



## COVID-19: PUBLIC NUISANCE AT THE DOOR

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# COVID-19: Public Nuisance At the Door†

The coronavirus disease 2019 (COVID-19) has caused loss of life and property on every continent except Antarctica. According to Johns Hopkins University, the number of confirmed COVID-19 cases worldwide surpassed one million on April 2, 2020.<sup>1</sup>

Of those one million cases, 243,453 were in the United States and the disease had caused 5,926 deaths. Worldwide, the number of deaths attributed to the pandemic was 52,983 as of that date. By June 1, the number of worldwide cases

had ballooned to more than 6.2 million, nearly 1.8 million of which were in the United States, resulting in more than 104,000 deaths.<sup>2</sup>

## Pandemic Impact By the Numbers

Demonstrating the severity of the disruption caused by COVID-19, the United States Centers for Disease Control and Prevention issued a Domestic Travel Advisory for New York, New Jersey, and Connecticut on March 28, 2020, urging residents of those states “to refrain from non-essential domestic travel for 14 days effective immediately.”<sup>3</sup>

As of April 7, 2020, 42 states and numerous localities had issued stay-in-place orders that placed 95 percent of Americans, about 306 million

people, under some form of mandatory lockdown.<sup>4</sup>

Goldman Sachs estimated that the pandemic would push the U.S. unemployment rate to 15 percent and cause a 34 percent contraction in gross domestic product in the second quarter of 2020.<sup>5</sup> According to the Department of Labor, the unemployment rate grew to 14.7 percent by the end of April, and by May 14, a total of 36.5 million Americans had become unemployed due to the COVID-19 pandemic.<sup>6</sup>

On March 23, 2020, the Dow Jones Industrial Average fell to a 52-week low of 18,213.65,<sup>7</sup> over ten thousand points off of the all-time high of 29,551.42 set on February 12, 2020,<sup>8</sup> and a 38 percent loss of value in just over a month. Demonstrating the volatile nature of the crisis, the financial markets recovered in both April and May and, by the end of May, the S&P 500 was up 38 percent from its low point of March 23.<sup>9</sup>

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of COVID-19 claims. While some plaintiffs will seek damages for contract breaches and ordinary business torts, others will likely seek

compensation through more creative, less common mechanisms such as public nuisance claims.

# The Public Nuisance Landscape

Public nuisance is often seen as a shortcut to recovery in lawsuits over matters of significant social and public importance, even though traditionally the tort has been quite limited, relating to interferences with land and requiring private plaintiffs to show a unique injury to claim damages. Courts have largely enforced those limits.<sup>10</sup>

Early examples of public nuisance litigation arising from the COVID-19 pandemic include lawsuits filed by individuals, business owners,<sup>11</sup> and states<sup>12</sup> against the People's Republic of China and other government entities.<sup>13</sup>

Regardless of the disposition of the public nuisance claims in those cases, other plaintiffs will almost certainly bring public nuisance claims against private entity defendants that do not implicate foreign relations or sovereign immunity issues. Creative plaintiffs have already filed public nuisance suits against domestic corporate defendants, including Smithfield Foods and McDonald's, for

failing to provide work environments sufficiently safe from COVID-19.<sup>14</sup>

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and their attorneys are continually trying to bring public nuisance actions to address large-scale public policy problems, and public health crises are no exception.<sup>15</sup> These

actions are often, but not always, dismissed by courts as exceeding the traditional bounds of public nuisance and the functions of the judicial branch in ways that would undermine traditional tort law and encroach on the responsibilities of the legislative and executive branches.<sup>16</sup>

In relation to the COVID-19 pandemic, enterprising plaintiffs may bring public nuisance claims against businesses and individuals that they contend are responsible for the spread of the virus and the harms resulting from its spread. But as shown by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which provided two trillion dollars in economic stimulus to individuals and businesses negatively impacted by the pandemic,<sup>17</sup> Congress and other

legislative bodies have acted and likely will continue to act to specifically address the harms experienced as a result of COVID-19. Recent executive orders and decisive action on



the part of officials and agencies at the federal, state, and local levels show they will also move swiftly to solve problems associated with the pandemic. To the extent legislative or executive solutions leave any gaps, courts may still be able to provide relief to appropriate plaintiffs by applying statutory law and tort theories other than public nuisance.

