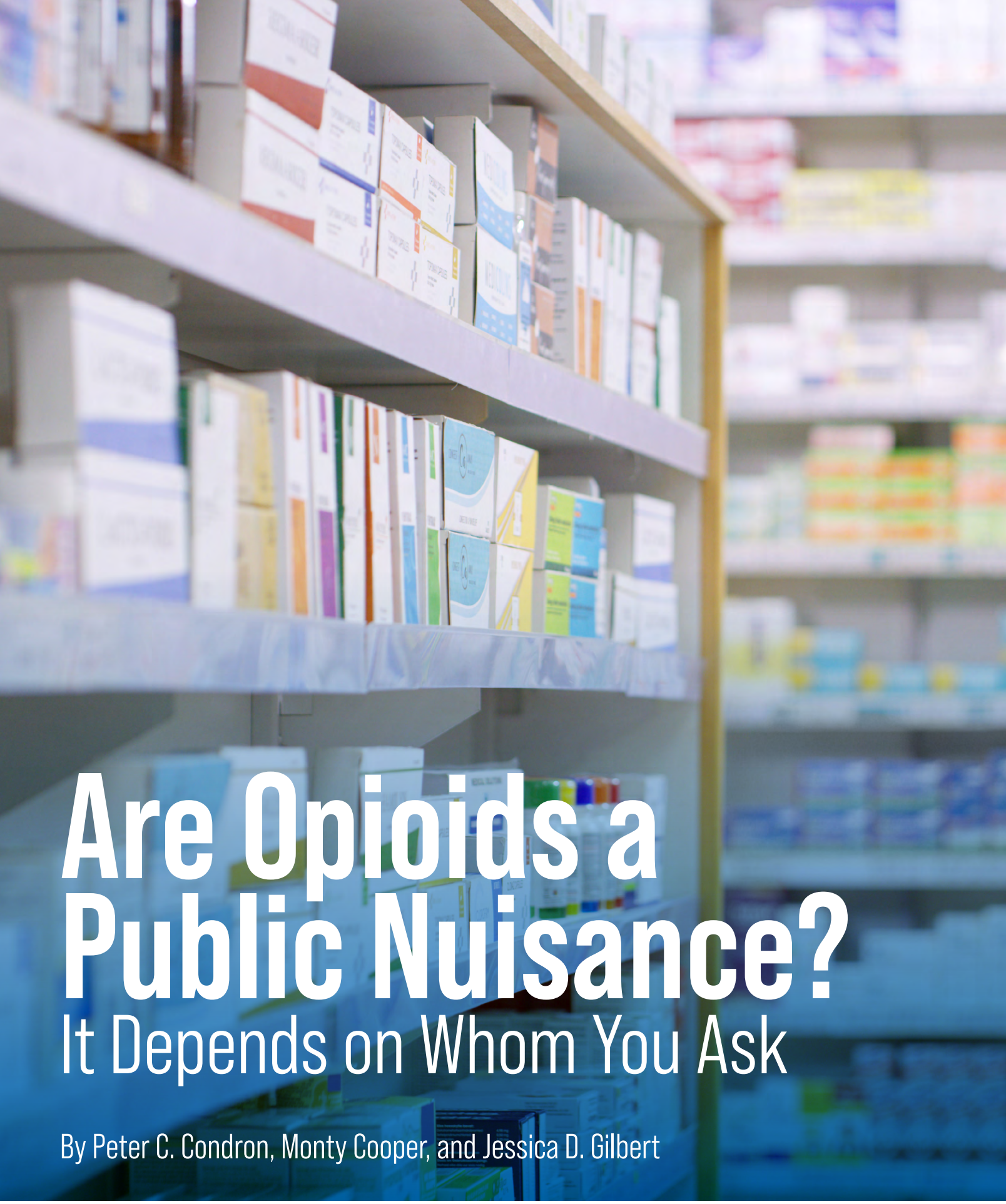

Are Opioids a Public Nuisance?

It Depends on Whom You Ask

By Peter C. Condron, Monty Cooper, and Jessica D. Gilbert

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The fall of 2021 and summer of 2022 saw important milestones in the ongoing opioid litigation battles, with both defendants (e.g., pharmaceutical companies) and plaintiffs (e.g., local governments) achieving significant victories. The outcomes may have been contingent on whether a judge or jury decided their fate—with judges seeming more favorable to defendants and juries more inclined to side with plaintiffs. But of paramount importance in the cases is how broadly (or narrowly) the judges presiding over the litigation view the public nuisance doctrine.

In early November 2021, pharmaceutical manufacturer defendants won important victories before judges in California and Oklahoma state courts against local government plaintiffs seeking to hold those companies responsible for the nation's "opioid overdose epidemic," as it has been characterized by the Centers for Disease Control and Prevention.[1] These state courts rejected the plaintiffs' argument that opioid manufacturers and distributors and retail pharmacies created a "public nuisance" that caused significant damage to communities.[2] In July 2022, pharmaceutical distributor defendants were successful before a West Virginia federal judge against local government plaintiffs seeking to hold distributors responsible for opioid costs incurred in their localities.[3] By contrast, in late November 2021, plaintiffs won victories before juries against pharmaceutical companies and retail pharmacies in an Ohio federal court and a New York state court. Those juries accepted the plaintiffs' arguments and held the defendants liable for creating a public nuisance.[4]

These cases are significant because they are among the first opioid liability decisions rendered by courts and juries out of the many cases filed in courts across the country. Perhaps even more significant are the outcomes reached in each—with judges declining to find companies responsible for creating a public nuisance and juries so imposing liability.

