Public Nuisance: Will It Sink Insurers or Is There a Life Raft?

By Adam Fleischer, BatesCarey LLP

Public nuisance claims are almost literally "legal lottery." Because public nuisance claims seek to hold a policyholder liable for a share of an entire industry's harm to society, they are indeed the prototypical "bet the company" claims both for insureds and insurers.

I. A few billion dollars of public nuisance liability to date

In the early days of tobacco litigation, public entity plaintiffs such as states and local governments, sought to use public nuisance theories to hold every company in the tobacco industry responsible for paying a share of the societal economic harm suffered by the governmental plaintiffs. While tobacco claims settled without legally testing whether public nuisance theories could substitute for product liability, the playbook has now been resurrected as states, counties, schools, and hospital systems sue entire industries to recover economic social costs of opioids, climate change, social media addiction and more.

Public nuisance theories are attractive to plaintiffs because they not only justify large awards, but they also provide an easy evidentiary path to establish liability. In pleading public nuisance, plaintiffs seek relief for generalized public harm rather than damages for injury sustained by a specific person. Plaintiffs must prove only that the defendant policyholders, as a group, engaged in a fraudulent scheme or common negligence that harmed society. For example, plaintiffs have alleged that a wide range of pharmaceutical defendants acted to create a market for long-

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term use of prescription opioids and to flood the market with such large quantities of prescription opioids that harm and misuse would surely have been the expected result.

In a public nuisance claim, there is no need to prove that any specific defendant caused the particular injury to any specific individual. The individuals are not part of the suit, will not be compensated from the government plaintiffs' recovery of economic losses, and the policyholders' liability to the harmed individuals will not be litigated or resolved. And this approach is working.

The public nuisance theories aimed at the opioid industry have resulted in three opioid distributors, Amerisource, Cardinal Health, and McKesson, agreeing to pay $19.5 billion for global resolution of opioid public nuisance claims pending against them. Opioid retailers have also succumbed to public nuisance settlements with CVS paying $4.9 billion, Walgreens paying $4.79 billion and Kroger paying $1.2 billion. As other opioid industry defendants line up to settle similar claims, the plaintiffs' bar has targeted new industries with this lucrative approach.

II. Public nuisance: The Copycats Are Coming

State and local governments are using public nuisance to address the impact of climate change in their communities. More than two-dozen cases have used public nuisance theories to hold fossil fuel producers responsible for the impact of climate change. These suits allege that the defendant companies have long promoted fossil fuel consumption despite their knowledge of resulting harm to the environment. Questions of causation feature prominently in these cases, and courts are being asked to consider whether it is possible to link defendants' emissions to climate harms. These plaintiffs generally seek the creation of an abatement fund to pay for climate adaptation projects.

In another new public nuisance arena, nearly 200 school districts have brought claims against social media companies, including Facebook, TikTok, Snapchat, and YouTube, alleging that their apps are addictive and damaging to students' mental health, and are causing adverse impacts on schools and other government resources that constitute a public nuisance. The lawsuits have been consolidated in Oakland, California federal court, along with hundreds of suits by families alleging harms to their children from social media.

Many school districts recently pursued a similar tactic in public nuisance lawsuits against Juul Labs and other vaping companies. Juul agreed to pay $1.7 billion in a broad legal settlement covering more than 5,000 lawsuits, including those from school districts, after being accused of marketing addictive products to children and teens.

Another public nuisance dam that may be waiting to break is glimpsed through the recently filed case *Martinez v. Kraft*.[1] The plaintiff alleges that food producers such as Kraft, Coca-Cola, General Mills, Nestle USA, and Conagra Brands sold “ultra-processed foods” or UPFs, which are alleged to contain little or no whole foods at all, and which have been proven to be “intrinsically unhealthy.” The suit alleges “predatory profiteering,” which resulted in “immense harm to American children” and which “ushered in a multitude of epidemics.” While the UPF litigation at this stage is brought by a single individual in the form of a traditional bodily injury claim (not public nuisance), the allegations of societal harm in the complaint do not make a future evolution into public nuisance litigation difficult to divine.

