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March 2021

Abating Economic Disaster: A Call to Reform Oklahoma's Public Nuisance Statute

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In 2019 a state district court ordered Johnson and Johnson to pay the state of Oklahoma $572 million. The court entered this judgment without any meaningful finding of causation or actual damages. It did so in violation of numerous legal norms, including proper notice, the ban on *ex post facto* laws, and the separation of powers.

While it appears the drug makers in question did violate state and federal laws regarding fraud and misleading advertising, those causes of action were abandoned in favor of public nuisance. If Johnson and Johnson was found liable for fraud there would not be a crisis, but the state would not have a judgment ordering $572 million in pork-barrel spending, and the state's outside counsel would not stand to recover enormous contingency fees. The problem comes from the unjust way the court applied public nuisance law. It appears that if a product becomes disfavored, that unpopularity alone could become grounds for future liability.

Unless the Oklahoma Supreme Court overrules the district court, or the legislature aggressively pursues public nuisance reform, Oklahoma may soon regret the chain of events just described. Out-of-state companies may refuse to sell into Oklahoma, fearing they will be next. Companies already in the state may flee to greener pastures. And progressive states may use Oklahoma's precedent to prosecute fossil fuel producers.

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Public nuisance is an ancient cause of action - at least 900 years old. It was created in an era when the bureaucratic regulation of every aspect of life was unthinkable, not only because it creates undue interference in the lives of citizen, but because it was logistically impossible. Public nuisance was a way to let courts step in and order someone to clean up a mess they had created or allowed to be created. Because not every eventuality could be foreseen, it could be used to combat a wide array of harms. The vague and nearly unlimited class of actions to which it could apply could have made it a doctrine ripe for abuse. With this in mind, courts wisely subjected it to several restrictions.

First, it was almost always used in connection with land use. Usually this was the misuse of the defendant's land, or two incompatible and conflicting uses of land. Common applications were ditches created when an uphill property was irrigated improperly, causing a ditch to erode a public road, or a downhill landowner allowing his stream to become clogged with plants or debris, causing the uphill road to flood.

Second, the doctrine could only be applied when public rights were infringed. Initially only the king could invoke it. Later his lawful agents could stand in his place. Public rights are rights held in common; multiple private rights do not add up to a public right.

The third and most important restriction was the remedy available: courts could order a defendant to abate the nuisance. This meant *only* that a defendant would have to repair the damage they had allowed, and take measures to ensure it would not happen again. Damages to compensate the public for their trouble, were not allowed. This restriction is a great impediment to abuse. If no money is going to change hands, then public nuisance actions will tend to be reserved to its proper role. If the state can get money, however, the temptation to find disfavored industries with deep pockets may prove too much for an ambitious attorney general or a struggling county commission or city council to resist.

Although they developed in parallel over the centuries, public nuisance can be contrasted with a private nuisance, which

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follows more traditional tort patterns. A private nuisance occurs when one person, or a few people individually, are unreasonably harmed as a result of one person's actions. Both public and private nuisance relate to land use. The key element of a private nuisance claim is that the defendant unreasonably interfered with the plaintiff's right to the quiet enjoyment of his property. Private nuisance, as the name implies, can be brought by private parties. And if a private plaintiff proves his nuisance claims, he can recover damages in addition to an injunction against further nuisance.

Public nuisance is an inappropriate doctrine for going after products manufacturers.

Oklahoma is on the verge of inflicting a serious wound on itself. It has allowed the previously mentioned safeguards to erode. In 2019, a Cleveland County District Court held that Johnson and Johnson was liable for creating a public nuisance related to opioid drug manufacture and sales.[1] Public nuisance is an inappropriate doctrine for going after products manufacturers. Products liability, fraud, and misleading advertising are all more appropriate causes of action. But none of them results in a windfall for the state. Each of the limitations on public nuisance listed above was ignored. There is no connection to land use; the court contends that the use of personal residences for training amounts to enough land use to invoke public nuisance, but it misunderstands the history of that connection. Johnson and Johnson may have infringed multiple private rights, but there is no public right at issue. The remedy the court prescribed is one that has traditionally been unavailable in public nuisance cases, and of a kind that ought to be reserved for the legislative branch.[2]

The case is currently on appeal to the Oklahoma Supreme Court. If the court fails to overturn this dangerous precedent, the legislature must make revising the law a top priority. Failure to do so could open every business operating in Oklahoma to massive liability for acts previously considered legal and responsible. This would not only disrupt the companies that would inevitably be sued, it would create a hostile environment for all business operating in Oklahoma. This could turn Oklahoma into an economic wasteland.

