisance doctrine is needed. The public nuisance doctrine traces its roots to English common law, dating back to around the twelfth century.[22] The term nuisance was amorphous and difficult to define even in its origins.[23] Nuisance began as a crime against invasions of the rights of the Crown.[24] It was soon expanded to encompass encroachments upon the rights of the public in actions brought by the Crown on behalf of the people.[25] This included interferences with public health, such as noxious emissions from a nearby tannery, as well as conduct that inconvenienced the public and offended morals, like a rowdy brawl in a village market.[26] The definition and use of nuisance continued to stretch, embracing any unlawful acts or omissions

19 Opioid Overdose, *supra* note 13.

20 German Lopez, *The Thousands of Lawsuits Against Opioid Companies, Explained*, VOX (Oct. 17, 2019, 6:10 PM), https://www.vox.com/policy-and-politics/2017/6/7/15724054/opioid-epidemic-lawsuits-purdue-oxycontin [https://perma.cc/22ZU-VPJ8].

21 *Id.*

22 Fidelma Fitzpatrick, *Painting over Long-Standing Precedent: How the Rhode Island Supreme Court Misapplied Public Nuisance Law in* State v. Lead Industries Association, 15 ROGER WILLIAMS U. L. REV. 437, 442 (2010).

23 In its common law origin, "nuisance" vaguely meant an act that caused harm or inconvenience. RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (AM. LAW INST. 1979).

24 *Id.*

25 *Id.*

26 *Id.* cmt. b.

of duties that tended to obstruct or inconvenience the exercise of public rights.[27] The power to bring nuisance actions belonged exclusively to the English Crown as a criminal charge until the sixteenth century, when it was first held that private individuals who suffered particularized harm could sue in tort and recover damages for invasions of a public right.[28] The inclusion of a private right to sue for encroachments upon a public right was a pivotal moment in nuisance law, steering the doctrine toward what it is today.

The public nuisance doctrine was adopted in the United States as a part of the English common law.[29] American public nuisance doctrine broadly embraced interferences with the rights of the general public—including interests such as public health, safety, morals, and convenience in travel.[30] But early American public nuisance law generally targeted interferences so unreasonable that they constituted criminal offenses.[31] Around the twentieth century, state legislatures began to circumscribe specific acts that would constitute a public nuisance per se through statutes.[32] Today, states and local municipalities have enacted public nuisance statutes that broadly protect citizens and specify particular conduct deemed to constitute a nuisance.[33] The tort of nuisance is a preferable means to end quasi-criminal conduct by requiring offenders to abate the nuisance, thereby putting a halt to the conduct at issue, rather than implementing fines or criminal punishments.[34]

---

27 *Id.* cmt. a.

28 *Id.*

29 Richard C. Dale noted that "our whole [legal] system is predicated upon a body of laws not found in any books published on this side of the Atlantic; and a consideration of our colonial history points to the quarter in which this basis of our laws is to be found." Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 553 (1882).

30 RESTATEMENT (SECOND) OF TORTS § 821B cmt. b.

31 *Id.*

32 Echoing the words of Richard C. Dale, "[b]ut though the common law has been incorporated into the general system of our laws, it is within the power of the legislature to alter or amend it . . . ." Dale, *supra* note 29, at 572.

33 *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. c.

34 *See* Victor E. Schwartz, Phil Goldberg, & Corey Schaecher, *Game Over? Why Recent State Supreme Court Decisions Should End the Expansion of Public Nuisance Law*, 62 OKLA. L. REV. 629, 633 (2010).

The public nuisance doctrine significantly transformed with the publication of the Second Restatement in 1979.[35] Environmental lawyers called for reforms and expansions of the application of public nuisance to combat pollution in courts, fearing that administrative agencies were ineffective.[36] The Restatement drafters and environmentalists reached compromise in describing public nuisance broadly as an interference with a right of the general public.[37] The reformers accomplished their goal and courts began to entertain public nuisance claims in unprecedented contexts.[38] Some scholars argue that the broadened characterization of public nuisance has allowed courts to create their own definitions of public rights and unreasonableness, which has shrouded the doctrine in more confusion than clarity.[39]

Despite concerns about the state of the doctrine after the Second Restatement, many public nuisance suits have been brought with varying degrees of success. A notable starting point in examining modern public nuisance case law is the California environmental pollution litigation, *Diamond v. General Motors Corp*.[40] This suit targeted various companies for air pollution in Los Angeles.[41] In affirming the trial court's dismissal of the suit, the California Court of Appeal held that regulating emissions is a task reserved for the political branches.[42] Accordingly, the court held that public nuisance doctrine should not be used to judicially regulate businesses.[43] In contrast, New York courts found chemical manufacturers liable for dumping waste that seeped into the water supply years later, holding that defendants' conduct at the time they dumped waste

35 *See* Faulk & Gray, *supra* note 8, at 955; *see also* RESTATEMENT (SECOND) OF TORTS § 821B.

36 Faulk & Gray, *supra* note 8, at 955.

37 *Id.* Despite the expansions, comment e of the Restatement warned that courts would be acting beyond a recognized standard if a defendant's conduct did not fall within one of the traditional categories of the common law public nuisance. RESTATEMENT (SECOND) OF TORTS § 821B cmt. e.

38 Faulk & Gray, *supra* note 8, at 956.

39 *E.g.*, *id.* at 956.

40 *See generally* Diamond v. General Motors Corp., 97 Cal. Rptr. 639 (Cal. Ct. App. 1971).

41 *Id.* at 641.

42 *Id.* at 646.

43 *Id.* at 645–46.

eventually caused the nuisance.[44] Public nuisance suits also targeted asbestos manufacturers, but were overwhelmingly unsuccessful due to issues of causation.[45] In one asbestos nuisance claim, the Eighth Circuit concluded that liability for damage caused by a nuisance turns on whether the defendant has control over the nuisance-causing conduct or instrumentality.[46] Some courts fear that extending public nuisance doctrine to manufacturers who no longer have control over the alleged nuisance-causing product would create a limitless tort which would hold defendants liable far beyond their degree of culpability.[47] Plaintiffs then took aim at gun manufacturers, arguing that their conduct in designing, distributing, and marketing firearms caused higher rates of gun-related crime and illegal firearm sales.[48] The vast majority of these cases failed due to intervening acts of third parties between lawful sales and criminal conduct, lack of control over the nuisance, and fear that holding manufacturers of lawful products liable for public nuisance would have unforeseen consequences on tort law.[49]

Despite resistance by many courts, some plaintiffs have achieved enormous victories through public nuisance law. For instance, the California Court of Appeal upheld a $1.15 billion abatement judgment against lead paint manufacturers.[50] The court held that the defendants

---

44 *See* State v. Schenectady Chemicals, Inc., 459 N.Y.S.2d 971, 977 (N.Y. Sup. Ct. 1983) (finding in favor of plaintiffs, despite acknowledging the California court's reasoning that these policy decisions are best left to elected officials), *aff'd as modified*, 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984); *see also* United States v. Hooker Chems. & Plastics Corp., 722 F. Supp. 960 (W.D.N.Y. 1989) (finding defendants liable for polluting public water under a nuisance theory).