III. Will Recent Rulings Curtail the Momentum of Public Nuisance Theories?

As billions of dollars in opioid settlements have unfolded, so too have court rulings begun to accumulate that call into question the viability of public nuisance as a theory for government plaintiffs to essentially circumvent the product liability construct of mass tort law.

In an early commentary on public nuisance, the Superior Court of Connecticut dismissed public nuisance claims brought by thirty-seven municipalities against twenty-five drug companies, finding that they failed to show how the opioid defendants caused the opioid addiction-related costs that the cities sought to recoup.[2] The ruling noted that if courts are to safeguard a rational legal system, then courts cannot endorse a "wildly complex and ultimately bogus system that pretends to measure the indirect cause of harm to each individual (municipality) and fakes that it can mete out proportional money awards for it."

While the Supreme Courts of Alaska and Ohio have also rejected public nuisance as a substitute theory for mass torts,[3] and the Supreme Court of West Virginia has recently heard argument on the issue and the Supreme Court of Maine is the most recent high court to weigh in.[4] The Supreme Court of Maine dismissed public nuisance opioid claims against Walgreens and a host of opioid defendants that had been sued by nine Maine hospitals. The court explained that hospitals, which treat injured individuals, if they obtain subrogation rights from the injured people, could then have a derivative claim that attaches to the bodily injury liability owed by the policyholder to the injured person. However, without a derivative claim, a hospital may not use public nuisance as theory to try to obtain economic recovery for generic categories of bodily injury that the hospital itself did not suffer or obtain the right to litigate.

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Of course, public nuisance theories have not been erased altogether. In the national opioid MDL, the court recently *allowed* a public nuisance claim against Albertsons to move forward.[5] In allowing the public nuisance claim to proceed, the court explained that the Texas county that brought the public nuisance claim "is not seeking relief for injuries to its citizens" and that the county's harms are unique and "of a different kind and degree than those suffered by Texas and the Tarrant County citizens at large." The court concluded that, because the public nuisance claim is seeking recourse to actual governmental harms and does not seek compensation for any bodily injuries, the public nuisance claim may therefore proceed in its own right.

IV. What Is an Insurer To Do? The Public Nuisance Coverage Wars

A. A public nuisance risk is not the same as a mass tort bodily injury risk

It bears mention that, from an insurance underwriting perspective, a public nuisance risk lacks the fundamental characteristics of an insurable risk. Chiefly, an insurable risk is one that is determinable and that can be spread across an entire population of policyholders, anticipating that, at any given time, there will be enough *unharmed* policyholders paying premium to cover the cost of the injuries of those *harmed* policyholders. However, for public nuisance, these insurance concepts simply don't work. When the entire population of "the public" is generally said to be harmed, the risk itself is characteristi-

cally indeterminable and impossible to model relative to deciphering individuals harmed versus those not harmed within the "public's injury."

Furthermore, the nature of a public nuisance risk is decidedly incompatible with even the basic terms, conditions and obligations of a liability policy. It is an impossibility for a policyholder sued for public nuisance to comply with a notice provision's requirement of reporting the name, time, location and circumstances of the injured individuals. A public nuisance claim presents no realistic way to measure which individual injuries began before or after the policy period. The typical claims handling obligations of examining medical records and striving to compensate probable liability for an injury within the policy limit are not possible to employ when faced with an alleged injury to an entire segment of society.

It should be very evident that the risk that a policyholder is liable for participating in an industry, which collectively caused societal economic losses, is an entirely different risk than the intended liability coverage for a policyholder alleged to have caused specific bodily injury to a specific person. The question then for insurers is, where in the policy language can this distinction be found and how might it be presented in the courts?

