



**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**  
**IN RE: OPIOID LITIGATION**                      **CIVIL ACTION NO. 21-C-9000 DISTRIBUTOR**

**THIS DOCUMENT APPLIES TO ALL DISTRIBUTOR CASES**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND  
ORDER DENYING DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT RE "FACTUAL ISSUE #2"**

The Mass Litigation Panel ("MLP" or "Panel") has previously denied the Distributor Defendants' Motion for Summary Judgment Re "Factual Issue #2" as set forth in the Court's June 9, 2022, Order (Transaction ID 67707770). The Panel now makes the following findings of fact and conclusions of law in support of its decision:

In their motion, Defendants make two arguments in support of summary judgment. First, Defendants argue that the law of public nuisance does not encompass Plaintiffs' product-based claims. Distributors' Motion for Summary Judgment Re "Factual Issue #2" (Transaction ID at 67621963) ("Motion") at 3-8. Second, Defendants argue that there is no evidence that distributors interfered with a public right. Motion at 8-14. This Panel and a number of courts across the country have previously rejected both of these arguments. The Panel reaffirms its prior rulings and **DENIES** Defendants' motion.

**I. West Virginia Public Nuisance Law Encompasses Plaintiffs' Opioid Claims.**

In denying a similar motion in Phase 1a, this Panel previously held:

West Virginia defines public nuisance as an "an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons." *Hark v. Mountain Fork Lumber Co.*, 127 W.Va. 586, 595-96, 34 S.E.2d 348, 354 (1945). The Supreme Court of Appeals of West Virginia has determined this definition is consistent with the *Restatement (Second) of Torts* § 821B(1) (1979), which defines a public nuisance as "unreasonable interference with a right common to the general public." *Duff v. Morgantown Energy Ass'n*, 187 W. Va. 712, 716 n.6, 421 S.E.2d 253, 257 n.6 (1992). In West Virginia, "nuisance is a flexible area of the law that is adaptable to a wide variety of factual situations." *Sharon Steel Corp. v. City of Fairmont*, 175 W. Va. 479, 483, 334 S.E.2d 616, 621 (1985). This is a fact-specific

determination. The Court further notes that at least 22 states have found public nuisance claims based on the marketing of prescription opioids to be viable.

*In Re: Opioid Litigation Civil Action*, No. 21-C-9000 (MFR), Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference, p. 4 (May 23, 2022) (ID 67650385).

This ruling in the Manufacturer Cases aligns with the four other West Virginia trial courts – including this Panel – which have found that governmental opioid claims are cognizable as public nuisance claims.<sup>1</sup> The previous decision of this Panel in *Monongalia County*, along with the decision by Judge Thompson in *Morrissey* and Judge Hummel in *Brooke County*, were all the subject of unsuccessful writ proceedings in the Supreme Court Appeals brought by these same Defendants.<sup>2</sup> Moreover, these decisions are also consistent with Judge Polster’s decisions in the MDL,<sup>3</sup> along with the courts in 22 other states that have recognized public nuisance claims in the opioid litigation.<sup>4</sup>

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<sup>1</sup> See *State ex rel. Morrissey v. AmerisourceBergen Drug Corp.*, No. 12-C-141, 2014 WL 12814021, at \*10 (W. Va. Boone Cty. Cir. Ct. Dec. 12, 2014) (Thompson, J.), writ denied, *State ex rel. AmerisourceBergen Drug Corp. v. Thompson*, No. 15-1026 (W. Va. Jan. 5, 2016); *Brooke Cty. Comm’n v. Purdue Pharma, L.P.*, No. 17-C-248, p. 13 (W. Va. Marshall Cty. Cir. Ct. Dec. 28, 2018) (Hummel, J.), writ denied, *State ex rel. Cardinal Health, Inc. v. Hummel*, No. 19-0210 (W. Va. June 4, 2019); *Monongalia County, et al. v. Purdue Pharma L.P., et al.*, Nos. 18-C-222-236 (adopting and applying the reasoning and rulings from *Brooke County*) (W.Va. M.L.P. Oct. 31, 2019), writ denied, *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, No. 19-1051 (W.Va. January 30, 2020); *The City of Huntington v. AmerisourceBergen Drug Corp.*, No. 3:17-01362, Doc. # 1291 (S.D. W.Va. Apr. 28, 2021) (Faber, J.).

<sup>2</sup> See, *infra* n. 1.

<sup>3</sup> See, e.g., *In Re Nat’l Prescription Opiate Litig.*, 406 F. Supp. 3d 672, 674 (N.D. Ohio 2019) (noting previous opinions and concluding “[a] factfinder could reasonably conclude that this evidence demonstrates an interference with public health and public safety rights.”).

