South Carolina Law Review

Volume 70
Issue 3 *Volume 70, Issue 3, Spring 2019*

Article 3

Spring 2019

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

Luther J. Strange III

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

Part of the Food and Drug Law Commons, State and Local Government Law Commons, and the Torts Commons

Recommended Citation

Luther J. Strange II., 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 (2019).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

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

The Honorable Luther J. Strange III*

I. INTRODUCTION 518

II. A HISTORY OF LOCAL GOVERNMENT USE OF PUBLIC NUISANCE LITIGATION 519
- A. *The Origins and Evolution of Public Nuisance Litigation* 519
  - 1. *Municipal Suits Against Firearms Manufacturers* 521
  - 2. *Municipal Suits Against Oil Producers Relating to Climate Change* 523
  - 3. *Municipal Suits Against Banks and Lenders for Subprime Lending Practices* 527
- B. *Opioid Litigation and the Uncertain Future Expansion of Public Nuisance Claims* 530

III. LAWSUITS BROUGHT BY LOCAL GOVERNMENTS ASSERTING PUBLIC NUISANCE CLAIMS ARE AN IMPROPER, OR AT BEST, ILL-SUITED FORUM IN WHICH TO ADDRESS POLICY-TYPE QUESTIONS 536
- A. *Separation of Powers* 538
- B. *Nonjusticiable Political Question* 544
- C. *Preemption* 548
- D. *Primary Jurisdiction* 551
- E. *Difficulty of Establishing and Calculating Damages that are Traceable to and Proximately Caused by Defendants' Lawful Conduct or Products* 554
- F. *Dormant Commerce Clause* 556

IV. LOCAL GOVERNMENT PUBLIC NUISANCE SUITS DISRUPT THE ABILITY OF STATE ATTORNEYS GENERAL TO BRING AND MANAGE LITIGATION ARISING FROM THE SAME ALLEGED CONDUCT 558

---

* Mr. Strange is the Principal at Luther Strange & Associates, LLC. He previously served as the United States Senator from Alabama and as the 47th Attorney General of the State of Alabama.

Published by Scholar Commons, 2019

South Carolina Law Review, Vol. 70, Iss. 3 [2019], Art. 3

V. PUBLIC NUISANCE SUITS BROUGHT BY LOCAL GOVERNMENTS ADVERSELY AFFECT THE FUNCTIONING OF THE JUSTICE SYSTEM 561

VI. CONCLUSION 563

I. INTRODUCTION

Recent years have seen a proliferation of governmental public nuisance litigation. The latest targets of such lawsuits have been manufacturers and distributors of opioid pain medication. Many of these suits, like those brought in the mid-1990s against the stalwarts of the tobacco industry, are filed by state Attorneys General to recover for harms ostensibly suffered by the citizens of the state. In a crucial development, however, a number of local governments have filed parallel lawsuits against opioid manufacturers and distributors, asserting public nuisance claims and seeking to recover for alleged injuries suffered by the local governments themselves.

This most recent wave of governmental public nuisance litigation is but a continuation of a two-decade trend in which local governments have sought to expand on the traditional scope of the public nuisance cause of action in hopes of recovering from deep-pocketed defendants in a variety of industries. The evolution of the public nuisance claim, however, has been fraught with difficulties, and in many instances, has been rebuffed by the courts. In addition, such public nuisance lawsuits are in many instances merely a clumsy way of resolving what is, at bottom, a policy question. Furthermore, such lawsuits disrupt the justice system's ability to justly and efficiently resolve the claims of those who have, in fact, actually been injured by the products or conduct at issue.

Part II of this Article summarizes a history of local government's use of public nuisance litigation. Part III explains that, for a variety of reasons, such lawsuits are an improper, or at best, ill-suited forum in which to address certain topics that necessarily involve the resolution of policy-type questions. Part IV further explains how such lawsuits disrupt the ability of states' Attorneys General to bring and manage litigation involving the same alleged conduct. Finally, Part V argues public nuisance suits brought by local governments have a negative effect on the effective and equitable functioning of the justice system.

II. A HISTORY OF LOCAL GOVERNMENT USE OF PUBLIC NUISANCE LITIGATION

Over the past 226 years,[1] the cause of action for public nuisance has evolved from a criminal remedy primarily employed to protect and preserve the rights and property shared by the public generally into a common law tort that has increasingly gained favor as a tool by which local governments attempt to galvanize popular opinion or to effect changes the locality was unable to achieve through its geographically limited legislative authority. As explained more fully below, this evolution has quickened in recent decades and continues apace in the form of hundreds of municipal public nuisance suits recently brought against makers and distributors of pharmaceutical drugs.

A. The Origins and Evolution of Public Nuisance Litigation

From its earliest use at the founding of the Republic, the term "public nuisance" has referred to conduct or a condition that interferes with or impairs a public right—a right commonly held by all members of the general public.[2] At its inception, the common law action for public nuisance was exclusively a criminal remedy, and the prosecution of such claims was reserved for state or government officials seeking injunctive relief or criminal conviction for harms to the public.[3] As the doctrine developed at common law, it was

---

1. The claim of public nuisance has been recognized in American jurisprudence since at least 1792, *see Burrows v. Pixley*, 1 Root 362, 362 (Conn. Super. Ct. 1792), and, prior to that, was a known aspect of English common law in use in America. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 800 (2003) ("As was the case with many aspects of the common law, the English law of public nuisance, or common nuisance, was adopted without significant change in colonial America and subsequently in the new republic during its early years.").

2. *See* RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1977); *see also* Gifford, *supra* note 1, at 800 ("The early American cases of what would now be regarded as public nuisance fell into two categories. Most public nuisance actions involved the obstruction of either public highways or navigable waterways.").

3. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. a; *see also* Gifford, *supra* note 1, at 814. Even today, though the doctrine of public nuisance has broadened somewhat, vestiges of this limitation remain, and a private individual may only bring a cause of action for public nuisance if he can show some special injury, unique from that suffered by the rest of the general public. *See* RESTATEMENT (SECOND) OF TORTS § 821C(a); *see also, e.g.*, Ileto v. Glock Inc., 349 F.3d 1191, 1212 (9th Cir. 2003) (upholding gunshot victims' public nuisance claim on basis of special injury); NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 499 (E.D.N.Y. 2003) (dismissing public nuisance claim brought by civil rights organization after finding that the harm suffered by the African-American community in the state of New York was the same as the injury to the rest of the public).

South Carolina Law Review, Vol. 70, Iss. 3 [2019], Art. 3

expanded to cover a wide-ranging class of minor criminal offenses, essentially applying to any interference with the interest of the general population.[4] According to the Restatement (Second) of Torts, these interests included public health, safety, morals, peace, comfort, and convenience:

> [I]nterference 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.[5]

As states began codifying criminal statutes and moving away from common law crimes, courts recognized that, given the unreasonableness of acts traditionally recognized as a public nuisance crime, such activities would also constitute a tort.[6] Today, the common law tort of public nuisance is far more prevalent than the common law crime, although the original tests for determining when a public nuisance arises and who may bring such claims remain applicable.[7]

As the nature of the public nuisance claim has evolved, so has the way in which the claim is used.[8] Over the last century, municipalities and governmental subdivisions have increasingly turned to public nuisance claims as a means of protesting or effecting change in pressing policy issues. Local governments have done so in a variety of suits relating to gun violence, climate change, and subprime lending practices. These suits—and the mixed results they have met—are described more fully below.

---

4. RESTATEMENT (SECOND) OF TORTS § 821B cmt. b.

5. *Id.*

6. *See id.*

7. *See id.*

8. *See generally* Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 869–70 (2004) (noting the use of public nuisance as a liability theory for government plaintiffs); Raymond H. Brescia, *On Public Plaintiffs and Private Harms: The Standing of Municipalities in Climate Change, Firearms, and Financial Crisis Litigation*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7, 8 (2010) (recognizing municipal plaintiffs as the parties most often asserting public nuisance claims).

1. Municipal Suits Against Firearms Manufacturers

In the late 1990s into the early 2000s, numerous municipalities brought actions against handgun manufacturers, seeking to recover costs arising from gun violence.[9] The outcomes of such lawsuits—and the States' legislative responses to them—have been mixed.[10]

For example, some state legislatures—like Louisiana's—have enacted laws prohibiting municipalities from bringing such claims against gun manufacturers.[11] Louisiana's statute was enacted shortly after the City of New Orleans filed the first suit of this kind in 1998 against fifteen gun manufacturers, five local pawnshops, and three firearms trade associations.[12] Subsequently, the Louisiana legislature passed another statute declaring that the manufacturing of firearms is not "unreasonably dangerous."[13] In 2001, the Louisiana Supreme Court upheld the statute, effectively mooting the City's lawsuit.[14] Similarly, the Georgia legislature enacted a statute prohibiting any government entity other than the state of Georgia itself from bringing actions against gun manufacturers and distributors only five days after the City of Atlanta filed a public nuisance action.[15]

Of the municipal suits that proceeded through the litigation process, courts have often ruled in favor of the defendant gun manufacturers.[16] For example, only a few weeks after the City of New Orleans filed its later-mooted lawsuit, the City of Chicago followed suit, bringing claims against multiple arms manufacturers and retailers alleging the defendants knowingly and willfully facilitated the use, transport, and sale of firearms in violation of

---

9. *See generally* Ausness, *supra* note 8, at 840–53 (summarizing a dozen local governments' lawsuits, including some alleging public nuisance causes of action, against firearms manufacturers seeking to recover the costs of municipal expenses allegedly related to gun violence); Brescia, *supra* note 8, at 12–20 (same); Doug Morgan, Comment, *What in the Wide, Wide World of Torts Is Going On? First Tobacco, Now Guns: An Examination of* Hamilton v. Accu-Tek *and the Cities' Lawsuits Against the Gun Industry*, 69 MISS. L.J. 521 (1999) (analyzing a 1999 verdict in the Eastern District of New York against fifteen arms manufacturers and commenting on the recent surge in similar lawsuits).

10. *See generally* Ausness, *supra* note 8, at 871–73 (describing courts' differing views on whether to expand the traditional scope of public nuisance law to encompass municipal claims against product manufacturers).

11. LA. STAT. ANN. § 40:1799 (2001).

12. *See* Brent W. Landau, Note, *State Bans on City Gun Lawsuits*, 37 HARV. J. ON LEGIS. 623, 624–25 (2000); *see* Morgan, *supra* note 9, at 528–29.

13. LA. STAT. ANN. § 9:2800.60 (Supp. 2005).

14. Morial v. Smith & Wesson Corp., 785 So. 2d 1, 19 (La. 2001).

15. Smith & Wesson Corp. v. City of Atlanta, 543 S.E.2d 16, 18 (Ga. 2001) (footnote omitted); *see also* GA. CODE ANN. § 16-11-184.

16. *See, e.g.*, City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1126 (Ill. 2004).

Chicago's gun laws and enabled the growth of the black market for illegal guns in the city.[17] The trial court dismissed the lawsuit, and the Illinois Supreme Court affirmed, holding there was no public right of freedom from the threat of illegal conduct.[18] Moreover, the court held that gun manufacturers and retailers were engaged in a lawful business such that, even if a public right did exist, it had suffered no unreasonable interference due to defendants' conduct.[19] Likewise, the Connecticut Supreme Court and the Florida Court of Appeals rejected similar claims by the City of Bridgeport, Connecticut and Miami-Dade County, Florida against gun manufacturers and distributors.[20]

The United States Court of Appeals for the Third Circuit also held that under New Jersey state law, public nuisance claims are not permitted "against manufacturers for lawful products that are lawfully placed in the stream of commerce."[21] Furthermore, the Third Circuit recognized that "courts have enforced the boundary between the well-developed body of product liability law and public nuisance law," and "if public nuisance law were permitted to encompass product liability, nuisance law 'would become a monster that would devour in one gulp the entire law of tort.'"[22] The following year, the Third Circuit reaffirmed its decision under Pennsylvania law, holding that "public nuisance is a matter of state law," and "Pennsylvania precedent does not support the public nuisance claim [the City of Philadelphia] advance[s] here . . . ."[23] The court also noted that "the causal chain is too attenuated to make out a public nuisance claim" because "the gun manufacturers do not

17. Morgan, *supra* note 9, at 530–32.

18. City of Chicago v. Beretta U.S.A. Corp., No. 98 CH 15596, 2000 WL 35509506 (Ill. Cir. Ct. Sept. 15, 2000) (dismissing City of Chicago's complaint); *see City of Chicago*, 821 N.E.2d at 1126.

19. *City of Chicago*, 821 N.E.2d at 1121–27.

20. Ganim v. Smith & Wesson Corp., 780 A.2d 98, 122 (Conn. 2001) (holding that the city could not recover purely economic losses arising from gun-related injuries to city residents); Penelas v. Arms Tech. Inc., 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001) (refusing to hold that the defendants' actions constituted a public nuisance and recognizing that the County's claims were merely "an attempt to regulate firearms and ammunition through the medium of the judiciary . . . because of the County's frustration at its inability to directly regulate firearms, an exercise proscribed by section 790.33, Florida Statutes (1999), which expressly preempts to the state legislature the entire field of firearm and ammunition regulation").

21. Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 540 (3d Cir. 2001).

22. *Id.* at 540 (quoting Tioga Pub. Sch. Dist. v. U.S. Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993)).

