Oklahoma's 'Painful' Opioid Litigation Reversal May Spell Trouble for Big Pharma Settlements

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I. INTRODUCTION

The devastating opioid epidemic has created a flood of litigation across the United States. In 2017, thousands of lawsuits surged at the state and federal levels, seeking to recover treatment and social costs associated with opioid addictions.[1] The litigation has been centralized in the federal court system as part of a Multiple District Litigation ("MDL"), transferring over three thousand cases filed in state courts to the MDL.[2] These lawsuits generally allege that the defendants engaged in unlawful conduct by marketing and selling opioids, leading to widespread addiction and overdose deaths.[3] In 2021, five major U.S. trials kicked off testing allegations from state and local governments against drug makers, wholesale distributors, and major pharmacy chains.[4]

The Oklahoma Supreme Court's reversal of *State ex rel. Hunter v. Johnson & Johnson* may change the balance in the rapidly evolving opioid

litigation cases against Big Pharma.[5] The Oklahoma Supreme Court unanimously reversed the $465 million district court decision, refusing to allow product liability-based public nuisance under Oklahoma's public nuisance statute for Johnson & Johnson's ("J&J") prescription opioid marketing campaign.[6] The Oklahoma Supreme Court held—however grave the opioid addiction epidemic is in the state—that public nuisance law does not remedy the alleged harms.[7]

This decision is important for three reasons. First, it departs from the approach taken by other courts in similar cases and sends a strong signal to defendants that global settlements may be premature.[8] Second, the ruling could make it harder for plaintiffs to bring public nuisance claims against drug companies in state courts. Third, the decision reinforces the importance of product liability law as the proper legal framework for addressing injuries caused by defective products and discourages plaintiffs from looking to public nuisance law as a workaround to statutory limitations on damages.

II. BACKGROUND

A. State ex rel. Hunter v. Johnson & Johnson

In 2017, the state of Oklahoma sued J&J and two other unaffiliated opioid manufacturers, alleging that defendants created a public nuisance by misrepresenting the risks of opioids, overstating the benefits of opioids, downplaying the seriousness of addiction, and using deceptive marketing practices.[9] The state based its theories on public nuisance and equitable

recovery, not focusing on any individual consumer to prove illness causation.[10] The state's theories also eliminated possible consumer defenses, like contributory negligence or assumption of risk.[11] The trial court found that J&J had created a public nuisance and ordered the company to pay $572 million to abate the nuisance.[12]

J&J appealed and the Oklahoma Supreme Court reversed the district court holding that the state did not prove that J&J's conduct was a public nuisance under Oklahoma law.[13] The court refused to allow a product liability-based public nuisance argument under Oklahoma's public nuisance statute because it explained that the state's claims exceeded Oklahoma's criteria for determining a nuisance.[14] The court also said that the state's abatement of a public nuisance did not propose to limit J&J's liability to injuries caused by J&J's products because the abatement was not based on a percentage of opioids sold by J&J but on overall opioid sales.[15] In other words, there was a disconnect between J&J's products, causation, and damages.[16]

The court explained that the supposed public nuisance could not be abated because "[t]he abatement is not the opioids themselves" or J&J's marketing and promotion of the opioids.[17] Instead, the court said the 'abatement' was an award to the state to fund multiple government programs, and an Oklahoma court had "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."[18] In sum, if the state were allowed abatement as an award to finance government programs, it would have harmful consequences. The state could take money from companies it accuses of causing damage—like in this opioid litigation case—effectively allowing tort liability to usurp taxation's role as a response to societal problems.[19]

B. Legal Background

1. Public Nuisance Law

The concept of public nuisance law began in England over two hundred years ago when public nuisance was recognized as a type of crime.[20] The concept of public nuisance is intended to let courts order defendants to stop specific behaviors that damage the public's interest—like polluting a public river.[21] But the concept of public nuisance has expanded beyond its early origins as a property offense and is now being used to hold manufacturers responsible for any perceived injuries to the public from lawful products.[22] Public nuisance first gained traction as the go-to substantive claim in lawsuits filed by states and municipalities against companies for causing collective harm during the mass product liability litigation against Big Tobacco that resulted in the Master Settlement Agreement ("MSA") in 1998.[23]

To serve as a collective litigant in product liability cases, the state attorney general must have the grounds to sue for broadly defined harms experienced by the state's citizens.[24] In other words, the state acts for all its citizens who might have been hurt by a product rather than those who could sue individually.[25] This acting on behalf of citizens is called parens patriae standing, where the state argues that it may bring together claims from individual victims of product-caused harm and collect damages for harms experienced only at an individual level—not necessarily by the state itself.[26] "In short, the state becomes a 'super plaintiff.'"[27]

