



Washington Legal Foundation

Advocate for Freedom and Justice®



ALCHEMY IN THE COURTROOM? THE TRANSMUTATION OF PUBLIC NUISANCE LITIGATION

Please stand by, the program will
begin momentarily.



Washington Legal Foundation

Advocate for Freedom and Justice®



Richard Faulk



Mr. Faulk is a Counsel with Davis Wright Tremaine LLP in the firm's Washington, DC office. He is a seasoned litigator with over three decades of trial and appellate experience in environmental and toxic torts, including air and water pollution class actions, CERCLA cost recovery claims, and defense of toxic tort cases. Mr. Faulk has significant federal and state appellate experience, including arguments before the U.S. Supreme Court, and *en banc* Courts of Appeals, especially in environmental and mass tort cases. He has written extensively on public-nuisance litigation, including a co-authored 2014 paper for Washington Legal Foundation that won a Burton Award for Distinguished Legal Writing.



Washington Legal Foundation

Advocate for Freedom and Justice



Neil Merkl



Mr. Merkl is a Partner with Kelley Drye & Warren LLP in the firm's New York, NY office. He is a commercial lawyer, litigator and trial attorney with more than thirty years of experience in contract, commercial law and civil litigation. Mr. Merkl represents innovative businesses that are facing unprecedented and unpredictable exposure to extreme litigation risk because their disputes arise from new products, new methods, new technologies, and complex subject matters unfamiliar to judges and jurors. He serves on the Commercial Division Advisory Council, which is charged with advising on matters concerning the Commercial Division of the Supreme Court of the State of New York.

Public Nuisance: Problematic – but Persistent

- Described as “notoriously contingent and unsummarizable,” generations of legal writers expressed their frustration with it “in the most unhappy terms.”
- In 1877, Horace Wood described it as a “wilderness of law.”
- Dean Prosser said it was a “legal garbage can” full of vagueness, uncertainty and confusion.”
- Richard Eptstein claimed that nuisance law “does not work on a moral or deductive principle”
- Justice Blackmun said that “one searches in vain for anything resubling a principle in the common law of nuisance.”

Public Nuisance:



What's the Big Deal?

What exactly is a “Public Nuisance?”

- An “act or omission” which “obstructs or causes inconvenience or damage in the exercise of rights common to all.” Prosser, Handbook of the Law of Torts, Sec. 72 at 566 (1941).
- An “unreasonable interference with a right common to the general public.” Restatement (Second) of Torts, Sec. 821B(1)(1979).
- The interference must be to a public right, not a private one. The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. *Ganna v. Smith & Wesson Corp.*, 780 A.2d 98, 104 (Conn. 2001).
- Intuitively, it seems that the manufacture and sale of products will rarely, if ever, violate a public right. Products are typically used by individual consumers – not the public. The number of persons injured isn’t the test – it’s the *nature of the right*, whether individual or the general public.

What exactly is a “Public Nuisance.”

- **“The harm must be substantial – one that materially interferes with the ordinary physical comfort of human existence according to plain, sober and simple notions.”**
- **“Unreasonable interference” with a public right requires consideration of (1) the impact on “public health, safety, peace, comfort or convenience,” (2) whether it is proscribed by statute, (3) whether it is of a continuing, long-lasting nature and the defendant knows that it has a “significant effect on the ongoing harm.”**
- **NOTHING is “exactly” a public nuisance. The tort is one of the most subjective causes of action at common law.**

Extraordinary Elasticity

- **Is the Opioid epidemic a public nuisance? Did the pharmaceutical companies create it?**
- **Is childhood lead poisoning a public nuisance? Are lead paint manufacturers responsible?**
- **Are noise and light contamination produced by permitted hydraulic fracturing and drilling operations a public nuisance? Are the drilling operators responsible?**
- **Is PCB contamination of West Coast Rivers bays and estuaries a public nuisance? Is the PCB manufacturer responsible?**
- **Are rising sea levels that threaten coastal cities and residences a public nuisance caused by the fossil fuel companies' exacerbation of global warming?**