This article examines these cases in more detail. First, it briefly discusses the history of public nuisance law and provides background information about opioid litigation. Next, it explains defendants' victories before California, Oklahoma, and West Virginia judges. It then examines plaintiffs' victories before Ohio and New York juries. After briefly discussing the status of several important opioid cases before courts, it offers closing thoughts about lessons learned.

Public Nuisance Law and Opioid Litigation

Public nuisance law. Public nuisance laws date to 12th-century England and impose liability for actions that interfere with rights commonly enjoyed by the public. As Dean Prosser notes, "The word first emerges in English law to describe interferences with servitudes or other fixed rights to the free use of land."[5] Also, in its earliest form, public nuisance was a criminal cause of action used to abate activities that were considered to be injurious to the common good and public welfare.[6] As explained in the *Restatement (Second) of Torts*:

TIP: Practitioners should be aware of efforts to expand public nuisance theory and be mindful of the impact that such expansion can have on their liability risk profile.

> [A] public, or common, nuisance was an infringement of the rights of the Crown. The earliest cases appear to have involved purprestures, which were encroachments upon the royal domain or the public highway and could be redressed by a suit brought by the King. By the time of Edward III[,] the principle had been extended to the invasion of the rights of the public, represented by the Crown, by such things as interference with the operation of a public market or smoke from a lime-pit that inconvenienced a whole town. . . . The remedy remained exclusively a criminal one in the hands of the Crown until the sixteenth century, when it was first held that a private individual who had suffered particular damage differing from that sustained by the public at large might have a tort action to recover damages for the invasion of the public right.[7]

Public nuisance's ties to the use, or misuse, of property are long-standing.

Today, many courts look to the *Restatement* definition of 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 public right is unreasonable include the following: (a) [w]hether the conduct involves a significant interference with the public health, the public 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 (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.[8]

Peter C. Condron *is a partner in the Mass Tort, Product, and Consumer Litigation group at Crowell & Moring LLP in Washington, D.C. He is a former cochair of the ABA's Environmental Litigation and Toxic Tort Committee in the Section of Environment, Energy, and Resources (SEER). He may be reached at pcondron@crowell.com.* **Monty Cooper** *is a counsel in Crowell & Moring's Washington, D.C., office, where he is a member of the Mass Tort, Product, and Consumer Litigation and Environment & Natural Resources groups. His practice focuses on product liability, environmental, and complex civil litigation. He may be reached at mcooper@crowell.com.* **Jessica D. Gilbert** *is an associate in Crowell & Moring's Washington, D.C., office, where she is a member of the firm's Mass Tort, Product, and Consumer Litigation group. Her practice focuses on product liability and safety issues. She may be reached at jgilbert@crowell.com.*

Many courts now interpret the *Restatement* as identifying four distinct elements for a public nuisance claim: (1) the existence of a public right,[9] (2) a substantial and unreasonable interference with that right,[10] (3) proximate causation,[11] and (4) injury.[12] In jurisdictions that adopt the *Restatement* construct, public nuisance can be the result of negligence or intentional activity and can include pollution of air and navigable waterways, interference with the use of public parks, disorderly conduct, and the creation of public health hazards.[13]

In addition to the adoption of the *Restatement* construct by the courts, some state legislatures have codified public nuisance, creating definitions of public nuisance and requiring various elements of proof. For example, both the California and Oklahoma civil codes describe a public nuisance as "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 individuals may be unequal."[14] Many state statutes include both the "unreasonable interference" and "causation" elements,[15] while some states also require proof of wrongful or intentional conduct.[16] However, state courts often interpret public nuisance claims differently. For example, while many states require that the alleged "interference" be abatable—i.e., capable of being remedied—some states, like California, do not have such a requirement and allow a plaintiff to recover a damages award.

Not everyone can bring a suit for a public nuisance. States and courts have restricted the class of plaintiffs with the right to sue to (1) public authorities that are responsible for protecting the rights of the public (including state and federal agencies, like parks departments or environmental protection agencies); and (2) those individuals who suffer harm from the nuisance more particularized than the general one suffered by the public. The use of the doctrine of public nuisance to recover damages allegedly caused by the actions of multiple parties over many years is rising.[17]

Historically, the public nuisance doctrine has encompassed pollution of land, air, and water insofar as public interests are affected, as well as a wide range of interferences with public health and safety.[18] The public nuisance doctrine directly governs activity that interferes with public rights and declares that private property cannot be used in complete disregard of the interests of others and, more generally, that individual rights are necessarily bounded in a civil society.[19] The typical remedy for public nuisance is injunctive relief. Courts may also award damages—although arguably only to private parties, not public authorities—if injunctive relief is not enough.

Regarding remedies, in many states, private plaintiffs can recover compensatory damages for harms, covering the value lost due to the nuisance and any reduction in property value. Plaintiffs can also seek abatement, which would require defendants found liable to take corrective action to prevent future harm. Finally, if the nuisance is an ongoing activity, the court may issue an injunction ordering the harmful activity to cease.

