IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Appeal No. 118,474

STATE OF OKLAHOMA,
ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,
Plaintiff/Appellee/Counter-Appellant,
vs.
JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC.; ORTHO-McNEIL JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.,
Defendants/Appellants/Counter-Appellees,
and
PURDUE PHARMA L.P.; PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY; TEVA PHARMACEUTICALS USA, INC.; CEPHALON, INC.; ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.; WATSON LABORATORIES, INC.; ACTAVIS LLC; and ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,
Defendants.

AMICUS CURIAE BRIEF OF COMPETITIVE ENTERPRISE INSTITUTE

District Court of Cleveland County, Oklahoma
Honorable Thad Balkman, Trial Judge
District Court Case No. CJ-2017-816
Public Nuisance

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INTEREST OF AMICUS CURIAE

The Competitive Enterprise Institute ("CEI") is a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI regularly participates in public interest litigation, as litigant or amicus, where fundamental due process and other basic constitutional rights are threatened. The cases in which it participates include lawsuits challenging the constitutionality of dubious statutes, questionable interstate agreements, onerous regulations, and government overreach. Allowing the district court's judgment to stand in this case would have profound national consequences that run counter to CEI's core mission of protecting free enterprise and the basic rights enshrined in the Constitution of the United States.

SUMMARY OF ARGUMENT

On November 15, 2019, the District Court of Cleveland County, Oklahoma entered an unprecedented judgment for $465 million (reduced from over $572 million) against Johnson & Johnson and its wholly-owned Janssen subsidiaries (hereinafter "J&J") for what it calls "an abatement of a public nuisance." As that judgment rested explicitly on a novel version of "public nuisance," the case by design did not provide compensation for any individual case of death or bodily injuries from the defendants' action. Any such private actions are not precluded by this judgment, and those suits, depending on the applicable law, could easily result in billions of dollars of additional damages in Oklahoma alone. The $465 million payment for abatement represents only a first installment to the state of Oklahoma for its collective steps to deal with a nationwide problem. The State also claimed, without explaining how or why, that an appropriate abatement plan would take at least twenty years to implement. The district court, however, refused to consider these out years by insisting

that "…the State did not present sufficient evidence of the amount of time and costs necessary, beyond year one, to abate the Opioid Crisis." Final Judgement (FJ) at 30 ¶ 2. There is a potential of further penalties from future legislative or court action for those out years, such that the instant case is the tip of a legal iceberg. At this very moment, there is a nationwide lawsuit filed in Ohio, which also is host to about 200 other lawsuits brought by such states as California, Illinois, Ohio, and West Virginia.[1]

To get some sense of the magnitude of this decision, the population of Oklahoma is just short of four million people, which constitutes about 1.2 percent of the national population of just over 330 million people. Yet this judgment was entered against only one defendant in that State for one year's public losses, the vast majority of which arose from opioids manufactured by others. There is nothing in either the decision of the District Court or in any of the relevant papers which suggests that the opioid situation in Oklahoma is materially different from that in many other states, including those involved in the nationwide action in Ohio. Yet if every state imposed that one-time payment of $465 million proportionally to population, the resulting penalty would total about $38.8 billion nationwide for that first year alone, which over time could lead to a cumulative cost in the hundreds of billions. As a result of the district court's woefully elementary and flawed understanding of the public nuisance doctrine, states could divert a large part of the pharmaceutical sector's revenue needed for product research and development into untested policy programs devised entirely by courts as policy-making bodies.

[1] Andrew Welsh-Huggins, Ohio opioid woes one reason drug lawsuits brought to state, Associated Press, January 14, 1918, https://apnews.com/article/04c6fd38893e4d71ba4a9a650fd847d7.

That ominous prospect, which raises a serious separation-of-powers problem, depends entirely upon a basic error in the district court's understanding of the public nuisance doctrine. Far from its origins in common rights of the public to land and water, the district court's rule is a misapplication of straightforward misrepresentation and products liability law, which if faithfully applied could succeed on the facts of the case.

