

Locke Lord QuickStudy: Texas Legislature Advances Bill to Tame ?Public Nuisance ?Litigation

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Public nuisance lawsuits against drug companies, chemical manufacturers, fossil fuel producers, and countless other industries have raised the spectre of onerous abatement orders and substantial damage awards. Many of these lawsuits assert novel theories of public nuisances in an attempt to use the courts, rather than the legislative or regulatory processes, to alter the way products are made, marketed, or sold. Such lawsuits seek redress for myriad social harms—real, perceived, or imagined—whether or not the creation of the alleged nuisance was foreseeable or the defendant’s conduct in creating or contributing to the alleged nuisance was wrongful. While many of these lawsuits have been unsuccessful, they have been widely noted for the significant risks they pose to businesses and other litigation targets.

Such potential liability, often for decades-old alleged conduct, has prompted calls to curb public nuisance actions. In response to those calls, a pair of bills filed in the 2023 state legislative session aim to rein in the misuse of public nuisance in Texas courts. The committee substitute of House Bill 1372 ([CSHB 1372](#)) and its companion Senate Bill 1034 (SB 1034) would eliminate public nuisance theories based on legally authorized activities and conduct, including those authorized, permitted, or regulated by the state or federal government. The bill would also prevent plaintiffs from filing public nuisance claims where a statutory cause of action or administrative enforcement mechanism already exists to address the conduct at issue. If enacted, the legislation would essentially preclude the use of public nuisance lawsuits to hold businesses operating in Texas liable for actions largely, if not entirely, beyond their control.

Development of the Public Nuisance Doctrine

The public nuisance doctrine has undergone a dramatic evolution from its humble origins as a theory tied to public property harms to one that now permits plaintiffs—often states or local governments aided by contingent-fee private attorneys—to bring lawsuits for societal harms like the opioid abuse crisis, electronic cigarettes, or global climate change. A cause of action for “public nuisance” emerged in medieval England as a judicial response to a disruption of the king’s land, a common road, or a public water source. Initially, the only remedy was a criminal writ brought by the Crown, but over time, the doctrine developed to allow suits by private citizens seeking equitable remedies.

In America, public nuisance law developed along similar lines, with its application limited primarily to criminal conduct that infringed upon a public right (typically involving the use of land), for which the remedy was limited to injunctive relief or abatement for governmental plaintiffs. To recover damages under public nuisance a private plaintiff must demonstrate “special injury,” which has been ubiquitously interpreted by courts as requiring an injury “distinct in kind” (rather than simply in degree) from that affecting the general public.^[1]

Today, the widely adopted RESTATEMENT (SECOND) OF TORTS § 821B (Am. Law. Inst. 1979) defines a public nuisance as “an unreasonable interference with a right common to the general public.” Whether an interference is “unreasonable” turns on: “(a) whether the conduct involves a significant interference with the public health, the public peace, the public comfort, or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance, or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.”

Since the 1980s, plaintiffs have tried to use the public nuisance doctrine against product manufacturers alleged to have caused public health crises—such as asbestos, lead paint, and tobacco—and the practice has only expanded in the twenty-first century. In the era of tobacco litigation, the only court to review the viability of a public nuisance claim against tobacco companies dismissed it because, under Texas law, the court was “unwilling to accept the state’s invitation to expand a claim for public nuisance beyond its ground in real property.”^[2] Other jurisdictions, including Illinois, New Jersey, New York, and Rhode Island have similarly recognized that public nuisance is fundamentally ill-suited to resolve claims against product manufacturers.^[3] As the more recent Restatement (Third) of Torts: Liability for Economic Harm § 8 cmt. G (Am. Law Ins. 20202) explains:

Torts seeking to recover for public nuisance have occasionally been brought against the makers of products that have caused harm.... Liability on such theories has been rejected by most courts, and is excluded by this Section, because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue. Mass harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake.

Recent and Emerging Public Nuisance Litigation

Despite these trends, public nuisance plaintiffs have occasionally won massive judgments or entered into lucrative settlement agreements to resolve their cases against product manufacturers. In 2017, for example, a California state appellate court substantially upheld a verdict finding that three manufacturers had caused a public nuisance by advertising and selling lead-based paint products decades before the federal government banned their use. The plaintiffs – 10 California cities and counties – were awarded \$1.15 billion “to address lead paint-related hazards” without any proof of specific causation.^[4] Moreover, numerous California cities, counties, and other governmental entities brought public nuisance claims that revolved around allegations that the design, manufacture, sale, promotion, and supply of chemicals known as Polychlorinated Biphenyls (PCBs) contaminated public water bodies and stormwater systems. Several of the cases advanced beyond the summary judgment stage before the parties reached a settlement agreement in November 2022 for \$550 million.

