

You'll Pay for What You've Done: Holding Industries Accountable for Societal Harms via Public Nuisance Statutes [*State v. Purdue Pharma LP, et al.*, No. CJ-2017-816, 2019 WL 4019929, (Okla. Dist. Ct., Cleveland Cty. Aug. 26, 2019).]

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I. INTRODUCTION

Despite reassurance from the medical community that opioids were not addictive, increased prescriptions have “led to widespread misuse of . . . opioids.”¹ In 2017 alone, 47,600 people fatally overdosed using opioids, and the U.S. Department of Health and Human Services declared a public health emergency.² In a landmark decision, an Oklahoma district court ruled pharmaceutical manufacturer Johnson & Johnson liable for \$572 million for its role in the crisis.³

Opioids are remarkably prevalent.⁴ Opioid addiction does not discriminate; it affects more and more people each year.⁵ Before the Oklahoma district court decision, the method of combating this issue had been through treating the symptoms, not the cause.⁶ The Centers for Disease Control and Prevention provide resources to patients for creating a pain-management plan and information on how to prevent an opioid

1. See *What is the U.S. Opioid Epidemic?*, U.S. DEP'T HEALTH & HUM. SERVS., <https://www.hhs.gov/opioids/about-the-epidemic/index.html> [https://perma.cc/W55W-VNCW] (last updated Sept. 4, 2019).

2. *Id.*

3. *State v. Purdue Pharma LP*, No. CJ-2017-816, 2019 WL 4019929, at *20 (Okla. Dist. Aug. 26, 2019).

4. *Opioid Deaths by Race/Ethnicity*, HENRY J. KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/opioid-overdose-deaths-by-raceethnicity/?dataView=0¤tTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [https://perma.cc/DNE5-52HZ] (last visited Jan. 2, 2020).

5. *Id.*

6. *Opioid Overdose, Information for Patients*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/patients/index.html> [https://perma.cc/FWT2-DBXK] (last updated July 26, 2019).

overdose.⁷ It was not until recently that drug companies have begun facing financial retribution for the actions that compounded the issue.⁸

Johnson & Johnson is the first drug-maker to actually be held liable for the opioid crisis, and the path to liability was unusual.⁹ The State of Oklahoma argued that Johnson & Johnson created a public nuisance with its misleading marketing and promotion of opioids.¹⁰ By agreeing with the State's argument and applying Oklahoma's public nuisance statute to pharmaceutical advertisements, the court may have opened the floodgates for litigation against other industries for the role advertisements may have played in national crises.¹¹

II. BACKGROUND

A. An Overview of *State v. Purdue Pharma LP*

The Oklahoma Attorney General filed suit against opioid manufacturers on June 30, 2017.¹² Prior to trial, which commenced May 28, 2019, all of the manufacturers except for Johnson & Johnson settled.¹³ "The State's sole claim for relief against Defendants was for causing a public nuisance," pursuant to an Oklahoma statute.¹⁴ The country saw 75,340 total opioid overdose deaths in 2015 and 2016 alone, of which 871

7. *Id.*

8. German Lopez, *The maker of OxyContin will reportedly pay billions to settle opioid epidemic lawsuits*, VOX (Sept. 11, 2019, 7:25 PM), <https://www.vox.com/policy-and-politics/2019/9/11/20861226/purdue-oxycontin-settlement-opioid-epidemic> [https://perma.cc/A8W7-H2FJ].

9. *See generally* *State v. Purdue Pharma LP*, No. CJ-2017-816, 2019 WL 4019929, at *20 (Okla. Dist. Aug. 26, 2019).

10. *Id.* at *15.

11. *Id.* at *20; *see generally* *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 301 (Conn. 2019).