The root difficulty is that the State of Oklahoma has morphed itself into a collective plaintiff that purports to act on behalf of all of its citizens in pursuing this public nuisance case. In fact, the state is a wholly inappropriate plaintiff in this instance because it is not suing for harms to its common property, or to any rights held by the public at large, as the law of public nuisance uniformly requires. Instead, it sues as a disguised guardian for all individuals who are fully capable of bringing tort actions on their own for any substantial injuries they suffered. The interposition of the state as a plaintiff has made it all too easy for the district court to lump together this large collection of diverse individuals into a single entity that somehow has suffered an ill-defined public harm for which enormous damages are awarded.

This false aggregation of individual claims, under the banner of the State of Oklahoma, has allowed the district court to cobble together a weird theory of public nuisance liability as though J&J through its sale and promotion of its products stands somehow responsible for all of these diffuse social harms. The public liability is imposed even for those losses suffered by parties who never consumed or used its products, let alone knew or relied on the representations that the defendants made at different times to different groups of injured parties, all of whom used different products. That form of collective liability is also wholly at odds with the entire Anglo-American tradition of vicarious tort liability that holds

individuals and firms responsible for the discrete harms that they have caused, and not for global harms that were caused by unrelated parties.

STATEMENT OF FACTS

Starting in the mid-1990s, an opioid epidemic has swept the United States. The last two decades have witnessed thousands of opioid-related deaths in Oklahoma alone. The majority of these have resulted from prescription opioids. O*klahoma: Opioid-Involved Deaths and Related Harms*, National Institutes of Health (April 2020). In the overwhelming majority of cases, however, these deaths were linked to illegal or other improper use of prescription opioids, according to the Oklahoma State Board of Pharmacy. R.784. Few opioid-related deaths have occurred where pharmaceutical opioids have been used as prescribed, and few cases of opioid addiction appear to have resulted from J&J products. R.721. Indeed, during much of the crisis, the state itself encouraged doctors to prescribe opioids generally, and hydrocodone in particular, even though it knew that it was the most abused opioid in the state, because of its cost and effectiveness with patients burdened by chronic pains. R.785.

Nevertheless, on June 30, 2017, the State of Oklahoma sued three pharmaceutical companies for allegedly causing the opioid crisis in Oklahoma. R.1. The state alleged that these companies had deceptively marketed the drugs as safer and more effective than they really were, and made that assertion the basis for claims of consumer protection, fraud, and public nuisance. *Id.* The state eventually dismissed all claims except public nuisance, while settling with Purdue for $270 million and with Teva for $85 million, leaving Janssen, a subsidiary of Johnson & Johnson, as the sole defendant. The state sought $17.5 billion from Janssen, far out of line with its two earlier settlements on this claim settled for tiny fractions

of that sum. The disparity is particularly noteworthy given that the two Schedule II Janssen medications marketed in the state during the period in question—Duragesic and Nucynta—were specialty products with less than one percent market share among prescription opioids in Oklahoma, R.721, and were responsible for at most a vanishingly small fraction of opioid-use disorder and opioid-related deaths in the state. R.706; R.711; R. 721.

The district court held J&J liable for the entirety of the opioid crisis in Oklahoma, under Oklahoma's public nuisance law, 50 O.S. § 1, which provides, in pertinent part, that "A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission […] Annoys, injures or endangers the comfort, repose, health, or safety of others…." The district court held "[a]s a matter of law" that "Defendants' actions caused harm and those harms are the kinds recognized by 50 O.S. §1 because those actions annoyed, injured and endangered the comfort, repose, health and safety of Oklahomans." FJ at 28 ¶ 17. The court ruled in favor of the state's abatement plan, requiring Janssen to fund the plan at a cost eventually determined at $465 million for the first year's installment. The court rejected Janssen's plea for a credit in the amount of the state's settlement with Purdue and Teva, to wit $365 million.

