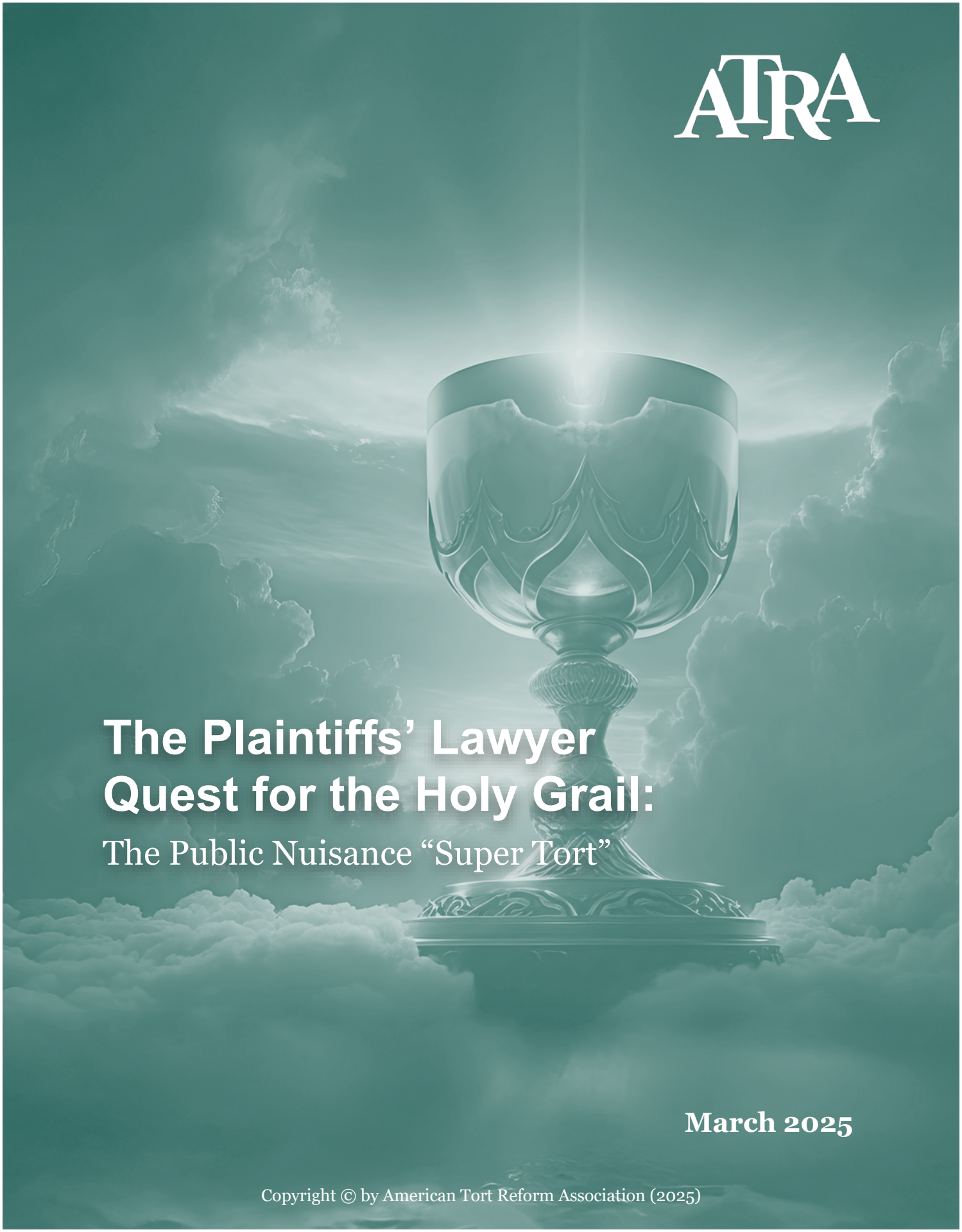

The Plaintiffs' Lawyer Quest for the Holy Grail:

The Public Nuisance "Super Tort"

March 2025

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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 product makers and sellers 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 traditional liability law. Under tort law, including public nuisance, a person or company is supposed to be subject to liability only for wrongfully causing harm. In today's public nuisance lawsuits, plaintiffs' lawyers try to convince judges to discard these basic principles. These lawsuits attempt to subject businesses to liability over societal and political issues—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' [insert business] pay."

These lawsuits attempt 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. It explains what public nuisance theory is, how it has long been used, and how plaintiffs' lawyers are trying to re-engineer it into a 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 any specific company.

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 that unlawfully interfere with the public's right to use public roads, parks and waterways. 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 harms caused by consumer use, misuse or improper disposal of products they put into the stream commerce.

These crises do need to be solved, but in the right way. Imposing these costs onto manufacturers and sellers of goods when they did not cause the harms is wrong, makes their products more expensive for American families and businesses, and harms the companies' ability to increase jobs and compete in the global economy against those not subject to this "tort tax." 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 a government to stop someone from unlawfully interfering with the public's right to use a shared government resource—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—such as for prostitution, gambling, or drug dealing—that creates illegal local disturbances to the community at-large.[2] The government sues to protect the public's common right to use the land or water or be free from the local disturbance. The court can enjoin the person from engaging in the unlawful activity causing the public nuisance and require that person to pay abatement costs to clean up the public nuisance so it no longer exists.[3]

For 700 years, the key concepts and elements of a public nuisance action have been:

1) A public nuisance lawsuit must defend a public right, such as blocking a public road. Blocking private driveways or doing something else that may be against the public's *interest* is not the same as interfering with a public *right*.
2) The public nuisance is the condition blocking the use the land or water. It has nothing to do with actions elsewhere, like how a product is made, marketed or sold.
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 companies that made products used to create the nuisance.