Using the parens patriae doctrine to allege collective harm rather than individual harm means these claims do not require evidence that any specific manufacturer made the products that harmed any particular victim.[28] State attorneys general often expand the boundaries of common law using this doctrine to regulate an industry expressly.[29] This leaves manufacturers no choice but to agree with the regulatory scheme put in place through a consent decree like the MSA.[30] In the case of the opioid crises and subsequent litigation, federal regulators or state legislators created modest regulations.[31] But state attorneys general and a few plaintiffs' firms specializing in mass products liability lawsuits used novel substantive claims such as public nuisance to usher in a new, harsher regulatory scheme like that used in the Big Tobacco litigation of the 1990s.[32] "The recent filings of claims against product manufacturers, however, are far more than the mere filing of lawsuits."[33] Even more, under the MDL, the state uses public nuisance and other equitable recovery theories to prove illness causation without focusing on individual consumers.[34] These theories also eliminate possible defenses based on the consumers' conduct, like contributory negligence or assumption of risk.[35]

2. Opioid Epidemic and Litigation

The U.S. opioid epidemic began in the 1990s when pharmaceutical companies started aggressively marketing opioids for pain relief.[36] Over the past two decades, the number of prescriptions for opioids quadrupled, and the number of overdose deaths rose correspondingly.[37] In 2020, over 91,000 overdose deaths occurred from opioids in the United States alone.[38] The increase in opioid prescriptions and overdoses led to a wave of litigation against pharmacies, pharmaceutical companies, and pharmaceutical distributors.[39] Individuals and local and state governments have filed thousands of lawsuits alleging these defendants are responsible for the opioid epidemic because they negligently marketed and sold opioids, did not track prescriptions properly, and/or turned a blind eye to the illegal diversion of opioids.[40] Several cases have gone to trial with mixed results.[41] In current and rapidly evolving opioid litigation, localities are joining forces with their states' governments to capture an entire supply chain—opioid

manufacturers, distributors, and retailers—exponentially raising the number of claims and defenses.[42]

III. THE OKLAHOMA SUPREME COURT'S DECISION

Determining whether public nuisance laws can be applied requires a court to carefully analyze whether a legitimate public interest is at stake, justifying state intervention.[43] In *Hunter*, the Oklahoma Supreme Court unanimously reversed the $465 million district court decision, refusing to supplant existing liability limitations with the state's novel public nuisance theory because "extending public nuisance law to the manufacturing, marketing, and selling of products . . . would allow consumers to 'convert almost every products liability action into a [public] nuisance claim.'"[44] The court held that public nuisance law is ill-suited to resolve claims against product manufacturers because "(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."[45] Thus, the state did not prove J&J violated a public right because generally, individual consumers buy and use products, even if the product causes widespread personal injuries, and sheer volume "does not transform the harm from individual injury into communal injury."[46]

Further, a product manufacturer cannot control how a consumer uses or misuses a product after it is sold.[47] Without control, the manufacturer cannot remove or stop the nuisance.[48] The court also commented that many agencies and boards are responsible for enforcing the laws regulating the development, production, distribution, manufacturing, testing, labeling, advertising, prescribing, selling, possessing, and reselling of prescription opioids, and J&J had no control over its products because they changed hands multiple times.[49] For that reason, the court explained that while the case challenged them to reconsider long-held conceptions about liability and causation, it remained unconvinced that the state's public nuisance theory was the correct framework.[50] Therefore, the court held that J&J bore no responsibility for the damages inflicted by the opioids it never manufactured, marketed, or sold.[51] Even more, the court explained that the state's abatement plan does not remove the alleged nuisance, nor can J&J eliminate the condition that caused the nuisance.[52] Finally, the court emphasized that while the opioid epidemic is a societal problem, it cannot be remedied by introducing public nuisance theories of liability for product manufacturers.[53]

IV. COMMENTARY

The Oklahoma Supreme Court correctly held that the district court's interpretation of public nuisance law went too far. The problem with using public nuisance law to target product manufacturers is that it creates broad and limitless liability. As the court explained, applying nuisance statutes to the manufacturing, marketing, and selling of lawful products would extend the reach of public nuisance laws, which would open the floodgates, allowing plaintiffs to bring unlimited and unprincipled product liability claims to almost every product liability action.[54]

It remains to be seen how these developments will affect ongoing opioid litigation. The landscape of these cases has changed significantly in

recent months, even during the writing of this Comment. The Food and Drug Administration ("FDA") and the Drug Enforcement Administration ("DEA") chiefly regulate the U.S. legal prescription drug industry.[55] Like the manufacturing, marketing, and selling of lawful products, pharmacists fill legal prescriptions written by DEA-licensed doctors who prescribe legal, FDA-approved substances to treat patients in need.[56] Yet, a California federal court recently held Walgreens liable for opioid abuse that permeated San Francisco.[57] Similarly, an Ohio district court recently upheld a jury's findings holding three major pharmacy chains liable for damages on the theory that filling pill mill prescriptions[58] for opioids created a public nuisance.[59]