## **MUNICIPALITY LITIGATION**

In addition to private entity defendants, state and local governments could also be named as defendants in some of these suits, on the theory they should have acted more quickly and introduced stricter measures to protect public health and economic well-being. This would represent a turning of the tables from recent public nuisance cases, where governments have used the tort to seek large awards to pay for problems ordinarily addressed through tax dollars.

While municipalities may be defendants in public nuisance lawsuits related to the coronavirus pandemic, some municipalities may also assert public nuisance claims against businesses or other entities. Municipalities, which typically rely on tax receipts to fund their operations, have been hit hard by the economic slowdown caused by the coronavirus. As they have done previously with claims related to climate change, lead paint, and the opioid crisis, enterprising plaintiffs' lawyers may solicit municipalities to bring public nuisance claims on a contingency fee basis as a low cost way to recover for their economic losses.

One may question whether there is a real threat of a municipality suing a job creator and taxpayer in its own jurisdiction. But consider the 2018 public nuisance claim brought by the city of Richmond, California against Chevron, Richmond's largest employer, which had been present in the city for over a century, for damages related to the costs of adapting to climate change.<sup>18</sup>

Whether cities will bring similar public nuisance claims against businesses in relation to the COVID-19 pandemic remains to be seen. Given municipal police powers and access to state and federal aid sources, there are other, more appropriate avenues for municipalities to recover for their harms that do not require paying private attorneys often substantial portions of the recovery, or undermine the authority of the political branches of government to solve problems more appropriately in their purview than that of the court system.

# The Evolution of Public Nuisance

Public nuisance is an ancient tort, dating to 12<sup>th</sup> century England. It originated as a royal writ that only the king could bring to abate an interference with crown property, such as the obstruction of a public highway or waterway.<sup>19</sup> Over the centuries, the tort evolved to allow for private plaintiffs to assert public nuisance claims in limited circumstances where they had suffered a “special injury,” different in kind from the injury suffered by the public as a whole.<sup>20</sup> But the focus of the public nuisance tort remained on removing an interference with a public right, usually related to land.<sup>21</sup>

From its foundation, American law recognized public nuisance in a manner consistent with how it had developed in English courts. Specifically, the American version of the tort addressed conduct interfering with a public right, often affecting the use of land; restricted injunction and abatement remedies to governmental plaintiffs; and allowed individuals to sue for damages only if they satisfied

the special injury rule.<sup>22</sup> Courts also required proof of causation<sup>23</sup> and that the defendant maintained control over the nuisance such that it could abate it if ordered to do so.<sup>24</sup>

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In light of the tort’s purpose and history of addressing discrete, localized problems, courts have thus far been relatively hesitant to use public nuisance as a vehicle to solve major public policy problems.<sup>25</sup> In so doing, they have recognized that the legislative and executive branches are better equipped to balance the needs and interests involved in such wide-ranging challenges.<sup>26</sup> As the COVID-19 pandemic highlights, legislatures, executive officials, and agencies are also better positioned

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schemes in place to deal with problems as they arise.<sup>27</sup>

## THE RESTATEMENT OF TORTS

For example, in the drafting of the Second Restatement of Torts in the 1970s, attempts were made by environmentalists to broaden the tort’s usage by defining it to encompass an “unreasonable interference” with a public right.<sup>28</sup> The Second Restatement was amended to

adopt that definition. But the courts that were faced with requests to fashion environmental policy soon afterward declined to do so, reasoning that it would encroach on the role better suited for lawmakers and expert agencies and go beyond the traditional limits of the tort.<sup>29</sup>

In light of the Second Restatement’s expansion of the doctrine, not all courts, however, have declined the opportunity to use public nuisance to usurp the policy-



making role and flout the historical limits of the tort.<sup>30</sup> Given the amount of potential damages involved in public nuisance claims related to lead paint, tobacco, and other large-scale societal problems, the fact that some courts will allow public nuisance claims to proceed, when they should be dismissed based on the traditional limits of the tort, incentivizes plaintiffs and their attorneys to continue to bring such claims against perceived deep-pocketed defendants and industries.