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[1] *See generally* 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).

Early Attempts at Expansion: 1960s–1980s

Since the 1960s, lawyers have sought to blow the doors off these legal tenets. They pushed for 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 products contributed to the smog.[4] In dismissing the case, the California court stated that there is a "system of statutes and administrative rules" that govern these activities, and 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.

> "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."
>
> -New York Supreme Court, Appellate Division

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

The dynamics for these lawsuits changed in the 1990s. Private lawyers realized they could get life-changing wealth through contingency fees if these types of cases succeeded. They started signing up local governments to sue for a variety of environmental and social issues—from lead poisoning to gun violence—associated with the use, misuse, or improper disposal of products.[7] 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 associated with them. Full stop. No wrongdoing, no fault, and no causation needed.

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[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. Ct. Mar. 25, 2014).

[7] *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).

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.[8] 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 the Illinois Supreme Court 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."[9] Violence, whether gun violence or other type, is certainly an issue of public interest, but it does not invoke the public rights 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.[10] Lawfully selling a product is not an activity within the bounds of public nuisance law.

In this and other similar public nuisance litigations brought at the time, courts around the country expressed serious concerns with allowing this new expansive liability. They cautioned that it would have no limiting principle. As one said, any number of product liability actions could be converted into public nuisance suits.[11] 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."[12] A third called the liability "staggering."[13]

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 companies that produced lead paint until the 1950s pay the costs of abating lead paint in private homes built before that time.[14] In Rhode Island, New Jersey and Missouri, state supreme courts rejected these lawsuits for the same reasons other courts rejected the smog and gun suits: "public nuisance law simply does not provide a remedy for this harm."[15]

> 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.

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

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

[10] *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.").

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

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

[13] *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) (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").

[14] *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.

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

Otherwise, "merely offering an everyday household product for sale" could create untold liability, which "far exceed[s] any cognizable cause of action."[16]

In California, though, the lower court endorsed the legal work-arounds widely rejected everywhere else, awarding $1.15 billion in abatement costs against three companies without any proof their paint was in any home.[17] The trial court made clear 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 it was trying to "protect thousands of lives."[18] In what can be described only as an act of judicial malpractice, the California Supreme Court refused to consider the appeal.[19] The case settled for $305 million in 2019, with $65 million going to the lawyers.[20]

Why did the case settle for about a quarter of the total verdict, you might ask? The court ruled all monies that go into a public nuisance abatement fund had to be spent on actual abatement—nothing else, including the lawyers' fees.[21] So, the local governments offered to settle the case for much less so their legal departments and outside lawyers could make tens of millions of dollars.

Not surprisingly, the California lead paint case became the clarion call plaintiffs' lawyers had been seeking for more than 50 years. The traditional tenets of product liability, including the lack of a manufacturer's wrongdoing, the benefits a product provides, the public interest in affordable access to the product, and the lapse of time since the product was lawfully sold, all took 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 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

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[16] *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").

[17] 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.

[18] *Id.* at *52-53.

[19] Ben Hancock, "California Supreme Court Allows Landmark Lead Paint Ruling to Stand—For Now," The Recorder, 2/15/18.

[20] Mike LaSusa, "Paint Makers to Pay $305M to End 19-Year Calif. Lead Case," Law360, 7/17/19.

[21] Tentative Ruling re: Motion for Attorneys' Fees and Costs, *People v. ConAgra Grocery Prods. Co.*, No. 2000-1-CV-788657 (Cal. Super. Ct., Santa Clara County, May 10, 2019).

[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, a Court of Common Pleas judge responded: "Find some legal arguments for me." Max Mitchell, "Can Opiate Litigation Ever Be the New Mass Tort?," Legal Intelligencer, 3/31/17.

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, the lawyers and governments 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. So have some trial courts in allowing cases to proceed beyond a motion to dismiss. For example, more than 2,600 opioid cases were consolidated in multi-district litigation (MDL) before a federal judge in Ohio.[27] The judge candidly acknowledged at the first MDL meeting that he was interested not on "figuring out the answer to interesting legal questions," but to "do something meaningful" about prescription drug abuse: "we need some treatment" not "a lot of briefs and we don't need trials."[28] In a related case, the judge acknowledged the claims "do not fit neatly into the legal theories."[29] Many companies settled rather than risk prolonged litigation.[30]

> "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

The first public nuisance case to go to trial was in Oklahoma. Public nuisance law in Oklahoma is provided by statute, but follows traditional common law principles. The terms of the statute were intentionally broad, defining a "nuisance" as any "unlawful" act that "annoys, injures or endangers" the health or safety of others,[31] and a "public nuisance" as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal."[32] It was intended to be a catch-all law for stopping a wide variety of local disturbances. The trial court allowed the case to proceed, spurring Purdue and TEVA to settle for $270 million and $85 million, respectively.[33] Johnson & Johnson opted to go

[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] 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).
[28] Transcript, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-CV-2804-DAP (N.D. Ohio Jan. 9, 2018).
[29] *County of Summit v. Purdue Pharma L.P.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 19, 2018).
[30] Lenny Bernstein et al, "Last-Ditch Opioid Settlement in Ohio Could Open Door for Much Larger Deal," Wash. Post, 10/21/19.
[31] Okla. Stat. § 50-1.
[32] Okla. Stat. § 50-2.
[33] Nate Raymond, "Oklahoma Judge Approves Teva's $85 Million Opioid Settlement," Reuters, 6/24/19; Jan Hoffman, "Purdue

to trial, where the judge heard the case himself and imposed a $572 million judgment to fund an "abatement" program for opioid abuse.[34]