It should be noted at the outset that, if the district court's finding of facts are taken as true, Johnson and Johnson is legally and morally culpable for misleading the public about the risk of addiction associated with opioids and should be held responsible. However, the misuse of a public nuisance cause of action sets a precedent that the state cannot afford. Fraud and false advertising are distinct from public nuisance for a reason. The acts that can lead to liability or conviction under these laws have firmly established boundaries, while public nuisance is considerably less well-defined.[3]

The only thing that has kept public nuisance from dominating the tort landscape and irreparably disrupting commerce is that it has always been limited in its application and remedy. Since the district court's ruling, those safeguards are a single appeal away from annihilation. If merely selling a product in Oklahoma is enough to open liability under public nuisance, Oklahomans may be cut off from sellers operating outside our borders. We may also see a significant number of businesses flee the state, leading to markedly increased unemployment.

Scholars have long warned of the perils of public nuisance run amok. A federal court once observed that, if not kept in check, public nuisance could become the "monster that would devour in one gulp the entire law of tort."[4] Since the district court's decision, the parade of horribles, once speculative and distant, is lining up in the streets. The band is warming up, and the grotesques are donning their masks. Could a restaurant that followed every Covid-19 requirement find itself liable for a public nuisance if contact tracing revealed that, despite every due precaution, it was a super-spreader of the virus? The Johnson and Johnson opinion offers no limiting principle to prevent such a verdict.

Gun makers, who have federal protection from civil liability, cannot be held to account for the insanity of their end buyers, or those who steal from the end buyers, but what of carmakers? There have been several instances of terrorists and madmen intentionally driving into crowds. When does such misuse of an automobile rise to the level of turning vehicles generally into a public nuisance? Until matters are clarified by Oklahoma's high court or its legislature, it would seem the answer is any time the attorney general and a district court judge agree that the public is negatively impacted. Fault and causation appear to be afterthoughts.

The Johnson and Johnson decision treats public nuisance as a super-tort, one that takes the power of traditional public nuisance and ignores all the safeguards.[5] It requires almost no evidence; the plaintiff does not have to show that the defendant knowingly or even negligently allowed the nuisance to happen. Nor is proximate cause, the legal concept of who is at fault, given due consideration. Instead, "but-for" causation is seemingly sufficient. Every action in a causal chain that was needed for a given act to occur is but-for causation, but only a few of those actions are legally relevant. You would not have been in a car accident on your way to work if you had called in sick. Your commitment to your job is one of many but-for causes of the accident, but your negligence in driving too fast while looking at your phone was the legal cause of the wreck.

Instead of traditional tort causation analysis, a sort of strict liability is imposed under public nuisance reasoning: did the nuisance occur, and can the defendant conceivably be blamed? If the answer to both questions is yes, the court will impose on the defendant a complex quasi-regulatory scheme that bears little resemblance to historically available remedies.[6]

Oklahoma's Public Nuisance Statute and the *Johnson and Johnson* Decision

Oklahoma has codified public nuisance in statute, but the concept first arose from common law.[7] It was developed as a means for courts to take corrective action when a right common to the public was being infringed. Traditionally, a public nuisance was found when the defendant maintained a condition which caused an *illegal* (sometimes formulated as unreasonable) interference with a *public* right, the *proximate cause* of which was under the *control* of the defendant. The proper *remedies* were abatement, and injunction.[8] There was also a connection with the

use of land, and the nuisance generally had to be of an *ongoing* nature.

That last piece is crucial. Courts could order whomever was maintaining the interference to remove or "abate" it. Courts could also issue injunctions, barring the defendant from allowing the same interference to recur. They could not order monetary damages, or create a regulatory framework.[9]

In truth, public nuisance legal action has always operated somewhere outside the traditional norms of due process, but there were enough limitations built in to prevent abuse that this was not a cause of great concern. Public nuisance was linked to the ownership of land, and was usually connected to public rights-of-way as well.[10] It was limited to injuries to collective public rights like the right to travel on public roads or navigable waterways. Since it was a public right, only a public plaintiff, that is, the legal representative of the state, could bring the action. And the remedies were limited to setting things right and not being allowed to create the same harm again.