At the same time, the potential for a large verdict also puts pressure on the entities and industries targeted by these suits to settle public nuisance claims. In that vein, it is notable that the only federal court to rule on a public nuisance claim in the tobacco litigation of the late 1990s rejected the claim.<sup>31</sup> Nevertheless, the threat posed by the continuation of the remaining claims in that case and the assertion of public nuisance claims in others resulted in a multi-billion-dollar settlement that likely inspired and motivated much of the public nuisance litigation that followed.<sup>32</sup>

## **NATIONAL PUBLIC POLICY ISSUES**

Since public nuisance claims are brought under state law, the

same plaintiffs or attorneys can file highly similar claims in several jurisdictions to effectively give themselves multiple bites at the apple. The public nuisance litigation related to lead paint provides a good example. There, the Supreme Courts of Missouri, New Jersey, and Rhode Island all interpreted their states' laws to prohibit a public nuisance claim against lead paint manufacturers related to

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contamination resulting from deterioration decades after the paint was first applied.<sup>33</sup> Those courts based their decisions on traditional limitations on public nuisance claims, such as the requirements that the defendant control the nuisance at the time the harm occurred, the plaintiff prove that a specific defendant caused a specific harm, and the nuisance relate to a particular use of real property.<sup>34</sup> Most recently,

however, a California appeals court interpreted its state law to allow a verdict requiring three lead paint manufacturers to pay \$1.15 billion into a fund to abate lead paint in 10 California cities and counties.<sup>35</sup> How that decision and verdict will impact future public nuisance litigation in California and beyond, including in relation to the COVID-19 pandemic, is still to be seen.

Also remaining to be seen is how the ongoing litigation related to climate change and the opioid epidemic will be resolved and impact the future of public nuisance litigation. With respect to climate change, the U.S. Supreme Court and federal district courts have thus far dismissed the claims, largely based on the principle that such sweeping public policy judgments should be made by the legislative and executive branches, not the judicial branch.<sup>36</sup> As with COVID-19, the international dimension of climate change means courts are even less able to address the problem holistically. It must be noted, however, that climate change litigation involving public nuisance claims remains ongoing in federal and state court. For example, the Ninth Circuit recently vacated a federal district court's dismissal order in a case originally filed in

state court and later removed on the grounds that federal jurisdiction had not been established.<sup>37</sup> The appeals court remanded the case for further consideration of the jurisdictional issue.<sup>38</sup>

Another federal dismissal order remains pending on appeal.<sup>39</sup>

In the opioid litigation, a few state courts have dismissed public nuisance claims as outside the traditional

bounds of the tort.<sup>40</sup> However, several other state courts and a federal court overseeing multidistrict litigation have allowed such claims to proceed on the basis that the opioid

epidemic represents an interference with public health allegedly traced to conduct by drug makers and other defendants.<sup>41</sup> A claim brought by the state of Oklahoma went to a

bench trial, resulting in an order requiring one manufacturer to pay \$572,102,028 in abatement costs to the state.<sup>42</sup> A number of parties have settled in some cases, but the litigation remains active.

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## Public Nuisance and COVID-19

Like other widespread public policy problems, the COVID-19 pandemic does not fit within the historical limits or purpose of the public nuisance tort. Even the Second Restatement, which broadened the definition of public nuisance, describes the threat of communication of an infectious disease as potentially a public nuisance “because of the possibility of an epidemic” being created, but not the epidemic itself or the spread of an ongoing epidemic.<sup>43</sup> Further, the Third Restatement excludes liability for damages based on a defendant’s products, referring to the tobacco and lead paint litigation as examples, and

states that such claims instead should be addressed through the law of products liability.<sup>44</sup> Thus, the Third Restatement seeks to pull back on the Second Restatement’s expansion of the tort. In so doing, the Third Restatement expressly rejects the notion that public nuisance “can be read to encompass anything injurious to public health and safety,” while also observing that “[t]he traditional office of the tort ... has been narrower” than that wide-ranging formulation, and the reach of public nuisance “remains more modest” under contemporary case law.<sup>45</sup>

The case law relating to public nuisance and the potential for an epidemic is sparse but aligns with the tort’s historical limits in two important ways. First, the case law is consistent with the principle that public nuisance involves an interference with a public right, usually associated with land use. Second, the cases involve governmental plaintiffs seeking to abate conditions at a specific location that could lead to an epidemic. There do not appear to be cases allowing private individuals to seek compensation for being injured by an epidemic. Examples of governmental use of the tort to abate potential causes of public health problems in particular



## THE STATES

Several states, including New York, Arizona, and Massachusetts, have implemented some form of limited liability protection for nursing homes and similar facilities, either by executive order or legislation.

