

ATRA

**The Plaintiffs' Lawyer
Quest *for* the Holy Grail:
The Public Nuisance "Super Tort"**

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INTRODUCTION

One can only imagine the scene inside the plaintiffs’ lawyers’ R&D laboratory for expansive liability theories when they created today’s public nuisance litigation: “Let’s come up with a way to sue manufacturers without having to prove product liability,” said one personal injury lawyer. “Wouldn’t it be great if this new legal theory did not even require us to prove fault,” added another. “I know, let’s get rid of causation too! And, while we’re at it, let’s figure out how to bring these new lawsuits on behalf of a whole bunch of people without having to deal with those pesky class action rules.”

Mix a little bit of this and a little bit of that, and bam! A “Super Tort” is born.

That is today’s public nuisance litigation in a nutshell. It is completely unprincipled and a far departure from any long-standing liability law. Under tort law, including under public nuisance theory, a person or company is supposed to be subject to liability only for wrongfully causing harm. In today’s public nuisance lawsuits, though, plaintiffs’ lawyers are attempting to convince judges to discard this basic principle. These lawsuits are attempts to subject businesses to liability over societal problems—regardless of fault, how the harm developed or was caused, whether the elements of the tort are met, or even if the liability will actually address the issue. Their mantra is, “Let’s make ‘Big Business’ pay.”

These lawsuits are attempts to subject businesses to liability to solve a societal problem—regardless of fault, who caused the harm, whether the elements of the tort are met, or even if the liability will actually address the issue.

This report explores several high-profile public nuisance lawsuits being waged in courtrooms around the country today. It explains what public nuisance theory is, how it has long been used, and how plaintiffs’ lawyers are trying to re-engineer it into their Super Tort. What we find is that plaintiffs’ lawyers typically look for a crisis that people want to solve. This can be a hot-button political issue like climate change, a widespread social harm like opioid addiction, or an environmental concern such as contamination in a local waterway. Then, they look to represent a local or state government so they can sue on behalf of an entire community without abiding by class action rules. The lawyers offer to do this for “free,” agreeing to be paid only from money the lawsuits generate.

For elected officials, signing up for this litigation is enticing. They get to tell their constituents that they are trying to solve a local, national, or even international problem and it isn’t going to cost them anything. Who doesn’t want free money? Then, the government-deputized contingency-fee lawyers target businesses—often large, faceless, out-of-state companies—that they can vilify in the media and blame for the problem because their products are associated with the crisis. It doesn’t matter whether the companies actually *caused* the crisis or are legally responsible for it. In fact, they often sue entire industries to cast blame in broad strokes in an effort to get away from having to prove specific allegations against specific companies.

Those who bring today’s novel brand of public nuisance lawsuits gamble that (1) local judges, who often are elected, will want to be seen as trying to solve a problem for the community and will facilitate the recoveries despite traditional tort law, or (2) the targeted businesses will buckle under the pressure of the media and litigation onslaught and settle the claims just to end the nightmare, regardless of the truth or justice.

The truth is that public nuisance theory is not and should not become a “Super Tort” for making businesses pay for any and all crises. As the next section shows, it is a centuries-old tort with a highly specific purpose, namely to deal with local disturbances like vagrancy. It also does not permit either this Cuisinart-style of liability, where everyone in an industry is

blended together, or strict liability for manufacturers merely because their products are associated with a downstream harm.

These crises do need to be solved, but they should be solved the right way. That is why today's expansive public nuisance litigation should concern us all.

THE HISTORY & DEVELOPMENT OF PUBLIC NUISANCE LAW

Since old English common law, public nuisance has been narrowly defined. It allows governments to stop someone from unlawfully interfering with a public right that it is responsible for providing—namely, the right to use a public road, local park or river in that government's jurisdiction—and to make that person repair any damage they may have caused.¹ Traditional public nuisances also include a person's use of land in a manner that creates local disturbances, such as the use of property for prostitution, gambling, or drug dealing.² The government sues to protect the public's common right to use the land or water, and the court enjoins the nuisance-causing activity and requires the person engaging in that activity to pay abatement costs.³

So, for 700 years, the key concepts of public nuisance litigation have been:

- (1) A public nuisance lawsuit must defend a public right. Blocking private driveways or even doing something against the public interest is not interfering with a public right.
- (2) The public nuisance is the condition blocking the public's right to use the land or water. It has nothing to do with actions elsewhere, like marketing or promoting products.
- (3) To be liable for the public nuisance, one must be engaged in an unlawful activity that is causing the public nuisance condition. These are generally quasi-criminal acts.
- (4) Only the person unlawfully causing or in control of the public nuisance is responsible, not the companies that made products used to create the nuisance.

Early Attempts at Expansion: 1960s–1980s

Since the 1960s, lawyers have sought to blow the doors off of these legal tenets. They want public nuisance liability to include any conduct, even when lawful and regulated, and for manufacturers to face broad-based liability for any costs associated with their products, regardless of fault.

Their first test case was over smog in Los Angeles in the 1970s. Residents sued dozens of companies whose activities and

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-New York Supreme Court, Appellate Division

¹ See Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006).

² Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 801 (2003).

