Introduction

On July 6, 2021, Governor Andrew Cuomo signed Senate Bill S7196 amending the New York state public nuisance law to subject gun sellers and gun manufacturers to liability for public nuisance if they failed to implement reasonable controls to prevent the unlawful sale, possession, or use of firearms in New York.[1] The statute allows gun manufacturers and distributors to be held liable for actions that harm public safety. The public nuisance statute specifically regulates the marketing, distribution, and sale of firearms. The legislation reflected a carefully crafted state workaround of the federal Protection of Lawful Commerce in Arms Act (2005),[2] in a bold and innovative state attempt to end the firearms industry's immunity from liability for criminal misuse of firearms. In January 2022, California followed New York's lead and introduced AB 1594 declaring that gun manufacturers have created a public nuisance if their failure to follow state and local gun laws result in injury or death.[3]

In August 2021, Mexico filed a $10 billion lawsuit in Massachusetts federal district court against gun manufacturers Smith & Wesson, Sturm, Ruger & Co., Beretta USA, Barrett Firearms Manufacturing, Colt's Manufacturing Co., and Glock Inc.[4] The lawsuit accuses major U.S. gun makers of facilitating weapons trafficking to drug cartels, leading to thousands of deaths. The complaint set forth several claims alleging that the defendants' conduct created and contributed to a public nuisance by unreasonably interfering

[1] N.Y. S7196, An Act to Amend the General Business Law, in Relation to the Dangers to Safety and Health and Creation of a Public Nuisance Cause by the Sale, Manufacturing, Distribution, Importing and Marketing of Firearms, Art.39-DDDD.

[2] Pub. L. 109-92, 119 Stat. 2095, codified at 15 U.S.C. §§ 7901–7903.

[3] Cal. Assembly Bill AB 1594 (June 27, 2022); Cal Civ. Code Div. 3, Part 4, Title 20: Firearms Industry Responsibility Act.

[4] Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., et al., Case 1:21-cv-11269-FDS (D. Mass 2021).

with public safety and health and undermining Mexico's gun laws, resulting in specific and particularized injuries suffered by the government. The complaint further alleged that the Mexican government and its residents had the right to be free from conduct that created an unreasonable risk to the public health, welfare, and safety, and to be free from conduct that created a disturbance and reasonable apprehension to person and property. Thirteen states and three Latin American and Caribbean countries filed amicus briefs in support of Mexico.

Climate change has been at the forefront of recent public nuisance litigation, leading to conflicting federal and state decisions concerning the viability of using public nuisance law to remedy problems relating to climate change. In 2018 and 2019, in a second wave of climate change litigation, plaintiffs filed a spate of state lawsuits against fossil fuel companies asserting public nuisance claims for producing and distributing fuels that generate greenhouse gases that unreasonably interfere with a public right by contributing to the climate change crisis.

These lawsuits followed a series of similar public nuisance litigation against power companies allegedly responsible for creating a public nuisance through their carbon dioxide emissions exacerbating climate change. However, climate change public nuisance lawsuits have encountered numerous challenges, including a Supreme Court ruling that the federal Clean Air Act displaced federal common law public nuisance claims against power companies.[5] On April 1, 2021, a Court of Appeals for the Second Circuit upheld the dismissal of a New York municipal lawsuit against oil company defendants that sought to hold the defendants legally liable for climate change under public nuisance law.[6]

Beginning in 2020 with the advent of the COVID-19 pandemic and consequent transmission of the virus and resulting illnesses, attorneys sued employers invoking public nuisance doctrine in a series of workplace safety lawsuits. These lawsuits alleged that the company defendants, by failing to follow public health protocols, created a COVID transmission hazard that not only threatened workers but also unreasonably interfered with the public's right to health and safety. As a common law tort, workers could sue under a private right of action and avoid federal preemption based on an express common law exemption under the Occupational Health Act. These lawsuits have met with mixed results.

In 2020 an Illinois state court granted McDonald employees a preliminary injunction requiring multiple McDonald locations to enforce statewide

[5] American Power Co., Inc. v. Connecticut, 564 U.S. (2011).
[6] New York v. Chevron Corp., No. 18-2188, 2021 WL 1216541 (2d Cir. Apr. 1, 2021).

mask-wearing and social distancing protocols.[7] The court cited the company's failure to abide by state health guidelines, concluding that the company's practices constituted a substantial interference with the public health in a pandemic. Other courts have deferred COVID-related public nuisance suits under the primary jurisdiction doctrine to allow a relevant administrative agency to act first. Some courts have rejected COVID public nuisance lawsuits for the failure of plaintiffs to show the "special injury" necessary for standing under public nuisance law.