12. *See* Original Petition, *Purdue Pharma*, 2019 WL 4019929 (No. CJ-2017-816), <https://advance.lexis.com/r/documentprovider/6539k/attachment/data?attachmentid=urn%3acontentItem%3a5SKT-KOJ1-DXDT-G2JC-00000-00&attachmenttype=PDF&attachmentname=Click+to+view+PDF+document&origination=BlobStore&sequencenumber=1&ishotdoc=false&docTitle=&&aci=la&cbc=0&lnsi=8ca31459-6935-43bf-be79-89351316bea&rmflag=0&sit=1568395363687.942#page=> [https://perma.cc/8P77-W6KK].

13. Berkeley Lovelace Jr., *Judge rules against Johnson & Johnson in landmark opioid case in Oklahoma*, CNBC (Aug. 26, 2019, 4:05 PM), <https://www.cnbc.com/2019/08/26/judge-rules-against-johnson-johnson-in-landmark-opioid-case-in-oklahoma.html> [https://perma.cc/U5KC-SET6]. The other manufacturer defendants were Purdue Pharma, L.P., Purdue Pharma, Inc., The Purdue Frederick Company, Teva Pharmaceuticals USA, Inc., Cephalon, Inc., Janssen Pharmaceuticals, Inc., Allergan, PLC, Watson Laboratories, Inc., and Actavis LLC. *Purdue Pharma*, 2019 WL 4019929.

14. *Purdue Pharma*, 2019 WL 4019929, at *1. The statute provides:

A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: First. Annoys, injures, or endangers the comfort, repose, health, or safety of others; or . . . [o]ffends decency; or . . . [u]nlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or . . . [i]n any way renders other persons insecure in life, or in the use of property

OKLA. STAT. tit. 50, § 1 (2019).

occurred in Oklahoma, a little over one percent of the nation’s total fatalities.¹⁵

In the petition filed by the State of Oklahoma, the State alleged the “[d]efendants’ deceptive marketing campaign and the resulting opioid abuse and addiction epidemic caused, and continues to cause, the State of Oklahoma . . . to bear enormous social and economic costs including increased healthcare, criminal justice, and lost work productivity expenses.”¹⁶ The State also alleged the drug-makers’ advertising caused the state to “pay millions of dollars for unnecessary or excessive opioid prescriptions.”¹⁷ In response, Johnson & Johnson denied the allegations of the State and asserted twenty-six affirmative defenses.¹⁸

B. Legal Background

Generally, a public nuisance is “a violation of general public rights” and stems from common law.¹⁹ The Restatement defines public nuisance as “an unreasonable interference with a right common to the general public.”²⁰ Oklahoma’s public nuisance statute reads, in relevant part, “[a] nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or Second. Offends decency; or . . . Fourth. In any way renders other persons insecure in life . . .”²¹ Further, it states a public nuisance “is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal.”²² This is the first case that has used Oklahoma’s public nuisance statute for an issue not explicitly related to real

15. Puja Seth, PhD, et al., *Overdose Deaths Involving Opioids, Cocaine, and Psychostimulants — United States, 2015–2016*, CTRS. FOR DISEASE CONTROL & PREVENTION (March 30, 2018), <https://www.cdc.gov/mmwr/volumes/67/wr/mm6712a1.htm> [<https://perma.cc/U5KC-SET6>]. Not all states provided accurate reporting on overdose deaths. *Id.* New Hampshire, Ohio, and West Virginia reported “the highest overdose death rates across multiple drug categories,” and Maryland, Rhode Island, and West Virginia experienced higher opioid-involved deaths than deaths involving heroin. *Id.*

16. Original Petition at ¶ 31, *Purdue Pharma*, 2019 WL 4019929 (No. CJ-2017-816).

17. *Id.* at ¶ 34.