45 *See generally* City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986); Cnty. of Johnson v. U.S. Gypsum Co., 580 F. Supp. 284, 294 (E.D. Tenn. 1984); Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513, 520–22 (Mich. Ct. App. 1992).

46 Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915, 920 (8th Cir. 1993).

47 *Id.* at 921. The court explained that holding defendants liable would cause "[n]uisance [to] become a monster that would devour in one gulp the entire law of tort . . . ." *See also* Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 540 (3d Cir. 2001) (quoting *Tioga*, 984 F.2d at 921); *In re* Lead Paint Litig., 924 A.2d 484, 505 (N.J. 2007).

48 *See generally* City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004); *see also In re* Firearm Cases, 24 Cal. Rptr. 3d 659 (Cal. Ct. App. 2005).

49 For more information on the reasoning in the gun cases and federal legislation enacted to halt them, see Faulk & Gray, *supra* note 8, at 958–59.

50 *See generally* People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017).

created a public nuisance by intentionally concealing the dangers of lead paint and promoting hazardous uses, despite having actual knowledge of the risks posed to humans.[51] The court distinguished this suit from a products liability suit because it arose from affirmative conduct, rather than simply a defective or unreasonably dangerous product.[52] The affirmative conduct was promoting lead paint for interior use despite actual knowledge of its dangers.[53] The court found causation because the defendants knowingly promoted hazardous uses, which satisfied California's substantial factor requirement in bringing about the resulting harm.[54]

Tort law scholar William Prosser once argued that nuisance is the most impenetrable jungle in all of law; it is nearly impossible to define and has been applied indiscriminately to conduct ranging from disturbing advertisements to cockroaches baked in a pie.[55] The Second Restatement attempted to cement a workable definition of public nuisance as an "unreasonable interference with a right common to the general public."[56] Still, Prosser's words ring true to this day, as incongruity surrounding the meaning and application of nuisance law prevails throughout the American judicial system. Although many courts have refused to expand public nuisance law, the massive success of some cases at trial as well as record-breaking settlements embolden governmental plaintiffs to continue bringing novel suits against companies across the United States.[57]

---

51 *Id.*

52 *Id.* at 594.

53 *Id.*

54 *Id.* at 543–47.

55 WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 571 (4th ed. 1971).

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

57 The tobacco industry ended the public nuisance claims brought against them in the 1990s with an unprecedented settlement. *See* Faulk & Gray, *supra* note 8, at 958; *see also 15 Years Later, Where Did All the Cigarette Money Go?*, NPR (Oct. 13, 2013, 5:52 PM), https://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go [https://perma.cc/ZW2E-KHG5] (describing how the record breaking twenty-five-year, $246 billion tobacco settlement money has been distributed).

III. FACTS AND PROCEDURAL HISTORY

A. *Facts*

The findings of fact presented in this Case Note are drawn directly from the opinion and represent a summary of the court's findings in light of competing evidence presented at trial.[58]

Defendant J&J marketed and sold opioid drugs in the state of Oklahoma from the 1990s through at least 2016.[59] J&J strategically formed a "pain management franchise" consisting of two subsidiaries.[60] The first, Tasmanian Alkaloids Limited, cultivated poppy plants in Tasmania and processed them into narcotic raw materials.[61] The raw materials were then imported to the United States and further processed into active pharmaceutical ingredients (APIs) by the second subsidiary, Noramco, Inc. (Noramco).[62] J&J tactically positioned itself as a key player in the opioid industry by providing direct access to raw narcotic materials and APIs to the major pharmaceutical companies within the United States.[63] Anticipating growing demand for APIs, J&J developed a mutant poppy called the Norman Poppy.[64] The Norman Poppy contained higher concentrations of thebaine, an opium alkaloid used in the synthesis of pharmaceutical drugs.[65] Simultaneously, Purdue Pharma created

---

58 For a complete reading of the facts, please refer to the case. State v. Purdue Pharma, LP, No. CJ-2017-816, 2019 WL 4019929, at *2–10 (Okla. Dist. Ct. Aug. 26, 2019).

59 *Id.* at *2.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.* at *3.

64 *Id.* For a discussion of the "mutant poppies," see Julia Lurie, *Inside Johnson and Johnson's Quiet Domination of the Opioid Market*, MOTHER JONES (June 11, 2019), https://www.motherjones.com/politics/2019/06/johnson-and-johnson-opioid-poppies-tasmania-oklahoma-lawsuit [https://perma.cc/ML2Q-SYJR].

65 *See* Peter Andrey Smith, *How an Island in the Antipodes Became the World's Leading Supplier of Licit Opioids*, PAC. STANDARD (July 11, 2019), https://psmag.com/ideas/opioids-limiting-the-legal-supply-wont-stop-the-overdose-crisis [https://perma.cc/B2FG-JVPZ]; *see also The Opium Alkaloids*, UNITED NATIONS OFFICE ON DRUGS & CRIME, (Jan. 1, 1953) https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1953-01-01_3_page005.html [https://perma.cc/6PJE-URE3].

OxyContin, which utilized the Norman Poppy as its painkilling agent.[66] J&J, through Noramco, entered long-term contracts with all of the top generic drug companies in the United States.[67] By 2015, the J&J pain franchise had become the leading supplier of narcotics APIs.[68]

In an effort to raise prescription rates, and in turn, increase profits, J&J developed a major marketing campaign throughout Oklahoma and the United States, aggressively disseminating the message that chronic pain was undertreated and that prescription opioid drugs carried a low risk of abuse.[69] J&J broadcasted this message to Oklahoma doctors through J&J's sales representatives, as well as by funding publications in medical journals, organizing educational programs, and sending speakers to events armed with a message that prescription opioids were a safe solution to treat chronic pain.[70] J&J's marketing to Oklahoma doctors included hosting dinners, presentations, and seminars intended to influence doctors to prescribe higher rates of opioid drugs.[71] J&J elaborately manufactured a problem—undertreatment of chronic pain—and relentlessly asserted that prescribing opioid drugs was the solution.[72] J&J manipulated Oklahoma doctors through emotional messages about chronic pain and blatant misinformation.[73] J&J invented the phrase

---

66 *Purdue Pharma*, 2019 WL 4019929, at *3; Katie Thomas & Tiffany Hsu, *Johnson & Johnson's Brand Falters Over Its Role in the Opioid Crisis*, N.Y. TIMES (Aug. 27, 2019), https://www.nytimes.com/2019/08/27/health/johnson-and-johnson-opioids-oklahoma.html [https://perma.cc/BA8X-RC8L]. OxyContin is known for being one of the major causes of the opioid epidemic. *See* Katie Mettler, *OxyContin: How Misleading Marketing Got America Addicted*, WASH. POST (Feb. 21, 2018), https://www.washingtonpost.com/graphics/2018/national/amp-stories/oxycontin-how-misleading-marketing-got-america-addicted [https://perma.cc/94L5-FC8Y]. Purdue Pharma deployed evangelistic marketing tactics, which included cash prizes for high performing sales representatives and product giveaways for doctors, which was entirely unprecedented for a Schedule II opioid drug. *Id.* Despite FDA warnings as well as criminal and civil sanctions for its deceptive marketing campaign, the effort paid off for Purdue Pharma, bringing in billions of dollars in profits at the expense of American communities. *Id.*

67 *Purdue Pharma*, 2019 WL 4019929, at *4.

