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THE OPIOID EPIDEMIC: PRODUCT LIABILITY OR ONE HELL OF A NUISANCE?

Kristen S. Jones[*]

I. INTRODUCTION

Pharmaceutical companies have received heavy scrutiny in the news lately for their pricing tactics and hand in the opioid epidemic.[1] For example, Time, The Atlantic, Fortune, and CBS have all published negative articles regarding the unnecessary hiking of drug prices.[2] Even before the judgment against Purdue Pharmaceutical for their part in the opioid epidemic, public perception of the pharmaceutical industry and their manufacturing of opioid-based medication was negative.[3] An article in Vox described pharmaceutical company efforts at successfully enticing doctors to prescribe opioids.[4] After Purdue Pharmaceuticals and other Pharmaceutical Manufacturers were found liable for part of the opioid epidemic, public perception praised the Judge for finally punishing the

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1. *See* Justin McCarthy, *Big Pharma Sinks to the Bottom of U.S. Industry Rankings*, GALLUP (Sept. 3, 2019), https://news.gallup.com/poll/266060/big-pharma-sinks-bottom-industry-rankings.aspx.

2. *See* Laura Entis, *Why Does Medicine Cost So Much? Here's How Drug Prices Are Set*, TIME (Apr. 9, 2019), https://time.com/5564547/drug-prices-medicine/; *See also* Ezekiel J. Emanuel, *Big Pharma's Go-To Defense of Soaring Drug Prices Doesn't Add Up*, THE ATLANTIC (Mar. 23, 2019), https://www.theatlantic.com/health/archive/2019/03/drug-prices-high-cost-research-and-development/585253/; *See* Chris Morris, *Big Pharma Raised Prices of Several Prescription Drugs on First Day of 2020*, FORTUNE (Jan. 2, 2020), https://fortune.com/2020/01/02/prescription-drug-price-increase-2020/; *see also* Megan Cerullo, *2020 is three days old and drug prices are already jumping*, CBS NEWS (Jan. 3, 2020),, 5:17 PM), https://www.cbsnews.com/news/big-pharma-companies-raised-prices-on-more-than-400-drugs-to-start-2020/.

3. *See* Domenica Ghanem, *You Want to Kill Drug Dealers, Start with Big Pharma*, INSTITUTE FOR POLICY STUDIES (Apr. 5, 2018), https://ips-dc.org/want-kill-drug-dealers-start-big-pharma/.

4. German Lopez, *Drug Companies Bought Doctors Fancy Meals – And Then Those Doctors Prescribed More Opioids*, VOX (May 15, 2018), https://www.vox.com/science-and-health/2018/5/15/17355722/opioid-epidemic-doctor-pharma-insys.

companies responsible for the opioid epidemic.[5] The high tensions and negative perception towards the pharmaceutical industry have led to lawsuits against private individuals for their association and involvements with such companies.[6]

In 2017, there were more than 191 million opioid prescriptions.[7] One in four patients that receive pro-longed opioid treatment will struggle with addiction.[8] Two out of three drug overdose deaths involve an opioid.[9] Since the late 1990s, pharmaceutical companies have continuously downplayed the addictive nature of opioids.[10] Out of 700,000 overdose deaths, roughly 68% are due to overdoses involving opioids.[11] Approximately 130 individuals die each day from opioids.[12] From 2015 through 2018, the opioid epidemic has cost the United States approximately $631 billion in association with addiction.[13] Of the $631 billion, roughly $205 billion is spent on healthcare, $253 billion on premature deaths, $49 billion associated with crime, $39 billion associated with childcare, and approximately $96 billion arises from a loss in productivity.[14]

Opioids are prescribed to treat moderate-to-severe pain.[15] Risks associated with prescription opioids include "misuse, addiction, overdose,

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5. *See* Chris McGreal, *Capitalism Gone Wrong: How Big Pharma Created America's Opioid Carnage*, THE GUARDIAN (July 24, 2019), https://www.theguardian.com/us-news/2019/jul/24/opioids-crisis-big-pharma-drugs-carnage.

6. Charles W. Van Way, III, *Bashing Big Pharma*, US NAT'L LIBRARY OF MEDICINE NAT'L INST. OF HEALTH (Mar.-Apr. 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6461324/.

7. 20*18 Annual Surveillance Report of Drug-Related Risks and Outcomes*, CDC (Aug. 2018), https://www.cdc.gov/drugoverdose/pdf/pubs/2018-cdc-drug-surveillance-report.pdf. https://www.cdc.gov/drugoverdose/pdf/pubs/2018-cdc-drug-surveillance-report.pdf?s_cid=cs_828.

8. *Addiction and Overdose*, CDC (Aug. 29, 2017), https://www.cdc.gov/drugoverdose/opioids/prescribed.html.

9. H. Hedgegaard, AM. Miniño & M. Warner, *Drug Overdose Deaths in the United States, 1999-2017*, CDC (Nov. 2018), https://www.cdc.gov/nchs/products/databriefs/db329.htm.

10. *What is the U.S. Opioid Epidemic*, HHS (Sept. 2019), https://www.hhs.gov/opioids/about-the-epidemic/index.html.

11. *Understanding the Epidemic*, CDC (Dec. 2018), https://www.cdc.gov/drugoverdose/epidemic/index.html.

12. *Id.*

13. Stoddard Davenport, Alexandra Weaver, Matt Caverly*, Economic Impact of Non-Medical Opioid Use in the United States, Mortality and Longevity*, SOCIETY OF ACTUARIES (Oct. 2019), https://www.soa.org/globalassets/assets/files/resources/research-report/2019/econ-impact-non-medical-opioid-use.pdf.

14. *Id.*

15. *Prescription Opioids*, CDC (Aug. 2017), https://www.cdc.gov/drugoverdose/opioids/prescribed.html.

and death, especially with long term use."[16] Currently, opioids are a controlled substance and are a schedule II drug.[17] Schedule II drugs include any medication that has "a high potential for abuse."[18] Any individual that wishes to manufacture or distribute any controlled substances must register with the Attorney General.[19] All manufacturers and distributors of controlled substances must also comply with the labeling and packaging requirements under applicable federal and state laws.[20]

Due to the opioid epidemic, the U.S. Department of Health & Human Services outlined a five-point plan to combat emerging issues which includes "(1) improving access to treatment and recovery services; (2) promoting use of overdose-reversing drugs; (3) strengthening our understanding of the epidemic through better public health surveillance; (4) providing support for cutting edge research on pain and addiction; and (5) advancing better practices for pain management."[21]

This Comment argues that the judgment in *State v. Purdue Pharmaceuticals* was incorrect in holding defendants liable under the doctrine of public nuisance and should, therefore, be vacated. First, as to the judgment, the Judge expanded the definition of a public right beyond its traditional scope without cause, the Judge incorrectly applied the theory of proximate cause, and the Judge was likely persuaded by public perception in his ruling. Second, the doctrine of public nuisance should not expand into the realm of product liability instead of using traditional doctrines aimed at consumer protection, such as product liability or negligence. Third, the legislature should enact new consumer protection laws to protect consumers from pharmaceutical companies that act egregiously.

In *State v. Purdue Pharmaceuticals*, the Court held defendants liable for false and misleading advertising associated with the manufacturing, promoting, and selling of opioid-based drugs.[22] It found the plaintiff, Oklahoma, experienced significant harm associated with opioid addiction through the costs of services.[23] Further, the Court found that the defendants willfully understated the consequences of opioid-based

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16. *Prescription Opioid: Overview*, CDC (Nov. 2019), https://www.cdc.gov/drugoverdose/data/prescribing/overview.html.

17. 21 U.S.C.A. § 812(b)(2) (West 2018).

18. *Id.*

19. 21 U.S.C.A. § 822(a)(2) (West 2018); 21 U.S.C.A. § 823(a) (West 2018).

20. 21 U.S.C.A. § 825 (West 2018).

21. Thomas E. Price, *Secretary Price Announces HHS Strategy for Fighting Opioid Crisis,* U.S. DEP'T OF HEALTH & HUMAN SERVICES (Apr. 2017), https://www.hhs.gov/about/leadership/secretary/speeches/2017-speeches/secretary-price-announces-hhs-strategy-for-fighting-opioid-crisis/index.html.

22. State v. Purdue Pharma LP, No. CJ-2017-816, 2019 WL 4019929, at *12 (Dist. Ct. Okla. Aug. 26, 2019).

23. *Pardue Phrama LP.*, 2019 WL 4019929, at *15-21.

drugs, broadened product distribution, took data out of context, and actively promoted opioid-based medication in contrast to company policy. [24]

The proceeding section will provide a brief historical development of public nuisance law. Next, this paper will discuss the procedural history, facts, and the judgment in *State v. Purdue Pharmaceuticals*. Subsequently, this Comment will apply the Restatement (Second) of Torts to the facts of this case. This Comment will then compare the facts and holding in *State v. Purdue Pharmaceuticals* with similar cases regarding product liability claims under the theory of public nuisance. Thereafter, this Comment will discuss the possible rationales behind the judgment. Lastly, this Comment will provide a summary of possible consequences that may occur as a result of the extension.

II. HISTORICAL DEVELOPMENT OF PUBLIC NUISANCE

Traditionally, the scope of public nuisance was connected to the infringement of public rights or in connection to land.[25] The purpose of public nuisance is to deter activities that are harmful to the community.[26] Public nuisance is typically considered with but not limited to "interference with the public health, … public safety, … public morals, … [and] public peace."[27]

Historically, courts rarely used the doctrine of public nuisance for criminal liability because it was reserved for limited circumstances involving the interference of public or royal rights.[28] *Anonymous* expanded the doctrine of public nuisance beyond a cause of action for monarchies to encompass private individuals and suggested that public nuisances must cause specific harm for an individual to have standing with the claim.[29]

In the 1536 case of *Anonymous*, the plaintiff, a property owner, brought suit against the defendant for blocking the king's highway.[30] The court held that allowing suits for any individual harmed under the doctrine of public nuisance would open the floodgates of litigation.[31] Therefore,

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24. *Id.* at *11.

25. W. Page Keeton et al., Prosser and Keeton on Torts § 86 at 617-18 (5th ed. 1984).

26. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741 (2003).

27. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821 (B) (Am. Law Inst. 1979).

28. Reynolds, Osborne N. Jr., *Public Nuisance: A Crime in Tort Law*, 31 Okla. L. Rev. 318, 319 (1978) (citing E Garrett & H. Garrett, *Nuisances* (4d ed. 1908)).

29. Anon., Y.B. Mich., 27 Hen. 8, f. 27, pl. 10 (1536) (Eng.), *reprinted in* History and Sources of the Common Law 98 (1970).

30. *Id.*

31. *Id.*

only individuals who have suffered a special or unique harm different from others may have standing to bring a claim under the doctrine of public nuisance.[32] The court reasoned that the plaintiff's use of the road was unique and that he suffered more significant harm than the average individual using the road.[33] Thus, he was permitted to bring this nuisance action against the defendant because the roadblock uniquely harmed the plaintiff.[34]

Since *Anonymous*, the doctrine of public nuisance has commonly been used in cases for obstruction of highways or waterways and noise violations.[35] For example, an action for public nuisance was brought against railroad companies alleging that the railroad created dangerous conditions for individuals that wished to travel the road alongside the tracks.[36] The court found the railroad companies not liable under the doctrine of public nuisance for the risk of harm associated with traveling alongside the track.[37] They reasoned that legislative authorization and compliance shield companies from public nuisance so long as they are compliant with the applicable law.[38] The court found the railroad companies not liable based on legislative approval to operate the railroad.[39] However, more recently, public nuisance has been used for claims involving environmental grievances, banking, and product liability claims.[40]

The current elements of public nuisance include (1) standing, (2) public right, (3) a substantial and unreasonable interference with that right by the defendant, and (4) proximate cause.[41]

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32. *Id.*

33. *Id.*

34. *Id.*

35. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) cmt. c. (Am. Law. Inst. 1979).

36. Bordentown & S.A. Turnpike Road v. Camden & A.R. &. Transp. Co., 17 N.J.L. 314, 317 (N.Y. App. Div. 1839).

37. *Id.* at 320-21.

38. *Id.*

39. *Id.* at 319-20.

40. Young v. Bryco Arms, 821 N.E. 2d 1078, 1085 (Ill. 2004); Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs, 101 F. 3d 503, 505 (7th Cir. 1996); City of Cleveland v. Ameriquest Mort. Sec., Inc., 615 F.3d 496, 497-99 (6th Cir. 2010).

41. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B).).) (Am. Law. Inst. 1979). Proximate cause is added under case law and recognized in the notes of the Restatement (Second) of Torts but not in the elements of the rule. The proceeding case explicitly recognized proximate cause as an element of public nuisance: Burns v. Simon Properties Group, LLP, 996 N.E. 2d 1208, 1212 (Ill. 2013). For clarity, the analysis section will further breakdown each element of public nuisance into smaller "sub-categories."