Public nuisance litigation. As states have defined and interpreted public nuisance laws, plaintiffs—which have included individuals and state and local governments—have sought to expand the public nuisance concept beyond its historical moorings as a property tort to hold a variety of product manufacturers responsible for alleged public harms caused by lawful products. In the 1980s and 1990s, plaintiffs brought suits against asbestos manufacturers, alleging that these defendants created a public nuisance that affected the public's right to health and safety.[20] During this same period, similar suits were brought by states against tobacco manufacturers, almost all of which settled as part of the 1998 tobacco Master Settlement Agreement.[21] In the early 2000s, public entity plaintiffs, largely unsuccessfully, sued firearms manufacturers, seeking to pin liability for gun violence on these gunmakers.[22] And in the late 2000s, plaintiffs sued lead paint manufacturers[23] and subprime mortgage lenders[24] for alleged harms done. Most were dismissed because the court found that manufacturing a legal product differed from the creation of a nuisance *or* that a public nuisance claim requires the defendant to have control of the damage-causing instrumentality at the time of the nuisance's creation. Not all courts have required public nuisance claims to be tied to a defendant's misuse of real property.

For example, a number of California public entities prevailed in a representative public nuisance action against several lead paint or lead pigment manufacturers, in which the trial court ordered the defendants to pay $1.15 billion into a fund to be used to abate the public nuisance created by interior residential lead paint in the 10 counties represented by the state.[25] The court there determined that to succeed on a nuisance claim, a government plaintiff must prove that the defendant affirmatively engaged in conduct that assisted in the creation of the hazardous condition by promoting its product for a use it actually knew was harmful. Conversely, other courts have recognized that, consistent with the historical antecedents of public nuisance law, a claim for public nuisance must be tied to a defendant's improper use of real property; it cannot simply be a product liability claim in disguise.[26]

Plaintiffs have been drawn to public nuisance law as a way of seeking redress from product manufacturers for many reasons. First, many state public nuisance laws do not include a statute of limitations, thus preventing a restriction on the time available to take legal action.[27] Second, plaintiffs are often attracted to public nuisance's abatement remedy, which can require liable defendants to pay substantially to prevent future harm. In these abatement cases, plaintiffs often create allocation plans that require defendants to pay for addiction treatment and education programs in opioid cases, or to fund the abatement of lead paint.[28] Third, governmental plaintiffs view the causation standard in a public nuisance setting to be less rigorous than what they might otherwise need to prove in a product liability or negligence setting; rather than providing proof that a particular defendant's product caused a particular case of addiction, plaintiffs instead seek to prevail by proving that an opioid defendant contributed to a societal problem requiring abatement (although the relief sought often bears a curious resemblance to money damages rather than an injunction).

But most important, the concept of public nuisance is notably elastic, and plaintiffs have often sought to stretch it well beyond its traditional bounds. No less an authority than Dean Prosser has observed: "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people . . . ."[29] Some courts' approach to public nuisance seems to be, to borrow a phrase from Justice Stewart, "I know it when I see it." Indeed, in an oft-quoted line, one court expressed its concern that left unchecked, public nuisance could "become a monster that would devour in one gulp the entire law of tort."[30] It is this very lack of clarity that plaintiffs seek to exploit in many cases.

Not all courts have required public nuisance claims to be tied to a defendant's misuse of real property.

Opioid litigation. The use of opioids to treat pain first became prevalent in the United States in the early 1860s in the treatment of wounded soldiers during the Civil War.[31] Throughout the late 19th century and into the 20th century, Americans continued to use opioids as a way of treating pain. Finally, in the 1970s, after years of evidence of opioid misuse, Congress passed the Controlled Substances Act to regulate the use of these substances.[32] Nevertheless, the 1980s saw the introduction of Vicodin and other hydrocodone prescriptions for the treatment of pain outside of cancer or end-of-life therapy.

In 1995, Purdue Pharma, a pharmaceutical company, introduced OxyContin, a version of the opioid oxycodone, and marketed it as a less-addictive opioid pill.[33] Purdue Pharma had dramatic sales increases year over year, and other pharmaceutical companies launched additional hydrocodone and fentanyl-based medications while promoting the use of these drugs for everyday pain. Over the next two decades, doctors would increasingly prescribe opioids to treat pain, and it is alleged that as more people began using these drugs, addiction rates increased. Further, the opioids that have been the subject

of litigation involve both immediate and extended-release opioid pain medication, including OxyContin, morphine, and fentanyl. Also, besides public nuisance claims, plaintiffs have alleged that opioid products were defectively designed because companies failed to include safety mechanisms for these drugs and that manufacturers failed to adequately warn about addiction risks on drug packaging and in marketing activities.[34]

Although opioid lawsuits began in the early 2000s—with individuals addicted to opioids first bringing personal injury claims against opioid manufacturers—the lawsuits have increased in frequency in the last decade. In the past few years, various plaintiffs—including government agencies like counties, municipalities, and states—have cast their net wide and sued not only opioid suppliers (e.g., manufacturers and distributors) but also medical practitioners, hospitals, hospital systems, and pharmacies. Plaintiffs have sued these defendants on an individual and class basis.

Plaintiffs allege that manufacturers "grossly misrepresented" the risks of long-term use of opioids and distributors "failed to properly monitor suspicious orders."