COMMON LAW ORIGINS

- **“Public nuisance” actions originated in England and were originally prosecuted by the sovereign as a criminal offense.**
- **Generally used to redress situations that imposed on a right owned by the public at large, rather than private persons, e.g., blocking roads, sidewalks, unsanitary conditions and immoral activities.**
- **American courts adopted English common law and its recognized causes of action, including public nuisance.**

EXPANSION AND CONTRACTION

- **The industrial revolution prompted courts to apply the doctrine to an increasing variety of situations in a more complex society.**
- **Environmental claims were recognized for spills and dumping into streams, for polluting public water supplies, damaging or obstructing public sanitation facilities, and for other interference with public health and safety.**
- **In each instance, the courts focused on the interference with a public right, not impacts on the rights of individuals on their private property or in their private residences.**
- **As society emerged from the Great Depression, governmental regulations proliferated and their enforcement resulted in the decline of public nuisance litigation as a means of redressing public harms. Not even mentioned in the Restatement (First) of Torts (1939).**

REACHING EQUILIBRIUM?

- **As late as 1966, Dean Prosser, the “Father of Product Liability,” viewed public nuisance narrowly as matter restricted to criminal conduct. As a result, he elected to pursue strict product liability as a basis for suits arising from defective products.**
- **Despite opposition from environmentalists who advocated a broader application of public nuisance claims when the Restatement (Second) was proposed, Prosser’s narrower interpretation prevailed.**
- **As approved, the Restatement (Second) recognized that “unreasonable” interference with a “public right” could support a public nuisance suit, but precluded claims based on conduct that fell outside of “the traditional common law claim of public nuisance” or conduct “not prohibited by a legislative act.”**
- **Prophetically, the Restatement’s drafters warned courts that when they based public nuisance claims on other grounds, the courts risked “acting without an established and recognized standard”**

“Standardless Liability”

- Courts have traditionally resisted invitations to expand public nuisance liability in the absence of clear boundaries and guiding principles.
- Respect for the legislative and executive spheres, and the constitutional limits on judicial power is critical – such “political questions” are not justiciable because they cannot be based on principled, rational and reasoned distinctions.
- “In a field where the meaning of terms is so vague and uncertain, it is a proper function of the legislature to define breaches of public policy which are to be considered public nuisances.” *People v. Lim*, 118 P.2d 472, 476 (Cal. 1941).
- “This lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a ‘public nuisance.’” *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal. 1997).

PUBLIC NUISANCE UNDER THE RESTATEMENT (SECOND) OF TORTS

- **Plaintiff must establish an “unreasonable interference” with a “public right”**
- **A “public right” is “collective in nature.” It is not a right to be free from personal intrusion or insult, but rather a right held by the public at large – unlike “the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.”**
- **Courts have been “reluctant to recognize a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it.”**
- **Plaintiffs must establish that the defendants actually caused the nuisance. Liability is precluded if the injuries are too remote or unforeseeable, or if the harm is caused by the superseding conduct of others.**
- **Defendants must actually control the situation that causes the injuries at the time the harm is incurred, e.g., they must be in a position to prevent the nuisance from arising and to abate its impact once it occurs.**
- **Public nuisance is an equitable cause of action and is redressed by equitable remedies, e.g., injunctive relief requiring abatement. Awards of money damages are generally not appropriate.**

PRODUCT LIABILITY LIMITS

- **As Dean Prosser intended, strict product liability became the claim “of choice” for injuries associated with defective products.**
- **Originally opposed and viewed as “progressive,” products liability developed into a traditional and reliable doctrine for businesses to guide their conduct.**
- **But “strict” liability was not “absolute” liability. Important prerequisites remained, such as:**
 - **product identification and causation**
 - **statutes of limitations, and state of the art defenses**
- **Product liability reform statutes (e.g., statutes of repose) made recoveries more difficult. Even CERCLA contains a “product liability” exception that protects mere manufacturers from liability.**
- **Plaintiffs’ counsel began seeking more “elastic” options when claims for some products failed (e.g., lead paint, firearms).**