According to the Restatement (Second) of Torts, an individual must have standing to recover for injuries sustained by a public nuisance.[42] The injury suffered must be "of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."[43] Furthermore, private individuals or statutorily approved government entities or officials may bring suits for public nuisance.[44]

Under the doctrine of public nuisance, the injury must occur while exercising a public right.[45] According to the Restatement (Second) of Torts, "a public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured."[46]

Once a public right or an exception has been established, the doctrine of public nuisance requires that interference with the public right to be unreasonable and significant.[47] Unreasonable interference may be intentional or unintentional actions by the defendant.[48] In addition, the Restatement (Second) of Torts provides a list of interferences that might be unreasonable.[49] When a defendant acts intentionally to interfere with an individual's public right or if there is a high probability of interference, then the defendant's actions are unreasonable.[50] However, even if an individuals' actions were intentional, then the court must consider the potential benefits, costs, and harms associated with the defendant's actions.[51] In contrast to intentional interference, if the action that harms a public right was unintentional, then the court will consider if the

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42. RESTATEMENT (SECOND) OF TORTS: WHO CAN RECOVER FOR PUBLIC Nuisance § 821(C) cmt. c, (Am. Law Inst. 1979).

43. RESTATEMENT (SECOND) OF TORTS: WHO CAN RECOVER FOR PUBLIC NUISANCE § 821(C) (Am. Law. Inst. 1979).

44. *Id.*

45. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) (Am. Law. Inst. 1979).

46. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) cmt. g. (Am. Law Inst. 1979)

47. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) (Am. Law Inst. 1979); Restatement (Second) of Torts: Significant Harm § 821(F) (Am. Law Inst. 1979).

48. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) cmt. e (Am. Law Inst. 1979).

49. *Id.*

50. RESTATEMENT (SECOND) OF TORTS: INTENTIONAL INVASION – WHAT CONSTITUTES § 825 (Am. Law Inst. 1979).

51. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) (Am. Law Inst. 1979); RESTATEMENT (SECOND) OF TORTS: GENERAL RULE § 822 cmt. g, (Am. Law Inst. 1979); RESTATEMENT (SECOND) OF TORTS: § 826 (Am. Law Inst. 1979).

interference was due to other actionable torts, such as negligence.[52] According to the Restatement (Second) of Torts, an individual is negligent if they act or fail to act regarding a duty and said action or inaction falls below a reasonable standard of care designed to protect others from an unreasonable risk of harm.[53] Furthermore, a defendant may be negligent for failing to warn an individual of the potential harm.[54]

After an interference has been established, the court must consider if such interference was significant.[55] Almost all activities can interfere, harm, or annoy those in society.[56] The significance of the harm must be objectively determined considering all relevant factors.[57]

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52. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) cmt. e (Am. Law Inst. 1979).

53. RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE DEFINED § 282 cmt. a-e, (Am. Law Inst. 1979). Case law suggests that a finding of negligence requires that the defendant owed a duty of care to the public and that the defendant breached said public duty by failing to maintain a reasonable standard of care. N.A.A.C.P. v. AcuSport, Inc., 271 F. Supp. 2d 435, 488 (E.D.N.Y. 2003). Typically, in determining whether a duty exists, courts "balance … foreseeability, public policy, and the relationship between the parties. City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E. 2d 1222, 1242 (Ind. 2003); *see also* City of Chicago v. Beretta U.S.A. Corp., 821 N.E. 2d 1099, 1125 (Ill. 2004). However, the balancing test is only required if the law has not yet established such a duty by law. *Id*. The instant case, *State v. Purdue Pharmaceuticals*, pertains to public nuisance in the context of manufacturing opioid-based medications. Therefore, we will consider the duties that pharmaceutical companies owe. In Oklahoma, pharmaceutical manufacturers only owe a duty to the prescribers. Edwards v. Basel Pharmaceuticals, 933 P.2d 298, 301 (Okla. 1997). Their duty to prescribers only requires that they disclose any of the potential side effects or risks associated with the use of their products. *Id*. New York and Florida impose similar duties on pharmaceutical companies. *See* Amos v. Biogen Idec Inc., 28 F. Supp. 3d 164, 173 (W.D.N.Y. 2015); *see also* Levine v. Wyeth Inc., 684 F. Supp. 2d 1338, 1344-45 (M.D. Fla. 2010).

54. RESTATEMENT (THIRD) OF TORTS: NEGLIGENT FAILURE TO WARN § 18 (Am. Law Inst. 2010). In context to the instant case, *State v. Purdue Pharmaceuticals*, pharmaceutical companies have a general duty to warn consumers of potential risks associated with the use of medication when required by the FDA or when other exceptions have been identified by law. *Edwards*, 933 P.2d 298, 301-02. However, compliance with the FDA is not a shield from liability and a mere minimum duty that must be met. *Id*. at 303. Therefore, states may impose heightened duties on pharmaceutical manufacturers. *Id*.

55. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) cmt. e (Am. Law Inst. 1979); RESTATEMENT (SECOND) OF TORTS: SIGNIFICANT HARM § 821(F) (Am. Law Inst. 1979).

56. RESTATEMENT (SECOND) OF TORTS: GENERAL RULE § 822 cmt. g.

57. RESTATEMENT (SECOND) OF TORTS: GRAVITY OF HARM – FACTORS § 827 cmt., b, (Am. Law Inst. 1979).

Proximate cause has been interpreted to include cause in fact and legal cause.[58] Cause in fact requires that there be "a reasonable certainty that a defendant's acts caused the injury or damage."[59] In contrast to cause in fact, legal cause "addresses the separate issue of how far legal responsibility should extend for a party's actions."[60] An individual is the legal cause of harm if their conduct "is a substantial factor in producing the injury."[61] See footnote 62 for notes on the Restatement (Second) of Tort's approach to proximate cause.[62] The purpose of proximate cause is to limit liability to injuries that are foreseeable as a result of a tortfeasor's actions.[63] The Supreme Court of the United States has suggested that "proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'"[64] A defendant is the proximate cause of an injury when their actions, "in a natural and continuous sequence [resulting

58. Young v. Bryco Arms, 821 N.E. 2d 1078, 1085 (Ill. 2004) (citing Lee v. Chicago Transit Authority, 605 N.E. 2d 492, 502 (Ill. 1992)); *see also* Ashley County, Ark. v. Pfizer, Inc., 552 F. 3d 659, 667 (8th Cir. 2009) (citing Chambers v. Stern, 64 S.W. 3d 737, 744 (Ark. 2002)).

59. *Young*, 821 N.E. 2d 1078, 1085 (citing *Lee*, 605 N.E. 2d 493, 502). As put by the Supreme Court of Missouri, legal cause turns on whether the "harm is the reasonable and probable consequence of the defendant's conduct." City of St. Louis v. Benjamin Moore &. Co., 226 S.W. 3d 110, 114 (Mo. 2007). Therefore, had the tortfeasor not acted, then the harm would not have occurred. *Id.* at 114; *see also Jones*, 155 P.3d 9, 14-15. The Supreme Court of Ohio provided factors to consider when determining the remoteness of harm from the alleged conduct. Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1152 (Ohio 2002) (citing Holmes v. Securities Investor Protection Corp., 503 U.S. 248, 269 (2002)). First, a court must consider whether the injury was direct or indirect. *Id*. Second, if a court must employ complicated or burdensome rules to determine if the injury was direct, then the injury was likely indirect. *Id*. Third, was the injured party directly or indirectly related to the conduct. *Id*.

60. *Ashley,* 552 F.3d 659, 667 (citing *See* W. Keeton, Prosser & Keeton on Torts § 41, at 264 (5th ed. 1984)); *see also Benjamin Moore*, 226 S.W. 3d 110, 114 (citing Callahan v. Cardinal Glennon Hospital, 863 S.W. 3d 852, 856 (Mo. 1993)).

61. People v. ConAgra Grocery Products Co., 17 Cal. App. 5th51, 103 (Cal. Ct. App. 2017) (citing Soule v. General Motors Corp, 8 Cal. 4th 548, 572 (Cal. 1994)).

62. The restatement, in contrast to cases, uses the term "legal cause" instead of proximate cause. RESTATEMENT (THIRD) OF TORTS: LIMITATIONS ON LIABILITY FOR TORTIOUS CONDUCT § 29 cmt. a-b, (Am. Law Inst. 2010). Proximate cause includes cause in fact and legal cause. The restatement's approach to legal cause satisfies both the common law definition of cause in fact and legal cause. *Id.*; RESTATEMENT (FIRST) OF TORTS: LEGAL CAUSE; WHAT CONSTITUTES § 431 cmt. a-d, (Am. Law Inst. 1934). Therefore, although citing cases, this is not inconsistent with the restatement. Instead, this is to assist readers in providing familiar terms that are utilized in cases.

63. Ileto v. Glock Inc., 349 F. 3d 1191, 1206 (9th Cir. 2003) (citing Mendoza v. City of Los Angeles, 66 Cal. App. 4th 1333, 78 (Cal. Ct. App. 1998)).

64. Holmes v. Sec. Inv. Prot. Corp., 502 US. 258, 268 (2002) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41 p. 264 (5th ed. 1984)).

from their actions], unbroken by any efficient intervening cause, produced the injury, and without which the result would not have occurred."[65] A plaintiff who cannot establish some direct relation between the injury asserted and the injurious conduct alleged fails to plead a key element for establishing proximate causation, independent of and in addition to other traditional elements of proximate cause.[66] However, an intervening act may shield an individual from liability if such an act is "sufficient to stand as the cause of the injury" and the intervening act is "totally independent" of the original act.[67]

A. Public Nuisance: Environmental

Historically, environmental claims have been brought based on noxious odors, pollution, and water contamination.[68] Public nuisance was the basis for creating and determining the scope of many environmental statutory regimes.[69] For example, Congress used public nuisance as a basis in The Clean (§ 503) Air Act, Water Pollution Control Act (7003), The Clean Water Act (§ 504).[70] Furthermore, some statutes share the same purpose of public nuisance, protecting individuals and govern behavior.[71]

B. Public Nuisance: Banking

In recent years, the doctrine of public nuisance has been used against banks for their part in the subprime mortgage crisis.[72] For example, in the *City of Cleveland v. Ameriquest Mort. Securities, Inc*., Cleveland brought suit against financial institutions claiming that their part in the

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65. *Ashley*, 552 F.3d 659, 666 (8th Cir. 2009) (citing City of Caddo Valley v. George*,* 340 Ark. 203, 9 S.W.3d 481, 487 (2000)).

66. *Id*.

67. *Caddo Valley,* 9 S.W.3d at 487 (quoting Hill Constr. Co. v. Bragg*,* 725 S.W. 2d 538, 540 (Ark. 1987)); *see also Ashley,* 552 F. 3d 659, 667.

68. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) cmt. g (Am. Law Inst. 1979).

69. *See, e.g*., E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1J.L. Econ. & Org. 313, 315 (1985).

70. S. REP. 96-172. 96th Cong., 1ST Sess. 1979, 1980 U.S.C.C.A.N. 5019, 1979 WL 10338 (Leg. Hist.)

71. Solid Waste Agency of Northern Cook County v. U.S. Army Corps. of Eng'rs, 101 F. 3d 503, 505 (7th Cir. 1996).

72. Richard E. Gottlieb, Andrew J. McGuinness, *Subprime Lending As A Public Nuisance: Casting Blame Mortgage On Lenders And Wall Street For Inner City Blight*, 62 Consumer Fin. L.Q. Rep. 4 (2008).

subprime mortgage crisis constituted a public nuisance.[73] The plaintiff contended that the defendant's part in creating subprime mortgages, with their relaxed lending standards, was not the sole but a partial cause of the crisis, which constituted a public nuisance.[74] The alleged harm was an increase in societal costs due to foreclosures, loss in property tax, unemployment, and lower innovation.[75] The court was unpersuaded by the plaintiff's argument because the harm alleged was also due to a multitude of factors all outside the bank's control.[76] For example, the court found that homeowners applied for and defaulted on their loans by their own volition.[77] Moreover, the defendants engaged in statutorily legal activities and did not partake in any illegal activities.[78] Therefore, defendants were not the proximate cause of the harm and could not be held liable for the public nuisance.[79]

C. Public Nuisance: Class Actions

In addition to municipalities and private individuals bringing claims under the doctrine of public nuisance, groups of individuals have attempted to assert class actions under the doctrine. The plaintiffs, in *Diamond v. General Motors,* comprised of over seven thousand Los Angeles residence, brought a class-action for discharging harmful pollutants into the atmosphere against numerous defendants on public nuisance grounds as well as others.[80] The court dismissed the class-action claim for public nuisance because it would unreasonably complicate the litigation, each party has suffered different harm, and that each member would have a separate interest in this litigation.[81] Furthermore, plaintiffs failed to assert any specific injury that prevented them from enjoying the use of their property.[82] Therefore, the class action was denied.[83]

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73. City of Cleveland v. Ameriquest Mort. Sec., Inc., 615 F.3d 496, 498-99 (6th Cir. 2010).
74. *Id.* at 499.
75. *Id.*
76. *Id.* at 505.
77. *Id.*
78. *Id.* at 505.
79. *Id.* at 506-07.
80. Diamond v. General Motors Corp., 20 Cal. App. 3d 374, 377 (2nd Cir. 1971).
81. *Id.*at 377-78.
82. *Id.* at 378.
83. *Id.* at 383.