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.* at *5.

73 *Id.*

"psuedoaddiction" to convince doctors that patients who exhibited telltale signs of dependence were not actually suffering from addiction but from undertreated pain; the solution was to prescribe more opioids.[74] J&J used websites and brochures to disseminate their "prescribe more" message, downplay the many risks associated with opioids, and to promote opioids generally as a class of drug.[75] J&J lobbied various government agencies in an attempt to minimize concerns about the enormous abuse potential of painkillers.[76] J&J trained its sales representatives to insist that opioids prescribed by physicians carried only an addiction risk of 2.6% or lower.[77] Sales representatives targeted "high-opioid prescribing physicians," such as pain specialists and primary care physicians, whom they labeled as their key customers.[78] J&J widely distributed data from studies that the FDA later labelled false and misleading, and delivered free trial coupons and samples of opioid drugs to physicians.[79] J&J funded various influential pain advocacy groups, who portrayed pain as undertreated and suggested that the fear surrounding addiction was merely an impediment to prescribing more opioids.[80]

The facts further demonstrate that J&J actually knew that its marketing was false, deceptive, and misleading in many ways.[81] As early as 1998, the FDA labelled marketing messages for J&J's drug Duragesic to be false and misleading.[82] In 2001, J&J's own hired scientists declared primary marketing messages claiming low abuse potential to be misleading and advised J&J not to publicize them.[83] The scientists told J&J that Duragesic was dangerous and that increased sales would cause a surge in abuse and addiction.[84] In 2004, the FDA again contacted J&J about its false and misleading messages regarding the abuse potential of

74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.* at *6.
78 *Id.*
79 *Id.*
80 *Id.* at *7.
81 *Id.* at *8.
82 *Id.*
83 *Id.*
84 *Id.*

Duragesic.[85] Many promotional materials distributed by J&J throughout Oklahoma contained the false and misleading messages that the FDA and J&J's scientists labelled deceptive.[86] J&J intentionally targeted physicians with high prescription rates in Oklahoma, including doctors who later faced disciplinary actions for their prescribing practices.[87] Various doctors testified that J&J's misleading marketing influenced their prescribing practices and caused them to "liberally and aggressively write opioid prescriptions they would never write today."[88]

The rise of opioid addiction and overdose deaths in Oklahoma ran parallel to the increase in opioid sales within the state.[89] One witness, Dr. Beaman, testified that he believed the upsurge in opioid abuse was directly caused by overprescribing and increased opioid sales that occurred since the late 1990s.[90] Commissioner White of the Oklahoma Department of Mental Health and Substance Abuse similarly testified that the rapid escalation of opioid sales "caused the 'significant rise in opioid overdose deaths' and 'negative consequences' associated with opioid use," including addiction and increased welfare payouts.[91] The President's Commission on Combating Drug Addiction and the Opioid Crisis listed various contributing factors to the opioid epidemic, all of which can be attributed to J&J's conduct in Oklahoma.[92] The evidence established that Oklahoma doctors were misled by J&J's false and deceptive marketing of opioid drugs, which led to overprescribing and caused severe harm to Oklahoma.[93]

---

85 The FDA found that certain advertisements misbranded Duragesic as having a low abuse risk, and that those ads had potential to encourage unsafe use of the drug. *Id.* at *9.

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* at *10.

92 *Id.*

93 *See id.*

B. *Procedural History*

On June 30, 2017, the State of Oklahoma commenced the Opioid Case against various pharmaceutical companies.[94] Prior to trial, Oklahoma reached settlement agreements with Purdue Pharma and Teva Pharmaceuticals for around $350 million, collectively.[95] J&J refused to settle and was the only defendant to proceed to trial.[96] The non-jury trial took place from May 28, 2019 to July 15, 2019.[97] Judge Balkman's decision, in favor of Oklahoma, was delivered on August 26, 2019.[98] J&J is appealing the decision.[99]

1. Holding and Abatement

The Oklahoma Court held that J&J created a public nuisance under Oklahoma's nuisance statute, title 50, section 2 of Oklahoma Statutes, by knowingly propagating false and misleading messages and pervasively marketing opioid drugs, and that such affirmative acts annoyed, injured, or endangered the comfort, health, and safety of Oklahomans by causing rampant addiction, overdose deaths, and cases of neonatal abstinence syndrome.[100] J&J's conduct caused harm which affected entire communities and neighborhoods in Oklahoma, although the extent of the harm inflicted upon individual Oklahomans may have been unequal.[101] The court found that the proper remedy for public nuisance is abatement and that this public nuisance is capable of being abated.[102]

---

94 *Id.* at *1.

95 Mansoor, *supra* note 1.

96 *Id.*

97 *Purdue Pharma*, 2019 WL 4019929, at *1.

98 *Id.*

99 Mansoor, *supra* note 1.

100 *Purdue Pharma*, 2019 WL 4019929, at *12. Oklahoma defines a nuisance in part as "unlawfully doing an act, or omitting to perform a duty, which . . . [a]nnoys, injures or endangers the comfort, repose, health, or safety of others . . . ." OKLA. STAT. tit. 50, § 1 (2019).

101 *Purdue Pharma*, 2019 WL 4019929, at *14.

102 *Id.* at *15.

Upon finding J&J liable for public nuisance, Judge Balkman ordered J&J to pay the cost of one year of Oklahoma's Abatement Plan.[103] The Abatement Plan was primarily designed by Commissioner White of the Oklahoma Department of Mental Health and Substance Abuse Services.[104] The Abatement Plan provides care for opioid addiction, including preventative services, counseling, and recovery assistance.[105] Oklahoma will establish opioid use treatment programs to serve residents, as well as offer medical assessments, housing and employment assistance, and additional personnel and services for juveniles struggling with or affected by opioid abuse.[106] The plan also includes public medication disposal programs, non-opioid pain management therapies, expanded access to overdose education and preventative medications, and prenatal screening and treatment for infants suffering from opioid withdrawal.[107] Commissioner White testified that these evidence-based programs will save the lives of countless Oklahomans and abate the catastrophic damage this nuisance has brought to the State of Oklahoma.[108]

IV. ANALYSIS

The court correctly found under Oklahoma law and the Second Restatement that J&J's deceptive and misleading marketing of opioid drugs created a public nuisance that interfered with the health and safety of a considerable number of Oklahomans.[109] Despite defendant's argument that Oklahoma nuisance law is traditionally grounded in property rights, the court found that the text of the statute did not limit

---

103 *Id.* at *20.

104 *Id.* at *15.

105 *Id.*

106 *Id.* at *15–16.

107 *Id.* at *16–18.

108 *Id.* at *15.

109 In Oklahoma, "[a] nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: . . . [a]nnoys, injures or endangers the comfort, repose, health, or safety of others; or . . . [o]ffends decency; or . . . [u]nlawfully interferes with, obstructs or tends to obstruct . . . [various public land]; or . . . [i]n any way renders other persons insecure in life, or in the use of property." OKLA. STAT. tit. 50, § 1 (2019).

public nuisances solely to those affecting property.[110] Further, the court applied century-old precedent to demonstrate that public nuisance actions in Oklahoma have long occurred without a connection to property rights.[111] To constitute a public nuisance under Oklahoma law, the alleged conduct must affect an entire community or neighborhood, or a considerable number of people.[112] This analysis of the Opioid Case and related case law will demonstrate that J&J's conduct interfered with the rights of the people of Oklahoma and constituted a public nuisance.