³ See Restatement (Second) of Torts § 821B cmt. b (Am. Law. Inst. 1979) (providing examples of public nuisances).

products caused the smog.⁴ In dismissing the lawsuit, the California court explained that there is a “system of statutes and administrative rules” that govern emissions in this country and that engaging in lawful commerce cannot be re-categorized as tortious conduct, even when contributing to a public nuisance.⁵

Other lawsuits in the 1970s and 1980s sought to get rid of the public *right* requirement, arguing only a public *interest* need be involved or that aggregating private rights should be sufficient. Others suggested that because the suits are broad or communal in nature, they should not require causation between any defendant’s conduct and the nuisance. Any contribution to the risk that the nuisance could occur should be sufficient.⁶ These lawsuits also failed; they were way out-of-step with public nuisance law.⁷

The Next Wave of Novel Public Nuisance Lawsuits: 1990s–2000s

The dynamics for these lawsuits fundamentally changed in the 1990s. Private lawyers realized that they can get life-changing wealth through contingency fees if these types of cases succeed. They signed up local governments to sue for a variety of environmental and social issues associated with the use, misuse, or disposal of products, from lead poisoning to gun violence.⁸ They also leveraged their ability to bring the same cases in multiple jurisdictions in hopes of finding at least one judge to let a case go forward. All they would need is one crack in the dam to create huge contingency fees. These cases did not argue that products were defective, but that manufacturers should have to pay to remediate harms. Full stop. No wrongdoing, no fault, and no causation needed.

For example, dozens of lawsuits against firearm manufacturers were filed for the “costs of enforcing the law, arming the police force, treating the victims of handgun crimes, implementing social service programs, and improving the social and economic climate” in municipalities.⁹ The courts were not fooled. They dismissed the suits, even though the contingency fee lawyers filed them in jurisdictions they thought would be friendly. As one explained, the public right in public nuisance law is not the same as individual people’s right “to be free from the threat that members of the public may commit crimes against individuals.”¹⁰ Violence certainly is an issue of public concern, but not the kind of public right that public nuisance suits enforce. So, notwithstanding the political debate on guns, balancing their harm and utility is a policy question for the legislature, not courts.¹¹ Lawfully selling a product is not an activity within the bounds of public nuisance law.

In this and other litigation, courts around the country expressed serious concerns that allowing this new expansive liability would have no limiting principle. As one said, any number of product liability actions could be converted into public nuisance suits.¹² Said another: “All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.”¹³ A third called the liability “staggering.”¹⁴ This had the plaintiffs’ lawyers salivating!

⁴ *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639, 641 (Ct. App. 1971).

⁵ *Id.* at 645. Plaintiffs were “asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of court.” *Id.*

⁶ See, e.g., *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523 (Wis. 2005), *superseded by statute*, S.B. 1, 2011, as stated in *Clark v. Am. Cyanamid Co.*, No. 06CV12653, 2015 WL 1257118 (Wis. Cir. Mar. 25, 2014).

⁷ See Schwartz & Goldberg, 45 Washburn L.J. at 561-70.

⁸ See Victor E. Schwartz et al., *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 (2009).

⁹ *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 115 (Conn. 2001).

¹⁰ *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1088, 1116 (Ill. 2004).

¹¹ See *id.* at 1121 (“We are reluctant to interfere in the lawmaking process in the manner suggested by plaintiffs, especially when the product at issue is already so heavily regulated by both the state and federal governments.”).

¹² See *County of Johnson v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984).

¹³ *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (App. Div. 2003).

¹⁴ *Ileto v. Glock, Inc.*, 370 F.3d 860, 862 (9th Cir. 2004) (Callahan, J., dissenting); see also *Tioga Pub. Sch. Dist. #15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993)

TODAY'S EXPANSION OF PUBLIC NUISANCE LAW

The watershed moment for today's public nuisance litigation was a lead paint lawsuit brought on behalf of cities and counties in California. These lawsuits were also filed in several other states starting in the late 1990s, again as part of a strategy of throwing as many of these on the wall and seeing if any would stick. The suits sought to make the few remaining lead paint companies from before the 1950s pay the costs of abating lead paint in private homes built before then.¹⁵ In Rhode Island and New Jersey, the state supreme courts explained that “public nuisance law simply does not provide a remedy for this harm.”¹⁶ Otherwise, “merely offering an everyday household product for sale” could create untold liability, which “far exceed[s] any cognizable cause of action.”¹⁷

The California lead paint case has been the clarion call plaintiffs' lawyers have been seeking for more than 50 years, as they try to make money off of environmental or social harms.

In California, however, the lower courts endorsed the legal work-arounds widely rejected everywhere else, awarding \$1.15 billion in abatement costs against three companies without any proof that these companies' paint was in any home.¹⁸ The trial court made clear that it was trying to solve a problem, not enforce the law, saying it did not want to “turn a blind eye” to lead poisoning and that it was trying to “protect thousands of lives.”¹⁹ In what can be described only as an act of judicial malpractice, the California Supreme Court refused to consider an appeal of that ruling.²⁰ Last year, the case settled for \$305 million, with \$65 million going to the plaintiffs' lawyers.²¹

The California lead paint case has been the clarion call plaintiffs' lawyers have been seeking for more than 50 years, as they try to make money off of environmental or social harms. The traditional tenets of product liability, including the lack of a manufacturer's wrongdoing, a product's utility, the overall public interest, and the lapse of time since the product was lawfully sold, take a back seat to this desire for a new revenue source.

Opioid Litigation

The largest of today's public nuisance lawsuits target pharmaceutical manufacturers, distributors, and pharmacies, seeking costs associated with treating and fighting opioid abuse. Prescribing practices for opioids were liberalized in the 1990s to relieve undertreated pain, but recently opioid addiction and abuse has become a major concern. The legal dynamics are comparable to the gun

“It might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money and moral responsibility. Maybe it would make them pay up and ease straining municipal fiscs across the state. But it's bad law.”

—Connecticut Superior Court Judge Thomas G. Moukawsher, dismissing claims seeking costs of treating opioid addiction

(observing that to hold otherwise would “give rise to a cause of action . . . regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories of recovery”).