<sup>4</sup> See, e.g., *Alabama v. Purdue Pharma L.P.*, 03-CV-2019-901174.00, slip op. at 11-12 (Ala. Cir. Ct. Nov. 13, 2019); *Alaska v. McKesson Corp.*, No. 3AN-18-10023CI, slip op. at 7 (Alaska Super. Ct. Aug. 28, 2019); *City of Surprise v. Allergan PLC*, No. CV2019-003439, slip op. at 35-36 (Ariz. Super. Ct. Oct. 28, 2020); *Arkansas v. Purdue Pharma L.P.*, 2019 WL 1590064 (Ark. Cir. Ct. Apr. 5, 2019); *City and Cnty. of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 669 (N.D.

These courts have specifically rejected the arguments of these and other opioid defendants that governmental public nuisance claims are limited to claims arising out of the use of property.<sup>5</sup>

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Cal. Sept. 30, 2020); *In re Nat'l Prescr. Opiate Litig.* (West Boca Med. Ctr.), 452 F. Supp. 3d 745 (N.D. Ohio 2020); *Kentucky ex rel. Beshear v. Walgreens Boots Alliance, Inc.*, No. 18-CI-00846, slip op. (Ky. Cir. Ct. July 18, 2019); *City of Boston v. Purdue Pharma, LP*, 2020 WL 416406 (Mass. Super. Ct. Jan. 3, 2020); *Michigan ex rel. Kessel v. Cardinal Health, Inc.*, No. 19016896-NZ, slip op., at 2 (Mich. Cir. Ct. Mar. 24, 2021), *reversing on reconsid.* slip op. (Mich. Cir. Ct. Nov. 17, 2020); *Mississippi v. Cardinal Health, Inc.*, No. 25Cll:18-cv00692, slip op. (Miss. Cir. Ct. Apr. 5, 2021); *Missouri ex rel. Schmitt v. Purdue Pharma, L.P.*, No. 1722-CC10626, slip op., \*7-8 (Mo. Cir. Ct. Apr. 6, 2020); *Nevada v. McKesson Corp.*, No. A-19-796755-B, slip order (Nev. Dist. Ct. Jan. 3, 2020); *New Hampshire v. Purdue Pharma Inc.*, 2018 WL 4566129 (N.H. Super. Ct. Sept. 18, 2018); *New Mexico ex rel. Balderas v. Purdue Pharma L.P.*, No. D-101-CV-2017-02541 slip op. (N.M. Dist. Ct. Dec. 17, 2020); slip op. (Dist. Ct. Sept. 10, 2019); *In re Opioid Litig.*, slip op. 2018 WL 3115102, \*28 (N.Y. Sup. Ct. June 18, 2018); *County of Delaware v. Purdue Pharma, L.P.*, CV- 2017008095, slip ops. (Pa. Ct. C.P., March 13, 2020, Dec. 4, 2019, and Oct. 25, 2019); *Rhode Island ex rel. Neronha v. Purdue Pharma L.P.*, 2019 WL 3991963, \*9 (R.I. Super. Ct. Aug. 19, 2019); *South Carolina v. Purdue Pharma L.P.*, No. 2017-CP40-04872, slip order (S.C. Ct. C.P. Apr. 12, 2018); *Tennessee ex rel. Slatery v. Purdue Pharma L.P.*, 2019 WL 2331282, \*5 (Tenn. Cir. Ct. Feb. 22, 2019); *In re Texas Opioid Litig. (Cnty. of Dallas)*, No. 2018-77098, slip op. (Tex. Dist. Ct. June 9, 2019); *Vermont v. Cardinal Health, Inc.*, No. 279-3-19 Cnev, slip op. (Vt. Super. Ct. May 12, 2020); *Washington v. Purdue Pharma L.P.*, 2018 WL 7892618 (Wash. Super. Ct. May 14, 2018).