23. City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 421 (3rd Cir. 2002).

exercise significant control over the source of the interference with the public right."[24]

On the other hand, some courts have permitted these actions to proceed to trial.[25] For instance, the Ohio Supreme Court—in a 4–3 opinion—adopted a broad definition of public nuisance, holding that an "action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public."[26] The court rejected the defendants' argument that their lack of control over the firearms at the time of the injury was fatal to the public nuisance claim.[27] Instead, the court held that the creation of and supplying to an illegal firearm market as a result of defendants' alleged "ongoing conduct of marketing, distributing, and selling firearms in a manner that facilitated their flow into the illegal market" would constitute a viable public nuisance claim and reinstated the lawsuit.[28] Both the Supreme Court of Indiana and the Appellate Division of the New Jersey Superior Court have likewise held that a public nuisance claim can stand even where the defendant was not engaged in any unlawful activity.[29]

2. *Municipal Suits Against Oil Producers Relating to Climate Change*

Another area in which local governments have sought to expand the traditional bounds of public nuisance claims involves suits against oil producers for injuries allegedly sustained as a result of climate change. The Supreme Court and the Ninth Circuit have declined to opine whether municipalities have standing to bring such suits, holding instead that such claims were impermissible because the federal common law upon which they

24. *Id.* at 422.

25. *See, e.g.*, White v. Smith & Wesson Corp., 97 F. Supp. 2d 816, 829 (N.D. Ohio 2000) (holding that the City of Cleveland's public nuisance claim survived defendants' motion to dismiss because the claim would be allowable if the city could prove that defendants were negligently creating or enabling the nuisance conditions).

26. City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1142 (Ohio 2002).

27. *Id.* at 1143.

28. *Id.* at 1143–44.

29. City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1232–33 (Ind. 2003); James v. Arms Tech., 820 A.2d 27, 50–53 (N.J. Super. Ct. App. Div. 2003) (upholding City of Newark's public nuisance claim based on the Restatement (Second) of Torts definition of "public nuisance" as not requiring interference with property or "conduct that is proscribed by a statute, ordinance or administrative regulation").

South Carolina Law Review, Vol. 70, Iss. 3 [2019], Art. 3

were based had been "displaced" by federal statutory law, and two recent district court rulings have dismissed similar lawsuits for other reasons.[30]

The historic backdrop against which such lawsuits are assessed dates back to the Supreme Court's 2007 opinion in *Massachusetts v. EPA*,[31] holding the Commonwealth of Massachusetts had standing to sue the United States Environmental Protection Agency ("EPA") challenging the EPA's failure to enact regulations under the Clean Air Act pertaining to specific pollutants.[32] The Supreme Court held Massachusetts had standing both as a sovereign state[33] and as an owner of property affected by rising water levels allegedly caused by global warming.[34] The Court further grounded its holding on the fact that Congress had expressly authorized suits challenging the EPA's failure to enact regulations under the Clean Air Act, which thus provided a "procedural right" to ensure the EPA's enforcement of the Act.[35]

In the wake of the Court's holding in *Massachusetts v. EPA*, litigants began attempting to expand the application of that holding to other claims and settings.[36] The first global warming cases based on a public nuisance claim were filed by the City of New York, eight states and three land trusts in 2004 in the Southern District of New York.[37] The plaintiffs sued five major electric power companies that owned and operated fossil-fuel-fired power plants in

30. *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423 (2011); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 856–57 (9th Cir. 2012).

31. *See* 549 U.S. 497, 518–21 (2007).

32. *Id.* at 518–21.

33. *Id.* at 518–20 (noting the "considerable relevance that the party seeking review here is a sovereign State," emphasizing the "special position and interest of Massachusetts," and noting that in light of "Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis").

34. *Id.* at 519 (noting Massachusetts' status as an owner of "a great deal of the 'territory alleged to be affected'" constitutes a particularized injury and "only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power").

35. *Id.* at 516 (citing 42 U.S.C. § 7607(b)(1) (2012)); *see also id.* at 517–18 ("[A] litigant to whom Congress has 'accorded a procedural right to protect his concrete interests,'—here, the right to challenge agency action unlawfully withheld—'can assert that right without meeting all the normal standards for redressability and immediacy.' When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992)) (internal citations omitted)).

36. *See* Brescia, *supra* note 8, at 32.

37. Am. Elec. Power v. Connecticut, 564 U.S. 410, 418 (2011) ("In July 2004, two groups of plaintiffs filed separate complaints in the Southern District of New York against the same five major electric power companies. The first group of plaintiffs included eight States and New York City, the second joined three nonprofit land trusts . . . ." (footnotes omitted)).

twenty states, and who collectively were alleged to be "the five largest emitters of carbon dioxide in the United States."[38] Plaintiffs alleged these activities constituted a public nuisance under federal common law, or alternatively, state tort law.[39] The district court dismissed both suits, ruling they presented non-justiciable political questions,[40] but the Second Circuit reversed, holding the suits were not barred by the political question doctrine and the plaintiffs had adequately alleged Article III standing.[41] The Supreme Court granted certiorari and reversed but declined to address the questions of standing and whether the suits raised justiciable questions. Rather, the Court grounded its holding on the conclusion that the Clean Air Act and the EPA action the Act authorizes displace the federal common-law claims asserted by the plaintiffs.[42]

The Ninth Circuit, too, declined to address the question of standing and justiciability in a public nuisance suit relating to climate change.[43] In *Kivalina*, the governing body of an Alaskan tribal village had filed suit against twenty-four oil, energy, and utility companies, alleging its village was threatened by the reduction in protective sea ice and an increase in storms and flooding allegedly caused by the climate change resulting from the defendants greenhouse gas emissions.[44] The plaintiffs asserted a nuisance claim under federal common law, and alternatively, under state tort law.[45] The defendants moved to dismiss, arguing the tribes lacked standing, had asserted non-justiciable political questions, and had asserted claims that were displaced by the Clean Air Act.[46] The district court dismissed the nuisance claims for lack of standing and for presenting non-justiciable questions.[47] The Ninth Circuit affirmed but did not rely on the doctrines of standing or justiciability.[48] Rather, like the Supreme Court's opinion in *American Electric Power*, the

---

38. *Id.*

39. *Id.*

40. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), *vacated and remanded*, 582 F.3d 309 (2nd Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

41. *Am. Elec. Power*, 582 F.3d at 392.

42. *Am. Elec. Power*, 564 U.S. at 415.

43. *See* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 856–57 (9th Cir. 2012).

44. *Id.* at 853–54.

45. *See id.*

46. *Id.* at 854.

47. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 879–80 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

48. *Kivalina*, 696 F.3d at 858.

Ninth Circuit's panel ruling focused solely on the statutory displacement of the federal common law of nuisance.[49]

As noted above, the Second Circuit held in *American Electric Power* that the plaintiffs, including New York City and several private land trusts, had adequately alleged standing and had presented a justiciable question.[50] The continued viability of that ruling is debatable in light of the Supreme Court's subsequent reversal, albeit on other bases. At least one other circuit has declined to extend standing to private litigants.[51]

The Second and Ninth Circuits may soon have another chance to opine on municipal standing and the justiciability of public nuisance claims as they review appeals from recently dismissed climate change lawsuits.[52] In *City of New York v. BP*, the City filed suit against five multinational oil and gas companies, asserting public nuisance claims and alleging the companies are responsible for climate change and the resulting costs borne by the City.[53] The District Court dismissed the suit, ruling both that federal common law displaces the City's state and federal common law claims and that the claims are barred by the doctrine of the separation of powers.[54] In a similar lawsuit, the Northern District of California likewise recently dismissed a municipal public nuisance suit involving climate change, ruling the City's claims "require a balancing of policy concerns" and "undoubtedly implicate the interests of countless governments, both foreign and domestic."[55] Accordingly, the district court held the claims regarding climate change and implicating environmental policy were best left to the legislative and executive branches.[56] Clearly, both judges issuing these recent rulings understood "that empowering courts to determine national policy is dangerous precedent and counterproductive."[57]

---

49. Connecticut v. Am. Elec. Power, 582 F.3d 309, 349 (2nd Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

50. *Id.*

51. Comer v. Murphy Oil U.S.A., 585 F.3d 855, 866–67 (5th Cir. 2009), *vacated*, 607 F.3d 1049, 1055 (5th Cir. 2010) (en banc) (vacating original opinion extending *Massachusetts v. EPA* to permit claims by private litigants based on court's lack of quorum).

52. *See* City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018); City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1028–29 (N.D. Cal. 2018).

53. 325 F. Supp. 3d at 468–70.

54. *Id.* at 474–75.

55. *City of Oakland*, 325 F. Supp. 3d at 1025, 1026.

56. *Id.* at 1025–26, 1029.

57. Luther Strange, *Why Judges Aren't Buying Cities' Climate Change Lawsuits*, REAL CLEAR MKTS. (Aug. 2, 2018), https://www.realclearmarkets.com/articles/2018/08/02/why_judges_arent_buying_cities_climate_change_lawsuits_103372.html.

3. *Municipal Suits Against Banks and Lenders for Subprime Lending Practices*

As with gun-related violence and climate change, the financial crisis brought its own set of challenges and costs for municipalities and local governments, including reduced property values (and consequently lowered tax bases) and increased criminal activity.[58] In response to these losses, cities began instigating lawsuits against banks and mortgage lenders, alleging that subprime lending practices constituted a public nuisance.[59] Some commentators have argued, however, that this "'profusion' of litigation is not necessarily to win in court," but rather is meant to muster sufficient pressure to force a settlement.[60]

The first two lawsuits of this kind were filed by the mayor and city council of Baltimore against Wells Fargo Bank, N.A. alleging that Wells Fargo's lending practices violated the Fair Housing Act and constituted a public nuisance,[61] and by the City of Cleveland against numerous investment banks

58. *See, e.g.*, DAN IMMERGLUCK & GEOFF SMITH, WOODSTOCK INST., THERE GOES THE NEIGHBORHOOD: THE EFFECT OF SINGLE-FAMILY MORTGAGE FORECLOSURES ON PROPERTY VALUES 9 (2005), https://woodstockinst.org/wp-content/uploads/2013/08/TGTN_Report-1.pdf (study showing that, within the City of Chicago during the 1990s, each foreclosure reduced property values of all homes within a one-eighth mile radius by approximately one percent); WILLIAM C. APGAR ET AL., HOME OWNERSHIP PRESERVATION FOUNDATION, THE MUNICIPAL COST OF FORECLOSURES: A CHICAGO CASE STUDY 10–11 (2005), https://www.issuelab.org/resources/1772/1772.pdf.

59. *See, e.g.*, City of Cleveland v. Ameriquest Mortg. Sec., 621 F. Supp. 2d 513, 515–16 (N.D. Ohio 2009); Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847, 848 (D. Md. 2010). *See also* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 OKLA. L. REV. 359, 382–87 (2018) (noting the plaintiffs framed their suits "under government public nuisance theory," and the "lawsuits often do not provide specific factual allegations of tortious conduct; rather, they rely on general notions of wrongdoing to create industry culpability in the minds of the public" and "rest entirely on generalized notions").

60. Schwartz, Goldberg & Appel, *supra* note 59, at 387 (citing Nate Hegyi, *Cherokee Nation Sues Wal-Mart, CVS, Walgreens Over Tribal Opioid Crisis*, NPR (Apr. 25, 2017, 5:58 PM), https://www.npr.org/sections/codeswitch/2017/04/25/485887058/cherokee-nation-sues-wal-mart-cvs-walgreens-over-tribal-opioid-crisis). *See also* U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, WAKING THE LITIGATION MONSTER: THE MISUSE OF PUBLIC NUISANCE (Mar. 2019) (citing Richard F. Scruggs, *Are Opioids the New Tobacco?*, LAW360 (Sept. 15, 2017, 11:04 AM), https://www.law360.com/articles/962715 ("[T]he success of the opioid cases will depend upon whether the plaintiffs can muster sufficient legal, political and public relations pressure to force a settlement.").

61. *See* Mayor & City Council of Baltimore, 677 F. Supp. 2d at 848.

South Carolina Law Review, Vol. 70, Iss. 3 [2019], Art. 3

alleging the defendants' promotion of the sale of subprime mortgage products constituted a public nuisance.[62] Both cases were quickly dismissed.[63]

In *Wells Fargo*, the District Court for the District of Maryland held that the city lacked standing to bring a public nuisance claim because there was no "causal connection between the injury and the conduct complained of."[64] The court noted that, "using the City's own figures, Wells Fargo is responsible for only a negligible portion of the City's [alleged damages]."[65] The court further relied on the fact that the defendant lenders did not create the environment giving rise to the foreclosures and injuries the City alleged:

> It may be entirely reasonable to posit—as the City's allegations amply support—that unscrupulous lenders took advantage of inner city residents living in a dysfunctional environment to induce them to make loans they could not afford. It does not follow, however, that it is reasonable to infer—as the City argues—that the unscrupulous lenders themselves created the dysfunctional environment they exploited.[66]

Accordingly, the court dismissed the City's public nuisance claim.[67]

In *Ameriquest*, the District Court for the Northern District of Ohio held that the City's public nuisance claim failed as a matter of law for multiple reasons.[68] In particular, the court held the defendants' conduct did not amount to an unreasonable interference with a public right, and the City failed to allege facts sufficient to demonstrate any causal connection between defendants' conduct and the City's alleged injury.[69] With respect to determining whether defendants' conduct rose to the level of public nuisance, the court explained:

> Ohio courts have long imposed the following concrete limitation on public nuisance claims: "What the law sanctions cannot be held to be a public nuisance." This is but another way of saying that although it

62. *See Ameriquest Mortg. Sec.*, 621 F. Supp. 2d at 515–16.

63. *See Wells Fargo Bank, N.A.*, 677 F. Supp. 2d at 851; *Ameriquest Mortg. Sec.*, 621 F. Supp. 2d at 536.

64. *Wells Fargo Bank, N.A.*, 677 F. Supp. 2d at 849, 850.

65. *Id.* at 850.

66. *Id.* at 851.

67. *Id.*

68. *See Ameriquest Mortg. Sec.*, 621 F. Supp. 2d at 536.

69. *See id.* at 528, 530, 533, 535–36. The court also went on to conclude that the City's claims of public nuisance against investment banks were preempted by state law and barred by the economic loss rule. *See id.* at 518–22.