18. Defendants Janssen Pharmaceuticals, Inc.’s and Johnson & Johnson’s Answer to Plaintiff’s Petition at 29–37, *Purdue Pharma*, 2019 WL 4019929 (No. CJ-2017-816). The asserted affirmative defenses included failure to state a claim, statute of limitations, primary jurisdiction, federal preemption, no fraud on the FDA, laches, waiver, equity, adequate remedy at law, good faith/reasonable belief as to accuracy and validity, unclean hands, estoppel, learned intermediary doctrine, sophisticated user, informed consent, failure to join indispensable parties, misjoinder and severance, ratification, third-party actions, protected speech, lack of proximate cause, due process, excessive fines, economic loss rule, conduct predating enactment of OMFCA, and violation of due process and statutory rights based on contingent fee counsel. *Id.*

19. 7 ALFRED W. GANS, ET AL., *AMERICAN LAW OF TORTS* § 20:5.

20. *Id.*

21. OKLA. STAT. tit. 50, § 1 (2019).

22. *Id.* § 2.

or personal property.²³ While many pharmaceutical companies have settled similar claims out of court, this was the first case to reach trial and hold a drug-maker liable for contributing to the opioid epidemic.²⁴

III. COURT'S DECISION

Judge Balkman agreed with the State and applied Oklahoma's public nuisance statute to this unique situation.²⁵ First, the court clarified the plain text of the public nuisance statute does not limit actions to those involving real or personal property alone.²⁶ Oklahoma's statute is unique in that it does not "limit nuisances to the 'habitual use or the threatened or contemplated habitual use of any place.'"²⁷ Instead, it broadly refers to unlawfully acting or failing to perform a duty, and the court found "[t]here is nothing in this text that suggests an actionable nuisance *requires* the use of or a connection to . . . property."²⁸

After deciding the public nuisance statute was appropriate, the court then explored the specific allegations against the drug-makers.²⁹ Looking at the marketing involved, Judge Balkman found the "[d]efendants promoted their specific opioids using misleading marketing."³⁰ In fact, "[d]efendants concede that 'False and Misleading' promotion includes at least . . . Broadening of product indication; Data taken out of context; Minimization of safety issues; Omission of material information; Comparative efficacy or safety claims without substantial evidence; and Overstatements of efficacy or safety."³¹ Additionally, the court found such

23. *State v. Purdue Pharma LP*, No. CJ-2017-816, 2019 WL 4019929, at *11 (Okla. Dist. Aug. 26, 2019). The language of other state statutes frequently limits nuisances to "the 'habitual use or the threatened or contemplated habitual use of any place.'" *Id.* (emphasis added).

24. Jill Sheridan, *Oklahoma Opioid Case May Hold Clues For Indiana's Lawsuit Against Purdue Pharma*, WBAA (Aug. 27, 2019), <https://www.wbaa.org/post/oklahoma-opioid-case-may-hold-clues-indianas-lawsuit-against-purdue-pharma#stream/0> [<https://perma.cc/GCQ2-LXPJ>]; Lovelace Jr., *supra* note 13.

25. *Purdue Pharma*, 2019 WL 4019929, at *11; *see* OKLA. STAT. tit. 50, § 1.

26. *Purdue Pharma*, 2019 WL 4019929, at *11. "There is nothing in this text that suggests an actionable nuisance requires the use of or a connection to real or personal property." *Id.* The court recognizes that even if the statute did require a connection to property, the State has proven that Defendants substantially used real and personal property to create this nuisance. *Id.*

27. *Id.* Alabama, California, Florida, Georgia, Idaho, Iowa, Kansas, Minnesota, Montana, New Jersey, New Mexico, North Dakota, South Dakota, Utah, and Washington have public nuisance statutes drafted broadly and do not require a connection to property like Oklahoma's. *See* ALA. CODE § 6-5-121 (1975); CAL. PENAL CODE § 370 (2019); FLA. STAT. ANN. § 823.01 (2001); GA. CODE ANN. § 41-1-2 (2019); IDAHO CODE ANN. § 18-5901 (2019); IOWA CODE ANN. § 657.1 (2010); KAN. STAT. ANN. § 21-6204 (2015); MINN. STAT. ANN. § 609.74 (1971); MONT. CODE ANN. § 45-8-111 (2017); N.J. STAT. ANN. § 2C:33-12 (1983); N.M. STAT. ANN. § 30-8-1 (1963); N.D. CENT. CODE ANN. § 42-01-06 (1943); S.D. CODIFIED LAWS § 21-10-3 (1960); UTAH CODE ANN. § 76-10-803 (2019); WASH. REV. CODE ANN. § 9.66.010 (1994).

