ILR Briefly

December 2022

Taming The Litigation Monster: The Continued Threat of Public Nuisance Litigation

U.S. Chamber of Commerce
Institute for Legal Reform

Unmoored from traditional limits, plaintiffs can attempt to deploy public nuisance against virtually any perceived harm relating to a company's manufacture and sale of a lawful product.

Elbert Lin, Trevor S. Cox, Roger C. Gibboni, and J. Pierce Lamberson, Hunton Andrews Kurth LLP

Executive Summary

In March 2019, the U.S. Chamber of Commerce Institute for Legal Reform (ILR) released *Waking the Litigation Monster: The Misuse of Public Nuisance*,[1] a detailed white paper documenting the origins, expansion, and contemporary use of public nuisance in litigation. The paper surveyed efforts to stretch the age-old law of public nuisance beyond its traditional boundaries to reach and ostensibly address wide-ranging societal and policy issues more appropriately left to the political branches. Echoing the Eighth Circuit, the research warned that the expansion of public nuisance could create "a monster that would devour in one gulp the entire law of tort."[2]

This edition of *ILR Briefly* provides an update on the continued dangers posed by public nuisance litigation. It outlines key aspects of state statutes defining the cause of action and surveys recent public nuisance litigation targeting climate change, the opioid epidemic, COVID-19, and other topics. The paper then turns to solutions that policymakers can implement to curb such litigation. It details several traditional limits on public nuisance that can help provide certainty and predictability to all participants in our legal system. The paper places specific emphasis on legislative solutions—a focus reflecting that, while defendants and courts must continue to reject novel attempts to expand public nuisance, state legislators are uniquely situated to implement measures that can reverse the trend.

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Introduction

Over the last 50 years, plaintiffs have sought to transform the age-old theory of public nuisance into an all-purpose, potentially limitless tort. Historically, public nuisance served as a vehicle for government actors to seek abatement of criminal interferences on public lands, roads, or waters.

But, in the last several decades, and increasingly so today, enterprising plaintiffs' lawyers have attempted to expand the cause of action to allow suits over the alleged societal impacts of a variety of otherwise lawful products—from firearms, lead paint, and subprime mortgages to fossil fuels, opioids, and asbestos. Not only do these efforts improperly channel public policy matters into the judicial arena but, if accepted, they threaten to convert public nuisance into a "litigation monster" with few, if any, predictable bounds. In many instances, these novel lawsuits attempt to subvert or replace remedies available in other, more established areas of the law, including criminal law, products liability law, and consumer protection law—even when those remedies offer sufficient, if not superior, avenues for recourse. Other cases threaten to hold businesses responsible for the criminal acts of others, over which they exercise no control.

This trend poses a worrisome threat to businesses of all stripes. It creates an ever-present risk of potentially devastating liability that is difficult to either anticipate or assess. As the Supreme Court of Oklahoma recently observed: "Without [traditional] limitations [on public nuisance], businesses have no way to know whether they might face nuisance liability for manufacturing, marketing, or selling products, i.e., will a sugar manufacturer or the fast food industry be liable for obesity, will an alcohol manufacturer be liable for

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psychological harms, or will a car manufacturer be liable for health hazards from lung disease to dementia or for air pollution."[3]

The efforts to expand and misuse public nuisance in high-stakes litigation have enjoyed only limited success, but they continue to generate lawsuits—always just one judge or jury away from a breakthrough. And, in the face of extended legal battles, unpredictable verdicts, and the recent trend of municipality-driven nuisance litigation, these cases carry intense pressure to settle for increasingly massive sums.

It should also be noted that even dismissed or dropped lawsuits can cost defendant businesses massive sums to defend. This dynamic leaves businesses without clear standards to guide their conduct. Moreover, it forces businesses to constantly guess at what newly alleged public nuisance *du jour* might be lurking around the corner and whether their otherwise lawful product might be deemed a public nuisance. This trend is offensive to the rule of law.

The Origins and Evolution of Public Nuisance Law

Public nuisance law dates back to 12th-century England, where it was initially created as a criminal writ to remedy actions or conditions that infringed on royal property or blocked public roads or waterways.[4] The monarch alone had the authority to bring a public nuisance claim pursuant to his or her police powers. And injunction or abatement, as opposed to monetary damages, represented the only available remedies to a public nuisance.

In the 16th century, English courts slightly extended the cause of action so that individuals who suffered "special" injuries from the same interference causing the injury to the general public, but which were different in kind from injuries to the public, could bring public nuisance claims to recover damages. But, even as the English courts adapted to a changing and modernizing society, the basic elements of public nuisance, and limitations to it, remained unchanged to the time of the founding of the United States.

Consistent with English decisions, early American courts limited the application of public nuisance to criminal or quasi-criminal interferences that infringed upon a public right. They also limited the abatement remedy to governmental plaintiffs and the damages remedy to individual plaintiffs suffering "special" injuries. These longstanding constraints, combined with the blossoming regulatory state, relegated public nuisance to such a minor role that it was not even included in the American Law Institute's (ALI) First Restatement of Torts in 1939.[5] ALI is a private organization of legal scholars, judges, and practitioners that periodically issues treatises—called "restatements"—that summarize common law legal theories.[6] While often relied upon by judges and state legislators, ALI's restatements have been criticized, including by Justice Antonin Scalia, for being aspirational rather than strictly descriptive of the state of the law.[7]

The Second Restatement of Torts

The retreat of public nuisance into obscurity

ended in 1979 with ALI's publication of the Second Restatement of Torts. At the behest of environmental activists, the Second Restatement expanded public nuisance to include any "unreasonable interference with a right common to the general public" and added a list of factors to help determine whether the interference was "unreasonable."[8] It also suggested that individual plaintiffs could seek to enjoin or abate a public nuisance if they sued "as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action."[9] Less a reflection of existing law than an aspirational departure from it, the Second Restatement seemed "destined to invite mischief in other areas [of the law] where the historical core purposes of public nuisance do not apply and where alternative theories of recoveries are available."[10]

Unsurprisingly, in the wake of the Second Restatement's expansion, creative plaintiffs sought to use public nuisance to address large-scale public policy issues in ways not attempted before. And government plaintiffs, especially municipalities represented by contingency fee counsel,[11] have increasingly attempted to use it to seek large recoveries, in some instances successfully.

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In response to such attempts, courts have largely stayed true to the tort's historical limits and deferred to the policy judgments of the legislative and executive branches. A minority of courts, however, have eschewed those limits and judicially expanded the reach of public nuisance to respond to societal issues more appropriately addressed by the political branches.