<sup>5</sup> *Morrisey*, 2014 WL 12814021 at \*9 (holding that State of West Virginia's claims against opioid distributors "fit squarely" within this definition of public nuisance); *Brooke Cty. Comm'n* at p. 13 ("a claim for public nuisance is not limited to property disputes and that West Virginia courts have applied the public nuisance doctrine in numerous contexts, including in opioids cases like this."); *see also Lemongello v. Will Co.*, No. CIV.A. 02-C-2952, 2003 WL 21488208, at \*2 (W. Va. Cir. Ct. June 19, 2003) (holding, in case alleging that the defendants' sale of handguns supplied an illegal handgun market, that "West Virginia law does not limit claims of public nuisance to those dealing with real property"); *City of Bos. v. Purdue Pharma, L.P.*, No. 1884CV02860, 2020 WL 977056, at \*5 (Mass. Super. Jan. 31, 2020) (rejecting "Distributor Defendants' arguments that public nuisance is limited to property or land-based claims"); *In re Nat'l Prescription Opiate Litig.*, 452 F. Supp. 3d 745, 774–75 (N.D. Ohio 2020) (rejecting argument by Distributor Defendants that nuisance law in Florida requires an interference with the use and enjoyment of property); *In re Nat'l Prescription Opiate Litig.*, No. 1:17-CV-02804, 2019 WL 2477416, at \*14 (N.D. Ohio Apr. 1, 2019) ("Based on those legislative and judicial sources, the court concludes that the Montana Supreme Court would not hold that the definition of nuisance is limited to acts or conditions that interfere with property rights and that it would recognize as actionable a public nuisance claim that is based on a defendant's alleged affirmative misconduct in the manufacture, distribution and sale of the products at issue in this action."), *report and*

And, a number of these courts have also rejected these Defendants' arguments that product-based public nuisance claims are not cognizable.<sup>6</sup>

Defendants place great weight on language in the Restatement (Third) of Torts: Liability for Economic Harm § 8 (2020). Motion at 1-3, 7-8. Section 8 of the Third Restatement has not been adopted by any court in West Virginia. Without citation to any West Virginia authority, Defendants argue that the Third Restatement reflects West Virginia law. While West Virginia has explicitly equated West Virginia's public nuisance law with the Second Restatement, it has never adopted the Third Restatement.<sup>7</sup> Unlike its predecessor, the Third Restatement has not been

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*recommendation adopted in relevant part*, No. 1:17-MD-2804, 2019 WL 3737023 (N.D. Ohio June 13, 2019); *see also* Restatement (Second) of Torts § 821B, comment h ("unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land").

<sup>6</sup> *See, e.g., In re Nat'l Prescription Opiate Litig.*, 458 F. Supp. 3d 665, 681 (N.D. Ohio 2020); *In re Opioid Litig.*, 2018 WL 3115102 (N.Y. Sup. Ct. June 18, 2018) (opioids). The decisions rejecting the exclusion of products from public nuisance claims are not limited to opioid cases. Multiple state supreme courts have upheld product-based nuisance claims in the context of handguns, *see, e.g., City of Cincinnati*, 768 N.E.2d 1136; *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1229-33 (Ind. 2003); *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997); *Nat'l Ass'n for the Advancement of Colored People v. Acusport, Inc.*, 271 F.Supp.2d 435, 484 (E.D.N.Y.2003) *James v. Arms Tech., Inc.*, 359 N.J. Super. 291, 315, 820 A.2d 27, 41 (App. Div. 2003) (handguns), while numerous other courts have recognized public nuisance claims involving other products including lead paint, "flushable" wipes, asbestos, and gasoline additives. *See, e.g., People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 546 (Cal. Ct. App. 2017) (lead paint); *City of Milwaukee v. NL Indus., Inc.*, 278 Wis. 2d 313, 325, 691 N.W.2d 888, 894 (WI App 2005) (lead paint); *City of Wyoming v. Procter & Gamble Co.*, 210 F. Supp. 3d 1137, 1162 (D. Minn. 2016) ("flushable" wipes); *State of Maryland v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420 (D. Md. 2019) (MTBE); *Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal.App.3d 116, 99 Cal.Rptr. 350, 355 (1971) (asbestos); *Gov't of U.S. Virgin Islands v. Takata Corp.*, No. ST-16-CV-286, 2017 WL 3390594, at \*40-44 (V.I. Super. Ct. June 19, 2017) (airbags). More recently, Judge Bryer in *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 497 F. Supp. 3d 552, 645 (N.D. Cal. 2020), rejected this defense and upheld a multistate class claim brought by government entities arising out of the distributing and marketing of JUUL electronic cigarettes for underage use in violation of each state's public nuisance law.

<sup>7</sup>Many other courts adjudicating governmental opioid lawsuits have applied the Second

widely adopted by the states; indeed, it has been rejected by many courts.<sup>8</sup> Here, the Supreme Court of Appeals’ explanation that West Virginia’s definition of public nuisance tracks Section 821B of the Second Restatement offers clear guidance on this State’s law.