¹⁵ See Petition for Writ of Certiorari, *State v. Lead Indus. Ass'n*, No. 2004-63-MP (R.I. Super. Ct. Mar. 2, 2004), 2004 RI S. Ct. Pleadings LEXIS 4, *8; Edward Fitzpatrick, “Paint Maker Seeks Ruling on Judge in Lead Case,” *Providence J.*, Aug. 19, 2005, at B1.

¹⁶ *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007).

¹⁷ *Id.* at 501; see also *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 457 (R.I. 2008) (in dismissing public nuisance claim, finding it “essential” that public nuisance and product liability remain “separate and distinct causes of action”).

¹⁸ For example, the trial court eliminated the bedrock tort law requirement that a person can be liable only for harms that he or she caused. The trial court stated that defendants could be liable *without requiring* plaintiffs to “identify the specific location of the nuisance or a specific product sold by each such Defendant.” *People v. Atlantic Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at *44 (Cal. Super. Ct. Mar. 26, 2014). The court made a causation ruling solely on the fact that defendants' products *could* be in California homes. *Id.* at *18. The trial court then held defendants jointly and severally liable to bypass the need to identify which properties, if any, have a company's lead-based paint. *Id.* at *62.

¹⁹ *Id.* at *52-53.

²⁰ Ben Hancock, “California Supreme Court Allows Landmark Lead Paint Ruling to Stand—For Now,” [The Recorder](#), 2/15/18.

²¹ Mike LaSusa, “Paint Makers to Pay \$305M to End 19-Year Calif. Lead Case,” [Law360](#), 7/17/19.

suits. This time, thousands of state, local, and tribal governments have filed public nuisance lawsuits seeking to make the pharmaceutical industry pay for costs related to opioid addiction.²²

Initially, opioid lawsuits against the industry were brought by individuals, but courts found the abuse was the responsibility of doctors who overprescribed the painkillers and people who took them.²³ In recasting the litigation under public nuisance law, lawyers hoped to circumvent the responsibility of individuals. Richard Scruggs, a renowned former plaintiffs' attorney, explained that the legal theories most likely to resonate are those that "do not hinge on fault," but are based simply on the fact that these entities made money selling opioids.²⁴ Their success will depend on "whether the plaintiffs can muster sufficient legal, political and public relations pressure to force a settlement."²⁵

This is the exact playbook the plaintiffs' lawyers have used. The lawsuits do not provide specific factual allegations of tortious conduct, such as specific orders shipped from a distributor or filled at a pharmacy that were illegal. Many people who abuse the painkillers got them from friends or relatives who purchase them legally.²⁶ So, they launched a media campaign to cast blame on the whole industry. They point to "voluntary duties" they say companies have or should adopt, potential violations of reporting and regulatory requirements, or marketing practices. These allegations, even if true, have nothing to do with public nuisance liability. They are meant solely to enrage the public against the pharmaceutical industry and spur courts to act.

The media has bought into this narrative. What even savvy followers of this litigation may not know is that these cases have had mixed results in court. In 2019, a Connecticut judge tossed the public nuisance case brought by 37 municipalities, finding they failed to show how the companies caused the opioid addiction-related costs the cities sought to recoup.²⁷ The judge clearly understood what was at stake here: "it might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money and moral responsibility. Maybe it would make them pay up and ease straining municipal fiscs across the state. But it's bad law."²⁸ These lawsuits "risk letting everyone sue almost everyone else about pretty much everything that harms us."²⁹

A North Dakota court similarly found the claims not viable, concluding the companies' lack of control over the opioids after they entered the market doomed any public nuisance liability.³⁰ Again, even if opioid addiction could be considered a public nuisance, which requires a violation of a public right, the liability is on the people who are actually causing the local disturbance—not the industry. As the court explained, manufacturers do not control how doctors prescribe opioids and individuals use them. That's why the tort does not apply to the sale of goods. Otherwise, public nuisance litigation would become "a monster that would devour in one gulp the entire law of tort."³¹

So far, the only opioid public nuisance case to go to trial has been in Oklahoma, a newly minted Judicial Hellhole. In Oklahoma, public nuisance law is provided by statute, not the common law. The statute is intentionally broad, defining a "nuisance" as any "unlawful" act that "annoys, injures or endangers" the health or safety of others,³² and a "public nuisance" as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons,

²² Tom Hals, "U.S. Regions Hard Hit by Opioids to Ditch Class Action, Pursue Own Lawsuits," [Reuters](#), 12/3/19.

²³ In Philadelphia, when a plaintiff's lawyer in a wrongful death case against an opioid manufacturer presented on the problem of opioid abuse, the judge for the Court of Common Pleas responded: "Find some legal arguments for me." Max Mitchell, "Can Opiate Litigation Ever Be the New Mass Tort?," [Legal Intelligence](#), 3/31/17.

²⁴ See Richard Scruggs, "Are Opioids the New Tobacco?," [Law360](#), 9/18/17.

²⁵ *Id.*

²⁶ See National Center for Injury Prevention and Control, [Policy Impact: Prescription Painkiller Overdoses](#) (Nov. 2011).

²⁷ *City of New Haven v. Purdue Pharma, L.P.*, 2019 WL 423990 (Ct. Super. Ct., Jan. 8, 2019).

²⁸ *Id.* at *8.

²⁹ *Id.* at *2.

³⁰ *North Dakota ex rel. Stenehjem v. Purdue Pharma L.P.*, 2019 WL 2245743, at *11 (N.D. Dist. Ct. May 10, 2019).

³¹ *Id.* at *13 (quoting *Tioga Pub. Sch. Dist. No. 15 of Williams Cty. State of N. Dakota v. United States Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993)).