D. Public Nuisance: Product Liability

Historically, the purpose of product liability was to hold manufacturers liable for defective products.[84] In order to bring a claim for product liability it had to be founded on negligence.[85] Product liability claims are brought because of "defects, design defects, and defects based on inadequate instructions or warnings."[86] Beginning around the 1970s, the doctrine of public nuisance became a popular mode to litigate product liability claims.[87] When product liability claims are brought under the doctrine of public nuisance, there are four general themes: (1) at the time of sale, the product was legally manufactured and; (2) at the time of sale, the product was non-defective; (3) after the sale, the harm was indirectly caused by an individual other than the manufacturer; and (4) after the sale, the manufacturer or distributor had relinquished control of the product.[88] Public nuisance in product liability has been prevalent for quite some time.[89] Product liability claims have commonly been brought under the doctrine of public nuisance regarding the tobacco industry, lead paint industry, firearm industry, and, more recently, the pharmaceutical industry.[90]

1. Public Nuisance: Tobacco

In 1998, forty-six states, the District of Columbia, and five U.S. territories reached a settlement agreement with cigarette manufacturers concerning Medicaid lawsuits.[91] The basis for the litigation was that

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84. RESTATEMENT (THIRD) OF TORTS: LIABILITY OF COMMERCIAL SELLER OR DISTRIBUTOR FOR HARM CAUSED BY DEFECTIVE PRODUCTS § 1 (Am. Law Inst. 1998).

85. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003) (citing *MacPherson v. Buick Motor Co*., 111 N.E. 1050, 1051 (N.Y. 1916)). *See also* the RESTATEMENT (THIRD) OF TORTS: LIABILITY OF COMMERCIAL SELLER OR DISTRIBUTOR FOR HARM CAUSED BY DEFECTIVE PRODUCTS § 1 cmt. a, that further suggests warranty actions could be brought as well.

86. RESTATEMENT (THIRD) OF TORTS: LIABILITY OF COMMERCIAL SELLER OR DISTRIBUTOR FOR HARM CAUSED BY DEFECTIVE PRODUCTS § 1 cmt. a.

87. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003).

88. *See* Labzda v. Purdue Pharma, L.P., 292 F. Supp. 2d 1346, 1349 (S.D. Fla. 2003); *see also Ashley* County, Ark. v. Pfizer, Inc., 552 F.3d 659, 673 (8th Cir. 2009); *see* State of Texas v. American Tobacco Co., 14 F. Supp. 2d 956, 960 (E.D. Tex. 1997).

89. *See Labzda,* 292 F. Supp. 2d 1346, 1349 (S.D. Fla. 2003); *see also Ashley*, 552 F.3d at 673; *see American Tobacco Co*., 14 F. Supp. 2d at 960.

90. *See Labzda,* 292 F. Supp. 2d 1346, 1349 (S.D. Fla. 2003); *see also Ashley,* 552 F.3d 659, 673; *see American Tobacco Co*., 14 F. Supp. 2d 956, 960. *Id.*

91. Robin Miller, *Validity, Construction, Application, and Effect of Master Settlement Agreement (MSA) Between Tobacco Companies and Various States, and State*

cigarette manufacturers caused an increase in medical costs for smoking-related illnesses.[92]

Prior to the 1998 settlement agreement, Texas partially litigated a case against cigarette manufacturers under the doctrine of public nuisance. In 1997, Texas brought suit against the American tobacco company for the increased cost in the state Medicaid program, alleging that tobacco products directly caused an increase in costs associated with healthcare.[93] The district court dismissed the Texas' claim as to public nuisance because they failed to prove how the tobacco companies harmed the state by "improperly us[ing] their own property, or that the state itself has been injured in its use or employment of its property."[94] Shortly thereafter, the settlement agreement was signed.[95]

2. Public Nuisance: Lead Paint

Up until 1978, lead-based paint was heavily used in residential areas.[96] The use of lead-based paint ended because lead exposure is highly toxic to both children and adults.[97] Public nuisance claims against lead paint manufacturers were generally sought because of the cost to remove lead-based paint and because of increased healthcare costs due to the harmful effects on children that were exposed to lead-based paint.[98]

In the case of *In re Lead Paint Litigation,* numerous cities sued lead paint manufacturers, alleging increased cost in removing lead-based paint, healthcare cost to those exposed, and educating residents on the harmful effects of lead.[99] The court held that plaintiffs failed to identify a unique harm from the lead paint other than "those arising from the common right."[100] The court reasoned that a finding of liability would expand public

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Statutes Implementing Agreement; Use and Distribution of MSA Proceeds 25 A.L.R.6th 435 (Originally published in 2007).

92. *Id.*

93. *American Tobacco Co*., 14 F. Supp. 2d 956, 960.

94. *Id.* at 973.

95. Robin Miller, *Validity, Construction, Application, and Effect of Master Settlement Agreement (MSA) Between Tobacco Companies and Various States, and State Statutes Implementing Agreement; Use and Distribution of MSA Proceeds,* 25 A.L.R.6th 435 (Originally published in 2007).

96. People v. ConAgra Grocery Prod. Co., 17 Cal. App. 5th 51, 73 (Cal. Ct. App. 2017)

97. *Id.* at 79.

98. *See Id.* at 79; *see also* In re Lead Paint Litigation, 924 A.2d 484, 487 (N.J. 2007).

99. *In re Lead Paint Litigation*, 924 A.2d at 487.

100. *Id.* at 502.

nuisance so far that it may never stop and would "devour in one gulp the entire law of tort." [101]

In 1999, the Attorney General of Rhode Island brought an action for public nuisance against lead paint manufacturers.[102] Their main contention was that lead paint manufacturers concealed and misrepresented the harmful effects of lead exposure, which ultimately led to a public health crisis from said exposure.[103] Lead poisoning was deemed a public health crisis due to its permanent and detrimental effect on childhood development.[104] Due to the harmful effects of lead-based paint, Congress and state legislature banned the use of lead-based products and implemented educational programs to discuss the harm of exposure.[105] The court held that the harm caused by lead paint and the impacts it had on individuals was not a public right.[106] To satisfy the public right requirement under the doctrine of public nuisance, the plaintiff must provide more than a general interference with "health, safety, peace, comfort or convenience."[107] Without a public right, an individual will not be liable even if their actions were unreasonable.[108] The court furthered its rationale on public policy. First, the expansion of public nuisance would be "bad law" and result in the "worst sort of tyranny."[109] Second, if the court were to expand the doctrine of public nuisance, then it would surpass the intended scope of the doctrine.[110]

By contrast, in *People v. ConAgra*, lead paint manufacturers were held liable for all injuries sustained as a result of their harmful marketing tactics. [111] In this case, California sued lead paint manufacturers, alleging that their promoting and manufacturing of lead paint constituted a public nuisance.[112] In extending public nuisance to product liability, the court further stated that a claim for public nuisance based on a product does not require the defendant to have full control of the product up until the

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101. *Id.* at 505 (citing Camden County Bd. Of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 540 (3rd Cir. 2001)).

102. *Id*. at 439-40.

103. *Id*. at 440.

104. State v. Lead Industries, Ass'n, Inc., 951 A. 2d 428, 436-37 (R.I. 2008).

105. *Id*. at 438.

106. *Id*. at 453.

107. *Id*. at 453-54.

108. *Id*.

109. *Id*. at 454. (citing Edmund Burke, The Works of Edmund Burke: With a Memoir 318 (1860)).

110. *Id*. at 453-54

111. People v. ConAgra Grocery Products Co., 17 Cal. App. 5th 51, 166-69 (Cal. Ct. App. 2017)

112. *Id.* at 79.

injury.[113] In addition, the court extended public rights to issues that impact societal interests at large and found that children have a right to be free from lead-based paint in their homes.[114] The court held that lead paint manufacturers knew of the risks associated with the use of lead paint and still promoted and sold their product for residential purposes.[115] A nuisance, in California, only requires that the defendant be culpable in creating a hazardous condition.[116] Ultimately, the defendants created a public nuisance by failing to warn of the hazardous effects of lead-based paint.[117]

3. Public Nuisance: Firearm

In 2017, approximately 39,773 people died from firearm-related injuries in the United States.[118] The firearm industry is heavily regulated.[119] Even with such regulations, there are still casualties of violence and accidents. As a result of a slew of lawsuits against firearm manufacturers, in 2005 Congress enacted the Protection of Lawful Commerce in Arms Act to shield gun manufacturers from liability in instances where their products are misused or used for any unlawful purposes.[120]

In *Ileto v. Glock*, the plaintiffs, parents of the deceased, sued gun manufacturers under the doctrine of public nuisance.[121] Ileto argued that gun manufacturers interfered with public safety and health in the production and promotion of firearms.[122] The court held that the families of the victims suffered an injury that was "different in kind from the general public."[123] The court additionally found that the manufacturers were the proximate cause of the injuries and death suffered by the victims because the manufacturers fostered an "illegal secondary market that foreseeably led to a prohibited purchase."[124] The court further stated that products might be

113. *Id.* at 163.
114. *Id.* at 112.
115. *Id*. at 168.
116. *Id*. at 163.
117. *Id.* at 166.
118. Pew Res. Ctr. *What the Data Says About Gun Deaths in the U.S.*, (Aug. 2019), https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s/.
119. § 7901. Findings; purposes, 15 U.S.C.A. §7901(a)(4) (Westlaw though P.L. 116-158)
120. *Id.* at §7901(b)(1)
121. Ileto v. Glock, 349 F.3d 1191, 1212 (9th Cir. 2003), *dismissed*, 421 F. Supp. 2d 1274 (C.D. Cal. 2006).
122. *Id.* at 1211.
123. *Id.* at 1212.
124. *Id.* at 1213.

the cause of a public nuisance if said products "unreasonably interfere with a right common to the general public."[125] However, on remand, the district court dismissed Ileto's claim and held that legislative intent would not permit recovery on public nuisance grounds.[126]

A similar conclusion was reached in the *City of Philadelphia v. Baretta U.S.A. Corp*, where the City of Philadelphia sued gun manufacturers on public nuisance grounds, alleging that the use of defendants' products by criminals resulted in an increased cost to protecting the public.[127] First, the court noted that no prior New Jersey court had held lawful activities in commerce to be a public nuisance.[128] Furthermore, public rights were typically limited to "interference connected with real property or infringement of public rights."[129] Moreover, the court found that the causal connection between an increased cost in preventing crime and the manufacturing was too attenuated to hold the defendants liable because they had no direct control over the firearms.[130] Thus, the court ultimately declined to extend New Jersey law and chose not to hold a firearm manufacturer legal for harm caused indirectly by defendants.[131]

In *Young v. Bryce Arms*, on a motion for summary judgment, the court reached comparable conclusions as in the *City of Philadelphia* and *Ileto.*[132] Ultimately, the court dismissed claims against gun manufacturers, which alleged that they created a public nuisance by selling firearms that were used in furtherance of criminal activities.[133] In *Young*, five plaintiffs comprised of family members and estate administrators sued firearm manufacturers and retailers for the death of individuals who died at the hand of illegal firearms.[134] The plaintiffs premised their claim on manufacturers intentionally selling firearms to juvenile gang members.[135] The court held that defendants manufacturing and selling of firearms constituted a public right because individuals have a public right to be safe in public.[136] Notably, the plaintiffs failed to raise any violations of federal or state laws

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125. *Id.* at 1214 (quoting Cincinnati v. Beretta U.S.A. Corp, 768 N.E.2d 1136, 1142 (Ohio 2002)).

126. *Ileto*, 421 F. Supp. 2d at 1304.

127. City of Philadelphia v. Baretta U.S.A. Corp., 277 F.3d 415, 419 (3rd Cir. 2002).

128. *Id.* at 421.

129. *Id.* at 420 (citing W. Page Keeton, Prosser and Keeton on Torts § 86 at 616-18 (5th ed. 1984)).

130. *Id.* at 422.

131. *Id.*

132. Young v. Bryco Arms, 821 N.E. 2d 1078, 1091 (Ill. 2004).

133. *Id.* at 1082.

134. *Id.* at 1080.

135. *Id.* at 1082.