Today, more than 3,000 cases have been filed across the country in state and federal courts by government entities and tribal nations against manufacturers, distributors, retail pharmacies, pharmacy benefit management plans, and others. Many of these suits were transferred to multidistrict litigation (MDL) 2804, *In re National Prescription Opiate Litigation*, in the U.S. District Court for the Northern District of Ohio for pretrial matters; and a mass litigation panel (MLP), *In re Opioid Litigation*, in West Virginia state court for most of the West Virginia government entity suits. MDL 2804 is a collection of opioid cases pending in the federal courts that were consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation before Judge Dan Aaron Polster in the U.S. District Court for the Northern District of Ohio. In MDL 2804, the plaintiffs allege that "manufacturers of prescription opioids grossly misrepresented the risks of long-term use of those drugs for persons with chronic pain, and distributors failed to properly monitor suspicious orders of those prescription drugs—all of which contributed to the current opioid epidemic."[35] The West Virginia MLP is made up of over 80 suits brought by the State of West Virginia, counties, hospitals, and municipalities over the opioid crisis and whether drug companies' marketing of opioids created a public nuisance.

Defendant Victories in State Bench Trials

Purdue Pharma. In May 2014, a group of California local governments sued five pharmaceutical companies in a complaint alleging a fraudulent opioid marketing scheme. In their sixth amended complaint, the plaintiffs asserted causes of action for false advertising, unfair competition, and public nuisance. On November 1, 2021, a California state judge in Orange County, in *People v. Purdue Pharma L.P.*, tentatively ruled that Los Angeles, Orange, and Santa Clara Counties and the City of Oakland failed to prove that the pharmaceutical companies created a public nuisance through their advertising of opioid products.[36] The court made its decision final on December 14, 2021.[37]

Overall, under California law, a public nuisance claim requires that defendants knowingly created an unreasonable interference with a "public right."[38] Interference is "unreasonable" if the gravity of harm inflicted outweighs its social utility. Further, California law requires proof of causation as a necessary element of any public nuisance claim.

Upon review, the court in *Purdue Pharma* found that the plaintiffs failed on both the "unreasonable interference" and "causation" elements of public nuisance.[39] First, the court held that the defendants' actions were reasonable: the defendants followed federal law when they submitted the drugs for approval by the Food and Drug Administration (FDA) and Drug Enforcement Administration (DEA). The FDA and DEA then approved the drugs, cognizant of their risks but determining that the medical benefits of appropriately prescribed opioids outweighed any potential harm caused by them.

Further, the defendants' actions complied with state law. Years earlier, the State of California had given its imprimatur to the manufacture and sale of these drugs when it adopted the Pain Patient's Bill of Rights in 1997, which ensured that opioid medications, even with their inherent risks, were available to patients who needed them and guaranteed that patients would have access to opioid medications when they were medically appropriate.[40] These laws also made certain that health-care practitioners could, in appropriate circumstances, prescribe opioid medications without risk of discipline.

Thus, given the federal and state governments' review and approval of these drugs and the Pain Patient's Bill of Rights, the court held that even if the defendants had engaged in some amount of false advertising, "any adverse downstream consequences flowing from *medically appropriate* prescriptions [could not] constitute an actionable public nuisance" because

the government had determined that the "social utility of medically appropriate prescriptions outweigh[ed] the gravity of the harm inflicted by them."[41] The defendants' conduct did not constitute an unreasonable interference with any public right.

Second, the plaintiffs failed to prove causation because they did not present evidence that the defendants' marketing practices caused doctors to write medically inappropriate prescriptions or that a rise in opioid prescriptions could be directly tied to the opioid epidemic. Although the plaintiffs presented evidence that the volume of opioid prescriptions increased dramatically between 1997 and 2011, the court found that "the mere proof of a rise in opioid prescriptions does not, without more, prove there was also a rise in medically *inappropriate* opioid prescriptions."[42] Further, the court determined that the plaintiffs provided no evidence that would help the court "distinguish between medically appropriate and medically inappropriate prescriptions," stating: "There is simply no evidence to show that the rise in prescriptions was not the result of the medically appropriate provision of pain medications to patients in need. A need the Pain Patient's Bill of Rights and the Intractable Pain Treatment Act were specifically designed to meet."[43]

Because (1) both the federal government and California "approve[d] the use of opioids in appropriate circumstances" and (2) the plaintiffs' evidence did not permit the court to "draw a distinction between [i] conduct resulting in the anticipated, approved use, and [ii] conduct resulting in improper use," the court found that the defendants did not create a public nuisance and found for the defendants on all claims.[44] On February 3, 2022, the court denied the plaintiffs' motions to set aside or vacate its final decision. In this order, the court stated, "I do not see a basis either to set aside or vacate or, leaving the judgment intact, to modify the statement of decision in any manner."[45]

Johnson & Johnson. On November 9, 2021, the Oklahoma Supreme Court, in *State ex rel. Hunter v. Johnson & Johnson*, reversed a trial court's $465 million judgment against Johnson & Johnson (J&J), finding that the lower court incorrectly interpreted the state's public nuisance statute when it held that the drug maker's opioid marketing campaign helped to create a public nuisance.[46]

In *Johnson & Johnson*, the trial court's proceedings and rulings are instructive in understanding the damages that plaintiffs often seek. In June 2017, the State of Oklahoma sued three pharmaceutical companies—J&J, Purdue Pharma, and Teva Pharmaceuticals—and invoked the state's public nuisance statute, asserting that opioid abuse qualified as a public nuisance and the companies created this public nuisance by their practices in marketing opioid products. Purdue Pharma and Teva eventually settled, but J&J proceeded to trial.