TRANSMUTATION

- **To expand the scope of liability, a new vehicle was needed. “Public nuisance” was chosen as a label because it did not focus on the existence of a “defect,” but rather could be “merely the right thing in the wrong place – like a pig in the parlor instead of the barnyard.” *Euclid v. Ambler Realty Co.*, 272 U.S. 560 (1923).**
- **Similarities ended there, however, because to obtain recovery, plaintiffs needed an “absolute liability” theory that did not mandate:**
 - **control by the defendant**
 - **identification of the defendant’s product**
 - **a specific injury caused by the defendant’s particular product**
 - **consideration of contribution by third parties or other products**
 - **consideration of competing state statutes or executive regulations**
- **Suits based on this new tort were filed by private contingent fee counsel on behalf of public authorities in New Jersey, Rhode Island, Ohio and California. Favorable verdict in Rhode Island reversed, but California appellate court affirmed.**

THE RHODE ISLAND MODEL

- **“Public nuisance” exists when the “cumulative presence” of lead paint creates a burden that the public “should not bear.”**
- **Fact that paint is only in private homes, as opposed to public places, deemed irrelevant. What “public right” was affected?**
- **Number of impacted homes not identified or quantified. How is “cumulative presence” determined?**
- **Control by defendants over the conditions at the time of injury (or at the time abatement is ordered) was not required. How could they have prevented injury? How can they be ordered to abate it? Court has no jurisdiction to coerce non-party homeowners to cooperate.**

THE RHODE ISLAND MODEL

- **Actual presence of defendants' product in state not required if products were marketed widely. How can one be responsible if the product is not linked to the manufacturer?**
- **Statutory responsibilities of property owners not considered. Alternative sources of lead in the environment not considered. Why isn't the disregard of statutory duties an intervening cause? How can liability be imposed without considering the role of equally likely causes of lead poisoning?**
- **Proof of specific injuries caused in any particular person not required. How can liability be imposed without proof of injury? Without even proof of a *risk* posed to any particular person?**
- **Claim is not really a "tort" but rather a *tax* imposed by a "common law" court on the basis of a defendants' status, as opposed to blameworthiness.**

How Much Is Owed?

- **December 16, 2013:** California state judge orders three lead pigment manufacturers to put ***\$1.1 billion*** into a state-held fund to decontaminate homes in 10 counties and cities.
- Critical issue was whether manufacturers “created or assisted in the creation of the nuisance” by the “affirmative promotion of lead paint for interior use.”
- ***Court of Appeals affirmed liability*** – but reduces homes eligible for abatement to homes built before 1951. Reduced award estimated at \$400 million.
- California Supreme Court ***denied review*** on Feb. 14, 2018. **People v. Conagra Grocery Products Co., No. S246102 (Cal. 2018).**

“The power to tax
is the power to destroy.”

McCulloch v. Maryland, 17 U.S. 316, 17 U.S. (4
Wheat.) 316, 4 L.Ed. 579 (1819)(per Marshall, C.J.)

Texas – A Compromise Position?

- ***Crosstex v. North Texas Pipeline v. Gardiner* 505 S.W.3d 580 (2016):**
- **Conduct must “substantially interfere with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use or enjoy it.”**
- **To prove legal injury, interference must be “substantial and resulting discomfort or annoyance must be unreasonable”, but “no need to prove that defendant’s conduct was unreasonable.”**
- **Nuisance may be caused by intention to interfere, knowledge with “substantial certainty” that interference will result, negligent interference, or result from an “abnormally dangerous activity.”**
- **Nuisance cannot be premised on mere accidental interference, or by conduct that is “merely abnormal or out of place with its surroundings.”**

In Texas, a “Pig in the Parlor”
isn’t necessarily a nuisance!



CLIMATE CHANGE: THE ULTIMATE PUBLIC NUISANCE?