B. Courts have begun to differentiate public nuisance and bodily injury risk

Liability policies are not blank checks to insure every conceivable economic loss that can be ultimately traced back to a bodily injury or property damage. Instead, liability policies typically specify that they only insure the policyholder's "legal obligation to pay sums as damages because of bodily injury." Legal precedent abounds demonstrating that, when the policyholder is not sued for allegedly causing a specific bodily injury or property damage, then claims by third parties involving downstream economic losses from bodily injury or property damage are simply not covered.

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For example, a restaurant sued a policyholder for having caused an E.coli outbreak that sickened customers and caused the restaurant to temporarily close. The restaurant sought its lost profits from the policyholder. A court determined that claim was not insured under the liability policy because it was not a bodily injury risk.[6] In another case, an employer sued the policyholder HVAC company after air conditioning failed and caused the plaintiff's employees to become sick and unable to work. The claim sought costs of lost productivity, and was found not to be insured because it was not a claim seeking to establish liability or compensation for the policyholder having caused any bodily injury.[7] In another matter, when petroleum had damaged a tenant's property, the resulting economic costs to the policyholder for a claim for having breached its lease and disclosure obligations was not a covered "property damage" claim because there was no liability at issue for the causation or compensation of the property damage itself.[8] There are many more cases from courts across the country that have consistently applied these same concepts.

It has not been and should not be a far leap for courts to apply the line of cases referenced above to the realm of public nuisance. For example, this application is just what was spelled out by the Delaware Supreme Court in *ACE American Insurance Co. v. Rite Aid Corp*.[9]

The *Rite Aid* decision explained that, in order for a claim to fall within the bodily injury coverage of a liability policy, the claim must be brought either by (1) the person injured; (2) those who have

the legal right to recover on behalf of the person injured, such as the parent of minor; or (3) people or organizations that directly cared for or treated the person injured, such as a hospital with a derivative subrogation claim obtained from the injured party. In other words, the underlying suit must seek to prove the policyholder's liability to pay compensation for a person's injury and the costs of treating the specific bodily injury. Because the opioid public nuisance lawsuits in *Rite Aid* did not bring claims to prove that Rite Aid caused, or must compensate, the injury of any individual, but instead sought to recoup the aggregate economic costs incurred to abate the opioid crisis, the court held that those suits were not covered.

Since *Rite Aid*, other reviewing courts have echoed the sentiment that if there are no claims in a suit seeking to prove the policyholder's liability for causing or compensating a specific bodily injury, then there are no triggering claims for any "legal obligation to pay sums as damages because of bodily injury." For example, in *Acuity v. Masters Pharmaceutical, Inc.*, the Ohio Supreme Court held that underlying opioid lawsuits did not come within the scope of coverage, reasoning that "damages because of 'bodily injury'" "requires more than a tenuous connection between the alleged bodily injury sustained by a person and the damages sought."[10] Likewise, in *Westfield National Insurance Co. v. Quest Pharmaceuticals, Inc.*, the Sixth Circuit Court of Appeals, applying Kentucky law, held that underlying opioid lawsuits (including those brought by hospitals) were not covered, because the underlying claims did not "predicate[] recovery on a particular person's bodily injury."[11]

Policyholders have countered with arguments that: 1) the public nuisance claims would not exist "but for" bodily injuries at the root of all governmental claims; 2) some insurance policies have excluded governmental claims or opioid claims altogether, therefore there must be coverage under those that did not, and; 3) public nuisance settlements specifically earmark dollars to pay to abate or address bodily injury claims, and therefore are evidence of the allegedly insured bodily injury risk that is being settled.

