

## What Evolution Of Public Nuisance Claims Means For Cos.

By **Laura Flahive Wu and Nicole Antoine** (October 25, 2021, 5:29 PM EDT)

Environmental, social and governance lawsuits against corporations have taken on increasing importance in recent years, spawning a variety of creative litigation strategies. Attention has increasingly turned to activist litigation by state attorneys general, consumers and shareholders.

Some of these cases assert novel theories of public nuisance. While many of these suits have been unsuccessful, they have been widely noted for the significant risks they pose to a variety of litigation targets.

But, although these suits have been the subject of renewed interest, they are not new. In fact, the nuisance claims cresting now are part of a wave that has been approaching for decades. What is new is the recent credence that courts have been giving to these novel nuisance claims.

The waters began to stir in the 1970s, when the authors of the Second Restatement of Torts published a new and broad definition of "public nuisance," which purported to expand the tort to cover "unreasonable interference with a right common to the general public."<sup>[1]</sup>

This definition was the result of a grudging compromise between William Prosser, then dean of the School of Law at the University of California, Berkeley, and practitioners who sought to expand public nuisance to address environmental concerns.<sup>[2]</sup>

Historically, the tort of public nuisance had been limited to claims involving a violation of a criminal statute.<sup>[3]</sup> The initial draft for the Second Restatement, proposed by Prosser, hewed closely to that traditional definition.<sup>[4]</sup>

Prosser's proposed definition was met with concern by certain members of the American Law Institute and environmental activists, who worried that a narrow definition grounded in criminal law would prevent lawsuits for environmental pollution from proceeding under a theory of public nuisance.<sup>[5]</sup> The Second Restatement ultimately adopted the much broader definition of the tort seen today — unmoored from criminal law.<sup>[6]</sup>

The shift in the Restatement definition was seen by many as a major departure from prior common-law



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definitions of "public nuisance," and one that would open a new frontier of potentially unlimited tort liability. Indeed, many courts recognized the potential for public nuisance to replace other traditional tort claims, and cautioned that limitations were necessary.

In its 1993 decision in *Tioga Public School District No. 15 of Williams County, State of North Dakota v. U.S. Gypsum Co.*, for example, the U.S. Court of Appeals for the Eighth Circuit warned that nuisance claims could "become a monster that would devour in one gulp the entire law of tort."<sup>[7]</sup>

Although public nuisance litigation has threatened corporate defendants at times, the wave has never reached the shore, perhaps because of this concern. Early attempts at using nuisance to litigate against pollution and address social ills either failed, or never reached the point at which a court had to decide whether public nuisance was a viable theory for the plaintiffs' claims.

One early test case in the California Court of Appeals, *Diamond v. General Motors Corp.*, involved smog in Los Angeles.<sup>[8]</sup> In 1971, residents sued dozens of companies, including car companies, whose activities allegedly contributed to pollution in Los Angeles. The court rejected the nuisance theory, citing emissions regulation as the appropriate mechanism for the plaintiffs' concerns.<sup>[9]</sup>

Attempts to mold other tort claims into public nuisance were also met with resistance by courts. One of the first attempts to use public nuisance for mass products liability claims was the tobacco litigation, which involved many states suing tobacco companies under a theory of public nuisance for expenses arising from their citizens' tobacco use.

All but one of those cases settled before the nuisance theory was tested, and the only court to consider the merits — the U.S. District Court for the Eastern District of Texas — rejected the plaintiffs' public nuisance theory in *State of Texas v. American Tobacco Co.* in 1997.<sup>[10]</sup> Similar attempts to extend public nuisance to asbestos-related harms<sup>[11]</sup> and firearms cases<sup>[12]</sup> were also largely rejected by courts.

Indeed, the Third Restatement of Torts recognized that public nuisance suits based on products that cause harm have been "rejected by most courts ... because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue."<sup>[13]</sup> These cases have newfound relevance, however, as courts now seem more inclined to entertain these claims.

In *People v. ConAgra Grocery Products Co.*, a watershed 2017 case, the California Court of Appeals endorsed a public nuisance framework for claims regarding residential exposure to lead-based paint brought on behalf of cities and counties in California.<sup>[14]</sup> The plaintiffs were awarded \$1.15 billion in abatement costs, without any proof of specific causation.<sup>[15]</sup>

And, in 2019, a judge in Oklahoma's District Court of Cleveland County ruled, in *State of Oklahoma v. Purdue Pharma LP et al.*, that Johnson & Johnson must pay hundreds of millions to compensate the state for the opioid epidemic.<sup>[16]</sup> The decision was based on an expansive reading of the state's public nuisance law, and represented an unprecedented expansion of public nuisance to pharmaceutical products liability.

These recent plaintiff successes are likely to encourage more claims, and more attempts to stretch public nuisance law. Such novel nuisance claims are particularly attractive to plaintiffs — and potentially problematic for corporate defendants — for several reasons.

First, they could be alleged against virtually any industry, product or activity regarding a variety of social

issues. As the Appellate Division of the New York Supreme Court noted in *People ex rel. Spitzer v. Sturm, Ruger & Co.* in 2003:

Such lawsuits could be leveled not merely against these defendants, but, well beyond them, against countless other types of commercial enterprises, in order to address a myriad of societal problems — real, perceived or imagined — regardless of the distance between the "causes" of the "problems" and their alleged consequences.[17]

Second, according to the plaintiffs bar, nuisance claims in certain jurisdictions may be subject to a relaxed causation requirement.[18]

If successful, the plaintiffs bar's nuisance theory could remake American tort law, undermining causation standards, and opening the floodgates to litigation seeking to hold corporate defendants liable for everything from addiction to climate change.

Particularly if there continue to be large settlements and/or verdicts for plaintiffs, new nuisance litigations will follow. Corporations across a large range of industries that may have never considered themselves subject to mass tort risks should take notice.

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[1] Restatement (Second) of Torts § 821B (1971).

[2] See Donald G. Gifford, *Public Nuisance As A Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 806–07 (2003).

[3] *Id.* at 806.

[4] *Id.*

[5] Thomas W. Merrill, *Is Public Nuisance A Tort?*, 4 J. Tort L. 1, 25 (2011).

[6] Restatement (Second) of Torts § 821B (1971).

[7] *Tioga Pub. Sch. Dist. No. 15 of Williams Cty., State of N.D. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

[8] See *Diamond v. General Motors Corp*, 97 Cal. Rptr. 639 (Ct. App. 1971).

[9] See *id.* at 641.

[10] See *McClendon v. Georgia Dep't of Cmty. Health*, 261 F.3d 1252, 1253 (11th Cir. 2001) (describing master settlement agreement for the tobacco cases); *State of Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997) (rejecting the state of Texas's public nuisance theory).

[11] See *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986).

[12] See *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (2004).

[13] Restatement (Third) of Torts: Liability for Economic Harm § 8, cmt. g.

[14] See *People v. ConAgra Grocery Prod. Co.*, 17 Cal. App. 5th 51, 65, 227 Cal. Rptr. 3d 499, 514 (2017).

[15] *Id.*

[16] See *State of Oklahoma v. Purdue Pharma LP et al.*, Case No. CJ-2017-816 (Dist. Ct. Cleveland Cty. Aug. 26, 2019).

[17] *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 105, 761 N.Y.S.2d 192, 203 (2003).

[18] See, e.g., *City of Chicago v. Am. Cyanamid Co.*, 355 Ill. App. 3d 209, 219, 823 N.E.2d 126, 135 (2005) (describing and rejecting the plaintiffs' relaxed theory of causation).