28. *Purdue Pharma*, 2019 WL 4019929, at *11 (emphasis added).

29. *Id.* at *12.

30. *Id.*

31. *Id.*

marketing was connected to “exponentially increase[ed] rates of addiction, overdose deaths, and Neonatal Abstinence Syndrome.”³²

Based upon those findings, Judge Balkman held these actions by the defendants violated Oklahoma’s public nuisance statute.³³ Judge Balkman then addressed the First Amendment and held that it “does not prohibit imposing liability for the acts complained of here.”³⁴ Finally, he calculated the State’s damages, coming to \$572,102,028.³⁵

IV. COMMENTARY

Applying a public nuisance statute to a case of this type may have unintended outcomes. Furthermore, it could create an avenue for litigation against other industries for impacts on public health and safety—such as gun manufacturers or oil and gas companies—as well as future claims against drug-makers.³⁶

This is not necessarily a negative outcome. Using public nuisance statutes may provide a remedy in cases that otherwise would not have one. Currently, for example, most suits against gun manufacturers are barred by the Protection of Lawful Commerce in Arms Act (“PLCAA”).³⁷ The PLCAA “bars qualified civil liability actions in state or federal court against firearms sellers based on the criminal or unlawful use of a firearm.”³⁸ However, “[t]he PLCAA did not bar an equitable action for public nuisance under state law against out-of-state gun retailers.”³⁹

By mirroring Oklahoma’s use of a public nuisance statute, avenues to recovery may exist against gun manufacturers for the manufacturers’ marketing practices.⁴⁰ Success would hinge on whether the statute in question is “a ‘statute *applicable* to the sale or marketing of [firearms]’” or,

32. *Id.*

33. *Id.* Specifically, that the unlawful acts “annoys, injures, or endangers the comfort, repose, health, or safety of others.” *Id.* (quoting OKLA. STAT. tit. 50, § 1 (2019)).

34. *Purdue Pharma*, 2019 WL 4019929, at *13. Judge Balkman cites Supreme Court precedent which recognizes that commercial speech is subject to government regulation. *Id.* (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562 (1980)).

35. *Id.* at *20. Among other things, Judge Balkman looked to the yearly cost of various addiction treatment programs, public medication disposal programs, and pain prevention and non-opioid pain management, as well as law enforcement and personnel costs. *Id.*

36. See generally *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 301 (Conn. 2019); see also *Lovelace Jr.*, *supra* note 13. There were 1,900 pending cases against various opioid manufacturers that were consolidated and transferred to federal court. *Id.*

37. 15 U.S.C. §§ 7901–7903 (2005).

38. 94 C.J.S. WEAPONS § 82 (2019).

39. *Id.* (citing *City of New York v. Bob Moates’ Sport Shop, Inc.*, 253 F.R.D. 237 (E.D.N.Y. 2008) (also applying New York Law)). In *City of New York v. Bob Moates’ Sport Shop, Inc.*, the City successfully argued that the exception in section 7903(5)(A)(iii) applied and the PLCAA did not require dismissal. *Id.* (citing *Bob Moates’ Sport Shop*, 253 F.R.D. at 241). An equitable cause of action seeks “an injunction abating the public nuisance” rather than monetary damages. *Bob Moates’ Sport Shop*, 253 F.R.D. at 239.

