



What A Nuisance!!

Public nuisance theories and insurance challenges

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Q: So, exactly why are public nuisance theories a thing? A: *BET THE COMPANY CLAIMS*



Amerisource, Cardinal Health, McKesson, agreed to pay **\$19.5 billion** for global resolution of opioid public nuisance claims pending against them. *Feb. 2022*



CVS to pay **\$4.9 billion** to resolve opioid public nuisance claims against it.



Walgreens to pay **\$4.79 billion** to resolve public nuisance opioid claims.



Kroger to pay **\$1.2 billion** *for opioid public nuisance claims.*



What is a public nuisance claim?

12th Century: *A criminal action* brought by the Crown for infringing on **public property**, public roads, public waterways.



What is a public nuisance claim?



16th Century: Tort was expanded to allow some “special damages” for private individuals whose rights were intertwined with a public right.



What is a public nuisance claim?

Modern Day:

- “Unreasonable interference **with a public right**”
- Public nuisance causes of action are incorporated into law via statutes, enforceable mostly by governments, or those with a “special injury.”
- Noise emanating from a bar causing neighbors to lose sleep is a public nuisance. Or sewage facility that creates noxious odors in surrounding neighborhood.
- ***WHY HAS PUBLIC NUISANCE ATTRACTED P's ATTYS?***



Can public nuisance theory replace products?

- **TOBACCO:** Public nuisance theories were used by governments. settlements, *but the legal theories were never tested.*



- **OPIOIDS:** Evolution of public nuisance torts continued . . .
 - 3,000 suits in national Multi-District Litigation
 - Claims brought by states, cities, counties
 - Defendants have been all players in opioid commercial chain
 - Public nuisance theories have evolved to allow massive claims to proceed without requirements of product ID or medical causation
 - And billions of dollars in settlements have begun to flow. . . .
 - *But so have legal rulings that test public nuisance as a mass tort theory.*

CREDIBILITY?

Can public nuisance theory replace products?

City of New Haven, Connecticut Superior: Dismissed opioid public nuisance claims of 37 municipalities against 25 drug companies.

These claims do not involve the righteous manifestation of a government vindicating the public good. These are claims for plaintiffs to gain money solely for themselves. If we are to safeguard a rational legal system, courts cannot endorse a wildly complex and ultimately bogus system that pretends to measure the indirect cause of harm to each municipality and fakes that it can mete out proportional money awards for it.



VIABILITY? CREDIBILITY?

Can public nuisance theory replace products?

Meanwhile, in West Virginia, Alaska, Georgia:

- **City of Huntington, S.D. W. Va:** Opioid defendants NOT LIABLE because public nuisance theories only apply to conduct that interferes with a public property right. Otherwise, floodgates would be open.
 - **W. Virginia state mass litigation panel:** Public nuisance claims are NOT LIMITED to property disputes, and the opioid distributors had indeed interfered with a public right involving the public's health.
 - **W. Va. Supreme:** In March, the Fourth Circuit Court of Appeals certified the *City of Huntington* issues to the West Virginia Supreme Court to determine the permissible scope of public nuisance.
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- ***State of Alaska v. Walgreen co. et al.***, March 4, 2024, Dismissed public nuisance as a viable theory for mass torts. And here is how that court explained it . . .



Can public nuisance theory replace products?

“Public nuisance doctrine historically has been both a vast and a vague area of law. Described 130 years ago as the ‘wilderness of law’ and a ‘legal garbage can’ full of vagueness, uncertainty and confusion,’ it led Justice Blackmun to proclaim that ‘one searches in vain . . . for anything resembling a principle in the common law of nuisance.’”

State of Alaska v. Walgreen co. et al., Order Granting Motion to Dismiss, March 4, 2024.

- *Publix* has now asked the opioid MDL to certify public nuisance to the Georgia Supreme Court.

But plaintiff’s attorneys have continued to pursue public nuisance theories as Robin will explain ...



The future of public nuisance? Climate change

- ***MORE THAN 2 DOZEN CASES PENDING!***
- *City of Chicago v. BP America, et al.*
 - Alleging that the defendant fossil fuel companies—Exxon Mobil, Shell, BP, ConocoPhillips, and Chevron—and the oil and gas industry’s largest trade association, the American Petroleum Institute, engaged in disinformation campaign to conceal the link between fossil fuel production and climate change.
- *State of Delaware v. Chevron, et al. (Ruling 1/9/24)*
 - Limits the scope of lawsuit to claims for injury to land directly owned by the State (not in public trust) from air pollution originating in Delaware;
 - Dismisses all claims alleging misrepresentations (with leave to amend);
 - Dismisses the State’s Delaware Consumer Fraud Act claim as time barred.
- *Aloha Petro v. Nat. Union Fire (D. Hawaii)* ([Hawaii Sup. Ct](#))
 - Whether “recklessness” can be an accident or “occurrence”?
 - Whether greenhouse gases are “pollutants”?
 - Hawaii Supreme Court has accepted certification



The future of public nuisance? Social media claims



- 200 school districts have brought public nuisance claims in Oakland against Facebook IG, Snapchat, Youtube, Tik Tok, Discord, alleging addictive apps damage teen health.
- 3 TYPES OF SUITS:
 - Individual bodily injury: Teen mental health claims; individual children harmed (not public nuisance, but part of same MDL)
 - School districts: Nuisance suits. School districts allege students have misbehaved and caused trouble bc of social media platforms (costs incurred like detention)
 - Attorney general complaints: Similar to school districts. Impacting general public. Caused all these problems and need to be abated.