- **Suits filed against the automotive industry, energy companies, oil and gas producers and refiners, and government agencies – despite problems of causation and “collective responsibility.”**
- **Federal suits generally dismissed under “political question” doctrine, where judges abstain from deciding questions that invade the provinces of other branches of government.**
- **Dismissals were appealed to Second and Ninth Circuits, and ultimately to U.S. Supreme Court. Supreme Court held that nuisance claims seeking injunctive relief were “displaced” by the Clean Air Act and EPA greenhouse gas regulations.**
- **Suit by Alaskan Inuit tribe in San Francisco federal court sought damages for relocation of village threatened by coastline erosion. 9th Circuit held that claims for damages were also displaced.**
- **Polar bear’s listing as “threatened” species, rising sea levels, coupled with official government recognition of man’s contribution to global warming arguably strengthens claims under state common law.**

New West Coast Climate Change Litigation

- **California counties and cities have sued 37 oil, gas and coal companies claiming billions in climate change-related damages to residents, business and environment.**
- **“[M]assive increase in extraction and consumption” of fossil fuels has caused “an enormous, foreseeable and avoidable increase in global greenhouse gas pollution.”**
- **Claims based on public nuisance and various other causes of action seek damages to homes, businesses, roads, beaches, wetlands and habitat areas from rising seas and more severe storms.**
- **Energy companies allegedly “went to great lengths” to learn about the hazards associated with extraction and sale of fossil fuels and did not disclose “known harms.”**

New West Coast Climate Change Litigation

- **Counties' and cities' claims contrast significantly with statements made in municipal bond offerings to investors.**
- *“The City is unable to predict when . . . natural events such as sea rise or other impacts of climate change or flooding from a major storm, could occur, when they may occur, and, if such events occur, whether they will have a materials adverse effect.” Oakland Gen. Oblig. Bond A-48-49.*
- **How can the difference be explained? Unlike mere allegations in pleadings, there are serious consequences for making wrongful statements in securities offerings. Generally, false statements are actionable under a strict liability standard. Perhaps the cities' litigation and securities lawyers think differently?**
- **Because of the gross disparity between allegations and disclaimers, ExxonMobil filed a petition in Texas state court. seeking early discovery of the underlying basis for the suits.**

New West Coast PCB Public Nuisance Litigation

- **Monsanto Corporation sued by cities and counties for manufacturing PCBs that contaminated storm water and ultimately contaminated bays, estuaries and rivers.**
- **Lawsuits currently pending by the State of Washington, Seattle, Spokane, Portland, San Francisco, Los Angeles, Long Beach, and others.**
- **Present rulings have denied dismissal and (so far) precluded Monsanto from recovering contribution or cost sharing by entities that actually deposited the contaminants in the waters.**
- **Actions prosecuted by well-known plaintiffs' counsel with history of significant success in environmental litigation (e.g., MTBE gasoline additives; Atrazine agricultural chemical product).**

Further Readings on Public Nuisance Litigation

Richard O. Faulk and John S. Gray, *Public Nuisance at the Crossroads: Policing the Intersection Between Statutory Primacy and Common Law*, 15 Chapman L. Rev. 495 (2011).

Richard O. Faulk, *Hannibal Eclipsed? Envelopment by Public Nuisance*, 30 Westlaw Env. J. 1 (April 14, 2010).

Richard O. Faulk and John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941 (2008).

Richard O. Faulk and John S. Gray, *The Mouse that Roared? Novel Public Nuisance Theory Runs Amok in Rhode Island*, Working Paper No. 146 (Washington Legal Foundation, March, 2007).

Richard O. Faulk and John S. Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation by Public Authorities and Private Counsel* (Part 1), Toxics L. Rpt., Vol. 21, No. 46, at 1071-1098 (BNA, Nov. 30, 2006); (Part 2), Toxics L. Rpt., Vol. 21, No. 47, at 1124-1152 (BNA, Dec. 7, 2006); (Part 3), Toxics L. Rpt., Vol. 21, No. 48, at 1172-1196 (BNA, Dec. 14, 2006).

Richard O. Faulk and John S. Gray, *Looking for Lead in All the Wrong Places: Alternative Sources of Exposure in Lead Paint Litigation*, Mealey's Lead Litigation Reporter (April, 2007), also published as Working Paper No. 148 (Washington Legal Foundation, April, 2007).

Victor E. Schwartz and Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L. J. 541-83 (2006).

Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cinn. L. Rev. 741 (2003).