> would be a nuisance at common law, conduct which is fully authorized by statute or administrative regulation is not an actionable tort. This is especially true where a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct exist. . . .
>
> . . . .
>
> Under a long line of decisions, a showing that the challenged conduct is subject to regulation and was performed in conformance therewith insulates such conduct from suit as a public nuisance. This is so regardless of whether, despite compliance with the regulations, such conduct could otherwise be described as negligent.[70]

In this case, the court found that "[m]ortgage lending in general is subject to a vast regulatory regime," and, because the City did not challenge defendants' compliance with the regulations, held that defendants could not be liable for public nuisance.[71]

Additionally, the court held that the City failed to plead facts to prove proximate causation, noting "[i]t would be tremendously difficult, if not completely impossible, to determine which of the City's damages are attributable to Defendants' alleged misconduct and not to some absent party."[72] The court recognized that, in fact, none of the City's alleged damages were directly linked to the defendants but rather were "purely contingent on harm first visited upon absent third-parties."[73] Accordingly, the court held the City's public nuisance claim also failed as a matter of law for lack of proximate causation.[74]

In its analysis, the court distinguished this case from *City of Cincinnati*, in which the Ohio Supreme Court permitted Cincinnati to bring public nuisance claims against gun manufacturers and retailers.[75] Specifically, the district court focused on the "distinction between conduct that is subject to regulation,"—such as mortgage lending—"and conduct that is merely

---

70. *Id.* at 526, 528 (first quoting Allen Freight Lines, Inc. v. Consol. Rail Corp., 595 N.E.2d 855, 857 (Ohio 1992); then quoting Brown v. Scioto Cty. Bd. of Comm'rs, 622 N.E.2d 1153, 1159 (Ohio Ct. App. 1993)) (internal citations omitted).

71. *Id.* at 528.

72. *Id.* at 533.

73. *Id.* at 535 (citing Holmes v. Secs. Inv'r Prot. Corp., 503 U.S. 258, 271 (1992)).

74. *Id.* at 536.

75. *Id.*

lawful,"—like the distribution and sale of firearms.[76] Also, as did the Maryland District Court in *Wells Fargo*, the court emphasized the fact that the defendants did not create the underlying issue or environment: "the guns that comprised the illegal firearms market in *City of Cincinnati* originated with the defendant gun manufacturers, while in this case, Defendants did not originate the underlying subprime loans or initiate foreclosures in Cleveland, but merely provided funding for subprime lending."[77] Furthermore, the court noted that the harm alleged by Cincinnati could have occurred independent of any injury to third parties, as opposed to the damages sought by Cleveland that could not arise absent any foreclosure.[78]

B. Opioid Litigation and the Uncertain Future Expansion of Public Nuisance Claims

The latest potential evolution in public nuisance claims brought by local governments involve lawsuits against makers and distributors of opioid pharmaceutical drugs. The first lawsuits filed against opioid manufacturers in response to the growing opioid epidemic were filed by state Attorneys General—specifically, the Attorneys General for Mississippi, Ohio, Missouri, and Oklahoma.[79] Although the Mississippi Attorney General filed suit approximately one-and-a-half years before the Attorneys General for Ohio, Missouri, and Oklahoma, the claims and allegations asserted—and the defendants named—are all quite similar.[80] Opioid manufacturers Purdue, Teva/Cephalon,[81] Johnson & Johnson, Janssen, Endo, Allergan, and Actavis

---

76. *Id.* at 528 (citing City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1140, 1143 (Ohio 2002)).

77. *Id.* at 536; *see also* Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847, 851 (D. Md. 2010) (noting that defendants did not create "the dysfunctional environment," but merely exploited it).

78. *Ameriquest Mortg. Sec.*, 621 F. Supp. 2d at 536 (citing *City of Cincinnati*, 768 N.E.2d at 1148–49).

79. Complaint, Mississippi v. Purdue Pharma L.P., No. 25CH1:15-CV-001814 (Miss. Chan. Ct. December 15, 2015); Complaint, Ohio v. Purdue Pharma L.P., CV-17 CI 00261 (Ohio Ct. Com. Pl. May 31, 2017); Complaint, Missouri v. Purdue Pharma, L.P. (Mo. Cir. Ct.); Complaint, Oklahoma v. Purdue Pharma L.P., CJ-2017-816 (Okla. Dist. Ct. June 30, 2017).

80. *See generally* Complaint, *Mississippi*, *supra* note 79 (25CH1:15-CV-001814); Complaint, *Ohio*, *supra* note 79 (CV-17 CI 00261); Complaint, *Missouri*, *supra* note 79; Complaint, *Oklahoma*, *supra* note 79 (No. CJ-2017-816).

81. Teva completed its acquisition of Cephalon in 2011. *See Teva Completes Acquisition of Cephalon*, TEVA (last visited Mar. 21, 2019), https://www.tevapharm.com/news/teva_completes_acquisition_of_cephalon_10_11.aspx.

were named as defendants in at least three of the four actions.[82] Each Attorney General brought similar claims: Medicaid fraud, violation of consumer protection statutes, fraud/deceit, fraudulent/negligent misrepresentation, public nuisance, and other violations of state laws. In each case, the allegations supporting these claims were essentially the same: that the defendants were aware of the substantial risks associated with use of opioid medications as compared with the unproven and disputed benefits; that defendants willfully and knowingly disregarded and concealed the risks from doctors and consumers; that defendants used unbranded marketing (i.e., doctors, opinion leaders, and "front groups") in order to disseminate false or misleading information regarding opioid usage; that defendants used unfair and deceptive marketing techniques to target vulnerable and lucrative populations; that defendants' conduct gave rise to increased opioid usage, both prescribed and through illegal black market dealings; and that the States and their citizens suffered considerable harm from the increased opioid use, including higher rates of addiction and death, Medicaid costs related to increased prescriptions, and costs related to treatment of addiction.[83]

In June 2017, around the same time that the Ohio, Missouri, and Oklahoma Attorneys General were filing their lawsuits, another forty-one states' Attorneys General joined together to create a coalition to conduct a joint investigation into the opioid epidemic.[84] To accomplish its goal, the coalition served investigative subpoenas and information requests on eight manufacturers and distributors of opioid medications.[85] Each of the manufacturers served with subpoenas had already been named as defendants in the four initial AG lawsuits discussed above: Endo, Janssen, Teva/Cephalon, Allergan, and Purdue.[86] The joint investigation also targeted

---

82. Complaint, *Mississippi*, *supra* note 79 (25CH1:15-CV-001814); Complaint, *Ohio*, *supra* note 79 (CV-17 CI 00261); Complaint, *Missouri*, *supra* note 79; Complaint, *Oklahoma*, *supra* note 79 (No. CJ-2017-816). Opioid manufacturers Purdue, Johnson & Johnson, and Janssen were named as defendants in all of the lawsuits. Watson, on the other hand, was only named in the Oklahoma case.

83. Complaint, *Mississippi*, *supra* note 79 (25CH1:15-CV-001814); Complaint, *Ohio*, *supra* note 79, at 66–99; Complaint, *Missouri*, *supra* note 79, at 27–41; Complaint, *Oklahoma*, *supra* note 79, at 20–31 (No. CJ-2017-816).

84. News Release, Office of Attorney General of Texas, AG Paxton: 41-State Investigation Requests Documents from Companies that Manufacture and Distribute Highly Addictive Opioid Drugs (Sept. 19, 2017) [hereinafter News Release, Paxton]; *see also* News Release, New York State Office of the Attorney General, A.G. Schneiderman, Bipartisan Coalition of AGs Expand Multistate Investigation Into Opioid Crisis (Sept. 19, 2017) [hereinafter News Release, Schneiderman].

85. *See* News Release, Paxton, *supra* note 84; News Release, Schneiderman, *supra* note 84.

86. News Release, Paxton, *supra* note 84; News Release, Schneiderman, *supra* note 84.

three opioid distributors—AmerisourceBergen, Cardinal Health, and McKesson—which at the time accounted for more than ninety percent of opioid distribution in the United States.[87] According to Texas Attorney General Ken Paxton, the goal of the investigation was "to collect enough information so that the multi-state coalition can effectively evaluate whether manufacturers and distributors engaged in unlawful practices in the marketing, sale, and distribution of opioids."[88] Once it was determined what role, if any, the manufacturers and distributors had in creating or prolonging the opioid crisis, the coalition would determine an appropriate course of action.[89]

Since the joint investigation, dozens of states' Attorneys General have filed lawsuits against opioid manufacturers and distributors.[90] These lawsuits were filed in state court, and although in some cases they named additional manufacturers and distributors—either by name or as "Doe" corporations—every case named Purdue Pharma as a defendant.[91] Additionally, each Attorney General brought claims for violation of state consumer protection or

87. News Release, Schneiderman, *supra* note 84; *see* News Release, Paxton, *supra* note 84.

88. News Release, Paxton, *supra* note 84.

89. *Id.*

90. *See* Jonathan Stempel, *New York Sues OxyContin Maker Purdue Pharma Over Opioids*, REUTERS (Aug. 14, 2018, 12:13 PM), https://www.reuters.com/article/us-usa-opioids-purduepharma/new-york-sues-oxycontin-maker-purdue-pharma-over-opioids-idUSKBN1KZ1WZ ("New York joined at least 26 other U.S. states and Puerto Rico to sue Purdue over opioids."); *see also* Joanna Walters, *Sackler Family Members Face Mass Litigation and Criminal Investigations Over Opioids Crisis*, GUARDIAN (Nov. 19, 2018), https://www.theguardian.com/us-news/2018/nov/19/sackler-family-members-face-mass-litigation-criminal-investigations-over-opioids-crisis ("Purdue is also being sued by at least 30 states in state court."). The states include Alaska, Arizona, Alabama, Colorado, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, New Mexico, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and West Virginia. *See* Marilyn Odendahl, *Citing Opioids' Devastation, State Sues Purdue Pharma*, IND. LAW. (Nov. 28, 2018), https://www.theindianalawyer.com/articles/48769-citing-opioids-devastation-state-sues-purdue-pharma.

91. *See, e.g.*, Complaint, South Carolina v. Purdue Pharma L.P. (S.C. Ct. Com. Pl. Aug. 15, 2017); Complaint, Massachusetts v. Purdue Pharma L.P., No. 1884CV01808 (Mass. Super. Ct. Jun. 13, 2018); Amended Complaint, Florida v. Purdue Pharma L.P., No. 2018-CA-001438 (Fl. Cir. Ct. Nov. 16, 2018); Complaint, North Carolina v. Purdue Pharma L.P. (N.C. Super. Ct. May 15, 2018); Complaint, North Dakota v. Purdue Pharma L.P. (N.D.S. Centr. Jud. Dist. May 15, 2018); Complaint, Tennessee v. Purdue Pharma L.P., No. 1-173-18 (6th Jud. Dist. Tenn. May 15, 2018).

Strange: A Prescription for Disaster: How Local Governments' Abuse of Publ

unfair trade practices laws,[92] and frequently causes of action for negligence and public nuisance were also included.[93]

In addition to the actions brought by the Attorneys General, numerous local governments have filed their own lawsuits against opioid manufacturers and distributors. Notably, public nuisance suits brought by local government differ from those brought by Attorneys General in at least one respect—namely the local government's inability to recover for injury to citizens. In South Carolina, for example, the Attorney General possesses *parens patriae* authority and may sue for harms suffered by the *citizens* of the State.[94] In contrast, local governments lack *parens patriae* authority and thus, may sue only based on injuries the city *itself* has suffered,[95] or potentially, when the issue is one of "overriding public concern."[96] A similar dichotomy is present

92. *See, e.g.*, Complaint, *South Carolina*, *supra* note 91, ¶¶ 164–209, at 57–66; Complaint, *Massachusetts*, *supra* note 91, ¶¶ 246–61, at 68–71; Amended Complaint, *Florida*, *supra* note 91, ¶¶ 430–43, at 95–97; Complaint, *North Carolina*, *supra* note 91, ¶ 127, at 44–45; Complaint, *North Dakota*, *supra* note 91, ¶¶ 173–98, at 51–58; Complaint, *Tennessee*, *supra* note 91, ¶¶ 924–51, at 261–67.

93. *See, e.g.*, Complaint, *Massachusetts*, *supra* note 91, ¶¶ 263–89, at 71–76; Amended Complaint, *Florida*, *supra* note 91, ¶¶ 464–505 at 103–10; Complaint, *South Carolina*, *supra* note 91, ¶¶ 227–34, at 69–71.

94. *See, e.g.*, Condon v. State, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003) ("This Court has recognized that the Attorney General has broad statutory and common law authority in his capacity as the chief legal officer of the State to institute actions involving the welfare of the State and its citizens, *including vindication of wrongs committed collectively against the citizens of the State*.") (emphasis added); *see also* 23 W. THOMAS LAVENDER, JR., THOMAS G. EPPINK, S.C. JUR. PUBLIC NUISANCE § 29 (2018) ("The Attorney General of South Carolina has long had broad power to institute proceedings to abate public nuisances.") (citing State *ex rel.* Lyon v. Columbia Water Power Co., 82 S.C. 181, 63 S.E. 884 (1909)); *cf.* 15 U.S.C. § 15c(a) (2012) (granting exclusive authority to state Attorneys General to bring *parens patriae* actions on behalf of the state's citizens to recover for injuries sustained from violations of Title 15 of the United States Code).

