2019-2020

SOUTHERN ILLINOIS UNIVERSITY

NATIONAL HEALTH LAW MOOT COURT COMPETITION

Transcript of Record
Docket No. 18-102

State of LINCOLN,
Petitioner,

v.

CHASE PHARMA, INC., et al.,
Respondent.

COMPETITION PROBLEM

SPONSORED BY:

Southern Illinois University School of Law

AND

Department of Medical Humanities
Southern Illinois University School of Medicine

The American College of Legal Medicine

The American College of Legal Medicine Foundation

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IN THE FEDERAL CIRCUIT COURT
FOR THE CIRCUIT OF LINCOLN

State of Lincoln, Plaintiff	))	
	)	No. 17-0811-CV
v.	)	
	)	July 17, 2017
Chase Pharma, Inc., et al., Defendants.	))	

MEMORANDUM OPINION

Blackstone, District Judge

This matter comes before the Court on Defendants' motion to dismiss under the Federal Rules of Civil Procedure 12(b)(6). The State of Lincoln initially filed this proceeding on April 13, 2017, in Lincoln state court against the defendant drug companies, who manufacture opioid medications. The defendants, none of whom are corporations registered or with their principal place of business in the State of Lincoln, removed the case to this Court on April 21, 2017, on the basis of diversity jurisdiction.[1] The State alleges the defendants caused an opioid crisis that is a public nuisance in the State of Lincoln. The State seeks abatement of that nuisance, damages for the economic costs the State has expended in response to the nuisance, and other equitable remedies. The Court grants the defendants' motion to dismiss, for the following reasons.

FACTUAL AND PROCEDURAL HISTORY.

The following facts, as well-pleaded in the Complaint, are treated as undisputed for purposes of the instant motion.

[1] There are no issues raised in this case about whether the federal courts have jurisdiction over this claim.

Like a number of other states, the State of Lincoln has experienced a high number of deaths from opioid overdoses. In 2016 alone, over 2000 deaths in Lincoln were attributed to opioid use. While opioid prescriptions overall have been declining for the past few years, the State alleges the costs associated with them continue to climb. Lincoln's Bureau of Prisons estimates that it is providing opioid addiction treatment annually to over 3200 inmates state-wide. Public hospitals report on average that they see dozens of overdose patients on a weekly basis as well as babies born addicted as a result of their mother's opioid drug use. Governor Edwin Stanton declared a state of emergency regarding the "opioid crisis" in Lincoln on January 23, 2017.

As part of its response to the crisis, Lincoln brought this suit against Chase Pharma, Inc., and a number of other prescription drug manufacturers whose medications contained hydrocodone, oxycodone, fentanyl, codeine and other opioids, alleging they have created a public nuisance in the State of Lincoln. Lincoln alleges the defendants' sales and marketing practices have unreasonably interfered with Lincoln citizens' common rights to public health, welfare, and safety and created a reasonable apprehension of danger to person and property from the adverse effects addiction has had on their communities. The State more specifically alleges that over the past two decades Chase Pharma and other pharmaceutical companies engaged in a sophisticated and well-funded campaign to persuade doctors to prescribe opioids for the treatment of chronic pain, which lead to the current opioid crisis.

Opioid medications themselves have been prescribed for many years for pain management. Prior to the 1990s, the general practice within the medical profession was to limit the use of opioids to the treatment of short-term acute pain, pain associated with recovery from surgery or treatment for cancer, and end-of-life care. The medical profession discouraged prescribing opioids to treat chronic pain because of the profession's concerns about their effectiveness and

the risk of addiction. The State alleges that, to overcome this reluctance and obtain more sales of their drugs, the defendants and their agents knowingly made a number of false assertions about the safety of their opioid drugs and intentionally downplayed the risks of addiction from them:

- The defendants assured members of the medical profession that opioids were safe and effective for the treatment of non-malignant chronic pain. These assurances were communicated to the medical profession through direct marketing by branded advertising and statements by sales representatives. The defendants also engaged in unbranded advertising by funding seemingly independent key opinion leaders and front groups[2] who published these assurances in journal articles and at presentations in continuing medical education seminars and similar venues.
- The defendants assured doctors that the risk of addiction is low when opioids were prescribed for the treatment of chronic pain. The defendant drug companies told doctors and patients that signs of addiction were symptoms of a condition they called "pseudoaddiction," which they claimed was undertreated pain that required higher doses of opioids.
- The defendants claimed that opioids could be safely prescribed for patients who were predisposed to addiction because precautions such as screening for risk addiction, discussions with patients, and drug testing, would enable doctors to detect potential addiction before it became a problem. The defendants also distinguished between physical dependence and opioid addiction and contended that dependence was different, and less serious, than actual addiction. The

[2] Front groups are organizations that appear to have been set up to advance one agenda but in reality are controlled by other organizations with hidden agendas.