³² Okla. Stat. § 50-1.

although the extent of the annoyance or damage inflicted upon the individuals may be unequal.”³³ This makes sense in the way it was intended: as a catch-all law giving prosecutors the ability to stop a wide variety of local disturbances.

With the writing on the wall, Purdue reached a \$270 million settlement and TEVA an \$85 million settlement before trial.³⁴ Johnson & Johnson opted to go to trial, where the judge heard the case himself and imposed a \$572 million judgment to fund an abatement program.³⁵ The court found this was the amount Oklahoma planned to pay during the first year of a twenty-year plan to address the opioid crisis.³⁶ (The judge later admitted that, due to a math error, the award was about \$100 million too high, adjusting it to \$465 million).³⁷ The arbitrary nature of this award and the fact that it places the entire responsibility for opioid addiction in Oklahoma on one company underscores the lack of any legal principles for this litigation. The case is on appeal and the judgement is widely seen as highly vulnerable.

More than 2,600 other opioid cases are consolidated in multi-district litigation before a federal judge in Ohio.³⁸ On the eve of first bellwether trial, three pharmaceutical distributors and TEVA agreed to a \$260 million settlement to give two Ohio counties “badly needed cash” to address opioid addiction.³⁹ Plaintiffs’ lawyers, a few attorneys general, and defendants also began floating a \$48 billion settlement proposal that would require five companies to pay \$22.25 billion in cash over 18 years and to fund \$26 billion in addiction services over the next decade.⁴⁰ Other state AGs and lawyers representing local governments, however, have opposed the proposal.⁴¹ Unsurprisingly, one of the sticking points is how much of the money goes to the contingency-fee lawyers.⁴² Meanwhile, the judge overseeing the federal litigation has proposed a novel “negotiation class” in an attempt to reach a massive global settlement.⁴³

Vaping

One of the newest public nuisance litigations that is trying to follow the opioid model is over vaping. Over the past year, the news has been flooded with stories about vaping, the increased use of e-cigarettes by minors, and the harm caused by illicit vaping products. Trial lawyers have been quick to try to capitalize on this emerging public health crisis. They trying to recruit school districts, local governments and states to file public nuisance lawsuits against Juul Labs and other e-Cigarette companies.

The lawsuits claim these companies have created a public nuisance by marketing their products in a way that gave rise to a vaping epidemic among minors and that this epidemic is harming students and disrupting schools. They say the companies created “a condition dangerous to the public’s health” and that the school districts and governments are spending “significant resources combating” this public health issue.⁴⁴

For example, the law firm Wagstaff & Cartmell, a Kansas-based law firm, approached the school boards across Kansas and actively recruited them as clients. They are taking the cases on a contingency-fee basis to make it easy for the schools to

³³ Okla. Stat. § 50-2.

³⁴ Nate Raymond, “Oklahoma Judge Approves Teva’s \$85 Million Opioid Settlement,” [Reuters](#), 6/24/19; Jan Hoffman, “Purdue Pharma and Sacklers Reach \$270 Million Settlement in Opioid Lawsuit,” [N.Y. Times](#), 3/26/19.

³⁵ Judgment After Non-Jury Trial, *State of Oklahoma v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 4019929 (Dist. Ct., Cleveland Cnty., Aug. 26, 2019).

³⁶ *Id.* at *20.

³⁷ See Final Judgment After Non-Jury Trial, *State of Oklahoma v. Purdue Pharma L.P.*, No. CJ-2017-816 (Dist. Ct., Cleveland Cnty., Nov. 15, 2019); see also Jeff Overley, “J&J’s \$572M Opioid Loss Cut To \$465M As Judge Fixes Math,” [Law360](#), 11/15/19.

³⁸ U.S. Judicial Panel on Multidistrict Litig., [MDL Statistics Report](#) - Distribution of Pending MDL Dockets by Actions Pending, 1/15/20 (*In re: Nat’l Prescription Opiate Litig.*, MDL-2804, N.D. Ohio).

³⁹ Lenny Bernstein et al, “Last-Ditch Opioid Settlement in Ohio Could Open Door for Much Larger Deal,” [Wash. Post](#), 10/21/19.

⁴⁰ Melanie Schuman & Madeline Holcombe, “Four Attorneys General Propose Framework for a Global \$48 Billion Opioid Settlement,” [CNN](#), 10/22/19.

⁴¹ Tom Hals & Nate Raymond, “Several States Wary of \$48 Billion Opioid Settlement Proposal,” [Reuters](#), 10/24/19.

⁴² Sara Randazzo, “Opioid-Addiction Litigation Heads to Complex Trial,” [Wall St. J.](#), 10/20/19.

⁴³ Emily Field, “Attys Report Broad Support for Opioid MDL Negotiation Class,” [Law360](#), 12/3/19.

⁴⁴ Tiffany Kary & Jef Feeley, “Juul Accused by School Districts of Creating Vaping ‘Nuisance,’” [Bloomberg News](#), 10/7/19 (quoting several complaints).

sign on. As with opioids, they are hoping to flood the courts with lawsuits by local governments to pressure businesses to settle and maximize their attorney fees. Initial lawsuits were filed by Kansas school districts, as well as school districts in New York, Missouri and Seattle.

King County, which is where Seattle is located, filed a public nuisance class action in October 2019. This suit essentially tries to make marketing, advertising and government relations related to e-cigarettes proof of wrongdoing.⁴⁵ To create culpability for these acts in the minds of the public, the media and the courts, it argues that Juul followed the “tobacco playbook” to achieve its success. Making a lawful product that appeals to the public and lawfully promoting that product, though, is not wrongdoing, nor is it the type of conduct that gives rise to public nuisance liability. Products liability and consumer protection acts have separate rules and enforcement measures for those acts.