The 33-day bench trial focused on the State's sole claim against J&J for public nuisance under the Oklahoma statute, which provided that "[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."[47] On August 26, 2019, the trial judge found in the plaintiff's favor, awarding $572 million for an abatement of opioid damage to the state.[48] The trial court found that J&J engaged in false, misleading, and dangerous opioid marketing campaigns that promoted opioids as underprescribed and as having a low risk for abuse. The trial court also found that J&J's campaigns exponentially increased Oklahoma's opioid addiction rates and overdose deaths. Further, the court found that J&J's actions violated the state's public nuisance law by injuring or endangering the health and safety of communities.[49] The trial court also found no intervening causes to defeat a finding of direct and proximate cause.

The court's original judgment was later reduced by $107 million (due to a math error made by the court; the court inadvertently set aside $107.6 million to support programs treating addiction in babies exposed to opioids in the womb when it meant to set aside roughly $107,600), leaving a judgment of $465 million. The amount was based on testimony from experts as to the yearly cost for remediation as laid out in an abatement plan. The plan included money for a significant number of treatment options for residents, including addiction treatment (assessment and treatment at all levels for addicted individuals), public medication and disposal programs, universal screening, a pain management program for state Medicaid members, education services, and perinatal preventive services. Although the court ordered these extensive services, it limited Oklahoma's award to costs for one year because "the State did not present sufficient evidence of the amount of time and costs necessary, beyond year one" for abatement to be complete.[50] Both the State and J&J appealed the ruling.

On appeal, the Oklahoma Supreme Court, applying that state's nuisance statute,[51] stated that a nuisance consisted of an unlawful act that annoyed others, offended decency, or unlawfully interfered *with land*. The court reviewed precedent requiring that any finding of a public nuisance must be based only on conduct performed in a location within a party's control that harmed the general public's common rights to use land. The court also considered public nuisance's 12th-century English origins, when the Crown applied public nuisance to remedy conditions that infringed on royal property or blocked public roads or waterways.[52]

As a result, the court declined to extend the state's public nuisance law to J&J's marketing of prescription opioids, doing so for three reasons: (1) the manufacture and distribution of products rarely violate a public right, (2) a manufacturer rarely has control of its product once it is sold, and (3) a manufacturer could be held perpetually liable for its products under a nuisance theory. Ultimately, the court found public nuisance to be "fundamentally ill-suited to resolve claims against product manufacturers."[53] The court concluded that these claims were best addressed by product liability law, not

public nuisance.[54] The Oklahoma Supreme Court overturned the $465 million bench verdict against the defendants.

AmerisourceBergen. In July 2022, defendants continued to find success before judges, this time in West Virginia federal court in *City of Huntington v. AmerisourceBergen Drug Corp.*[55] There, the court dismissed the plaintiffs' (a West Virginia city and county) sole claim of public nuisance against three wholesale distributors.

Similar to the *Restatement*, under West Virginia law, a plaintiff must prove two key elements: (1) "an unreasonable interference with a right common to the general public," which can be proven by showing that the gravity of the harm (i.e., dangers of opioids) outweighed the social utility of the defendant's conduct (i.e., distribution of opioids for legitimate medical needs); and (2) that the defendant's conduct proximately caused the harm.[56] To prove "unreasonable interference," the plaintiffs argued that the defendants' distribution of a large volume of prescription opioids into the plaintiffs' communities—allegedly more than 50 million dosage units from 2006 to 2014—was "per se unreasonable."[57] In an effort to establish causation, the plaintiffs contended that the defendants' distribution systems caused opioids to be diverted into the illicit drug market, resulting in an oversupply of opioids and an epidemic in their communities.

The court, however, rejected these arguments. First, the defendants did not act unreasonably. As the court noted, for years, medical professionals have considered opioids to be essential to the effective treatment of chronic pain. As a result, the social utility of the responsible use of these drugs outweighed the dangers of their misuse. The distributors also responsibly distributed these drugs pursuant to doctors' lawful prescriptions. Given their lawful conduct, the defendants' actions were not unreasonable. As the court reasoned, "the distribution of medicine to support the legitimate medical needs of patients as determined by doctors exercising their medical judgment in good faith cannot be deemed an unreasonable interference with a right common to the general public."[58]

Second, the plaintiffs failed to prove that the defendants' conduct caused the opioids to be diverted to illicit uses. The defendants shipped prescription opioids only to licensed pharmacies in response to doctors' prescriptions, and the defendants did not control whether the opioids arrived at the pharmacies or were diverted into the illegal marketplace. In fact, the defendants worked to prevent diversion by designing systems to identify suspicious orders and correcting problems with these systems as they arose. For the court, these efforts were enough to show that the defendants' actions did not cause diversion.

Finally, in rejecting the plaintiffs' claim, the court expressed its overall objection to extending public nuisance beyond its traditional application in cases involving land or property. The court noted that the West Virginia Supreme Court had historically applied public nuisance law only in the context of conduct that interfered with public property or resources. Given this history, the court concluded that to extend public nuisance beyond property "to cover the marketing and sale of opioids [would be] inconsistent with the history and traditional notions of nuisance."[59]