A watershed moment for the theory came in the 1990s with the settlement of public nuisance claims filed against tobacco companies. Although no court endorsed or tested public nuisance as a vehicle for claims in this litigation, the role it played as the underlying cause of action in the historic settlement might have given a degree of credence to the legal theory. At a minimum, public nuisance's role in the tobacco litigation inspired a generation of plaintiffs' lawyers in the years following the settlement to craft similar claims over different alleged harms in an effort to profit from bringing the "next tobacco litigation."

The tobacco settlement was staggering in size. One scholar has valued it at "something on the order of a quarter of a trillion dollars"—with roughly $13.75 billion siphoned off to contingency fee counsel—representing "the largest transfer of wealth as a result of litigation in the history of the human race."[12] Thus, "[e]ven though public nuisance theory was not validated in [a] single tobacco case, the plaintiffs' victory in achieving a mass settlement in litigation

that included this novel theory gave it the hint of legitimacy the trial bar needed."[13] In search of the next massive tobacco litigation-like settlement, plaintiffs are more than ever relying on public nuisance in cases targeting large-scale policy issues.

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Update on Public Nuisance Litigation: Pushing the Envelope

Without clear statutory guidance on public nuisance, courts remain free to shape and reshape nuisance law with their decisions. *Waking the Litigation Monster* profiled efforts by plaintiffs to subject manufacturers of chemicals, asbestos, tobacco, and lead paint to nuisance liability. It also discussed emerging litigation related to climate change and opioids. This section picks up where that discussion left off, highlighting key developments in public nuisance litigation in the years since the white paper's release.

As was the case in 2019, most courts continue to reject public nuisance claims against manufacturers of lawful products. But plaintiffs have achieved incremental victories that may embolden and encourage the continued expansion and abuse of the tort. If past is prologue, the plaintiffs' bar will keep pushing the envelope on public nuisance irrespective of their actual success.

Fossil Fuels and Climate Change

Several states and numerous local governments have brought suit against large energy companies alleging, in part, that they have created a public nuisance through their marketing and sale of fossil fuels, the use of which contributes to global warming. These cases seek to force the defendant companies to pay for extensive measures purportedly aimed at climate change prevention and mitigation. In doing so, they represent a prototypical example of stretching public nuisance beyond its traditional limits. Not

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only do these cases seek to forgo the requirements that defendants cause and control the alleged nuisance (as the defendant companies clearly do not control all of the carbon emitted into the atmosphere by the ultimate consumers of fossil fuels), they also put important and fluid public policy issues in front of judges, would impose liability on completely lawful activity, and attempt to bypass statutory regimes designed to protect the environment.

There are currently well over a dozen state and local government lawsuits pending before courts across the United States alleging, among other things, the creation of a public nuisance associated with the marketing and sale of fossil fuels. Over the last few years, litigation in these cases has centered on procedural matters, including whether the cases belong in federal or state court.[14] Procedural disputes in these cases are still unfolding, but many cases have already been remanded to state court.[15]

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In affirming the dismissal of New York City's climate lawsuit, the U.S. Court of Appeals for the Second Circuit aptly noted that "[g]lobal warming presents a uniquely international problem of national concern. It is therefore not well-suited to the application of state law. Consistent with that fact, greenhouse gas emissions are the subject of numerous federal statutory regimes and international treaties."[16] The court went on to note that the city "sidestepped those procedures and instead instituted a state-law tort suit against five oil companies to recover damages caused by those companies' admittedly legal commercial conduct in producing and selling fossil fuels around the world."[17] In so doing, the court observed, "the City effectively seeks to replace these carefully crafted frameworks—which are the product of the political process—with a patchwork of claims under state nuisance law."[18]

Another court handling such a case has described the plaintiffs' public nuisance theory as "breathtaking" because it "would reach the sale of fossil fuels anywhere in the world, including all past and otherwise lawful sales, where the seller knew that the combustion of fossil fuels contributed to the phenomenon of global warming."[19]

These suits are perhaps the starkest recent example of plaintiffs attempting to effectuate sweeping policy changes through public nuisance litigation. While also seeking monetary relief in the forms of damages and "abatement," the injunctive relief sought in these

lawsuits would aim to halt the marketing and sale of fossil fuels altogether and immediately—a prospect that would have widespread impacts on the global economy and life as we know it, fundamentally remaking U.S. energy policy. This type of policy change, with such massive economic and national security implications, surely should not be dictated by one city or one court.

It remains true today that "[n]o plaintiff has ever succeeded in bringing a nuisance claim based on global warming."[20] But these cases are proceeding, and companies are feeling the burden of extended litigation now. By contrast, the government entities pursuing these claims, often represented by private attorneys on a contingency fee basis, face little downside.

Opioids

The opioid epidemic has visited unspeakable hardship on families across the nation. It represents a major societal problem that deserves concerted attention and action. But instead of pursuing innovative policy solutions, over the past five years more than 3,000 local governments have channeled resources into suing the entire prescription opioid medication supply chain. And, despite the questionable merits of the public nuisance theory's application in this context, when a public nuisance-based opioid claim succeeds, regardless of the underlying reason for its success, plaintiffs expand the cause of action beyond its traditional scope.

Enforcing Traditional Guardrails

Several recent decisions in opioid cases have rejected public nuisance theories and enforced traditional limits on the tort. In July 2022, for example, a federal judge in West Virginia ruled in favor of drug distributors in a public nuisance case brought by a West Virginia city and county. Following past cases rejecting efforts to subject product manufacturers and distributors to nuisance liability, the court held that public nuisance in West Virginia did not extend to "the sale, distribution, and manufacture of opioids."[21] The court explained: "[t]he phrase 'opening the floodgates of litigation' is a canard often ridiculed with good cause. But here, it is applicable. To apply the law of public nuisance to the sale, marketing and distribution of products would invite litigation against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product."[22]

Eight months earlier, in November 2021, the Supreme Court of Oklahoma reached a similar conclusion[23] when it refused to stretch Oklahoma public nuisance law to reach the manufacturing, marketing, and sale of prescription opioids. The state's high court emphasized that public nuisance law should address "discrete, localized problems, not policy problems."[24] Endorsing the plaintiffs' expansive theory, the court explained, would allow "courts to manage public policy matters that should be dealt with by the legislative and executive

branches; the branches that are more capable than courts to balance the competing interests at play in societal problems."[25]