In order to overcome this fact, the complaint seeks to mirror the arguments that the Oklahoma trial court accepted in its opioid case. It states that Washington’s statutory public nuisance law applies to “whatever is injurious to health” and consists of “unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures, or endangers the comfort repose, health or safety of others.”⁴⁶ It then argues that because the social harms of vaping were “reasonably foreseeable,” Juul and others should be liable for all of the costs associated with illegal vaping use.⁴⁷

Several state attorneys general, including those in North Carolina, California and New York and Minnesota, have filed similar lawsuits and sound the same themes. They claim Juul’s advertising “has significantly contributed to the public health crisis” of vaping.⁴⁸ They argue these ads violate consumer protection laws, and that, rather than pursuing remedies in those acts, suggest the alleged violations can be used to make the companies liable for the “public nuisance” of youth vaping. The suits seek money to fund public education campaigns against youth vaping and vaping cessation programs.⁴⁹

It is too early to know how these lawsuits will fare in the courts. Certainly, youth vaping is a public health concern that should be addressed. But, as several courts in the opioid cases pointed out, public health concerns are not “public nuisances” under these acts or the common law. Further, if the companies are making defective products or unlawfully promoting them, legal actions should be pursued under the bodies of law that govern those acts. Public nuisance theory is not a Super Tort for any and all public health crises.

Climate Change

In climate change litigation, public nuisance lawsuits are used as a political or regulatory shortcut. More than a dozen local and state governments are suing energy producers for the costs they say they will have to spend to deal with the impacts of climate change, such as building sea walls to protect shorelines. These lawsuits began with a handful of California municipalities in 2017 and echo the themes from the lead paint case. They allege that by producing the energy Americans need and use every day, the companies knowingly created the public nuisance of global climate change.

The money trail and dynamics in these cases, though, are different than the others. Here, the lawsuits are by-and-large not funded by the plaintiffs’ lawyers themselves, but by environmental foundations who want to leverage the mass filings of climate lawsuits to create political pressure on the oil and gas industry.⁵⁰ Since 2004, they have provided grant money to lawyers and activists to circle the country recruiting governments to file the lawsuits. (Of course, that hasn’t stopped

⁴⁵ See *King County v. Juul Labs, Inc.*, 2:19-cv-01664 (W.D. Wash. filed Oct. 16, 2019).

⁴⁶ *Id.* at 71.

⁴⁷ *Id.* at 74.

⁴⁸ Makena Kelly, “New York Attorney General Sues Juul for Deceptive Marketing,” [The Verge](#), 11/19/19.

⁴⁹ *Minnesota AG Sues E-Cigarette Maker Juul Over Rise in Youth Vaping*, *Ins. J.*, Dec. 6, 2019.

⁵⁰ See Manufacturers’ Accountability Project, *Beyond the Courtroom*, at <https://mfgaccountabilityproject.org/beyond-the-courtroom/> (last visited 2/7/20) (Chapter Two: The Complex Web of Philanthropies, Researchers and Nonprofits Supporting Litigation).

the lawyers from seeking 20-25% contingency fees from the governments in case they win.) The foundations hope the companies will agree to the public policies they want to see imposed if the litigation appears viable and the media around the litigation does damage to their reputations.

Understanding today's climate litigation requires going back to 2004, when the first round of climate litigation started. Then, the advocates of using public nuisance law to regulate greenhouse gases embraced the political nature of the litigation. They expressed frustration that Congress and the Environmental Protection Agency were not doing enough to regulate carbon emissions, so they sued hoping courts would regulate emissions through injunctive relief or by imposing monetary damages against the industry.⁵¹ In the most prominent case, *American Electric Power v. Connecticut*, six utilities were sued for making electricity for Americans.⁵²

This case went all the way up to the U.S. Supreme Court and, in 2011, was rejected unanimously. The Court found that federal public nuisance claims had been displaced. It also explained the institutional deficiencies with courts getting into the climate change debate, that setting climate policy is “within national legislative power,” and that Congress and EPA are “better equipped to do the job than individual district judges issuing ad hoc, case-by-case” decisions.⁵³ The Ninth Circuit then quickly dismissed a similar public nuisance case against energy producers alleging they caused climate injuries to an Alaskan village. The Ninth Circuit said that even though the issues were presented differently, given the Supreme Court's broader message, “it would be incongruous to allow [this litigation] to be revived in another form.”⁵⁴

Undeterred, the lawyers, environmental activists and funders got together in La Jolla, California in 2012 to brainstorm new litigation strategies.⁵⁵ First, they approached then-New York Attorney General Schneiderman to sue ExxonMobil over allegations of industry climate secrecy and fraud, hoping to get internal documents they hoped would be damning and could be used to vilify the company and “delegitimize” it politically.⁵⁶ The lawsuit sought up to \$1.6 billion⁵⁷ from ExxonMobil and was hailed as “the trial of the century” by those trying to blame industry for climate change.⁵⁸ A funny thing happened. After ExxonMobil produced millions of documents, the AG's office abandoned or lost all of its claims. There simply was no “there” there.

“Having reaped the benefit of that historic progress, would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded?”

-U.S. District Court Judge William Alsup, dismissing lawsuits against the oil and gas industry seeking costs associated with climate change.

Second, the lawyers and activists set about the country like traveling salesmen trying to convince local and state governments to file public nuisance lawsuits against the oil and gas industry. These lawsuits have sought to blame climate change on energy producers—regardless of any wrongdoing, fault, or causation—and demand they pay for the local infrastructure projects to address the effects of climate change. So far, about 14 or 15 communities have filed or announced that they plan to file these claims, including San Francisco, Oakland, New York City, and Boulder. These public nuisance cases, as well as other climate actions, have not fared well in the courts.

