UNIVERSITY CASEBOOK SERIES®

MAY 2022 UPDATE MEMO

2021–2022 CASE AND STATUTE SUPPLEMENT TO

PRODUCTS LIABILITY AND SAFETY

CASES AND MATERIALS

EIGHTH EDITION

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CHAPTER 9

LIMITING DEFECTIVENESS—USER CHOICE

2. INHERENT DANGERS

Page 395, after Note 6 (Public Nuisance), consider the following:

After a 33-day bench trial, the state of Oklahoma prevailed in a public nuisance claim against Johnson and Johnson in 2019. The judge held J & J liable under Oklahoma's public nuisance statute for using false, misleading, and dangerous marketing campaigns to sell its prescription opioids and ordered J & J to fund a $465 million opioid abatement program that included 21 state programs to combat opioid abuse. J & J appealed:

State of Oklahoma v. Johnson & Johnson

Supreme Court of Oklahoma, 2021.

499 P.3d 719.

■ WINCHESTER, J.

An opioid drug epidemic exists in the United States. Oklahoma has experienced abuse and misuse of opioid medications, opioid use disorder, and thousands of opioid-related deaths in the past two decades. Specifically, opioid-related deaths increased during the early 2000s, plateaued around 2007, and then declined. What we cannot ignore is that improper use of prescription opioids led to many of these deaths; few deaths occurred when individuals used pharmaceutical opioids as prescribed. We also cannot disregard that chronic pain affects millions of Americans. It is a persistent and costly health condition, and opioids are currently a vital treatment option for pain. The FDA has endorsed properly managed medical use of opioids (taken as prescribed) as safe, effective pain management, and rarely addictive. Yet opioid abuse is still prevalent and has become a complex social problem.

To address this problem, the State of Oklahoma *ex rel.* Mike Hunter, Attorney General of Oklahoma ("State"), sued three prescription opioid manufacturers and requested that the district court hold opioid manufacturers liable for violating Oklahoma's public nuisance statute. The question before the Court is whether the conduct of an opioid manufacturer in marketing and selling its products constituted a public nuisance under 50 O.S.2011, §§ 1 & 2. We hold that the district court's

expansion of public nuisance law went too far. Oklahoma public nuisance law does not extend to the manufacturing, marketing, and selling of prescription opioids.

Facts And Procedure

Since the mid-1990s, Appellant Janssen Pharmaceuticals, Inc. (and its related entities), a wholly-owned subsidiary of Appellant Johnson & Johnson (collectively "J&J"), has manufactured, marketed, and sold prescription opioids in Oklahoma. J&J specifically manufactured two FDA-approved Schedule II[3] opioid medications: (1) Duragesic—a transdermal patch that provides a controlled dose of pharmaceutical fentanyl; and (2) Nucynta and Nucynta ER—tablets with tapentadol. J&J also manufactured a Schedule IV opioid medication: Ultram and Ultram Extended Release—tablets with tramadol. J&J marketed several other medications containing tramadol.

The State presented evidence that J&J used branded and unbranded marketing, which actively promoted the concept that physicians were undertreating pain. Ultimately, the State argued J&J overstated the benefits of opioid use, downplayed the dangers, and failed to disclose the lack of evidence supporting long-term use in the interest of increasing J&J's profits.

J&J no longer promotes any prescription opioids and has not done so for several years. J&J ceased to actively promote its Schedule II branded products by 2015. Specifically, J&J ceased to actively promote Duragesic in 2007, and it divested its U.S. Nucynta product line in 2015. Even with J&J's marketing practices, these two Schedule II medications amounted to less than 1% of all Oklahoma opioid prescriptions. Overall, J&J sold only 3% of all prescription opioids statewide, leaving the other opioid manufacturers named in this suit responsible for selling 97% of all prescription opioids.

On June 30, 2017, the State sued three opioid manufacturers—J&J (and its related entities[8]), Purdue Pharma L.P. (and its related entities), and Teva Pharmaceuticals USA, Inc. (and its related entities) alleging the companies deceptively marketed opioids in Oklahoma. The State settled with the other opioid manufacturers[11] and eventually dismissed

[3] The Drug Enforcement Administration ("DEA") classifies drugs that contain controlled substances into five "schedules" based on currently accepted medical use in the U.S. and abuse potential. Schedule I controlled substances have no accepted medical use. Schedules II through V controlled substances do have medical use but range from high potential for abuse (Schedule II) to low potential for abuse (Schedule V). *See, e.g.*, Uniform Controlled Dangerous Substances Act, 63 O.S., §§ 2-201 to -212.