The emergence of the role of public nuisance claims is the newest frontier and battleground in resolving mass tort litigation. But courts are split concerning the viability of public nuisance claims and the theories underlying these claims, which conflict is amply illustrated by inconsistent rulings in the state as well as national opioid litigation and other attempted public nuisance lawsuits concerning opioid harms. Beginning in 2017, plaintiffs filed more than 2,500 public nuisance opioid cases in federal and state courts. On November 9, 2021, the Oklahoma Supreme Court overturned a $465 million opioid public nuisance judgment following a bench trial in which the judge found facts in favor of Oklahoma against opioid manufacturers.[8] The state had sued Johnson & Johnson, Purdue Pharma, and Teva Pharmaceuticals alleging they created a public nuisance when they manufactured, marketed, and sold opioids as an effective painkiller, that they were or should have been aware of the dangers associated with opioid abuse and addiction, and that they should have warned the public about these dangers.

In overturning the verdict, the Oklahoma Supreme Court stated that while the state's nuisance statutes had been applied to unreasonable conduct that interfered with and endangered the public's health and safety, the application of those statutes was limited to criminal conduct that affected public property. In a similar vein, a California Superior Court judge ruled against several local governments and in favor of four large pharmaceutical companies, concluding that the governments failed to prove how many medically unnecessary prescriptions had been written because of the manufacturers' alleged misleading marketing efforts, and whether and how much such prescriptions had contributed to a public nuisance.[9] On the other hand, on November 22, 2021, a federal jury in Cleveland, Ohio, after a six-week trial before Judge Dan Polster, found that CVS Health, Walmart, and Walgreens created a public

[7] Massey v. McDonald's Corp., Case No. 2020-CH-04247 (Ill. Cir. Ct. 2020).
[8] State *ex. rel.* Hunter v. Johnson & Johnson, 499 P.3d 719 (Okla. 2021).
[9] California v. Purdue Pharma, No. 30-2014-00725287-CU-BT-CXC), 2021 WL 5227329 (Cal. App. Supp. Nov. 1, 2021).

nuisance that contributed to the opioid crises in two northeastern Ohio counties when the pharmacies overlooked the so-called red flags when filling certain opioid subscriptions.[10]

The advent of public nuisance claims has generated a battle between plaintiff and defense counsel concerning the legitimacy of public nuisance doctrine to remediate mass tort litigation. Whether modern public nuisance claims in mass tort litigation are viable remains to be seen. But there is evidence that the threat of a public nuisance claim has served to encourage mass tort settlements before trial. Thus, in Oklahoma, Purdue Pharma and Teva settled with the state agreeing to pay $270 million and $85 million, respectively. In summer 2021, Walgreens, Rite Aid, CVS, and Walmart settled with two New York counties for a combined $26 million. In Ohio, Rite Aid and Giant Eagle, a regional chain, settled before trial for an undisclosed amount. Johnson & Johnson and three large drug distributors (McKesson, Cardinal Health, and AmerisourceBergen) entered into a $26 billion settlement to resolve several states' claims, although the Washington state attorney general characterized this settlement as "not nearly good enough for Washington" and the case has gone to trial in Seattle.

To understand the revolutionary contemporary use of public nuisance law as the new frontier in mass tort litigation, this book begins with an historical overview of traditional concepts that distinguished private and public nuisance. Earliest private nuisance law involved harms arising from interference with another person's enjoyment and use of land. The law has long recognized that a person with rightful possession had rights to occupancy and unimpaired condition in reasonable comfort and convenience.

Historically, public nuisance interfered with group rights and was considered a criminal wrong. A public nuisance was defined as an act or omission that obstructed, damaged, or inconvenienced community rights. Public nuisance covered a wide variety of minor crimes that threatened the health, morals, safety, comfort, convenience, or community welfare. Examples of the same included shooting fireworks in the streets, gaming, houses of prostitution, keeping diseased animals, or harboring a vicious dog. A person or entity that created a public nuisance might be punished by a criminal sentence, a fine, or both.