> defendants claimed that their medications were formulated to contain certain features they identified as abuse-deterring, such as time release formulas. In addition, the defendants claimed the risks of non-opioid pain relievers such as NSAIDs were higher than what the Federal Drug Administration ("FDA") and the Center for Disease Control ("CDC") have identified.

The State additionally alleges the defendants identified and targeted certain providers, such as primary care doctors, who were more likely to treat patients with chronic pain. They also targeted patients such as veterans and elderly patients who were more likely to suffer from chronic pain, even though they knew that the risks associated with long-term opioid use were greater for those groups than for the general population.

According to the State, the defendants' marketing campaign thus caused doctors to prescribe opioids in quantities or for treatment purposes that were dangerous and ineffective and threatened public health and safety. Long-term administration of opioids caused many patients to become addicted to painkillers. As a result, the State has incurred substantial costs in order to treat the effects of addiction and overdoses. The State has also been forced to spend additional money on law enforcement because of increased criminal activity by opioid drug dealers and abusers, and on social services provided to families affected by the crisis. The economic cost of opioid addiction in the State of Lincoln amounts to billions of dollars annually.

In response, the defendants point out that their products are regulated and approved by the FDA and the Drug Enforcement Administration ("DEA").[3] The FDA closely monitors the

[3] The FDA requires the sponsor of a prescription drug to prove by means of clinical trials and other scientific testing prior to marketing that the drug will be safe and effective for its intended use. *See generally* 21 C.F.R. pt. 314 (2019). The FDA also must approve any labeling,

promotion and marketing of prescription drugs to ensure that drug companies do not make fraudulent claims or promote off-marketing uses of their products. U.S. Department of Health and Human Services & Food and Drug Administration, et. al, *Guidance for Industry: Oversight of Clinical Investigations—A Risk-Based Approach to Monitoring* 1, 5 (2013), *available at* https://www.fda.gov/media/116754/download. In the case of narcotic drugs such as those involved here, the DEA regulates manufacturers, distributors and retail sellers to ensure that these drugs are used for proper medical purposes. *Id.* The defendants maintain that they have fully complied with all FDA and DEA regulations and that their marketing activities were consistent with industry practice. They also point out that even if the State's allegations regarding the defendants' marketing practices are true, the State has not identified any particular doctor who was misled into prescribing any of the defendants' opioid drugs.

The State filed its complaint in Lincoln state court against the defendants on April 13, 2017, alleging the defendants' actions amounted to a public nuisance. Defendant timely removed the action from the state court to this Court, correctly asserting diversity jurisdiction under 28 U.S.C. § 1332 and removal jurisdiction under 28 U.S.C. § 1441. Defendants then filed their Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) on April 28, 2017, asserting two grounds: 1) the State's claims raise a nonjusticiable political question and 2) the State has failed as a matter of law to state a claim of public nuisance. For the reasons set forth below, I agree with the defendants on both grounds for dismissal.

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including indications, contra-indications, warnings and directions for use before the drug can be sold. *See generally id*. pt. 1302 (2019).

ANALYSIS

I. Nonjusticiable Political Question

The defendants first urge this Court to find the State's claims raise a nonjusticiable political question and for that reason, the Court should decline to hear this case. The political question doctrine provides that certain questions or issues are not legal in nature, but rather are political and, therefore, should be resolved by the political branches of government rather than by the courts. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 871 (N.D. Cal. 2009), *aff'd on other grounds*, 696 F.3d 849 (9th Cir. 2012) (reasoning that a lawsuit presents a nonjusticiable political question when it requires the court to "make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis"). A court's power to grant relief is limited when the controversy falls within the purview of the legislative or executive branches of government. *Baker v. Carr*, 369 U.S. 186, 210-11 (1962).

In *Baker*, the Supreme Court identified a number of factors that suggest that a non-justiciable political question exists**.** These are: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standard for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 217.

Some federal courts have dismissed public nuisance suits brought by governmental entities on the basis of nonjusticiability. For example, a federal district court in California dismissed a municipal public nuisance claim brought by a village in Alaska against twenty-four oil and power utility companies for their alleged production of greenhouse gas emissions that caused global warming. *Native Vill. of Kivalina*, 663 F. Supp. 2d at 877. The court found the public nuisance claims beyond the scope of judicial expertise, applying the second and third *Baker* factors. *Id.* at 873-77.[4] I find that court's reasoning instructive in this case.