A. *Interference with a Public Right*

An essential step and common obstacle in stating a public nuisance claim is identifying a public right.[113] Many high-profile public nuisance suits, challenging manufacturers of goods ranging from lead paint to handguns, have failed because the plaintiffs could not identify a cognizable public right that had been interfered with.[114] Despite the obstacle some plaintiffs face in identifying a public right, the Second Restatement clearly defers to state nuisance statutes, noting that no

---

110 *Purdue Pharma*, 2019 WL 4019929, at *11. A plain reading of the statute's text demonstrates that any unlawful act or the omission of a duty could potentially create a nuisance regardless of a link to property. Tit. 50, § 1.

111 *Purdue Pharma*, 2019 WL 4019929, at *11; *see also* Reaves v. Territory, 74 P. 951, 954 (Okla. 1903) (finding a public nuisance where no damage to property rights were claimed, but only injury to "good morals and public decency").

112 Tit. 50, § 2. The Second Restatement describes a public nuisance as an interference with a right common to the general public and provides examples. *See* RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

113 *See* City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1113–14 (Ill. 2004) (citing RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (noting that public rights "include the rights of public health, public safety, public peace, public comfort, and public convenience"). This requirement is clear in the Second Restatement definition of public nuisance as "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821(B)(1).

114 *See, e.g.*, *Beretta*, 821 N.E.2d at 1116 (finding that the right to be free from handguns is akin to a private "right not to be assaulted"); State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 453 (R.I. 2008) (finding that the right to be free from harms of unabated lead paint fell short of traditional notions of public rights, which relate to shared resources). *But see* People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 551–52 (Cal. Ct. App. 2017) (finding that a public right existed to be free from lead paint in homes because homes allow access to public resources).

traditional conception of public right is necessary where a state's statute defines public nuisance to include interferences with considerable numbers of people.[115] In Oklahoma, an interference with a public right is one that affects an entire community or neighborhood, or any considerable number of people, regardless of whether the damage is equal from person to person.[116] Thus, on a textual basis, the Opioid Case plaintiffs avoided one of the most troublesome roadblocks in public nuisance litigation. The Oklahoma court found that the nuisance affected the entire state because there were enough opioid prescriptions dispensed in Oklahoma for every adult to have 110 pills, while more than one overdose per day occurred on average from 2011 to 2015.[117] The court reasoned that addiction, overdose deaths, and related medical issues were harms that the legislature intended to capture.[118] Presumably, the legislature drafted the statute broadly in order to protect Oklahomans from public harms such as those brought about by J&J.[119]

B. *Conduct Creating a Public Nuisance*

The Oklahoma Court correctly found that J&J's false and deceptive marketing practices—which were designed to convince Oklahoma doctors, patients, and citizens that opioids were safe—constituted an act capable of sustaining liability under Oklahoma's nuisance statute.[120] Similarly, in *People v. ConAgra Grocery Products Co.,* a public nuisance case against lead paint manufacturers, the California Court of Appeal affirmed the trial court's finding that defendants' promotion of lead paint for interior use, despite actual knowledge of the dangers it posed to children, was an act that created a public nuisance.[121] The facts

---

115 RESTATEMENT (SECOND) OF TORTS § 821B cmt. g.

116 Tit. 50, § 2 (2019).

117 *See* State v. Purdue Pharma, LP, No. CJ-2017-816, 2019 WL 4019929, at *1 (Okla. Dist. Ct. Aug. 26, 2019).

118 *Id.* at *12. The court further found that the public nuisance continues to affect large portions of Oklahoma, if not the entire state. *Id.* at *14.

119 *See generally* tit. 50, § 2.

120 *See Purdue Pharma*, 2019 WL 4019929, at *12.

121 *See generally* People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017). This can be distinguished from a products liability action, where liability is premised on

demonstrated that from the 1930s until at least 1950, defendants actively promoted lead paint for interior use.[122] In many ways, the affirmative promotion of lead paint for interior use, despite actual knowledge of its dangers, is analogous to deceptively promoting prescription opioids while knowingly downplaying the risk of addiction.[123] In both circumstances, the deceptive marketing conduct by manufacturers created a public nuisance by encouraging hazardous use of a product to the public at large while downplaying or ignoring the known risks.[124]

Some anti-expansion commentators have argued that lawful products can never create a public nuisance because they are generally purchased and consumed by individuals.[125] Critics of the holding in the Opioid Case might postulate that prescription opioids are lawful products used by private individuals and could not violate a public right.[126] However, it is not the product alone but rather the deceitful conduct in marketing the product that created the interference.[127] Despite having

manufacturing or distributing the product, or failing to warn of its dangers. *Id. at* 534–35 (citing Cty. of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 309–10 (Cal. Ct. App. 2006)).

122 Defendants promoted interior lead paint use despite having actual knowledge of the dangers it posed to children through attending conferences and speeches, and being on notice of available studies dating back to the nineteenth century. *Id.* at 529, 534–43. One defendant even distributed a "paint book" for children, depicting children stirring and painting with cans labelled lead paint, then playing in their playrooms newly coated in lead paint. *Id.* at 541. Each page contained instructions to give their parents a coupon inside the booklet. *Id.* The paint book even contained "paper chips of paint" for children to use to color in pictures. *Id.* Ironically, ingesting sweet tasting lead paint chips would become a common source of lead poisoning for California children. *Id.* at 515.

123 *Compare Purdue Pharma*, 2019 WL 4019929, at *4–10 (finding that J&J created a public nuisance by knowingly decimating the hazardous message that opioids carried a low risk of addiction, and that prescribing more opioids was the solution to undertreated chronic pain), *with ConAgra*, 227 Cal. Rptr. 3d at 558–59 (affirming that defendants knowingly engaged in hazardous conduct by promoting lead paint for interior use to millions of people, which created a public nuisance and placed children in imminent risk of harm).

124 *See* cases cited *supra* note 123.

125 *See* Faulk & Gray, *supra* note 8, at 963–64.

126 *See* City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1113–17 (Ill. 2004); State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 453–56 (R.I. 2008).

127 *See Purdue Pharma*, 2019 WL 4019929, at *12; *see also* ConAgra, 227 Cal. Rptr. 3d at 552 (holding that a public right existed to access safe housing). Other courts have agreed that conduct linked to lawful products, like dumping toxic waste, can violate a public right and create a public nuisance. *See, e.g.*, United States v. Hooker Chems. & Plastics Corp., 722 F. Supp. 960 (W.D.N.Y. 1989).

knowledge of the true risks of abuse, J&J's conduct created a climate where addiction rates could grow exponentially.[128] J&J's deceptive conduct, linked to the marketing of a lawful product, was sufficient to create a public nuisance.[129]

C. *Causing the Nuisance*

After demonstrating an interference with a public right and conduct capable of creating a nuisance, causation between the conduct and the interference must be established.[130] Proving causation is a requirement in public nuisance suits, consistent with the law of torts generally.[131] Judge Balkman concluded that J&J's false, misleading, and deceptive marketing campaigns caused massive increases in opioid addiction, overdose deaths, and neonatal abstinence syndrome in Oklahoma.[132] J&J manipulated Oklahoma doctors by using predatory selling tactics and misinformation about the addictive potential of the drugs, which caused them to be prescribed at rates unthinkable today.[133] This analysis will explore causation in the context of public nuisance and demonstrate why Judge Balkman's decision was justified on the merits.