Also in November 2021, a Superior Court in California held that public nuisance did not apply to an opioid manufacturer's marketing of products because (1) the U.S. Food and Drug Administration's approval of opioids as controlled substances prevented a finding of unreasonableness; and (2) the plaintiffs did not provide other evidence proving causation between the manufacturer's marketing and the rise in "medically inappropriate" prescriptions that had led to the addiction crisis.[26]

Likewise, in a 2019 dismissal of one Connecticut city's public nuisance lawsuit against opioid companies, the court noted that "[t]o keep order in law, government enforcement agencies must represent the indirect public interest in court, not a flurry of individual plaintiffs—even when they are local governments[,]" and that "[t]o permit otherwise would risk letting everyone sue almost everyone else about pretty much everything that harms us."[27]

Expanding the Scope

Unfortunately, however, not all courts have guarded the traditional scope of public nuisance in this area, fueling continued litigation and increasingly astronomical settlement agreements. In August 2022, for example, a federal judge in the U.S. District Court for the Northern District of California found a major retail pharmacy chain "liable for substantially contributing to the [opioid] public nuisance in San Francisco."[28] In discussing the defendant's knowledge of the hazard and causation, the court turned repeatedly to

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People v. ConAgra Grocery Products Co.,[29] one of the few decisions ever to find lead paint manufacturers liable for creating a public nuisance.[30] The court distinguished the recent West Virginia and California superior court decisions by focusing on its finding that the pharmacy chain violated federal regulations when it failed to properly vet prescription information.[31] It remains unclear how influential this case will be, given its reliance on California's expansive public nuisance statute and specific factual findings.

In addition to the San Francisco case, there are recent decisions from the U.S. District Court judge overseeing the multidistrict opioid litigation (MDL) in the Northern District of Ohio[32] and the West Virginia Mass Litigation Panel[33] allowing public nuisance claims to proceed against drug distributors. As highlighted by the opioid MDL, these decisions opened the gates to later jury verdicts pinning liability on pharmacies and drug companies and imposing damages under public nuisance theories.[34] These outcomes demonstrate the significant risks that broad public nuisance theories pose to defendants, especially in jury trials, regardless of whether the claims have merit. They also demonstrate the potential that a court will adopt expansive legal theories out of a desire to "solve" the social and policy issues underlying the litigation and, to that end, allow claims to reach a jury in the first instance. Not surprisingly, these decisions—especially Judge Dan Polster's handling of the MDL—have been widely criticized by the business community.[35] And the Sixth Circuit has repeatedly reversed MDL decisions, describing one as "plainly incorrect as a matter of law,"[36] chiding the lower court in another for adopting "novel" procedural devices beyond the scope of the federal rules,[37] and generally having to remind the court that "MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance."[38]

The dynamics at play in the opioid MDL also highlight the immense pressure to settle that defendants face when a judge endorses a plaintiff's expansive public nuisance theory. As *The Wall Street Journal* Editorial Board observed, "Judge Polster is wielding the club in the pharmacy litigation … pressur[ing] defendants to settle in the name of doing 'something meaningful to abate the crisis.'"[39]

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COVID-19

Consistent with the trend of directing public nuisance claims at large-scale policy issues, plaintiffs have also invoked public nuisance in COVID-19 cases brought against employers. These cases have largely failed. In *Rural Community Workers Alliance v. Smithfield Foods, Inc.*, for example, the U.S. District Court for the Western District of Missouri found that plaintiffs were unlikely to succeed on their public nuisance claim because the employer's significant measures to combat the disease established that the employer did not violate the public's right to health and safety.[40] And in *Palmer v. Amazon.com, Inc.*, the Second Circuit upheld a district court's dismissal of fulfillment center workers' public nuisance claims.[41] In light of the general public's risk of exposure to COVID-19 almost anywhere in the world, the court held that "[p]laintiffs' alleged harms [were] different in degree, not in kind, and so [did] not make out the requisite special injury to state a claim for public nuisance."[42]

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Other Noteworthy Cases

In July 2022, a Delaware Superior Court judge dismissed the state attorney general's lawsuit against three companies over polychlorinated biphenyl (PCB) pollution.[43] In line with the Oklahoma and West Virginia decisions discussed above, the court held that "product claims are not encompassed within the public nuisance doctrine."[44] In particular, the court relied on a prior Delaware case holding that "a defendant is not liable for public nuisance unless it exercises control over the instrumentality that caused the nuisance at the time of the nuisance."[45] The decision joins the large majority of court rulings rejecting public nuisance claims brought against producers of lawful products and could head off similar PCB-related public nuisance claims in the future.

One set of cases in which plaintiffs have been more successful in convincing courts to expand the boundaries of public nuisance is in land-based matters involving large numbers of people. Historically, the "special injury" rule limited the availability of privately pursued public nuisance claims to a "particular plaintiff" or a "limited group" suffering from an injury different in kind from the public at large.[46] But recent cases have stretched this requirement to include even large groups comprising most, or even all, of the relevant community. Thus, in *Thornburgh v. Ford Motor Co.*,[47] the U.S. District Court for the Western District of Missouri allowed a public nuisance action to proceed on behalf of over 6,000 households in a 12-mile radius surrounding a Ford Motor Company assembly plant. Similarly, in *Baptiste v. Bethlehem Landfill Co.*, the

U.S. Court of Appeals for the Third Circuit found a special injury shared by a class of "about 8,400 households within a 2.5-mile radius of [a] landfill."[48] Courts have not uniformly accepted such claims, however. Recent decisions from New York's Appellate Division refused public nuisance claims because large groups of city residents failed to allege a special injury from a landfill's odors that was different from the injury posed to the community as a whole.[49]

New Issues on the Horizon

Unmoored from traditional limits, plaintiffs can attempt to deploy public nuisance against virtually any perceived harm relating to a company's manufacture and sale of a lawful product. As a result, future possibilities for the abuse of public nuisance are endless and difficult to predict.

Some new targets of public nuisance litigation are unsurprising, at least in light of past defendants. For example, in February 2022, the Colorado attorney general filed a public nuisance suit against producers of perfluoroalkyl and polyfluoroalkyl substances (PFAS), a chemical component found in fire-fighting foams and household cookware, seeking costs for environmental investigation, monitoring, and restoration.[50] Attorneys general in North Carolina, California, Florida, and other states have filed similar suits alleging public nuisances.[51] The focus on PFAS, an emerging target of environmental litigation, falls in line with past efforts to address widespread environmental claims with nuisance law.