Native Village of Kivalina first considered whether the court could reach a decision that was "principled, rational, and based upon reasoned distinctions." *Id.* at 874 (citation omitted). The plaintiffs in that case argued that public nuisance cases involve issues of reasonableness, which make these cases no different from any other nuisance claims in terms of whether there are discoverable and manageable standards. *Id.* The court disagreed, finding that in order to evaluate the merits of the plaintiffs' public nuisance claim, the court would have to balance the utility and benefit of the alleged nuisance against the alleged harm. *Id.* The court would have to weigh, among other things, alternative sources of energy and their reliability and safety considerations, as well as their impact on consumers and business at every level. *Id.* Then, it would have to balance the benefits from those choices against the risk that

[4] *Native Village of Kivalina* found the first *Baker* factor was not implicated in that case, despite the fact the plaintiffs' claims touched upon issues of foreign policy. 663 F. Supp. 2d at 873. The first *Baker* factor applies only when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department…" *Baker*, 369 U.S. at 217. *Native Village of Kivalina* reasoned that the fact one branch of government has been given a mandate to address something does not equate to that branch having been given exclusive power over it. 663 F. Supp. 2d at 872. The same is true in this case. While Congress may have authority to regulate prescription drugs, there is no basis to conclude it has been given exclusive power to do so.

increasing greenhouse gases would heighten the risk of flooding in the area of the plaintiff village's coastline. *Id.* at 874-75.

Rejecting the plaintiff's argument that the federal courts had a long history of litigating similarly complex air and pollution cases, the court noted that whereas public nuisance claims based on air and water pollution involve a discrete number of "pollutors" who caused specific injuries to a specific area, the plaintiff's greenhouse emissions claims involved innumerable sources and wide-spread effects. *See id.* at 875. The court concluded that the plaintiffs had not identified any discoverable and manageable standards that would guide a factfinder in rendering a decision on such far-ranging matters that would be principled, rational, and based upon reasoned distinctions. *Id.*

The court in *Native Village of Kivalina* next considered the third *Baker* factor, whether it could decide the case without the sort of policy determination that was more appropriate for the exercise of nonjudicial discretion. *Id.* at 876 (citing *Baker*, 369 U.S. at 217). The court observed that, regardless of whether injunctive relief or damages were sought, deciding the case would require the court to balance the social utility of the defendants' conduct against the harm that it would inflict, a process that would require it to establish an acceptable limit on the level of greenhouse gases emitted by the defendants. *Id.* at 876. In addition, court would have to decide who could best bear the costs of climate change. *Id.* at 876-77. According to the court, "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance." *Id.* At 877. Accordingly, the court dismissed the action on the grounds that it involved a nonjusticiable political question. *Id.*

I conclude that the issues raised by the plaintiff's public nuisance claim similarly involve considerations beyond the purview of the judiciary. Courts are not suited to address societal

epidemics such as drug abuse because the court would be required to balance the benefits and utility of the legitimate uses of the prescription drugs against the risks posed by their misuse, and there are no consistent, reliable, objective *judicial* standards by which a court can make such a complex *societal* assessment. This is especially true when the State concedes the drugs and their labeling are consistent with FDA regulations and places its focus on whether opioid drug use is good for the citizens of Lincoln.[5] That requires an initial policy decision not by this Court. Moreover, assuming the Court could find some objective principles to assess the State's nuisance claim, the Court would lack any legal method for calculating damages, crafting remedies, and allocating fault. The State alleges far-reaching impacts and injuries that cannot be traced to any specific drug manufacturer's conduct or, for that matter, to opioid drugs as opposed to any other cause.[6] The complex question of whether and how opioid drugs should be marketed to doctors and consumers is one suited to a regulatory body, not a single federal court. For that reason, I find this case raises a nonjusticiable political question and should be dismissed on that ground.

II. Public Nuisance.

Even if the State's complaint is not dismissed on political question grounds, it must nonetheless be dismissed because the State has failed to plead a plausible claim regarding several required elements of a public nuisance claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding a complaint must state a claim that is plausible on its face to survive a motion to

[5] While defendants in some of the opioid litigation cases have argued federal law preempts state public nuisance claims because of FDA approval, the defendants in this case do not raise that issue in this motion to dismiss.

