



Montana Enacts First-of-Its-Kind Law to Stem Expansions of Public Nuisance Liability

by Cary Silverman & Jacob A. Bennett

Montana has enacted first-of-its-kind legislation that codifies the state’s public nuisance and private nuisance law, H.B. 791. Signed into law by Governor Greg Gianforte in May 2025, the legislation responds to ongoing attempts by state and local governments to convert public nuisance law into a “super tort” for shifting costs associated with societal problems onto sellers of lawful products.¹

The Origins and Established Elements of Public Nuisance Law. For centuries, public nuisance law has provided governments with the ability to address unlawful interferences with the public’s right to use public land, communal property, and waterways. The tort has applied to conduct ranging from blocking access to a public road or park to situations in which criminal activity on a property jeopardizes the safety of the community at large. The established elements of a public nuisance claim require a plaintiff to show: (1) the existence of a public right; (2) the defendant unlawfully or unreasonably interfered with that public right; (3) the unlawful conduct caused the public nuisance; and (4) the defendant controls the instrumentality that created the public nuisance.

Efforts to Expand Public Nuisance into a “Super Tort.” For decades, state and local governments, often through contingency-fee lawyers, have attempted to expand public nuisance beyond its traditional confines into a tool for requiring businesses, rather than individual wrongdoers or society, to pay for the costs of social harms associated with lawful products. Governments have sought to use public nuisance law to circumvent products liability and marketing laws—and to assume a regulatory function best suited for legislatures and administrative agencies. Such attempts were repeatedly made, and largely unsuccessful, in litigation against product manufacturers to obtain costs associated with gun violence² and lead paint remediation.³ More recently, governments have brought public nuisance claims seeking to recover costs associated with climate change, opioid abuse, and discarded plastic products.

Courts have mostly rejected attempts to jettison the core elements of public nuisance claims. They have recognized that without boundaries, public nuisance threatens to “become a monster that would devour in one gulp the entire law of tort.”⁴ For instance, in opioid litigation, the Oklahoma Supreme Court observed, “Applying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers; this is why our Court has

¹ See generally Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006); Am. Tort Reform Assoc., *The Plaintiffs’ Lawyer Quest for the Holy Grail: The Public Nuisance “Super Tort”* (Mar. 2025).

² *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1088, 1116 (Ill. 2004).

³ *State v. Lead Indus. Ass’n*, 951 A.2d 428, 447 (R.I. 2008); 5 *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007).

⁴ *Tioga Public Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

never applied public nuisance law to the manufacturing, marketing, and selling of lawful products.”⁵ A New York court dismissed a public nuisance claim against beverage manufacturers for a “plastic pollution crisis,” stating the state’s “theory has never been adopted by a court in this state or any other.”⁶

Montana’s New Public Nuisance Law. Montana’s 2025 legislation amends MCA § 27-30-101, an existing statute that broadly defined “nuisance” without distinguishing between public and private nuisances.

The amendment defines a public nuisance as (1) “a condition arising out of the use of real property that unlawfully interferes with a public right by endangering communal safety, being indecent to the community, or being offensive to the community” or (2) “a condition that unlawfully interferes with the public right to free passage or use . . . of a navigable [waterway] or a public park, square, street, road, or highway.” This definition is consistent with the established definition of a public nuisance.

The new law includes a nonexclusive list of situations that do *not* constitute a public nuisance, such as “an action or condition that is lawful” or “that is authorized, approved, licensed, or mandated” by law or “approved by a government entity.” The law also instructs that “the design, manufacturing, distributing, selling, labeling, or marketing of a product” may “not be considered a public nuisance,” and “the aggregation of individual injuries or private rights” does not transform them into a public nuisance.

Montana’s 2025 law also provides that a person may only be subject to public nuisance liability if that person “proximately caused” or controlled the public nuisance at the time it was created, or if that person is a successive property owner who neglects to abate a continuing public nuisance on their property. A government that brings a public nuisance action can seek “injunctive relief to enjoin an unlawful activity that is proximately causing the public nuisance.” By contrast, “monetary and nonmonetary resources” may only be awarded if a court finds them to be “reasonably necessary to abate the public nuisance.” Any recovered funds must actually be spent on abatement. Governments may not seek other forms of relief, including damages. A claimant in a private action for public nuisance may receive damages if (and only if) the claimant suffers a “special injury . . . that is different in kind, not just in degree, from an injury sustained by the general public exercising the same public right.”

By contrast, a *private* nuisance action typically comes into play when one person’s use of private property adversely affects a neighbor. The legislation defines a “private nuisance” as a condition arising out of the use of real property that “(a) is injurious to health or safety, indecent or offensive to the senses of an individual on an adjacent or neighboring property, or (b) obstructs the free use of an adjacent or neighboring property so as to interfere with the comfortable enjoyment of life or property.” Certain actions or conditions cannot serve as the basis for a private nuisance action, such as actions authorized or required by law or longstanding agricultural or farming operations.

The 2025 Montana amendments apply to causes of action that accrue on or after October 1, 2025. The legislation abrogates Montana common law to the extent it is inconsistent with the Act.

Implications. Montana is the first state to codify established principles of public nuisance law. The law’s definition of public nuisance, and exclusion of product-based claims, should stem future attempts to transform a property-based tort into one that circumvents key requirements for product liability and other claims. As product-based public nuisance lawsuits continue to be filed and litigated, more states may consider similar legislation.

⁵ *State of Oklahoma ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 725 (Okla. 2021).

⁶ *People by James v. PepsiCo., Inc.*, 222 N.Y.S.3d 907, 916 (N.Y. Sup. Ct., Erie County 2024).