



The Fourth Circuit Supercharges Public Nuisance Litigation in West Virginia and Beyond

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In the past few decades, the plaintiffs' bar has attempted to make public nuisance litigation a new frontier in mass torts. These attempts have largely been met with skeptical courts and the litigation has been little more than a nuisance in and of itself. But in a recent U.S. Court of Appeals for the Fourth Circuit decision applying West Virginia law, a three-judge panel found opioid drug distributors can be held liable for a public nuisance for an oversupply of opioids. *See City of Huntington, W. Virginia v. AmerisourceBergen Drug Corp.*, No. 22-1819, 2025 WL 3009526, at *2 (4th Cir. Oct. 28, 2025). This decision overruled a district court's finding in favor of the defendant-distributors that West Virginia common law does not permit a claim of public nuisance "based on the distribution of prescription drugs." *Id.* at *1.

At the outset, the appellate decision required an "Erie¹ guess" after the West Virginia Supreme Court refused to answer the panel's certified question on the issue. The panel pointed to the West Virginia Supreme Court's refusal to answer the certified question as a contributing factor to reaching the decision it did—stating that the West Virginia Supreme Court "could have used our certified question as a vehicle for restricting the availability of public nuisance . . . , but the court did not do so." *Id.* at *11. Thus, the absence of an answer on the certified question to the West Virginia Supreme Court suggested to the panel that the court did not feel public nuisance theories should be restricted in the case of opioids.

The panel stated two other legal justifications for why West Virginia state law would likely allow for public nuisance claims predicated on product-based harms. First, West Virginia has a broad definition of public nuisance. *Id.* at *11. Defendants requested that the panel adopt the reasoning from the Restatement (Third) of Torts, but the court rejected the treatise and instead favored the Restatement (Second) of Torts as being the more persuasive treatise under West Virginia law. *Id.* at *10. According to the Restatement (Third), "the common law of public nuisance is an inapt vehicle for addressing" harms related to products. Restatement (Third) of Torts: Liability for Economic Harm § 8 cmt. G (A.L.I. 2020). The Restatement (Second) provides no such commentary on the validity of product-based public nuisance claims.

The other reason the panel reached the conclusion it did was that no West Virginia Supreme Court decision had ever limited the definition of public nuisance to exclude product-based harms. *Id.* at *11. The defendants noted that the state high court has only ever applied the law of public nuisance in cases dealing with "public property such as highways, public grounds, harbors, landings, or shared resources such as clean air and water." *Id.* at *10. However, the panel was unimpressed and stated that, because the West Virginia Supreme Court has never decided that a claim for public

¹ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

nuisance does not encompass product-based harms, there is no precedent to restrict public nuisance claims to cases involving public property. *Id.* at *11.

Though all these reasons are couched in West Virginia law, enterprising lawyers could argue they are relevant for any state's public nuisance jurisprudence that mirrors West Virginia.

The West Virginia Panel Seemed Untroubled by Application to Cases Beyond Opioids

In its decision, the panel openly acknowledged the potential floodgates that expanding public nuisance law could open. In fact, one of Defendants' main arguments was that, by applying the common law of public nuisance to the distribution of opioids, the panel was unleashing claims for public nuisance on "every seller of a product that arguably affects public health[.]" *Id.* at *11. Ensuring its holding could be interpreted broadly, the panel stated that "nothing in [the West Virginia Supreme Court's] jurisprudence indicates that public nuisance under West Virginia law should be restricted by carving out any product-based harm." *Id.* at *11.

Under the court's ruling, all manner of product manufacturers and distributors could be potentially liable for public nuisance so long as the plaintiff can demonstrate a known harm flowing from the product. *City of Huntington* is not the first successful attempt to expand public nuisance law to product-based harms. Several state courts have upheld such claims. *See e.g., People v. ConAgra Grocery Prod. Co.*, 17 Cal. App. 5th 51, 109 (2017); *Brooke County Comm'n v. Purdue Pharma*, No. 17-c-248, 2018 WL 11242293 at *7 (W.Va. Cir. Ct. Dec. 28, 2018); *State ex rel. Morrissey v. Amerisource-Bergen*, No. 12-c-141, 2014 WL 12814021 at *9 (W.Va. Cir. Ct. Dec. 12, 2014). The Fourth Circuit is also not the only federal appellate court to uphold such claims.