[8] The State sued Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil Janssen Pharmaceuticals, Inc., n/k/a Janssen Pharmaceuticals, Inc., and Janssen Pharmaceutica, Inc., n/k/a Janssen Pharmaceuticals, Inc.

[11] The State settled with Purdue for $270 million, and the State settled with Teva for $85 million.

all claims against J&J except public nuisance. The district court conducted a 33-day bench trial with the single issue being whether J&J was responsible for creating a public nuisance in the marketing and selling of its opioid products. The district court held J&J liable under Oklahoma's public nuisance statute for conducting "false, misleading, and dangerous marketing campaigns" about prescription opioids. The district court ordered that J&J pay $465 million to fund one year of the State's Abatement Plan, which consisted of the district court appropriating money to 21 government programs for services to combat opioid abuse.[12] The amount of the judgment against J&J was not based on J&J's percentage of prescription opioids sold. The district court also did not take into consideration or grant J&J a set-off for the settlements the State had entered into with the other opioid manufacturers. Instead, the district court held J&J responsible to abate alleged harms done by all opioids, not just opioids manufactured and sold by J&J.

J&J appealed. The State cross-appealed contending that J&J should [pay] for 20 years of the State's Abatement Plan, or approximately $9.3 billion to fund government programs. This Court retained the appeal.

The issue before this Court is whether the district court correctly determined that J&J's actions in marketing and selling prescription opioids created a public nuisance. We hold it did not. The nature of the

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[12] The district court appropriated the funds to the following governmental programs:

Opioid Use Disorder Treatment Program	$232,947,710
Addiction Treatment—Supplementary Services	$ 31,769,011
Public Medication and Disposal Programs	$ 139,883
Screening, Brief Intervention and Referral to Treatment (SBIRT) Program	$ 56,857,054
Pain Prevention and Non-Opioid Pain Management Therapies	$103,277,835
Expanded and Targeted Naloxone Distribution and Overdose Prevention Education	$ 1,585,797
Medical Case Management/Consulting	$ 3,953,832
Developing and Disseminating NAS Treatment Evaluation and Standards	$ 107,683
Development of NAS as a Required Reportable Condition	$ 181,983
Implementing Universal Substance Use Screening for Pregnant Women	$ 1,969,000
Medical Treatment for Infants Born with NAS or Opioid Withdrawal	$ 20,608,847
Investigatory and Regulatory Actions	$ 500,000
Additional Staffing for: OBN; Oklahoma Boards of Licensure, Veterinary, Osteopathic, Nursing, Medical Licensure and Supervision, Dentistry; and Office of the Chief Medical Examiner; and Office of the Attorney General; and Medicaid Fraud Control Unit	$ 11,101,076
TOTAL	**$465,026,711**

nuisance claim pled by the State is the marketing, selling, and overprescribing of opioids manufactured by J&J. This Court has not extended the public nuisance statute to the manufacturing, marketing, and selling of products, and we reject the State's invitation to expand Oklahoma's public nuisance law.

In reaching this decision, we do not minimize the severity of the harm that thousands of Oklahoma citizens have suffered because of opioids. However grave the problem of opioid addiction is in Oklahoma, public nuisance law does not provide a remedy for this harm.

Discussion

I. Origins and History of Oklahoma Public Nuisance Law

Public nuisance began as a criminal remedy primarily employed to protect and preserve the rights and property shared by the public. It originated from twelfth-century England where it was a criminal writ to remedy actions or conditions that infringed on royal property or blocked public roads or waterways. Richards, Pills, Public Nuisance, and Parens Patriae: Questioning the Propriety of the Posture of the Opioid Litigation, 54 U. Rich. L. Rev. 405, 418 (2020). The king had the authority to bring such claims, seeking only injunction or abatement as remedies. [In] the 16th century, other individuals began to bring private nuisance claims seeking only injunctive relief when they had a "special" injury.