Similarly, though with the potential to impact a much broader range of defendants, a recent lawsuit in California claims that companies selling products in plastic packaging have created a public nuisance.[52] Like the global societal and policy issues at stake in the climate change cases, this lawsuit "invites a court to transform the everyday use of plastic bottles—and indeed the use of plastics in society more generally—into a national tort."[53] A federal district court remanded the case to state court in February 2021,[54] where the California Superior Court has allowed the case to proceed.[55]

Other new targets of public nuisance lawsuits fall farther afield from its traditional use. In response to a rash of recent thefts that exploit an alleged design flaw in certain Korean-manufactured cars, for example, cities like St. Louis and Milwaukee have threatened public nuisance suits against the foreign automakers.[56] In November 2022, the city of Columbus, Ohio, announced its intention to file a similar suit.[57] The cities argue that the automakers are responsible for a public safety crisis, notwithstanding that the thefts at issue are independent criminal acts over which the automakers have no control.

Most recently, in November 2022, the mayor and city council of Baltimore, Maryland, filed a lawsuit "to hold cigarette manufacturers accountable for cleanup costs associated with tobacco product litter."[58]

The suit alleges that cigarette and cigarette filter makers "manufactured, distributed, marketed, promoted, and attempted the disposal of filtered cigarettes in a manner that created or contributed to the creation of public nuisances that unreasonably obstruct the free use and enjoyment of Baltimore City's property."[59] The city's complaint goes on to claim that "[a]n ordinary person would be reasonably annoyed or disturbed by the presence of cigarette filters accumulated on Baltimore City property."[60] In an apparent attempt to try to avoid the obvious rebuttal that it is litterers themselves who cause the complained-of harms, not the defendants, Baltimore's complaint asserts that the defendant companies did not do enough to correct the mistaken impression among members of the public that discarded cigarette filters are biodegradable.

These lawsuits (both actual and threatened) may portend an expanding reliance on public nuisance theories. Municipal plaintiffs may encourage courts to impose liability whenever an alleged product defect—or even an unpopular or inappropriate end use of a non-defective product—leads to the expenditure of public funds. Such expanded theories would allow municipalities to essentially act as product regulators and consumer protection authorities, roles they have neither the expertise nor the mandate to fill. Furthermore, these public nuisance lawsuits highlight another unsettling emerging trend: municipalities attempting to use court judgments as a source of unappropriated municipal funding. Regardless of how one feels about certain products or commercial activities, attempts to use litigation to recoup expenses for municipal activities, like ambulance purchases or litter pickup, are both

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unprecedented and unwise. It is for that very reason that several states adhere to the so-called "free-public services doctrine," also known as the municipal cost recovery rule. This rule states that a municipal government should not be able to recover the cost of public services from a tortfeasor, even if the tortfeasor is allegedly responsible for increasing the cost of such services.[61] Allowing recovery in such circumstances would enable municipal governments to "double dip," by collecting funds both from the taxpayer or state to carry out public services and then "recovering" expended funds from an alleged tortfeasor. It also allows municipalities to circumvent the appropriations process, in which elected officials rightly exercise oversight on the allocation and expenditure of funds. Public nuisance lawsuits, particularly when used by municipalities in suits seeking damages to pay for infrastructure repairs and upgrades, facilitate inappropriate and unaccountable governance. Recent cases have also stretched public nuisance to attempt to cover surprising new forms of conduct. In one particularly troubling development, for example, plaintiffs have begun crafting claims that expand public nuisance to cover advertising, marketing, advocacy, and other forms of commercial speech.[62] Subjecting speech to nuisance law would not only be a dramatic departure from the cause of action's traditional land-based origins, but would undoubtedly raise serious constitutional concerns.

The Important Role of State Legislatures

State legislatures have played and should continue to play a crucial role in defining and clarifying public nuisance liability. Through legislation, they can both limit the discretion of the courts and provide clarity and predictability to market participants.

Indeed, before the Second Restatement rewrote centuries of public nuisance law, the "principal mechanism for identifying conduct as constituting a public nuisance was a determination by the legislature … that particular conditions should be condemned as public nuisances."[63] As a result, all 50 states and the District of Columbia have at least some form of public nuisance law on the books.[64] These statutes range from general legislation defining the cause of action to laws targeting specific conduct like gambling and prostitution. Although easy to overlook in light of the high-stakes lawsuits grabbing headlines in recent years, "this legacy of legislative activity refutes the notion that the identification of public nuisances is inherently or even primarily a judicial function."[65]

Several states maintain general laws defining "public nuisance."[66] Some of these statutes retain the hallmarks of traditional public nuisance law. For example, Arizona's statute declares, in part, that a public nuisance constitutes anything that "unlawfully obstruct[s] the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal or basin, or any public park, square, street or highway."[67] Similarly, Montana defines as a public nuisance "a condition that renders dangerous for passage any public highway or right-of-way or waters used by the public."[68] Other states, such as Arkansas, have incorporated the Second Restatement's definition of public nuisance into their own laws: "[c]onduct within a municipality that

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unreasonably interferes with the use and enjoyment of lands of another, including conduct on property which disturbs the peaceful, quiet, and undisturbed use and enjoyment of nearby property, constitutes a common nuisance."[69] Whether or not these statutes have incorporated the Second Restatement's reasonableness standard, nearly all of them stipulate a connection to land or real property.

A number of states have enacted what might be described as general public nuisance statutes, containing broad language that is particularly susceptible to novel applications of public nuisance. These statutes occasionally play an important role in judicial decisions. California offers a good example of such a statute. In the August 2022 decision discussed above, the U.S. District Court for the Northern District of California placed considerable weight on California's "broad[]" nuisance statute in finding public nuisance liability.[70] That statute, California Civil Code § 3479, defines a "nuisance" as "[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances … or [anything that] unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway."[71] Despite the language in the latter part of the statute referencing unlawful obstructions to public lands and waters, the court read the statute "broadly," placing emphasis on its reference to "[a]nything which is injurious to health."[72] The statute's critical role in this decision—in which vague language provided an opening for the imposition of extensive liability—demonstrates the importance of clear statutory guidance in this area.[73]

Other states lack general public nuisance laws but define various narrow categories of activities as public nuisances. Missouri, for example, lacks a general public nuisance statute but has declared prostitution,[74] gambling,[75] and buildings frequented by street gangs[76] each as public nuisances. Likewise, West Virginia does not generally address public nuisance, but labels houses of prostitution[77] and drug-related establishments[78] as public nuisances. Due to their limited scope, and sometimes outdated subject matter, public nuisance laws addressing specific topics rarely implicate the large-scale policy issues associated with public nuisance lawsuits today. At the same time, they demonstrate the superior aptitude legislatures possess to define and address nuisances, and the type of policy judgments that they, unlike courts, are authorized to make.