[6] The State has alleged costs associated with opioid abuse into the billions of dollars. Although not directly relevant under the *Baker* factors, the Court is mindful that imposing crushing liability on the pharmaceutical industry by judicial action will threaten the economic stability of these companies and might cause them to quit producing opioid drugs entirely, thereby depriving doctors of an important option for the treatment of both acute and chronic pain.

dismiss). The State asserts its claims under Lincoln's nuisance law. Lincoln defines nuisance by statute as: "Any conduct or activity that is injurious to health; indecent; offensive to the senses; or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property." Linc. Stat. 54-133 (2018). The Lincoln Supreme Court has held that its nuisance law follows the common law principles set forth in the Restatement of Torts. *Seward Cty. v. Blaine*, 233 Linc. 3d 1008 (1998) (adopting Restatement (Second) of Torts § 821B (1979)).[7] The Restatement defines a public nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B. In order to constitute a public nuisance, the offending conduct or activity must therefore: (1) substantially interfere with a right held in common by the public; (2) be unreasonable; (3) be within the defendant's control and be capable of abatement by the defendant; and (4) proximately cause the injury in question. *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923, 940 (2009).

The defendants argue the State's complaint has three fatal flaws: 1) the State failed to allege any interference with a right held in common by the public; 2) the State failed to allege an unreasonable interference with a public right; and 3) the State failed to allege that the defendants had control of the instrumentalities (products) at the time of the alleged injury and would have been able to abate any claimed public nuisance.[8] This Court agrees with all three assertions.

[7] Ed. note: Teams may cite this case as a state law decision for the proposition stated in the text.
[8] The defendants conceded that Lincoln law does not limit nuisance claims to those involving real property. For purposes of this appeal, the defendants also raise no issues about whether the State can prove proximate cause.

A. Interference with a Right Common to the Public.

In order to prevail in a public nuisance case, the plaintiff must show that the defendant's conduct has adversely affected a right that is held in common by the general public. *See Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) ; *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 445 (R.I. 2008)A public right is a right common to all members of the public and not merely one that is enjoyed by a large number of people. Restatement (Second) of Torts § 821B, cmt. g. Public rights are traditionally concerned with such matters as health, safety, peace, comfort and convenience. *See* Restatement (Second) of Torts § 821B(2)(a). The test is not the number of persons who are adversely affected, but rather whether the public at large will be adversely affected by the invasion of its rights. *See Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 132 (Conn. 2001). In other words, because this right is collective in nature, it is distinguishable from an individual's right not to be assaulted, defamed, defrauded or negligently injured. *See* Restatement (Second) of Torts § 821B, cmt. g.

In related contexts, courts have found governmental plaintiffs failed to allege an injury to a public right. *See City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1107 (Ill. 2005); *Lead Industries Ass'n*, 951 A.2d at 448. For example, in *City of Chicago*, the City of Chicago and Cook County alleged that the sale of illegal firearms constituted a public nuisance because it violated laws intended to protect the public's health, welfare and safety. 821 N.E.2d at 1107. The Illinois Supreme Court declared that the public right claimed by the City was nothing more than an assertion of an individual's right not to be assaulted. *Id.* at 1116. The court was concerned about the breadth of such a rule, which would in effect potentially make a public nuisance out of any individual's use of an otherwise legal product in a way that might create a risk of harm to others. *See id.*

Similarly, the Rhode Island Supreme Court declared:

> [T]the manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance. Products generally are purchased and used by individual consumers, and any harm they cause—even if the use of the product is widespread and the manufacturer's or distributor's conduct is unreasonable—is not an actionable violation of a public right.

Lead Industries Ass'n, 951 A.2d at 448 (quoting Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 817 (2003)).

These cases suggest that cases of addiction or overdose deaths from opioid use, while numerous, do not interfere with any right held in common by the public. At most, they assert harm to individual interests, more akin to a products liability claim. Here, the State broadly articulates the public rights as "public health, welfare, and safety" and "a reasonable apprehension of danger to person and property." But what the State is really alleging is a public right to be free from the risk that someone will engage in the illegal use of a legal product. As the Illinois Supreme Court recognized, this would be an unprecedented and inappropriate expansion of a "public right." *See City of Chicago*, 821 N.E.2d at 1116. I, therefore, conclude the State has failed to state a claim for public nuisance because it has not alleged a plausible interference with any public right.

B. Unreasonable Interference.

I also find the State failed to allege a plausible claim regarding the second required element of public nuisance, namely that the defendant's conduct must unreasonably interfere with the asserted public right. *See* Restatement (Second) of Torts § 821B. The State argues that it has adequately pleaded a claim that the defendants' marketing and promotional activities constituted unreasonable interference with public health and safety. The defendants argue that

their statements and assurances were made in good faith and did not contradict any FDA-approved labeling; therefore, the unreasonable interference claim is not plausible**.**

I conclude this can be resolved by looking at the scope of public nuisance law. While the Restatement of Torts suggests that even legal uses of property may constitute a nuisance, most of the context for that rule involves the use of real property. *See City of Chicago*, 821 N.E.2d at 1117-18 (characterizing the Restatement as "less than helpful" because it arises out of law tied to use of land and invasion of property rights). As I noted above, the State's claims in this case are more akin to a products liability claim than a traditional nuisance claim. The State acknowledges that there is simply no case law in Lincoln regarding whether a nuisance claim, public or otherwise, may be based on a defendant having placed a lawful product into the stream of commerce. As a New Jersey federal court reasoned, allowing products-based nuisance claims has the potential to "become a monster that would devour in one gulp the entire law of tort." *Camden Cty. Bd. of Chosen Freeholders*, 273 F.3d at 540 (reasoning that "courts have enforced the boundary between the well-developed body of product liability law and public nuisance law").