Public nuisance came to cover a large [miscellany] of minor criminal offenses. *Restatement (2d) of Torts* § 821B cmt. b (1979). The offenses involved an "interference with the interests of the community at large—interests that were recognized as rights of the general public entitled to protection." The *Restatement* [explained]:

> Interference with the public health, as in the case of keeping diseased animals or the maintenance of a pond breeding malarial mosquitoes; with the public safety, as in the case of the storage of explosives in the midst of a city or the shooting of fireworks in the public streets; with the public morals, as in the case of houses of prostitution or indecent exhibitions; with the public peace, as by loud and disturbing noises; with the public comfort, as in the case of widely disseminated bad odors, dust and smoke; with the public convenience, as by the obstruction of a public highway or a navigable stream; and with a wide variety of other miscellaneous public rights of a similar kind.

Public nuisance evolved into a common law tort. It covered conduct, performed in a location within the actor's control, which harmed those common rights of the general public. It has historically been linked to the use of land by the one creating the nuisance. Nichols v. Mid-Continent

Pipe Line Co., 933 P.2d 272, 276 (Okla. 1996). A public entity that proceeds against the one in control of the nuisance may only seek to abate, at the expense of the one in control of the nuisance. Courts have limited public nuisance claims to these traditional bounds. See, e.g., In re Lead Paint Litig., 924 A.2d 484, 499 (N.J. 2007).

Oklahoma's nuisance statute codifies the common law:

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:
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> 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.

50 O.S.2011, § 1. The Oklahoma Legislature has long defined public nuisance as a nuisance that contemporaneously affects an entire community or large group of people, but need not damage or annoy equally to all. *Id.* § 2. [The] nuisance and public nuisance statutes became law in 1910. . . .

For the past 100 years, [applying our nuisance statutes, this court] has limited . . . public nuisance liability to defendants (1) committing crimes constituting a nuisance, or (2) causing physical injury to property or participating in an offensive activity that rendered the property uninhabitable.[13] . . .

The State's allegations in this case do not fit within Oklahoma nuisance statutes as construed by this Court. The Court applies the nuisance statutes to unlawful conduct that annoys, injures, or endangers the comfort, repose, health, or safety of others. But that conduct has been criminal or property-based conflict. Applying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers; this is why our Court

[13] See, e.g., [Numerous case rulings, from 1908-1996, that various conduct/conditions were public nuisances: pollution from leaking oil pipeline; pollution in water from waste disposal facility; obscene works in violation of Oklahoma law; conduct outside of saloon; pollution by crude oil; limestone quarry dust; forty cats in a home; overgrown hedges obstructing street; barn in disrepair; harboring vicious dog in violation of Oklahoma law; installation of toilets causing sewage backflow and pollution to city water; dumping untreated sewage; gambling on dog races, and on horse races, in violation of Oklahoma law; monopoly in violation of Oklahoma law; smoking indoors in violation of Oklahoma law; and dance hall activities in violation of Oklahoma law. But neither an open saloon in violation of Oklahoma law, nor advertising liquor in violation of Oklahoma law, were considered public nuisances.].

has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products.

II. Oklahoma's Public Nuisance Law Does Not Cover the State's Alleged Harm.

The central focus of the State's complaints is that J&J was or should have been aware and that J&J failed to warn of the dangers associated with opioid abuse and addiction in promoting and marketing its opioid products. This classic articulation of tort law duties—to warn of or to make safe—sounds in product-related liability.[15]

Public nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap. State v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 456 (R.I. 2008). The Restatement explains as follows:

> Tort suits seeking to recover for public nuisance have occasionally been brought against the makers of products that have caused harm, such as tobacco, firearms, and lead paint. These cases vary in the theory of damages on which they seek recovery, but often involve claims for economic losses the plaintiffs have suffered on account of the defendant's activities; they may include the costs of removing lead paint, for example, or of providing health care to those injured by smoking cigarettes. Liability on such theories has been rejected by most courts, and is excluded by this Section, because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue. Mass harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake.

Restatement (3d) Torts: Liab. for Econ. Harm § 8 cmt. *g* (2020).