By in large, these policyholder arguments to find public nuisance coverage have been rejected. Courts have recognized that, just because an economic recovery claim would not exist "but for" the existence of injured individuals, this does not make every economic recovery claim a bodily injury claim. Courts have also recognized that when a claim is not capable of being reported pursuant to the "who, when, where" of a notice provision, it is likely not the type of claim intended to be covered. Similarly, the fact that insurers were ultimately forced to employ opioid exclusions to clarify these points does not mean that policies in place without those exclusions were meant to cover public nuisance claims.[12]

CONCLUSION

With federal governmental programs being reduced, and the increasing pressures on state and local municipalities to find new financing for budgetary and social costs, it will not be surprising if public nuisance suits remain a main tool within the recovery arsenal of these plaintiffs. While the narrative surrounding such claims of societal harm tend to be sympathetic and often gut-wrenching, the claims themselves are simply an entirely different risk than the bodily injury and property damage risks covered by liability insurance. By capitalizing on both the historic precedent and developing caselaw, insureds, insurers and the courts should come to the uniform conclusion that, if a claim does not present alleged liability against the policyholder for causing or compensating a specific injury, then the claim is not within the insurance of a liability policy.

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12 insurer coverage counsel in the United States, and Fleischer has similarly been recognized by his peers through selection to the London-based Who's Who Legal for Insurance and Reinsurance.

Endnotes

1 Case No. 241201154, (Ct. Com. Pleas Phila. Cnty.) (Dec. 10, 2024).

2 *City of New Haven v. Purdue Pharma, L.P. et al.*, No. X07HHDCV176086134S, 2019 WL 423990 (Conn. Super. Ct. Jan. 8, 2019).

3 *State of Alaska v. Walgreen Co., et al.*, No. 3AN-22-06675 CI, 2024 WL 1178352 (Alaska Super. Mar. 01, 2024))(rejecting public nuisance as viable substitute theory for mass tort claims); *In Re National Prescription Opiate Litigation, Trumbull County v. Purdue*, 2024 WL 5049302 (Ohio 2024)(on a certified question from United States Court of Appeals for the Sixth Circuit, the Ohio Supreme Court found that Ohio's Product Liability Act should be the sole means of recovery for opioid injury claims in Ohio.)

4 *Eastern Maine Medical Center v. Walgreen Co.*, 2025 ME 10, 2025 WL 410303. Of note, this opioid decision was submitted as authority in the national social media MDL as precedent demonstrating the lack of viability of economic recovery claims in the absence of the injured parties themselves. *In Re: Social Media Adolescent Addiction*, MDL No. 3047, Case No. 22-md-3027, U.S. District Court, Northern District of CA, Dkt. No. 1667 (Feb. 10, 2025).

5 *In Re: National Prescription Opiate Litigation*, MDL 2804, Case No. 1:17-md-2804 (Dkt. No. 5921 Jan. 28, 2025).

6 *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Ready Pac Foods, Inc.*, 782 F. Supp. 2d 1047 (C.D. Cal. 2011)

7 *Diamond State Ins. Co. v. Chester-Jensen Co., Inc.*, 243 Ill. App. 3d 471, 477-78 (Ill. App. Ct. 1993)

8 *Unigard Security Ins. Co. v. Murphy Oil*, 331 Ark. 211, 962 S.W.2d 735 (Ark. 1998)

9 *ACE American Insurance Co. v. Rite Aid Corp.*. 270 A.3d 239 (Del. 2022).

10 205 N.E.3d 460, 472 (2022).

11 57 F.4th 558, 567 (6th Cir. 2023). *But see, Walmart Inc. v. ACE Am. Ins. Co.*, 2023 WL 9067386 (Cir. Ct. Ark. Dec. 29, 2023)(pending appeal)(finding that governmental opioid claims fall within coverage for damages "because of bodily injury), and *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771 (7th Cir. 2016)(Same).

12 *See, Publix Super Markets v. ACE Property, et al.*, 2024 WL 4605991(M.D. Fla. Oct. 29, 2024). *See also Allied Prop. & Cas. Ins. Co. et al. v. Bloodworth Wholesale Drugs, Inc.*, 727 F.Supp.3d 1404, 1414 (M.D. Ga. 2024).