ARGUMENT

I. THIS IS NOT A "PUBLIC NUISANCE" CASE UNDER EITHER OKLAHOMA LAW OR THE COMMON LAW OF TORTS.

The basic definition of nuisance under the Restatement (Second) of Torts, § 821B, is: "A public nuisance is an unreasonable interference with a right common to the general public." The insistence on a right common to the general public is best understood in opposition to a private nuisance, or indeed, any other tort, so that the interest in question has to be to some form of common property (i.e., property open to all). These public nuisance

principles apply to harm to public lands, to obstructions of traffic on land or sea, and to the discharge of pollution into public waters, i.e. waters that are open to all.

The Supreme Court of Oklahoma has ruled on this provision. In *City of McAlester v. Grand Union Tea Co.*, 1940 OK 39, 98 P. 2d 924, this Court held that a company's course of trespass against many homes in the state (by its door-to-door salesmen) was a series of private trespasses, not a public nuisance. The Court invalidated a city ordinance that punished these private trespasses as a misdemeanor under the state's public nuisance statute, holding that "the municipality cannot successfully declare that to be a nuisance which plainly is not." As this Court explained, "While some annoyance may be said to result from a call of a solicitor, he can only be at one place at one time and such a call cannot reasonably be said to disturb at the same time an entire community or neighborhood or any considerable number of persons." *Id*. "At most," this Court held, "specific incidents of door-to-door solicitation could constitute separate and unrelated instances of private trespass or private nuisance, but in no event did the activity constitute a public nuisance." *Id.*

In *McAlester*, this Court's main objection was to the municipality's elevating to misdemeanor status what "at most is simply a private nuisance subject to less stringent remedies provided by statute." *Id.* In this case, the district court is seeking to elevate into a major nuisance a course of conduct that might not even violate the less stringent remedies provided by law for the alleged private torts, namely misrepresentation and liability for defective products.

A. The District Court Misunderstands the Doctrine of "Public Nuisance."

The district court makes much of its contention that in Oklahoma, a public nuisance need not be related to the public's use of property. But that common view across jurisdictions

is not relevant to the boundary between public and private nuisance. To be a public nuisance, the conduct must infringe upon some right held in common by the public, though the injury may be disparate, as the Oklahoma public nuisance statute is careful to point out. When it speaks of conduct which violates "the comfort, repose, health, or safety of others" it is describing the peaceable public enjoyment of some right, such as clean air or clean water.

The origin of this requirement of public rights in addition to any private rights dates back to the 1536 British case of *Anonymous* before the Court of King's Bench, Y.B. 27, Hen. 8, f. 27, pl.10 (1536) (reprinted in Richard A. Epstein and Catherine M. Sharkey, *Cases and Materials on Torts* 637 (12th ed. 2020)). The defendant had blocked plaintiff's access to the King's Highway—open to all for transportation—so that the no passerby could reach his destination. The Chief Justice recognized that it would be impractical to extend a private right of action to every person so harmed, as, "if one person shall have an action for this, by the same reason every person shall have an action, and so [the defendant] will be punished a hundred times on the same case." *Id.* On the other hand, Judge Fitzherbert concluded that the plaintiff could recover damages if he "suffered greater damage than all others," for instance because he "had more convenience by this highway than any other person." *Id.* Absent a showing of such "special damages," the defendant's actions would be "punishable in the Leet," meaning through fines imposed by an administrative body. *Id.* In other words, absent a claim to special damages, diffuse harms were appropriately redressed through regulatory action, either fines or repairs, a systematic solution that remains good law today. *See generally*, Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. Legal Stud. 49, 101-02 (1979); and *see*, *e.g.*, Richard A. Epstein, *Beware Prods and Pleas: A Defense of the Conventional Views on Tort and Administrative Law in*

the Context of Global Warming, 121 Yale L. J. Online 317 (2011) (noting that no private federal action by an electric company for global warming was allowed in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011)). A similar result has applied to state causes of action. *See, e.g.*, *Rhode Island v. Chevron Corp.*, C.A. No. 18-395 WES, 2019 WL 3282007 (D.R.I. July 22, 2019); and *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019).