For instance, a landowner or tenant might irrigate their fields in such a way that the road between their farm and their neighbor's farm is eroded. Causation is relatively straightforward, since it's easy to follow the stream of water to its source. The landowner's state of mind is irrelevant, he is ordered to restore the road and divert the stream; he is not being punished. Since it is his land use that led to the damage, it is reasonable for him to make repairs and prevent further damage. And there is not much opportunity or incentive to abuse the system. It is clear to all that the road was damaged, that the uphill landowner could fix the underlying problem, and the sheriff asked the court to require the repair. No one had anything to gain by seeking out minor infractions and bringing a public nuisance action, since there was no money in it.

Public Right

The public nuisance action was reserved for interference with *common* or *public* rights. These most often involved free movement like roads or waterways. Multiple instances of interference with private rights did not make a private nuisance public. It was usually connected in some way with the use of land.[11] The paradigmatic example is a ditch running across a public road, or an obstruction of a navigable waterway. The public holds a corporate right to free travel on public roadways - that is, everyone has the same right to use the public way. Polluting a public park is a public nuisance - everyone had the right to use the park, and was prevented from doing so. Even if only one person would have visited the park, everyone's right to do so was harmed.[12] In contrast, the same pollution on a single private yard is a private nuisance. If that pollution spreads to 100 private yards without ever contaminating public property, the nuisance is still private; there are multiple private injuries. Multiple invasions of private rights may lead to a class action, but they do not take on the character of a public right. The difference is qualitative, not quantitative. The right must be one held in common.[13]

The district court declared that Johnson and Johnson created a public nuisance because the claimed harm affects a large number of people.[14] The court failed to follow through with that analysis, never asking whether the crisis is public in character, or whether it merely impacts the private rights of numerous individuals.

The exact language of the public nuisance statute could, if read casually, be interpreted in line with the district court's holding, "A public nuisance is 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."[15] However, in light of the history of the doctrine, especially at the time the statute was passed, "affects at the same time" ought to be read as invoking interference with a public right. Drug manufacturers' contribution to the opioid crisis is better characterized as multiple interferences with a private right.

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While public nuisance has at times included interference with public morals, like saloons and brothels, it would be disingenuous to say that the legal sale of prescription drugs falls into that category. To regulate and control the release of such drugs and then declare their very existence is an illegal detriment to the community morals would itself be immoral. What Johnson and Johnson are actually guilty of, taking as true the district court's findings of fact, is fraudulent advertising. This is undoubtedly an interference with a private right, as evidenced by the fact that the tort of fraud is a private claim. Fraudulent advertising is also a criminal misdemeanor, so the state is not powerless to prevent these acts. If sterner penalties are desirable, it falls to the legislature to make the necessary changes. Courts are not empowered to take matters into their own hands by expanding public nuisance beyond recognition.

Proximate Cause

One element common to all torts is proximate causation: the plaintiff must show that the defendant is the legal cause of the harm claimed. Public nuisance is no exception, though the claim acts as something of a strict liability. If there is proof of an interference with a public right, and proof that the defendant is unreasonably causing that harm through his conduct or omission, he will be liable to abate the condition causing the interference. His state of mind is not at issue, and the plaintiff need not prove negligence or even knowledge of the condition.

Still, the weight of evidence must demonstrate that the defendant's conduct is indeed the legal cause of the harm. If a building is set on fire using gasoline as a propellant, we blame the arsonist, not the oil producers.[16]

Ruling on the applicability of public nuisance to the legal sale of firearms that work as intended, a federal court of appeals held that,

> The causal chain is simply too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim. In the initial steps, the manufacturers produce lawful handguns and make lawful sales to federally licensed gun distributors, who

> in turn lawfully sell these handguns to federally licensed dealers. Further down the chain, independent third parties, over whom the manufacturers have no control, divert handguns to unauthorized owners and criminal use.[17]

The causal chain for opioids is similarly attenuated. In the initial steps, the manufacturers produce lawful, highly regulated and tested opioids and make lawful sales to state licensed pharmacies, who in turn lawfully sell those drugs to patients who have a prescription from a state licensed physician. Further down the chain, independent third parties, over whom the drug makers have no control, misuse the drugs, or sell to other third parties who misuse the drugs. Doctors who operate pill mills are much closer in the chain of causality than the drug makers.