1. The Nuisance Is Out of Control

In many public nuisance cases, the issue of control over the nuisance-causing product or instrumentality is crucial to the causation

---

128 *Purdue Pharma*, 2019 WL 4019929, at *12.

129 *Id.*

130 *See ConAgra*, 227 Cal. Rptr. 3d at 543 (citations omitted); *see also* Steven Sarno, *In Search of a Cause: Addressing the Confusion in Proving Causation of a Public Nuisance*, 26 PACE ENVTL. L. REV. 225 (2009).

131 State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 450–51 (R.I. 2008). For examples of causation analysis in public nuisance claims, see, for example, City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1127–28 (Ill. 2004); People *ex rel.* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 202 (N.Y. App. Div. 2003).

132 *Purdue Pharma*, 2019 WL 4019929, at *12.

133 *Id.* at *5, *9.

analysis.[134] Imagine a case where a landowner installs a problematic barbed wire fence, then sells his property to another. If that fence is held to constitute a nuisance years after the sale, it cannot be said that the prior owner was in control of the nuisance at the time the harm occurred.[135] The Rhode Island Supreme Court held that lead paint manufacturers who distributed a lawful product at the time of sale could not have caused a nuisance many years later, because they did not control the lead paint in the homes when injuries occurred.[136] The court explained that, although the harm would not have occurred but for the defendants' distribution of lead paint, the defendants could not be held liable for furnishing a condition that later resulted in harm due to lack of maintenance by homeowners.[137] Conversely, some commentators and courts have argued that control is not an essential element of all public nuisance claims.[138] For example, an Illinois court reasoned that, although control is a factor in the causation analysis, lack of control does not preclude liability in nuisances not linked to property.[139] In the Opioid Case, manufacturers of opioids were not in control of the actions taken by prescribing doctors nor the use habits of patients. However, their marketing intentionally encouraged lax attitudes, targeted pain specialists whom they knew would be receptive, and minimized concerns of addiction and abuse

134 *See generally* Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915 (8th Cir. 1993); *In re* Lead Paint Litig., 924 A.2d 484 (N.J. 2007); *Lead Indus. Ass'n*, 951 A.2d 428.

135 *Beretta*, 821 N.E.2d at 1130 (citing Maisenbach v. Buckner, 272 N.E.2d 851, 854 (Ill. 1971)).

136 *Lead Indus. Ass'n*, 951 A.2d at 453–55.

137 *Id.* In Rhode Island, landlords and property owners, who are in control of the lead pigment when it becomes hazardous, are responsible for maintaining their properties and ensuring that they are "lead-safe." *Id.* at 457. Control of the nuisance also becomes important when considering abatement. If the defendant no longer has control over the product or instrumentality that is alleged to cause the nuisance, they may no longer have the opportunity to abate it, especially when an injunction is sought. *Id.* at 449.

138 *E.g.*, Fitzpatrick, *supra* note 22, at 463 (arguing that requiring current control over a nuisance is at odds with the Restatement and long-standing precedent); Peter Tipps, *Controlling the Lead Paint Debate: Why Control Is Not an Element of Public Nuisance,* 50 B.C. L. REV. 605, 607 (2009) (arguing that imposing a control element is unfaithful to the Restatement definition of public nuisance).

139 *Beretta*, 821 N.E.2d at 1132. The Illinois court noted that where nuisance results from misuse of an object or conduct separate from land, public nuisance will not be precluded by lack of control. *Id.*; *see also* People v. Brockman, 574 N.E.2d 626, 635 (Ill. 1991) (concluding that lack of control is not dispositive).

potential.[140] Thus, their marketing campaigns were a substantial cause of the nuisance.[141] In New York, courts found chemical manufacturers liable in cases where toxic waste was dumped and caused a public health crisis many years later.[142] One New York judge explained that selling the land where the dumping occurred did not shift liability onto the buyer.[143] Similarly, J&J is not immune from liability simply because the pills are not in its control at the time of the harm.

2. Foreseeability

Foreseeability, whether a reasonable person could have anticipated the resulting harm, is essential to the causation analysis in Oklahoma and in many jurisdictions across the United States.[144] The facts of the Opioid Case demonstrate that J&J knew that it was downplaying the risks of addiction and making false claims to the medical community and the public at large.[145] Because it knowingly disseminated false information about opioid drugs, one can conclude that the epidemic of addiction and overdose in Oklahoma was a reasonably foreseeable result.[146] In marketing opioid drugs deceptively, J&J willfully ignored its own scientists as well as FDA warnings.[147] In fact, evidence established that its objective was to drastically increase the use and availability of these

---

140 Oklahoma v. Purdue Pharma, LP, No. CJ-2017-816, 2019 WL 4019929, at *4–10 (Okla. Dist. Ct. Aug. 26, 2019).

141 Sarno, *supra* note 130, at 253 (arguing that causation, in part, must be proven by demonstrating that the defendant-manufacturer engaged in activities that were a substantial cause of the nuisance).

142 United States v. Hooker Chems. & Plastics Corp., 722 F. Supp 960 (W.D.N.Y. 1989) (finding that a chemical manufacturer's dangerous conduct of dumping chemicals was enough to sustain liability for a nuisance that occurred many years later, regardless of who controlled the waste or land at the time of the harm); *see also* New York v. Schenectady Chems., Inc., 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984) (holding that defendant's waste dumping caused a nuisance fifteen to thirty years later).

143 *Hooker Chems.*, 722 F. Supp. at 970.

144 *See* Atherton v. Devine, 602 P.2d 634, 636 (Okla. 1979); *see also* 1 J.D. Lee & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 5:7 (2d ed. 2016).

145 *See Purdue Pharma*, 2019 WL 4019929, at *4.

146 *See id.* at *8–9.

147 *Id.* at *8.

dangerous drugs.[148] Doctors testified regarding the link between higher prescribing rates and misuse.[149] In *ConAgra*, the defendants knew through conferences and studies that the interior use of lead paint was harmful to children.[150] Consequently, it was foreseeable that promoting interior use would cause such harms. Foreseeability is a factual inquiry, and the facts of the Opioid Case prove that the nuisance was a reasonably foreseeable result of J&J's conduct.[151]

3. Intervening Cause

In the Opioid Case, Judge Balkman found that there were no intervening causes that superseded J&J's conduct.[152] Under Oklahoma precedent, in order for an intervening cause to rise to the level of a supervening cause, it must be adequate to cause the harm on its own and must not have been reasonably foreseeable to the original actor.[153] One might suggest that the acts of prescribing doctors were an intervening cause that superseded J&J's marketing. Beyond the heavy regulation that prescription drug manufacturers face, licensed medical professionals and pharmacies sit between the manufacturer and consumer, ultimately making decisions on dosage and monitoring the patients' use.[154]

---

148 *Id.* at *4–9.

149 *See id.* at *9.