Plaintiff Victories in Jury Trials

In re National Prescription Opiate Litigation. Although the pharmaceutical manufacturer and distributor defendants have found success before judges, retail pharmacy defendants did not fare as well before a jury. On November 23, 2021—in a case that served as the first bellwether trial from MDL 2804 to test public nuisance claims against pharmacies—an Ohio federal jury found that several pharmacies "engaged in intentional and/or illegal conduct [that] was a substantial factor in producing the public nuisance" that resulted in the opioid epidemic in Lake and Trumbull Counties in northeastern Ohio.[60] These counties accused the pharmacies of selling massive amounts of addictive painkillers with insufficient oversight, which exacerbated societal woes including fatal overdoses, crime, and orphaned children. In many instances, the plaintiffs argued that the pharmacists dispensed individual prescriptions despite detecting "red flags" indicating that the prescription likely was not for a legitimate medical purpose and that the pharmacies had a duty to investigate the red flags and to refuse to dispense such prescriptions if the red flag could not be cleared. The plaintiffs also alleged that the pharmacists shipped opioid orders through their distribution channels despite observing obvious signs that the orders exceeded legitimate medical needs. The court allowed the public nuisance claim to go to the jury because the court held, in a pretrial ruling, that the defendants had "control" over the nuisance in that their "conduct in carrying out their business activities [was] the instrumentality by which the nuisance was created and fueled."[61] However, at least one court recently expressed doubt that "a manufacturer's choice to carry out its daily business activities constitutes control over a product after it has been sold."[62]

Besides a victory for plaintiffs, this case was also significant because it was the first jury verdict involving retail pharmacies—a class of defendants that generally has been reluctant to agree to negotiated settlements in opioid-related litigation. The plaintiffs argued that pharmacies ignored countless red flags about suspicious opioid orders and were able to link conduct at the defendant pharmacies' retail locations and corporate headquarters to the public nuisance created by the opioid epidemic. This causal link may be what differentiates the verdicts involving manufacturer defendants and those involving retail defendants, where judges found that according to the specifics of their own states' public nuisance laws, the manufacturer defendants' activities were too removed from the overdoses and deaths for them to be liable for public nuisance. The retail defendants plan to appeal the verdict, which was limited to liability. The damages phase of the trial began in May 2022, with the county government plaintiffs seeking a $2 billion-plus abatement program.[63]

In re Opioid Litigation. In addition, on December 30, 2021, a New York jury in Suffolk County Supreme Court found that Teva Pharmaceutical Industries Ltd., an Israeli multinational pharmaceutical company, substantially contributed to an epidemic of opioid abuse in New York relating to its generic opioid medications.[64] In this case, public nuisance claims were permitted to go to the jury because the court rejected the defendants' argument that public nuisance was a property-based claim that did not apply to the sale of products.[65] Instead, the court remained "open to the possibility that public nuisance may be an appropriate tool to address the consequential harm from the defendants' concerted efforts to market and promote their products for sale and distribution, particularly as such efforts are alleged to have created or contributed to a crisis of epidemic proportions."[66]

The jury found that Teva created a public nuisance in Suffolk and Nassau Counties by creating an oversupply of opioids. The jury also found that Anda Inc., a drug distributor owned by Teva that the plaintiff did not name, contributed to the epidemic in the two counties. Specifically, the jury agreed with the counties' arguments that Teva downplayed the risks of opioid use, which led to communities being flooded with prescriptions. The jury also concluded that Anda's failure to flag suspicious orders contributed to an epidemic of opioid abuse in the state. This verdict concluded the liability phase, and Teva and Anda will now face a jury again in the damages phase of the trial, which is set to begin later this year.

Status of Other Ongoing Opioid Cases

These decisions are only the opening round of opioid litigation, given the number of opioid cases still pending in courts across the country in the years to come. For example, cases continue to proceed in MDL 2804 in Ohio federal court. Many of those cases, especially against the large pharmaceutical distributors and J&J, have already settled for damages totaling more than $26 billion, and additional settlements may come in the future. Also, in West Virginia, a state court trial is expected to begin soon in a case involving claims against opioid distributors.

Final Thoughts

Going forward, opioid defendants may continue to receive a more sympathetic hearing before judges, while plaintiffs may have a more favorable audience with juries. Judges appear less inclined to hold product manufacturers liable under public nuisance given, as explained in *Purdue Pharma*, the difficulty of proving the "unreasonable interference" and "causation" elements in cases involving highly regulated and legal products like opioids and where there are multiple intermediaries between the manufacturer and patients. On the other hand, juries appear more sympathetic to plaintiffs, especially government entities suing on behalf of the jury members' community and their peers. Thus, the parties in these cases will need to consider these results as they litigate these matters, plan their case strategy, and defend their interests.

The future of opioid litigation ultimately may turn on how far courts will expand the concept of public nuisance. The trend over the last two decades has been to return that cause of action to its traditional roots as a claim meant to prohibit the unlawful use of a defendant's real property. Only one case—*State ex rel. Hunter v. Johnson & Johnson*—has proceeded beyond the trial court level, and that case resulted in a favorable ruling for the defendants on applying the public nuisance doctrine. Additional appellate guidance will be critical in determining whether judges in opioid cases will allow public nuisance to become "all things to all people" or a more limited, property-based cause of action. ◄

Notes

1. *Understanding the Opioid Overdose Epidemic*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/opioids/basics/epidemic.html (last reviewed June 1, 2022); *see also What Is the U.S. Opioid Epidemic?*, U.S. Dep't of Health & Hum. Servs., https://www.hhs.gov/opioids/about-the-epidemic/index.html (last reviewed Oct. 27, 2021).

2. People v. Purdue Pharma L.P., No. 30-2014-00725287, 2021 Cal. Super. LEXIS 31743 (Dec. 14, 2021); State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719, 721, 726 (Okla. 2021) (holding that "Oklahoma public nuisance law does not extend to the manufacturing, marketing, and selling of prescription opioids"; a public nuisance involves the violation of a "public right," and a public right is more than an aggregate of private rights by a large number of injured people).