Since the district court's decision hinged on a finding that false advertising was the challenged conduct, there ought to be some consideration of how much that conduct contributed to the opioid crisis. But such causation is impossible to trace, or even to accurately estimate. It may be the case that no one would have become addicted to opioids without Johnson and Johnson's false advertising. It may be that every person who became addicted to opioids would have become addicted regardless of the defendant's actions. It may be that some people who became addicted to opioids would have become addicted to even more harmful drugs. Any suit alleging such harms directly would have had to grapple with these possibilities. But the court took the vague causation requirements of public nuisance as license to ignore the issue completely.

Control

A key element of public nuisance, one that distinguishes it from products liability, is that the defendant must have control over the instrumentality of the nuisance.[18] Control is wrapped up with causation. Once a product is sold and title is transferred to the end user, the manufacturer does not have physical or legal control. A manufacturer who has sold a product, can no longer control how it is used. It is unreasonable to require them to abate the use of the product once it is out of their hands.

The Seventh Circuit, in affirming that the manufacturer of PCBs could not be held liable for their improper disposal by an end user noted that, "since the pleadings do not set forth facts from which it could be concluded that Monsanto retained the right to control the PCBs beyond the point of sale to Westinghouse, we agree with the district court that Monsanto cannot be held liable on a nuisance theory."[19] It elaborated that, "there is no basis upon which to conclude that Monsanto — as opposed to Westinghouse — has invaded the City's interest in the enjoyment of land."[20]

Control also goes to the remedy: since products manufacturers generally do not control the instrumentalities of the nuisance at the time of suit, they are unable to abate the nuisance.[21] The sellers of asbestos and lead paint did not exercise such control over their products at the time they caused their respective harms, and, multiple courts concluded that the square peg of products liability could not be crammed into the round hole of public nuisance.[22] "Furthermore, as in most products liability actions, the defendants are no longer in control of the instrument of the nuisance, further attenuating the application of nuisance doctrine to products. In each of the Pennsylvania public nuisance cases discussed above, the defendants controlled the source of the nuisance, whether a mine with acid drainage, ownership of the fireworks, ownership and possession of dogs on a residential street, or a dilapidated building."[23]

Like other products manufacturers, opioid makers do not control their product once it is sold to a third party pharmaceutical retailer. There are strict legal limitations on who may buy opioid products from those pharmacies, namely only a patient who has a prescription from a doctor. To attribute to Johnson and Johnson anything done with the drugs after they arrive at the pharmacy is a miscarriage of justice. Even if they were somehow at fault, their lack of control means they can't abate the nuisance. Like toothpaste out of a tube, once a drug hits the streets it is impossible to get it back in again.

Unreasonable or Illegal

The final element of liability for a public nuisance is that the interference with the public right must be one that is illegal or unreasonable. Each of these words has been used over the centuries. Oklahoma, when creating its statute, chose illegal.[24] This tracks with the more common formulation. One of the leading tort scholars said that "public nuisance is always a crime."[25] Blackstone referred to public nuisance as "public wrongs, or crimes and misdemeanors."[26] And a contemporary scholar and practitioner notes that two categories of conduct may lead to public nuisance liability: "(i) unlawful, intentional acts and (ii) lawful conduct involving conflicting uses of property."[27]

The district court did find that Johnson and Johnson acted illegally. Operating as finder of fact, the court concluded that Johnson and Johnson knowingly engaged in false advertising of the worst kind: downplaying the addictive properties of opioids and instead assuring prescribers that they were a safe alternative. But this seems immaterial to the court's finding of liability. Neither the criminal code nor the Oklahoma Consumer Protection Act is invoked when the court declares that: "the challenged conduct here is Defendants' misleading marketing and promotion of opioids." This conduct is well outside the bounds of what can constitute a public nuisance. Yet, two sentences later the court concludes, without any analysis, that, "The greater weight of evidence shows that Defendants did, in fact, engage in such false and misleading marketing and the law is clear that such conduct qualifies as the kind of act or omission capable of sustaining liability under Oklahoma's nuisance law." Again, the court does not invoke criminal or civil law in declaring Johnson and Johnson liable for the misuse of opioids by thousands of Oklahomans. By the court's logic, any crime that harms a large number of people is a public nuisance. This can lead to the state recovering money even when it is not the real party harmed. It can lead to liability based on a lowered burden of proof. And it can lead to liability

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beyond the limits of time or penalty allowed under more proper causes of action.