The definition of a public nuisance must be contrasted with a private nuisance which also involves "a non-trespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts, § 822. The nontrespassory activities that constitute a private nuisance include emissions of pollutants that cross property lines, as well as noises, vibrations and any other conduct that results in a disturbance of the rights of quiet enjoyment that attach to real property. *See*, *Morgan v. High Penn Oil*, 77 S.E. 2d 682, 689 (N.C. 1953) ("[A]ny substantial non-trespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance.")

It is clear from these definitions that the interests in lands, air or water protected by the law of nuisance are identical for both private and public nuisance. Neither head of nuisance has ever covered financial losses or personal injuries resulting from the individual ingestion of particular products that they have acquired either in market or informal transactions of the sort claimed here. Those claims require individual suits brought by the parties afflicted against the parties who have caused the harm in question.

What illustrates the difference between the two types of nuisances is the kinds of remedies available in each sort of case. With private nuisances, the general laws allow for injunctive relief to stop actual or threatened harm, plus the award of damage to fill the gap,

given that injunctive relief does not reach prior harms. In addition, an absolute injunction could cause excessive disruption of the defendant's business, so that often the injunction is limited in its extent—by time of day, by amount of pollution—which makes it appropriate to award additional damages to close the gap, or deny injunctive relief altogether. *See*, e.g. *Boomer v. Atlantic Cement Co*., 257 N.E.2d (N.Y. 1970).

The coupling of injunctive relief and damages also applies by close analogy to public nuisances, where the plaintiff is the state as the representative of all its citizens, who share access to the common highway or waterway. Using this basic rule avoids the enormous administrative costs needed to resolve the huge number of private disputes that would arise if suit could be brought by every person delayed by a traffic obstacle, or inconvenienced by the pollution of public waters. The government agency fills that enforcement gap. It is authorized to take steps to rectify the particular wrong. Indeed, in modern times it need not wait until the harm is upon us, but may also impose restrictions on the use of public lands or waters with an eye to stopping particular forms of pollution before they occur.[2] An administrative agency is also in a position to levy fines against the particular offenders, so as to bulk up the system of deterrence. Thereafter, it is authorized to spend the revenues so raised in order to repair or upgrade the public road or other facility impacted by the public nuisance.

Yet since 1536, it has been recognized that the collective remedy for public nuisances does not do full justice, for it does not take into account the unique position of those persons who have suffered "special damages" above and beyond those suffered by ordinary members

[2] *See*, generally, EPA, *Enforcement under Section 404 of the Clean Water Act*, available at https://www.epa.gov/cwa-404/enforcement-under-cwa-section-404.

of the public. If one person is injured physically by an obstacle that a defendant has placed on a public highway, payments to the general treasury will offer scant compensation for that personal loss. Hence the private right of action for the special injury, wholly apart from the administrative action.

Sometimes it is difficult to determine which cases fall on either side of the line, given the rough continuum between the two classes of damages. That problem received a careful analysis in *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Maine 1973), which asked the question of which parties could sue for special damages resulting from an oil spill on public waters:

> The parties agree that, as alleged in the complaints in these actions, an oil spill occurring in Maine's coastal waters constitutes a maritime tort and is within the admiralty jurisdiction of this Court. . .
>
> First, as to the claims of the commercial fishermen and clam diggers, it is not disputed that title to its coastal waters and marine life, including the seabeds and the beds of all tidal waters, is vested in the State of Maine and that individual citizens have no separate property interest therein. It is also uncontroverted that the right to fish or to harvest clams in Maine's coastal waters is not the private right of any individual, but is a public right held by the State "in trust for the common benefit of the people." Since the fishermen and clam diggers have no individual property rights with respect to the waters and marine life allegedly harmed by the oil spill, their right to recover in the present action depends upon whether they may maintain private actions for damages based upon the alleged tortious invasion of public rights which are held by the State of Maine in trust for the common benefit of all the people. As to this issue, the long standing rule of law is that a private individual can recover in tort for invasion of a public right only if he has suffered damage particular to him — that is, damage different in kind, rather than simply in degree, from that sustained by the public generally. Concededly, the line between damages different in kind and those different only in degree from those suffered by the public at large has been difficult to draw. But the Court is persuaded that the commercial fishermen and clam diggers have sufficiently alleged "particular" damage to support their private actions….
>
> It would be an incongruous result for the Court to say that a man engaged in commercial fishing or clamming, and dependent thereon for his livelihood, who may have had his business destroyed by the tortious act of another, should be denied any right to recover for his pecuniary loss on the ground that his injury is no different in kind from that sustained by the general public. Indeed, in substantially all of those

> cases in which commercial fishermen using public waters have sought damages for the pollution or other tortious invasion of those waters, they have been permitted to recover.
>
> Unlike the commercial fishermen and clam diggers, the Old Orchard Beach businessmen do not assert any interference with their direct exercise of a public right. They complain only of loss of customers indirectly resulting from alleged pollution of the coastal waters and beaches in which they do not have a property interest. Although in some instances their damage may be greater in degree, the injury of which they complain, which is derivative from that of the public at large, is common to all businesses and residents of the Old Orchard Beach area. In such circumstances, the line is drawn and the courts have consistently denied recovery.

Id. at 249-251 (citations removed).

There is no intimation of a public injury (as opposed to a series of private injuries) anywhere in the district court's discussion, which extensively turns on its flawed accounts of misrepresentation and product liability.

B. The District Court's Decision Cannot Be Justified Under Any Theory of Misrepresentation or Product Liability.

The district court uses the public nuisance theory as a cloak for what are really just private disputes arising under misrepresentation or product liability theory. These two areas of law share a common link because both involve communications through words or symbols.

Under the standard law of fraudulent misrepresentation the defendant is responsible for a false statement (or omission). Section 9 of the Restatement of the Law (Third) of Torts: Liability for Economic Harm states: "One who fraudulently makes a material misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to act or refrain from acting, is subject to liability for economic loss caused by the other's justifiable reliance on the misrepresentation."

The parallel provisions for product liability law in the warning cases, the only branch of the law involved here, reads as follows:

> Section 1: One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.
>
> Section 2: A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product
>
> (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

In both settings, a general misstatement or an inadequate warning or instruction only creates liability in the party to whom the misrepresentation is made or to whom the product is sold. The basic theory behind both of these provisions runs as follows. Liability is imposed when parties respond to representations by purchasing or using the product, but only when consumers or users of the information change their position for the worse in reliance on that information, for otherwise there is no causal connection between what has been said or implied on the one hand, and the injury on the other.

The requirement of reliance in turn requires further explication. The representations in question must be "material" because it is all too easy for people after the fact to claim that their behavior was altered for the worse by some trivial statement to which in fact they paid no heed. This materiality requirement is imposed both in ordinary fraud cases and cases brought under the federal securities laws, and for the same reason. *See, e.g., TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) ("An omitted fact is material if there is a

substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.")

Yet even if some stated fact or omission is material, the plaintiff is required to eliminate two other possibilities. The first is that they had other sources of information about the uses or dangers of a particular product, or knew about the risks already, so that the supposed misrepresentation has been negated by a proper awareness of the risk in advance. In addition, if plaintiffs do rely on that information, their reliance has to be justifiable so that at a minimum there is some reason to believe that the information was convincing in the first place. One can't reasonably rely on information that comes in a garbled or ragged form which indicates that the source itself is not credible. In many misrepresentation cases this is not an issue, for example when dealing with official statements or printed materials by a product manufacturer. But if the information is ripped out of context by some third party it is not justified to rely on that information to hold the seller of the original product or the issuer of the statement responsible.