What savvy followers of public nuisance litigation know is that when the public nuisance theories in product cases face any kind of legal scrutiny, courts have largely thrown out the cases—as in the Illinois firearm case and the Rhode Island and New Jersey lead paint cases. So, when J&J appealed the verdict to the Oklahoma Supreme Court, it was not surprising that the court in a 5-1 ruling vacated the verdict and dismissed the suit. The court's 2021 ruling reinforced the basic notion that public nuisance law does not apply to the manufacturing, marketing and selling of products: "Applying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers; this is why our Court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products."[35]

The court also explained these lawsuits do not satisfy any of the time-honored elements or remedies of a public nuisance cause of action. For example, there is no *public right* to be free from opioid abuse and, even if so, public nuisances occur at the local, not manufacturing levels. Also, damages for treating opioid addiction, which are the impacts of the alleged public nuisance, are not remedies governments can seek. The sole purpose of a government public nuisance suit is to enjoin the public nuisance activity and abate the nuisance itself so the nuisance no longer exists. Here, "opioid use and addiction[] would not cease to exist even if the defendant pays for the abatement plan."[36] That's why governments are not entitled to money damages in public nuisance cases.

A few months ago, the Ohio Supreme Court reached the same conclusion when Judge Dan Polster in the federal MDL referenced above certified this question to the Ohio Supreme Court. The specific question was whether public nuisance liability can extend to lawsuits brought by Ohio counties against national pharmacy chains for costs associated with treating opioid abusers. The Ohio Supreme Court said no.[37] It held the Ohio Product Liability Act (OPLA) provides the exclusive remedy for product-based harms and public nuisance is not a products-based tort. The court acknowledged that although there had been some "unorthodox use[s] of the tort of public nuisance"—including in gun litigation in Ohio more than 20 years ago—the Ohio legislature has since clarified twice that public nuisance claims against product makers and sellers are not viable under OPLA.

And, weeks before publication of this report, the Maine Supreme Judicial Court added its name to the list of high courts rejecting expansive public nuisance theories. In that case, hospitals filed public nuisance claims against businesses involved in the marketing, distribution and selling prescription opioid medications. In affirming dismissal of the case, the court cited the Restatement (Third) of Torts: Liability for Economic Harm (2020) for the proposition that product liability, not public nuisance, is the appropriate body of law for this claim. It then held that, regardless, hospitals cannot bring a public nuisance claim because they do not have the type of special injury from the public nuisance that is required for seeking damages in a public nuisance case.

Other jurists have astutely observed what's going on in these cases and have rejected this attempt at deep pocket jurisprudence that violates longstanding tort liability principles. As one Connecticut judge

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Pharma and Sacklers Reach $270 Million Settlement in Opioid Lawsuit," N.Y. Times, 3/26/19.

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

[35] *State of Oklahoma ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 725 (Okla. 2021).

[36] *Id.* at 729.

[37] *In re Nat'l Prescription Opiate Litig. (Trumbull County Ohio v. Purdue Pharma, L.P.),* -- N.E.3d --, 2024 WL 5049302 (Ohio Dec. 10, 2024).

appreciated, "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."[38]

Added a West Virginia judge:

> The phrase "opening the floodgates of litigation" is a canard often ridiculed with good cause. But here, it is applicable. To apply the law of public nuisance to the sale, marketing and distribution of products would invite litigation against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product. . . . If suits of this nature were permitted any product that involves a risk of harm would be open to suit under a public nuisance theory regardless of whether the product were misused or mishandled. [39]

The West Virginia Supreme Court of Appeals is now hearing this lawsuit and held oral arguments in January 2025.

Climate Change

Climate change public nuisance litigation started out as a political or regulatory effort to impose new rules for energy production and use, but it has now turned into just as much about deep pocket jurisprudence as the opioid cases. Today, about three 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. In short, 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 underscore the political nature of the litigation. By-and-large, the climate lawsuits are developed, funded and waged by environmental foundations who leverage them to exert political pressure on the oil and gas industry.[40] Since 2004, these groups have provided grant money to lawyers and activists to circle the country recruiting governments to file lawsuits. (Of course, that hasn't stopped the lawyers from seeking 20-25% contingency fees from the governments in case they win.) The foundations hope the companies will agree to the funding and public policies they want imposed if the litigation appears viable and media around the litigation damages their reputations.

When the initial lawsuits launched in 2004, these groups embraced the political nature of the litigation. They expressed frustration that Congress and the Environmental Protection Agency were not imposing their preferred policies on carbon emissions, so they sued hoping courts would regulate emissions through injunctive relief or by imposing damages against the industry.[41] In the most prominent case, *American Electric Power v. Connecticut*, six utilities were sued for making electricity for Americans.[42]

This lawsuit went all the way up to the U.S. Supreme Court, which, in 2011, unanimously rejected it. 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

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

[39] *See City of Huntington v. AmerisourceBergen Drug Corp.*, No. 3:17-01362, 2022 WL 2399876, at *59 (S.D.W.V. July 4, 2022).

[40] *See* Manufacturers' Accountability Project, Beyond the Courtroom, https://mfgaccountabilityproject.org/beyond-the-courtroom/ (Chapter Two: The Complex Web of Philanthropies, Researchers and Nonprofits Supporting Litigation).

[41] Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 Colum. J. Envt'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.").

[42] *Am. Elec. Power v. Connecticut*, 564 U.S. 410 (2011).