The 8th Circuit explained this [in an asbestos case,] Tioga Public School District No. 15 v. US Gypsum Co., 984 F.2d 915 (8th Cir. 1993). [*Tioga*] concluded that North Dakota courts only applied [its] statute in the classic context of a landowner or other person in control of property conducting an activity on his or her land in such a manner as to interfere with the property rights of a neighbor. The [court] determined that the North Dakota Supreme Court would not extend its nuisance statute—which is the source of, and [is] identical to Oklahoma's nuisance statute—to cases involving the sale of products. [T]he *Tioga* court warned:

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[15] See, e.g., Kirkland v. Gen. Motors Corp., 521 P.2d 1353 (Okla. 1974) (adopting the Restatement (2d) Torts § 402A (1965)); Cunningham v. Charles Pfizer & Co., Inc., 532 P.2d 1377, 1380-81 (Okla. 1974) (defendant had a duty to warn plaintiff or his parents of the risk of contracting polio from the vaccine and the failure to warn of this risk rendered the vaccine defective under § 402A).

> Under Tioga's theory, any injury suffered in North Dakota would give rise to a cause of action under [its nuisance statute] regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories of recovery. Nuisance thus would become a monster that would devour in one gulp the entire law of tort, a development we cannot imagine the North Dakota legislature intended when it enacted the nuisance statute.

Tioga, 984 F.2d at 921. And the court refused to extend public nuisance liability to harms caused by asbestos.

We agree with *Tioga*'s analysis of nuisance law and the sale of products. Public nuisance is fundamentally ill-suited to resolve claims against product manufacturers, including J&J in this case. In reaching this decision, we identify three reasons not to extend public nuisance law to envelop J&J's conduct as an opioid manufacturer: (1) the manufacture and distribution of products rarely cause a violation of a public right, (2) a manufacturer does not generally have control of its product once it is sold, and (3) a manufacturer could be held perpetually liable for its products under a nuisance theory. We address each in turn.

A. The manufacture and distribution of products rarely cause a violation of a public right.

One factor in rejecting the imposition of liability for public nuisance in this case is that the State has failed to show a violation of a public right. A public nuisance involves a violation of a public right; a public right is more than an aggregate of private rights by a large number of injured people. See Territory v. Long Bell Lumber Co., 99 P. 911 (Okla. 1908); *Rest. (2d) Torts* § 821B cmt. g (1979) . . . . Rather, a public right is a right to a public good, such as "an indivisible resource shared by the public at large, like air, water, or public rights-of-way." *Am. Cyanamid Co.*, 823 N.E.2d at 131 Unlike an interference with a public resource,

> [t]he manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance. Products generally are purchased and used by individual consumers, and any harm they cause--even if the use of the product is widespread and the manufacturer's or distributor's conduct is unreasonable—is not an actionable violation of a public right. . . . The sheer number of violations does not transform the harm from individual injury to communal injury.

Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. Rev. 741, 817 (2003); see also *Lead Indus. Ass'n, Inc.*, 951 A.2d at 448, 454 (holding the right of a child to not be poisoned by lead is a nonpublic

right). The damages the State seeks are not for a communal injury but are instead more [like] a private tort action for individual injuries . . . from use of a lawful product and in providing medical treatment or preventive treatment to certain, though numerous, individuals.

The State characterizes its suit as an interference with the public right of health. We disagree. See City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007) (rejecting city's argument that its nuisance claim re lead paint was an injury to public health). This case [is unlike those where] an injury to the public health would occur, e.g., diseased animals, pollution in drinking water, or the discharge of sewer on property. Such property-related conditions have no beneficial use and only cause annoyance, injury, or endangerment. In this case, the lawful products, prescription opioids, have a beneficial use in treating pain.

[In City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004), Chicago] and Cook County brought public nuisance claims against manufacturers, distributors, and dealers of handguns. The city and county alleged that [manufacturers] knowingly oversupplied the market with their products and marketed [them] to appeal to those who intended to use them for criminal purposes. The state and county sought compensation for the abatement of the nuisance, including costs of medical services, law enforcement efforts, and prosecutions for violations of gun control ordinances. [Rejecting these claims, and despite the tragic consequences of gun violence, the] Illinois Supreme Court sustained the trial court's dismissal of the public nuisance claims[, ruling that] the city and county failed to show an unreasonable interference with a public right. The *Beretta* court ultimately concluded that a public right to be free from the threat that others "may defy [criminal] laws would permit nuisance liability to be imposed on an endless list of manufacturers, distributors, and retailers of manufactured products." It acknowledged the far-reaching effects of a decision otherwise:

> If there is a public right to be free from the threat that others may use a lawful product to break the law, that right would include the right to drive upon the highways, free from the risk of injury posed by drunk drivers. This public right to safe passage on the highways would provide the basis for public nuisance claims against brewers and distillers, distributing companies, and proprietors of bars, taverns, liquor stores, and restaurants with liquor licenses, all of whom could be said to contribute to an interference with the public right.