95. *See, e.g.*, County of Lexington v. City of Columbia, 303 S.C. 300, 301, 400 S.E.2d 146, 147 (1991) (holding a county lacked standing to maintain a suit unless it was based on an infringement of the county's own proprietary interest or statutory right because "[a]s a political subdivision of the State, . . . [the county] lacks the sovereignty to maintain such a suit under the doctrine of *parens patriae*") (citations omitted); Capital View Fire Dist. v. County of Richland, 297 S.C. 359, 362, 377 S.E.2d 122, 124 (Ct. App. 1989) ("The doctrine of *parens patriae* applies only to sovereigns asserting at least quasi-sovereign interests apart from the interests of particular private citizens. Political subdivisions, such as cities and counties, however, lack the element of sovereignty that is a prerequisite to maintaining a suit under the doctrine of *parens patriae*.") (citations omitted).

96. *County of Lexington*, 303 S.C. at 301, 400 S.E.2d at 147. Other holdings have omitted this seeming exception and have reiterated that a local government unit has standing only when it can establish some infringement or injury to its own proprietary interests or statutory rights. *See, e.g.*, Town of Arcadia Lakes v. S.C. Dept. of Health & Envtl. Control, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013) (citing Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C.

Published by Scholar Commons, 2019

in other states.[97] Accordingly, public nuisance suits brought by local governments—whether against firearm manufacturers, oil producers, or opioid manufacturers and distributors—are founded not on the injuries suffered directly by the individuals injured by the alleged wrongdoing but rather on the alleged secondary injuries the city or county itself suffered in responding to or dealing with the situation.

Nevertheless, as of December 12, 2017, at least forty-six lawsuits had been filed by local governments and municipalities against opioid manufacturers and retailers alleging "improper marketing of and inappropriate distribution of various prescription opiate medications into cities, states, and towns across the country."[98] On motion of the plaintiffs in these forty-six cases, the Judicial Panel on Multidistrict Litigation centralized and transferred those cases to the United States District Court for the Northern District of Ohio.[99] Over the next several months, the MDL swelled to more than four-hundred centralized lawsuits brought by cities and counties, Native

---

Dep't of Nat. Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001); Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992)); City of Spartanburg v. County of Spartanburg, 303 S.C. 393, 395, 401 S.E.2d 158, 159 (1991) (citing Richland Cty. Recreation Dist. v. City of Columbia, 290 S.C. 93, 348 S.E.2d 363 (1986)); Glaze v. Grooms, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996); Beaufort County v. Trask, 349 S.C. 522, 528, 563 S.E.2d 660, 663 (Ct. App. 2002).

97. *See, e.g.*, Arapahoe Bd. of Cty. Comm'rs v. Denver Bd. of Water Comm'rs, 718 P.2d 235, 241 (Colo. 1986) (en banc) (holding that counties cannot sue under *parens patriae* because they "are not independent governmental entities existing by reason of any inherent sovereign authority of their residents" (citing Bd. of Cty. Comm'rs v. Love, 470 P.2d 861, 862 (Colo. 1970) (en banc))); Bd. of Comm'rs of Union Cty. v. McGuinness, 80 N.E.3d 164, 170 (Ind. 2017) (holding that "a county has no sovereign powers and cannot act as *parens patriae*, asserting the claims of its residents" (quoting Bd. of Comm'rs of Howard Cty. v. Kokomo City Plan Comm'n, 330 N.E.2d 92, 101 (Ind. 1975))); Coldsprings Twp. v. Kalkaska Cty. Zoning Bd. of Appeals, 755 N.W.2d 553, 555 (Mich. Ct. App. 2008) (noting that "political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae*." (quoting *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir. 1973))); State v. Dover, 891 A.2d 524, 531–32 (N.H. 2006) (holding that, under the *parens patriae* doctrine, the cities had no standing to sue and their claims "must yield to the attorney general's suit"); Bergen County v. Port of N.Y. Auth., 160 A.2d 811, 815–16 (N.J. 1960) (holding that a county, as a "subdivision of the State," does not have *parens patriae* authority to represent its residents); Tuma v. Kerr County, 336 S.W.3d 277, 282 (Tex. App. 2010) (noting that the *parens patriae* doctrine "does not apply to counties, whose power is derivative and not sovereign"). *But see* Town of Riverhead v. Long Island Lighting Co., 258 A.D.2d 643, 644 (N.Y. App. Div. 1999) (holding that a town could bring a cause of action under *parens patriae* to recover damages for breach of the public trust "[c]ontrary to the defendant's contention and the holding of the Supreme Court").

98. Transfer Order at 1, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (J.P.M.L. Dec. 12, 2017). "[A]ll of the cases on the motion before us involve claims brought by political subdivisions.". *Id.* at 3.

99. *Id.* at 1, 4.

American tribes, hospitals, and third-party payors.[100] All told, as of publication, lawsuits against opioid manufacturers and distributors are estimated to have topped 1,500, including those brought by Attorneys General, the suits centralized in the MDL, and other suits brought by individuals or other plaintiffs.[101]

At the outset, Judge Dan Aaron Polster—the judge presiding over the MDL—adopted an unusual approach, dispensing with standard litigation processes normally employed at the commencement of such a proceeding, such as discovery, setting a schedule for dispositive motions, and the like, and instead, essentially required the parties to enter meaningful settlement negotiations.[102] The parties subsequently persuaded Judge Polster that the "settlement track" he had encouraged the parties to pursue would be aided if, simultaneously, there was a "litigation track" that included selecting three test cases—designated as "track one" cases—and setting a schedule for dispositive motions, discovery, trial preparation, and trial in those cases.[103] That scheduling order was subsequently amended, and trial in the "track one" test cases is currently set for September 3, 2019.[104]

---

100. In particular, three Native American tribes from South Dakota and a Cherokee tribe all filed suits against opioid drug manufacturers. Sari Horwitz, *3 S.D. Indian Tribes Sue Drugmakers Over Opioid Addiction*, WASH. POST (Jan. 9, 2018), https://www.washingtonpost.com/world/national-security/3-sd-indian-tribes-sue-drugmakers-over-opioid-addiction/2018/01/09/7bb50438-f568-11e7-a9e3-ab18ce41436a_story.html; *see* Jan Hoffman, *Cherokee Can't Sue Opioid Distributors in Tribal Court, Judge Rules*, N.Y. TIMES (Jan. 11, 2018), https://www.nytimes.com/2018/01/11/health/cherokee-opioids-lawsuit.html.

101. *See* Sara Randazzo, *Opioid Makers Ask Counties for Proof of Harm*, WALL STREET J. (Oct. 18, 2018, 9:00 AM), https://www.wsj.com/articles/opioid-makers-ask-counties-for-proof-of-harm-1539867600?mod=e2tw.

102. *See* Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html; *see also* Minutes of Initial Pretrial Conference – 1/9/2018 at 1, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio Jan. 11, 2018) (noting that during the initial pretrial conference "the Court solicited and obtained the consensus of Counsel to focus everyone's present efforts on abatement and remediation of the opioid crisis rather than pointing fingers and litigating legal issues" and scheduling a subsequent conference "devoted to preliminary settlement discussions.").

103. *See* Case Management Order One at 1, 6, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804-DAP (N.D. Ohio Apr. 11, 2018).

104. Case Management Order No. 7 Setting New Deadlines for Track One Cases at 2, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804-DAP (N.D. Ohio Aug. 13, 2018).

III. LAWSUITS BROUGHT BY LOCAL GOVERNMENTS ASSERTING PUBLIC NUISANCE CLAIMS ARE AN IMPROPER, OR AT BEST, ILL-SUITED FORUM IN WHICH TO ADDRESS POLICY-TYPE QUESTIONS

Courts and commentators have noted the expansion of the theory of public nuisance beyond its traditional bounds is fraught with problems.[105] A discussion of the full extent of those problems—and the viable legal defenses that may be raised against such claims—is beyond the scope of this Article.[106]

---

105. *See generally* Ausness, *supra* note 8, at 871–73 (describing the legal hurdles confronting municipal plaintiffs who seek to expand the scope of public nuisance law to encompass claims against product manufacturers). In the context of municipal public nuisance claims against gun manufacturers, for example, some courts have entirely rejected such claims, which would expand the scope of public nuisance law so far beyond its traditional bounds (namely interference with the use and enjoyment of land or a statutory violation implicating health and safety) as to threaten to supplant the whole of products liability law and even the entirety tort law. *See, e.g.*, City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 421 (3d Cir. 2002); Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 539 (3d Cir. 2001); People v. Sturm, Ruger & Co., 309 A.D. 2d 91, 93–94, (N.Y. App. Div. 2003). Other courts, however, have blessed a more expansive theory of public nuisance suits, relying in a broad definition found in the Restatement, *see* RESTATEMENT (SECOND) OF TORTS § 821C (AM. LAW INST. 2017), and have recognized the viability of public nuisance claims against gun manufacturers. *See, e.g.*, White v. Smith & Wesson, 97 F. Supp. 2d 816, 829 (N.D. Ohio 2000) (refusing to dismiss the city of Cleveland's negligence and public nuisance claim against gun maker); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1143–44 (Ohio 2002); James v. Arms Tech., Inc., 820 A.2d 27, 50–51 (N.J. Super. Ct. App. Div. 2003) (holding City of Newark could proceed with its public nuisance claim even though defendant's alleged wrongdoing did not harm any interest in property); City of Gary *ex rel* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1230–31 (Ind. 2003) (adopting an expansive view of what could constitute a public nuisance).

106. In the context of municipal public nuisance lawsuits against opioid manufacturers and distributors, for example, the defendants may argue that learned intermediaries (namely, prescribing physicians and the pharmacists who fill the prescriptions) stand between the drug makers and the public and disrupt any causal chain between the drug makers' conduct and the alleged harms to individuals who abuse the drugs. *See* Schwartz, Goldberg & Appel, *supra* note 59, at 384–86. Similarly, such defendants may argue the vast majority of people who abuse opioid drugs do so as a result of intervening, intentional, and often criminal acts by the abuser or third parties. *See id.* at 382. They may further dispute the local government's ability to establish monetary damages uniquely caused by opioid abuse (as opposed to other drug abuse or other confounding causes). *See id.* at 383. Furthermore, a number of the claims asserted in the opioid suits rest on shaky legal grounds because the Controlled Substances Act "does not have a private cause of action, and its standards are intentionally vague" and because "[t]here is no common law duty under tort law to monitor a product, including a prescription drug, after it is sold." *Id.* at 385, 386. Suits brought by individual litigants against opioid manufacturers have also been largely stymied by standard litigation defenses. *See* Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1122 (2014) ("A number of individuals have brought suit against Purdue, contending that the company is responsible for the consequences of their drug abuse and addiction. However, Purdue has won

At a much more fundamental level, however, public nuisance claims brought by local governments that exceed the claim's traditional scope suffer from a more foundational flaw, namely that they inject courts and litigants into what is, at bottom, a democratic policy-making decision that courts and litigants are ill-suited to make.[107] In the context of public nuisance suits against gun manufacturers, for example, a pervasive scheme of state and federal statutes and regulations—enforced by multiple state and federal agencies—already controls the manufacture, sale, purchase, transfer, possession, record-keeping, destruction, theft, use, and misuse of firearms.[108] Similarly, in the case of opioid drugs, Congress and the various state legislatures have already enacted a comprehensive statutory scheme that is implemented by a complex and pervasive regulatory framework overseen and enforced by multiple agencies and boards controlling the development, testing, production, manufacturing, distribution, labeling, advertising, prescribing, sale, possession, use, misuse, abuse, theft, resale, and inter-state transportation of opioid drugs.[109] The same could be said for the extensive legislative and regulatory schemes controlling the production and processing of fossil fuels (the focus of the public nuisance suits pertaining to alleged climate change), offshore drilling (the focus of the public nuisance claims arising from the Deepwater Horizon oil spill), or the lending, bundling, and selling of residential loans in the form of mortgage-backed securities (the focus of the public nuisance suits relating to subprime mortgage lending).

---

most of these cases on summary judgment by successfully raising issues such as lack of causation, misuse, wrongful conduct, or running of the statute of limitations." (footnotes omitted)).

107. The federal judge overseeing the hundreds of centralized suits in the multi-district litigation against opioid manufacturers, distributors, and others has acknowledged the awkwardness of using the judicial system to remedy what is, in fact, a societal problem best suited for legislative policy-making and regulatory oversight and enforcement. *See* Hoffman, *supra* note 102 ("'The judicial branch typically doesn't fix social problems, which is why I'm somewhat uncomfortable doing this,' [Judge Dan Polster] said. 'But it seems the most human thing to do.'").

108. *E.g.*, Gun Control Act of 1968, 18 U.S.C. § 922(a) (2012) (making it illegal for an unlicensed person to make a firearm for sale or distribution); Nat'l Firearms Act of 1934, I.R.C. §§ 5841–5859 (2012) (regulating manufacture and transfer of firearms); *see also Does an Individual Need a License to Make a Firearm for Personal Use?*, ATF, https://www.atf.gov/firearms/qa/does-individual-need-license-make-firearm-personal-use (last updated Nov. 6, 2018). *See generally* ATF, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE (2014), https://www.atf.gov/file/11241/download.

109. Including, but not limited to, the Federal Food and Drug Administration, the Drug Enforcement Agency, the Federal Bureau of Investigations, state law enforcement agencies, and state boards that license and supervise physicians and pharmacists.

These extensive statutory and regulatory schemes reflect extensive legislative deliberation balancing the good, legitimate, and helpful uses of various conduct or products against the dangers of their use and misuse. This is, by definition, a policy-making calculus, and the imposition of civil liability on a manufacturer whose conduct and product complied with these regulatory requirements—and in many cases was expressly reviewed and authorized by the supervising agency—effectively replaces these policy decisions with more onerous requirements or more restrictive controls. Accordingly, as explained more fully below, such suits insert the courts into a policy-making role for which they are, at best, ill-suited, and give litigants an outsized policy-shaping role for which they have no constitutional or electoral claim.