Recently, the U.S. Court of Appeals for the Second Circuit held that the federal Protection of Lawful Commerce in Arms Act did not preempt New York's "gun-related public nuisance statute." *Nat'l Shooting Sports Found., Inc. v. James*, 144 F.4th 98, 102–03 (2d Cir. 2025). The court found gun manufacturers are subject to public nuisance claims for "knowingly or recklessly endanger[ing] the safety or health of the public through their sale or marketing of firearms." *Id.*

In addition, the U.S. Court of Appeals for the Ninth Circuit sitting in diversity has held that California law allows for gun manufacturers to face liability for public nuisance caused by "over-saturating the legal gun market." *Ileto v. Glock Inc.*, 349 F.3d 1191, 1214 (9th Cir. 2003) ("Over one hundred years ago, a California state court explained that the fact that a certain occupation or business can be performed in a legal manner does not prevent that occupation or business from becoming a nuisance when the occupation or business is performed in a manner that unreasonably infringes on a public right.")²

Given the distinctions between the elements and defenses for a product liability claim and a public nuisance claim, one can expect that plaintiffs will pursue similar claims in friendly Circuits against other manufacturers. In some ways, public nuisance claims require lower burdens of proof. For example, case-specific causation is not a required element in a public nuisance claim because the claim is not brought on behalf of an individual plaintiff but rather on behalf of the general public. *See* Restatement (Second) of Torts § 821B. Further, without the requirement to prove control over the product at issue at the moment of harm or case-specific causation,³ dubious cases will

² Judge Hall argued in dissent that the California Court of Appeals stated unequivocally in *City of San Diego v. U.S. Gypsum Co.* that "nuisance cases "universally" concern the use or condition of property, not products." *Ileto*, 349 at 1223 (Hall, J., dissenting) (quoting *City of San Diego v. U.S. Gypsum Co.*, 30 Cal.App.4th 575, 585–86, 35 Cal.Rptr.2d 876 (1994)).

³ *See* Restatement (Second) of Torts § 821B ("A public nuisance is an unreasonable interference with a *right common to the general public.*") (emphasis added); *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 403(2004) ("[W]hen

become the norm, and manufacturers of lawful, non-defective products would face “unlimited and unprincipled liability[.]” *State of Oklahoma ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 725 (Okla. 2021). In a traditional product liability case, “a product manufacturer’s responsibility is to put a lawful, non-defective product into the market.” *Id.* at 728. Courts widely recognize that “[t]here is no common law tort duty to monitor how a consumer uses or misuses a product after it is sold.” *See e.g., id.* However, the *City of Huntington* decision usurps these long-held strict liability defenses.⁴ *City of Huntington*, 2025 WL 3009526, at *19 (holding that the district court should have evaluated “the foreseeability of the actions of the pharmacies, doctors, and individuals engaged in diversion[.]”).

Defenses to Public Nuisance Claims

Although the opinion is broad, there are strategies manufacturers and distributors can use to reduce exposure to suits for public nuisance. First, the case dealt exclusively with the distribution of opioids, a controlled substance under federal law.⁵ Even though determining “whether a nuisance exists is a factual issue,” *id.* at *9, drawing out this distinction in any litigation where available is critical.

The next step should be a choice-of-law analysis followed by a determination of which possible forums have the narrowest public nuisance case law. Any indication in a state’s jurisprudence that product-based harms are not covered under public nuisance claims will likely be sufficient. Simply pointing out that none of a state’s public nuisance cases have ever dealt with product-based harm will be insufficient. *See id.* at *10 (rejecting the argument that, because West Virginia public nuisance law has only ever been applied in cases dealing with the interference of public property, the law should only be applied in said cases).

Compared to other states, West Virginia public nuisance law is broad, and lower courts in the state have held that such law applies to product-based harms. *See Brooke County Comm’n v. Purdue Pharma*, No. 17-c-248, 2018 WL 11242293 at *7 (W.Va. Cir. Ct. Dec. 28, 2018) (“West Virginia courts have applied the public nuisance doctrine in numerous contexts, including in opioids cases[.]”); *State ex rel. Morrissey v. Amerisource-Bergen*, No. 12-c-141, 2014 WL 12814021 at *9 (W.Va. Cir. Ct. Dec. 12, 2014) (applying West Virginia public nuisance law to claims brought against opioid manufacturers).

On the other hand, most state and federal courts faced with this issue have held that public nuisance law does not apply to product-based harms. *See, e.g., State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021) (“[P]ublic nuisance law does not extend to the manufacturing, marketing, and selling of prescription opioids.”); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (2003) (“The New York Court of Appeals has never recognized a common-law

the nuisance results from the use or misuse of an object apart from land, or from conduct unrelated to a defendant’s use of land, *lack of control of the instrumentality at the time of injury is not an absolute bar to liability.*”) (emphasis added); *see also Tioga Pub. Sch. Dist. #15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (observing that to allow claims for public nuisance based on asbestos contamination would “give rise to a cause of action . . . regardless of the defendant’s degree of culpability or of the availability of other traditional tort law theories of recovery”).

⁴ Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 773 (2003) (“[T]he assertion of public nuisance claims by governmental entities seems calculated to circumvent the application of well-established product liability doctrines and defenses that would prevent recovery under more traditional causes of action.”).