In any event, the Panel concludes that Section 8 of the Third Restatement does not apply to the Plaintiffs’ abatement claim here. Section 8 of Third Restatement applies to claims for economic loss by a private party who has suffered an injury “distinct in kind from those suffered by members of the affected community in general.”<sup>9</sup> The comments to Section 8 state that Section 8 is not intended to apply to public nuisance actions seeking abatement brought by public officials.<sup>10</sup> Plaintiffs have disclaimed all damage claims, and this action seeks only equitable relief. *Cf. State ex rel. Amerisourcebergen Drug Corp. v. Moats*, 245 W. Va. 431, 443, 859 S.E.2d 374, 386 (2021) (refusing writ of prohibition challenge to order “denying Defendants’ requests for a jury trial of Plaintiffs’ public nuisance claims (liability only) on the grounds that those claims are

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Restatement to public nuisance claims. *See, e.g.,* cases cited *supra* n. 4.

<sup>8</sup> *See, e.g., Delaney v. Deere and Co.*, 999 P.2d 930, 946 (Kan. 2000) (stating that the (Third) Restatement “goes beyond the law” and is “contrary to the law in Kansas”); *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 415 (Pa. 2014) (declining to adopt a product liability portion of the Third Restatement and discussing other courts across the country that have done the same); *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1331 (Conn. 1997) (observing that a provision of the Draft Restatement (Third) “has been a source of substantial controversy among commentators” and stating that rule promulgated in the Draft Restatement (Third) was inconsistent with the court’s “independent review of the prevailing common law”). Only one state supreme court has adopted the Third Restatement. *Oklahoma ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021).

<sup>9</sup> Restatement (Third) of Torts: Liab. for Econ. Harm, § 8.

<sup>10</sup> *Id.*, § 8 cmt. a (“In addition to the common-law claims recognized here, public officials may bring civil or criminal actions against a defendant who creates a public nuisance. . . . The definition of ‘public nuisance’ for those purposes is widely a matter of statute and tends to be considerably broader than the common-law definition recognized by this Section as a basis for a private suit.”).

legal, and not equitable.”). Thus, the Panel concludes Section 8 is inapplicable to governmental abatement claims.

Defendants’ motion also ignores contrary authority (including the decisions of this Panel). Defendants rest much of their argument on the Oklahoma Supreme Court’s decision in *Hunter*. *Hunter* is contrary to the numerous West Virginia opioid decisions in this litigation and most opioid decisions elsewhere. This Panel has already rejected *Hunter* as a bar to West Virginia opioid public nuisance claims, finding that Oklahoma’s nuisance statutes are not equivalent to West Virginia law.<sup>11</sup> Judge Polster has also rejected the decision as a matter of both Ohio and Georgia law.<sup>12</sup> Finally, the Panel notes that the non-opioid cases cited by Defendants are far from overwhelming and, as previously noted, ample contrary authority exists.

In the end, the contrary opioid decisions of 22 other states and the other courts interpreting West Virginia law are far more persuasive. Therefore, the Panel finds and concludes that West Virginia public nuisance law encompasses Plaintiffs’ opioid claims. The Panel, therefore, **DENIES** the Defendants’ motion for summary judgment on this basis.

## **II. There Are Disputed Issues of Fact for Trial as to Whether Distributors’ Conduct Substantially Interfered with Public Rights.**

Defendants next attempt to convince the Panel that there is no evidence that Defendants’ conduct interfered with public rights. Defendants claim that the harms Plaintiffs seek to abate

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<sup>11</sup> May 23, 2022 Order, *supra* p. 4.

<sup>12</sup> *In re Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2022 WL 228150, at \*4 (N.D. Ohio Jan. 26, 2022) (“As for *Hunter*, the Oklahoma Supreme court examined “legal interpretation of *Oklahoma’s* nuisance statutes,” which are clearly different from Georgia’s statutes”); *In re Nat’l Prescription Opiate Litig.*, No. 18-OP-45032, 2022 WL 671219, at \*17–18 (N.D. Ohio Mar. 7, 2022) (“Put simply, Oklahoma law is different and inapplicable. Plaintiffs bring their public nuisance claim under Ohio law and Defendants do not persuade the Court to adjudicate the claim under contrary law of other jurisdictions.”).

“implicate only the inherently private right that each individual has to not be injured by a product.”<sup>13</sup>

Plaintiffs respond that their claims are based on harms to public health and public safety. Response at 9. Plaintiffs point out that the opioid epidemic in Plaintiffs’ communities has affected the general public and the public entities tasked with addressing public health and public safety. *Id.* They argue that the burden of the opioid epidemic is borne by the community as a whole—including law enforcement, first responders, healthcare workers, the courts, employers, teachers, and families—and by local governments like Plaintiffs that are responsible for serving their citizens. *Id.*

Like Defendants’ other arguments, the argument that the opioid epidemic does not implicate public rights has been repeatedly rejected by this Panel and other courts applying West Virginia law.<sup>14</sup>

The Plaintiffs point to the evidence submitted in the Phase 1a trial and argue that this evidence dispels the argument that no public rights are involved in this case. Response at 2. The

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<sup>13</sup> Motion at 9.