⁵¹ Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 Colum. J. Env't'l L. 335, 339 (2005) (quoting Maine Attorney General Stephen Rowe: “It's a shame that we're here, here we are trying to sue [companies] . . . because the federal government is being inactive.”).

⁵² *Am. Elec. Power v. Connecticut*, 564 U.S. 410 (2011).

⁵³ *Id.* at 421, 428.

⁵⁴ *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).

⁵⁵ See Findings of Fact and Conclusions of Law, *In re ExxonMobil Corp.*, No. 096-297222-18 (Tex. Dist. Ct.—Tarrant Cty. Apr. 24, 2018), at 3 (discussing the “Workshop on Climate Accountability, Public Opinion, and Legal Strategies”).

⁵⁶ Editorial, “A Climate Show Trial,” *Wall St. J.*, 10/22/19.

⁵⁷ See Priscilla DeGregory, “ExxonMobil Cleared of Hiding Costs of Climate Change from Investors,” *N.Y. Post*, 12/10/19.

⁵⁸ Miyo McGinn, “What Exxon's Win in New York Means for Other Climate Lawsuits,” *The Grist*, 12/12/19.

In June 2018, U.S. District Judge William Alsup dismissed the state public nuisance claims from San Francisco and Oakland.⁵⁹ He explained that oil, gas and other energy products are not public nuisances. They have given the world electrification and helped raise global health and living standards. “Having reaped the benefit of that historic progress, would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded?”⁶⁰

The next month, U.S. District Judge John M. Keenan echoed this ruling in dismissing New York’s lawsuit.⁶¹ He also found it highly inappropriate to use state public nuisance laws and courts to address costs attributed to global emissions. The U.S. Courts of Appeal for the Ninth and Second Circuits are hearing the appeals in these cases. Several other cases, including those brought by Baltimore, Boulder, Rhode Island and several other California communities, are also on appeal, but solely on the issue of whether the claims should be heard in state or federal court.

As these courts have uniformly found, climate change is not a liability question for the courts, including under the tort of public nuisance, but a complex global problem requiring a global, public policy-based solution. As National Association of Manufacturers General Counsel Linda Kelly wrote in the *Wall Street Journal*, public nuisance theory “has nothing to do with regulating global energy supply. And, the notion that these communities are entitled to financial compensation while using the very products their lawsuits demonize is nonsensical.”⁶²

All of the dominoes are properly falling against efforts to use public nuisance law to regulate emissions. As ATRA General Counsel Victor Schwartz has observed, “filing lawsuits that have failed time and again would appear the definition of frivolous and vexatious. Courts have not yet gone down the road of potential sanctions, but it is an issue increasingly worthy of consideration.”⁶³ It is an abuse of the legal system to file specious claims for political purposes.

Environmental Clean-Ups

The final type of expansive government public nuisance lawsuits being waged today target manufacturers for environmental impacts of products they may have sold years ago, regardless of fault. As discussed above, when it comes to chemical contamination cases, the person responsible for abating the public nuisance is the one who dumped the chemicals and caused the public nuisance, not the company that manufactured those chemicals. But here, the lawsuits target manufacturers and industries as a way of one-stop-shopping. The communities want money and to avoid the burden of going after individual wrongdoers. So, they say the manufacturers and others should “pay their share” irrespective of product identification, causation and control.

In addition to not being legally sound, a significant concern has arisen of the harm these lawsuits can do to the availability of beneficial products, particularly when not justified by the science. Chemicals, like energy, are an inherent part of modern society. Their health and safety profiles should be made by experts based on reliable science and the public interest, not self-interested plaintiffs’ lawyers through fearmongering. In many situations, the products at issue in the cases were sold decades ago and, at the time, their substantial benefits were deemed to outweigh their risks. Often, they were developed or demanded by the government itself.

⁵⁹ See *City of Oakland v. BP P.L.C.*, 325 F.Supp.3d 1017 (N.D. Cal. 2018).

⁶⁰ *Id.* at 1023.

⁶¹ *City of New York v. BP P.L.C.*, 325 F.Supp.3d 466 (S.D.N.Y. 2018).

⁶² Linda Kelly, Op-ed, “Should Fossil-Fuel Companies Bear Responsibility for the Damage Their Products Do to the Environment?,” [Wall St. J.](#), 11/19/19.

⁶³ Victor Schwartz, Expert Analysis - Opinion, “Climate Change Tort Litigation: Enough is Enough,” [Law360](#), 2/28/19.

PCBs

Monsanto, which is now owned by Bayer Corporation, has been the target of public nuisance lawsuits over polychlorinated biphenyls (PCBs) since 2015. Monsanto manufactured PCBs from the 1930s through the 1970s as a component part for other companies' products because they were resistant to extreme temperature and pressure.⁶⁴ They were used as insulators in high voltage applications and added to construction materials as fire retardants.⁶⁵ Monsanto did not control the other companies' products, where those products were sold, or how they were disposed. PCBs were banned in the 1970s because of their potential environmental impact.⁶⁶

In 2015, contingency fee lawyers teamed with governments on the West Coast to bring public nuisance lawsuits against Monsanto to abate PCBs that ended up in bodies of water after being disposed in landfills and other places.⁶⁷ These governments included San Diego, San Jose, Oakland, Berkeley, Portland, Spokane, and Seattle, along with the State of Washington.⁶⁸ All allege Monsanto should be subject to liability merely because they made PCBs and knew they could cause environmental harm, which can be said about many chemicals.⁶⁹ That's why mere knowledge of a risk is not tortious in products liability—nor should it be under public nuisance.