A. Separation of Powers

The rise of local government public nuisance claims described in the preceding section of this Article included several instances of suits brought against industries or corporations relating to conduct or products that were entirely compliant with federal, state, and local laws. In essence, such suits amount to "regulation by litigation" by imposing what amounts to additional and higher requirements than those established by the legislature or the agencies vested with responsibility for regulating the conduct or product.[110] By so doing, litigants and courts invade the province of the legislature and violate the doctrine of the separation of powers.[111]

Some courts in recent public nuisance suits have recognized this principle and dismissed the lawsuits on this basis.[112] For example, Judge Keenan of the Southern District of New York dismissed the City's public nuisance claim against oil producers for their alleged contributions to climate change because such litigation impinged on the role of the political branches of government.[113] Judge Keenan explained:

---

110. *See generally* ANDREW P. MORRISS, BRUCE YANDLE, & ANDREW DORCHAK, REGULATION BY LITIGATION (2008) (discussing the history and dangers of the growing practice of regulating industries via lawsuits and settlement terms).

111. The Supreme Court of New Jersey has articulated a similar concept in a holding affirming the dismissal of a municipal public nuisance suit against paint manufacturers. *See In re* Lead Paint Litig., 924 A.2d 484, 505 (N.J. 2007) (noting in part that the state legislature had already enacted a "careful and comprehensive scheme" to address the danger of deteriorating lead paint and that regime was not "meant to create an ill-defined claim that would essentially take the place of its own enforcement, abatement, and public health funding scheme").

112. *See, e.g.*, City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 474–75 (S.D.N.Y. 2018); City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1028–29 (N.D. Cal. 2018).

113. *See, e.g.*, *City of New York*, 325 F. Supp. 3d at 474–75 ("Climate change is a fact of life, as is not contested by Defendants. But the serious problems caused thereby are not for the

Strange: A Prescription for Disaster: How Local Governments' Abuse of Publ

> The Court recognizes that the City, and many other governmental entities around the United States and in other nations, will be forced to grapple with the harmful impacts of climate change in the coming decades. However, the immense and complicated problem of global warming requires a comprehensive solution that weighs the global benefits of fossil fuel use with the gravity of the impending harms. To litigate such an action for injuries from foreign greenhouse gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government. Accordingly, the Court will exercise appropriate caution and decline to recognize such a cause of action.[114]

Judge Alsup of the Northern District of California also reached the same conclusion in *City of Oakland*:

> [Q]uestions of how to appropriately balance these worldwide negatives against the worldwide positives of the energy itself, and of how to allocate the pluses and minuses among the nations of the world, demand the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate. Nuisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus.[115]

Similarly, the New Jersey Supreme Court, "traditionally one of the most influential and pro-plaintiff courts in the country on issues related to products liability," as well as the Rhode Island Supreme Court, "recently [commented] explicitly on the antidemocratic character of "courts seeking to use common law claims to remedy a public health problem previously addressed in a far different and inconsistent manner by the state legislature."[116] Each court emphasized that their state legislatures had enacted statutory and regulatory schemes placing the burden and costs of abatement on property owners, rather

---

judiciary to ameliorate. Global warming and solutions thereto must be addressed by the two other branches of government.").

114. *Id.* at 475–76.

115. *City of Oakland*, 325 F. Supp. 3d at 1026.

116. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 918 (2008) (citing State v. Lead Indus. Ass'n, 951 A.2d 428, 457–58 (R.I. 2008); *In re* Lead Paint Litig., 924 A.2d at 505).

Published by Scholar Commons, 2019

South Carolina Law Review, Vol. 70, Iss. 3 [2019], Art. 3

than lead-paint manufacturers.[117] Accordingly, the New Jersey and Rhode Island Supreme Courts held it was improper for the Attorneys General to attempt to use the judicial system to modify those schemes and shift the burden onto the product manufacturers.[118] In other words, they acknowledged the impropriety of permitting a court to impose a regulatory scheme contrary to or inconsistent with the statutes and regulations enacted by the state legislature.[119]

Indeed, even Judge Silverstein—the Rhode Island Superior Court judge whose refusal to dismiss the state Attorney General's public nuisance action against lead-paint manufacturers was subsequently reversed by the Rhode Island Supreme Court[120]—acknowledged that the issues presented by such claims were "a polycentric problem that cannot easily be resolved through a traditional courtroom-bound adjudicative process," essentially admitting the judiciary's inability to resolve complex questions of health and policy.[121]

From a practical standpoint, what each of these courts has recognized is that the use of *parens patriae* actions and public nuisance claims as a means to address these types of pervasive policy concerns flies in the face of the established allocation of powers between the legislature, the judiciary, and the executive branches of government.[122] In bringing these kinds of actions, states and their political subdivisions have usurped the regulatory authority vested in the legislature and the administrative agencies it appoints.[123] Thus, the real conflict is not so much between the judiciary and the legislature, but between the legislature and the executive—namely the states and their political subdivisions.[124] Moreover, due to "both the disproportionate power of state Attorneys General, particularly when acting collectively, to force a regulatory settlement and the pragmatic political pressures facing state court judges that might otherwise check the attorney general," these kinds of cases become a

117. *Lead Indus. Ass'n*, 951 A.2d at 457–58; *In re Lead Paint Litig.*, 924 A.2d at 494.

118. *See Lead Indus. Ass'n*, 951 A.2d at 457–58; *In re Lead Paint Litig.*, 924 A.2d at 500–05.

119. *See Lead Indus. Ass'n*, 951 A.2d at 457–58; *In re Lead Paint Litig.*, 924 A.2d at 500–05; *see also* Gifford, *supra* note 116, at 919.

120. *See Lead Indus. Ass'n*, 951 A.2d at 455–56.

121. State v. Lead Indus. Ass'n, No. PC 99-5226, 2007 WL 711824, at *87 (R.I. Super. Ct. Feb. 26, 2007) (quoting Hart v. Cmty. School Bd. of Brooklyn, 383 F. Supp. 699, 766–67 (E.D.N.Y. 1974)).

122. Gifford, *supra* note 116, at 946–47.

123. *See id.* at 950–51.

124. *Id.* at 951.

breeding ground for "the greatest tyranny, namely, the accumulation of excessive authority in a single branch of government."[125]

States and their agencies and subdivisions enjoy significantly greater bargaining power in these types of lawsuits because few corporations have the ability, let alone the willingness, to risk trial when the plaintiff is an entire state asserting billions of dollars in damages from injuries to millions of citizens.[126] In this way, states are able to use litigation as a means of regulation "[b]y threatening catastrophic consequences" in order to "persuade[] (or coerce[]) the regulated entities to agree to a final outcome that looks like the [traditional methods] of regulation-by-negotiation or regulation-by-rulemaking: a set of detailed rules that constrain future behavior."[127] However, there are no benefits to having states seek to regulate through litigation as opposed to conventional rulemaking and legislative procedures. Rather, "[t]he key to the attractiveness of regulation by litigation is exactly this—that it enables regulators to assume powers that they otherwise lack."[128] "It should be seen as a negative, not a positive, attribute of regulation by litigation that it enables government and private actors to evade constitutional restraints on their powers."[129] As former Secretary of Labor Robert B. Reich explained:

> [T]he biggest problem is that these lawsuits are end runs around the democratic process. We used to be a nation of laws, but this new strategy presents novel means of legislating—within settlement negotiations of large civil lawsuits initiated by the executive branch.

---

125. *Id.* at 952 (quoting M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1149 (2000)) (internal quotation marks omitted).

126. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298, 1299, 1300 (7th Cir. 1995) (noting the "intense pressure to settle" facing corporate defendants in aggregate litigation in which a single jury "will hold the fate of an industry in the palm of its hand" as compared with the "decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions . . . "); Gifford, *supra* note 116, at 915–16.

127. Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Litigation: Regulation by Litigation*, ENGAGE, Feb. 2008, at 109, 110, https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/50GoDOY8E60TrrSFOTxtkQZqaGScJUXTaktmt5LO.pdf. Of course, one of the downfalls of this kind of regulation is that it can only be effective if all—or at least most—of the market participants are parties to the underlying lawsuit. *See id.* Naturally, if the parties were to settle, the agreement would bind only those entities named in the lawsuit, placing them at a disadvantage with respect to the rest of the market while failing to curb behavior of the remaining market entities. *See id.*

128. *Id.*

129. *Id.*

> This is faux legislation, which sacrifices democracy to the discretion of . . . officials operating in secrecy.[130]

Additionally, the reality often is not that the legislature has failed to regulate a particular industry, "but rather that the extent or type of legislative or administrative regulation is not deemed optimal by the state attorney general."[131] Nevertheless, "the deliberative legislative process, with its assortment of checks and balances, either constitutionally mandated or arising from legislative tradition, offers comparative institutional advantages over the attorney general's process of deciding whether to regulate a given industry or a specific manufacturer through state-sponsored litigation."[132]

> "[I]t is commonly understood that, in a representative democracy, macro-economic regulation is accomplished most appropriately by elected officials and their lawful delegates." The legislative process provides, theoretically and—to a greater or lesser extent—realistically, an opportunity for all parties to be heard and for their experts to testify.
>
> . . . .
>
> As imperfect as the functioning of state legislatures in reality may be, the attorney general's appropriate role within the constitutional framework is not to replace the legislatively enacted provisions regulating products with a regulatory scheme, whether resulting from settlement or judicial decree, which implements his or her own vision of social engineering. Nor will public policymaking be improved by a process that prioritizes regulatory goals depending on whether corporations with perceived deep pockets can be blamed for causing a particular public health problem.[133]

Where the state legislature has, either expressly or impliedly, approved of a state bringing such claims there can be little doubt that the state acts within its constitutional authority, regardless of its intent to supplant the legislature's

---

130. Gifford, *supra* note 116, at 915 (quoting Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL STREET J., Jan. 12, 2000, at A22).

131. *Id.* at 961.

132. *Id.* at 961–62 (citing James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 338 (2005)).

133. *Id.* at 962, 969 (quoting Henderson, *supra* note 132, at 338).

existing regulatory scheme.[134] On the other hand, however, even without explicitly prohibiting such claims, a state legislature can indicate its disapproval of such lawsuits through the enactment of a thorough and holistic statutory or regulatory scheme addressing the public concerns these lawsuits seek to remedy.[135] Specifically, the manufacturing and distribution of prescription medications, including opioid painkillers, is highly regulated by both federal and state legislatures. Thus, this same reasoning for prohibiting regulatory lawsuits by states under the guise of public nuisance claims applies equally to the opioid crisis. Finally, even if the legislature is entirely silent on an issue, its failure to act should not, and in fact, cannot be interpreted as tacit compliance to such litigation, especially in light of the significant hurdles to the enactment of new legislation as compared with the ease of merely filing a lawsuit.[136]

Moreover, it is clear that a state's use of such regulatory lawsuits is not only an invasion of the legislature's regulatory powers, but also its taxing and spending powers when one considers the desired results of these *parens patriae* actions. For example, as a result of the tobacco litigation, cigarette prices rose to fund tobacco companies' settlement payments to the states, creating the equivalent of a new, additional tax on cigarettes.[137]

In sum, *parens patriae* lawsuits instigated by states or their subdivisions asserting public nuisance claims without the express or implicit approval of the state legislature overstep the bounds of the powers constitutionally allocated to the executive branch.[138] The decision such suits seek is not within "the proper—and properly limited—role of the courts in a democratic

---

134. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952); *see also* FLA. STAT. ANN. § 409.910 (West 2017) (statute enacted during height of tobacco litigation implying authority for state Attorney General to utilize *parens patriae* actions); MD. CODE ANN., HEALTH-GEN. § 15-120(a) (West 2018) (same); VT. STAT. ANN. tit. 33, § 1901(h) (West 2018) (same). For additional information on the enactment of the Florida statute, see Richard N. Pearson, *The Florida Medicaid Third-Party Liability Act*, 46 FLA. L. REV. 609, 611 (1994) ("Based on the discussion surrounding the adoption of the Act, the Legislature's clear purpose in enacting it was to seek reimbursement of medical expenditures made on behalf of recipients that are attributable to cigarette smoking." (citations omitted)).

135. *See, e.g.*, State v. Lead Indus. Ass'n, 951 A.2d 428, 457–58 (R.I. 2008) (dismissing Attorney General's public nuisance lawsuit against lead-paint manufacturers because the legislature had clearly placed the burden of remedying the issue of childhood lead poisoning on property owners, not manufacturers); *In re* Lead Paint Litig., 924 A.2d 484, 493–94, 501–02 (N.J. 2007) (same).

136. *See, e.g.*, Gifford, *supra* note 116, at 960.

137. *Id.* at 962.

138. *Id.* at 964.

society."[139] In the absence of legislative authorization and guidance, courts are "without competence" to address matters of policy,[140] and they lack authority to "formulate national policies or develop standards for matters not legal in nature."[141]

B. Nonjusticiable Political Question

Public nuisance suits brought by local governments present courts with nonjusticiable political questions disguised as litigants' claims and prayers for relief. An issue is cognizable by the courts—e.g., is justiciable—only when the suit presents a case or controversy requesting a judgment or other remedy that the court actually has the power to grant under the applicable state or federal Constitution and statutes. "The political question doctrine is a species of the separation of powers doctrine and provides that certain questions are political as opposed to legal, and thus, must be resolved by the political branches rather than by the judiciary."[142] The doctrine limits the judiciary's authority to "formulate national policies or develop standards for matters not legal in nature."[143] A lawsuit presents a nonjusticiable political question when it requires the court to "'make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis.'"[144] "This issue surfaces because a court's power to grant relief is necessarily limited when a party seeks the court's intervention in a matter that falls within the purview of the legislative or executive branches of government."[145]

The Supreme Court has articulated six factors, any one of which dispositively indicates the presence of a non-justiciable political question:

---

139. Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (internal quotation marks omitted) (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)).

140. Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980).

141. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (citing United States *ex rel.* Joseph v. Cannon, 642 F.2d 1373, 1379 (1981) (footnote omitted)).

142. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 871 (N.D. Cal. 2009) (citing Corrie v. Caterpillar, Inc., 503 F.3d 974, 980 (9th Cir. 2007)); *see also* Baker v. Carr, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

143. *Japan Whaling Ass'n*, 478 U.S. at 230 (citing *Cannon*, 642 F.2d at 1379).

144. *Kivalina*, 663 F. Supp. 2d at 871 (quoting E.E.O.C. v. Peabody W. Coal Co., 400 F.3d 774, 784 (9th Cir. 2005)).

145. Warren Allen, *The Unexpected Regulator: Regulation Through Settlement After Vioxx & Bextra*, 6 BROOKLYN J. CORP. FIN. & COM. L. 565, 572 (2012) (citing KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 49 (16th ed. 2007)); *see also* Gifford, *supra* note 116, at 950 (noting that justiciability refers to "whether the matter is suitable for judicial resolution or should be left to the legislative branch").

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[146]

When analyzing and applying these six factors, lower courts have rearticulated them in the form of three specific questions: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?"[147]

The presence of any one of the foregoing six factors is enough to withdraw a matter from the realm of justiciability. Public nuisance suits brought by local governments against gun makers, oil producers, drug manufacturers, and the like present multiple indicia of nonjusticiability. For example, the District Court for the Northern District of California dismissed as non-justiciable the municipal public nuisance claims asserted against twenty-four oil and power utility companies for their alleged contribution to greenhouse gas emissions causing global warming.[148] The district court's ruling focused particularly on "whether 'resolution of the question demand[s] that a court move beyond areas of judicial expertise.'"[149] The court first considered whether it had "the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'"[150] In other words, "whether the judiciary is *granting relief in a reasoned fashion* versus allowing the claims to proceed such that they 'merely provide "hope" without a substantive

146. *Baker*, 369 U.S. at 217; *see also Kivalina*, 663 F. Supp. 2d at 872 (citing Alperin v. Vatican Bank, 410 F.3d 532, 547 (9th Cir. 2005)) (noting that "[a]ny one of the *Baker* factors may be dispositive").

147. *Kivalina*, 663 F. Supp. 2d at 872 (quoting Wang v. Masaitis, 416 F.3d 992, 995 (9th Cir. 2005)) (internal quotation marks removed).

148. *Id.* at 883.

149. *Id.* at 873 (quoting *Wang*, 416 F.3d at 995).

150. *Id.* at 874 (quoting *Alperin*, 410 F.3d at 552).

legal basis for a ruling.'"[151] The district court noted that, to apply the elements of a public nuisance claim, "the factfinder [would] have to weigh, inter alia, the energy-producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and business at every level."[152] The judge or the jury "would then have to weigh the benefits derived from those choices against the risk that increasing greenhouse gases would in turn increase the risk of causing flooding along the coast of a remote Alaskan locale."[153] Thus, the court held the analysis weighed in favor of dismissal because the plaintiffs had "fail[ed] to articulate any particular judicially discoverable and manageable standards that would guide a factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions."[154]

In addition, the district court in *Kivalina* considered whether it would be possible to decide the case "without an initial policy determination of a kind clearly for nonjudicial discretion."[155] The court noted this factor applies if the court's resolution of the matter would "remov[e] an important policy determination from the Legislature."[156] Applying this test to the plaintiffs' public nuisance claims, the court recognized that, regardless of whether the claim was for injunctive relief or damages, resolution of the case would "require[] balancing the social utility of Defendants' conduct with the harm it inflicts[,]" which "by definition, entails a determination of what would have been an acceptable limit on the level of greenhouse gases emitted by Defendants."[157] The court noted determination of liability would also require a decision as to who best to bear the costs of climate change.[158] "[T]he allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance."[159] Thus, the court dismissed the action on the grounds of political question.[160]

---

151. *Id.* (quoting *Alperin*, 410 F.3d at 553).
152. *Id.* at 874.
153. *Id.* at 874–75.
154. *Id.* at 875.
155. *Id.* at 876 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)) (internal quotation marks removed).
156. *Id.* (quoting *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 438 F. Supp. 2d 291, 297 (S.D.N.Y. 2006)) (internal quotation marks removed).
157. *Id.*
158. *Id.* at 876–77.
159. *Id.* at 877.
160. *Id.*

Strange: A Prescription for Disaster: How Local Governments' Abuse of Publ

The issues raised by the opioid litigation are comparable to those at issue in *Kivalina*—requiring expertise beyond the purview of the judiciary and necessitating important policy determinations before a resolution can be reached.[161] For example, the second *Baker* factor indicates that "judicial action must be governed by *standard*, by *rule*. . . . [L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions."[162] But societal epidemics such as drug abuse are ill-suited for judicial resolution because the factfinder must balance the benefits and utility of the legitimate and helpful uses of such prescription drugs against the risks posed by their misuse and abuse, and there are not consistent, reliable, objective judicial standards by which to make such an assessment.[163]

Similarly, the courts lack any legal method for calculating damages, crafting remedies, and allocating fault when the plaintiffs—cities, counties, and other local governmental entities—allege injuries that cannot be traced with any degree of precision to any specific drug manufacturer's conduct (much less any illegal conduct) or even to any injury caused particularly by opioid drugs (as opposed to other confounding causes). Accordingly, "the allocation of fault—and cost—of [the conduct at issue] is a matter appropriately left for determination by the executive or legislative branch."[164]

The third *Baker* factor also supports dismissal because addressing the so-called opioid crisis involves complex policy judgments.[165] Adjudicating local governments' public nuisance claims "would require the Court to balance the competing interests of reducing [the alleged harm] and the interests of advancing and preserving economic and industrial development," which is "the type of initial policy determination to be made by the political branches."[166] *Baker*'s fourth, fifth, and sixth factors—namely the need to respect decisions of coordinate branches of government, adherence to policy decisions already made, and the potential embarrassment from different decisions from coordinate branches of government[167]—likewise counsel against the justiciability of the opioid suits. The need for deference to legislative and agency decision-making is explained in section II.A, *supra*, and section II.D, *infra*, and the risk of conflicting outcomes is heightened

161. *Id.*

162. Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) (plurality).

163. *See Kivalina*, 663 F. Supp. 2d at 874–75; State v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *15 (N.D. Cal. Sept. 17, 2007).

164. *Kivalina*, 663 F. Supp. 2d at 877; *see also Gen. Motors*, 2007 WL 2726871, at *15.

165. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 427 (2011).

166. *Gen. Motors*, 2007 WL 2726871, at *8 (citing Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005)); *see also* Comer v. Murphy Oil USA Inc., 839 F. Supp. 2d 849, 864–65 (S.D. Miss. 2012).

167. Baker v. Carr, 369 U.S. 186, 217 (1962).

where, as here, not only might the courts penalize conduct and products that complied with legislative and agency dictates, but which other courts have or will find to be permissible.

In sum, governmental litigation asserting public nuisance claims raises considerable concerns regarding the justiciability of the political question raised therein. Any judicial decree resulting from litigation that seeks to penalize or impose heightened requirements on conduct or products that were already regulated and were in compliance with existing law and regulations intrudes on the legislature's province and addresses a political question.[168] Moreover, "[t]he type of decision-making process required to solve, or at least ameliorate, complex social problems does not easily fit within either the liability phase or the remedial phase of the judicial process," especially in light of the "extremely vague and ill-defined boundaries of public nuisance and other torts typically employed in *parens patriae* actions against product manufacturers."[169] For these reasons, the use of public nuisance claims in such cases is inappropriate for judicial review on political question grounds.

C. Preemption

Claims brought under state law, including state common law claims of public nuisance, may be expressly or impliedly preempted by federal law. The principle of federal preemption is grounded in the Supremacy Clause, which establishes that federal law "shall be the supreme Law of the Land . . . [the] Laws of any State to the Contrary notwithstanding."[170] Stated simply, where state and federal law conflict, state law must yield. Such conflict may arise either expressly or impliedly, such as where Congress has occupied the field through legislation;[171] where the claims interfere with, hinder, or stand as an obstacle to federal purposes and objectives[172] or, where the claims implicate "uniquely federal interests" that are "committed by the Constitution and laws of the United States to federal control."[173]

The preemption doctrine presents a substantial hurdle to public nuisance suits arising from conduct or products already regulated by and in compliance

---

168. Gifford, *supra* note 116, at 920.

169. *Id.* at 962–63.

170. U.S. CONST. art. VI, cl. 2.

171. *See* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 348 (2001); N.Y. SMSA Ltd. P'ship v. Town of Clarkstown, 612 F.3d 97, 104 (2d Cir. 2010) ("[C]onflict preemption [exists] where . . . the local law is an obstacle to the achievement of federal objectives."); Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 313 (2d Cir. 2005).

172. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 881 (2000).

173. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (citations omitted) (internal quotation marks removed).

with federal law and which, in some instances, were affirmatively authorized and approved by federal regulators. For example, in the context of public nuisance suits against manufacturers and distributors of opioid medications, a host of federal laws, including the Food, Drug, and Cosmetics Act ("FDCA"),[174] control every aspect of the development, testing, production, manufacturing, distribution, labeling, advertising, prescribing, sale, possession, use, misuse, abuse, theft, resale, and inter-state transportation of pharmaceutical drugs. The FDCA expressly prohibits enforcement by states or private actors.[175] A state or local government ought not be able to avoid this preclusive bar by simply imbedding its action in the vehicle of a public nuisance claim. Likewise, the myriad federal statutes governing the sale, possession, use, abuse, and transportation of such substances occupy the field and displace any state common law claims that would impose different or higher requirements. Accordingly, "[s]ome courts have properly recognized that the FDA's regulation of prescription drug marketing precludes [state consumer protection law] claims based on federal preemption."[176] In addition, at least one commentator has opined that "a settlement that attempted to regulate the marketing of certain medical devices governed by the explicit preemption statute would be unenforceable."[177]

Indeed, the FDCA and its implementing regulations (as well as other relevant regulations promulgated by the Food and Drug Administration ("FDA")) serve an important federal objective—namely to ensure the safety and efficacy of medical drugs and devices—and comprise a complex and lengthy process for doing so. If states and local governments are permitted to intrude into the sphere of regulating the safety and efficacy of medical drugs,

174. 21 U.S.C. §§ 301–399i (2012 & Supp. I 2017).

175. *See id.* § 337(a) (stating that "all such proceedings for the enforcement, or to restrain violations, of [the FDCA] shall be by and in the name of the United States"); *see also Buckman*, 531 U.S. at 349 n.4 ("The FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with the [FDCA].").

176. Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *"That's Unfair!" Says Who—the Government or the Litigant?: Consumer Protection Claims Involving Regulated Conduct*, 47 WASHBURN L.J. 93, 119–20 (2007) (citing Pa. Emp. Benefit Tr. Fund v. Zeneca, Inc., No. Civ. 05-075-SLR, 2005 WL 2993937, at *2–4 (D. Del. Nov. 8, 2005) (unpublished opinion) (holding the Delaware Consumer Fraud Act does not apply to actions involving the safety and efficacy of an FDA-approved prescription drug); Williams v. Purdue Pharma Co., 297 F. Supp. 2d 171, 177–78 (D.D.C. 2003) (dismissing class action on behalf of patients prescribed OxyContin for failure to state an actionable injury under consumer protection law)).

177. Allen, *supra* note 145, at 581 (citing Riegel v. Medtronic, Inc., 552 U.S. 312, 323 (2008)).

the hindrances and obstacles to the federal objectives would be many.[178] For example, rather than complying solely with the FDA's complex but uniform regime, drug and device manufacturers would suddenly be subject to a patchwork scheme of fifty states' tort laws and consumer protection statutes.[179] Manufacturers may be reticent to introduce new drugs and devices due to uncertain liability under such multiple overlapping enforcement systems.[180]

States, of course, possess authority to regulate issues of health and safety, including practices governing the prescribing and distribution of prescription medications.[181] Accordingly, a state may, if it wishes, place certain restrictions and conditions on the use and prescription of certain medications, even if the drug has received approval from the federal government through the FDA without running afoul of the preemption doctrine.[182] A state may not, however, ban or prohibit outright the use of a product that has undergone a thorough assessment and approval by the FDA[183] because doing so would "obstruct the FDA's Congressionally-given charge" by "interpos[ing] its own conclusion about [the drug's] safety and effectiveness" contrary to the FDA's approval and endorsement.[184]

Nor does the United States Supreme Court's decision in *Wyeth v. Levine*[185] permit actions by states and governmental subdivisions that seek to penalize or impose higher standards on products or conduct already controlled, reviewed, and approved by federal law, regulations, and agencies. In *Levine*, the plaintiff received a direct injection of an anti-nausea medication

---

178. *See Buckman*, 531 U.S. at 350 (noting that state law claims "inevitably conflict with the FDA's responsibility to police fraud consistently with the Administration's judgment and objectives").

179. *Id.* ("As a practical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants—burdens not contemplated by Congress in enacting the FDCA . . . .").

180. *See, e.g.*, *Riegel*, 552 U.S. at 326 (noting that Congress's "solicitude for those injured by FDA-approved devices . . . was overcome in Congress's estimation by solicitude for those who would suffer without new medical devices if juries were allowed to apply the tort law of 50 States to all innovations").

181. *See* Zogenix, Inc. v. Patrick, No. 14-11689-RWZ, 2014 WL 4273251, at *3 (D. Mass. Aug. 28, 2014).

182. *See id.*; *see also* Catherine M. Sharkey, *States vs. FDA*, 83 GEO. WASH. L. REV. 1609, 1618–20 (2015).

183. *See Zogenix*, 2014 WL 1454696, at *2–3; *see also* Sharkey, *supra* note 182, at 1617 (citing Verified Amended Complaint at 14–15, Zogenix, Inc. v. Patrick, No. 1:14-cv-11689-RWZ, 2014 WL 1454696 (D. Mass. Apr. 15, 2014)).