It is just this set of concerns that have imposed other limitations in actions for fraud. Thus in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the Supreme Court limited fraud actions under the securities acts to actual purchasers and sellers of stock, denying that recovery to someone who claimed that they did not purchase shares because of the defendant's false and misleading statements. The stated reason for the decision was that "while much of the development of the law of deceit has been the elimination of artificial barriers to recovery on just claims, we are not the first court to express concern that the inexorable broadening of the class of plaintiff who may sue in this area of the law will ultimately result in more harm than good." *Id.,* at 747-748.

The ostensible fraud on the public in this case goes far beyond the expansion rejected by the United States Supreme Court in *Blue Chip*, and would impose liability far disproportionate to the alleged harm. There is a more than credible claim that this unlimited liability is a violation of the state and federal constitutional requirements of procedural due process, because of how it short circuits the already-dubious public nuisance theory by not requiring proof of any of the essential elements of either a legitimate public nuisance claim or a claim of misrepresentation or defective product liability. *See*, *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which struck down a punitive damage award that functioned like the excessive damages awarded in this case, without any allegation of criminal conduct.

In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), yet another federal securities case, the Supreme Court further recognized that individual plaintiffs who buy and sell on securities markets might not be able to identify the source of the information on which they rely. Accordingly, it accepted the use of "fraud on the market theory" to create a "rebuttable presumption" of reliance:

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business…. Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements…. The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.

Id., at 241-242.

It takes little reflection to see just how far removed the state's public nuisance case is from both these bodies of established law. By labeling the case one of public nuisance, the state cannot claim that it was deceived in any way by the various statements made in the

production and distribution of the defendants' opioid products. Instead it necessarily claims that defendants "deceptively marketed" their materials to various physicians and potential patients at various times in various ways. But at no point does the state link any statement by these defendants to any individual's use of an opioid. In so doing it eliminates its need to prove reliance in any particular case, in order to make these defendants responsible to the state for harms caused by individuals who improperly take or alter products that have been properly labelled and legally marketed. It is impossible to say that such persons have justifiably relied on any of the statements made by the defendants, even if they saw, read or ingested products made by the defendants or indeed any other reputable manufacturer.

It would be wrong, however, to assume that an injured plaintiff could not overcome these obstacles, in any individual case, where the plaintiff is able to trace the chain of custody with respect to one of defendant's products and otherwise make out all the requirements for a case in fraud or in products liability, perhaps by relying on the theory of product overpromotion accepted in such cases as *Incollingo v. Ewing,* 282 A. 2d 206 (Pa 1971). But those lawsuits would have to meet all of the elements that are set out in the Restatement (Third) Products Liability, without shortcuts.

Speaking more generally, every legal system faces a dual risk of overdeterrence on the one side and underdeterrence on the other. It should never be forgotten in the current din about these opioids that they were subject to FDA approval, both as to labeling and as to the product itself, before they were put into the marketplace, raising significant preemption concerns in addition to those of interbranch separation-of-powers. *See*, e.g., *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011).

The public nuisance theory conjured up by the State of Oklahoma and wrongly accepted by the district court is an unprincipled attempt to gain money from private firms by inventing theories of liability that are nowhere found in the history of the common law.

II. THE DISTRICT COURT'S FINDING OF RESPONSIBILITY VIOLATES ALL KNOWN PRINCIPLES OF VICARIOUS LIABILITY.

The alleged responsibility in this case is one of agent liability, a form of vicarious liability. It is widely accepted that the principle of vicarious liability allows an individual plaintiff to sue a firm for the wrongs committed by one or more of its employees arising out of and in the course of employment. Thus § 1.01 of the Restatement (Third) of Agency provides:

> (1) An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.
>
> (2) An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.