Most state public nuisance statutes have sat untouched for many years. But as the plaintiffs' bar adapts the historical theory to novel situations, state legislatures should not sit idly by. Rather, they should reassert their appropriate authority and engage in contemporary efforts to define and clarify the scope of public nuisance through legislative enactments. As discussed

below, such efforts could prove to be an important tool for restoring traditional limits to the tort in the face of attempts to expand it in ways inconsistent with the rule of law.

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Principles for Restoring Traditional Limits to Public Nuisance

Before plaintiffs' attorneys began their campaign to expand public nuisance following the publication of the Second Restatement, several limiting principles held the cause of action in check. Discussed below are seven such principles, which courts have relied on in rejecting expansive public nuisance claims over the past several decades.

While defense attorneys and many judges continue to resist creative attempts by plaintiffs' lawyers to expand public nuisance law, it is critical to note that state legislators can be even more effective in restricting public nuisance by codifying these principles. Lawmakers in states like Texas have already introduced such legislation.

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Principles for Reform

These traditional principles should serve as guideposts for efforts to curb the expansion of public nuisance litigation. Defining and enforcing these principles can help guide efforts to restrict the tort, and aid in returning it to its historical bounds.

A Public Nuisance Must Involve a Public Right

Public nuisance cases should address interferences with public rights to shared resources. A public right—such as the use of public land or water—is conceptually distinct from a private right held by a large number of people—such as the right to the use and enjoyment of one's home. Classic examples of interferences with public rights include the "obstruction of highways and waterways, [and] pollution of air or navigable streams."[79]

A Public Nuisance Must Relate to Real Property

The historical basis for public nuisance was a defendant's offensive use of land or obstruction of public highways and waterways. As one scholar observed, "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."[80] Even the Second Restatement acknowledges the land-based nature of the cause of action: "[t]he feature that gives unity to either public or private nuisance is the interest invaded, namely either the public right or the private interest in the use and enjoyment of land."[81] It should come as no surprise, then, that early American cases described public nuisance predominantly in the context of obstructions to real property.[82] More recent cases, too, have rebuffed attempts to "depart from the long-standing principle that a public right is a right of the public to shared resources such as air, water, or public rights of way."[83] Importantly, the theory's nexus with real property ensures that defendants have control of the nuisance and, thus, have the capacity to abate it.

Only Government Entities and Individuals Suffering "Special Injury" Can Initiate Suit

For much of public nuisance's long history, government entities alone enforced public nuisance violations as criminal offenses. In the early days, actions to enjoin or abate public nuisances were brought in the name of the Crown.[84] As the theory developed under English law, however, the "special injury rule" emerged to allow a private plaintiff to sue for damages resulting from a public nuisance that were different in kind than the damages of the general public.[85] But the special injury rule has limits. For instance, a special injury "must be particular to the plaintiff, or to a limited group in which he is included. When it becomes so general and widespread as to affect a whole community, or a very wide area within it, the line is drawn."[86] And even the Second Restatement acknowledges that "[a] private individual can recover in tort for a public nuisance only if he has suffered harm of a different kind from that suffered by other persons exercising the same public right. It is not enough that he has suffered the same kind of harm or interference but to a greater extent or degree."[87]

"In keeping with this traditional understanding, a public nuisance should not arise from lawful conduct, especially conduct expressly authorized by or encouraged by the government."

Public Nuisance Requires Unlawful—Not Just Unreasonable—Conduct

As discussed above, the Second Restatement introduced the "unreasonable interference" standard into public nuisance law for the first time in the 1970s. At the urging of environmental activists, the American

Law Institute redefined public nuisance as "an unreasonable interference with a right common to the general public."[88] This replaced the common understanding of public nuisance that reigned for hundreds of years, and Dean Prosser's original definition for the Restatement: "a criminal interference with a right common to all members of the public."[89] In keeping with this traditional understanding, a public nuisance should not arise from lawful conduct, especially conduct expressly authorized by or encouraged by the government.

A Public Nuisance Defendant Must Maintain Control of the Nuisance

Control has long been a basic element of public nuisance. "[L]iability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise .... If the defendants exercised no control over the instrumentality, then a remedy directed against them is of little use."[90] More specifically, "control *at the time the damage occurs* is a time-honored element of public nuisance."[91]

A Public Nuisance Defendant Must Proximately Cause the Harm

As discussed in *Waking the Litigation Monster*, if the causation requirement is relaxed or excused, "the battle in the public nuisance courtroom resembles a public policy debate, not the traditional role of courts to mete out individualized justice," with the end result mirroring the creation of a social program more than the resolution of a particular dispute.[92] Appropriately enforcing the causation requirement grounds public nuisance litigation in specific factual circumstances, and ensures that the defendant's conduct is "a substantial factor in bringing [the nuisance] about."[93]

Recently, the Supreme Court of Oklahoma specifically emphasized the necessity of elements like causation and control when it recognized that "(1) the manufacture and distribution of products rarely cause a violation of a public right [and] (2) a manufacturer does not generally have control of its product once it is sold."[94] In August 2022, the U.S. District Court for the Southern District of West Virginia likewise emphasized causation and control in rebuffing public nuisance claims against drug distributers.[95]

Government Plaintiffs May Seek Only Injunction or Abatement of Nuisances

Because public services are already funded by taxpayers, government plaintiffs should not be permitted to recover damages for the cost of those services. As originally conceived, public nuisance lawsuits served only to stop an existing nuisance from continuing, not to provide monetary compensation for an injury. Moreover, monetary damages for alleged product defects are accessible through products liability causes of action. The recovery of compensatory damages for a public nuisance, therefore, should

be limited to individual plaintiffs sustaining an appropriately shown special injury. Recognizing this, some jurisdictions prohibit municipalities from seeking the recoupment of costs of public services through litigation.[96] Such "municipal cost recovery rules" reduce the incentive for bringing public nuisance claims in the first place.