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.[43] 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."[44]

Undeterred, the lawyers, environmental activists and funders got together in La Jolla, California in 2012 to brainstorm new litigation strategies.[45] First, they approached then-New York Attorney General Schneiderman to sue ExxonMobil over allegations of industry climate secrecy and fraud, attempting to get internal documents they hoped would be damning and could be used to vilify the company and "delegitimize" it politically.[46] The lawsuit sought up to $1.6 billion[47] from ExxonMobil and was hailed as "the trial of the century" by those trying to blame industry for climate change.[48] After ExxonMobil produced millions of documents, however, the AG's office abandoned or lost all of its claims. There simply was no "there" there.

Next, 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 35 local, county and state governments have filed or announced that they plan to file these claims, from Honolulu to San Francisco to Boulder to New York City, along with the states of New Jersey, Minnesota, Rhode Island and California. While most of the past eight years has been spent on procedural issues, courts have begun ruling on motions to dismiss.

New York City's case was the first to reach resolution.[49] The U.S. Courts of Appeal for the Second Circuit affirmed the lawsuit's dismissal, explaining these climate cases are no different from *AEP v. Connecticut*, regardless of how packaged—including as state law damages claims: "we are told that this is merely a local spat about the City's eroding shoreline, which will have no appreciable effect on national energy or environmental policy. We disagree. Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions."[50] The court continued that it is immaterial whether the case is "styled as" an action for injunctive relief or damages because liability has "the same practical effect" of regulating global energy production and use.[51] And, subjecting energy companies to liability "for the effects of emissions made around the globe over the past several hundred years" is "simply beyond the limits of state law."[52]

The Second Circuit also explained constitutional deficiencies with state courts imposing liability on energy production, promotion and use in other states and countries: these activities are legal in those other places and states cannot impose liability on activities that do not intersect with their state: "Any actions the Producers take to mitigate their liability, then, must undoubtedly take effect across every state (and country). And all without asking what the laws of those other states (or countries) require."[53] Because it "'implicates

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[43] *Id.* at 421, 428.

[44] *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).

[45] *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").

[46] Editorial, "A Climate Show Trial," Wall St. J., 10/22/19.

[47] *See* Priscilla DeGregory, "ExxonMobil Cleared of Hiding Costs of Climate Change from Investors," N.Y. Post, 12/10/19.

[48] Miyo McGinn, "What Exxon's Win in New York Means for Other Climate Lawsuits," The Girst, 12/12/19.

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

[50] *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021).

[51] *Id.* at 96.

[52] *Id.* at 92.

[53] *Id.*

the conflicting rights of states and relations with foreign nations,' this case poses the quintessential example of when federal common law is most needed."[54]

Over the past year or so, state trial courts in Delaware, Maryland, New Jersey and New York have followed the Second Circuit's lead. The Delaware court found that seeking damages for "out-of-state or global emissions and interstate pollution" is "beyond the limits" of state public nuisance and other common law torts.[55] The Maryland court echoed that the claims are "artful but not sustainable."[56] Public nuisance cases, whether they seek to directly regulate, as in *AEP*, or seek damages, as here are unconstitutional: "Global pollution-based complaints were never intended by Congress to be handled" by states.[57] The New Jersey court added that "logic and reasoning" compel dismissal of public nuisance and other claims seeking damages by transboundary emissions.[58]

On the other side of the ledger are rulings from the Hawaii Supreme Court and trial courts in Colorado and Minnesota. The Hawaii Supreme Court's ruling is based on two faulty pillars. First, it held Hawaii can apply its law to emissions and conduct in other states and countries.[59] As the Second Circuit explained, no state law has that scope. Second, the Hawaii high court said that GHG emissions may have been controlled by federal common law in the past—after all, all interstate pollution questions must be resolved by federal law—but that is no longer true here. The court found that because Congress displaced federal common law in this area when it delegated to the EPA the authority to regulate GHG emissions, any state can now grab this federal authority.[60] The Second Circuit called this notion—that state claims over interstate GHG emissions suddenly became viable when Congress spoke to the federal questions at issue—"too strange to seriously contemplate."[61] The Hawaii Supreme Court not only contemplated it, but ruled that way.

The Colorado trial court bought into this faulty logic hook, line and sinker. Citing the Hawaii case, the Colorado court found the viability of this litigation turns, not on the claims' substance, but on how one "frames" the litigation.[62] And, because this case is framed differently from *AEP*, state courts do not have to follow *AEP*. The court then suggested liability does not regulate or penalize defendants, and Boulder *deserves* a remedy—presumably regardless from whom or the elements of any cause of action. The Minnesota ruling, released just before this report went to print, echoes these sentiments.[63] The Constitution, though, is not swayed by subjective framing. The differences these courts asserted from *AEP* are not legal distinctions allowing for different outcomes.

In fact, the past three presidential administrations may not agree on much, but they all have filed briefs in this litigation explaining the limitations of state law to these climate cases. In 2011, President Obama's solicitor general told the Supreme Court in *AEP* that climate change is "a result of the actions of innumerable sources of various kinds of emission from around the world over many decades," making it "impossible to consider the sort of focused and more geographically proximate effects that were characteristic of traditional nuisance suits."[64] When New York City's state law case against energy producers was before the Second

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[54] *Id.*(quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)) (cleaned up).

[55] *Delaware ex rel. Jennings v. BP America Inc.*, 2024 WL 98888, at *9 (Del. Super. Ct. Jan. 9, 2024).

[56] *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 24-C-18-004219, 2024 WL 3678699, at *5 (Md. Cir. Ct. July 10, 2024).

[57] *Id*. at *12.