136. *Id.* at 1084.

concerning the manufacturing, marketing, or selling of firearms.[137] The court stated that when an injury occurs in a highly regulated industry, so long as the defendant is not intentionally negligent, then the defendant will not be liable under the doctrine of public nuisance.[138] Ultimately, the court reasoned that reliance should be placed on the legislature in public nuisance cases for manufactured products in heavily regulated industries.[139] Lastly, the court concluded that even if there was a public right, the defendants were not the direct and proximate cause of the injury.[140]

In contrast, in the *City of Gary Ex Rel. King v. Smith & Wesson Corp*., plaintiffs complaint survived defendants motion to dismiss for failure to state a claim.[141] The plaintiffs brought a claim for public nuisance, alleging the defendants negligently marketed and sold firearms that ended up in the hands up criminals, which, as a result, lead to an increased cost in protecting the public.[142] The court reasoned that defendants' negligent conduct, when applied to the doctrine of public nuisance, might lead a jury to conclude that there was unreasonable interference with the public right to health and safety.[143] The court denied the motion to dismiss for failure to state a claim because, on the face of the complaint, plaintiffs had pleaded enough to prove that a duty existed and that said duty had been breached.[144] In determining whether a duty existed, the court "balance[ed] … foreseeability, public policy, and the relationship between the parties.[145] Therefore, a jury might conclude that a public right was violated when the defendant breached their duty.[146]

In *N.A.A.C.P. v. AcuSport, Inc*., the plaintiffs brought suit against gun manufacturers, alleging that a public nuisance arose from gun manufacturers' failure to limit the sale of guns and deter firearm violence.[147] The plaintiffs claim that their public right to health and safety were injured due to the misuse of firearms.[148] The court was unpersuaded by this argument and held that the harm suffered by plaintiffs was no

137. *Id.* at 1085.
138. *Id.* at 1084.
139. *Id.* at 1091.
140. *Id.*
141. City of Gary ex rel. King v. Smith & Wesson Corp., 801 N.E. 2d 1222, 1249 (Ind. 2003).
142. *Id.* at 1228.
143. *Id.* at 1248.
144. *Id.* at 1242.
145. *Id.*
146. *Id.* at 1248.
147. N.A.A.C.P. v. AcuSport, Inc*.,* 271 F.Supp. 2d 435, 446-47 (E.D.N.Y. 2003).
148. *Id.* at 508.

different from that of the general public.[149] In order to show harm under the doctrine of public nuisance, a plaintiff must show that they have suffered a "particular harm not shared in common with the rest of the public."[150] Harm different in kind does not mean severity or degree of harm.[151] Furthermore, the plaintiffs failed to allege a harm different in kind because the police and New York government owe all residents the same duty of protection and safety.[152]

In the *City of Chicago v. Beretta U.S.A. Corp*, Chicago sued firearm manufacturers for costs associated with gun violence.[153] According to the court, Chicago failed to recognize a public right to general safety because "any dangerous instrumentality in the community could … threaten" a public right.[154] The court further stated that "a public right is 'not like the individual right that everyone has not to be assaulted.'"[155] Therefore, Chicago's action for public nuisance cannot be maintained.[156]

4. Public Nuisance: Pharmaceutical Industry

In 2017, the pharmaceutical industry was worth over $900 billion.[157] The pharmaceutical industry is also heavily regulated at the federal and state level.[158] Even with such regulation, opioid deaths have been on an accelerating rise since the 1990s.[159]

In *Labzda v. Purdue Pharmaceuticals*, the plaintiffs brought an action against Purdue Pharmaceuticals, alleging that the wrongful death of their son was due to a public nuisance created by Purdue Pharmaceuticals.[160] Before the death of the plaintiffs' son, he was prescribed opioids for chronic pain management.[161] A few years later, their

149. *Id.* at 499.

150. *Id.* at 497 (citing Callanan v. Gilman, 107 N.Y. 360, 370 (N.Y. 1887)).

151. *Id.* at 489 (quoting RESTATEMENT (SECOND) OF TORTS: WHO CAN RECOVER FOR PUBLIC NUISANCE § 821(C) cmt. h. (Am. Law Inst. 1979)).

152. *Id.* at 499.

153. City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1105 (Ill. 2004).

154. *Id.* at 1116.

155. *Id.* (citing RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821 (B) cmt., g).

156. *Beretta*, 821 N.E.2d at 1148.

157. *The Growing Pharmaceuticals Market: Expert Forecasts and Analysis*, THE BUSINESS RESEARCH COMPANY, (May 2018), https://blog.marketresearch.com/the-growing-pharmaceuticals-market-expert-forecasts-and-analysis.

158. Charles L. Hooper, *Pharmaceuticals: Economics and Regulation*, https://www.econlib.org/library/Enc/PharmaceuticalsEconomicsandRegulation.html.

159. *Opioid Data Analysis and Resources*, CDC (2019), https://www.cdc.gov/drugoverdose/data/analysis.html.

160. Labzda v. Purdue Pharma, L.P., 292 F. Supp. 2d 1346, 1348 (S.D. Fla. 2003).

161. *Id.*

son overdosed.[162] First, the court held that pharmaceutical manufacturers are not liable for the actions of prescribing physicians.[163] In addition, the plaintiffs' son willfully took drugs after being repeatedly warned of the dangers.[164] As a result, Purdue Pharmaceutical was not the proximate cause of the plaintiffs' son's death.[165] Thus, the court dismissed the lawsuit.[166]

In *Ashley County, Ark. v. Pfizer*, twenty Arkansas counties brought public nuisance claims against methamphetamine manufacturers.[167] The plaintiffs argued that the defendants' created a public nuisance by manufacturing cold and allergy medication that they knew was being illegally synthesized into methamphetamine, and therefore increasing the societal cost of addiction treatment.[168] The court held that there were no intervening causes leading to the increased societal cost of addiction treatment and were not the direct result of the defendants actions.[169] Therefore, there can be no claim for nuisance.[170]

Since 2018, more than half of the United States have filed lawsuits against drug manufacturers for deceptive marketing strategies or on public nuisance grounds.[171] The instant case, the *State of Oklahoma v. Purdue Pharmaceuticals*, is important because the plaintiff argued that defendants' false and misleading marketing tactics lead to the opioid epidemic.[172] Unlike typical product liability theories, the plaintiffs do not argue that the products were defective. Instead, they argued that defendants conduct increased rates of addiction and increased costs associated with treating addiction.[173]

The following section will discuss the procedural history, facts, and holding in *State v. Purdue Pharmaceutical*. Subsequently, this Comment will analyze the facts in *State v. Purdue Pharmaceutical* under the Restatement (Second) of Torts. This Comment will then compare the facts and holding in *State v. Purdue Pharmaceuticals* with similar cases regarding product liability. Thereafter, this Comment will discuss the possible reasonings that might have been behind the judgment. Lastly, this

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162. *Id.*
163. *Id.*
164. *Id.* at 1356.
165. *Id.*
166. *Id.*
167. *Ashley*, 552 F.3d 659, 662-63 (8th Cir. 2009).
168. *Id.* at 662-63.
169. *Id.* at 669.
170. *Id.* at 673.
171. *17-2804 – In Re: National Prescription Opiate Litigation*, https://www.govinfo.gov/app/details/USCOURTS-ohnd-1_17-md-02804/USCOURTS-ohnd-1_17-md-02804-0/summary.
172. *Purdue,* 2019 WL 4019929, at *12.
173. *Id.* at 15-21.

Comment will provide a summary of possible consequences that may occur as a result of the extension.

III. PROCEDURAL HISTORY AND FACTS OF *STATE V. PURDUE PHARMACEUTICALS*

A. Procedural History

This suit was brought in the District Court of Cleveland County in Oklahoma by the Attorney General of Oklahoma on behalf of the State of Oklahoma on June 30th, 2017, against drug manufacturers, their subsidiaries, sister corporations, agents, and principals. [174] The defendants included Purdue Pharmaceutical L.P., Purdue Pharmaceutical, Inc., Purdue Frederick Company, Teva Pharmaceuticals USA, Inc., Cephalon, Inc., Johnson & Johnson, Jannsen Pharmaceuticals, Janssen Pharmaceutica, Inc., Jannsen Pharmaceuticals, Inc., Actavis PLC, Actavis LLC, and Watson Laboratories, Inc.[175]

Oklahoma reached a settlement agreement with Purdue Pharmaceuticals, L.P., Purdue Pharmaceuticals Inc., and Purdue Frederick Company Inc. on March 26th, 2019.[176] Furthermore, on June 7th, 2019, a second settlement was entered between Oklahoma and Teva Pharmaceuticals USA, Inc.[177]

On August 26th, 2019, the District Court of Cleveland County rendered a judgment in favor of Oklahoma, against the remaining defendants Cephalon, Inc., Johnson & Johnson, Jannsen Pharmaceuticals, Janssen Pharmaceutica, Inc., Jannsen Pharmaceuticals, Inc., Actavis PLC, Actavis LLC, and Watson Laboratories, Inc. for $572,102,028.[178]

B. Factual Summary

The State of Oklahoma is currently experiencing an opioid epidemic.[179] Oklahoma began experiencing issues from a rising opioid epidemic during the mid-1990s.[180] Throughout the 1990s, defendants promoted, manufactured, and sold opioid-based drugs such as Duragesic, Ultram, Ultram Extended Release, Ultracet, Nucynta, Nucynta Extended

174. *Purdue,* 2019 WL 4019929, at *1.
175. *Id.*
176. Settlement Agreement, State v. Purdue Pharma L.P., No. CJ-2017-816, 2019 WL 4059721 (Dist. Ct. Okla. 2019).
177. *Id.*
178. *Purdue,* 2019 WL 4019929, at *20.
179. *Id.* at 2.
180. *Id.*

Release, Tylenol with Codeine, and Tylox.[181] As part of a pain management scheme, defendants' opioid-based drugs were said to treat chronic and non-chronic pain without discussing the risk of addiction.[182] The overall purpose of the defendants' pain management scheme was to increase revenue.[183]

For example, in support of the defendants' pain management scheme, in 1980, Johnson & Johnson obtained and formed two subsidiaries to secure the supply of the necessary ingredients to produce opioid-based drugs.[184] Those subsidiaries, Noramco and Tasmanian Alkaloids, became the "number #1 supplier of Narcotic APIs in the United States, the world's largest market."[185] However, in 2016, Johnson & Johnson sold those two subsidiaries used in manufacturing materials for opioids.[186]

Defendants targeted individuals with chronic cancer pain and chronic non-cancer pain.[187] In promoting their pain management schemes, defendants publicized the low risk of opioid addiction and, simultaneously, claimed that pain was undertreated and harmful.[188] Defendants partook in branded and unbranded marketing techniques.[189] The defendants focused their efforts on government agencies, doctors, and the general public.[190] The ultimate goal was to increase the sale of opioid-based drugs.[191]

Defendants' advertised their opioid-based drugs to Oklahoma residents through websites and brochures.[192] Defendants' strategies also included marketing tactics that discussed the harm of chronic pain on patients, the prevalence of chronic pain, and the likelihood that acute pain would turn into chronic pain if untreated.[193] For example, "Prescribe Responsibly" was a website designed to increase the number of opioid prescriptions alleging, that additional prescriptions were the solution to pseudo-addiction.[194] Brochures further promoted opioid prescriptions as a solution to avoid possible negative consequences of undertreated chronic pain.[195] Furthermore, defendants gave coupons and sample vouchers to

181. *Id.*
182. *Id.* at 2-5.
183. *Id.* at 4.
184. *Id.* at 2-3.
185. *Id.* at 3.
186. *Id.* at 4-5.
187. *Id.* at 4-6.
188. *Id.*
189. *Id.* at 4.
190. *Id.* at 5.
191. *Id.* at 4.
192. *Id.* at 5.
193. *Id.* at 5.
194. *Id.*
195. *Id.*

patients that were prescribed opioid-based drugs in an attempt to increase sales.[196]

To incentivize doctors to prescribe more opioid-based drugs, defendants funded research articles, funded medical programs to continue education, funded speaking engagements, and had their pharmaceutical sales representative educate medical professionals.[197] Moreover, they held seminars, dinners, symposiums, and conferences.[198] Defendants intended for doctors to widely prescribe opioids for any area of "chronic pain [that] was undertreated."[199] For example, in 1996, a "Consensus Statement" was issued by two pain advocacy groups funded by the defendants.[200] The majority of the committee involved in drafting the consensus on opioids had personal ties with the defendants.[201] The report described government regulation and addiction as barriers to the use of opioids.[202] The report furthered the idea that pain was undertreated and must be resolved.[203] The "Consensus Statement" was repeatedly used in marketing and sales by defendants.[204]

Pharmaceutical representatives were told by defendants to avoid any negative phrasing when it came to promoting opioids.[205] These representatives also promoted a "study from Dr. Portenoy" that encouraged doctors to prescribe more opioids.[206] Moreover, sales representatives alleged that opioids prescribed by physicians were less addictive than opioids by other means.[207] Pharmaceutical representatives emphasized the undertreatment of acute pain as an additional means to increase prescriptions.[208] The defendants, in no way, attempted to educate their pharmaceutical representatives as to addiction, addiction to opioids, or the opioid epidemic.[209] The report included research funded by defendants.[210]

Even if patients experienced signs of addiction, defendants convinced doctors that patients were experiencing "pseudo-addiction" and

196. *Id.* at 7.
197. *Id.*
198. *Id.* at 4.
199. *Id.* at 5,
200. *Id.* at 7.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 6.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*

should prescribe more.[211] Patients labeled with pseudo-addiction typically requested a dosage increase or refills before their script "should have run out."[212] In support, defendants' sales representatives cited a study by Allan, Simpson, and Milligan, which was later found to be "false and misleading."[213]

In 2001, defendants deliberately ignored a recommendation by one of their scientists to halt misleading marketing strategies when it came to promoting opioids and their likelihood of addiction.[214] In addition, their scientist informed them that no data supported their claims as to the low risk of addiction and abuse.[215]

In 2004, the FDA informed defendants that the information conveyed concerning Duragesic was false and misleading when it came to the probability of addiction and abuse.[216] The FDA was unable to find any evidence or data in support of the defendants' claim that Duragesic was not addictive nor likely to be abused.[217] The FDA ordered defendants to stop all false or misleading marketing techniques as to Duragesic due to a violation of 21 U.S.C. §352(a).[218] The FDA further ordered that all marketing techniques used for Duragesic must comply with federal regulations.[219]

Doctors alleged that defendants marketing strategies led them to prescribe excessive amounts of opioids.[220] Moreover, some doctors even faced criminal prosecution due to the volume of opioids prescribed to patients.[221]

The increase in opioid prescriptions increased opioid-related deaths in Oklahoma.[222] In addition to opioid overdoses, the state of Oklahoma experienced an increase in "opioid use disorder, the rise in NAS, and children entering the child welfare system."[223]

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211. *Id.* at 5.
212. *Id.*
213. *Id.* at 6.
214. *Id.* at 8.
215. *Id.*
216. *Id.* at 9.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 9-11.
221. *Id.* at 9.
222. *Id.* at 9-11
223. *Id.* at 10.