150 People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 530 (Cal. Ct. App. 2017).

151 *See Purdue Pharma*, 2019 WL 4019929, at *8–9; *see also* Atherton v. Devine, 602 P.2d 634, 637 (Okla. 1979) (stating that causation is traditionally a matter of fact, not law).

152 *Purdue Pharma*, 2019 WL 4019929, at *14. For a statement on the intervening cause rule established by the Oklahoma Supreme Court and relied on by Judge Balkmann, see Graham v. Keuchel, 847 P.2d 342, 348 (Okla.1993) ("To rise to the magnitude of a supervening cause, which will insulate the original actor from liability, the new cause must be (1) independent of the original act, (2) adequate of itself to bring about the result and (3) one whose occurrence was not reasonably foreseeable to the original actor." (emphasis and citations omitted)).

153 *See Graham*, 847 P.2d at 348; *see also* Lockhart v. Loosen, 943 P.2d 1074, 1079 (Okla. 1997) (stating that an intervening act only relieves liability when it is not a reasonably foreseeable event).

154 For more information on the common structure of the opioid supply chain and the corresponding regulations at each step, see *Combating Opioid Misuse, Distributor Role*, CARDINALHEALTH, https://www.cardinalhealth.com/en/about-us/corporate-citizenship/combating-opioid-misuse/distributor-role.html [https://perma.cc/UFG7-6S48].

However, prescription rates correlated with the promotional efforts by J&J, and doctors testified that they would not have prescribed at the rates they did if they were not convinced to by J&J.[155] In *ConAgra*, lead paint manufacturers argued that the harm to plaintiffs was due to homeowner neglect and improper handling of lead paint.[156] The court found that defendants' deceptive promotion of lead paint for interior use was at least a substantial factor in bringing about the harm.[157] Even if it is arguable that the prescribing practices of doctors and the actions of patients were contributing factors, the evidence shows that J&J's deceptive marketing was the principal cause of the nuisance.[158]

V. ARGUMENT

An analysis of the Opioid Case demonstrates that it was correctly decided under Oklahoma law and the Second Restatement. Still, there are many policy concerns that arise when courts attempt to expand public nuisance into new territory. One common concern is that enlarging the doctrine will create a monster that will envelop other existing torts.[159] Another concern is that the judiciary is violating separation of powers principles when it rules on community-wide harms best left to the legislative and executive branches.[160] Nevertheless, the novel Opioid Case fell within the bounds of public nuisance and the circumstances involved warranted the ruling.[161]

---

155 *Purdue Pharma*, 2019 WL 4019929, at *9.

156 People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 543 (Cal. Ct. App. 2017).

157 *Id.* at 546.

158 *See generally Purdue Pharma*, 2019 WL 4019929; *see also* United States v. Hooker Chems. & Plastics Corp. 722 F. Supp 960, 968 (W.D.N.Y 1989) (supporting the proposition that independent acts of third parties are not enough to break the causal chain when the acts of defendant were the dominant and most relevant fact in bringing about the nuisance).

159 *In re* Lead Paint Litig., 924 A.2d 484, 505 (N.J. 2007) (quoting Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 540 (3d Cir. 2001)).

160 State v. Schenectady Chems., Inc. 459 N.Y.S.2d 971, 977 (N.Y. Sup. Ct. 1983). For an in-depth discussion of separation of powers issues in public nuisance suits, see PAYNE & NIX, *supra* note 7.

161 *See Purdue Pharma*, 2019 WL 4019929, at *11–12.

A. *Separation of Powers*

When public nuisance doctrine is employed by plaintiffs to address major public policy issues, courts have expressed concern that they are being asked to perform tasks best suited for the political branches.[162] This argument arises from the separation of powers between the executive, judicial, and legislative branches of government, which is implicit in the American constitutional structure.[163] This structure recognizes the independent powers granted to each branch of government.[164] When courts are presented with issues such as pollution, lead paint, gun control, or prescription drugs, some judges conclude that these are regulatory or lawmaking questions solely intended for the political branches.[165]

Though the courts' function is not regulatory, courts have a duty to resolve the issues properly raised by litigants and are empowered to grant remedies for harms.[166] Where similar public nuisances have been presented to courts, some judges have been willing to adjudicate, reasoning that swift abatement of the nuisance outweighed other public policy implications.[167] Oklahoma governmental plaintiffs brought a valid public nuisance claim before the court, thus the court was entitled to rule

---

162 *See Schenectady Chems.*, 459 N.Y.S.2d at 977 (stating that solutions to modern problems like pollution are largely beyond the scope of the courts); *see also* People *ex rel.* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 199 (N.Y. App. Div. 2003) (finding that courts are the least equipped and least appropriate branch of government to regulate manufacturing, marketing, and distribution of products).

163 1 NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 3:2 (7th ed. 2019). In contrast to the Federal Constitution, many state constitutions explicitly mention the separation of powers doctrine. *Id.*

164 *Id.* In general, authorities agree that the purpose of the doctrine, in part, is to prevent one branch from encroaching on the duties of another. *Id.*

165 *See Ruger*, 761 N.Y.S.2d at 199 (acknowledging that the judicial branch is the least equipped and least appropriate branch of government to regulate and manage the manufacturing, marketing, and distribution of handguns); *Schenectady Chems.*, 459 N.Y.S.2d at 977.

166 *See Schenectady Chems.*, 459 N.Y.S.2d at 977.

167 *See* United States. v. Hooker Chems. & Plastics Corp., 722 F. Supp. 960, 962 (W.D.N.Y. 1989) (stating that Jimmy Carter had declared the water pollution from defendant's chemical dumping to be a national emergency).

on it. The facts demonstrate that J&J caused the public nuisance and thus must contribute to its abatement.[168]

The decision by the Oklahoma court to rule in the Opioid Case came with support from other jurisdictions.[169] Still, defendants could posit that the court was not a proper venue to remedy this nuisance. For example, defendants in *ConAgra* argued that the court was overstepping the California Legislature, which had specifically rejected a bill that sought to declare lead paint a public nuisance.[170] The court rebutted that the rejection of the bill was not a denial of judicial power to declare a public nuisance.[171] The defendants further argued that declaring lead paint a public nuisance violated separation of powers principles, because only the legislature could declare lead paint a nuisance per se through statute.[172] However, the court was not declaring lead paint a nuisance per se, but had crafted a specific order to abate deteriorating lead paint inside homes built no later than 1950, when the dangerous promotion by defendants occurred.[173]

In the Opioid Case, the court did not declare prescription opioids a nuisance per se in a manner best left to the legislature, but instead declared that J&J's deceptive promotion of opioids triggered a crisis that interfered with the health, safety, and welfare of the public under the existing nuisance statute.[174] The court required J&J to pay for one year of Oklahoma's Abatement Plan, which supplements efforts already underway by Oklahoma state agencies.[175] The court simply held defendants accountable within the existing statutory framework and

---

168 *See In re* Lead Paint Litig., 924 A.2d 484, 506 (N.J. 2007) (Zazzali, C.J., dissenting) (arguing that abatement costs should be shifted to those responsible for creating the nuisance).

169 *See generally* Hooker Chems., 722 F. Supp. 960; People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499 (2017); *Schenectady Chems.*, 459 N.Y.S.2d 971.