[58] *Platkin v. ExxonMobil Corp.*, No. MER-L-001797-22 (N.J. Super. Ct. Feb. 5, 2025).

[59] *See City and County of Honolulu v. Sunoco*, 537 P.3d 1173 (Haw. 2023).

[60] *Id*. at 1181.

[61] *City of New York*, 993 F.3d at 98-99.

[62] *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.*, No. 2018-CV-30349 (D. Ct. Boulder County, June 21, 2024).

[63] *Minnesota v. American Petroleum Inst*., No. 62-CV-20-3837 (Minn. D. Ct., 2d Jud. Dist., Feb. 14, 2025).

[64] Brief for the Tennessee Valley Authority, *AEP* at 15 (filed Jan. 31, 2011).

Circuit a few years ago, the Trump Administration said that it was the federal government's position that the door has never been open for climate claims on the common law of an affected State.[65]

And, although President Biden's solicitor general opposed Supreme Court review of the Hawaii ruling, Solicitor General Elizabeth Prelogar fully acknowledged that Honolulu's state-law claims may be foreclosed "to the extent they are based on emissions or conduct outside of Hawaii."[66] She explained: "To be sure, petitioners may ultimately prevail on their contention that respondents' claims are barred by the Constitution—specifically, the Interstate and Foreign Commerce Clause, the Due Process Clause, and federal constitutional structure—to the extent the claims rely on conduct occurring outside of Hawaii."[67]

At this point, it is painfully obvious that, even though climate public nuisance cases are repeatedly filed around the country and courts in some states are allowing them to play out for years, climate change is not a liability question for state courts, 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."[68] There is no doubt the U.S. Supreme Court will be called on again to resolve this split in rulings.

Social Media

One of the newer mass public nuisance litigations has targeted what appears to be the latest punching bag for any variety of societal issues: social media. In this series of lawsuits, hundreds of school districts are suing social media companies Facebook, Instagram, Snapchat, TikTok and YouTube to pay them for costs they associate with student use of these platforms. The lawsuits allege the companies' social media platforms are public nuisances because students are addicted to these platforms, which, in turn, interferes with school operations and requires schools to spend resources on student mental health services, disciplinary actions, investigating threats made on the platforms, and updating school policies, among other things.

These cases have the same core failings of the other litigations discussed in report: hosting a social media platform is not a public nuisance, and even if it were, the school districts have no standing to bring any such public nuisance claim against the platform providers. But, the legal reaction to this litigation also mirrors the above case law: judges intent on applying the law have dismissed them, while judges who want to solve a perceived problem, regardless of the elements of the cause of action, allow the litigation to advance in hopes of driving settlement or other changes.

Take the federal MDL. The claims—now approaching 1,500—have been consolidated before Judge Yvonne Rogers in Oakland.[69] At a hearing last year, Judge Rogers squarely put herself in the latter camp. Reminiscent of the statement by the federal MDL judge hearing the opioid litigation when he said we don't need briefs on legal issues, but treatment for people, Judge Rogers said: "I don't know if [the school districts] have a claim… But I do know that the challenges they're facing are real, they are significant, and they're all tied back to these platforms."[70] Subsequent rulings have made it clear that Judge Rogers is not intent on

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[65] Brief of the United States as Amicus Curiae, *City of New York v. BP P.L.C.*, 2019 WL 1112108 (2d Cir. filed Mar. 7, 2019).

[66] Brief of the United States as Amicus Curiae, *Sunoco v. City and County of Honolulu*, No. 23-947, at *7 (U.S. filed Dec. 2024).

[67] *Id*. at 12.

[68] 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.

[69] U.S. Judicial Panel on Multidistrict Litig., MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending, 3/3/25 (*In re: Social Media Adolescent Additional/Personal Injury Products Liability Litigation*, MDL-3047, N.D. Cal.).

[70] Isaiah Poritz, "Social Media a 'Double-Edged Sword' for Students, Judge Says," Bloomberg Law, 5/17/24.

sticking to the role of a federal judge applying established state law, but helping the school districts, often regardless of that state's law.

In November 2024, Judge Rogers issued a ruling on the defendants' motion to dismiss. In short, the court took advantage of the fact that these cases are entirely novel and that this exact situation had never been brought before—even though any fair reading of the case law in the states would raise serious doubts as to whether their public nuisance laws could be stretched this far. In going through state rulings, the court was forced to acknowledge that Illinois, New Jersey, Rhode Island and South Carolina would not allow these claims because, as discussed above, the state supreme courts have directly said in response to the cases above that public nuisance must be tied to the use of land.[71] As for the rest, even though the claims were wholly out of character with the elements and character of public nuisance cases in those states, the court rubber stamped the school district suits solely because none of them "formally adopted [the land- or product-related] limitations."[72]

Based on this false premise, the court went on to mischaracterize the elements of a public nuisance cause of action. First, the ruling indicates that "a public right can be reframed as a series of individual harms."[73] Not so. Blocking a public road violates the public's right to use a public right-of-way. Blocking an individual person's private driveway violates only that person's private right. The number of private driveways blocked does not convert the private right to use one's driveway into a public right. They are distinct concepts.

Second, the court held that the school districts had standing—not as government entities protecting the public rights of its citizens, but as private plaintiffs who suffered a harm different in kind from that of the general community. Judge Rogers used the circular logic that if defendants were correct and "only individuals" would be able to assert special injuries—then that would leave "schools, hospital systems, or municipalities" without the ability to get damages.[74] That's exactly right, and what judges from Maine to Oklahoma have held. If a public nuisance exists, governments can seek only to enjoin or abate it so there is no longer an interference with the public right, whereas individuals can seek compensatory damages for special injuries sustained by coming into contact with the public nuisance. Again, these are distinct concepts that the court blurred to allow the litigation to proceed.