C. Court's Analysis

Oklahoma argued that the defendants' intentional false and misleading dissemination of opioid prescriptions constituted a public nuisance under Okla. Stat. Tit. 50 §1.[224] Oklahoma alleged that the number of opioid prescriptions increased based on defendants' manufacturing, promoting, and selling of opioid-based drugs.[225] The alleged injury was the increased societal costs in providing healthcare and other government associated services that pertain to enforcement and treatment of opioid addiction.[226] Defendants, on the other hand, claimed that the plaintiff did not meet their burden of proof required by public nuisance.[227] However, defendants conceded that their advertising campaign was false and misleading.[228]

The Court opined that because "the defendants' false, misleading, and dangerous marketing campaign caused exponentially increasing rates of addiction, overdose deaths, and Neonatal Abstinence Syndrome, I [the Court] conclude these are unlawful acts which 'annoys, injures, or endangers the comfort, repose, health, or safety of others.'"[229] The court ultimately held that there was sufficient evidence to prove that the defendants did, in fact, cause a public nuisance.[230]

In Oklahoma, under 50 O.S. 1981 § 1, 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
> Third. Unlawfully 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
> Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.[231]

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224. *Id.* at 1.
225. *Id.* at 9-11.
226. *Id.* at 15-21.
227. *Id.* at 1.
228. *Id.* at 12.
229. *Id.*
230. *Id.* at 11-12.
231. OKLA. STAT. ANN. tit. 50, § 8 (West 2020).

According to 50 O.S. § 2, 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."[232]

The actions committed by the defendants included their "false, misleading, and dangerous marketing campaigns."[233] In addition, these actions "… annoy[ed], injure[d], or endanger[ed] the comfort, repose, health, or safety of others."[234] Defendants' marketing techniques specifically increased "rates of addiction, overdose deaths, and Neonatal Abstinence Syndrome."[235]

The Court further found that defendants' conduct was the cause in fact of the injuries suffered by Oklahoma and its residents.[236] Furthermore, the defendants willfully understated the consequences of opioid-based drugs, broadened product distribution, took data out of context, and actively promoted opioid-based medication in contrast to company policy.[237]

In addition, the District Court concluded that the doctrine of public nuisance extends to claims outside of those that include real property and now to those of corporate activity.[238] In the instant case, corporate activity by the defendants includes the use of "real and personal property, private and public, as well as the public roads, buildings and land of the State of Oklahoma, to create this nuisance."[239] In support of this conclusion, the District Court cited an Oklahoma Supreme Court case that further extended nuisance to conduct which infringes upon the just rights of an individual.[240]

In Oklahoma, a supervening cause may mitigate the liability of a defendant in an action for public nuisance.[241] If there were any acts or omissions by the plaintiff that directly or even proximately contributed to the public nuisance by the defendant, then the defendants actions would not be the proximate cause of the nuisance.[242] A supervening cause requires that the new cause be "(1) independent of the original act, (2) adequate of

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232. OKLA. STAT. ANN. tit. 50, § 2 (West, Westlaw through Sept. 1, 2020). *But see* OKLA. STAT. ANN. Tit. 50, § 4 (West, Westlaw through Sept 1, 2020) (providing that any activity expressly permitted by a statute does not constitute a public nuisance, and potentially rendering the entire holding invalid because defendants met all statutory requirements regarding the sale and distribution of their opioid-based drugs).

233. *Purdue,* 2019 WL 4019929, at *12.

234. *Id.*

235. *Id.*

236. *Id.* at 11.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id*. at 11 (citing *Briscoe v. Harper Oil Co.*, 702 P.2d 33, 36 (Okla. 1985)).

241. *Id.* at 14.

242. *Id.*

itself to bring about the result and (3) one whose occurrence was not reasonably foreseeable to the original actor."[243] The Court further found that there were no supervening causes to mitigate the defendants' liability.[244]

D. Damages

In Oklahoma, a plaintiff may seek an indictment, information, a civil action, or abatement as remedies for a nuisance.[245] However, indictment or information may only be sought where criminal charges or punishment are brought against a defendant for public nuisance.[246] If the plaintiff is a public body or authorized by law, then they may bring suit to abate a nuisance.[247] In addition, cities, towns, and counties may similarly abate a nuisance under Oklahoma law.[248]

The relief sought by the state was for an abatement of the nuisance.[249] The court held that abatement of the nuisance was reasonable and necessary as a proper remedy for the injury suffered by the plaintiffs.[250]

The breakdown of costs is as follows:

Program	**Yearly Cost**
Opioid Disorder Prevention and Treatment Programs	$232,947,710[251]
Supplementary Addiction Programs	$31,796,011[252]
Public Medication and Disposal Programs	$139,883[253]
Universal Screening Programs	$56,857,054[254]
Pain Prevention and Non-Opioid Pain Management Programs	$103,277,835[255]
Naloxone Distribution and Overdose Prevention Education	$1,585,797[256]
Patient Management and Consultations	$3,953,832[257]

243. *Id*. at 14 (quoting Graham v. Keuchel, 847 P.2d 342, 348 (Okla. 1993)).
244. *Id*. at 14.
245. Okla. Stat. Ann. tit. 50, § 8 (West 2020).
246. *Id*. § 9 (West 2020).
247. *Id.* § 11 (West 2020),
248. *Id.* § 16 (West 2020); *Id.* 2020 § 20 (West 2020).
249. *Purdue,* 2019 WL 4019929, at *1.
250. *Id.* at 15.
251. *Id.* at 15-16.
252. *Id.* at 16.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 17.
257. *Id.*

Continuing Education for Doctors to Deal with Neonatal AS	$107,683,000[258]
Hospital Funding for NAS Programs, Treatment, and Equipment	$181,983[259]
Prenatal Opioid Screening Program	$1,969,000[260]
Infant Withdrawal Program	$20,608,847[261]
Law Enforcement Regulation, Enforcement and Investigation	$11,101,076[262]
Total Amount That Defendants are Liable For:	**$572,102,028**[263]

IV. ANALYSIS

The analysis section, in this Comment, will apply the facts in *State v. Purdue Pharmaceuticals* to the doctrine of public nuisance under the Restatement (Second) of Torts. Although not binding, restatements are helpful compilations of common law rules and trends from courts across the country.[264] Furthermore, this section will demonstrate, in detail, how the Judge reached his conclusion, but how his conclusion was incorrect. First, the Judge incorrectly identified a public right. Second, even if a public right did exist, the Judge disregarded the proximate cause requirement, which would have mitigated liability. Therefore, the judgment should be reversed. The Restatement (Second) of Torts provides the following criteria for public nuisance:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a right is unreasonable include the following:
>
> > (a) whether the conduct involves a significant interference with the public health, safety, the public peace, the public comfort or the public convenience, or

258. *Id.*
259. *Id.* at 17-18.
260. *Id.* at 18.
261. *Id.*
262. *Id.* at 18-20.
263. *Id.* at 20.
264. About the ALI, AMERICAN LAW INSTITUTE (date accessed Nov. 1, 2020), https://www.ali.org/about-ali/.

> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[265]

To have standing for public nuisance, the individual must have "suffered harm different in kind" than that by other members of the public.[266]

First, this section will determine whether the plaintiffs have standing to sue. Second, this section will determine whether a public right exists to be free from opioid addiction. Third, this section will determine whether the defendants' conduct of manufacturing, marketing, and selling opioid-based drugs substantially and unreasonably interfered with a public right. Fifth, this section will discuss whether defendants were the proximate cause of the alleged injury. Lastly, this section will discuss any defenses that might mitigate or negate liability.

A. Oklahoma had standing to bring this action against defendants.

According to the Second Restatement of Torts, an individual must have standing to recover for injuries sustained by a public nuisance.[267] Standing requires that the injury suffered must be "of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."[268] In determining if injury is different in kind, the court may consider the degree of interference experienced by the plaintiff(s).[269] The harm suffered as a result of the nuisance may be physical, monetary, an inconvenience, or difficulty in exercising a right to that specific individual.[270] Furthermore, private

265. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) (Am. Law Inst. 1979).

266. RESTATEMENT (SECOND) OF TORTS: WHO CAN RECOVER FOR PUBLIC NUISANCE § 821(C).

267. RESTATEMENT (SECOND) OF TORTS: WHO CAN RECOVER FOR PUBLIC NUISANCE § 821(C) cmt. c.

268. *Id*.; *see also Anon.,* Y.B. Mich., 27 Hen. 8, f. 27, pl. 10 (1536) (Eng.); *see Diamond*, 20 Cal. App. 3d 374, 377; *see also Ileto*, 349 F.3d 1191, 1212.

269. RESTATEMENT (SECOND) OF TORTS: WHO CAN RECOVER FOR PUBLIC NUISANCE § 821(C).

270. *Id*.

individuals or statutorily approved government entities or officials may bring suits for public nuisance.[271]

In Oklahoma, due to the opioid epidemic, the general public experienced increased deaths, addiction, crime, and costs.[272] However, the injury suffered by the state of Oklahoma included the increased costs of providing healthcare, law enforcement, and other government services associated with the implementation, enforcement, and treatment.[273] Therefore, the harm suffered by the government was different in kind than that suffered by the general public. Both the general public and the government experienced harm due to the opioid epidemic. However, the bulk of the harm from the costs associated with managing the epidemic fell on the government.[274] Thus, the government, under the Restatement (Second) of Torts, had standing to bring this public nuisance action.

A public nuisance merely requires the opportunity to harm or impact an individual in society.[275] The injury suffered must occur during the exercise of a public right.[276] Thus, although the public nuisance has a possibility to impact everyone in the general public, it may only injure those that exercise their public right.[277]

In the instant case, the injury suffered by the State of Oklahoma was pecuniary.[278] Funds expended for health care, enforcement, and treatment are associated with the opioid epidemic in Oklahoma.[279] Therefore, the government suffered harm in exercising their public right. Thus, the government, under the Restatement (Second) of Torts, had standing to bring this public nuisance action.

B. Oklahoma does not have a public right of health and safety to be addiction free.

Under the doctrine of public nuisance, the injury must occur while exercising a public right.[280] "A public right is one common to all members of the general public. It is collective in nature and not like the individual

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271. *Id*.

272. *Purdue,* 2019 WL 4019929, at *12.

273. *Id.* at 15-21.

274. *Id.*

275. State v. Lead Indus., Ass'n, Inc., 951 A. 2d 428, 447-48 (R.I. 2008).

276. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) cmt. g (Am. Law Inst. 1979).

277. *Id.* at cmt. g.

278. *Purdue*, 2019 WL 4019929, at *15-21.