40. C.J.S. WEAPONS, *supra* 38. This is true unless the statute in question is found unconstitutional.

like Oklahoma’s public nuisance statute, is sufficiently broad enough to encompass the sale and marketing of goods.⁴¹ In *Soto v. Bushmaster Firearms International, LLC*,⁴² the Connecticut Supreme Court found the Connecticut Unfair Trade Practices Act is applicable to the sale or marketing of firearms, a decision which allows the parents of Sandy Hook victims to sue Bushmaster Firearms for the marketing of the firearm used in the massacre.⁴³

The marketing of firearms often insinuate that the weapon, while legal, should be used by civilians for militaristic purposes.⁴⁴ Taglines such as “Consider Your Mancard Reissued” or “Control Your Destiny” target young men with the “tactical coolness factor.”⁴⁵ The taglines imply he *needs* a firearm or that a firearm will give him control.⁴⁶ This may make it possible for the plaintiffs in *Soto* to succeed in a suit on the theory of public nuisance.⁴⁷ When compared with pharmaceutical marketing, firearm marketing is similarly “false and misleading”—specifically the “minimization of safety issues.”⁴⁸ Many firearm advertisements also include militaristic messages and imagery which imply that these weapons, advertised to civilians, not soldiers, are for killing people.⁴⁹ Additionally, like the opioid epidemic, guns and mass shootings have caused extensive casualty and injury, which satisfies the statute’s requirement that the nuisance “[a]nnoys, injures or endangers the comfort, repose, health, or safety of others” and “renders other persons insecure in life.”⁵⁰ Public

41. *Bushmaster*, 202 A.3d at 301; *see generally* State v. Purdue Pharma LP, No. CJ-2017-816, 2019 WL 4019929, at *11 (Okla. Dist. Aug. 26, 2019).

42. 202 A.3d 262 (Conn. 2019).

43. *Id.* at 309. The United States Supreme Court denied certiorari on November 12, 2019.

44. *The Militarized Marketing of Bushmaster Assault Rifles*, VIOLENCE POLICY CTR. (Apr. 2018), <http://vpc.org/wp-content/uploads/2018/04/Bushmaster2018.pdf> [<https://perma.cc/TY9N-8KA8>].

45. *Id.*

46. *Id.*

47. *See generally* State v. Purdue Pharma LP, No. CJ-2017-816, 2019 WL 4019929 (Okla. Dist. Aug. 26, 2019); *see also* *Bushmaster*, 202 A.3d at 277.

The plaintiffs’ . . . theory of liability is that the defendants advertised and marketed the [weapon] in an unethical, oppressive, immoral, and unscrupulous manner. They contend that the defendants have sought to grow the AR-15 market by extolling the militaristic and assaultive qualities of their AR-15 rifles and, specifically, the weapon’s suitability for offensive combat missions.

48. *See generally* *Bushmaster*, 202 A.3d at 301; *Purdue Pharma*, 2019 WL 4019929.

49. Jon Schuppe, *Gun-makers have always invoked the military to lure customers. Could it be their undoing?*, NBC NEWS (Mar. 30, 2019), <https://www.nbcnews.com/news/us-news/gun-makers-have-always-invoked-military-lure-customers-could-it-n989081> [<https://perma.cc/WC5P-ZH3F>].

50. OKLA. STAT. tit. 50, § 1 (2019); John Gramlich, *What the data says about gun deaths in the U.S.*, PEW RES. CTR. (Aug. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s/> [<https://perma.cc/2YTH-NT2P>]. In 2017, 39,773 people died from gun-related injuries. *Id.* The rate of gun deaths declined in the 1990s, however, it has risen in recent years—2017 is the highest total ever. *Id.* “[T]he FBI recorded 20 active shooter incidents in 2014 and 2015, followed by 20 incidents in 2016, 30 in 2017 and 27 in 2018.” *Id.*

nuisance lawsuits may provide a remedy for the victims that does not exist elsewhere.⁵¹

This approach could potentially be applied to other industries as well, such as oil and gas companies for climate change or vape manufacturers for recent illnesses caused by vaping.⁵² Prior to major broadcast companies pulling e-cigarette advertisements, vape manufacturer Juul had advertised that vaping was a healthier alternative to smoking cigarettes.⁵³ Further, oil company BP launched an ad campaign called “Beyond Petroleum” which featured manufacturing solar panels, an endeavor BP shortly abandoned.⁵⁴ Because these advertisements similarly market a dangerous product as safer than it actually is, there may be an avenue to recovery using public nuisance statutes.⁵⁵