Id. Similarly, a public right to be free from the threat that others may misuse or abuse prescription opioids—a lawful product—would hold manufacturers, distributors, and prescribers potentially liable for all types of use and misuse of prescription medications. Just as in *Beretta*, the State has failed to show a violation of a public right in this case. Id. at 1116 (holding "there is no authority for the unprecedented expansion

of the concept of public rights to encompass the right asserted by plaintiffs"). And as the manufacture and distribution of products rarely cause a violation of a public right, we refuse to expand public nuisance to claims against a product manufacturer.

B. A manufacturer does not have control of its product once it is sold.

Another factor in rejecting the imposition of liability for public nuisance in this case is that J&J, as a manufacturer, did not control the instrumentality alleged to constitute the nuisance at the time it occurred. See, e.g., City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986). The State asks this Court to broadly extend the application of the nuisance statute, namely to a situation where a manufacturer sold a product (for over 20 years) that was later alleged to constitute a nuisance. See *Tioga*, 984 F.2d at 920. A product manufacturer's responsibility is to put a lawful, non-defective product into the market. There is no common law tort duty to monitor how a consumer uses or misuses a product after it is sold.[17] Without control, a manufacturer also cannot remove or abate the nuisance—which is the remedy the State seeks from J&J in this case. See, e.g., *Tioga*, 984 F.2d at 920.[18]

A public nuisance claim against a gun manufacturer parallels the State's claims against J&J and its opioid production and distribution. We again find *Beretta* persuasive as it discussed a manufacturer's control of its product in determining public nuisance liability. Federal and state laws regulate the manufacture, distribution, and use of both firearms and opioids. As in *Beretta*, the alleged nuisance in this case is several times removed from the initial manufacture and distribution of opioids by J&J. See *Beretta* at 1137. Multiple agencies and boards across different jurisdictions oversee and enforce statutes and regulations that control the developing, testing, producing, manufacturing, distributing, labeling, advertising, prescribing, selling, possessing, and reselling of prescription opioids; this is a highly regulated industry.

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[17] See Bloomington v. Westinghouse Elec. Corp., 891 F.2d 611, 614 (7th Cir.1989) (noting the absence of cases "holding manufacturers liable for public or private nuisance claims arising from the use of their product subsequent to the point of sale"); see also Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. Rev. at 820 ("The essence of public nuisance law . . . is ending the harmful conduct. This is impossible for the manufacturer or distributor who has relinquished possession by selling or otherwise distributing the product."); Schwartz & Goldberg, The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort, 45 Washburn L.J. 541, 568 (2006) ("[F]urnishing a product or instrumentality—whether it be chemicals, asbestos, guns, lead paint, or other products—is not the same as having control over that instrumentality."). [See generally Lin, Dodging Public Nuisance, 11 UC Irvine L. Rev. 489, 498-99 (2020); Ausness, Public Tort Litigation: Public Benefit or Public Nuisance?, 77 Temp. L. Rev. 825 (2004)].

[18] A seller loses control of its products when they are sold and "lacks the legal right to abate whatever hazards its products may pose; under these circumstances, the purchaser's proper remedies are products liability actions for negligence or breach of warranty rather than a nuisance action." 63A Am. Jur. 2d Products Liability § 867 (2021).

J&J had no control of its products through the multiple levels of distribution, including after it sold the opioids to distributors and wholesalers, which were then dispersed to pharmacies, hospitals, and physicians' offices, and then prescribed by doctors to patients. J&J also had no control over the laws and regulations that govern the disbursement of its prescription opioids or whether prescribers follow the laws. Regulation of prescription opioids belongs to the federal and state legislatures and their agencies. . . .