Public nuisances were subject to injunctions or abatement remedies, and violators might be charged with the costs of a cleanup. There was no civil remedy for an individual harmed by a public nuisance, except for a specific tort injury limited to damages that were the direct result of the public nuisance.

[10] Meryl Kornfield & Lenny Bernstein, CVS, Walgreens and Walmart are Responsible for Flooding Ohio Countries with Pain Pills, Jury Says, Wash. Post (Nov. 23, 2021).

After surveying historical concepts of nuisance, the book discusses the emergence of public nuisance as a claim asserted in mass tort litigation beginning in the twenty-first century. This discussion sets forth the theoretical basis for public nuisance claims in mass tort cases, the relationship to traditional tort theories, and the introduction of public nuisance statutes. This analysis concludes with a roadmap for ensuing chapters, tracing the historical public nuisance jurisprudence, initial rejection in the 1990s of public nuisance claims, and the expansion of public nuisance to products cases. Chapters explore issues relating to litigating public nuisance claims including pleading, defenses, and remedies. In addition, the new public nuisance litigation has encountered many challenges, including standing, federal preemption, separation of powers, Commerce Clause, and the constitutionality of public nuisance statutes.

After setting out the framework for understanding the new public nuisance law, the book examines public nuisance claims in five illustrative mass torts: lead paint, environmental pollution, opioids, firearms, and e-cigarettes. These chapters assess the fate of public nuisance claims in the mass tort context. The book evaluates the competing arguments for expansion of public nuisance, balanced against arguments of the illegitimacy of public nuisance claims in mass tort cases. The book concludes with observations on evolving public nuisance jurisprudence in the new legal landscape of mass tort litigation, suggesting that shaping public nuisance law legislatively, as a matter of public policy, may be used in tandem with common law development.

Considering the inroads accomplished by the new public nuisance claims, the common law has evolved to expand the nature of public nuisance claims, the parties who may pursue such claims, the elements and defenses to such claims, and available remedies, including compensatory damages. In addition to common law developments, some states have enacted targeted public nuisance statues that have created new claims, complementing common law public nuisance jurisprudence.

The recent emergence of public nuisance claims as the basis for remediation in mass tort litigation has ignited controversy concerning the judicial expansion of vague concepts of common law public nuisance doctrine as a workaround of traditional products liability law. Courts are split concerning whether public nuisance law may be a proper avenue for vindicating mass tort harms. The debate centers on whether courts in their role to create and interpret common law may expand and rewrite public nuisance jurisprudence to advance claims that otherwise would not be actionable as products liability cases.

Critics have suggested that applying common law nuisance principles and state statutes to lawful products creates unlimited and unprincipled liability

for product manufacturers. These critics argue that gun manufacturers and pharmaceutical companies have no control over those who sell (in the case of guns) or prescribe (in the case of opioids) their products and whether those who obtain them use them properly. Other commentators have urged that the solution to the emerging use of public nuisance theories to resolve mass tort litigation should lie with the political branches of government as a matter of public policy, not with the courts through unwarranted expansion of the law of public nuisance.

The debate over the legitimacy of emerging public nuisance in mass tort products litigation need not be reduced to a binary choice between competing approaches. The existing terrain of public nuisance law, embracing common law and statutory approaches, can co-exist to accommodate the traditional role of common law development as well as institutional preferences for legislative policy enactments. The theoretical underpinning of public nuisance jurisprudence might expansively focus on social goals and distributive justice, as contrasted to private nuisance law, which focuses on prioritizing individual property rights and corrective justice. As a basis for mass tort litigation, public nuisance jurisprudence might rightly focus on harms to the public health or welfare and on the police powers of the state, or on individuals, to enforce and redress societal harms.

It has always been the nature of common law to adapt to changed circumstances. We may anticipate that common public nuisance law will continue to develop to embrace more flexible standards of public rights, harm, and remediation. The element of public nuisance law that requires an individual to plead and prove a "special injury" to obtain monetary damages has proved difficult for courts to unpack from the societal harm giving rise to the public nuisance. Thus, evolving public nuisance jurisprudence legitimately might relax the special injury requirement to enable claimants harmed by a public nuisance to obtain monetary relief.