Fraudulent advertising is a misdemeanor, with a penalty up to $50 and twenty days in jail. The attorney general is empowered, under Oklahoma's Consumer Protection Act, to investigate and prosecute fraudulent advertising. He may prosecute, on behalf of an injured party, and recover damages for that injured party. He may also seek an injunction against repeated violations. He may not, however, recover damages on behalf of the state, or seek a regulatory scheme.

If any crime can be a public nuisance, why list specific causes of action, and in particular, why limit recovery? Public nuisance was intended to have clear limits.

Remedies

As currently interpreted in the Johnson and Johnson case, Oklahoma's public nuisance law has no limits. If a rash of injuries occurred from people beating each other with hammers or falling off ladders, there is nothing in law to protect hardware stores, or the manufacturers of such products from being held liable under such a broad interpretation of public nuisance. If an attorney general decides to press its case that such simple tools constitute a public nuisance, a judge relying too much on recent precedent and too little on the historical meaning and limitations of the doctrine could conceivably find for the state and order the offending corporation to "abate" the nuisance of dangerous tools.

The remedy the district court prescribed is also improper. The court took testimony from experts, including "the primary architect of the state's abatement plan," who had previously determined that the nuisance "can be and must be abated."[28] The plan was made in consultation with interested parties and state agencies. The state's abatement plan, which the court enacted without modification, includes universal screening programs and training for medical practitioners on how to avoid future prescription drug abuse.

The plan also includes line items much more tenuously connected to abatement. Examples include additional employees for state licensing boards to help their members deal with addiction, a pain management program for SoonerCare members, and "services, programs, and personnel," for the Office of the Attorney General.[29] The court assumes that Johnson and Johnson should bear the whole cost of abating the opioid crisis without analyzing the portion of the crisis attributable to Johnson and Johnson. Other opioid makers settled out of court, and surely some portion of the crisis would have occurred absent *any* of the illegal and unreasonable actions of the drug makers.

While the court describes its order as an abatement plan, it resembles nothing so much as a regulatory scheme and damages.[30] This type of policymaking is the exclusive domain of the legislative branch. Even if it were merely actual damages, the cost of the actual harm done, which is a remedy normally within a court's power, it would still be incorrect in this instance.

Abatement means exactly what it sounds like: stopping something from continuing. In this case it means stopping an ongoing harm to the public. When a landowner creates a ditch across a public road, or blocks a navigable waterway, the court can order him to remove the obstacle. Injunction - an order by the court that the defendant cease the activity creating the public nuisance is also warranted, especially in instances where the nuisance is likely to repeat. But an order to repay the state for the cost of abating the nuisance itself is not the same as an order to abate the nuisance.[31] Repayment of accrued or expected costs is the very definition of actual damages, and that remedy has not traditionally been available to governments suing under a public nuisance cause of action.

Oklahoma's nuisance statutes distinguish between abatement and damages. Compare the terms "abatement" and "damages" in Section 6: "The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence."[32] The second half of this sentence refers to the ability of someone who had a "special harm" far greater than the general public, to sue and win private nuisance damages for a harm that would otherwise be a public nuisance. This reservation was important since under most circumstances only a government official could bring a public nuisance claim.

Connection to Land Use

Because of the low burden of proof for causation, the strict liability nature of the action, the lack of notice in most instance, and the broad class of actions which could otherwise fit within it, the action traditionally has been limited in its application to instances where the nuisance arises out of, or interferes with the use of real property.[33]

Oklahoma's previous applications of public nuisance conform to this requirement. The cases can be classified into four general categories: pollution of land or water, criminal prosecution for violation of an ordinance written pursuant to a municipality's power to define and outlaw *per se* nuisances (which satisfies the norms of notice and due process in ways non-criminal public nuisance suits do not), abating the maintenance of a condition dangerous to neighboring properties, and the use of real property to maintain a condition abhorrent to the public morals.