170 *See* ConAgra, 227 Cal. Rptr. 3d at 553–55.

171 *Id; see also In re Lead Paint*, 924 A.2d at 508 (Zazzali, C.J., dissenting) (arguing that a statute should not be interpreted to take away a common law right without clear indication of such intention).

172 *ConAgra*, 227 Cal. Rptr. 3d at 554–55.

173 *Id.*

174 Oklahoma v. Purdue Pharma, LP, No. CJ-2017-816, 2019 WL 4019929, at *12 (Okla. Dist. Ct. Aug. 26, 2019).

175 *Id.* at *20.

granted a remedy that required J&J to abate the harm.[176] Thus, the court was within its authority and acted in accord with Oklahoma's executive and legislative branches to reduce the harms of the opioid epidemic.

A potential argument is that the Oklahoma Legislature never intended its public nuisance statute to extend beyond traditional applications. In a case involving asbestos installed in a school which was later identified as friable and dangerous, the Eighth Circuit reasoned that holding manufacturers liable for harms that occurred after installation would produce a cause of action incompatible with over one hundred years of case law.[177] The court concluded that the North Dakota nuisance statute was not drafted to capture this sort of harm and that other traditional tort causes of action like negligence and products liability existed for this claim.[178] In contrast, the Oklahoma Court determined that the legislature intended the statute to apply to J&J's harmful conduct.[179] Since the Oklahoma public nuisance statute is broadly drafted and contains an expansive definition of public right—even more so than the Second Restatement—it is reasonable to conclude that Judge Balkman did not contravene the legislative branch by ruling in favor of Oklahoma.[180]

B. *Overtaking Products Liability*

Another possible argument is that allowing public nuisance claims against manufacturers will overlap with or overtake other existing causes of action in tort. In particular, courts have emphasized the importance of

---

176 *See id.* at *15–20; *see also In re Lead Paint*, 924 A.2d at 508 (Zazzali, C.J., dissenting) (arguing that public nuisance claims compliment regulatory schemes, because they help municipalities recoup the costs of resolving issues like lead paint from the pockets of accountable parties).

177 *See* Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915, 920 (8th Cir. 1993).

178 *Id.* at 921–22.

179 *Purdue Pharma*, 2019 WL 4019929, at *14 (holding that the harms in this case are those that were contemplated by the legislature).

180 Echoing a similar sentiment, Chief Justice Zazzali of the New Jersey Supreme Court argued in a dissent that courts have a duty to reconcile outdated precedent to fit the needs of contemporary society and to redress the evils it encounters and advocated for the use of public nuisance to vindicate those rights. *In re Lead Paint*, 924 A.2d at 506 (Zazzali, C.J., dissenting).

maintaining public nuisance as a separate doctrine from products liability.[181] Some have argued that if we allow public nuisance claims to proceed against manufacturers, it would invite countless fanciful or baseless theories of liability against commercial enterprises, which would circumvent more stringent products liability requirements.[182] Similarly, courts have reasoned that if public nuisance is universally expanded to non-defective products, a crafty plaintiff would only have to identify an existing problem and demonstrate some vague connection to a lawful product.[183] Though this concern is reasonable in some circumstances, public nuisance claims that relate to conduct, rather than simply a lawful product alone, do not overtake products liability; they are a distinct and valid application of public nuisance doctrine.[184]

Some courts have argued that public nuisance doctrine should never be applied to products, regardless of the resulting harms.[185] These courts are concerned with maintaining the boundaries between public nuisance and products liability.[186] For instance, the New Jersey Supreme Court refused to allow a public nuisance claim to proceed against lead paint manufacturers, out of concern that it would create a new cause of action resembling strict products liability.[187] The court opined that if it were to allow a public nuisance claim for the sale of a lawful product, it would set a precedent that simply offering an everyday household product could

---

181 State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 456–57 (R.I. 2008).

182 People *ex rel.* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 202–03 (N.Y. App. Div. 2003).

183 *See Ruger*, 761 N.Y.S.2d at 203 (finding liability for manufacturing of handguns under public nuisance theory would present insurmountable obstacles for judges); *Lead Indus. Ass'n*, 951 A.2d at 456–57 (finding a cause of action would make nuisance a monster that would engulf other tort causes of action).

184 People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 534–35 (Cal. Ct. App. 2017) (quoting Cty. of Santa Clara v. Atl. Richfield Co., 40 Cal. Rptr. 3d 313, 328 (Cal. Ct. App. 2006)) ("A public nuisance cause of action is not premised on a defect in a product or a failure to warn but on affirmative conduct that assisted in the creation of a hazardous condition.").

185 *See Lead Indus. Ass'n*, 951 A.2d at 456; *see also Ruger*, 761 N.Y.S.2d at 200 (finding no liability in public nuisance for manufacturers of a lawful product in marketing and distributing handguns that later caused harm).

186 *See* Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 540 (3d Cir. 2001); *Ruger*, 761 N.Y.S.2d at 197; *Lead Indus. Ass'n*, 951 A.2d at 456–57.

187 *In re Lead Paint Litig.*, 924 A.2d 484, 501–02 (N.J. 2007).

amount to conduct supporting a nuisance claim.[188] Doubtless, such an expansive cause of action would create uncertainty for manufacturers and overwhelm the court dockets.

Products liability claims are separate and distinct from public nuisance claims that relate to conduct by manufacturers, rather than simple harm caused by a product alone. For example, a products liability claim can only be brought by those who have already suffered injury from the product and recovery is limited to damages.[189] In contrast, the public nuisance claim at issue in Oklahoma was brought by a governmental plaintiff for harms to the general public and sought abatement, rather than monetary damages.[190] In the Opioid Case, the claim was not premised solely on injuries caused by the painkillers themselves, but instead emphasized the promotion of prescription opioids by J&J, despite its knowledge that the marketing was deceptive and could foreseeably lead to an epidemic.[191]

Plaintiffs advanced a similar public nuisance theory in *People ex rel. Spitzer v. Strum, Ruger & Co., Inc.* (Ruger), arguing that gun manufacturers had knowledge that their gun designs, marketing, and business conduct caused higher rates of violent crime and illegal gun trade.[192] Justice Rosenberger argued in dissent that any fear of a flood of litigation resulting from allowing this claim against gun manufacturers was unfounded.[193] Since these claims are brought by the likes of attorneys general representing the public, those advocating against public nuisance are suggesting that there are government officials "gone wild," lining up to bring frivolous public nuisance claims in order to escape the higher burdens of products liability.[194] Some scholars would claim that Justice

---

188 *Id.* at 501. The court concluded that this claim was cognizable only under a products liability theory. *Id.* at 503.

189 *ConAgra*, 227 Cal. Rptr. 3d at 594.

190 Oklahoma v. Purdue Pharma, LP, No. CJ-2017-816, 2019 WL 4019929, at *15 (Okla. Dist. Ct. Aug. 26, 2019).

191 *Id.* at *12.

192 *See* People *ex rel.* Spitzer v. Sturm, Ruger & Co., Inc., 761 N.Y.S.2d 192, 199 (N.Y. App. Div. 2003) (plaintiffs argued that gun manufacturers were aware that their guns got into the hands of criminals through firearm traces).

193 *Id.* at 210 (Rosenberger, J., dissenting).