In the same vein, courts engaged in refining public nuisance jurisprudence might take the opportunity to clarify the plaintiff's requirement to prove that the defendant's conduct amounted to an unreasonable interference with a public right. In nuisance cases, judicial standards for reasonableness are vague and inconsistently applied. This does not mean that a common law reasonableness standard is unworkable or unmanageable. At any rate, public nuisance violations might be considered a strict liability offense. In addressing the reasonableness standard, some state public nuisance statutes adopted this approach to eliminate the reasonableness requirement altogether.

Apart from potential evolution of common law doctrine, a model public nuisance statute, based on the state's police power to protect the general

health and welfare of its citizens, might cover behavior that threatened or harmed a community's health, safety, comfort, convenience, or a right common to the public. Conceptually, a public nuisance interferes with the public as a class, not merely one person or a group of persons. The right to sue for and recover monetary damages should be available to individuals as well as public authorities responsible for protecting the rights of the public, including federal and state agencies.

Public nuisance jurisprudence law was developed chiefly in the era before the emergence of widespread mass tort harms to entire communities, in the context of property and environmental contamination litigation. Public nuisance law might evolve to adapt to the changing legal landscape of mass tort product cases, as a function of common law development as well as legislative enactment. The fact that these lawsuits arise from events relating to harmful products does not lessen the fundamental communitywide harmful consequences to public health and welfare, nor the police powers to protect citizens.

Public nuisance claims have emerged as a novel, innovative approach to pursuing and resolving mass tort litigation in the twenty-first century. The development of public nuisance claims as a basis for group remediation is likely to be the focus of mass tort litigation in the next decades. With successful litigation and settlement of public nuisance claims, parties and courts will increasingly make recourse to public nuisance as a viable legal theory in mass products litigation. Federal and state courts have been cautiously receptive to public nuisance claims, and attorneys have successfully leveraged these claims to encourage massive settlements in tobacco, opioid, lead paint, PCBs, e-cigarettes, and other mass tort lawsuits. Analysis of unsuccessful public nuisance mass torts, however, illustrates the limitations on judicial reception to the new wave of public nuisance litigation.

This book is the first to survey, discuss, and analyze the emergence of public nuisance law as the newest approach to the resolution of mass tort cases. The book argues that conceiving the new public nuisance debate as a binary choice is not useful. The legal system is expansive enough to embrace both the common law approach along with new public nuisance statutory initiatives. Thus, the existing regime of evolving common law, coupled with statutory enactments reflecting carefully crafted public policy, provides a middle ground approach that accommodates the historical role of judicial common law development as well as institutional preferences for legislatively enacted public policy choices.

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Historical Context of Private and Public Nuisance at Law and Equity

1.1 DISTINGUISHING PRIVATE AND PUBLIC NUISANCE

A brief examination of the jurisprudential development of nuisance law helps provide a context for understanding the evolution of public nuisance law into the contemporary mass tort litigation landscape. The English jurisprudence surrounding private and public nuisance law was transplanted in the United States in the seventeenth century, with the immigration of colonists who brought with them the English common law system. Over time, nuisance law began to subsume elements of criminal, property, and tort laws. The historical evolution of nuisance law suggests three significant points.

First, nuisance law historically has been plagued with vague and fuzzy conceptualization, which has contributed to imprecise, inconsistent common law interpretations. In response, some jurisdictions turned to legislatively codifying nuisance principles. Such statutory nuisance law, however, has not been without its own controversies concerning statutory construction of nuisance laws. Additionally, the general fuzziness of nuisance common law principles – especially public nuisance law – has contributed to the modern controversies over the applicability of public nuisance law to contemporary mass tort litigation.

Second, the history of nuisance law presents a jurisprudential terrain constantly in a flux, often expanding to meet the challenges of new legal problems or retracting in resistance to novel approaches.[1] This understanding provides a basis for current advocates, who champion the new application of public nuisance theories to twenty-first century mass tort litigation, or detractors who resist the expansion of public nuisance in the mass tort arena. In the same

[1] For a comprehensive discussion of the development of modern nuisance law, *see* Donald G. Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. Rev. 741 (2003).

way that courts and litigants, spanning five decades of mass tort litigation, embraced novel theories of substantive and procedural justice, the expanding notions of public nuisance law represent the evolving nature of contemporary mass tort litigation.

