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# Court Rulings Put Damper on Expansive Reach of Public Nuisance Liability

Plaintiffs of all stripes have for the past several years advanced in more than 3,000 lawsuits nationwide a novel legal theory that the pharmaceutical manufacturers, distributors, and retail pharmacies in the opioid product supply chain have created a “public nuisance.”<sup>1</sup> The monetary relief sought by these opioid plaintiffs includes the billions of dollars in projected costs of “public nuisance abatement” in the form of health care, treatment facilities, and other community services.

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Recent rulings by the Supreme Court of Oklahoma and a California trial court, however, have established a counterpoint to these public nuisance claims. Earlier this month, an Orange County Superior Court judge held, following a three-month bench trial, that public nuisance claims brought by four California counties were without merit.<sup>2</sup> Just one week later, the high court of Oklahoma overturned a \$465 million verdict against Janssen Pharmaceuticals, a subsidiary of Johnson & Johnson, rejecting plaintiffs’ expansive theory of public nuisance liability and foreclosing their pursuit of damages under the applicable state statute.<sup>3</sup>

While both courts acknowledged the damaging ramifications of widespread opioid misuse,<sup>4</sup> they warned against the application of public nuisance law to the manufacturers and suppliers of legal products – including prescription opioids. The Oklahoma Supreme Court explained that “[a]pplying the nuisance statutes to lawful products as [plaintiffs] request 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.”<sup>5</sup>

Judge Peter J. Wilson of the Orange County Superior Court noted that the plaintiffs had not presented any evidence that the defendant drug companies’ marketing caused medically inappropriate prescriptions.<sup>6</sup> That is important, Judge Wilson explained, because the U.S. Food and Drug Administration and the state of California have approved the prescription and use of opioid pain relievers despite the risks of addiction, in light of those products’ medical benefits.<sup>7</sup>

“[E]ven if any of the marketing which caused an increase in the number, dose or duration of opioid prescriptions *did* include false or misleading marketing, any adverse downstream consequences flowing from *medically appropriate* prescriptions cannot constitute an actionable public nuisance,” Judge Wilson wrote in a 41-page tentative decision issued on November 1. “That is so because, as the Federal government and the California Legislature have already determined, and as this Court finds, the social utility of medically appropriate prescriptions outweighs the gravity of the harm inflicted by them and so is not ‘unreasonable’, or therefore, enjoined.”<sup>8</sup> He distinguished the plaintiffs’ main nuisance case, involving lead paint, on the grounds that opioid medications have an acknowledged appropriate use.<sup>9</sup>

<sup>1</sup> See Rocky Tsai & Andrew O’Connor et al., *Risk Assessments Need to Account for Public Nuisance Litigation*, Ropes & Gray, <https://www.ropesgray.com/en/newsroom/alerts/2020/10/Risk-Assessments-Need-to-Account-for-Public-Nuisance-Litigation> (last visited Nov. 18, 2021).

<sup>2</sup> *California v. Purdue Pharma L.P.*, No. 30-2014-00725287-CU-BT-CXC (Cal Super. Ct. tentative decision filed Nov. 1, 2021).

<sup>3</sup> *Oklahoma v. Johnson & Johnson*, No. 118474 (Okla. Nov. 9, 2021).

<sup>4</sup> See, e.g., *California*, *supra* note 2, at 2; *Oklahoma*, *supra* note 3, at 3.

<sup>5</sup> *Oklahoma*, *supra* note 3, at 13.

<sup>6</sup> *California*, *supra* note 2, at 14-15.

<sup>7</sup> *California*, *supra* note 2, at 10-13.

<sup>8</sup> *California*, *supra* note 2, at 14.

<sup>9</sup> *Id.* at 17.

In a similar vein, the Oklahoma high court emphasized: “What we cannot ignore is that improper use of prescription opioids led to many of these deaths; few deaths occurred when individuals used pharmaceutical opioids as prescribed. We also cannot disregard that chronic pain affects millions of Americans. It is a persistent and costly health condition, and opioids are currently a vital option for pain. The [FDA] has endorsed properly managed medical use of opioids (taken as prescribed) as safe, effective pain management, and rarely addictive.”<sup>10</sup>

The underlying themes of public nuisance law resonate particularly strongly today, as communities, businesses, and individuals continue to grapple with the repercussions of COVID-19.<sup>11</sup> In a world where institutions of all kinds (e.g., state and local governments, educational institutions, and private businesses) still struggle with the effects and consequences of COVID, notwithstanding these recent decisions, litigants may continue to attempt to invoke the public nuisance doctrine as a legal response to the widespread public health issues cause by COVID. These recent decisions, however, might provide a roadmap to a successful defense for any defendant that finds itself on the receiving end of one of these claims.<sup>12</sup>

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<sup>10</sup> *Oklahoma*, *supra* note 3, at 3.

<sup>11</sup> See Rocky Tsai & Andrew O’Connor et al., *Practical Guidance: Covid-19 Public Nuisance Claims*, Bloomberg Law, <https://www.bloomberglaw.com/product/health/document/X1DMTITG000000> (last visited Nov. 12, 2021).

<sup>12</sup> In her concurrence in *Oklahoma v. Johnson & Johnson*, Justice Dana Kuehn suggested that, without reasonable limitations, public nuisance could become “the newest fictional shape-shifting monster.” *Oklahoma v. Johnson & Johnson*, No. 118474, slip. op. at 3 (Okla. Nov. 9, 2021) (Kuehn, J., concurring). Noting that other tort laws exist to make injured persons whole, she cautioned against “creative” applications of public nuisance law. *Id.* “There is a reason why all things are as they are,” she wrote, quoting Bram Stoker’s *Dracula*.