Headlines

- “Opioid Abuse is in Everyone’s Backyard”
 - Suzanne Russell, *Opioid Abuse is in Everyone’s Backyard*, MyCentralJersey.com (Oct. 14, 2017, 12:00 PM), <http://www.mycentraljersey.com/story/news/health/addiction/2017/10/14/opioid-abuse-everyones-backyard/755295001/>
- “Even this Puppy wasn’t Safe from America’s Opioid Crisis”
 - Amy B. Wong, *Even this Puppy wasn’t Safe from America’s Opioid Crisis*, Washington Post (Oct. 28, 2017), https://www.washingtonpost.com/news/animalia/wp/2017/10/28/even-this-puppy-wasnt-safe-from-americas-opioid-crisis/?utm_term=.05bcf846563b
- “Born Addicted: The Number of Opioid-Addicted Babies is Soaring”
 - Hannah Rappleye, Rich McHugh, Ronan Farrow, *Born Addicted: The Number of Opioid-Addicted Babies is Soaring*, NBCNews (Oct. 9, 2017, 9:25 AM), <https://www.nbcnews.com/storyline/americas-heroin-epidemic/born-addicted-number-opioid-addicted-babies-soaring-n806346>
- “Christie on Opioids: ‘This is the AIDS epidemic of our generation, but even worse’”
 - David Wright, *Christie on Opioids: ‘This is the AIDS epidemic of our generation, but even worse’*, CNN (Oct. 27, 2017, 9:57 AM), <http://www.cnn.com/2017/10/27/politics/chris-christie-opioid-commission-aids-cnntv/index.html>

City of New York v. Purdue Pharma L.P., et al.

1. It is well-established that the nation is in the midst of an epidemic of addiction to opioid narcotics, both prescription painkillers and street drugs like heroin and illegally-manufactured fentanyl.¹ The Director of the National Institutes for Health declared that “Opioid misuse and addiction is an urgent and rapidly evolving public health crisis.” This opioid crisis has had serious impacts on New York City.

¹ Centers for Disease Control, Examining the Growing Problems of Prescription Drug and Heroin Abuse (Apr. 29, 2014), <http://www.cdc.gov/Washington/testimony/2014/t20140429.htm> (accessed May 30, 2017); see also Substance Abuse and Mental Health Services Administration, Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings, NSDUH Series H-46, HHS Publication No. (SMA) 13-4795. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2013.

County of Sullivan v. Purdue Pharma L.P., et al., No. 2017-961 (Sup. Ct., Sullivan Co. filed June 7, 2017)

232. Defendants, individually and acting through their employees and agents, and in concert with each other, have intentionally, recklessly, or negligently engaged in conduct or omissions which endanger or injure the property, health, safety or comfort of a considerable number of persons in Sullivan County by their production, promotion, and marketing of opioids for use by residents of Sullivan County.

State of Illinois v. Amerisourcebergen Drug Corp., et al.,
No. 3:17-cv-876 (S.D. Ill. Filed Aug. 17, 2017)

151. By causing dangerously addictive drugs to flood the community, and to be diverted for illicit purposes, each Defendant has injuriously affected rights common to the general public, specifically including the rights of the people of Alexander County to public health, public safety peace, public comfort, and public convenience. The public nuisance caused by Defendants' diversion of dangerous drugs has caused substantial annoyance, inconvenience, and injury to the public.

State of Illinois v. Amerisourcebergen Drug Corp., et al.,
No. 3:17-cv-876 (S.D. Ill. Filed Aug. 17, 2017)

159. Defendants' conduct in illegally distributing and selling prescription opioids where Defendants know, or reasonably should know, such opioids will be diverted and possessed and/or used illegally in Alexander County is of a continuing nature and has produced a significant effect upon the public's rights, including the public's right to health and safety.

State of South Carolina v. Purdue Pharma L.P. et al., No. 2017-CP-400-4872 (5th Cir. C.P. filed Aug. 15, 2017)

232. Purdue's actions were, at the very least, a substantial factor creating the public nuisance by deceiving prescribers and patients about the risks and benefits of opioids and distorting the medial standard of care for treating chronic pain. Without Defendants' actions, opioid use would not have become so widespread, and the opioid epidemic that now exists in South Carolina would have been averted or would be much less severe.