The concerns here are similar to those raised in the discussion of the nonjusticiable political question—whether this Court should decide such claims under nuisance law or defer to the legislature to make that decision. *See City of Chicago*, 821 N.E.2d at 1121 (noting the court's "reluctan[ce] to interfere in the lawmaking process in the manner suggested by the plaintiffs, especially when the product at issue is so heavily regulated by both the state and federal governments. . . " and "conclud[ing] that there are strong public policy reasons to defer to the legislature" to determine applicable regulation). The State does not contest either the importance of providing access to pain-relieving medication or the extensive process by which

the FDA and other agencies regulate access to these drugs. Because all that the State has alleged is that the defendants' actions in conjunction with their otherwise lawful and highly regulated products created the risk of harm to public health and safety, I conclude that the State's complaint fails to allege a plausible claim of unreasonable interference with a public right.

C. Control over the Instrumentality that Caused the Harm.

Finally, I also find the State failed to plausibly allege the defendants had the necessary control over the nuisance instrumentalities (the opioid drugs) at the time that they caused harm to the public. *See Lead Indus. Ass'n, Inc.*, 951 A.2d at 449 (reasoning that "[a]s an additional prerequisite to the imposition of liability for public nuisance, a defendant must have *control* over the instrumentality causing the alleged nuisance at the time the damage occurs"); s*ee also Camden County Bd. Of Chosen Freeholders*, 273 F.3d at 541 (requiring a gun manufacturer to have sufficient control of the source of interference with public right). Control is "critical" because "the principal remedy for the harm caused by the nuisance is abatement." *Lead Indus. Ass'n*, 951 A.2d at 449.

For example, the Rhode Island Supreme Court held that because lead paint manufacturers lacked control over their products at the time the alleged damage occurred, they could not be held responsible for any harm that their products caused after the time of sale. *Id*. at 450. The court acknowledged that the law did not require the defendant control the nuisance at all times but emphasized that they must have at least "minimally . . . controlled the nuisance at the time of the damage." *Id.*.

Therein lies the problem with the State's claim in this case. The State's case rests on the proposition that opioid drugs, while lawfully prescribed and otherwise in compliance with federal law, are being abused after the point of the defendant's sale. Even if the Court accepts,

as it must, the State's allegation that the defendants played a role in the cycle of abuse, the State does not and indeed cannot show that the defendants had any control over the actual use of the product once it left their hands. There are a number of downstream parties who have contributed to the opioid addiction epidemic: distributors who fail to monitor and report suspicious orders for opioids, doctors who overprescribe opioids, retail sellers who fail to monitor suspicious and report suspicious sales of opioids, patients and others who abuse opioids or who use them for non-medical purposes, and criminals who operate black markets for the sale of opioid drugs.

The State's theory is that the defendants' marketing practices caused the epidemic, but in fact, even if the defendants abated those practices, the epidemic is just as likely to continue because addicts and those willing to sell to them will find the products regardless. I conclude that the State has failed to state a plausible claim because it did not allege the defendants had even minimal control over the products at the time that the nuisance was created.

CONCLUSION AND ORDER

Based on the foregoing, the Court concludes that the State has not adequately stated its causes of action against the Defendants. The State's public nuisance claim involves a nonjusticiable political question and the case should be dismissed on that ground alone. Even if the case presented a legal question for this Court to determine, the complaint fails to set forth several requirements of a public nuisance claim. Therefore, the Defendants' Motion to Dismiss is, in all respects, hereby GRANTED.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

No. 18-670

The State of Lincoln, Appellant,

v.

Chase Pharma, Inc., et al., Appellees.

Submitted: February 4, 2018

Filed: July 3, 2018

Before Coke, Cardozo and O'Connor, Circuit Judges

Edward Coke, J. delivered the opinion of the Court, in which Benjamin Cardozo, J., joined. S.D. O'Connor, J., filed a dissenting opinion.

Coke, J.