Relatedly, several states have enacted and other states' lawmakers have announced plans to file legislation that would provide protection from liability under certain conditions to businesses from people claiming they caught the coronavirus while at that business. Such legislation will likely guide a court's consideration of a public nuisance claim related to the pandemic.

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locations include suits to abate the discharge of sewage and decaying matter into a stream,<sup>46</sup> close a piggery located in a section of a city that was a breeding ground for flies and insects because the pigs were fed garbage,<sup>47</sup> and destroy an elk herd that was infected with tuberculosis.<sup>48</sup> In each instance, the plaintiff was a governmental entity seeking abatement rather than damages and the nuisance at issue was specifically tied to the use of land whose location made the use at issue a threat to public health.<sup>49</sup>

As with many other public policy challenges relating to public health, lawmakers and executive officials and agencies are already addressing COVID-19. Indeed, it is the primary concern of governments around the world. As a result, there are few, if any, gaps for the public nuisance tort to fill. And even where there may be gaps, there are other, more suitable

remedies such as traditional personal injury claims.<sup>50</sup>

Even though the COVID-19 pandemic is ongoing and the harms that it will ultimately cause can only be estimated, a few preliminary observations may be made in relation to any future public nuisance claims filed with respect to it:

### FIRST

Public nuisance is an ill-suited vehicle to address widespread public policy problems, and COVID-19 is no different. It is important for courts to adhere to the traditional limits of the public nuisance tort and to allow the political branches room to operate in a crisis.

### SECOND

Enterprising plaintiffs' lawyers may be expected to bring public nuisance claims against businesses and individuals that they contend are responsible for the spread of the virus and the harms resulting from its spread. Even though it is ill-suited, plaintiffs remain attracted by the flexibility with which some courts have applied the tort and the large settlements that have resulted.



### THIRD

A court enforcing the traditional limits of public nuisance—relationship to real property, control by the defendant of the nuisance, causation, abatement remedy for government plaintiffs only, and the special injury rule for private damages actions—will likely dismiss a public nuisance claim related to the pandemic. For example, it would be difficult for a private plaintiff to show that its injury is different from the injury the pandemic inflicted on the public as a whole, and thus satisfy the special injury rule. And even if that high hurdle were cleared, it would be just as difficult for the plaintiff to tie that injury through proof of causation to a particular, culpable defendant with control over the nuisance.

### FOURTH

Given that Congress has already passed bipartisan legislation related to the COVID-19 pandemic and is considering more such legislation, and that

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legislative bodies and executives at all levels of government are also taking action to mitigate the impact of the pandemic to the extent possible, courts may see less of a need to allow public nuisance claims to proceed than if the other branches of government were taking no action.

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### FIFTH

Public nuisance claims for COVID-19 are not only out of step with the traditional development of tort law, they are also unnecessary. For centuries, public nuisance functioned as a gap-filling measure allowing for abatement and damages recovery when no other mechanism would. The rise of the modern administrative state in the 20<sup>th</sup>

century, including the empowering of health departments, departments of labor, and similar agencies that are now at the forefront of society’s response to COVID-19, has filled many of the gaps that public nuisance occupied previously. Accordingly, individuals or entities injured in the course of the pandemic likely will have the ability to make claims outside of the court system to address some injuries.<sup>51</sup>



# Conclusion

*In sum, the harm caused by the current pandemic is real and growing, and individuals and entities injured by it will seek compensation for their harm. While some injured parties will likely bring public nuisance claims, such claims are unlikely to fit within the traditional limits of public nuisance and should therefore be subject to dismissal. Given that there will almost certainly be many alternative avenues of relief, restricting these claims is unlikely to prevent the injured parties from recovering for harms suffered. At the same time, limiting such claims will help ensure that public nuisance remains within its traditional sphere, and does not undermine traditional tort law or the functioning of the legislative and executive branches of government.*