279. *Id.*

280. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) (Am. Law Inst. 1979).

right that everyone has not to be assaulted or defamed or defrauded or negligently injured."[281] However, statutory construction may waive the strict public right requirement if the statute specifies that interference only needs to be with "any considerable number of persons."[282] Although not exhaustive, the Second Restatement of Torts identifies the public rights to health, safety, morals, peace, and convenience are all public rights.[283] Furthermore, a statutes may also dictate public rights.[284]

Many judges, scholars, and legal experts struggle in determining public rights. There are two approaches, one narrow and one broad. In general, a public right is 'not like the individual right that everyone has not to be assaulted.'"[285] In 2008, the supreme court of Rhode Island suggested that to satisfy the requirement of a public right, the plaintiff must provide more than a general interference with "health, safety, peace, comfort or convenience."[286] It has been further suggested by law review articles that there are no public rights to "standards of living … holding a job … and there is no common law public right to a certain standard of medical care or housing."[287] In contrast, the broad interpretation of a public right like in *ConAgra*, the California appeals court held that a public right only requires a societal interest.[288] In *Young*, the court furthered the broad interpretation of public right to imply that individuals on public property have an in general right to public safety.[289]

According to the Court, defendants participated in unlawful acts that lead to increased addiction and death within Oklahoma communities.[290] However, in making this statement, the judge failed to identify the issue at hand. The judge failed to accurately determine the public right. The opinion identified the defendants' conduct and then concluded that there was harm to public health. The true issue at hand is whether Oklahoma has a public right to be free from addiction, not whether there was harm.

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281. *Id.* at cmt. g.

282. *Id.*

283. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) cmt. b (Am. Law Inst. 1979).

284. *Id.* at cmt. c.

285. *Lead Industries,* 951 A.2d 428, 543-4 (citing Restatement (Second) of Torts: Public Nuisance § 821 (B) cmt. e). State v. Lead Indus., Ass'n, Inc., 951 A. 2d 428, 436-37 (R.I. 2008).

286. *Id.* at 543-44.

287. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741 (2003).

288. People v. ConAgra Grocery Products Co., 17 Cal. App. 5th 51, 112 (Cal. Ct. App. 2017)

289. *Young,* 812 N.E. 2d 1078, 1084.

290. *Purdue,* 2019 WL 4019929, at *12.

Under a narrow interpretation, a court would likely conclude that there is no public right to be free from addiction. The right to be free from addiction seems analogous to the private right to not be assaulted. Moreover, the right to be free from addiction is comparable to the absence of a public right to specific standards of living. In contrast, under a broad interpretation of a public right, a court would likely conclude that the general public has a societal interest in being free from addiction. Furthermore, under a broad interpretation, a court might elaborate on the impact of addiction to a community and the harm to public property because most addicts will increase the number of those homeless and, thereafter, live on public property.

The dilemma faced by each court is whether to take the narrow or broad definition of a public right. A court, in making this determination, should consider precedence, public policy, legislative enactments, and legislative intent. If courts were to expand the definition of public right, this could lead to a public right organic food. Where all farmers or food manufacturers are liable for using any chemicals on their food that have the potential to harm individuals. The idea of a public right could be further extended to blame food manufacturers or even private individuals for increased healthcare costs that society incurs as a result. Without limitations, this extension could allow a public right to be anything that harms society. Alternatively, the expansion of a public right might lead to more vigilant product safety measures and more consumer-minded businesses. If a statute expressly identifies a public right to be addiction-free, then the court should defer to the legislature. In addition, if legislature enacted substance abuse preventative measures, legislative intent may also include comments on a public right to being addiction free. In the instant case, Oklahoma prohibits all legal activities from being held a public nuisance, suggesting a hesitancy to hold companies liable for activities conducted legally.[291] Further, there are federal and state statutes regulating the sale, production, marketing, and use of pharmaceuticals. Indicating strong legislative policy interests. In addition, there are consumer protection laws established by the legislature to protect individuals from injuries that arise. Therefore, a narrow interpretation would more closely align with statutory intent, public policy, and current statutes.

The definition of public rights should not be expanded to include a right to be free from addiction. Although addiction impacts an entire community, the right to be addiction-free is private. In addition, if the

291. OKLA. STAT. ANN. tit. 50, § 4 (West, Westlaw through Sept. 1, 2020) (providing that any activity expressly permitted by a statute does not constitute a public nuisance and potentially rendering the entire holding invalid because defendants met all statutory requirements regarding the sale and distribution of their opioid-based drugs).

definition of public rights were to expand, courts will see a flood of litigation concerning new potential public rights. An individual might assert a claim for public nuisance alleging harm to a public right solely because a third party used an item, outside of its intended use, and harmed them. Lastly, the pharmaceutical industry is heavily regulated. Pharmaceutical companies must meet and maintain state and federal requirements for all marketing, manufacturing, and selling.[292] If the legislature had intended to identify a public right in such statutes, they would have done so.

In conclusion, there is no public right to be addiction free. However, the restatement suggests that even in the absence of a public right, statutory construction may still permit an action under the doctrine of public nuisance.[293] In the instant case, under 50 O.S. 1981 § 2, there need not be a public right due to the broad language in the statute.[294] Therefore, if a court were to choose the broad definition of public right or if the state has broad statutory language that forgives the public right requirement, then we must determine if there was unreasonable and significant interference with the public right to health and safety.

C. Defendants unintentionally and unreasonably interfered with Oklahoma and its citizen's public right.

Once a public right or an exception has been established, the doctrine of public nuisance requires that interference with the public right to be unreasonable and significant.[295] Under the Restatement (Second) of Torts, although not conclusive, the court may consider these instances as unreasonable:

> (a) whether the conduct involves a significant interference with the public health, safety, the public peace, the public comfort or the public convenience, or
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

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292. 21 U.S.C.A. § 822 (West 2018); 21 U.S.C.A. § 823 (West, 2018); 21 U.S.C.A. § 825 (West, 2018).

293. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) cmt. e (Am Law. Inst. 1979).

294. OKLA. STAT. ANN. tit. 50, § 2 (West). The broad language of this statute implies that the judge was correct in concluding that a public right exists. However, under my analysis from existing case law and the Restatement (Second) of Torts, a different conclusion is reached. However, his extension of public right was plausible.

295. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) (AM. LAW INST. 1979); *see also* RESTATEMENT (SECOND) OF TORTS: SIGNIFICANT HARM § 821(F).

> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[296]

Unreasonable interference may either be intentional or unintentional actions by the defendant.[297] Both intentional and unintentional interference requires either action or inaction by the defendants.[298] Therefore, to determine if interference was unreasonable, we must determine if the defendants conduct interfered with a public right and then whether such interference was significant.

1. Defendants unintentionally interfered with Oklahoma's public right to health and safety.

The issue at hand is whether the defendants' actions of manufacturing, selling, and promoting opioid-based drugs unreasonably and significantly interfered with the public right to health and safety of being addiction-free.[299] First, we must consider whether the defendants intentionally interfered with Oklahoma's public right to health and safety to be addiction free. If we find that defendants' interference was not intentional, then we must determine if their conduct unintentionally interfered with the public right.[300] Lastly, if we find that defendants interfered unintentionally or intentionally with a public right to be addiction-free, then we must consider if the interference was reasonable.

A. Defendants did not intentionally interfere with Oklahoma public right to be addiction-free.

Any intentional interference with a public right is unreasonable.[301] When a tortfeasor acts intentionally to interfere with an individual's public right or if there is a high probability of interference, then the tortfeasor's actions are unreasonable.[302] However, even if a tortfeasor's actions are

296. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) (Am. Law Inst. 1979).

297. *Id.* at cmt. e.

298. *Id.*

299. Recall that this article ultimately concludes that there is no public right to be addiction-free. This section merely discusses the exception or a broad interpretation.

300. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) cmt. e (Am. Law Inst. 1979).

301. *Id.* at cmt. e.

302. RESTATEMENT (SECOND) OF TORTS: INTENTIONAL INVASION – WHAT CONSTITUTES § 825.

intentional, then the court must consider the potential benefits, costs, and harms associated with those actions.[303]

In *AcuSport*, the court stated that intentional conduct that interferes with a public right requires more than a "general awareness" or knowledge that harm may occur or that there are potential risks involved with their conduct.[304] Intent requires that the manufacturer "knows or is substantially certain that its marketing practices have a significant impact on the likelihood that" opioid-based drugs will result in "substantial harm to the public" through addiction and costs therein associated.[305] However, once an individual becomes aware that they are affecting a public right and makes no effort to change their conduct, then they will have intentionally interfered with the public right.[306]

The facts of the case make no indication that the defendants intended for the sale, promotion, or manufacturing of opioid-based drugs to increase costs and death associated with addiction to their products. According to the facts, the purpose was to generate revenue.[307]

However, two instances might indicate that defendants' actions intentionally interfered with the public right to be addiction-free because there might have been a high probability of interference. First, in 2001, defendants ignored a recommendation to halt misleading marketing strategies regarding opioid-based drugs.[308] Second, in 2004, the FDA informed the defendants that they were spreading false and misleading information concerning the likelihood of addiction and abuse of Duragesic.[309] These two instances are examples of conduct that could have lead defendants to believe their marketing strategy was false and misleading, resulting in an increase in addiction and costs associated with addiction. Conversely, defendants may have known that their marketing strategies were false and misleading but not have foreseen the consequence of harm to the health and safety of society. Under the facts of the instant case, the main focus of defendants was profit-oriented and not focused on externalities. Therefore, although a court might find that defendants intentionally interfered with Oklahoma's public right to health and safety, it is unlikely that they would.

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303. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) (Am. Law Inst. 1979); *See Also* RESTATEMENT (SECOND) OF TORTS: GENERAL RULE § 822 cmt. g; *see also* RESTATEMENT (SECOND) OF TORTS: UNREASONABLENESS OF INTENTIONAL INVASION § 826.

304. *AcuSport,* 271 F. Supp. 2d at 435, 488.

305. *Id.*

306. *Id.*

307. *Purdue*, 2019 WL 4019929, at *4.

308. *Id.* at 8.

309. *Id.* at 9.

In conclusion, the defendants did not intentionally interfere with a public right to be addiction free. Consequently, we must consider if defendants' actions unintentionally interfered with a public right to be addiction free.

B. Defendants' unintentionally and negligently interfered with Oklahoma's public right to be addiction-free health.

In contrast to intentional interference, if the action that harms a public right was unintentional, then the court will consider if the interference was due to other actionable torts, such as negligence or recklessness.[310] Therefore, we must determine if the defendants' actions of promoting, selling, and manufacturing opioid-based drugs unintentionally interfered with a public right.

A court may find that a tortfeasor interfered with a public right if the harm resulted from unintentionally negligent conduct.[311] Negligence is "the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation."[312] According to the Restatement (Second) of Torts, an individual is negligent if they act or fail to act regarding a duty and said action or inaction falls below a reasonable standard of care designed to protect others from an unreasonable risk of harm.[313] Furthermore, a defendant may be negligent for failing to warn an individual of the potential harm.[314]

> (a) a defendant whose conduct creates a risk of physical or emotional harm can fail to exercise reasonable care by failing to warn of the danger if:
>
> > (1) the defendant knows or has reason to know: (a) of that risk; and (b) that those encountering the risk will be unaware of it; and
> >
> > (2) a warning might be effective in reducing the risk of harm.
>
> (b) Even if the defendant adequately warns of the risk that the defendant's conduct creates, the defendant can fail to exercise reasonable care by failing to adopt further

310. RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821(B) cmt. e (Am. Law Inst. 1979).

311. *Id.*

312. *Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

313. RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE DEFINED § 282 cmt. a-e. (Am. Law Inst. 1979).

314. RESTATEMENT (THIRD) OF TORTS: NEGLIGENT FAILURE TO WARN § 18. (Am. Law Inst. 2020).

> precautions to protect against the risk if it is foreseeable that despite the warning some risk of harm remains.[315]

Furthermore, an actor may still be negligent for failing to take additional precautions, even though they were following those required by statute.[316]

A finding of negligence requires that the defendant owe a duty of care to the public and that the defendant breach said public duty by failing to maintain a reasonable standard of care.[317] Typically, in determining whether a duty exists, courts "balance … foreseeability, public policy, and the relationship between the parties.[318] However, the balancing test is only required if the law has not yet established such a duty by law.[319] For example, in Oklahoma, drug manufacturers only owe a duty to the prescriber, which requires disclosure as to the potential side effects or risks associated with its use, not to the patient.[320] In general, pharmaceutical manufacturers owe a duty to warn consumers of potential risks when required by the FDA and when other exceptions are carved out by law.[321] However, compliance with the FDA is not a shield from liability and a mere minimum duty.[322] Therefore, states may impose heightened duties on pharmaceutical manufacturers.[323]

First, it is important to note that the court does conclude that doctors were misled regarding the prescribing practices of opioid-based medications.[324] Therefore, that alone would be sufficient to find that pharmaceutical manufacturers breached their duty of care. However, it does seem that the judge offered little evidence on the information provided to doctors other than pseudo-addiction and false reports.[325]

In the instant case, however, it is likely that a duty exists to adequately inform all potential purchasers of opioid-based drugs of the risks

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315. *Id.*

316. RESTATEMENT (THIRD) OF TORTS: STATUTORY COMPLIANCE § 16. (Am. Law Inst. 2010).

317. *AcuSport,* 271 F.Supp. 2d at 435, 488.