Third, the court also confused available remedies, stating that because the school districts have such a "special injury," then can seek "abatement of the nuisance."[75] But, as the Oklahoma Supreme Court explained, addressing the impacts of a public nuisance is not the same as abating it so it no longer exists. Finally, at a recent hearing, Judge Rogers signaled she will not allow the defendants to appeal her decision now, but they must go through years of expensive, wrongful litigation before an appeal would be available.[76]

By contrast, state Judge Carolyn Kuhl in Los Angeles, California dismissed the school district cases from the four states that were consolidated in her court, recognizing all these shortcomings with an attempt to apply public nuisance law to social media.[77] Judge Kuhl explained that social media harms do not constitute a public nuisance because, at most, they implicate only private rights:

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[71] Order Granting in Part and Denying in Part Defendants' Motion to Dismiss the School District and Local Government Entities' Claims of Public Nuisance, *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, No. 4:22-md-3047, MDL No. 3047, at 2 (N.D. Cal. Nov. 15, 2024).

[72] *Id.* at 1.

[73] *Id*. at 22.

[74] *Id*. at 27.

[75] *Id*.

[76] *See* Dorothy Atkins, "*Social Media MDL Judge Rips Google, Snap Quick Appeal Bid*," Law360, 2/12/25.

[77] *See Social Media Cases*, No. JCCP 5255 (Cal. Super. Ct., Los Angeles County, June 7, 2024).

> The School Districts' reliance on nuisance fails because the right not to be injured by the Defendants' social media platform is a right personal to the minors who used Defendants' platforms, and individual injuries to health have not been recognized by any of the four states in question as a basis for nuisance liability, even when the individual harms are considered collectively.[78]

Judge Kuhl also held that the school districts have no standing to bring these cases as private entities asserting special injuries because they "did not suffer particular damage in exercising a right common to the general public. . . . Because the School Districts thus cannot assert that they themselves shared in the injury to public health, they cannot bring a nuisance action . . . based on alleged harm to public health."[79]

Finally, the court opined that it "is hard to imagine how any business could function – or reasonably insure itself against potential losses – if its liability extends to all those who could reasonably be expected to interact with the individuals that are caused emotional harm by that business or institution."[80] That court did, however, allow individuals to pursue their own claims under common law negligence to the extent they could prove the elements of a negligence cause of action for the individualized injuries they alleged.

Car Thefts

Several local governments have taken this new rash of public nuisance suits even further, suing a couple of automakers because local thieves stole cars the companies sold to residents in their communities. In 2020, a group of teenagers in Milwaukee discovered a way to steal certain model cars made by Hyundai and Kia by "hotwiring" the car and circumventing the vehicles' anti-theft devices. They dubbed themselves the "Kia Boyz" and posted a tutorial on Tik-Tok to instruct other would-be criminals how to unlawfully hack into and steal the cars. The post went viral, leading to vehicle thefts.

Hyundai and Kia responded like one would hope companies would: they offered to send individuals who still owned the affected car models wheel lock anti-theft devices that they could use to protect their cars. Nevertheless, the governments sued the automakers alleging the local car thieves were creating a public nuisance and the companies should have to pay government costs, such as policing, associated with these car thefts.

The federal courts established an MDL and, in November 2023, Judge James Selna of the Central District of California allowed most of the claims to survive a motion to dismiss. Like Judge Rogers in the social media MDL, Judge Selna recognized this use of public nuisance law was entirely new, but allowed the cases because, in this idiosyncratic situation, "courts have not rejected the novel theory presented here."[81]

For example, Judge Selna acknowledged that some states have product liability acts that govern all harms caused by products—including those here—but said somehow this is different because the company knew there were better ways to make anti-theft devices. This sounds no different than an argument, which could be properly made under product liability law, that there was a reasonable alternative design.

Finally, with respect to proximate cause, Judge Selna said it was immaterial that the companies did not steal the cars or cause the thefts in any way, and that they actively tried to stop them based on the following

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[78] *Id.* at 26.

[79] *Id.* at 34-35.

[80] *Id.* at 20.

[81] Order Regarding Motion to Dismiss, *In re: Kia Hyundai Vehicle Theft Litig.*, No. 8:22-ml-03052-JVS, at 13 (C.D. Cal. Nov. 17, 2023).

circular logic: "Theft is the very foreseeable conduct that anti-theft devices specifically protect against."[82] Of course, that does not make every lock maker, cyber security device and others liable for criminals who hack their devices.

Environmental Clean-Ups

Expansive government public nuisance lawsuits over environmental clean-ups present a different, but equally concerning abdication of traditional public nuisance elements. In these cases, the contamination may very well be a public nuisance, but rather than targeting those who engaged in the illegal activity that caused the public nuisance, the lawsuits target the manufacturers of the products, regardless of fault or passage of time.

Under public nuisance law in every state, 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. This makes sense: if someone dumps a bunch of nails and tacks to block a public road, the company that made the nails and tacks and sold them to consumers are not responsible for policing how those nails and tacks are used—or misused. But here, governments target manufacturers and industries as a way of one-stop-shopping in an effort to avoid identifying and going after individual wrongdoers. They argue the manufacturers—individually or as an industry—should "pay their share"—often irrespective of product identification, causation and control.

Imposing strict liability on manufacturers, though, can impose unfair restrictions on the availability of their products, particularly when the potential harm caused by the alleged contamination is not justified by science or where regulators allow the products to be marketed because of their benefits and engage in other efforts to manage the public risks attendant to their use. This health and safety balancing 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, the products were developed or demanded by the government itself.