City of New York v. Purdue Pharma L.P., et al., No. 450133/2018 (N.Y. County Supreme Court filed Jan. 23, 2018)

744. Defendants' misrepresentations and actions created, caused, and contributed to a public nuisance, the opioid epidemic, within the City.... including the rapid growth in the demand for heroin, fentanyl and other opiates sold through illegal street trade. Defendants' misrepresentations and actions, individually and together and in concert with others, have resulted in substantial and unreasonable interference with the public health, safety and welfare.

City of New York v. Purdue Pharma L.P., et al., No. 450133/2018 (N.Y. App. Div. filed Jan. 23, 2018)

746. As a direct and foreseeable consequence of the Manufacturer Defendants' wrongful conduct, the City has been required to spend hundreds of millions of dollars. The City has incurred and continues to incur costs related to opioid overuse, addiction and misuse, including, but not limited to health care, emergency response, addiction treatment and care management, law enforcement, criminal justice and victimization costs, and costs associated with prevention, public health response and myriad social consequences.

State of South Carolina v. Purdue Pharma L.P., et al., no. 2017-CP-400-4872 (5th Cir. C.P. filed Aug. 15, 2017)

229. This injury to the public includes, but is not limited to (a) a distortion of the medical standard of care for treating chronic pain, resulting in pervasive overprescribing of opioids and the failure to provide more appropriate pain treatment; (b) high rates of opioid abuse and addiction, with which too many South Carolina residents will now struggle their entire lives; (c) overdoses, other serious diseases (like Hepatitis C), and fatalities, with grievous consequences to South Carolina communities and families; (d) children removed from their homes and newborns born to addicted to opioids; (d) lost employee productivity due to opioid-related addiction and disability; (f) greater demand for emergency services, law enforcement, addiction treatment, and social services; and (h) increased health care costs for individuals, families, and the State.

List of Opioids

Brand Name Opioids

- Abstral (fentanyl)
- Actiq (fentanyl)
- Avinza (morphine sulfate extended-release capsules)
- Butrans (buprenorphine transdermal system)
- Demerol (meperidine [also known as isonipecaine or pethidine])
- Dilaudid (hydromorphone [also known as dihydromorphinone])
- Dolophine (methadone hydrochloride tablets)
- Duragesic (fentanyl transdermal system)
- Fentora (fentanyl)
- Hysingla (hydrocodone)
- Methadose (methadone)
- Morphabond (morphine)
- Nucynta ER (tapentadol extended-release oral tablets)
- Onsolis (fentanyl)
- Oramorph (morphine)
- Oxaydo (oxycodone)
- Roxanol-T (morphine)
- Sublimaze (fentanyl)
- Xtampza ER (oxycodone)
- Zohydro ER (hydrocodone)

List of Opioids

Combination Opioid Prescriptions:

- Anexsia (hydrocodone containing acetaminophen)
- Co-Gesic (hydrocodone containing acetaminophen)
- Embeda (morphine sulfate and naltrexone extended-release capsules)
- Exalgo (hydromorphone hydrochloride extended-release tablets)
- Hycet (hydrocodone containing acetaminophen)
- Hycodan (hydrocodone containing homatropine)
- Hydromet (hydrocodone containing homatropine)
- Ibudone (hydrocodone containing ibuprofen)
- Kadian (morphine sulfate extended-release tablets)
- Liquicet (hydrocodone containing acetaminophen)
- Lorcet (hydrocodone containing acetaminophen)
- Lorcet Plus (hydrocodone containing acetaminophen)
- Lortab (hydrocodone containing acetaminophen)
- Maxidone (hydrocodone containing acetaminophen)
- MS Contin (morphine sulfate controlled-release tablets)
- Norco (hydrocodone containing acetaminophen)
- Opana ER (oxymorphone hydrochloride extended-release tablets)
- OxyContin (oxycodone hydrochloride controlled-release tablets)
- Oxycet (oxycodone containing acetaminophen)
- Palladone (hydromorphone hydrochloride extended-release capsules)
- Percocet (oxycodone containing acetaminophen)