# Endnotes

- † This edition of *ILR Briefly* was prepared by Joshua K. Payne and Jess R. Nix, Spotswood Sansom & Sansbury LLC.
- 1 See Chris Lefkow, *Global Virus Cases Top a Million, Deaths Surpass 50,000*, Yahoo News (Apr. 2, 2020), <https://news.yahoo.com/global-virus-cases-near-million-spain-sees-record-113228634.html>.
  - 2 Henrik Pettersson, Byron Manley and Sergio Hernandez, *Tracking Coronavirus' Global Spread*, CNN (June 1, 2020), <https://www.cnn.com/interactive/2020/health/coronavirus-maps-and-cases/>.
  - 3 See CDC Issues Domestic Travel Advisory for New York, New Jersey, and Connecticut, CDC Newsroom (Mar. 28, 2020), <https://www.cdc.gov/media/releases/2020/s038-travel-advisory.html>.
  - 4 See Holly Secon and Aylin Woodward, *About 95% of Americans Have Been Ordered to Stay at Home. This Map Shows Which Cities and States are Under Lockdown*, Business Insider (Apr. 7, 2020, 2:13 PM), <https://www.businessinsider.com/us-map-stay-at-home-orders-lockdowns-2020-3?op=1>.
  - 5 See Jeff Cox, *Goldman Sees 15% Jobless Rate and 34% GDP Decline, Followed by the Fastest Recovery in History*, CNBC (Apr. 1, 2020, 10:51 AM), <https://www.cnbc.com/2020/03/31/coronavirus-update-goldman-sees-15percent-jobless-rate-followed-by-record-rebound.html>.
  - 6 Jeff Cox, *Weekly Jobless Claims Total 2.981 Million, Bringing Coronavirus Tally to 36.5 Million*, CNBC (May 14, 2020, 8:30 AM), <https://www.cnbc.com/2020/05/14/weekly-jobless-claims.html>. At the time of publication, the Bureau of Labor Statistics has acknowledged that its unemployment calculations for the months of April and May have suffered from "misclassification errors." While the BLS has not yet issued a correction, it has stated that the overall unemployment number may be several percentage points higher than reported. Heather Long, *A 'Misclassification Error' Made the May Unemployment Rate Look Better Than it is. Here's What Happened*, The Washington Post (June 6, 2020, 9:57 AM), <https://www.washingtonpost.com/business/2020/06/05/may-2020-jobs-report-misclassification-error/>.
  - 7 See Thomas Franck, Maggie Fitzgerald, & Yun Li, *Stock Market Live Tuesday: Dow Ends Negative, Gives Up 900-Point Rally, Goldman Not Buying*, CNBC (April 7, 2020, 4:26 PM), <https://www.cnbc.com/2020/04/07/stock-market-live-updates-dow-futures-up-800-points-set-to-add-to-1600-point-monday-rally.html>.
  - 8 See Kimberly Amadeo, *Dow Highest Closing Records*, The Balance (Mar. 20, 2020), <https://www.thebalance.com/dow-jones-closing-history-top-highs-and-lows-since-1929-3306174>.
  - 9 Fred Imbert & Thomas Franck, *Dow Rises 100 Points in First Day of June as Traders Bet on the Economy Reopening*, CNBC (May 31, 2020, 6:02 PM), <https://www.cnbc.com/2020/05/31/stock-market-futures-open-to-close-news.html>.
  - 10 Joshua K. Payne, Jess R. Nix, *Waking the Litigation Monster: The Misuse of Public Nuisance*, U.S. Chamber Institute for Legal Reform, March 2019 ("Waking the Litigation Monster"), <https://www.instituteforlegalreform.com/uploads/sites/1/The-Misuse-of-Public-Nuisance-Actions-2019-Research.pdf>.
  - 11 See Complaint at ¶¶ 1, 11-16, 79-85, *Alters, et al. v. People's Rep. of China, et al.*, No. 1:20-cv-21108-UU (S.D. Fla. Mar. 13, 2020), ECF No. 1.
  - 12 See Complaint at ¶¶ 139-48, *Missouri v. People's Rep. of China, et al.*, No. 1:20-cv-00099 (E.D. Mo. Apr. 21, 2020), ECF No. 1. The plaintiffs in this case attempt to avoid sovereign immunity by including the Communist Party of China as a defendant. See *id.* at ¶¶ 18-19. See also Complaint, *Mississippi v. People's Rep. of China, et al.*, No. 1:20-cv-00168 (S.D. Miss. May 22, 2020), ECF No. 1.
  - 13 See, e.g., *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1025-29 (N.D. Cal. 2018), appeal docketed, No. 18-16663 (9th Cir. Sept. 4, 2018) (discussing "presumption against extraterritoriality" in course of opinion dismissing public nuisance suit filed by cities against fossil fuel producers related to global warming, including quoting Supreme Court precedent holding "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns") (quoting *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403-04 (2018) (alteration in original)).
  - 14 Complaint, *Rural Community Workers Alliance v. Smithfield Foods, Inc.*, No. 5:20-cv-06063-DGK (W.D. Mo. April 23, 2020), ECF No. 1; Complaint, *Massey v. McDonald's Corp.*, No. 2020CH04247 (Ill. Cir. Ct. May 19, 2020).
  - 15 See *Waking the Litigation Monster* at 9-30.
  - 16 See *id.*