PCBs

Monsanto, 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 until 1977 as a component part for other companies' products because they were resistant to extreme temperature and pressure.[83] They were used as insulators in high voltage applications and added to construction materials as fire retardants.[84] Monsanto did not control the other companies' products, where those products were sold, or how they were disposed. Monsanto voluntarily stopped making PCBs two years before a federal ban on their production in 1979.[85]

PCBs were among the first substances in the 1980s where local governments tried to use the tort of public nuisance to go after manufacturers. For example, in the *City of Bloomington v. Westinghouse Electrical Corp.*,[86] Westinghouse was charged with releasing PCBs-containing waste into Bloomington, Indiana's sewers and landfills. In addition to suing Westinghouse, the city named Monsanto in a public nuisance case

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[82] *Id*. at 10.

[83] *See* Bayer, *Managing and Mitigating the U.S. PCB Litigation Risk*, 1/15/25, https://www.bayer.com/en/resolving-us-pcb-litigation.

[84] *Id.*

[85] *See* Toxic Substances Control Act, 15 U.S.C. § 2605(e); *see also* EPA, Learn about Polychlorinated Biphenyls, 4/4/25.

[86] 891 F.2d 611 (7th Cir. 1990).

to abate the PCBs from the land and water. The U.S. Court of Appeals for the Seventh Circuit dismissed Monsanto from the case, explaining that once Monsanto sold the PCBs to Westinghouse, "Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product."[87]

Yet, with the rebirth of product-based public nuisance lawsuits over the past couple of decades, contingency-fee lawyers also teamed with governments to bring public nuisance lawsuits against Monsanto to abate PCBs in water and landfills.[88] What's old is new again. These governments included several on the West Coast, including San Diego, San Jose, Oakland, Berkeley, Portland, Spokane, and Seattle, along with the State of Washington.[89] Each of them alleged Monsanto should be subject to liability merely because it made PCBs and knew they could cause environmental harm, which can be said about many chemicals.[90] 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."[91]

In California, a trial court dismissed lawsuits filed by San Jose, Oakland, and Berkeley in 2016 for lack of standing. The judge there held that the cities did not own the bodies of water at issue and, therefore, had no authority to bring the claims.[92] 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.[93]

In Spokane's case, the court diverted from traditional public nuisance theory to deny Monsanto's motion to dismiss.[94] It held the nuisance can be the "production, marketing, and distribution" of PCBs, not the contamination in the public waterway.[95] As discussed earlier, 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."[96]

In 2023, the Delaware Supreme Court similarly allowed a public nuisance claim to go forward against Monsanto for selling PCBs to companies in Delaware because those companies allowed PCBs to leak into local waterways.[97] There were no allegations that Monsanto controlled the companies' PCB storage or

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[87] *Id.* at 614.

[88] John Breslin, "West Coast 'Super Tort' Against Monsanto Could Spread to Other States," Forbes, 1/11/17.

[89] *Id.*

[90] *Id.*

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

[92] *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).

[93] *See* Sen. B. 859, 2015-2016 Reg. Sess. (Cal. 2016).

[94] 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).

[95] *Id.* at *20.

[96] *Id.* at *8.

[97] State of Delaware, ex rel. Jennings v. Monsanto Co., 299 A.3d 372 (Del. 2023).

disposal practices or instructed them to allow PCBs to get into local bodies of water. Yet, the court held that Monsanto could be liable under public nuisance law for this contamination. It dispensed of any notion of control and causation, holding public nuisance liability can arise if Monsanto's knowledge of the risks and statements about PCBs generally substantially contributed to the nuisance.[98]

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.[99] 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.

PFAS litigation gained steam after 3M settled an 8-year long case with Minnesota for $850 million in February 2018, $125 million of which went to private contingency fee lawyers.[100] When ATRA originally published this paper on public nuisance law in 2020, there were 183 lawsuits related to firefighting foam in the federal courts, many of which were brought by local governments.[101] At that time, observers said, "we may be seeing just the tip of the PFAS litigation iceberg."[102] Now, there are nearly 8,500 lawsuits in the federal MDL.[103] Recently, there have been several substantial settlements in the MDL litigation between manufacturers of firefighting foam and public water suppliers.[104] Meanwhile, the litigation has expanded from targeting companies that produced the chemicals and used firefighting foam to those that incorporated PFAS into consumer products.[105] While some of the cases are private class actions brought under state consumer protection laws, others are local government lawsuits alleging public nuisance claims.[106]

The PCB and PFAS cases suggest that public nuisance litigation may soon be brought over other chemicals, including those in common household products. 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.

Plastic and Plastic Packaging

Perhaps the oddest new public nuisance lawsuit comes out of California where a trial court recently allowed a public interest group, Earth Island Institute, to sue companies for participating in California's recycling

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[98] *Id*. at 383.

[99] *See* U.S. EPA, Basic Information on PFAS, https://www.epa.gov/pfas/basic-information-pfas.

[100] Tiffany Kary, "3M Settles Minnesota Lawsuit for $850 Million," Bloomberg, 2/20/18.

[101] 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.).

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

[103] U.S. Judicial Panel on Multidistrict Litig., MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending, 3/3/25 (*In re: Aqueous Film-Forming Foams Products Liab. Litig*., MDL-2873, D. S.C.).

[104] *See* Lauren Berg, "Tyco's $750M PFAS Deal in Foam CO. MDL Gets Initial OK," Law360, 6/11/24 (noting other settlements include 3M Co. settling for $12.5 billion, DuPont, Chemours and Corteva settling for $1.2 billion, and BASF Corp. agreeing to pay $316.5 million to resolve the drinking water claims).