The land use requirement is implicit in statute: "The repeated use of any real property or structure thereon to commit a felony violation of the Oklahoma Uniform Controlled Dangerous Substances Act may constitute a public nuisance."[34] "It shall be unlawful for any person to *maintain* a slaughterhouse within less than one half mile of any tract of land platted into lots and blocks as an addition to any town or city..." "It shall be unlawful for any person, firm, corporation or association to *lay out, establish, or use* for burial purposes any cemetery, graveyard or burial grounds less than three fourths of one mile from the incorporated line of any city..."[35] (Emphasis added).

The connection to land also relates to the control requirement. If the misuse of land owned, leased or otherwise used by a defendant is the cause of a public nuisance, they will have control over the source of the interference, and will be able to abate it. When public nuisance is applied to products liability, that element of control is absent.

The district court specifically disclaims any such connection between Oklahoma's statute and land use. "The plain text of the statute does not limit public nuisances to those that affect property." This may be true for the casual reader. But for an attorney versed in the law of public nuisance, such a connection would be so clear that it would hardly need mentioning. It would be akin to saying that because the fifth amendment does not say that a grand jury must be composed of citizens, that a dog may serve on a grand jury.

The court doubles down on its misreading of the statute in its historical context when it imputes the use of real and personal property to the defendants. Nowhere does the court say that the defendant owned or controlled real property in Oklahoma. Instead the court seems to understand that the use of anyone's property of any kind is enough to find a public nuisance. Training occurring in an employee's home lacks the nexus to the use of land required in past cases.

Policy Problems

The current interpretation of Oklahoma's public nuisance does more than merely misapply the law. It subverts justice. A mere change in the elements of a cause of action is not, in itself, a bad thing. It may be that the changes are for the better. That is not the case here. The current interpretation of the public nuisance statute flies in the face of several core legal principles. They are too many to list in detail here, but they all amount to an impairment of legal certainty.

Unless it is bounded by the traditional lines of public nuisance, the statute's vague language fails to provide proper notice to citizens as to what behavior is acceptable. Since courts only review actions after their occurrence, the judicially imposed regulatory scheme could fairly be said to be an *ex post facto* law, which is barred by the constitutions of both Oklahoma and the United States. Since the legislature ought to be the one prescribing such a scheme, the judgment is an assault on the separation of powers.

Since the drug industry is regulated by the federal government, any violation of those regulations should be prosecuted as such. It was reasonable for drug makers to assume that compliance with federal regulations would shield them from liability, and violation of those regulations would be prosecuted under those regulations. The federal laws might occupy the field, precluding judgements such as this. And while the court did find that the drug makers failed to comply with every regulation, it did not give the impression that such a finding was necessary for liability to attach. There was no attempt to connect the misleading advertising with the individuals whose addictions are at the heart of the crisis. The decision also glossed over the issue of causation - there was no due consideration of the chain of causality, meaning a company could be found liable for abating a nuisance of which they are not the legal cause.

In sum, nearly every protection we have erected against the unbridled power of the state was swept aside in a single flawed opinion. The injustice inherent in these breaches of ancient legal norms and notions of fair play speaks for itself. And while philosophical notions of justice bind the republic together, practical considerations move the gears of the legislative machine. These too will abound if nothing is done to rein in public nuisance law. Two of these practical problems bear mentioning here.

Uncertainty Leading Companies to Leave Oklahoma

Where legal certainty is impaired, corporate legal council will recommend caution to their clients. With the Johnson and Johnson decision, legal certainty is obliterated. There is no clear principle evident from the district court's opinion that can guide companies toward eliminating their liability. The only principle in operation is that one should not become a manufacturer of products that will someday be disfavored (an unknowable). While the district court found that Johnson and Johnson acted illegally, that did not appear to be prerequisite to a finding of liability. There was no warning that such a verdict might be levied at the time the products were distributed. If the Oklahoma Supreme Court lets the verdict stand, Oklahoma should expect to see businesses avoid selling into the state. Businesses who are already here might flee to greener pastures.

Other states will use Oklahoma precedent to justify coming after fossil fuels.

The one industry in Oklahoma that seems safe from this decision is oil and gas. The Attorney General is elected, and voters see fossil fuels as the lifeblood of the state. But other states hold less esteem for that industry. And state courts frequently follow each other, especially when encountering new doctrines or novel applications of ancient causes of action. If this decision stands, it will almost certainly be cited in a west coast state court. It will be given extra weight because it comes from the home state of many oil companies.