318. City of Gary ex rel. King v. Smith & Wesson Corp. 801 N.E. 2d 1222, 1242 (Ind. 2003).

319. *Id*.

320. *Edwards*, 933 P. 2d 298, 301.

321. *Id.* at 301-02.

322. *Id.* at 303.

323. *Id.*

324. *Purdue*, 2019 WL 4019929, at *9-11.

325. In determining if there was a breach of duty, we must first determine whether there was a duty. Therefore, two questions must be considered in determining if there was a breach of duty: (1) was there a duty to notify users of the potential risks associated with opioid-based drugs and (2) if defendants do owe a duty, was said duty breached by failing to exercise reasonable care. In the instant case, the court held that defendants breached their duty to consumers by failing to warn of the risks associated with taking opioid-based drugs.

associated with their use. Therefore, any failure to adequately or sufficiently warn, especially after being warned by the FDA, would most likely be a violation of their duty. Defendants have a duty, under FDA regulations, to properly label information regarding the side effects and risks associated with any drug.[326] As noted earlier, defendants, in 2001, were warned and failed to take adequate precautions associated with the risk of opioid-based drugs.[327] Therefore, defendants likely had a duty to inform both doctors and patients properly of the risks associated with their drugs and the act of misleading them was negligent.

In summary, it is likely that defendants' actions of manufacturing, marketing, and selling opioid-based drugs played a major role and are related to the opioid epidemic that resulted. Their conduct of misleading marketing tactics was negligent. Therefore, defendants unintentionally interfered with the public right to health and safety. Once a court has established a public right or an exception and that there was interference, then the court must consider the significance of the harm.

2. Plaintiffs' experienced significant harm due to defendants false and misleading marketing tactics.

In addition to there being an unreasonable interference with a public right, such an interference must be significant.[328] Almost all activities can interfere, harm, or annoy those in society.[329] The significance of the harm must be objectively determined considering all relevant factors.[330]

The harm associated with opioid-based addiction is not only severe in Oklahoma, but around the United States.[331] In Oklahoma due to the opioid epidemic, the general public experienced increased deaths, addiction, crime, and costs.[332] The purpose of opioid-based drugs is to help individuals manage chronic pain. In the absence of opioids, individuals may be stuck with chronic, untreatable pain. However, opioids are highly addictive. Costs associated with addiction impact the individual taking the drugs and the community at large. Due to the high number of alternatives,

326. 21 U.S.C.A. § 825 (West 2018).

327. *Purdue*, 2019 WL 4019929, at *8.

328. RESTATEMENT (SECOND) OF TORTS: SIGNIFICANT HARM § 821(F). (Am. Law Inst. 1979.

329. RESTATEMENT (SECOND) OF TORTS: GENERAL RULE § 822 cmt. g. (Am. Law Inst. 1979).

330. RESTATEMENT (SECOND) OF TORTS: GRAVITY OF HARM – FACTORS § 827 cmt. b. (Am. Law Inst. 1979).

331. *Purdue*, 2019 WL 4019929, at *2.

332. *Id.* at *18.

less addictive, pain management techniques, I believe that the costs associated with opioid use do not outweigh its benefits.

Therefore, if an exception to the public right requirement exists, then the defendants unreasonably interfered with Oklahoma's public right to be addiction free. First, defendants unreasonably and unintentionally partook in false and misleading marketing which led to the negligent prescribing and taking of their products. Second, the harm experienced by the entire state was significant. Nonetheless, even with interference and harm, a court, in determining whether defendants can be held liable, must determine if they were the proximate cause of the unreasonable interference and injuries that resulted.[333]

D. Defendants were not the proximate cause of Oklahoma's injury.

A tortfeasor will only be held liable for injuries to another if their conduct was the proximate cause of the injuries.[334] The purpose of proximate cause is to limit liability to injuries that are foreseeable as a result of tortfeasor's actions.[335] The United States Supreme Court suggests that "proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'"[336] A defendant is the proximate cause of an injury when their actions, "in a natural and continuous sequence [resulting from their actions], unbroken by any efficient intervening cause, produced the injury, and without which the result would not have occurred."[337] "A plaintiff who cannot establish " 'some direct relation between the injury asserted and the injurious conduct alleged' " fails to plead "a key element for establishing proximate causation, independent of and in addition to other traditional elements of proximate cause."[338]

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333. *Ashley,* 552 F.3d 659, 667 (citing Taylor Bay Protective Ass'n v. Adm'r*,* U.S. Ep. P.A., 844 F.2d 1073, 1077 (8th Cir. 1989)).

334. *Id.*

335. Ileto v. Glock Inc., 349 F. 3d 1191, 1206 (9th Cir. 2003) (citing Mendoza v. City of Los Angeles, 66 Cal. App. 4th 1333, 1342 (Cal. Ct. App. 1998)).

336. Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (2002) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41 p. 264 (5th ed. 1984)).

337. *Ashley,* 552 F.3d 659, 666 (citing City of Caddo Valley v. George*,* 9 S.W.3d 481, 487 (2000)).

338. Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc*.,* 191 F. 3d 229, 235 (2nd Cir. 1999) (citing *Holmes,* 503 U.S. 248, 268-9); *see also Philadelphia*, 277 F.3d 415, 423.

Proximate cause has been interpreted to include cause in fact and legal cause.[339] However, an intervening act may shield an individual from liability if such an act is "sufficient to stand as the cause of the injury' and the intervening act is 'totally independent' of the original act."[340]

1. Defendants' conduct was not the cause in fact of Oklahoma injury.

Cause in fact requires that there be "a reasonable certainty that a defendant's acts caused the injury or damage."[341] As put by the Missouri supreme court, legal cause turns on whether the "harm is the reasonable and probable consequence of the defendant's conduct."[342] Therefore, the "alleged harm would not have occurred but for the defendant's conduct."[343] The Ohio supreme court, in Cincinnati, provided factors to consider when determining the remoteness of harm from the alleged conduct.[344]

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. * * * Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. * * * And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.[345]

In the instant case, Oklahoma alleged that their direct harm included increased costs of providing healthcare, law enforcement, and other government associated services that pertain to implementation,

339. *Young,* 821 N.E. 2d 1078, 1085 (citing Lee, 605 N.E. 2d 493, 503); *see also Ashle*y, 552 F.3d 659, 667 (quoting *Chambers*, 64 S.W.3d 737, 744; *See also* Jones, 155 P.3d 9, 14-5.

340. *City of Caddo Valley,* 9 S.W.3d at 487 (quoting Hill Constr. Co. v. Bragg, 725 S.W.2d at 540 (1987)) *see also Ashley*, 552 F.3d at 667.

341. *Young*, 812 N.E. 2d 1078, 1085 (citing *Lee,* 605 N.E.2d 493, 503).

342. *Benjamin Moore*, 226 S.W.3d 110, 114.

343. *Id*. at 114; *See also Jones*, 155 P.3d 9, 14-15.

344. *Cincinnati,* 768 N.E.2d 1136, 1152 (citing *Holmes*, 503 U.S. 258, 269).

345. *Id*.

enforcement, and treatment.[346] Alleging that the defendants' conduct of manufacturing, marketing, and selling opioid-based drugs was the direct and proximate cause of the harm suffered.[347] Therefore, using the facts of the case, a court should consider the sequence of events that lead to the harm.

The sequence of events from manufacturing to the harm is provided as follows:

> (1) Defendants must receive FDA approval to manufacture the medication.[348]
> (2) Licensed providers place orders with manufacturers to receive the medication.[349]
> (3) Medication is packed and shipped to providers.[350]
> (4) Medication is received by providers and inventoried.[351]
> (5) The patient receives treatment by an individual authorized to prescribe medication.[352]
> (6) Although six may coincide with all steps, this event represents marketing to doctors and consumers. All marketing must be in accordance with FDA guidelines.[353]
> (7) The patient picks up the prescription.
> (8) The patient takes their medication. Hopefully, patients take their medication based on the guidelines provided by their doctor.
> (9) The patient becomes addicted to their medication.
> (10) The patient loses their job and become homeless or a burden on their family.
> (11) Oklahoma experiences increased costs of providing healthcare, law enforcement, and other government associated services that pertain to implementation, enforcement, and treatment.[354]

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346. *Purdue*, 2019 WL 4019929, at *15-21.

347. *Id.* at 11.

348. 21 U.S.C.A. § 822 (West, 2018); *see also*, 21 U.S.C.A. § 823 (West 2018).

349. Laura Olson, *How Does the Pharmaceutical Supply Chain Work?,* DATEX https://www.datexcorp.com/how-does-the-pharmaceutical-supply-chain-work/. (last visited Nov. 3. 2020).

350. *Id.*

351. *Id.*

352. Brian J. Kenny, Charles V. Preuss, *Pharmacy Prescription Requirements*, STATPEARLS (Feb. 27, 2019), https://www.ncbi.nlm.nih.gov/books/NBK538424/; *see also A Drug Supply Chain Example: From Supplier to Patient*, FDA https://www.fda.gov/media/81739/download.

353. 21 U.S.C.A. § 822 (West 2018); *see also* 21 U.S.C.A. § 823 (West 2018).

354. *Purdue*, 2019 WL 4019929, at *15-21.

According to the above timeline, Oklahoma's alleged injury is a direct result of individuals that become addicted to opioid-based drugs and not of the manufacturers. The injury alleged by Oklahoma is an indirect result of their manufacturing, marketing, and selling of opioid-based drugs. In contrast, however, private individuals that become addicted would, in fact, have a direct injury that resulted from the defendants' conduct. Individuals, in contrast to municipalities, suffer direct harm from the marketing and selling of opioid based drugs. In addition, individuals are harmed by the doctors that prescribe the medication and the pharmacists that sell it.

2. Defendants' conduct was not the legal cause of Oklahoma's injury.

Once cause in fact has been established, a court must determine if the defendants' conduct was the legal cause of the alleged injury by the plaintiff.[355] In contrast to cause in fact, legal cause "addresses the separate issue of how far legal responsibility should extend for a party's actions."[356] An individual is the legal cause of harm if their conduct "is a substantial factor in producing the injury."[357] According to *Young*, "the proper inquiry regarding legal cause involves an assessment of foreseeability, in which we ask whether the injury is of a type that a reasonable person would see as a likely result of his conduct."[358]

In determining whether defendants were the legal cause, it is beneficial to determine alternative causes of the alleged addiction.[359] Possible harm may include pill mills, bad doctors, bad pharmacists, theft, and misuse of prescribed medication. According to the opinion, the proportion of costs associated with the defendants' conduct is unknown. Moreover, ascertaining the true impact of defendants' conduct on Oklahoma is difficult because there is no other conclusion to make other than an increase in costs.

As to whether defendants conduct foreseeably caused the opioid epidemic, that is unknown. There were two indications that defendants became aware of their deceptive and incorrect marketing techniques.

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355. *Benjamin Moore,* 226 S.W.3d 110, 114 (citing *Callahan*, 863 S.W. 2d 852, 856).

356. *Ashley*, 552 F.3d 659, 667 (citing W. Keeton, Prosser & Keeton on Torts § 41, at 264 (5th ed. 1984)).

357. People v. ConAgra Grocery Prod. Co., 17 Cal. App. 5th 51, 103 (Cal. Ct. App. 2017) (citing Soule v. General Motors Corp, 882 P.2d 298, 311 (Cal.1994)).

358. *Young*, 821 N.E. 2d 1078, 1086 (citing *Lee*, 605 N.E.2d 493, 503).

359. Note that a court should also consider all events, other than addiction, that may have increased government costs. It is possible that the increased costs are the result of multiple events or even events that are unknown.

Nonetheless, defendants still maintained their federal and state required certifications to continue producing said substances. Moreover, the doctors still had the discretion to prescribe opioid-based drugs. With the burdensome regulations, oversight, and reporting, a reasonable person may not have foreseen the consequences. In hindsight, foreseeability is always easy. However, in the moment, it is a different perspective. Therefore, it is unlikely that defendants could have foreseen the additional costs that the government would incur in the event of addicted patients. In contrast, it is likely foreseeable that defendants could have foreseen harm to individuals that become addicted. Therefore, because we are concerned with the harm resulting from Oklahoma and not the individual level, the harm was not foreseeable.[360]

In conclusion, although it is plausible that defendants' conduct interfered with Oklahoma's public right to be addiction-free, defendants were not the proximate cause of the harm. Therefore, defendants should not be held liable under the doctrine of public nuisance.

V. COMPARING THE JUDGMENTS: PRODUCT LIABILITY WITHIN PUBLIC NUISANCE

When comparing similar cases of product liability under the doctrine of public nuisance, the distinctions almost become unnoticeable. The court was wrong in holding defendants liable in *State v. Purdue Pharmaceuticals*. In comparing public nuisance claims that involve product liability, it is essential to distinguish the instant case from those in the lead paint, cigarette, and firearm industry. The instant case is distinguishable from those against lead paint manufacturers because lead paint became illegal before the lawsuits brought against their manufacturers. Therefore, the outcomes would likely not be comparable. Moreover, the instant case, in contrast to cases against cigarette manufacturers, a settlement has yet to be reached. Thus, the proceeding section will analyze the facts and reasonings used in cases brought against firearm manufacturers and to conclude as to the possible conclusions that each court could reach.