The State of Lincoln brought suit against Chase Pharma, Inc. and several other drug companies who manufacture prescription opioid drugs, alleging that the drug companies contributed to the opioid crisis in Lincoln by engaging in a fraudulent campaign to persuade doctors to prescribe their products to treat chronic pain while concealing or misrepresenting the risk of addiction associated with such treatment. Judge Blackstone of the Lincoln District Court granted the drug companies' motion to dismiss on the grounds that Lincoln failed to state a claim for which relief could be granted. We affirm.

Because we agree with Judge Blackstone in all respects, we will only briefly set forth the basis for this Court's decision below. The facts of the case as set out in Judge Blackstone's opinion are hereby incorporated in full.

I. Nonjusticiable Political Question.

The District Court concluded that resolving the State of Lincoln's public nuisance suit would involve a nonjusticiable political question, applying the second and third factors from the United States Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962). First, let us say that we agree with the District Court that the first *Baker* factor does not apply here because there is no "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* at 217. While the Supreme Court has found Congress to have preempted certain tort claims against drug manufacturers, it has allowed others to proceed. *Compare PLIVA v. Mensing*, 564 U.S. 604 (2011) (preempting failure to warn claims against generic drug company) *with Wyeth v. Levine*, 555 U.S. 555 (2009) (permitting failure to warn claims against drug manufacturer to proceed). But, it only takes one *Baker* factor, and we find two are met. Zachary Baron Shemtob, *The Political Question Doctrines: Zivotofsky v. Clinton and Getting Beyond the Textual-Prudential Paradigm*, 104 Geo. L.J. 1001, 1011 (2016).

The District Court correctly concluded under the second *Baker* factor that this case presented the court with a lack of judicially discoverable and manageable standards for resolving the opioid addiction issue. Principles of public nuisance are too vague and indeterminate to provide any real guidance to the courts for the type of far-reaching claims brought by the plaintiff in this case. *Cf. City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 317 (1981) (characterizing nuisance concepts as "often vague and indeterminate"). The District Court also correctly concluded under the third *Baker* factor that the case required the court to make an initial policy determination of a kind clearly for nonjudicial discretion, including whether and how many opioid drugs should be available and how they should be used. As such, the District Court properly concluded this case raised a nonjusticiable political question that warranted dismissing the State's complaint.

II. Public Nuisance.

Like the District Court, we conclude that even if the State's claims do not ask the court to decide a nonjusticiable political question, the State nonetheless failed to plausibly state a claim of public nuisance. Even under the Restatement's liberal definition, the State has failed to allege that the drug companies' conduct constituted an unreasonable interference with a right held in common with the general public. *See* Restatement (Second) of Torts § 821B (1979). Neither the harm suffered by individual residents nor the economic costs incurred by the State satisfy the "public right." *Id.* Furthermore, the State cannot claim unreasonable interference with any such public right based on the sale of a legal product in accordance with FDA regulations. We agree with the District Court that this novel claim would unduly expand the reach of public nuisance law. *Cf. Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540-41 (3d Cir. 2001) (finding plaintiff's claims against handgun manufacturer to be "unprecedented" expansion of public nuisance law).

Finally, the State has failed to allege the drug companies exercised physical control over their products after they left the companies' possession. Rather, after the prescription opioids left their control, other parties, such as distributors, prescribing doctors and other health care providers, patient abusers, retail sellers, and criminal drug dealers all played a major role in creating the current opioid epidemic. The State is seeking, among other things, injunctive relief—it wants the drug companies to abate the nuisance. That requires that they be capable of doing so. *Cf. Midland Empire Packing Co. v. Yale Oil Corp. of S.D.*, 169 P.2d 732, 736 (1946) (reasoning that "[s]o far as the complaint seeks an injunction or abatement of the nuisance it is clear that no such relief can be granted against [a defendant that] has parted with title and control over the property"). Because the nuisance, as framed by the State, arises from misuse of the

product by parties other than the drug companies, the State has failed to plausibly allege the required elements of public nuisance.

For the reasons stated above, the judgment of the District Court is AFFIRMED.

Connor, J., dissenting.

A majority of this Court voted to affirm the lower court's decision to dismiss the public nuisance action brought against Chase Pharma and other manufacturers of opioid drugs. I respectfully dissent. In my view, the State's claims do not raise a nonjusticiable political question and the complaint's allegations easily satisfy the plausibility standard for a common law public nuisance.