Reforms in Practice

By codifying these traditional limits, state legislators could stop abusive public nuisance litigation—which could have devastating chilling effects on business in their states—before it starts. In 2021, state legislators in Texas undertook just such an effort. The result of that process, H.B. 2144,[97] serves as a model for legislative reform. H.B. 2144 set out "to ensure that the tort of public nuisance is defined clearly and in a manner consistent with its traditional scope for purposes of its use as a cause of action in [Texas]."[98] Consistent with that purpose, the legislation defined an "established public right" to mean "a right, commonly held by all members of the public, to the use of public land, air, or water."[99] It also pared back the Second Restatement's amorphous "unreasonable interference" standard by defining public nuisance in terms of an "unlawful condition"—an "ongoing circumstance or effect of an instrumentality that is expressly prohibited by the laws of this state."[100] Moreover, H.B. 2144 clarified that liability attached "only if the person causes an unlawful condition and controls that unlawful condition at the time the condition violates an established public right," [101] and it limited damages to individuals showing injury different in kind from the general population.[102] Importantly, the legislation

"By codifying these traditional limits, state legislators could stop abusive public nuisance litigation—which could have devastating chilling effects on business in their states—before it starts."

would have "abrogated" and replaced "the common law of public nuisance" in the state.[103] Although the measure did not ultimately become law, it represents a comprehensive, fully-formed model for future reform efforts.

Another possible legislative approach is to impose constraints on public nuisance lawsuits, rather than entirely supplant the common law. For example, legislatures could statutorily foreclose certain categories of public nuisance lawsuits, such as claims that a lawful product endangers the public at large or claims seeking to impose liability on the manufacturers and distributors of such lawful products. Such an approach could also limit the remedies available to government entities to stopping an ongoing nuisance, and prevent them from recovering monetary damages. This kind of legislation offers simplicity and ensures governments' abilities to address true public nuisances, while still providing regulated entities a welcome measure of predictability and fairness.

"This kind of legislation offers simplicity and ensures governments' abilities to address true public nuisances, while still providing regulated entities a welcome measure of predictability and fairness."

Finally, it is worth noting that defining and limiting public nuisance is nothing new for state legislatures. As discussed above, every state has codified some form of public nuisance, a practice that was fairly common prior to the Second Restatement. Moreover, state legislatures have engaged in contemporary efforts to restrict the reach of public nuisance in select areas.[104]

Conclusion

The plaintiffs' bar continues to wield public nuisance as a limitless, all-purpose "litigation monster" in high-profile lawsuits designed to extract maximum payouts from lawful businesses.

Directed at large-scale policy issues new and old, these lawsuits show no signs of stopping and threaten to become a permanent fixture of modern business litigation unless legislators and judges recognize and enforce traditional limits on the cause of action. As articulated above, several core principles should guide such efforts—the implication of a public right, a nexus to real property, a narrow special injury rule, the unlawfulness of a prohibited activity, causation of the condition, control over the condition's removal, and damages limitations. State legislators are uniquely positioned to codify these limitations, remove the discretion currently afforded individual judges and juries, and provide businesses with transparent and fair standards.

Endnotes

[1] Joshua K. Payne and Jess R. Nix, *Waking the Litigation Monster: The Misuse of Public Nuisance*, U.S. Chamber of Commerce Institute for Legal Reform (Mar. 2019), https://instituteforlegalreform.com/research/waking-the-litigation-monster-the-misuse-of-public-nuisance/ [hereinafter *Waking the Litigation Monster*].

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

[3] *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021); *see also People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (N.Y. App. Div. 2003) ("All a creative mind [needs] to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.").

[4] This section largely summarizes the history discussed in *Waking the Litigation Monster* at 3–8.

[5] Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 805–06 (2003).

[6] The American Law Institute, About ALI, https://www.ali.org/about-ali/.

[7] Glenn G. Lammi, *Will The American Law Institute 'Restate' Or Try To Rewrite U.S. Copyright Law?*, Forbes (Apr. 28, 2015), https://www.forbes.com/sites/wlf/2015/04/28/will-the-american-law-institute-restate-or-try-to-rewrite-u-s-copyright-law/?sh=95e472d79d1c.

[8] Restatement (Second) of Torts § 821B (Am. Law Inst. 1979).

[9] *Id*.

[10] Gifford, 71 U. Cin. L. Rev. at 809.

[11] *See* Trevor S. Cox and Elbert Lin, *ILR Briefly: Municipality Litigation: A Continuing Threat*, U.S. Chamber of Commerce Institute for Legal Reform (June 2021), https://instituteforlegalreform.com/research/ilr-briefly-municipality-litigation-a-continuing-threat/; Rob McKenna, Elbert Lin & Drew Ketterer, *Mitigating Municipality Litigation: Scope and Solutions*, U.S. Chamber of Commerce Institute for Legal Reform (Mar. 2019), https://instituteforlegalreform.com/research/mitigating-municipality-litigation-scopeand-solutions/.

[12] Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 Seton Hall L. Rev. 563, 563–64 (2001).

[13] Victor E. Schwartz et al., *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 Okla. L. Rev. 629, 638–39 (2010).

[14] *See BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) (holding 7-1 that courts of appeals could review entire remand orders implicating the federal officer removal statute, not just the part of the order deciding the federal officer removal ground).

[15] *See, e.g., Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 62 (1st Cir. 2022) (affirming remand to state court); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 706 (3d Cir. 2022) (same).

[16] *City of New York v. Chevron Corp.*, 993 F.3d 81, 85–86 (2d Cir. 2021).

[17] *Id*. at 86.

[18] *Id*.

[19] *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1022 (N.D. Cal. 2018), *vacated and remanded sub nom. City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020), *opinion amended and superseded on denial of reh'g*, 969 F.3d 895 (9th Cir. 2020).

[20] *Id*. at 1023.

[21] *City of Huntington v. AmerisourceBergen Drug Corp.*, No. CV 3:17-01362, 2022 WL 2399876, at *59 (S.D.W. Va. July 4, 2022).

[22] *Id*.

[23] 499 P.3d 719.

[24] *Id*. at 731.

[25] *Id*.

[26] *People v. Purdue Pharma L.P.*, No. 30-2014-00725287-CU-BT-CXC, at 14–15, 19–20, 34–35 (Super. Ct. Cal. Nov. 1, 2021).

[27] *City of New Haven v. Purdue Pharma, L.P.*, No. X07HHDCV176086134S, 2019 WL 423990, at *2 (Conn. Super. Ct. Jan. 8, 2019), *judgment entered*, (Conn. Super. Ct. 2019).

[28] *City & Cty. of San Francisco v. Purdue Pharma L.P.*, No. 18-CV-07591-CRB, 2022 WL 3224463, at *2 (N.D. Cal. Aug. 10, 2022).

[29] 17 Cal. App. 5th 51, 78–112 (2017).

[30] *See* 2022 WL 3224463, at *52–55.

[31] *Id*. at *56–57.