194 *Id.*

Rosenberger's argument fails in the face of contingency-fee agreements between governmental plaintiffs and private attorneys.[195] The conflict surrounding contingency-fee attorneys is most potent where nonmonetary interests, such as halting nuisance-causing conduct, supplant pecuniary interests.[196] In the Opioid Case, the Attorney General determined that hiring contingency-fee lawyers was essential to ensure that adequate resources were available.[197] Further, the Abatement Plan required substantial funding, which aligned interests between Oklahoma and the private lawyers.[198] Since abatement was premised on financing state programs to combat the opioid epidemic, the incentive to maximize the judgment value was shared by both Oklahoma and its private attorneys.

VI. AFTERMATH

Judge Balkman's decision holding J&J liable for public nuisance will have a significant impact on emerging litigation across the United States.[199] There are more than 2,000 pending lawsuits that have been consolidated in the Northern District of Ohio, which are utilizing a similar public nuisance theory.[200] The National Prescription Opiate

---

195 For some, fee arrangements between government entities and private attorneys raise significant ethical issues because the goals of private attorneys, with personal financial interests at stake, may differ greatly from the public interest goals of the governments they represent. *See* Victor E. Schwartz, Phil Goldberg, Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 931–33 (2009).

196 *Id.* at 933.

197 For a full view of the terms of the agreement between the State of Oklahoma and the private attorneys, see *Contract for Legal Services: Opioid Litigation Between Oklahoma and Whitten Burrage Law Firm* (June 23, 2017), http://www.oag.ok.gov/Websites/oag/images/18%20ORA%2089%20Production.pdf [https://perma.cc/V66V-FN9L].

198 For a full description of the Abatement Plan and the allocation of the funds, see Oklahoma v. Purdue Pharma, LP, No. CJ-2017-816, 2019 WL 4019929, at *15–21 (Okla. Dist. Ct. Aug. 26, 2019).

199 *See id.* at *11–12.

200 *See* Colin Dwyer, *Your Guide to the Massive (and Massively Complex) Opioid Litigation*, NPR (Oct. 15, 2019, 9:05 AM), https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation [https://perma.cc/CL2U-ATYP]; *see also* Melissa Healy, *Who's to Blame for the Nation's Opioid Crisis?*

Litigation has been brought by over 2,500 United States cities, counties, and governmental authorities, seeking judgments against players at all ends of the opioid supply chain.[201] Plaintiffs have collectively alleged that these companies aggressively marketed opioids and downplayed the serious addictive potential.[202] Internal documents suggest that defendants knew the risks were far greater than they indicated publicly.[203] The cities and states bringing these suits have worked tirelessly to mitigate the crisis, expending countless dollars of public funds to grapple with crime and addiction resulting from opioid abuse.[204] Drug companies have offered billions to settle this complex and massive multijurisdictional litigation, but some attorneys general argue that it is not enough.[205] Around two dozen attorneys general, as well as hundreds of local governments, seek a larger global settlement and also push for admissions of fault from defendants.[206] Drug companies are continuing to work toward a global settlement, which will provide immediate relief to this nationwide epidemic.[207]

In the wake of the successful Opioid Case, Oklahoma Attorney General Mike Hunter filed three new lawsuits against drug companies also named in the National Prescription Opioid Litigation.[208] The suits

Massive Trial May Answer that Question, L.A. TIMES (Sept. 18, 2019, 5:00 AM), https://www.latimes.com/science/story/2019-09-17/opioid-lawsuit-who-is-to-blame [https://perma.cc/K2XE-99J7].

201 Dwyer, *supra* note 200.

202 *Id.*

203 *Id.*

204 *Id.*

205 Josh Nathan-Kazis, *Opioid Settlement Faces Objection from Attorneys General, WSJ Reports*, BARRONS (Feb. 14, 2020, 11:43 AM), https://www.barrons.com/articles/opioid-settlement-faces-objection-from-attorneys-general-wsj-reports-51581698614 [https://perma.cc/K54F-C7LL].

206 Dwyer, *supra* note 200. Some attorneys general argue that plaintiffs should push for larger contributions from Purdue Pharma, the company responsible for Oxycontin, especially if settlement allows them to avoid the story being told in court. *Id.*

207 Nathan-Kazis, *supra* note 205. The rejected settlement included a four-billion-dollar payment from J&J, the defendants in the Opioid Case. *Id.*

208 Randy Ellis, *Oklahoma AG Mike Hunter Refiles Lawsuits Against 3 Opioid Distribution Companies*, OKLAHOMAN (May 2, 2020, 1:04 AM), https://oklahoman.com/article/5661435/oklahoma-ag-mike-hunter-files-lawsuits-against-3-opioid-distribution-companies [https://perma.cc/9XZ2-RR2R].

were filed in Bryan County, Oklahoma, where the defendants allegedly supplied enormous amounts of prescription opioids.[209] The suits rely on public nuisance theory, but target a different aspect of the opioid supply chain: distribution.[210] The Attorney General alleges that these distributors substantially contributed to Oklahoma's opioid epidemic by supplying unreasonable quantities of painkillers to Oklahoma communities, despite many warnings and ongoing monitoring obligations.[211] The three companies have rocky histories and have already paid large sums for their distribution conduct in other states.[212] By bringing these suits, Oklahoma hopes to gain even more funding from pharmaceutical companies in its effort to end the damage caused by this tragic and widespread crisis.

CONCLUSION

It is time that the corporations responsible for causing the opioid epidemic across the nation are held accountable, and the Opioid Case has proven that the courtroom is an effective venue to remedy this widespread public harm.[213] Attorney General Hunter hopes the decision to hold J&J liable for public nuisance acts as a template for other cities and states seeking redress in similar nuisance cases related to prescription opioids.[214] By finding a public nuisance in Oklahoma medicine cabinets, the Opioid Case embarked into the impenetrable jungle that is the public

---

209 *Id.* Defendants were allegedly responsible for seventy percent of opioid distributions in Bryan County, where enough opioids were dispensed for every adult to have 144 ten-milligram tablets in 2017 alone. *Id.*

210 *Id.*

211 *Id.* In a statement, Hunter said, "These companies ignored their responsibilities because they were making billions of dollars, while Oklahomans, especially those in our rural communities, suffered . . . . We must hold them accountable for this behavior and for the deaths and continued suffering that occurred from their actions." *Id.*

212 *Id.*

213 *See generally* Oklahoma v. Purdue Pharma, LP, No. CJ-2017-816, 2019 WL 4019929 (Okla. Dist. Ct. Aug. 26, 2019).

214 In his remarks, Attorney General Mike Hunter added that the Opioid Case "clearly establishes [J&J's] culpability." *What Lies Ahead Following the Oklahoma Johnson & Johnson Ruling*, CBS NEWS (last updated Aug. 27, 2019, 10:15 AM), https://www.cbsnews.com/news/johnson-johnson-opioid-verdict-what-lies-ahead-following-oklahoma-opioid-judgment [https://perma.cc/P7ZQ-RBPV].

nuisance doctrine and emerged triumphantly. The Opioid Case will likely lend credence to similar theories employed by governmental plaintiffs, even beyond the prescription drug context. As a result, corporations may need to be more diligent in considering the effects of their conduct as it relates to the lawful products they offer.