Even with its influential marketing, J&J ultimately could not control: (1) how wholesalers distributed its products, (2) how regulations and legislation governed the distribution of its products by prescribers and pharmacies, (3) how doctors prescribed its products, (4) how pharmacies dispersed its products, and (5) how individual patients used its product or how a patient responded to its product, regardless of any warning or instruction given.[19] Just as in *Beretta*, J&J did not control the instrumentality (prescription opioids) alleged to constitute the nuisance at the time the nuisance occurred. See *Beretta*, 821 N.E.2d at 1138.

Even more, J&J could not control how individuals used other pharmaceutical companies' opioids. A manufacturer traditionally does not have a duty to people who use other manufacturers' products.[20] J&J sold only 3% of all prescription opioids statewide; other pharmaceutical companies [marketed and sold] 97% of the prescription opioids. Yet the district court held J&J responsible for those alleged losses caused by other pharmaceutical companies' opioids. Where the law does not expressly allow, J&J should not be responsible for the harms caused by opioids that it never manufactured, marketed, or sold. To expand public nuisance to cover a manufacturer's production and sale of a product would cause the manufacturer to be responsible for products it did not produce. We refuse to expand Oklahoma's nuisance law so greatly.

Further, J&J cannot abate the alleged nuisance. [O]pioid use and addiction would not cease to exist even if J&J pays for the State's Abatement Plan. *Beretta* (holding the nuisance would not cease to exist even if the defendants stopped selling firearms). The State's Abatement Plan is not an abatement in that it does not stop the act or omission that constitutes a nuisance. The abatement is not the opioids themselves. Neither is it an injunction to halt the promoting and marketing of opioids as J&J has not promoted opioids for several years. It is instead an award to the State to fund multiple governmental programs for medical treatment and preventive services for opioid abuse, investigatory and

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[19] See also State v. Purdue Pharma, L.P., 2019 WL 2245743, at *13 (N.D. Dist. Ct. 2019) (holding that "Purdue has no control over its product after it is sold to distributors, then to pharmacies, and then prescribed to consumers, i.e. after it enters the market").

[20] See Strange III, A Prescription for Disaster: How Local Governments' Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into A Policy-Making Role and Subverts the Equitable Administration of Justice, 70 S.C. L. Rev. 517, 537 (2019).

regulatory activities, and prosecutions for violations of Oklahoma law regarding opioid distribution and use—activities over which J&J has no control. Our Court, over the past 100 years in deciding nuisance cases, has never allowed the State to collect a cash payment from a defendant that the district court line-item apportioned to address social, health, and criminal issues arising from conduct alleged to be a nuisance. We therefore reject the district court's remedy in this case as it does not abate the alleged nuisance; it does not abate the opioid epidemic, any act or omission of J&J, or any act or omission of other opioid manufacturers.

C. A manufacturer cannot be held perpetually liable for its products.

The final factor in rejecting the imposition of liability for public nuisance in this case is the possibility that J&J could be held continuously liable for its products. Nuisance claims against products manufacturers sidestep any statute of limitations. See, e.g., Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513 (Mich. Ct. App. 1992). In this case, the district court held J&J responsible for products that entered the stream of commerce more than 20 years ago, shifting the wrong from the manufacturing, marketing, or selling of a product to its continuing presence in the marketplace. The State's public nuisance claims could hold manufacturers perpetually liable for their products; Oklahoma law has rejected such endless liability in all other traditional tort law theories.[21] We again reject perpetual liability here.

III. This Court Will Not Extend Oklahoma Public Nuisance Law to the Manufacturing, Marketing, and Selling of Prescription Opioids.

Extending public nuisance law to the manufacturing, marketing, and selling of products—in this case, opioids—would allow consumers to "convert almost every products liability action into a [public] nuisance claim." Cty. of Johnson v. U.S. Gypsum Co., 580 F. Supp. 284, 294 (E.D. Tenn. 1984). As one court explained:

> All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.

N.Y. v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003).

[21] For example, a typical Oklahoma negligence action and products liability action have a statute of limitations of two years. 12 O.S.2011, § 95(a)(3); *Kirkland*, 521 P.2d at 1362.