⁵ In fact, on certified question to the West Virginia Supreme Court, the Fourth Circuit asked specifically whether “conditions caused by the distribution of a *controlled substance*” can constitute a public nuisance. *Id.* at *9 (emphasis added).

public nuisance cause of action based on allegations” that handgun manufacturers have “created, contributed to, and maintained a public nuisance by their respective manufacturing, distributing and marketing practices.”); *City of Chicago*, 213 Ill. 2d at 375 (“We conclude that there is no authority for the unprecedented expansion of the concept of public rights to encompass the right [to be free from unreasonable jeopardy to health, welfare, and safety, and from unreasonable threats of danger to person and property, caused by the presence of illegal weapons in the city of Chicago].”); *Tioga Pub. Sch. Dist. No. 15*, 984 F.2d at 920-22 (holding that to “allow recovery for a defective product under a nuisance cause of action . . . would devour in one gulp the entire law of tort”); *In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007); *City of Manchester v. Nat’l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986); *Warren Consol. Schs. v. W.R. Grace & Co.*, 518 N.W.2d 508, 511 (Mich. Ct. App. 1994); *City of San Diego*, 30 Cal. App. 4th at 586, 35 Cal. Rptr. 2d at 883; cf. *Town of Westport v. Monsanto Co.*, No. CIV.A. 14-12041-DJC, 2015 WL 1321466, at *3-4 (D. Mass. Mar. 24, 2015) (dismissing public nuisance claim based on asbestos contamination because the defendant “no longer had the power to abate the nuisance” after sale of the product).

In fact, despite repeated attempts dating back to the 1970s,⁶ only relatively recently have American courts embraced product-based harm as grounds for a public nuisance claim. See *People v. ConAgra Grocery Prod. Co.*, 17 Cal. App. 5th 51, 109 (2017). In addition to California, West Virginia courts have embraced public nuisance claims predicated on product-based harms are currently upheld. *Brooke County Comm’n*, 2018 WL 11242293 at *7 (“West Virginia courts have applied the public nuisance doctrine in numerous contexts, including in opioids cases[.]”); *State ex rel. Morrissey*, 2014 WL 12814021 at *9. However, several lower court decisions in other states have been overturned on appeal. See e.g., *State of Oklahoma ex rel. Hunter*, 499 P.3d at 725 (Okla. 2021) (overturning a \$465M Abatement Plan ordered by the Oklahoma trial court); *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007) (reversing Appellate Division’s decision to allow a public nuisance claim against lead paint manufacturers to go forward after initial dismissal by trial court).

A State’s embrace of the Restatement (Third) of Torts will also be strong evidence in favor of limiting public nuisance claims.⁷ Under West Virginia tort law, the Restatement (Second) is the preferred treatise. See *Duff v. Morgantown Energy Assocs.*, 421 S.E.2d 253, 257 (W. Va. 1992) (“We believe [our] definition is consistent with the *Restatement (Second) of Torts*, [] which defines a public nuisance as ‘an unreasonable interference with a right common to the general public.’”). The Fourth Circuit panel considered the *Duff* court’s recognition of the Restatement (Second) of Torts to be strong evidence that West Virginia public nuisance law could apply to product-based harms. See *City of Huntington*, 2023 WL 2031469 at *10. Therefore, if the state law at issue subscribes to the Restatement (Third), this will be highly persuasive.

In the past, defendants have advanced other successful defenses to product-based public nuisance claims. These include, but are not limited to, a failure to define an injury to a common public right,⁸ lack of proximate causation due to unforeseeable intervening causes,⁹ lack of control,¹⁰

⁶ See *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639, 641 (Ct. App. 1971).

⁷ Restatement (Third) of Torts: Liability for Economic Harm § 8 cmt. G (A.L.I. 2020) (stating that “the common law of public nuisance is an inapt vehicle for addressing” harms related to products).

⁸ *City of Chicago*, 213 Ill. 2d at 375 (“We conclude that there is no authority for the unprecedented expansion of the concept of public rights to encompass the right [to be free from unreasonable jeopardy to health, welfare, and safety, and from unreasonable threats of danger to person and property, caused by the presence of illegal weapons in the city of Chicago].”).

⁹ *Id.* at 410 (holding that gun manufacturers could not “reasonably foresee that the guns they lawfully sell would be illegally taken into the city in such numbers and used in such a manner that they create a public nuisance.”).

¹⁰ *ex rel. Hunter*, 499 P.3d at 728 (“Without control, a manufacturer also cannot remove or abate the nuisance—which

compliance with government regulations,¹¹ and preemption.¹²

While these strategies will not ensure dismissal of public nuisance claims, they are colorable distinctions that create a strong record on appeal for such a factual issue.

is the remedy the State seeks from [defendants] in this case”).

¹¹ *Id.* (“Multiple agencies and boards across different jurisdictions oversee and enforce statutes and regulations that control the developing, testing, producing, manufacturing, distributing, labeling, advertising, prescribing, selling, possessing, and reselling of prescription opioids.”).

¹² *City of New York v. Chevron Corp.*, 993 F.3d 81, 91-92 (2d Cir. 2021) (“Artful pleading cannot transform the City’s complaint into anything other than a suit over global greenhouse gas emissions. . . . Such a sprawling case is simply beyond the limits of state law.”).