<sup>14</sup>*See Brooke Cty. Comm’n v. Purdue Pharma, L.P.*, No. 17-C-248, p. 13 (W. Va. Marshall Cty. Cir. Ct. Dec. 28, 2018) (“The Court further finds and concludes that Plaintiffs have adequately alleged that Defendants interfered with a public right.”), *writ denied, State ex rel. Cardinal Health, Inc. v. Hummel*, No. 19-0210 (W. Va. June 4, 2019); *State ex rel. Morrissey v. AmerisourceBergen Drug Corp.*, No. 12-C-141, 2014 WL 12814021, at \*10 (W. Va. Boone Cty. Cir. Ct. Dec. 12, 2014), (concluding that “the State’s public nuisance claim sufficiently alleges the safety and health and morals of the people of West Virginia has been compromised due to Defendants’ alleged wrongful influx of addictive, controlled substances into West Virginia, thereby causing substantial injury to West Virginia citizens and taxpayers”), *writ denied, State ex. rel. AmerisourceBergen Drug Corp. v. Thompson*, No. 15-1026 (W. Va. Jan. 5, 2016); *see also Monongalia County, et al. v. Purdue Pharma L.P., et al.*, Nos. 18-C-222-236 (adopting and applying the reasoning and rulings from *Brooke County*), *writ denied, State ex rel. AmerisourceBergen Drug Corp. v. Moats*, No. 19-1051 (W.Va. January 30, 2020).

Panel finds that there is a triable issue of fact concerning Plaintiffs' claims of interference with public rights.

Defendants acknowledge that “it is the inherent nature of the right, not the number of persons affected, that defines a public right for purposes of public nuisance law.”<sup>15</sup> The Panel concludes that Plaintiffs' claims are based on rights common to the general public: the rights to the health and safety of the community at large. Because the interest allegedly invaded “is an interest shared equally by members of the public, . . . the alleged nuisance is public in nature if it is proved at trial.”<sup>16</sup> The Panel concludes that the fact any interference with a public right will invariably affect individual members of the public does not change the nature of the right.<sup>17</sup>

The Panel notes that courts in twenty-two states have rejected the Defendants' claim that no public rights are at issue in these opioid cases.<sup>18</sup> And recent decisions accepting similar public nuisance claims in non-opioid contexts confirm that these kinds of public health harms can constitute an interference with a public right.<sup>19</sup> Given this precedent to the contrary, Defendants' citations to *Hunter* and various non-opioid decisions are unpersuasive.

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<sup>15</sup> Motion at 9.

<sup>16</sup> *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 96 (4th Cir. 2011).

<sup>17</sup> *Id.* (explaining that, where the defendant's conduct “interfered with the general public's access to clean drinking water,” “[t]he fact that the water eventually was pumped into private homes did not transform the right interfered with from a public right to a private right”).

<sup>18</sup> See Doc. 1290-1 (Plaintiffs' Appendix of Decisions).

<sup>19</sup> See, e.g., *In re JUUL Labs, Inc., Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 19-MD-02913-WHO, 2020 WL 6271173, \*63 (N.D. Cal. Oct. 23, 2020) (claims by school boards that manufacturer of electronic cigarettes interfered with public health stated a claim for interference with public rights sufficient to support a claim for public nuisance under laws of Arizona, New York, Pennsylvania, Florida, and California).



The Panel finds and concludes that Plaintiffs' claims implicate public rights and constitute viable public nuisance claims. The Panel, therefore, **DENIES** the Defendants' motion for summary judgment on this basis.

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This Panel simply cannot ignore the many decisions (of this Panel and other courts) rejecting similar motions for summary judgment. Nothing in Defendants' motion justifies reconsidering this Panel's prior decisions or ignoring the substantial precedent supporting Plaintiffs' claims.

For the foregoing reasons, Defendants' Motion for Summary Judgment Re "Factual Issue #2" is **DENIED**.

The Panel notes the Defendants' objection and exception to this Order.

A copy of this Order has this day been electronically served on all counsel of record via File & Serve*Xpress*.

It is so **ORDERED**.

**ENTERED:** July 1, 2022.

/s/ Alan D. Moats  
Lead Presiding Judge  
Opioid Litigation

/s/ Derek C. Swope  
Presiding Judge  
Opioid Litigation