184. *Zogenix*, 2014 WL 1454696, at *2.

185. 555 U.S. 555 (2009).

that resulted in gangrene and the eventual amputation of part of her arm.[186] Levine brought a state tort suit against Wyeth, the manufacturer of the drug, claiming that Wyeth knew but failed to warn that the direct intravenous injection was more dangerous than other methods of administering the medicine.[187] Wyeth argued that, because all label changes required FDA approval, it could not have unilaterally amended the label as plaintiff alleged it should have done.[188] The Court rejected Wyeth's defense, holding in part that personal injury suits did not obstruct the purposes and objectives of federal drug labeling regulations.[189] Both *Levine's* holding and its reasoning, however, limit its applicability to a very particular set of facts and circumstances, namely state common law tort suits for personal injury brought by individuals. Indeed, the Supreme Court subsequently limited the scope of *Levine's* holding[190] and has reaffirmed the viability of implied obstacle preemption.[191]

For the same reasons, states and municipalities are preempted from using public nuisance litigation to regulate opioid manufacturers and distributors who are already subject to comprehensive federal rules and regulations. The legislative and executive branches, and their duly-appointed agencies, are constitutionally charged with the promulgation and enforcement of statutes and regulations governing the manufacture and distribution of opioid medications. Allowing local governments to challenge actions taken in full compliance with those statutory and regulatory schemes would be to allow the states to "stand[] in the way of 'the accomplishment and execution of' an important federal objective," which the Constitution does not allow.[192]

D. Primary Jurisdiction

The doctrine of primary jurisdiction may apply in situations where "decision-making is divided between courts and administrative agencies."[193] It is a doctrine of judicial deference[194] that "creates a workable relationship

---

186. *Id.*

187. *Id.* at 559–60.

188. *See id.* at 561–62.

189. *Id.* at 573.

190. Pliva, Inc. v. Mensing, 564 U.S. 604, 604 (2011) (holding that federal law preempts state law tort suits against manufacturers of generic drugs).

191. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).

192. Zogenix, Inc. v. Patrick, No. 14-11689-RWZ, 2014 WL 4273251, at *2 (D. Mass. Aug. 28, 2014) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

193. Cheyney State Coll. Faculty v. Hufstedler, 703 F.2d 732, 736 (3d Cir. 1983).

194. Clark v. Time Warner Cable, 523 F.3d 1110, 1114 (9th Cir. 2008). As a prudential doctrine of deference, primary jurisdiction is distinct from preemption. Primary jurisdiction

between the courts and administrative agencies . . . ."[195] In deferring to an agency's primary jurisdiction, a court recognizes that judicial intrusion risks introducing conflicting and inconsistent rulings, especially in areas requiring special expertise, unique knowledge, or technical experience:

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. . . . Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.[196]

Courts apply a four-factor test to determine whether the doctrine applies:

> (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made.[197]

---

counsels that, where the legislature has tasked a particular body with overseeing a specific sphere, courts should decline to exercise their jurisdiction in that sphere. *See id.* at 1115. Preemption, in contrast, neither prevents nor counsels against a court entering an arena. Rather, preemption principles guide the court in determining whether state or federal laws apply in that arena. *See Zogenix*, 2014 WL 1454696, at *1.

195. MCI Telecomms. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1105 (3d Cir. 1995) (quoting Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371, 376 (Pa. 1980)).

196. Clark v. Actavis Grp. HF, 567 F. Supp. 2d 711, 714–15 (D.N.J. 2008) (quoting IPCO Safety Corp. v. WorldCom, Inc., 944 F. Supp. 352, 355 (D.N.J. 1996)); *see* Jennifer L. Pomeranz, *Litigation to Address Misleading Food Label Claims and the Role of the State Attorneys General*, 26 REGENT U. L. REV. 421, 429–30 (2014) (citing *Phila. Nat'l Bank*, 374 U.S. at 353) ("This occurs when a court determines that Congress delegated the determination of an area of law to a regulatory agency and the court is faced with a novel or particularly complicated issue. In this context, a court might determine that the FDA has primary jurisdiction over the issue and that the court should abstain from deciding the case in order to protect the 'integrity of a regulatory scheme.'").

197. *Clark*, 567 F. Supp. 2d at 715 (citing *IPCO Safety Corp.*, 944 F. Supp. at 356).

The Supreme Court has recognized that public nuisance suits may intrude on an agency's primary jurisdiction because such suits require a "complex balancing"—i.e., weighing the utility of defendants' conduct against the alleged harm—that cannot be undertaken by courts because "Congress designated an expert agency . . . as best suited to serve as primary regulator" of the relevant subject matter.[198] Numerous cases illustrate the ongoing vitality of the primary jurisdiction doctrine in the context of drug and device litigation.[199] Similarly, many other cases, though not explicitly relying on the primary jurisdiction doctrine, demonstrate the federal government has the exclusive authority to enforce violations of federal drug labeling laws.[200]

Clearly, the regulation of medication—including opioid painkillers—is within the primary jurisdiction of the FDA, as duly-appointed by Congress. Therefore, courts should defer to the legislature and the FDA when it comes to issues related to the manufacture and distribution of such medications, rather than attempting to tackle the issues themselves through indirect public nuisance claims.

---

198. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 427–28 (2011).

199. *See, e.g.*, Wyeth v. Sun Pharm. Indus. Ltd., No. 09-11726, 2010 WL 746394, at *4 (E.D. Mich. Mar. 2, 2010) ("[I]t is solely the FDA's duty to investigate and prosecute allegations of misbranding or adulterating drugs."); *In re* Human Tissue Prods. Liab. Litig., 488 F. Supp. 2d 430, 432 (D.N.J. 2007) ("[W]hen an activity is arguably subject to an administrative agency's expertise . . . federal courts must defer to the exclusive competence of that agency."); Healthpoint, Ltd. v. Stratus Pharm., Inc., 273 F. Supp. 2d 769, 787 (W.D. Tex. 2001) ("[A]rguments concerning what federal law does or does not require for [a product] to be marketed legally require the direct application and interpretation of FDA regulations" and are thus improper for judicial determination); Bernhardt v. Pfizer, Inc., Nos. 00 Civ. 4042 LMM, 00 Civ. 4379 LMM, 2000 WL 1738645, at *2 (S.D.N.Y. Nov. 22, 2000) (noting that in matters such as the weight to be afforded to scientific studies, "[t]he FDA, not this Court, has the relevant expertise.") (citing Henley v. FDA, 77 F.3d 616, 621 (2d Cir. 1996)); Braintree Labs., Inc. v. Nephro-Tech, Inc., No. 96-2459-JWL, 1997 WL 94237, at *6 (D. Kan. Feb. 26, 1997) ("[C]laims that require direct interpretation and application of the FDCA are not properly recognized because such matters are more appropriately addressed by the FDA.").

200. *See, e.g.*, Schering-Plough Healthcare Prods. v. Schwarz Pharma, Inc., 586 F.3d 500, 510 (7th Cir. 2009); Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1139 (4th Cir. 1993); Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 231 (3d Cir. 1990); Mut. Pharm. Co. v. Watson Pharm., Inc., No. CV 09-5700 PA (RCx), 2009 WL 3401117, at *5 (C.D. Cal. Oct. 19, 2009) ("Plaintiffs' contentions concerning the product labels and inserts are even weaker . . . because disputes concerning the content of those labels and inserts falls even more squarely within the primary jurisdiction of the FDA."); Pediamed Pharm., Inc. v. Brekenridge Pharm., Inc., 419 F. Supp. 2d 715, 727 (D. Md. 2006); *Healthpoint*, 273 F. Supp. 2d at 787.

E. Difficulty of Establishing and Calculating Damages that are Traceable to and Proximately Caused by Defendants' Lawful Conduct or Products

Courts are authorized to hear and decide cases and controversies, which presupposes and requires the presence of a plaintiff who has suffered a concrete and particularized injury (e.g., a real and measurable harm), as opposed to merely an abstract, hypothetical, or contingent injury. This requirement poses a particular challenge to public nuisance suits in which the harm to the municipality or county is either an anticipated future injury or is merely the alleged increased cost of providing governmental services such as policing, emergency medical care, and the like. Indeed, an inherent difficulty in the latest iterations of public nuisance claims (e.g., municipal lawsuits asserting claims arising from conduct or products that were already heavily regulated, were in compliance with said regulations, and, in some instances, had been expressly approved by the regulators) is finding any discrete and measurable harm fairly traceable to the defendants' conduct. This challenge arises both from the fact that numerous intervening actors and actions disrupt the causal chain between the defendants' acts and the alleged harms and from the difficulty of calculating a fiscal cost to the municipality attributable solely and specifically to the challenged conduct or products.

Some governmental public nuisance plaintiffs have argued that a corporation that makes a product causing severe harm should, on an almost per se basis, be required to shoulder the costs of abating that harm.[201] But such an argument proves too much. As Judge Easterbrook explained in rejecting the same argument made against the tobacco companies, there is "no rule of law [that] requires persons whose acts cause harm to cover all of the costs, unless these acts were legal wrongs."[202] He further explained, even though "[t]he food industry puts refined sugar in many products," foreseeably resulting in "health problems and early death," plaintiffs cannot "recover in tort from Godiva."[203]

Rather, it is a well-settled rule of law that liability can only attach to "the *direct and immediate cause* of the damage" alleged.[204] The New York Appellate Division's First Department's opinion in *People v. Sturm, Ruger & Co.*, upholding the dismissal of New York State's public nuisance claim

201. *See, e.g.*, People *ex rel.* Spitzer v. Sturm, Ruger & Co., 309 A.D. 2d 91, 93 (N.Y. App. Div. 2003).

202. Int'l Bhd. of Teamsters, Local 734 Health & Welfare Tr. Fund v. Philip Morris Inc., 196 F.3d 818, 823 (7th Cir. 1999).

203. *Id.*

204. *Sturm, Ruger & Co.*, 309 A.D. 2d at 97.

against gun manufacturers, is instructive on this point.[205] When addressing whether the state had sufficiently alleged facts to show proximate causation, the court applied the "longstanding" principle that a cause of action cannot stand "where the causal connection between the alleged business conduct and harm is too tenuous and remote."[206] The court concluded that "the harm plaintiff alleges is far too remote from defendants' otherwise lawful commercial activity to fairly hold defendants accountable for common-law public nuisance."[207] In reaching this conclusion, the court relied on the New York Court of Appeals' decision in *Hamilton v. Beretta USA Corp.*, in which the Court of Appeals unanimously declared that liability "should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs."[208] The First Department also relied on the decisions of eight federal circuit courts of appeals directing dismissal of similarly remote claims brought against tobacco companies.[209]

The First Department recognized that "giving a green light" to the state's public nuisance claim against gun manufacturers would "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."[210] The court cautioned:

> 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 nondefective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.[211]

The court noted that, without strict adherence to the requirement that a plaintiff establish proximate causation, "such lawsuits employed to address a host of societal problems"—such as the opioid crisis—would arise, regardless of the remoteness of the alleged harm and the "nature and extent of any intervening causes between defendants' lawful commercial conduct and the

---

205. *See id.* at 104, 106.

206. *Id.* at 95.

207. *Id.* at 103.

208. Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1062 (N.Y. 2001); *see Sturm, Ruger & Co.*,761 N.Y.S.2d at 195–97, 202.

209. *See Sturm, Ruger & Co.*, 309 A.D. 2d at 103 n.3.

210. *Id.* at 96.

211. *Id.*

alleged harm."[212] In this way, the proximate cause requirement serves to assist courts in avoiding involvement in "issues which the Legislative and Executive branches are vastly better designed, equipped and funded to address."[213]

Moreover, as the First Department recognized in *People v. Sturm, Ruger & Co.*, the practice of barring remote and indirect claims for lack of proximate causation is not unique to New York state law, but rather has been utilized by at least eight United States Courts of Appeals to uphold dismissal of similar public nuisance claims against tobacco companies.[214]

The same rationale applies in equal force to such claims against opioid manufacturers. The lawful conduct of manufacturing and distributing legal, FDA-approved opioid medications is far too remote from the harms suffered by states and local governments as a result of the opioid crisis. Furthermore, even if a court were willing to permit such remote claims against opioid manufacturers and pharmaceutical companies, it is hard to imagine how states and local governments will calculate the damages that are the proximate result of the alleged conduct.[215] As one commenter recognized:

> Governmental entities undoubtedly bear heavy costs in law enforcement and medical treatment resulting from the opioid epidemic. It seems more than a stretch, however, to claim that all of the costs of law enforcement are related to illegal opioids, or that all government-borne health care costs are opioid-related. After all, there are other addicting drugs that might not follow from the use of opioids, such as methamphetamine, barbiturates and benzodiazepines.[216]

Therefore, proximate causation and establishment of damages poses yet another roadblock in the use of such public nuisance litigation as a remedy for the opioid-misuse epidemic.

F. Dormant Commerce Clause

There is no question that the imposition of civil liability and monetary judgments are a powerful method of altering defendants' (and other similarly

---

212. *Id.*

213. *Id.* at 105.

214. *See id.* at 103 n.3.

215. *See* Richard Scruggs, *Are Opioids the New Tobacco?*, LAW360 (Sept. 15, 2017, 11:04 AM), https://www.law360.com/articles/962715.

216. *Id.*

situated potential defendants') conduct.[217] Common-law tort claims especially can force a defendant "to change its methods of doing business . . . to avoid the threat of ongoing liability."[218] In short, a sizeable state-law judgment (or settlement) is a potent tool to alter a defendant's out-of-state conduct, and if multiple sizeable judgments (or settlements) are awarded in multiple jurisdictions, there could be seismic changes to the industry itself. Stated differently, such judgments and settlements affect interstate commerce in significant ways.