3. City of Huntington v. AmerisourceBergen Drug Corp., No. 3:17-cv-01362, 2022 U.S. Dist. LEXIS 117322 (S.D. W.Va. July 4, 2022).

4. County of Lake v. Purdue Pharma (*In re* Nat'l Prescription Opiate Litig.), No. 1:17-md-2804 (N.D. Ohio Nov. 23, 2021); *In re* Opioid Litig., No. 400000/2017 (N.Y. Sup. Ct.); County of Suffolk v. Purdue Pharma L.P., No. 400001/2017 (N.Y. Sup. Ct.); County of Nassau v. Purdue Pharma L.P., No. 400008/2017 (N.Y. Sup. Ct.); State v. Purdue Pharma L.P., No. 400016/2018 (N.Y. Sup. Ct.).

5. W. Page Keeton et al., Prosser & Keeton on Torts § 86 (5th ed. 1984).

6. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 790–91, 793–94 (2003).

7. Restatement (Second) of Torts § 821B cmt. a (Am. L. Inst. 1979); *see also id.* § 821C cmt. a ("The original remedies for a public nuisance were a prosecution for a criminal offense or a suit to abate or enjoin the nuisance brought by or on behalf of the state or an appropriate subdivision by the proper public authority. The first recorded case permitting a private action in tort was decided in 1536.").

8. *Id.* § 821B.

9. *Id.* § 821B cmt. g ("There must be some interference with a public right . . . [that is] 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.").

10. The *Restatement (Second) of Torts* lists specific factors to be considered in determining whether conduct is an unreasonable interference (e.g., foreseeability, significant interference with public health, safety, peace, comfort). A public nuisance must substantially interfere with a public right and cause unreasonable harm; it is not sufficient that the interference causes only an annoyance or disturbance of everyday life.

11. William L. Prosser, Handbook of the Law of Torts § 71, at 557–58 (1941).

12. *See, e.g.*, City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1113 (Ill. 2004).

13. Gifford, *supra* note 6, at 775.

14. Cal. Civ. Code § 3480; Okla. Stat. tit. 50, § 2.

15. Victor E. Schwartz et al., *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 Okla. L. Rev. 629, 634 (2010) (public nuisance claims have long been understood to rest on an unreasonable interference "with a right common to the general public").

16. Bentley v. City of New Haven, No. CV-97-0403487S, 2001 Conn. Super. LEXIS 2505 (Sept. 4, 2001). In *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 529 (Ct. App. 2017), the court held that product manufacturers could be responsible for abatement of harms caused by their products under a public nuisance theory, where they affirmatively engaged in conduct that assisted in the creation of the hazardous condition by promoting their product for a use they actually knew was harmful. Constructive knowledge was not enough.

17. Henry N. Butler & Todd J. Zywicki, *Expansion of Liability under Public Nuisance*, 18 Sup. Ct. Econ. Rev. 1 (2010).

18. Keeton et al., *supra* note 5, § 90, at 643–45.

19. Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in a Pod?*, 45 U.C. Davis L. Rev. 1075, 1079 (2012).

20. *See, e.g.*, City of San Diego v. U.S. Gypsum Co., 35 Cal. Rptr. 2d 876 (Ct. App. 1994); Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915, 920–21 (8th Cir. 1993); Corp. of Mercer Univ. v. Nat'l Gypsum Co., No. 85-126-3-MAC, 1986 WL 12447, at *6 (M.D. Ga. Mar. 9, 1986).

21. *See, e.g.*, State v. Am. Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997); *see also* Donald G. Gifford, *Impersonating the Legislature: State Attorney General and Parens Patriae Product Litigation*, 49 B.C. L. Rev. 913, 921–23 (2008) (discussing tobacco public nuisance litigation).

22. *See, e.g.*, Ileto v. Glock Inc., 349 F.3d 1191 (9th Cir. 2003); City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3d Cir. 2002); Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004).

23. *See, e.g.*, *In re* Lead Paint Litig., 924 A.2d 484 (N.J. 2007); State v. Lead Indus. Ass'n, 951 A.2d 428, 449 (R.I. 2008).

24. *See, e.g.*, City of Cleveland v. Ameriquest Mortg. Sec., Inc., 621 F. Supp. 2d 513 (N.D. Ohio 2009).

25. *See* People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499 (Ct. App. 2017). The appellate court, however, ordered the amount of the abatement fund to be reduced and recalculated because it included amounts for which it determined the defendants were not liable. The amount was cut by almost half, and the case eventually settled for $305 million in 2019. Press Release, Off. of the Santa Clara Cnty. Counsel, California Counties and Cities Announce Groundbreaking $305 Million Settlement of Landmark Lead Paint Litigation (July 17, 2019), https://counsel.sccgov.org/sites/g/files/exjcpb426/files/July%2017%2C%202019%20Press%20Release%20-%20Settlement%20of%20Landmark%20Lead%20Paint%20Litigation.pdf.

26. *See, e.g.*, *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., No. 1:00-1898, 2015 U.S. Dist. LEXIS 88035 (S.D.N.Y. July 2, 2015).

27. Jan Hoffman, *The Core Legal Strategy against Opioid Companies May Be Faltering*, N.Y. Times, Nov. 12, 2021, at A1.

28. *Id.*; *see ConAgra*, 227 Cal. Rptr. 3d 499.