That same year, a federal judge hearing a case filed by the Town of Westport, Connecticut, dismissed the public nuisance claims. It explained that because Monsanto did not have control of the PCBs after it was sold, it cannot be responsible for any public nuisance caused by the downstream use or disposal of PCBs: “Westport was in control of the instrumentality, the PCB-containing products, following purchase,” and “because [Monsanto] did not have the power or authority to maintain or abate these PCB-containing building materials, they cannot be liable for a public nuisance.”⁷⁰

In August 2016, a trial court dismissed lawsuits filed by San Jose, Oakland, and Berkeley for lack of standing. The judge there held the cities did not own the bodies of water at issue and, therefore, had no authority to bring the claims.⁷¹ As discussed above, the purpose of public nuisance law is to give governments the right to protect the public's right to use the land and water they control. The water here was not the cities' to protect. Within weeks, however, the California Legislature enacted laws aimed at laying the foundation for these suits, essentially giving cities the authority to sue over public nuisances on properties entrusted to them by the state.⁷²

In Spokane's case, the judge diverted from traditional public nuisance theory to deny Monsanto's motion to dismiss.⁷³ He held the nuisance can be the “production, marketing, and distribution” of PCBs, not the contamination in the public waterway.⁷⁴ As discussed above, these issues are governed by product liability law, not public nuisance law. Further, the court held that a manufacturer can be subject to liability for a public nuisance “regardless of the intervening actions by consumers” so long as the future contamination was “at least arguably foreseeable.”⁷⁵

Overall, lawsuits have been filed by New Mexico, Ohio, Oregon and Washington, along with 10 cities, including Los Angeles, Baltimore, Seattle, San Diego and San Jose. The Oregon and Washington actions were brought under their *parens patriae* capacity for PCB contamination in their states. There are better means to address PCB contamination than

⁶⁴ See Monsanto, *Questions About Products of the Former Monsanto*, 4/25/17, <https://monsanto.com/company/history/articles/former-monsanto-products/>.

⁶⁵ *Id.*

⁶⁶ See Toxic Substances Control Act, 15 U.S.C. § 2605(e).

⁶⁷ John Breslin, “West Coast ‘Super Tort’ Against Monsanto Could Spread to Other States,” *Forbes*, 1/11/17.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Town of Westport v. Monsanto*, 2015 WL 1321466, (D. Mass., Mar. 24, 2015).

⁷¹ See Order Granting Motions to Dismiss, *City of San Jose v. Monsanto*, No. 5:15-cv-03178-EJD, 2016 WL 4427492, at *4 (N.D. Cal. Aug. 22, 2016).

⁷² See Sen. B. 859, 2015-2016 Reg. Sess. (Cal. 2016).

⁷³ Order Granting in Part and Denying in Part Defendants' Motion to Dismiss for Failure to State a Claim, *City of Spokane v. Monsanto Co.*, No. 2:15-CV-00201-SMJ, 2016 WL 6275164, at *19 (E.D. Wash. Oct. 26, 2016).

⁷⁴ *Id.* at *20.

⁷⁵ *Id.* at *8.

local government public nuisance claims sponsored by contingency-fee lawyers. Specifically, the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) allows the government to identify potentially responsible parties and require them to pay a share of the clean-up costs.

PFAS

Contingency-fee lawyers are also teaming with local governments to bring public nuisance cases against companies in the per- and polyfluoroalkyl (PFAS) business. These chemicals have been used since the 1950s and are valued for their ability to resist heat, repel water, protect surfaces, and reduce friction. They have been incorporated into an array of consumer products, such as nonstick cookware, stain-resistant carpet, and electronics.⁷⁶ PFAS have also been used in the aerospace, automotive, and building and construction industries. They also have been used in firefighting foams to extinguish aircraft and oilfield fires faster and better than the alternatives.

Traces of PFOA and PFOS were detected at low levels in groundwater, likely from the disposal of products containing PFAS and the use of firefighting foam. In 2000, companies began voluntarily phasing out PFOA and PFOS. Scientific evidence has not established that the low levels of PFAS pose a risk to human health. In fact, the U.S. Department of Health's Agency for Toxic Substances and Disease Registry recognized last year that "cause-and-effect relationships have not been established for any of the effects."⁷⁷ The Centers for Disease Control & Prevention stated that merely finding a measurable amount of PFAS "does not imply that the levels of PFAS cause an adverse health effect."⁷⁸ The CDC said "more research is needed."⁷⁹

There are 193 lawsuits related to firefighting foam in the federal courts, many of which have been brought by local governments.⁸⁰ Observers say "we may be seeing just the tip of the PFAS litigation iceberg."⁸¹ Why the sudden rush to sue, particularly when the data appears to indicate that PFAS pose a lower risk to human health and the environment than previously believed?⁸² The litigation gained steam after 3M settled an 8-year long case with Minnesota for \$850 million in February 2018.⁸³ Of this total, \$125 million went to private contingency fee lawyers—which according to a Minnesota legislator, was the equivalent of earning \$47,000 per day for seven years.⁸⁴ Not bad work if you can get it—especially when the state's own Department of Health found no apparent health effects from PFAs exposure, reaffirming conclusions it reached in 2007 and 2015.⁸⁵

Experience demonstrates that lawsuits motivated and brought by contingency-fee lawyers on behalf of governmental entities will not solve complex public policy issues, and any proceeds are often diverted to other purposes.

If the PCB and PFAS cases succeed, public nuisance litigation will be soon be brought over any and all chemicals, including many household products we all need. It would be irrelevant how useful the products have been, that the manufacturers were not the ones who improperly discarded the products, or even whether people are exposed to the chemical at a level that causes any actual harm.

⁷⁶ See U.S. EPA, Basic Information on PFAS, <https://www.epa.gov/pfas/basic-information-pfas>.