These decisions illustrate the risks to Big Pharma created by the opioid epidemic, causing a surge of large settlements from some of the largest drug manufacturers because the state has much more bargaining power in a lawsuit than any one person.[60] There is intense pressure to settle aggregate litigation claims when a single jury holds the fate of an industry in its hands.[61] Public nuisance law amplifies this pressure when the product has caused extensive health problems for millions of people.[62] In December 2020, the U.S. Department of Justice announced that it had reached a $480 billion settlement with Purdue Pharma, the maker of OxyContin.[63]

Recently, there have been reports that drug companies, distributors, and pharmacies involved in opioid litigation are discussing the possibility of a global settlement.[64] The financial stakes carry immense importance for funding addiction programs, and parens patriae sovereignty means nothing keeps state attorneys general from misusing opioid recovery money the way they misused their Big Tobacco cash.[65] Like the Big Tobacco litigation, opioid trials are massive, with the potential for multibillion-dollar verdicts. That said, the Oklahoma Supreme Court's decision in *Hunter* could signify that the global settlements proposed in many opioid cases are premature because the ruling may give drug companies more ammunition to argue that these cases should be dismissed. Using public nuisance law in mass opioid litigation is questionable because applying public nuisance law to product manufacturers is dubious at best. Several state courts have held that public nuisance law does not apply to products lawfully made and sold.[66] At the same time, it is unclear whether the decision in *Hunter* will make settlements less likely, or will simply be used as leverage by one side or the other in the negotiation process.

One potential alternative to using public nuisance laws to address the opioid epidemic is to create legislation designed to deal with the problem

by allowing states and local governments to recover costs associated with treating and preventing opioid addiction. But legislative bodies must carefully craft legislation to avoid issues arising in public nuisance cases. For example, the legislation must be narrowly tailored to ensure it does not sweep too broadly or result in unjustified claims. It would also need to clarify what types of conduct would give rise to liability so defendants would know how to avoid liability.[67]

Unfortunately, increased regulation in the medical industry has driven many pain-treating physicians to prioritize avoiding penalties over providing care.[68] Desperate patients unable to get pain control from their physician often turn to drugs like heroin or fentanyl, which lead to self-medication and often tragic results.[69] The CDC's advice on prescribing opioids was never intended to apply to cancer or end-of-life treatment.[70] Yet even people with a terminal prognosis and excruciating pain have not been immune to the ravages of the opioid crackdown.[71] A recent study of terminally ill patients dying of cancer revealed that the number and strength of opioid prescriptions decreased, especially those for long-acting opioids.[72] Many patients suffering from chronic pain end their lives to prevent further suffering.[73] Opioid litigation and the war on opioids have created substantial collateral damage by severely affecting many chronic pain patients who cannot obtain legitimately needed prescription pain relief and who, as a result, choose to end their lives.[74]

Creating new legislation to address the opioid epidemic would be complex. Still, it may be the best way to ensure that those responsible for the problem are held accountable and that states and local governments can recover the costs associated with treating and preventing opioid addiction.

V. CONCLUSION

The decision in *Hunter* will influence the rapidly evolving landscape of opioid litigation. Yet it remains to be seen how other courts will interpret and apply the decision and how it will affect pending cases. Public nuisance

law is an indiscriminate legal tool that should not be used to target lawful activities or product manufacturers. This new wave of regulatory litigation is problematic because it requires a questionable expansion of states' parens patriae power[75] and dubious use of longstanding torts such as public nuisance.[76] Courts should use the intertwined concepts of justiciability and separation of powers to assess the legitimacy of this new wave of regulatory litigation. Manufacturers have no choice but to agree with the regulatory scheme put in place through a consent decree.[77] The doctrine of public nuisance is so vague and poorly understood that it is hard to know what is and is not a public nuisance.

Using parens patriae power and public nuisance litigation to reform public policy and institute social change through judicial action is problematic.[78] Because of the misuse of settlement funds post-Big Tobacco, there is significant doubt about whether opioid litigation by states met the goals of tort law or if it was a "big money grab" by governmental entities.[79] In addition, the increasing number of medical regulations has caused many pain-treating physicians to focus on avoiding penalties rather than providing care. Many desperate patients self-medicate when they cannot get relief from their physicians. This often leads to tragic results when they turn to drugs like heroin or fentanyl.[80] And sadly, many patients suffering from chronic pain often end their lives because they cannot bear the thought of living with the pain any longer.

Using public nuisance theories of liability hoping to remedy the societal problem of the opioid epidemic will create broad and unprincipled liability and will not alleviate the collateral damage that leaves chronic pain patients without relief. It is better to focus on specific illegal actions that damage the public interest, leaving public nuisance law to be used as it was

originally intended—to target unlawful conduct that harms the public—and leaving the regulating to Congress, state legislatures, and administrative agencies.