[105] *See* Juan-Carlos Rodriguez, "PFAS Litigation Finds a New Frontier: Consumer Products," Law360, 2/11/25.

[106] *See, e.g., Murray County, Ga. v. Shaw Indus., Inc*., No. 24-C-12330-S3 (Ga. St. Ct., Gwinnet County, filed Dec. 30, 2024).

program. To be clear, the companies are being sued for properly labeling the recyclability of plastic bottles they sold.

Earth Island views the state's plastic recycling program as ineffective. However, rather than direct those concerns to the legislature or appropriate regulatory body, Earth Island sued companies for participating in the program. The remedy they are seeking is the cost of cleaning up plastic packaging that is *not* recycled. Again, the conduct at issue is lawful, is required by the state, and *encouraged* recycling in order to reduce waste. This activity in no way caused or even contributed to littering.

Nevertheless, the trial court last year allowed the public nuisance claims to proceed, holding that labelling packaging as recyclable and encouraging consumers to participate in the State's recycling initiatives—which help *mitigate* impacts of the packaging—somehow qualifies as instructing consumers to use the packaging in a "hazardous manner." Only in DC Comics' Bizarro World would *promoting* recycling subject one to liability for products that are *not* recycled. Yet, that is what the court ruled.

Rather than let his bad idea go to waste, New York Attorney General Letitia James invoked public nuisance law to sue Pepsi to clean up plastic bottles others discarded in the Buffalo River. In another Bizarro World assertion, she asserted that Pepsi's social responsibility program urging proper disposal of plastic bottles shows the company knew there was a "plastic pollution crisis" and failed to stop it. The trial court quickly dismissed the claim.[107] It explained "[w]hile no one doubts the harm litter and waste cause in our ecosystem, this does not create a civil cause of action from which to punish Pepsi."[108] The court called it "selective prosecution based on a naïve theory."[109]

> Imposing civil liability on a manufacturer for the acts of a third party seems contrary to every norm of established jurisprudence. It is not difficult to imagine the lengths prosecuting agencies would take this theory, if adopted, to punish manufacturers for the acts of others who buy their products and then, throw them in a nearby body of water.
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> As Defendants rightly note, there are recycling bins everywhere along canalside and the other water tributaries. Yet, people continue to litter. Instead of pursuing those who commit the act [of littering], the Attorney General wishes to penalize those who produce the discarded item. This theory has never been adopted by a court in this state or any other. . . .[110]
>
> Absent the legislature passing a law or the executive branch issuing an order establishing such a theory of liability or imposing restrictions on what type and amount of plastic can be used, this lawsuit is simply policy idealism.[111]

Not to be outdone, California Attorney General Rob Bonta filed a public nuisance lawsuit against ExxonMobil for plastics pollution around the world.[112] The lawsuit, supported by a coalition of environmental groups, alleges the company should be liable for global plastics pollution under California public nuisance law because ExxonMobil made, promoted and sold plastics—as well as recycling and advanced recycling—even though it knew that recycling would not prevent all litter around the world. To repeat: selling a product,

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[107] *People v. PepsiCo., Inc.*, 222 N.Y.S.3d 907, 910 (N.Y. Sup. Ct., Erie County, Oct. 31, 2024).

[108] *Id*. at 914.

[109] *Id*.

[110] *Id*.

[111] *Id*. at 916.

[112] Complaint for Abatement, Equitable Relief, and Civil Penalties, *People v. Exxon Mobil Corp*., No. CGC24618323 (Cal. Super. Ct., San Francisco County, filed Sept. 23, 2024).

including with contemporary knowledge of its publicly known risks, does not make one responsible for a public nuisance that it did not cause.

In January 2025, ExxonMobil took the extraordinary step of fighting back. It filed a lawsuit in Texas federal court against the California Attorney General seeking to protect itself from this litigation. It said this lawsuit is nothing more than a deliberate smear campaign against the company that falsely claims its effective and innovative advanced recycling technology is a "false promise" and "not based on the truth."[113]

Vaping

Trial lawyers were also quick to capitalize on the public health crisis caused by the increased use of e-cigarettes by minors, and the harm caused by illicit vaping products. They recruited school districts, local governments and states to file public nuisance lawsuits against Juul Labs and other e-cigarette companies.

The lawsuits claimed these companies created a public nuisance by marketing their products in a way that gave rise to a vaping epidemic among minors and that this epidemic harmed students and disrupted schools. The claims alleged that 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.[114]

Rather than wage expensive litigation on multiple fronts, the companies agreed to settlements, including claims brought by state and local governments, totaling more than $2 billion, ending the litigation onslaught.[115]

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.

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[113] Complaint, *Exxon Mobil Corp. v. Bonta*, No. 1:25-cv-00011 (E.D. Tex. filed Jan. 6, 2025).

[114] Tiffany Kary & Jef Feeley, "Juul Accused by School Districts of Creating Vaping 'Nuisance,'" Bloomberg News, 10/7/19 (quoting several complaints).

[115] Brendan Pierson, "Juul to Pay $462 Million to Six U.S. States, D.C. Over Youth Addiction Claims," Reuters, 4/12/23 (reporting that Juul settled with 45 states for more than $1 billion in addition to an earlier settlement of $1.7 billion of lawsuits by local government entities and individual consumers); *see also* Ananya Mariam Rajesh & Brendan Pierson, "Altria Agrees to $235 Mln Settlement to Resolve Juul-Related Cases," Reuters, 5/10/23 (reporting settlement including both claims by local governments and individuals).