If a court were to follow the rationale used in *Ileto*, then defendants, in the instant case, would have likely escaped liability. First, the arguments

360. At this point, courts would typically consider defenses that a defendant might have to limit liability for the nuisance. In response to a public nuisance suit, a defendant may allege that their actions were authorized by law, the plaintiff was contributorily negligent, the plaintiff assumed the risk, the plaintiff came to the nuisance, others contributed to the nuisance or that the injury was a result of an intervening cause. RESTATEMENT (SECOND) OF TORTS: DEFENSES § 840 (D) – (E). (Am. Law Inst. 1979).

made in *Ileto* and the instant case were almost identical. The instant case, for example, argued that the defendants' intentional false and misleading dissemination of opioid prescriptions constituted a public nuisance under Okla. Stat. Tit. 50 §1.[361] Similarly, the plaintiffs, in *Ileto*, argued that firearm manufacturers created a public nuisance with their promotion of firearms.[362] In addition, the harm alleged in both Ileto and the instant case included increased costs regarding the health and safety of the public.[363] In *Ileto*, the court also found that interference by gun manufacturers unreasonably interfered with a public right and that manufacturers were the proximate cause of harm.[364] However, in contrast to the instant case, the manufacturers, in *Ileto*, were not held liable because their conduct was statutorily approved.[365] Therefore, if the instant case were to be heard in front of the *Ileto* court, then the judgment would have likely favored defendants.

If the court in *Philadelphia* were to hear the instant case, then the outcome would have likely favored the defendants, but for a different reason than in *Ileto*. Both *Philadelphia* and the instant case alleged increased costs to the health and safety of the public in association with government services.[366] Although the court would have likely acknowledged harm, the court would have found that defendants, in the instant case, were not the proximate cause of the injuries alleged.[367]

In both *Young* and in the instant case, the courts would have at least agreed that a public right does exist as to health and safety exists.[368] However, the court in *Young* stated that harm arising from negligence, even in a highly regulated industry, is likely to result in liability.[369] Alternatively, the court may take into consideration the legislative intent and reach a different conclusion.[370] Nonetheless, if the court in *Young* were to have heard the instant case, the conclusion would have likely favored

361. *Purdue*, 2019 WL 4019929, at *1.

362. Ileto v. Glock Inc., 349 F. 3d 1191, 1212 (9th Cir. 2003), *dismissed*, 421 F.Supp.2d 1274 (C.D. Cal. 2006).

363. *Ileto*, 349 F.3d 1191, 1211, *dismissed*, 421 F.Supp.2d 1274 (C.D. Cal. 2006) *cf*. *Purdue*, 2019 WL 4019929 at * 18.

364. *Ileto*, 349 F.3d 1191, at 1212-14, *dismissed*, 421 F.Supp.2d 1274 (C.D. Cal. 2006)

365. *Ileto*, 349 F.3d at 1304, *dismissed*, 421 F.Supp.2d 1274 (C.D. Cal. 2006).

366. City of Philadelphia v. Baretta U.S.A. Corp., 277 F.3d 415, 419 (3rd Cir. 2002); *cf*. *Purdue*, 2019 WL 4019929, at *18.

367. *Philadelphia*, 277 F. 3d at 422.

368. *Young*, 821 N.E. 2d 1078, 1084; *cf. Purdue,* 2019 WL 4019929 at 12.

369. *Young*, 821 N.E. 2d 1078, 1084.

370. *Id.* at 1091.

defendants because they were not the proximate cause of the harm alleged.[371]

At least on a motion to dismiss, like that in *Gary ex rel. King*, the court would likely permit the complaint to stand.[372] In addition, the harm alleged in the instant case and in *Gary Ex Rel. King* was that harm resulted in public health and safety which, in turn, lead to an increased cost in government services.[373] Therefore, at least on a motion to dismiss for failure to state a claim, the judge would likely not dismiss the case. Furthermore, based on the rules stated in this case, a judge might also have, similarly, held the defendants in the instant case liable.

AcuSport, in contrast, argued that manufacturers should have limited the sale of firearms.[374] Thus, a comparable argument would be that defendants should have limited the sale of opioid-based drugs to the public. Similarly, the instant case and *AcuSport*, alleged that harm was to public health and safety.[375] However, the court would have been unpersuaded by this argument.[376] The court would likely hold that defendants did not suffer harm different in kind than the general public, and therefore, have no standing.[377]

Likewise, if the court in Chicago were to hear the instant case, the judgment would have likely favored the defendants. In Chicago, the holding elaborated that a public right must be more than the general right "not to be assaulted."[378] In the instant case, the judge would have likely said that the right to be addiction-free is comparable. Therefore, the judge would undoubtedly dismiss Oklahoma's claim.

The arguments and the harm alleged in the instant case are far from new or novel. In contrast, numerous cases have alleged harm that resulted from the sale of legally manufactured goods that lead to increased costs regarding government provided programs.[379] In addition, previous courts

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371. *Id.*

372. City of Gary ex rel. King v. Smith & Wesson Corp., 801 N.E. 2d 1222, 1242 (Ind. 2003).

373. *City of Gary ex rel. King,* 801 N.E. 2d at 1228; *cf. Purdue*, 2019 WL 4019929, at * 18.

374. *AcuSport,* 271 F. Supp. 2d at 435, 446-7.

375. *AcuSport,* 271 F. Supp. 2d at 508 cf. State of Oklahoma v. Purdue Pharmacy, 2019 WL 4019929, at *18.

376. *AcuSport,* 271 F. Supp. 2d at 435, 497 (citing *Callanan,* 107 N.Y. 360, 370).

377. *Id.*

378. *Chicago,* 821 N.E.2d 1099, 1116 (citing RESTATEMENT (SECOND) OF TORTS: PUBLIC NUISANCE § 821 (B) cmt. g).

379. City of Gary ex rel. King v. Smith & Wesson Corp., 801 N.E. 2d 1222, 1228 (Ind. 2003); City of Philadelphia v. Baretta U.S.A. Corp., 277 F.3d 415, 419 (3rd Cir. 2002); Ileto v. Glock Inc., 349 F. 3d 1191, 1212-13 (9th Cir. 2003).

that have heard similar arguments have failed to extend liability to manufacturers. Therefore, judges should highly scrutinize the facts of a case before attempting to further expand the traditional doctrine of public nuisance to those involving product liability.

VI. IN THE MIND OF A JUDGE

The Judge in *State v. Purdue Pharmaceuticals* likely believes the extension of public nuisance was appropriate under the circumstances. It is clear that the Judge went with a broad definition of a public right and did not find an issue concerning a lack of proximate cause. However, in his opinion, the Judge disregarded the need to explain his extension of the doctrine of public nuisance. Therefore, it is beneficial to speculate on the potential rationale that might have led to the judgment.

First, regarding the public right to be addiction-free, the Judge appears to have logically extended the definition under the doctrine public nuisance. This is because the face of the Oklahoma public nuisance statute nuisance, where it appears to permit a claim for public nuisance without a public right affecting the entire public. However, in doing this the judge disregarded possible consequences that could occur due to such a broad definition of a public right.

Moreover, the harm experienced by Oklahoma from opioid-based medication was significant from the increased costs, broken families, and deaths. Living in Oklahoma, it could be tough to see the pain that occurs within the community. The possible sympathy that arises from seeing constant harm could lead a Judge to extend any doctrine of the law to assist those harmed where the law was insufficient to remedy a wrong.

Another possibility is that defendants became a scapegoat for an injury that the government played a role in. The government has approved medications, approved drug screening, and regulates the pharmaceutical industry. Therefore, the government is partially responsible for any harm that occurs due to a lack of oversight or regulation.

In conclusion, the change in public perception, the public harm, and the inability to remedy the situation under other legal theories, likely lead the Judge to the ultimate conclusion in this case. However, the opinion disregards the possible consequences of expanding the doctrine of public nuisance to product liability. Therefore, the proceeding section discusses the possible effects.

VII. WHAT NEXT? POSSIBLE CONSEQUENCES OF THE RULING IN *State v. Purdue Pharmaceuticals*

The doctrine of public nuisance should be expanded in limited instances to product manufacturers. Here, however, was not the proper place for such an expansion. This expansion could have ripple effects across the entire legal community. Generally speaking, the expansion of public nuisance and a disregard of intervening causes could have disastrous results for the doctrine and lead to a multitude of litigations. The expansion could increase the overall number of public nuisance cases filed. Until the law has further developed regarding the expansion, at least in the short term, there will likely be an influx of cases brought against product manufacturers where other doctrines have traditionally been insufficient. For example, it might be possible to see food manufacturer liable for health consequences that impact the entire community through an increased cost of insurance.

Due to the change in public perception, pharmaceutical companies will likely settle similar to that of the tobacco industry. A settlement could decrease overall costs to pharmaceutical companies by limiting damages, attorneys' fees, and future litigations by other states. With recent trends, a settlement would likely be in the best interest of pharmaceutical companies. Furthermore, even if courts were to find the defendants not liable, the potential costs associated with litigation may outweigh the costs associated with a settlement agreement.

The extension of public nuisance may not hold recourse for private members of society that are harmed. The instant case was a suit brought by a municipality and not a private party. Typically, courts decline class actions in public nuisance claims for failure to have harm different than that of the general public. Therefore, if an individual wished to bring a public nuisance claim against a pharmaceutical manufacturer, it might be more difficult regarding barriers to entry. First, the harm of a member in society will likely be similar if not slightly different from others within society. Second, even if an individual has suffered a harm different than that of the general public, such as the death of a family member, the court will likely dismiss the case. Although somehow disregarding these when considering a municipality as a plaintiff, a court might base their conclusion on intervening causes or contributory negligence. Moreover, a court could make a distinction between the monetary harm at large felt by the government and the harm on an individual level (even if such harm could be the same on different magnitudes).

Furthermore, by allowing pharmaceutical manufacturers to be held liable for the use of their medication by patients, whether lawfully used or not, could lead manufacturers to withhold new medications that could benefit society for fear of litigation. In addition, the pharmaceutical

industry is already heavily regulated at the state and federal level. If a state wished to deter pharmaceutical companies from certain conduct, then additional legislation would be more feasible than extending common law doctrines through the court system to remedy the harm.

The doctrine of public nuisance was incorrectly expanded to cover this kind of consumer protection. The traditional consumer protection doctrine failed to provide the necessary social and monetary incentives for pharmaceutical companies to accurately promote, manufacture, and sell their products. The holding in *State v. Purdue Pharmaceutical* brought to light a gap in the law where other legal theories have been insufficient to hold product manufacturers liable for harm caused as a result of their false and misleading marketing tactics. Therefore, the legislature should get involved to extend consumer protection laws further.

In order to better protect consumers, Congress and state legislature should enact statutes that require additional education on the side effects of prescriptions, documents should be in layman terms, and the true risks associated with addiction or the potential abuse labeled appropriately. In addition, to avoid conflicts of interest, pharmaceutical companies should be barred from providing educational classes, symposiums, or conferences regarding any medication. Rather than pharmaceutical companies educating doctors on what to prescribe, doctors should rely on their medical school training and other credible sources in determining the best prescriptions for their patients.

If the legislature fails to enact proper measures to account for this gap in consumer protection and if a court believes that the extension has gone too far, rather than litigate under the doctrine of public nuisance, the doctrines of negligence, product liability, fraud, fraudulent misrepresentation, and other doctrines directed at consumer protection could be used against the manufacturers that contributed to the opioid epidemic, especially if consumers wish to litigate.

VIII. CONCLUSION

Although the conduct of the defendants was unethical and questionable, the extension of public nuisance has gone too far from its common-law roots. The holding in *State v. Purdue Pharmaceuticals* should be reversed for extending beyond traditional parameters of public nuisance. The doctrine of public nuisance is now another ground for consumers to remedy an injury that occurs outside the control of manufacturers, even if harm seems attenuated or remote from the control of the alleged tortfeasor.

In conclusion, the doctrine of public nuisances was incorrectly extended to cover areas of consumer protection. In addition, the Judge disregarded the traditional notions of public right and proximate cause

within the doctrine of public nuisance. The Judge was likely persuaded by the need to protect the public from harm along with the negative perception towards the pharmaceutical industry. Furthermore, the true impact of the extension has yet to be seen. Therefore, if the legislature has different intentions for the pharmaceutical industry, then they should create statutes that limit or indicate additional ways of shielding or holding pharmaceuticals companies accountable for their manufacturing, promoting, and selling of medications.

Addiction is a serious public health issue. Addiction plagues individuals, families, and communities. If you or someone you know is suffering from addiction, reach out to your local doctor about possible treatment or recovery plans.