The Constitution, however, forbids states and their political subdivisions from regulating interstate commerce. Rather, the Commerce Clause grants Congress the sole authority to regulate interstate commerce.[219] The Supreme Court has inferred a "dormant" or "negative" Commerce Clause from this text, finding that since Congress has the power to regulate interstate commerce, states are precluded from doing so by enacting laws or regulations that excessively burden interstate commerce.[220] "The critical inquiry" in determining whether a state regulation violates the Commerce Clause "is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."[221] A state statute violates the dormant Commerce Clause in several ways: (1) if it "discriminates against interstate commerce in favor of intrastate commerce, (2) if it imposes a burden on interstate commerce incommensurate with the local benefits secured," or (3) if it has an effect of "extraterritorial control of commerce occurring entirely outside the boundaries of the state in question."[222]

Though the foregoing authorities analyze the dormant commerce clause in the context of state statutes, there can be no doubt that "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute,"[223] and that "regulation can be . . . effectively exerted

---

217. *See* Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625, 637 (2012) (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)) ("[T]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct.").

218. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 495 (1987); *see also* Boomer v. Atl. Cement Co., 257 N.E.2d 870, 873 (N.Y. 1970) ("[T]he risk of being required to pay permanent damages . . . would itself be a reasonable effective spur" to change the defendant's conduct).

219. *See* U.S. CONST. art. I, § 8, cl. 3.

220. *See* Maine v. Taylor, 477 U.S. 131, 137 (1986) (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980)); *see also* Healy v. Beer Inst., 491 U.S. 324, 336–37 (1989) ("[T]he Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.").

221. *Healy*, 491 U.S. at 336 (citing Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)).

222. Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 168 (2d Cir. 2005) (quoting Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 216 (2d Cir. 2004)).

223. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 n.17 (1996).

through an award of damages."[224] In the same way that the Commerce Clause forecloses a disruptive patchwork of protectionist state statutes, so too it forbids states from accomplishing the same piecemeal, variegated, and inconsistent quilt of regulation by virtue of staggering judgments or settlements that force the defendants to alter their conduct in all of the regions they serve.[225]

IV. LOCAL GOVERNMENT PUBLIC NUISANCE SUITS DISRUPT THE ABILITY OF STATE ATTORNEYS GENERAL TO BRING AND MANAGE LITIGATION ARISING FROM THE SAME ALLEGED CONDUCT

In addition to the challenges discussed above, there are a number of concerns that arise when a state or local government seeks to bring a public nuisance claim against opioid manufacturers where the state Attorney General's office has brought (or intends to bring) the same or similar claims. First, as explained more fully below, such parallel suits raise issues regarding Dillon's Rule, which might bar a local government or municipality from bringing suit in the first place. Second, even if a municipality has authority to bring its claims, there is the potential issue of double recovery and double or multiple liability. Thus, if these claims are to be brought at all, they should be left to the states through their Attorneys General and not to whims and diverse interests of local governments.

First, bringing public nuisance lawsuits of this kind may be beyond the scope of a municipality's authority in violation of Dillon's Rule. Dillon's Rule is a:

> common law canon of statutory construction propagated by Iowa Supreme Court Justice John F. Dillon over 100 years ago, stands for the principle that local governments possess and can exercise only (1) powers granted in express words; (2) powers necessarily or fairly implied in or incident to the powers expressly granted; and (3) powers

224. Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625, 637 (2012) (quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959).

225. *See BMW*, 517 U.S. at 571, 585 (stating a State may not use its tort law to "impos[e] its regulatory policies on the entire [n]ation," because "one State's power to impose burdens on the interstate market" is "constrained by the need to respect the interests of other States"); Am. Auto. Mfrs. Ass'n v. Cahill, 152 F.3d 196, 201 (2d Cir. 1998) (reasoning that air pollution is uniformly regulated by the EPA "in recognition of the burden on commerce that would result from allowing other states to set their own individual emission standards"); North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 301 (4th Cir. 2010) (noting nuisance law is ill-suited to national climate policy).

> essential to the accomplishment of the declared objects and purposes of the entity—not simply convenient, but indispensable.[226]

The extent Dillon's rule applies varies throughout the country. Forty-four jurisdictions have enacted some form of Home Rule, which curtails the applicability of the common law Dillon's Rule depending on the degree of local autonomy granted.[227] Thirty-six of the Home Rule jurisdictions adopted it via a constitutional amendment, while the other eight adopted Home Rule via legislative enactment.[228] Thirty-one jurisdictions are hybrid Home Rule/Dillon's Rule jurisdictions that apply Dillon's Rule to matters or governmental units not accounted for in the constitutional amendment/statute which grants Home Rule.[229] Other states, such as South Carolina, however, treat the enactment of Home Rule as a complete abolition of the applicability of Dillon's Rule.[230]

Nevertheless, regardless of "[w]hether a local government is governed by the Dillon Rule or Home Rule, the ultimate decision of what powers they possess resides with the states."[231] A "local government is strictly limited to what the state delegates to it," and "it is unfounded for local jurisdictions to contend they are equal to the states."[232] Therefore, absent an express designation of authority by a state to its local subdivisions or municipalities granting the right and responsibility to regulate and control the availability and distribution of opioid medications, any lawsuit effectively seeking to enforce or implement such local regulation through use of public nuisance claims constitutes a violation of Dillon's Rule and state sovereignty.[233]

---

226. Shorts v. Bartholomew, 278 S.W.3d 268, 276 (Tenn. 2009); *see also* BellSouth Telecomms. v. City of Laurinburg, 606 S.E.2d 721, 725 (N.C. Ct. App. 2005) (citing Homebuilders Ass'n of Charlotte v. City of Charlotte, 442 S.E.2d 45, 49–50 (N.C. 1994)) ("In its reading of N.C. GEN. STAT. § 160A-4, the [Supreme] Court found that the narrow rule of construction established over some 100 years prior by common law, known as 'Dillon's Rule,' had been replaced by the legislature's 1971 enactment.").

227. *See* HONORABLE JON D. RUSSELL & AARON BOSTROM, AMERICAN CITY COUNTY EXCHANGE, FEDERALISM, DILLON RULE AND HOME RULE 6 (2016), https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf.

228. *Id.*

229. *See id.* at 8.

230. *See, e.g.*, Williams v. Town of Hilton Head Island, S.C., 311 S.C. 417, 421–22, 429 S.E.2d 802, 804–05 (1993).

231. RUSSELL & BOSTROM, *supra* note 227, at 1.

232. *Id.* at 2, 3.

233. Indeed, the defendants in one of the suits centralized in the M.D.L. have already argued that a county in Ohio lacks standing to bring a complaint because the Ohio Attorney General—who is the only one authorized to "bring claims over a statewide public health crisis"—has already initiated such an action. Jeff Overley & Emily Field, *Drug Cos. Unleash*

South Carolina Law Review, Vol. 70, Iss. 3 [2019], Art. 3

Additionally, the use of public nuisance litigation by state subdivisions and localities raises an issue of potential double recovery against opioid manufacturers and distributors.[234] Pursuant to the rule against double recovery, "[a] plaintiff may not receive a double recovery for the same injuries or losses arising from the same conduct or wrong."[235] In other words, a double recovery exists when there is "an overlap between: (1) the injuries or damages for which a plaintiff has received compensation; and (2) the injuries or damages that are the subject of a plaintiff's claim against the defendant."[236]

In this case, because state Attorneys General can bring their claims on behalf of all state residents, that necessarily includes residents of all state subdivisions and municipalities.[237] Accordingly, if both a state's Attorney General and its municipalities file public nuisance claims against pharmaceutical companies—suing for essentially the same wrongdoing and for similar harms on behalf of the same state residents—then any recovery by the municipalities would necessarily be entirely duplicative of at least part of a judgment in favor of the Attorney General. Not only would recovery by state subdivisions under those circumstances violate the rule against double recovery, but it would also "violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process."[238]

Therefore, actions by local state governments bringing the same claims based on similar allegations against the same or similar defendants as those brought by the state Attorneys General are not only redundant, but also risk unnecessarily impeding the claims brought by the state Attorneys General.

Opioid MDL Counterattacks, LAW360 (June 11, 2018, 8:46 PM), https://www.law360.com/articles/1016049/drug-cos-unleash-opioid-mdl-counterattacks (discussing County of Summit v. Purdue Pharma LP, No. 1:18-op-45090 (N.D. Ohio)).

234. *See* Michael J. Purcell, Note, *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, 52 COLUM. J.L. & SOC. PROBS. 135, 136 n.4 (2018) (noting that lawsuits brought by municipalities and local governments "may create issues regarding double-recovery" where the state Attorney Generals have already filed suit).

235. 22 AM. JUR. 2D *Damages* § 32 (2018).

236. *Id.*

237. *See* Susan Harriman, Note, *Parens Patriae Actions on Behalf of Indirect Purchasers: Do They Survive Illinois Brick?*, 34 HASTINGS L.J. 179, 194 (1982).

238. Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1063 (D.N.J. 1989), *rev'd on other grounds*, 900 F.2d 686 (3d Cir. 1990) (quoting *In re* N. Dist. Cal. Dalkon Shield IUD Prods. Liab. Litig., 526 F. Supp. 887, 899 (N.D Cal. 1981)).

https://scholarcommons.sc.edu/sclr/vol70/iss3/3

V. PUBLIC NUISANCE SUITS BROUGHT BY LOCAL GOVERNMENTS ADVERSELY AFFECT THE FUNCTIONING OF THE JUSTICE SYSTEM

Apart from the various doctrinal barriers and practical dangers of municipal public nuisance suits discussed above, the expanding use of public nuisance litigation as a policy-making tool subverts the equitable administration of justice. Such suits consume considerable judicial resources, all for what some have opined are merely attempts to force lucrative settlements by ginning up sufficient public outrage by the filing of lawsuits regardless of the presence of any legally cognizable wrongdoing.[239] Though this tactic has in the past proven "successful," it runs roughshod over the rule of law and the equitable administration of justice:

> The natural impulse to want to help a severely injured victim or remediate extensive environmental damage is certainly understandable. Courts, though, must be grounded by the rule of law. Legal doctrines such as negligent misrepresentation, public nuisance, vicarious liability, and products liability all have elements that must be proved based on credible facts and sound scientific analysis. Courts must refrain from becoming mere compensation mechanisms for transferring money from businesses to injured people. Rather, they must remain places where justice can be achieved and where businesses are only required to pay victims that they wrongfully injured or to clean up environmental harms that they wrongfully caused. Liability rules must remain based on sound principles of law, not deep pocket jurisprudence.[240]

Furthermore, this instinct and the manner in which such suits are prosecuted gives rise to a very real risk that a judge or jury in a state court public nuisance suit will wrongly penalize the defendants for conduct occurring outside the jurisdiction.[241] In addition, the generalized claims—

---

239. *See* Schwartz, Goldberg & Appel, *supra* note 59, at 387 (quoting law professors and commentators opining that "the success of the opioid cases will depend upon whether the plaintiffs can muster sufficient legal, political and public relations pressure to force a settlement," the "publicity generated by the lawsuits, regardless of the suits' legal merit, is 'a great way to get information into the public domain,'" and the litigation is "'more of a publicity stunt'").

240. *Id.* at 404.

241. *See* BMW of N. Am. v. Gore, 517 U.S. 559, 572–73 (1996) ("Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.").

untethered from specific legal wrongdoing that is traceable to calculable damages—in the evolving breed of public nuisance suits complicate the allocation of liability and damages.[242]

There are also disputes about how to handle discovery in the hundreds of parallel lawsuits. In South Carolina, for example, all opioid cases—including those brought by local governments and the suit brought by the Attorney General—have been assigned to a single judge.[243] Even in that somewhat centralized approach, different cities' and counties' attorneys will each wish to issue their own document requests and conduct their own depositions. This duplication is magnified by the fact that scores of other lawsuits are pending in scores of other states, which are themselves overshadowed by the hundreds of suits centralized in the federal Multi-District Litigation proceeding. The MDL court itself has noted the difficulties, duplication, and drain on resources of attempting to coordinate the MDL discovery and trial process with the pending cases in state courts.[244]

Moreover, given this profusion of parallel lawsuits across the country, it is highly unlikely that these cases will all reach trial at the same time. Rather, there is a very real risk that one stand-alone case might go to trial first—without waiting for the MDL processes to play out—and return a verdict that will significantly impact the rest of the pending actions. For example, if the jury were to return an exorbitant, outlier verdict against defendants, the opioid manufacturers and distributors might be highly motivated to seek settlement, regardless of the merits of the claims against them, out of fear of being slapped with a similar judgment. This also creates the potential for the establishment and implementation of myriad new rules and regulations—either through settlement or court judgments—governing the manufacturing and distribution of opioid medications, varying from state to state and, potentially, even town to town, with which these defendants will have to comply. Such a system does not further the equitable administration of justice.

---

242. *See* Scruggs, *supra* note 215 (arguing in part that one "uncertainty is whether all potentially liable opioid defendants have been joined in the suits" and that "the lack of uniformity" in the defendants named or not named in the various lawsuits "creates the potential for 'empty chair' defenses where the missing defendant gets blamed by the others for causing the problem").

243. *See* Amended Order, *In re* Opioid Litigation, No. 2018-08-23-01 (Aug. 23, 2018).

244. *See* Protocol for State & Federal Court Coordination at 1–2, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (Oct. 9, 2018).

Strange: A Prescription for Disaster: How Local Governments' Abuse of Publ

VI. CONCLUSION

The expansion of governmental public nuisance claims beyond their traditional bounds runs headlong into a number of well-established judicial doctrines. Such claims inject courts and litigants into what is, at bottom, a democratic policy-making decision that courts and litigants are ill-suited to make. In addition, such suits disrupt Attorneys Generals' actions arising from the same conduct or products, and ironically, hamper the equitable administration of justice.

Published by Scholar Commons, 2019

*