- 17 For an outline of various types of relief provided in the CARES Act, see Leon LaBrecque, *The CARES Act has Passed: Here are the Highlights*, Forbes Media (Mar. 29, 2020, 7:00 AM), <https://www.forbes.com/sites/leonlabrecque/2020/03/29/the-cares-act-has-passed-here-are-the-highlights/#6a2a6daa68cd>.
- 18 Complaint, *City of Richmond v. Chevron Corp.*, No. C18-00055 (Cal. Super. Ct. Jan. 22, 2018).
- 19 See *Waking the Litigation Monster* at 3-4.
- 20 See *id.*
- 21 See *id.*
- 22 See *id.* at 4-5.
- 23 See *id.* at 28-30 (discussing recent efforts by municipal plaintiffs to use their status to avoid the traditional causation requirement for public nuisance claims).
- 24 See *id.* at 11-13 (discussing how courts across numerous jurisdictions relied on traditional control requirement in dismissing public nuisance claims against asbestos manufacturers).
- 25 See *id.* at 31-34.
- 26 See *id.*
- 27 See *id.* at 33-34.
- 28 See *id.* at 7-8 (citing Restatement (Second) of Torts § 821B (Am. Law Inst. 1979)).
- 29 See *id.* at 9-11.
- 30 See *id.* at 19-21 (discussing decisions by intermediate appellate courts in Wisconsin and California refusing to dismiss public nuisance claims against lead paint manufacturers).
- 31 See *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997), *subsequent mandamus proceeding sub nom. In re Fraser*, 75 F. Supp. 2d 572 (E.D. Tex. 1999) (construing Texas law).
- 32 See *Waking the Litigation Monster* at 13-14 (discussing settlement of tobacco cases and its impact on subsequent public nuisance litigation).
- 33 See *id.* at 14-19 (discussing decisions).
- 34 See *id.*
- 35 See *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 514 (Ct. App. 2017), *reh'g denied* (Dec. 6, 2017), *review denied* (Feb. 14, 2018), *cert. denied sub nom. ConAgra Grocery Prods. v. California*, 139 S. Ct. 377 (2018), *cert. denied sub nom. Sherwin-Williams Co. v. California*, 139 S. Ct. 378 (2018).
- 36 See *Waking the Litigation Monster* at 21-24 (discussing climate change litigation involving public nuisance claims).
- 37 See *City of Oakland v. BP PLC*, No. 18-16663, 2020 WL 2702680 (9th Cir. May 26, 2020).
- 38 See *id.* at \* 9.
- 39 See *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *appeal pending*, No. 18-2188 (2d Cir. July 26, 2018).
- 40 See, e.g., *State ex rel. Jennings v. Purdue Pharma L.P.*, No. CVN18C01223MMJCCLD, 2019 WL 446382, at \*11-13 (Del. Super. Ct. Feb. 4, 2019) (dismissing public nuisance claims against opioid manufacturers and distributors under Delaware law; court observed that public nuisance claims had not been recognized for products under Delaware law, and held that the state failed to allege a public right with which defendants interfered and control by defendants over the instrumentality of the nuisance at the time it occurred); *State ex rel. Stenehjem v. Purdue Pharma L.P.*, No. 08-2018-CV-01300, 23-27 (N.D. Dist. Ct. May 10, 2019) (similar ruling under North Dakota law).
- 41 See, e.g., *In re Nat'l Prescription Opiate Litig.*, 406 F. Supp. 3d 672 (N.D. Ohio 2019).
- 42 *State of Oklahoma v. Purdue Pharma L.P.*, No. CJ-2017-816 (Okla. Dist. Ct. Aug. 26, 2019). The court subsequently reduced the award by \$107 million due to a math error. See *Oklahoma Judge Shaves \$107 Million Off Opioid Decision Against Johnson & Johnson*, All Things Considered (Nov. 15, 2019, 3:31 PM), <https://www.npr.org/2019/11/15/779439374/oklahoma-judge-shaves-107-million-off-opioid-decision-against-johnson-johnson>.
- 43 Restatement (Second) of Torts § 821B cmt. g (Am. Law Inst. 1979) (“In many cases the interests of the entire community may be affected by a danger to even one individual. Thus the threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic; and a fire hazard to one adjoining landowner may be a public nuisance because of the danger of a conflagration.”).
- 44 See Restatement (Third) of Torts: Liability for Economic Harm § 8 cmt. g (Am. Law Inst. 2019). In this regard, requirements such as causation will be more difficult for plaintiffs to elide. For example, in the California lead paint case, the public entity plaintiffs were required to prove only that the lead paint manufacturer defendants played more than an “infinitesimal” or “theoretical” part in creating the nuisance. *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 543 (Ct. App. 2017).