Third, an understanding of the history of nuisance law illustrates how long-standing doctrinal precepts relating to public nuisance continue to bedevil the judicial reception of public nuisance claims in mass tort litigation. While the assertion of public nuisance claims has attempted to create a novel approach to thinking about mass harms and remediation, conventional common law defenses impair parties' ability to assert public nuisance theories. Public nuisance defenses, supplemented with other contemporary challenges to public nuisance claims, remain an obstacle to judicial embrace of this new frontier of mass tort litigation.

The torts scholar William L. Prosser described the law of nuisance as an "impenetrable jungle."[2] Historically, the word nuisance had its general origins in the French word for harm, but the term came to describe legal liability for two types of legal harms.[3] Nuisance law has been confused by colloquial understandings; sometimes, courts loosely applied nuisance to an array of legally inappropriate contexts, such as alarming advertisements or a cockroach baked into a pie.[4] Contemporary commentators have suggested that older decisions relating to nuisance claims were based on "broad, almost meaningless definitions and terminology that can now be largely discarded."[5] In addition, the concepts of private and public nuisance often were not carefully distinguished. Thus, nuisance has come to mean more than mere hurt, annoyance, or inconvenience but instead denotes invasions of different plaintiff interests, with a focus on the defendant's conduct.[6]

1.2 PRIVATE NUISANCE

From the twelfth century forward, common law nuisance recognized two branches: private and public nuisance. Private nuisance was narrowly concerned with a defendant's invasion of another person's use or enjoyment of their land. A private nuisance constituted a civil right with a remedy at law,

[2] W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, & David G. Owen, *Prosser and Keeton on the Law of Torts* § 86 at 616 (5th ed. 1984).
[3] *Restatement (Second) of Torts* ch. 10, Intro. note (Am. L. Inst. 1979).
[4] Keeton, *supra* note 2.
[5] Daniel B. Dobbs, Paul T. Hayden, & Ellen M. Bublick, *Hornbook on Torts* § 30.1 at 733 (2d ed. 2015).
[6] *Id.*

limited to interference with the use or enjoyment of land.[7] Any form of property ownership was sufficient to be characterized as a property interest to support a private nuisance claim.[8] In recent eras, private nuisance law has been heavily supplemented with regulations, zoning statutes, land-use ordinances, and the law of unconstitutional takings.[9] Legislatures that desire to end a land use may enact statutes to declare a property use as a nuisance.[10]

At common law, a person who owned or rightfully possessed land was entitled to its unimpaired condition and occupancy in reasonable comfort and convenience. The defendant's interference might cause physical or tangible harm to a plaintiff, resulting in diminution of a property's market value, or causing discomfort to a property's occupants.[11] To be actionable as a private nuisance, the disturbance or inconvenience had to be substantial, unreasonable, and offensive to a normal person. Thus, the presence of a howling dog next door was a considered private nuisance because it interfered with the undisturbed enjoyment of property.[12]

A plaintiff pursuing a claim for private nuisance at common law had to satisfy four requirements. First, the plaintiff had to show that the defendant acted intentionally to interfere with the plaintiff's use and enjoyment of the plaintiff's land.[13] Courts have construed intentionality to mean a defendant's creation and continued knowledge of a harm to the plaintiff's interests that were occurring or substantially likely to follow from the defendant's activities.[14] Second, the plaintiff had to show that the interference with the plaintiff's use and enjoyment was of the type intended.[15] Third, the plaintiff had to prove that the interference or physical harm, if any, was substantial, leading to depreciation in the value of the plaintiff's property.[16] Fourth, the plaintiff had to show that the defendant's interference was unreasonable and substantial.[17]

Courts have interpreted defendant's substantial interference as a significant harm to the plaintiff, and defendant's unreasonable conduct resulting in harm

7 Keeton, *supra* note 1, § 86 at 617. *See generally* Allan Beever, *The Law of Private Nuisance* (Oxford 2013); John Murphy, *The Law of Nuisance* (Oxford 2010) § 1.04 at 5–20, §§ 2.01–6.30 at 33–131.
8 *Id.* § 87 at 619.
9 Dobbs, *supra* note 5.
10 *Id.*
11 Dobbs, § 30.2 at 735.
12 Keeton, § 86 at 617.
13 *Id.* at 622.
14 *Id.* at 624–25.
15 *Id.* at 622.
16 *Id.* at 622–23.
17 *Id.*