[32] *In re Nat'l Prescription Opiate Litig.*, 477 F. Supp. 3d 613, 616 (N.D. Ohio 2020), *clarified on denial of reconsideration*, No. 1:17-MD-2804, 2020 WL 5642173 (N.D. Ohio Sept. 22, 2020), and *cert. denied*, No. 18-OP-45032, 2022 WL 278954 (N.D. Ohio Jan. 31, 2022).

[33] *In re Opioid Litigation*, No. 21-C-9000-PHARM (W. Va. Cir. Ct. (Kanawha Cty.) Aug. 3, 2022), available at http://www.courtswv.gov/lower-courts/mlp/mlp-orders/Opioid/8-3-22FOF-COLandOrderDenyingPharmacyMTDs.pdf.

[34] *Ohio Jury Holds CVS, Walgreens and Walmart Liable for Opioid Crisis*, NPR (Nov. 23, 2021), https://www.npr.org/2021/11/23/1058539458/a-jury-in-ohio-says-americas-big-pharmacy-chains-are-liable-for-the-opioid-epide; *New York Opioid Trial Ends With Verdict in Favor of Plaintiffs, Jury Finds Drug Companies Caused Public Nuisance*, Law.com (Dec. 30, 2021), https://www.law.com/newyorklawjournal/2021/12/30/new-york-opioid-trial-ends-with-verdict-in-favor-of-plaintiffs-jury-finds-drug-companies-caused-public-nuisance/.

[35] *See* The Editorial Board, *The Never-Ending Opioid Lawsuits*, The Wall Street Journal (Aug. 18, 2022), https://www.wsj.com/articles/the-never-ending-opioid-raid-judge-dan-aaron-polster-cvs-walmart-walgreens-ohio-11660773367?mod=Searchresults_pos1&page=1 (observing that "Judge Polster [has] repeatedly bent the federal rules of civil procedure and evidence to assist the trial lawyers.").

[36] *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 845 (6th Cir. 2020).

[37] *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 677 (6th Cir. 2020).

[38] *In re Nat'l Prescription Opiate Litig.*, 956 F.3d at 845.

[39] The Editorial Board, *A Case of Opioid Tort Abuse*, The Wall Street Journal (Nov. 9, 2021), https://www.wsj.com/articles/the-worst-tort-abuse-ohio-opioid-trial-judge-dan-polster-11636492713.

[40] 459 F. Supp. 3d 1228, 1244 (W.D. Mo. 2020).

[41] 51 F.4th 491, 498 (2d Cir. 2022).

[42] *Id*. at 512; *but see id*. at 518 (Chin, J., dissenting) ("I would find that the harm Plaintiffs faced was different in kind—not just degree—from that faced by the community at large.").

[43] *State ex rel. Jennings v. Monsanto Co.*, No. CVN21C09179MMJCCLD, 2022 WL 2663220, at *4 (Del. Super. Ct. July 11, 2022).

[44] *Id*.

[45] *Id*. at *2 (quoting *State ex rel. Jennings v. Purdue Pharma L.P.*, No. N18C-01-223 MMJCCLD, 2019 WL 446382, at *5 (Del. Super. Feb. 4, 2019)).

[46] *See* William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1015 (1966).

[47] No. 4:19-CV-01025-HFS, 2021 WL 1230271, at *3 (W.D. Mo. Mar. 31, 2021).

[48] 965 F.3d 214, 218 (3d. Cir. 2020).

[49] *See Davies v. S.A. Dunn & Co.*, LLC, 156 N.Y.S.3d 457, 460 (N.Y. App. Div. 2021), *leave to appeal denied*, 38 N.Y.3d 902 (2022); *Duncan v. Cap. Region Landfills, Inc.*, 152 N.Y.S.3d 862, 863 (N.Y. App. Div. 2021), *leave to appeal denied*, 38 N.Y.3d 902 (2022).

[50] Sara Wilson, *PFAS manufacturers sued by Colorado attorney general for environmental and health damages*, Colorado Newsline (Feb. 28, 2022), https://coloradonewsline.com/briefs/pfas-manufacturers-sued-colorado-environmental-health-damages/.

[51] Zach Bright, *DuPont, Chemours, 3M Sued by N.C. Attorney General Over PFAS*, Bloomberg Law (Oct. 19, 2022), https://news.bloomberglaw.com/environment-and-energy/dupont-chemours-3m-sued-by-n-c-attorney-general-over-pfas; Clark Mindock, *California sues 3M, DuPont over toxic 'forever chemicals'*, Reuters (Nov. 10, 2022), https://www.reuters.com/business/environment/california-sues-3m-dupont-over-toxic-forever-chemicals-2022-11-10/; Zachary T. Sampson, *Florida sues DuPont, other companies over toxic firefighting foam*, Tampa Bay Times (May 3, 2022), https://www.tampabay.com/news/environment/2022/05/03/florida-sues-dupont-other-companies-over-firefighting-foam-pollution/.

[52] Douglas A Henderson et al., *INSIGHT: Is Plastics Litigation the Next Public Nuisance?*, Bloomberg Law (April 23, 2020), https://news.bloomberglaw.com/environment-and-energy/insight-is-plastics-litigation-the-next-public-nuisance.

[53] *Id*.

[54] *Earth Island Inst. v. Crystal Geyser Water Co.*, 521 F. Supp. 3d 863 (N.D. Cal. 2021).

[55] *See* Press Release, Earth Island, *Coca-Cola, PepsiCo, Major Consumer Goods Companies Must Face Plastic Pollution Lawsuit Brought by Environmental Group in California* (July 6, 2022), https://www.earthisland.org/index.php/news/entry/coca-cola-pepsico-major-consumer-goods-companies-must-face-plastic-pollution-lawsuit-brought-by-environmental-group-in-california.

[56] Stephen Rivers, *St. Louis Wants to Sue Hyundai and Kia for Causing a "Public Safety Crisis" After Massive Surge in Thefts*, Carscoops (Oct. 10, 2022), https://www.carscoops.com/2022/10/st-louis-wants-to-sue-hyundai-and-kia-for-causing-a-public-safety-crisis-after-massive-surge-in-thefts/; Nick Bohr, *Milwaukee considers suing 2 automakers over stolen cars*, wisc.com (Dec. 6, 2021), https://www.wisn.com/article/milwaukee-considers-suing-two-automakers-over-stolen-cars/38444595.

[57] Monroe Trombly, *Columbus City Attorney says he intends to sue Kia and Hyundai over rampant car thefts*, The Columbus Dispatch (Nov. 7, 2022), https://www.dispatch.com/story/news/local/2022/11/07/columbus-to-file-lawsuit-against-kia-and-hyundai-over-vehicle-thefts/69625854007/.