- 45 Restatement (Third) of Torts: Liability for Economic Harm § 8 cmt. g (Am. Law Inst. 2019).
- 46 See *People v. Hupp*, 123 P. 651 (Col. 1912) (reinstating indictment against hotel owners charging them with offense of polluting a stream of running water by discharging sewage and other hotel waste into stream).
- 47 *Paris v. City of Philadelphia*, 63 Pa. Super. 41 (1916).
- 48 *S. Dakota Dep't of Health v. Owen*, 350 N.W.2d 48 (S.D. 1984).
- 49 While historically governmental plaintiffs had exclusive authority to bring abatement claims, the Second Restatement was broadened to provide that individuals satisfying the special injury rule could also bring them. Restatement (Second) of Torts § 821C(2) (Am. Law Inst. 1979). The recent *Smithfield* and *McDonald's* cases involve such claims for declaratory and injunctive relief seeking more protections for workers from COVID-19. See *Rural Community Workers Alliance v. Smithfield Foods, Inc.*, No. 5:20-CV-06063-DGK, 2020 WL 2145350 (W.D. Mo. May 5, 2020); *Masse et al. v. McDonald's Corp. et al.*, No. 2020CH04247 (Ill. Cir. Ct. May 19, 2020). The *Smithfield* case was dismissed without prejudice in light of the employer's substantial efforts to protect workers. *Smithfield*, 2020 WL 2145350, at \*11 ("While Plaintiffs argue that Smithfield could do more to protect its workers, that is not the issue before this Court. The issue is whether the Plant, as it is currently operating, constitutes an offense against the public order. Because of the significant measures Smithfield has implemented to combat the disease and the lack of COVID-19 at the facility, the Plant cannot be said to violate the public's right to health and safety. Thus, the Court finds that Plaintiffs are unlikely to be succeed [sic] on their public nuisance claim.").
- 50 A recent example of public nuisance and COVID-19 being used to expand liability is the litigation brought by individuals allegedly harmed by JUUL e-cigarette products. The plaintiffs amended their complaint to allege JUUL users were at greater risk of suffering more serious complications if they contracted the coronavirus. See Amended Consolidated Master Complaint, ¶¶ 725-26, *In re JUUL Labs, Inc. Marketing, Sales Practices, and Products Liability Litigation*, No. 3:19-md-02913-WHO (N.D. Cal. Apr. 6, 2020), ECF No. 420.
- 51 Indeed, the *Smithfield* case was dismissed without prejudice in order to allow the federal Occupational Health and Safety Administration to consider the issues the plaintiffs raised. *Smithfield*, 2020 WL 2145350, at \*1.





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