More recently, in November 2022, California’s attorney general filed a historic lawsuit against more than a dozen per- and polyfluoroalkyl substances (PFAS) manufacturers – as well as unnamed, “John Doe” PFAS

manufacturers – seeking equitable and unspecified damages for purported statewide injuries to the environment and public health.^[5] The Illinois Attorney General followed suit on April 5, 2023, seeking damages from 15 primary and secondary manufacturers of PFAS for costs to monitor and remediate PFAS contamination, injunctive relief, statutory penalties under the Illinois Consumer Fraud and Deceptive Business Practices Act, costs of litigation, and prejudgment interest.^[6]

Plaintiffs have also wielded public nuisance theories in numerous opioid litigation matters filed across the country. These suits have generated billions of dollars in settlements, although the cases proceeding to trial have met with mixed results, with many courts determining that public nuisance is not a viable claim in the opioid context. For example, in 2019, an Oklahoma trial court entered a \$465 million verdict following a bench trial in a public nuisance lawsuit, holding an opioid manufacturer liable under Oklahoma’s public nuisance statute for its prescription opioid marketing campaigning. The trial judgment came after Oklahoma had settled identical claims with two other pharmaceutical companies for \$270 million and \$85 million. But on cross appeal, in which the Oklahoma Attorney General claimed that the rightful amount owed by Johnson & Johnson was twenty times the trial judgment, the Oklahoma Supreme Court overturned the judgment and concluded that the manufacturer could not be held liable under Oklahoma public nuisance law at all.^[7] Despite these legal setbacks, if past is prologue, it seems likely that plaintiffs will continue to pursue novel public nuisance claims in new contexts.

What the Proposed Bill Does and Does Not Do

CSHB 1372 is a simple, two-page statute. On its face, the bill declares that a public nuisance claim is not cognizable in Texas if it seeks relief arising from three scenarios:

- (1) An action or condition authorized, licensed, approved, or mandated by a statute, ordinance, regulation, permit, order, or rule that has been approved by the federal government, a state, a state agency, or a political subdivision of the State of Texas;
- (2) An action or condition that occurs or exists in a context where a statutory cause of action or an administrative enforcement mechanism already exists to address the conduct that is injurious to the public; or
- (3) A product or the manufacturing, distributing, selling, labelling, or marketing of a product, regardless of whether the product is defective.

The bill also establishes that the aggregation of multiple injuries to individuals or private nuisances does not constitute a public nuisance or give rise to a public nuisance claim. The bill establishes that to the extent of a conflict between the bill and common law, the bill’s provisions control; otherwise, the bill’s provisions supplement the common law of public nuisance. CSHB 1372 applies prospectively, so it will only effect causes of action that accrue on or after the bill’s effective date (on passage, or, if the bill does not receive the necessary vote, September 1, 2023).

The bill is relatively narrow and does not:

- (1) Preclude enforcement actions by the Texas Attorney General, state agencies, or political subdivisions;

(2) Limit claimants from obtaining relief under state statutes, such as the Texas Deceptive Trade Practices Act; or

(3) Preclude private or public litigants from obtaining damages for cognizable public nuisance claims.

If enacted, CSHB 1372 could mitigate against abusive public nuisance lawsuits—and their potentially devastating effects on those doing business in Texas. CSHB 1372 would ensure that the tort of public nuisance as a cause of action in Texas is defined in a manner that is consistent with its traditional, limited scope. Thus, the bill offers simplicity and preserves public officials’ abilities to address genuine public nuisances, while still providing both the regulated community and those charged with regulatory oversight with a welcome measure of predictability and fairness.

Both CSHB 1372 and SB 1034 have received committee hearings, with CSHB 1372 sent to House Calendars on April 14 for a potential floor vote. Businesses should make their voices heard while there is still time to influence the proposed legislation, and consider encouraging the broader regulated community to do the same.

Locke Lord’s regulatory and administrative attorneys are closely following this legislation and are available to provide additional insight and guidance. For more information or to discuss the issues raised by this proposed legislation, please contact [Lauren Fincher](#).

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[1] Restatement (Second) of Torts § 821C(1) (“In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”).

[2] *State of Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997) (rejecting the state of Texas’s public nuisance theory).

[3] See, e.g., *City of Chicago v. Beretta*, 821 N.E.2d 1099, 1121 (Ill. 2004) (declining to “impose public nuisance liability for the sale of a [lawful] product”); *State v. Lead Indus. Ass’n, Inc.*, 951 A.2d 428, 456 (R.I. 2008) (holding “[t]he law of public nuisance never before has been applied to products, however harmful.”); *In re Lead Paint Litigation*, 924 A.2d 484, 505 (N.J. 2007) (ruling “were we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance”); *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (2001) (rejecting the contention that gun manufacturers have a general duty to lessen the risk of illegal gun trafficking because they have the power to restrict marketing and product distribution).

[4] *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 514 (Ct.App. 2017), *reh’g denied* (Dec. 6, 2017), *reviewed denied* (Feb. 14, 2018), *cert. denied sub nom. ConAgra Grocery Prods. v. California*, 139 S. Ct. 377 (2018), *cert. denied sub nom. Sherwin-Williams Co. v. California*, 139 S. Ct. 378 (2018).?

[5] *People of the State of California v. 3M Co. et al.*, (Alameda Cnty. Ct.) (2022). Copy of the state’s complaint [here](#).

[6] *People of the State of Illinois v. 3M Co. et al.*, (Cook Cnty. Cir. Ct.) (2023). Copy of the state complaint [here](#).

[7] *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021).

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