⁷⁷ U.S. Dep't of Health & Human Servs., Agency for Toxic Substances and Disease Registry, Toxicological Profile for Perfluoroalkyls: Draft for Public Comment, at 635-36 (2018), <https://www.atsdr.cdc.gov/toxprofiles/tp200.pdf>.

⁷⁸ Centers for Disease Control & Prevention, Per- and Polyfluorinated Substances (PFAS) Factsheet, https://www.cdc.gov/biomonitoring/PFAS_FactSheet.html.

⁷⁹ *Id.*

⁸⁰ U.S. Judicial Panel on Multidistrict Litig., [MDL Statistics Report](#) - Distribution of Pending MDL Dockets by Actions Pending, 1/15/20 (*In re: Aqueous Film-Forming Foams Products Liab. Litig.*, MDL-2873, D. S.C.).

⁸¹ James P. Ray, "PFAS Litigation: Just Getting Started?," [ABA Journal](#), 3/1/19.

⁸² Matthew Thurlow, Russ Abell & Stephen Zemba, "PFAS Contamination Remains a Hot-Button Issue: Overview of Recent Regulatory, Litigation, and Technical Developments," [ABA Journal](#), 12/15/17.

⁸³ Tiffany Kary, "3M Settles Minnesota Lawsuit for \$850 Million," [Bloomberg](#), 2/20/18.

⁸⁴ *Id.* (quoting Rep. Sarah Anderson, R-Plymouth).

⁸⁵ Bob Shaw, "Minnesota vs. Minnesota: Agency Pushes Back in \$5 Billion 3M Suit," [St. Paul Pioneer Press](#), 2/19/18.

Plastics

As this report neared publication, the Earth Island Institute filed litigation along these very same lines. The environmental group, founded in the 1980s, sued ten well-known food, beverage and consumer goods manufacturers. The lawsuit tries to make these businesses pay to clean up pollution caused by consumers who improperly threw out plastic bottles and other products in ways that end up in the world's oceans.⁸⁶

As the complaint shows, the public nuisance playbook is becoming exceedingly familiar:

Step 1: Identify a broad environmental issue that no needs to be addressed. People should dispose plastic bottles, containers and other products properly, including by recycling. Earth Island attempts to makes the problem of consumer plastic pollution the manufacturers' fault.

Step 2: Claim the companies did something wrong. Here, Earth Island asserts the companies knew of deficiencies in recycling and kept it secret. The complaint states that even though the products are fully recyclable, it was "false and misleading" to label them recyclable if recycling programs are not effective.

Step 3: Develop a causation theory. Earth Island said it did a study to see whose plastic bottles and products were in the polluted areas. This study mirrors efforts to determine whose oil products led to the most carbon emissions. All this attribution effort does is conclude that companies that successfully sold products and earned market share had more products involved. Business success is not causation.

Step 4: Allege it is tortious to even continue making plastic products, regardless of consumer demand, the utility of the products, or that the products are legal. This reveals the true goal of the lawsuit, which is to "regulate" plastic production.

Step 5: Come up with some way to model damages the companies should have to pay. Here, Earth Island claims its damages are the money it spent on cleaning up plastics. Of course, voluntarily raising and spending money is not damages in tort law. These efforts, while valuable, also do not give Earth Island standing to bring this lawsuit. But, why let the facts or law get in the way of a lawsuit.

Step 6: File the lawsuit in a jurisdiction viewed as friendly to the litigation. Earth Island filed this lawsuit in San Mateo, California, which is one of the same jurisdictions where an early climate change lawsuit was filed. The organization wants to find a judge who will at least deny a motion to dismiss.

Step 7: Develop a public relations campaign intended to influence the public and the judges. Earth Island has already called the industry "Big Plastic," just like "Big Oil," "Big Pharma," and other industries that have been sued.⁸⁷ Oh, and there is the always popular: "the companies made money selling the product so they should be part of the solution."

This playbook is not necessarily designed to achieve a victory in court, as the law and facts clearly do not support liability. By filing the lawsuit, the activists seek to gain publicity, motivate their supporters, and pressure the companies into settling the claims in ways that will fund their organization and regulate plastics. While that may fit their own purposes, this litigation is an abuse of the civil justice system and a waste of judicial resources.

⁸⁶ Earth Island Inst. v. Crystal Geysers Water Co., No. 20 Civ 01218 (Cal. Super. Ct., County of San Mateo, filed Feb. 26, 2020), https://www.earthisland.org/images/uploads/suits/2020-02-26_Earth_Island_Complaint_FILED.PDF.

⁸⁷ See Suit Aims to Hold "Big Plastic" Companies Responsible for Pollution, Bay City News, Feb. 27, 2020 at <https://www.nbcbayarea.com/news/local/suit-aims-to-hold-big-plastic-companies-responsible-for-pollution/2243170/>

CONCLUSION

Each of these public nuisance lawsuits are different in nature, but they share a common theme: they all seek to generate massive liability over a complex crisis despite the lack of legal or factual grounding for targeting the companies sued. Plaintiffs' lawyers actively court governments as "clients" because they understand that bringing lawsuits in the name of a government may provide them with power and leverage not present in ordinary "private" civil litigation. It also entitles them to outsized legal fees in the event of a verdict or a settlement.

Experience demonstrates that lawsuits motivated and brought by contingency-fee lawyers on behalf of governmental entities will not solve complex public policy issues, and any proceeds are often diverted to other purposes. States must ensure that any litigation it initiates serves the public interest and they should combat problems that arise when local governments bring such unfounded cases. Major public crises demand a major response by government leaders, but the continued wave of contingency-fee litigation brought by state and local governments is the wrong approach. It won't help victims or solve crises, and instead creates lasting problems for the civil justice system.