List of Opioids

- Percodan (oxycodone containing aspirin)
- Reprexain (hydrocodone containing ibuprofen)
- Rezira (hydrocodone containing pseudoephedrine)
- Roxicet (oxycodone containing acetaminophen)
- Targiniq ER (oxycodone containing naloxone)
- TussiCaps (hydrocodone containing chlorpheniramine)
- Tussionex (hydrocodone containing chlorpheniramine)
- Tuzistra XR (codeine containing chlorpheniramine)
- Tylenol #3 and #4 (codeine containing acetaminophen)
- Vicodin (hydrocodone containing acetaminophen)
- Vicodin ES (hydrocodone containing acetaminophen)
- Vicodin HP (hydrocodone containing acetaminophen)
- Vicoprofen (hydrocodone containing ibuprofen)
- Vituz (hydrocodone containing chlorpheniramine)
- Xartemis XR (oxycodone containing acetaminophen)
- Xodol (hydrocodone containing acetaminophen)
- Zolvit (hydrocodone containing acetaminophen)
- Zutripro (hydrocodone containing chlorpheniramine and pseudoephedrine)
- Zydone (hydrocodone containing acetaminophen)

In re: National Prescription Opioid Litigation

- “And in my humble opinion, everyone shares some of the responsibility, and no one has done enough to abate it. That includes the manufacturers, the distributors, the pharmacies, the doctors, the federal government and state government, local governments, hospitals, third-party payors, and individuals, hospitals, third-party payors, and individuals. Just about everyone we’ve got on both sides of the equation in this case.”

In re: National Prescription Opioid Litigation

- People aren't interested in depositions, and discovery, and trials. People aren't interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unravelling complicated conspiracy theories.

In re: National Prescription Opioid Litigation

- But the resolution I'm talking about is really – what I'm interested in doing is not just moving money around, because this is an ongoing crisis. What we've got to do is dramatically reduce the number of the pills that are out there and make sure that the pills that are out there are being used properly.

Articles on Opioids

- Neil Merkl, Bill Escobar, Cliff Katz, Sumi Naidoo, *Litigation Won't Cure America's Opioid Epidemic*, N.Y. L. J. (Feb. 14, 2018 at 2:53 PM)
<https://www.law.com/newyorklawjournal/2018/02/14/litigation-wont-cure-americas-opioid-epidemic/>
- Neil Merkl, Bill Escobar, Cliff Katz, Sumi Naidoo, *Litigation is not the Solution to the Opioid Epidemic*, LAW360 (Dec. 15, 2017 at 3:23 PM) <https://www.law360.com/articles/995238/litigation-is-not-the-solution-to-the-opioid-epidemic>

Data Cites

- Deni Carise, Karen Leggett Dugos, A. Thomas McLellan, Amy Camilleri, George E. Woody, Kevin G. Lynch, Prescription OxyContin Abuse among Patients Entering Rehab, 164 AM. J. PSYCHIATRY 1750 (2007).
- Deborah Dowell, Rita Noonan, Debra Houry, *Underlying Factors in Drug Overdose Deaths*, 23 JAMA 2295 (2017).
- NYC DEP'T OF HEALTH AND MENTAL HYGIENE, *Unintentional Drug Poisoning (Overdose) Deaths Involving Opioids in New York City, 2000-2013* [updated March 2015], 50 EPI DATA BRIEF (Mar. 2015).
- Arthur Hughes, Matthew Williams, Rachel Lipari & Jonaki Bose, *Prescription Drug Use and Misuse in the United States: Results from the 2015 National Survey on Drug Use and Health*, NSDUH Data Rev. (2016) available at <https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR2-2015/NSDUH-FFR2-2015.htm>
- Yi Hser, LJ Mooney, AJ Saxon, K Miotto, DS Bell, D Huang, Chronic Pain Among Patients with Opioid Use Disorder: Results from electronic health records data, 77 J. SUBST. ABUSE TREAT 26 (2017).



Washington Legal Foundation

Advocate for Freedom and Justice®



Questions

Interact with our speakers by submitting your questions through the Q&A platform in the view screen.

 @WashLglFndt

www.wlf.org

For more information about WLF, email info@wlf.org