I. Nonjusticiable Political Question.

The District Court below concluded that Lincoln's public nuisance claim should be dismissed because it raised a nonjusticiable political question. I believe there are two main problems with this conclusion. First, after *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), there is serious reason to doubt whether the United States Supreme Court continues to apply all six factors it previously articulated in *Baker v. Carr*. Instead, the Court now appears to recognize a nonjusticiable political question only when it finds one of the first two *Baker* factors, either "a textually demonstrable constitutional commitment of the issue to a coordinate political department" or "a lack of judicially discoverable and manageable standards for resolving it." *See* Zachary Baron Shemtob, *The Political Question Doctrines: Zivotofsky v. Clinton and Getting Beyond the Textual-Prudential Paradigm*, 104 Geo. L. J. 1001, 1008 (2016) (discussing

Justice Robert's reasoning for the majority in *Zivotofsky*). To the extent the lower court relied on the third *Baker* factor, I would find its decision to be in error on that basis alone.

Second, I do not believe *Baker* actually supports the lower court's reasoning. As to the second *Baker* factor, "a lack of judicially discoverable and manageable standards for resolving [the issue]," I would find most persuasive the reasoning in *Connecticut v. American Electric Power Co., Inc*., 582 F.3d 309 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011) ("*AEP")*. In *AEP,* eight states, New York City and three land trusts sued six electric power companies seeking to abate the public nuisance caused by their carbon dioxide emissions. *Id.* at 316. The plaintiffs requested the court to require each defendant to reduce its carbon dioxide emissions by a specified percentage each year for at least a decade. *Id*. at 318.
The *AEP* manufacturers maintained the uncertainties surrounding the precise effect of greenhouse gas emissions on climate were "mere preludes to the unmanageable policy questions a court would then have to confront" in adjudicating the plaintiffs' claim." *Id.* at 326. Furthermore, the manufacturers claimed that the "vague and indeterminate nuisance concepts and maxims of equity" gleaned from public nuisance cases or the Restatement of Torts provided little guidance for resolving these unmanageable issues. *Id.*

In response, the Second Circuit pointed out that over the years federal courts had adjudicated many complex public nuisance cases. *See id*. (citations omitted). Moreover, the court also declared that federal courts had often turned to the Restatement of Torts for guidance in developing standards in a variety of tort cases. *Id.* at 327. Although the court acknowledged that Restatement's definition of public nuisance was broad, the court concluded it provided a workable standard for courts to follow. *Id.* at 328.

In this case, as in *AEP*, the State is not asking the court to formulate a comprehensive national plan to deal with the opioid problem. The case is discrete—it asks the court to assess whether the drug companies' alleged nuisance caused the State's injuries. A long line of United States Supreme Court cases indicates that principles of common law nuisance, as well of the provisions of the Restatement of Torts, provide ample guidance to the courts for resolving such complex liability issues. *See id.* at 326 (collecting cases). Consequently, there is no lack of judicially discoverable and manageable standards for resolving this claim.

Finally, assuming the Supreme Court were to continue to apply the remainder of the *Baker* factors, no one in this case argues that the final three factors are relevant to the case at hand. *See id.* at 331 (rejecting relevance of final three *Baker* factors to a public nuisance claim). In regard to the remaining *Baker* factor, namely whether it was impossible to decide the case without an initial policy determination of a kind clearly for nonjudicial discretion, the Second Circuit rejected the lower court's suggestion that the remedy needed to be global in nature and a judicial remedy would be inconsistent with the political branches not yet having decided to regulate carbon dioxide emissions from power plants. *Id.* The Second Circuit instead relied on *Illinois v. City of Milwaukee ("Milwaukee I")*, 406 U.S. 91 (1972), to support its conclusion that common law nuisance doctrine could fill in a regulatory gap if one existed. 582 F.3d at 330. The court reasoned that *Milwaukee I* "stands for the proposition that even if the extant statutes governing water pollution do not cover a plaintiff's claims and provide a remedy, a plaintiff is free to bring its claim under federal common law of nuisance; a plaintiff is not obliged to await the fashioning of a comprehensive approach to domestic water pollution before it can bring an action to invoke the remedy it seeks." *Id.*

Therefore, the Second Circuit held the plaintiffs did not have to wait for an initial policy determination from one of the political branches in order to proceed with a public nuisance claim. *Id.* at 331. Instead, it declared that when a case "appears to be an ordinary tort suit, there is no 'impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.'" *Id*. (quoting *Baker*, 369 U.S. at 217); *see also* Comer v. Murphy Oil U.S.A., 585 F.3d 855, 877 (5th Cir. 2009) (rejecting defendants' characterization of an air pollution case as requiring courts engage in legislative-like balancing of social and economic costs).

Similarly, in this case, it is not impossible to decide this case without an initial policy determination of a kind clearly for the exercise of nonjudicial discretion. A public nuisance case is an ordinary tort suit. It is simply irrelevant that the political branches have not yet addressed the opioid addiction problem in a significant way. Federal courts are free to rely on public nuisance law to fill in regulatory gaps when the political branches have failed to address a problem. I would hold that this is such a case.