Other jurisdictions have refused to allow products-based public nuisance claims, signaling a clear national trend to limit public nuisance to land or property use. See, e.g., *Beretta*, 821 N.E.2d at 1116; *In re Lead Paint Litig.*, 924 A.2d at 505 ("were we to permit these complaints, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent . . . limitations of the tort of public nuisance"); Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y. 2001) (rejecting the contention that gun manufacturers have a general duty to lessen the risk of illegal gun trafficking because they have the power to restrict marketing and product distribution); *Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d at 196 (ruling "giving a green light to a common-law public nuisance cause of action will, in our judgment, likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities"); *Lead Indus. Ass'n, Inc.*, 951 A.2d at 456 ("[t]he law of public nuisance never before has been applied to products, however harmful"); see also Sills v. Smith & Wesson Corp., 2000 WL 33113806 (Del. Super. Ct. 2000) (unpublished) (holding the design, marketing, and advertising of handguns was not a public nuisance because the state did not recognize a cause of action for public nuisance based upon products).

In the same way, this Court will not extend Oklahoma public nuisance law to J&J's conduct in the manufacturing, marketing, and selling of prescription opioids. We follow North Dakota and South Dakota courts who rejected public nuisance claims against the same defendants for the same conduct as complained of in this case. Although unpublished opinions, we find both courts' reasonings for dismissing the claims persuasive as [they] applied nuisance statutes identical to Oklahoma's nuisance statute. The North Dakota court [reasoned that] public nuisance law does not apply to cases involving the sale of goods. State v. Purdue Pharma, L.P., 2019 WL 2245743 (N.D. Dist. Ct. 2019). The South Dakota court dismissed the public nuisance claim based on the same reason as the North Dakota court and held the defendants did not have control of the instrumentality of the nuisance when the damage occurred.

The common law criminal and property-based limitations have shaped Oklahoma's public nuisance statute. Without these limitations, businesses have no way to know whether they might face nuisance liability for manufacturing, marketing, or selling products, i.e., will a sugar manufacturer or the fast food industry be liable for obesity, will an alcohol manufacturer be liable for psychological harms, or will a car manufacturer be liable for health hazards from lung disease to dementia or for air pollution. We follow the limitations set by this Court for the past 100 years: Oklahoma public nuisance law does not apply to J&J's conduct in manufacturing, marketing, and selling prescription opioids.

CONCLUSION

This case challenges us to rethink traditional notions of liability and causation. Tort law is ever-changing; it reflects the complexity and vitality of daily life. The State presented us with a novel theory—public nuisance liability for marketing and selling a legal product, based on the acts not of one manufacturer, but an industry. [W]e are unconvinced that such actions amount to a public nuisance under Oklahoma law.

The Court allows public nuisance law to address discrete, localized problems, not policy problems. Erasing the traditional limits on nuisance liability leaves Oklahoma's nuisance statute impermissibly vague. The district court's expansion of public nuisance law allows courts to manage public policy matters that should be dealt with by the legislative and executive branches; the branches that are more capable than courts to balance the competing interests at play in societal problems. [Usurping] the Legislature by creating and funding government programs designed to address social and health issues goes too far. This Court defers policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law. The district court erred in finding J&J's conduct created a public nuisance.

District Court's Judgment Reversed.

■ KUEHN, J., Specially Concurring.

I agree with the Majority's analysis and conclusion and write to discuss why Oklahoma nuisance law is not, and unless the Legislature amends it, never will be, a tort. . . .

■ EDMONDSON, J., Dissenting.

. . . I would remand to the District Court to recalculate damages based upon J & J's share of the market in the years it sold its opioids in Oklahoma with its deceptive marketing scheme. The Attorney General's basic theory of the case is tenable, both in law and equity. The Court's view of public nuisance is too narrow . . . . I respectfully dissent.

NOTE

In late 2021, a California Superior Court dismissed a similar public nuisance opioid case on causation grounds. See Mann, Oklahoma's Supreme Court tossed out a landmark $465 million opioid ruling (NPR Nov. 9, 2021). However, in another 2021 public nuisance case brought by two Ohio counties, a federal jury found that three major pharmacies, Walmart, CVS, and Walgreens, had created a public nuisance by not properly monitoring opioid prescriptions. See Feeley, Walmart, CVS, Walgreens Fueled Opioid Crisis, Jury Concludes, U.S. Law Week (Nov. 24, 2021).