Legislative Recommendations

Restore Traditional Limits

The best thing the legislature could do would be to fully restore the traditional limits on public nuisance actions. It could specify that the nuisance be connected to the use of land, that the defendant have control over the instrumentality of the nuisance, and that the public character of the right interfered with is more than just multiple private rights. And most importantly, it could reaffirm the traditional norm that abatement does not include the recovery of damages or costs by a governmental entity.

Define Abatement to Exclude Monetary Recovery

If the legislature only does one thing, it should bar damages and other monetary payment as part of an abatement. While the possibility of injustice is still present without more sweeping clarification, the potential damage would be mitigated almost to zero if damages were unavailable. The state, counties, and cities would not be able to hire outside counsel on a contingency bases, because there is no monetary award to divvy up. This would mean that only ongoing harms that could actually be fixed would be worthy of the state's time. In a perfect world where the legislature had unlimited time and attention, the other issues would be well worth fixing, but in the real world where committees have mere weeks to digest a multitude of bills, removing monetary incentive from the equation would be more than good enough.

If the legislature only does one thing, it should bar damages and other monetary payment as part of an abatement.

Conclusion

Oklahoma's courts have misapplied the public nuisance statute. It now goes well beyond its traditional limits. As applied, the statute flies in the face of due process and notice. If the Oklahoma Supreme Court does not fix the problem, the legislature must act: justice and our economic security demand it.

End Notes

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1 *State of Oklahoma, ex. rel. Hunter v. Purdue Pharma, L.P., et. al.,* (Okla. Dist. Ct. Aug. 26, 2019), Case No. CJ-2017-816, https://nondoc-wpengine.netdna-ssl.com/wp-content/uploads/2019/08/Balkman-Opioid-Judgment.pdf.

2 brief amici curiae of the 1889 institute, andrew c. spiropoulos, and the oklahoma council of public affairs in support of defendant-appellant, https://1889institute.org/amicus-brief-to-the-supreme-court-of-the-united-states-in-the-case-of-oklahoma-v-johnsonjohnson/.

3 "As evidenced by this history and the occasional divergences from traditional public nuisance theory, there appears to be a "bewilderment," as a Michigan appellate court observed, among some legal scholars and jurists concerning the exact boundaries of public nuisance theory."

Victor E. Schwartz and Phil Goldberg, "The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort," *Washburn Law Journal*, Vol. 45, (2005-2006): 541, 561, https://contentdm.washburnlaw.edu/digital/collection/wlj/id/5546.

4 *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum*, 984 F.2d 915, 921 (8th Cir. 1993), https://law.justia.com/cases/federal/appellate-courts/F2/984/915/356238/.

5 "The reason personal injury lawyers have been lured by the elixir of public nuisance theory is because, if successful, it acts as a 'super tort.' As with products liability, public nuisance theory offers strict liability. But, products liability has well-defined boundaries, such as requiring the harm to be caused by a defective product. By filing claims under public nuisance theory, personal injury lawyers hope to expand liability for harm caused by products by avoiding a number of time-tested products liability rules, such as defect, the statute of limitation, and the rule against recovery for purely economic loss."

Schwartz and Goldberg, "The Law of Public Nuisance," at 552.

6 Brief Amici Curiae of the 1889 Institute, et al.

7 50 O.S. §1 et seq. (2020), https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKST50&level=1.

8 Victor E. Schwartz, Phil Goldberg, and Corey Schaecher, "Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law," *Oklahoma Law Review*, Volume 62 Number 4 (2010): 632, https://digitalcommons.law.ou.edu/olr/vol62/iss4/1/.

9 There is an exception, not relevant here, that allows a private party whose injury is worse than that suffered by the general public, to recover damages.

"Yet this rule admits of one exception, where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance, in which case he shall have a private satisfaction by action. As if, by means of a ditch dug across the public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action."

3 William Blackstone, commentaries on the laws of England chapter XIII.: of nuisance, 216, 219-20, https://oll.libertyfund.org/title/sharswood-commentaries-on-the-laws-of-england-in-four-books-vol-2#preview.

10 "The district court… shall have jurisdiction… to cause such nuisance to be abated and to assess all the costs thereof, including the costs of suit, *against the property on which such nuisance existed or is maintained*, and to declare such costs a judgment against said property and order and direct the sale of said property for the purpose of satisfying said judgment and shall cause the same to be sold and proceeds thereof applied to the payment of the costs of abating any such nuisance."