[58] Press Release, Mayor Brandon M. Scott, City of Baltimore Files a First of its Kind Lawsuit Against Tobacco Companies for Cigarette Filter Waste (Nov. 21, 2022), https://mayor.baltimorecity.gov/news/press-releases/2022-11-21-city-baltimore-files-first-its-kind-lawsuit-against-tobacco-companies.

[59] Compl. ¶ 130, *Mayor & City Council of Baltimore v. Philip Morris USA, Inc.*, et al., No. 24C22004904 (Md. Cir. Ct. (Balt. City) Nov. 21, 2022).

[60] *Id*. ¶ 132.

[61] Allan Ray and Marlin Zechman, *First Responder Fees – An Increasing Trend Borne By Insurance Companies*, Claims Journal (Aug. 8, 2011), https://www.claimsjournal.com/news/national/2011/08/08/189234.htm.

[62] *See, e.g., Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656, at *2 (D. Minn. Mar. 31, 2021), *appeal docketed*, No. 21-1752 (8th Cir. Apr. 5, 2021) (discussing plaintiffs' allegations related to "advertising and public relations campaigns").

[63] Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. Tort L. 1, 40 (2011).

[64] *Id*. at 41.

[65] *Id*.

[66] Cataloging the public nuisance statutes of each of the 50 states goes beyond the scope of this *ILR Briefly*. This paper notes trends based on a general sample of public nuisance laws across the country.

[67] Ariz. Rev. Stat. Ann. § 13-2917.

[68] Mont. Code Ann. § 45-8-111(1).

[69] Ark. Code Ann. § 14-54-1502; *see also* Alaska Stat. Ann. § 09.45.2555 ("'[N]uisance' means a substantial and unreasonable interference with the use or enjoyment of real property, including water."); Colo. Code Regs. § 1002-86:86.8 ("'Public nuisance' means the unreasonable, unwarranted and/or unlawful use of property, which causes inconvenience or damage to others, including to an individual or to the general public.").

[70] *City & Cty. of San Francisco*, 2022 WL 3224463, at *2.

[71] Cal. Civ. Code § 3479.

[72] *City & Cty. of San Francisco*, 2022 WL 3224463, at *59.

[73] A handful of general state nuisance statutes include expansive language similar to Cal. Civ. Code § 3479. *See*, e.g., Ga. Code Ann. § 41-1-1 ("A nuisance is anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance."); Idaho Code Ann. § 52-101 ("Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property … is a nuisance."); Minn. Stat. Ann. § 561.01 ("Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance."); N.M. Stat. Ann. § 30-8-1 ("A public nuisance consists of knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority …").

[74] Mo. Ann. Stat. § 567.080.

[75] Mo. Ann. Stat. § 572.090.

[76] Mo. Ann. Stat. § 578.430.

[77] W. Va. Code § 61-9-5.

[78] W. Va. Code § 60A-4-403a.

[79] Gifford, 71 U. Cin. L. Rev. at 818.

[80] *Id*. at 831.

[81] Restatement (Second) of Torts § 822, cmt. a (1979).

[82] *See, e.g., Barr v. Stevens*, 4 Ky. 292 (1808) (obstruction of public highways); *Thayer v. Dudley*, 3 Mass. 296 (1807) (same); *Rogers v. Joyce*, 4 Me. 93 (1826) (same); *Olcott v. Banfill*, 4 N.H. 537 (1829) (same); *Hendrick v. Andrick*, 3 Va. 267 (Va. Gen. Ct. 1812) (same); *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91 (1838) (navigable waters); *Burrows v. Pixley*, 1 Root 362 (Conn. Super. Ct. 1792) (same); *Lansing v. Smith*, 8 Cow. 146 (N.Y. Sup. Ct. 1828) (same); *Lansing v. Smith*, 4 Wend. 9 (N.Y. 1829) (same); *Hughes v. Heiser*, 1 Binn. 463 (Pa. 1808) (same); *Dimmett v. Eskridge*, 20 Va. 308 (1819) (same).

[83] *State v. Lead Indus. Ass'n, Inc*, 951 A.2d 428, 455 (R.I. 2008) (citing *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1127 (Ill. 2004)).

[84] Schwartz et al., 62 Okla. L. Rev. at 632.

[85] Gifford, 71 U. Cin. L. Rev. at 799–800.

[86] Prosser, 52 VA. L. Rev. at 1015.

[87] Restatement (Second) of Torts § 821C, cmt. b.

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

[89] Gifford, 71 U. Cin. L. Rev. at 806 (quoting Restatement (Second) of Torts 6, 16–44 (Tentative Draft No. 15, 1969)).

[90] *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986). *See also Tioga Pub. Sch. Dist. No. 15*, 984 F.2d at 920 (collecting cases) ("[L]iability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance.").

[91] *Lead Indus. Ass'n, Inc.*, 951 A.2d at 449 (citing *In re Lead Paint Litig.*, 924 A.2d 484, 499 (N.J. 2007)).

[92] Charles H. Moellenberg, Jr. et al., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy*, 7 Expert Evidence Report (BNA) No. 18, at 483 (Sept. 24, 2007).

[93] Restatement (Second) of Torts § 834, cmt. d.

[94] *Id*.

[95] *City of Huntington*, WL 2399876 at *59–66.

[96] *See City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983); *City of Pittsburgh v. Equitable Gas Co.*, 512 A.2d 83, 84 (Pa. Commw. Ct. 1986); *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 892 (E.D. Pa. 2000) (applying Pennsylvania law).

[97] H.B. No. 2144 Sec. 100F.001(a), 87th Leg. (Tex. 2021).

[98] *Id*.

[99] *Id*. Sec. 100F.002(1).

[100] *Id*. Secs. 100F.002(3); 100F.002(5).

[101] *Id*. Sec. 100F.003.

[102] *Id*. Secs. 100F.006(a); 100F.002(4).

[103] *Id*. Sec. 100F.001(b).

[104] For example, all 50 states have enacted right-to-farm laws that prevent public nuisance claims against certain categories of agricultural activities. The National Agricultural Law Center, States' Right-To-Farm Statutes (last updated April 15, 2022), https://nationalaglawcenter.org/state-compilations/right-to-farm/ (collecting statutes). The same approach could be taken for businesses that must defend against public nuisance lawsuits related to the lawful production and distribution of products.

202.463.5724 main
1615 H Street, NW
Washington, DC 20062
instituteforlegalreform.com

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