II. Public Nuisance.

Having found the claims justiciable, I would also find them adequately pled. The public nuisance claim in this case alleges the drug companies' opioid drugs have caused numerous social and financial problems in many communities, largely related to how those drugs are marketed and sold. These facts are not in dispute at this stage of the proceeding. Instead, the issue is whether those factual allegations can meet the legal standards for a public nuisance claim. In my view, none of what the District Court identified as legal roadblocks to the State's public nuisance claim are sufficient to justify depriving the State of its day in court.

A. Right Common to the Public.

The lower court read the requirement that the State allege interference with a public right too narrowly. The State has alleged that the drug companies' actions have interfered with Lincoln's citizens' common interest in public health, welfare and safety by overwhelming hospitals and other health care providers who treat individuals addicted to opioid drugs and diverting other public resources (such as law enforcement and social services) to address these individuals. I would have no trouble concluding that the complaint plausibly states a claim of substantial injury to the common rights of Lincoln citizens and taxpayers to be free from such harm. *See State ex rel. Morrisey v. AmerisourceBergen Drug Corp.*, No. 12-C-141, 2014 WL 12814021, at *10 (W.Va. Cir. Dec. 12, 2014) (finding a public nuisance claim under West Virginia law with similar allegations).

B. Unreasonable Interference

I would also conclude that the lower court erred in finding that because the opioid drugs complied with all federal statutory and regulatory requirements, the State has not plausibly alleged the drug companies' actions were unreasonable. This finding misses the point. As the California Court of Appeals reasoned, "[a] public nuisance cause of action is not premised on a defect in a product or a failure to warn but on affirmative conduct that assisted in the creation of a hazardous condition." *People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 529 (Ct. App. 2017). As the District Court's opinion acknowledges in its summary of the facts, the State's complaint identifies numerous actions that, if true, would support a finding that the drug companies engaged in a lengthy and successful campaign to fraudulently convince doctors to prescribe opioids for the treatment of chronic pain when they knew that safer and more effective alternatives were available. These allegations show affirmative conduct by the drug companies

that created a hazardous condition, which I would conclude plausibly sets forth that the drug companies' conduct was unreasonable.

C. Control

Finally, I would reject the drug companies' argument that the complaint fatally failed to allege they had sufficient control over the alleged nuisance. Many courts have rejected this requirement in other public nuisance cases. *See, e.g. City of Cincinnati v. Beretta U.S.A. Corporation,* 768 N.E.2d 1136, 1143 (Ohio 2002) (rejecting the claim that gun manufacturers had no control over the guns). For example, the Ohio Supreme Court held that even though the gun manufacturers did not physically control the actual firearms at the time the nuisance came into existence, they did contribute to its creation by marketing and distributing handguns in a manner that facilitated their entry into the illegal arms market. *Id.* at 1143. The Illinois Supreme Court also rejected the control requirement, holding that control or lack of control was merely a "relevant factor" in determining a defendant's liability for public nuisance. *City of Chicago v. Beretta U.S.A. Corporation*, 821 N.E.2d 1099, 1132 (Ill. 2004). In that court's view, "[i]f a public nuisance later results from the illegal use of firearms by third parties, liability in public nuisance is not necessarily precluded simply because manufacturers no longer control the objects." *Id.*

I believe that the control requirement adopted by the trial court is too restrictive. The State alleges facts regarding the drug companies' conduct in marketing their products over which they have control and which they can abate. That conduct is what the State alleges to have created the public nuisance in the State of Lincoln and I would find it sufficient to state a plausible claim.

There is no doubt that with the opioid epidemic, the country faces a crisis unlike anything it has faced before. While it may be a challenging task for courts to address these claims, courts often take on complex tasks. This case, arising out of common law nuisance law, is well within the capabilities of the judiciary. While it may be a novel public nuisance claim, the law of nuisance is not static. Whether this case will survive intact as it proceeds further into discovery is not clear today. What is clear is that the State of Lincoln should be allowed to make its case and prove its damages. I, therefore, dissent from the decision of this Court.

Supreme Court of the United States

State of LINCOLN, Petitioner,

v.

CHASE PHARMA, INC., et al., Respondents.

No. 18-102
July 15, 2019

Petition for writ of certiorari to the Twelfth Circuit Court of Appeals is GRANTED limited to the following questions:

1. Whether the State of Lincoln's public nuisance claims state a nonjusticiable political question;

2. Whether the State of Lincoln failed to state a claim for public nuisance for the reasons set forth by the lower courts in this case.

IT IS SO ORDERED.