V. CONCLUSION

Judge Balkman’s decision was the first of its kind.⁵⁶ By using Oklahoma’s public nuisance statute to hold drug-makers liable for the harm opioids have caused, he may have opened the door for future litigation against gun manufacturers.⁵⁷ The amount of gun-related deaths, though slightly less, is similar to the number of deaths caused by opioid overdoses.⁵⁸ The PLCAA bars suits against gunmakers based solely on criminal use of a firearm, but public nuisance statutes like Oklahoma’s may

51. *See generally Purdue Pharma*, 2019 WL 4019929.

52. *Holding Major Fossil Fuel Companies Accountable for Nearly 40 Years of Climate Deception and Harm*, UNION CONCERNED SCIENTISTS (Mar. 22, 2016), <https://www.ucsusa.org/global-warming/fossil-fuel-companies-knew-about-global-warming> [<https://perma.cc/4WXT-CTMV>]; Berkeley Lovelace, Jr., *Vaping illness outbreak surpasses 1,000 cases, 18 deaths with no sign of slowing*, *CDC says*, CNBC (Oct. 3, 2019, 4:05 PM) <https://www.cnbc.com/2019/10/03/vaping-lung-cases-surge-to-more-than-1000-with-at-least-18-deaths-cdc-says.html> [<https://perma.cc/8J3X-TDCS>].

53. Braktkton Booker, *TV Broadcasters To Stop Taking E-Cigarette Ads*, NPR (Sept. 19, 2019), <https://www.npr.org/sections/health-shots/2019/09/19/762410165/tv-broadcasters-to-stop-taking-e-cigarette-ads> [<https://perma.cc/LEC6-TEML>]; Michelle Andrews, *Cigarettes Can’t Be Advertised on TV. Should Juul Ads Be Permitted?*, NPR (Aug. 20, 2019), <https://www.npr.org/sections/health-shots/2019/08/20/75253108/cigarettes-cant-be-advertised-on-tv-should-juul-ads-be-permitted> [<https://perma.cc/Z4GS-2UFM>]. When searching for Juul, the first result to their website reads “The Smoking Alternative, unlike any E-Cigarette or Vape.” It is only upon entry to the site and navigation to the “Our Mission” page that they state this product is intended only for current adult smokers. *Our Mission*, JUUL <https://www.juul.com/mission-values> [<https://perma.cc/7V3D-HZXB>] (last visited Jan. 2, 2020).

54. Anjali Raval & Leslie Hook, *Oil and gas advertising spree signals industry’s dilemma*, *FIN. TIMES* (Mar. 6, 2019), <https://www.ft.com/content/5ab7edb2-3366-11e9-bd3a-8b2a211d90d5> [<https://perma.cc/F8AM-NLQY>]; Tom Bergin & Sarah Young, *BP turns out lights at solar business*, *REUTERS* (Dec. 21, 2011), <https://www.reuters.com/article/us-bp-solar/bp-turns-out-lights-at-solar-business-idUSTRE7BK1CC20111221> [<https://perma.cc/L8N6-WQXK>].

55. *See generally Purdue Pharma*, 2019 WL 4019929.

56. Lovelace Jr., *supra* note 13.

57. *See generally Purdue Pharma*, 2019 WL 4019929.

58. *See Gramlich, supra* note 50; U.S. DEP’T HEALTH & HUM. SERVS., *supra* note 1. The number of gun deaths in 2017 trails the number of opioid deaths by 7,827. *Id.*

provide an avenue for remedy for victims of gun violence as well as against industries that play a role in other national crises.⁵⁹

59. *See generally* Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 277 (Conn. 2019) (identifying that cases are already underway that focus on gun manufacturers' marketing.); UNION OF CONCERNED SCIENTISTS, *supra* note 52; Lovelace, Jr., *supra* note 52.