50 O.S. §17 (2020) (emphasis added), https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=72120.

11 Donald L. Gifford "Public Nuisance as a Mass Products Liability Tort," 71 *University of Cincinnati Law Review*, Volume 71 (2003) 797-800, https://digitalcommons.law.umaryland.edu/fac_pubs/426/.

12 Schwartz, et al., "Game Over?,"at 634.

13 "Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance." Restatement of Torts (Second) § 821B cmt. g (1979).

14 "There can be no question that this nuisance affects entire communities, neighborhoods, or a considerable number of persons. This nuisance has negatively impacted the entire state." *Johnson and Johnson*, at 29.

15 50 O.S. §2 (2020), https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=72105.

16 "State, county, and municipal attorneys have sued manufacturers for harms allegedly caused by their products' users, and as is often the case, misusers. The theory these plaintiffs advance is akin to suing an electric guitar manufacturer for all public nuisances caused by bands that play music too loudly."

Schwartz, et al., "Game Over?," at 630.

17 *Camden County v. Beretta U.S.A.*, 273 F.3d 536, 541, (3d Cir. 2001), https://casetext.com/case/camden-county-bd-v-beretta-usa.

18 Gifford, "Public Nuisance as a Mass Products Liability Tort," e.g. at 822.

19 *Bloomington v. Westinghouse Electric Corp.*, 891 F.2d 611, 614 (7th Cir. 1989), https://casetext.com/case/city-of-bloomington-ind-v-westinghouse-elec?.

20 *Bloomington v. Westinghouse Electric Corp.*, 891 F.2d 611, 615 (7th Cir. 1989)

21 Gifford, "Public Nuisance as a Mass Products Liability Tort," at 822.

22 Schwartz, et al., "Game Over?," at 639-40.

23 *City of Philadelphia v. Beretta USA, Corp.*, 126 F. Supp. 2d 882, 910-11 (E.D. Pa. 2000), (internal citations omitted), https://law.justia.com/cases/federal/district-courts/FSupp2/126/882/2504919/.

24 50 O.S. §1 (2020), https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=72103.

25 William L. Prosser "Private Action for Public Nuisance." *Virginia Law Review* 52, no. 6 (1966): 999, https://www.jstor.org/stable/1071578?seq=1.

26 3 Blackstone, Commentaries on the Laws of England Chapter, at 216.

27 "Generally speaking, courts have encountered four categories of conduct in common law public nuisance claims: (i) unlawful, intentional acts; (ii) lawful conduct involving conflicting uses of property; (iii) lawful conduct, not involving the use of land that leads to unintended consequences; and (iv) otherwise tortious conduct. Assuming interference with a public right, the conduct in the first two scenarios would fall within the bounds of public nuisance theory. On the other hand, lawful conduct without the traditional nexus to land would not; such conduct would be considered per se reasonable… Public nuisance theory would not support recovery simply because the 'manufacture and sale of a product [was] later discovered to cause injury.'"

Schwartz and Goldberg, "The Law of Public Nuisance," at 565.

28 *Johnson and Johnson*, at 30.

29 *Johnson and Johnson*, at 40.

30 Brief Amici Curiae of the 1889 Institute, et al. at 12-13.

31 "But once these elements have been established, the extent of liability is extremely limited. A government entity can only seek to enjoin the defendant's conduct or have the defendant abate the nuisance. It is a time honored principle that governments cannot seek money damages when alleging public nuisance."

Victor E. Schwartz, et al., "Game Over?," at 634, (internal citations omitted).

32 50 O.S. §6 (2020), https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=72109.

33 "Yet when one reads hundreds of nuisance cases from medieval times to the present, one is struck by the reality that public nuisance almost always involves land, not injuries that occur in a variety of other factual contexts such as collision between vehicles, business or professional settings, or other personal injuries. Most often, public nuisance cases arise in the context of defendant's, not plaintiff's, use of land. Almost all examples of common law public nuisances provided in the Restatement arise from the defendant's use of land." Gifford, "Public Nuisance as a Mass Products Liability Tort," at 830-31.

34 50 O.S. §21 (2020), https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=97917.

35 50 O.S. §41 (2020), https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=72124.