29. Keeton et al., *supra* note 5, § 86, at 616.

30. Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993).

31. *The Origin and Causes of the Opioid Epidemic*, Geo. Behav. Health Inst. (Aug. 14, 2018), https://www.georgetownbehavioral.com/blog/origin-and-causes-of-opioid-epidemic.

32. 21 U.S.C. §§ 801 *et seq*.

33. *The Role of Purdue Pharma and the Sackler Family in the Opioid Epidemic: Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. (Dec. 17, 2020), https://www.govinfo.gov/content/pkg/CHRG-116hhrg43010/html/CHRG-116hhrg43010.htm.

34. Richard C. Ausness, *The Role of Litigation in the Fight against Prescription Drug Abuse*, 116 W.Va. L. Rev. 1117, 1124–25 (2014).

35. *MDL 2804*, U.S. Dist. Ct. N.D. Ohio, https://www.ohnd.uscourts.gov/mdl-2804 (last visited Aug. 1, 2022).

36. People v. Purdue Pharma L.P., 2021 Cal. Super. LEXIS 31743 (Dec. 14, 2021).

37. Craig Clough, *Opioid Makers Cement Calif. Win as Judge Spurns Objections*, Law360 (Dec. 14, 2021), https://www.law360.com/articles/1448840/opioid-makers-cement-calif-win-as-judge-spurns-objections.

38. *See* People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499 (Ct. App. 2017).

39. *Purdue Pharma*, 2021 Cal. Super. LEXIS 31743, at *61.

40. Cal. Health & Safety Code § 124961.

41. *Purdue Pharma*, 2021 Cal. Super. LEXIS 31743, at *18.

42. *Id.* at *18–19.

43. *Id.* at *19 (citation omitted).

44. *Id.* at *29.

45. Cara Salvatore, *Calif. Judge Unpersuaded to Nix Drugmakers' Opioid Trial Win*, Law360 (Feb. 3, 2022), https://www.law360.com/articles/1461890/calif-judge-unpersuaded-to-nix-drugmakers-opioid-trial-win.

46. 499 P.3d 719 (Okla. 2021); *see also* Settlement Agreement, State *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2019 WL 4059721 (Okla. Dist. Ct. Apr. 2, 2019).

47. Okla. Stat. tit. 50, § 2.

48. Jackie Fortier & Brian Mann, *Johnson & Johnson Ordered to Pay Oklahoma $572 Million in Opioid Trial*, NPR (Aug. 26, 2019), https://www.npr.org/sections/health-shots/2019/08/26/754481268/judge-in-opioid-trial-

rules-johnson-johnson-must-pay-oklahoma-572-million.

49. Judgment after Non-Jury Trial, *Johnson & Johnson*, No. CJ-2017-816, 2019 WL 4019929, at *4 (Okla. Dist. Ct. Aug. 26, 2019) ("Defendants, acting in concert with others, embarked on a major campaign in which they used branded and unbranded marketing to disseminate the messages that pain was being undertreated and 'there was a low risk of abuse and a low danger' of prescribing opioids to treat chronic, non-malignant pain and overstating the efficacy of opioids as a class of drug . . . designed to reach Oklahoma doctors through multiple means and at multiple times over the course of the doctor's professional education and career in [the state].").

50. *Id.* at *20.

51. Okla. Stat. tit. 50, §§ 1 *et seq.*

52. *See* State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719, 723 (Okla. 2021).

53. *Id.* at 726.

54. This sentiment is similar to the court's reasoning in *State v. Lead Indus. Ass'n*, 951 A.2d 428, 444, 456 (R.I. 2008) ("[P]ublic nuisance and products liability are two distinct causes of action, each with rational boundaries that are not intended to overlap.").

55. No. 3:17-cv-01362, 2022 U.S. Dist. LEXIS 117322 (S.D. W. Va. July 4, 2022).

56. *Id.* at *191.

57. *Id.* at *118.

58. *Id.* at *192.

59. *Id.* at *185.

60. Verdict Form, County of Lake v. Purdue Pharma (*In re* Nat'l Prescription Opiate Litig.), No. 1:17-md-2804 (N.D. Ohio Nov. 23, 2021).

61. *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804, 2019 WL 3737023, at *10 (N.D. Ohio June 13, 2019).

62. *In re* Paraquat Prods. Liab. Litig., No. 3:21-md-3004, 2022 U.S. Dist. LEXIS 26303, at *33 (S.D. Ill. Feb. 14, 2022).

63. Jeff Overley, *Opioid Jurors Detail Talks as Pharmacy Trial Gets Feisty Start*, Law360 (May 11, 2022), https://www.law360.com/articles/1491572/opioid-jurors-detail-talks-as-pharmacy-trial-gets-feisty-start; Eric Heisig, *Ohio Counties Open to Lowering Opioid Damages Request*, Law360 (June 13, 2022), https://www.law360.com/articles/1499995/ohio-counties-open-to-lowering-opioid-damages-request.

64. The cases are *In re Opioid Litig.*, No. 400000/2017; *County of Suffolk v. Purdue Pharma L.P.*, No. 400001/2017; *County of Nassau v. Purdue Pharma L.P.*, No. 400008/2017; and *State v. Purdue Pharma L.P.*, No. 400016/2018, all in the New York Suffolk County Supreme Court.

65. *In re* Opioid Litig., No. 400000/2017, 2019 N.Y. Misc. LEXIS 3324 (Sup. Ct. June 21, 2019).

66. *Id.* at *26.