The future of public nuisance? What's coming next?



- Cigarette butt claims?
- Obesity or sugar claims?
- Vaping? (JUUL \$1.7 billion settlement v. schools and others)
- Cannabis?
- Deepfakes/AI
- Counties now passing their own public nuisance laws to tag insurance money!
- **BUT ARE PUBLIC NUISANCE RISKS REALLY INSURABLE?**

Are public nuisance claims really insurable?

- Unlike traditional claims, public or social harms have no “unharmed insureds” to carry the damages of those harmed. i.e. COVID.
- A policyholder’s liability to the “public at large” is impossible to predict or calculate, particularly with no historic claim data.
- Claims handling? How are insurers to investigate causation? Compensate those injured? Mediate or settle the injuries?



Where do the policies address any public nuisance issues?

Where are the coverage issues?

Public nuisance claims are not claims seeking damages “because of bodily injury”

First, the Good News: Courts finding NO COVERAGE for public nuisance

- ***Cincinnati Ins. Co. v. Richie Enterprises LLC*, No. 1:12-CV-00186-JHM, 2014 WL 3513211 (W.D. Ky. 2014) (applying Kentucky law):** A Kentucky federal court held the insurer had no duty to defend an opioid distributor because the State of West Virginia’s claim did not depend on proof of injury to any individual. The underlying allegations of addiction and death “only explains and supports the claims of the actual harm complained of: **the economic loss** to the State of West Virginia.”
- ***Travelers v. Anda, Inc.*, 90 F. Supp. 3d 1308 (S.D. Fla. 2015) (applying Florida and New Jersey law):** The district court held that insurers had no duty to defend an opioid distributor because the State of West Virginia’s payments for medical care were for **its own economic losses**, rather than “for bodily injury” to its citizens.
- ***ACE Am. Ins. Co. v. Rite Aid Corp.*, 270 A.3d 239 (Del. Jan. 10, 2022) (applying Pennsylvania and Delaware law):** Delaware’s high court held that “bodily injury” coverage is limited to three categories of claims:
 1. Claims for compensation brought by the injured person.
 2. Claims to compensate an individual’s injury, brought ON BEHALF OF the injured person. Causation still must be proven.
 3. Claims to reimburse those that treated the injured person, when the existence and cause of the injury is at issue. i.e., a lien.
- ***Rite Aid*** was persuasive:
 - ***Acutiy*** (Ohio Supreme); ***Quest*** (6th Circuit); **CVS** (Delaware, and ongoing dispute)

Where are the coverage issues?

Public nuisance claims are not claims seeking damages “because of bodily injury”

Now, the bad news: The H.D. Smith Problem

- *Cincinnati Ins. Co. v. H.D. Smith, LLC*, 829 F.3d 771 (7th Cir. 2016) (applying Illinois law): The Seventh Circuit found that the State of West Virginia’s claim against an opioid distributor for reimbursement of healthcare costs alleged “damages because of bodily injury” and finding a duty to defend.

Public nuisance is like a parent seeking to recover medical expenses incurred to care for an injured child, reasoning that if the parent’s damages are because of the child’s “bodily injury,” the State’s damages are likewise because of injuries to its citizens.

- *Walmart v. ACE American et al.*, (Benton Cty, Ark)(Dec. 29, 2023)
 - Coverage turns on the “nature or type of liability faced by the policyholder in the underlying suit.”
 - The public nuisance claims seek compensation for monies spent to treat bodily injury, and therefore are the same nature of liability as a bodily injury claim.
 - Walmart’s global settlement agreement shows that the money is being used to pay for future care of bodily injuries
 - **PROBLEM:** Court focussed on THE NATURE OF DAMAGES not so much on the NATURE OF LIABILITY.





• ***DOES THE SIDE OF THE OCEAN MATTER?***

- Duty to defend mindset in U.S. vs. The “catastrpohic damages” mindset in London
- New York law is the only law that matters in the U.K. (??)
- Level or rate: impossible with a public nuisance risk
- Continuous appraisal: could be more advantageous than U.S. “expected and intended”

• ***SO WHAT IS THE INSURANCE INDUSTRY TO DO?***

- Support our policyholders in contesting public nuisance as a mass tort or product liability substitute
- To exclude or not to exclude?
- NOTE: focus on the underlying NATURE OF THE RISK, not on the damages at issue (think notice)