That principle is generally applied so as to make sure that persons who are so harmed do not face a judgment-proof individual defendant, assuming that they can persuade the court that the defendant's own employees were involved in the design or production of the relevant product or service. *See* Alan Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231 (1984). Under this principle, it is perfectly appropriate to apply principles of vicarious liability so that actions done by any employee or group of employees can be imputed to their employer. In addition, it is equally appropriate to apply a rule of joint and several liability to those firms who have worked in concert in order to achieve a common end.

If individual A, who works for firm B, is responsible for an automobile accident in the course of employment, the individual and the firm are both responsible. So too if

individual C works for firm D. But there liability stops, for there is no known principle of tort liability that allows for firm B to be held liable for the wrongs of C, firm D to be held liable for the wrongs of A, or for either or both firms to be held responsible for the harms committed by unrelated third parties, especially for individuals or groups engaged in their own illegal conduct.

Yet it is just that dubious principle of aggregation that the district court applies through its amorphous public nuisance theory, which treats all the separate actions of dispersed firms, selling different products under unique circumstances, and large swathes of the medical community, as though they were one unified enterprise. The district court asserts that "Defendants, acting in concert with others, embarked on a major campaign in which they used branded and unbranded marketing to disseminate messages that pain was being under treated and 'there was a low risk of abuse and a low danger' of prescribing opioids to treat chronic, non-malignant pain and overstating the efficacy of opioids as a class of drug," FJ 9 ¶17. But it also noted that "Defendants' marketing and promotion efforts were designed to reach Oklahoma doctors through multiple means and at multiple times over the course of the doctor's professional education and career in Oklahoma." FJ 9 ¶ 18. The case is almost identical to *McAlester*, except that in *McAlester*, the alleged public nuisance was a series of distinct but parallel trespasses that could form a proper class. Here no such class could be formed, given differences in time, place, and manner. But by the same token, the defendants did not invade a public right, and the chief culprits were unrelated to the defendants at trial. The causation chain in these cases is thus composed of missing links, which means that ordinary principles of agency and vicarious liability, nowhere discussed in the district court's judgment, defeat the imposition of liability.

To be sure, courts have rightly used carefully tailored devices to overcome the inability of individual plaintiffs to identify a particular product in a particular case. Most notable is the market-share theory of liability pioneered by the California Supreme Court in *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980), which involved the drug diethylstilbestrol (DES), for use in pregnancy. The drug was always in the public domain, and its use was alleged to cause cancerous (adenocarcinoma) and precancerous growths (adenosis) in the daughters of the mothers who took the drug. It was agreed on all sides that the daughters could not identify which of the many suppliers of DES provided the drug to any individual physician, but the court held that this omission in proof was immaterial. Accordingly, a system of liability that could track the market share that each manufacturer had would get respective contributions of each defendant to the total loss right even if the proper identification in an individual case could not be made.

It was quickly realized that the market-share theory would call for excessive compensation if a discrete fraction of the market was held responsible for the entire loss. No principle of justice could hold the solvent companies responsible for insolvent codefendants or unknown third parties whose separate products also caused harm. Accordingly, the Supreme Court of California held in a subsequent case that

> [e]ach defendant would be held liable for the proportion of the judgment represented by its market share, and its overall liability for injuries caused by DES would approximate the injuries caused by the DES it manufactured. A DES manufacturer found liable under this approach would not be held responsible for injuries caused by another producer of the drug.

Brown v. Superior Court (Abbott Laboratories, RPI), 751 P.2d 470, 486 (Cal. 1988).

The situation was yet more complicated because the DES was sold for many different uses in many different tablet sizes, so that multiple corrections needed to be made to prevent

any firm from either escaping the liability that it should bear or bearing liability that it should escape. *See*, *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521, 1527 (D. Mass. 1985). It was then further held that the market share liability, if correctly determined, should be applied even if a given defendant had some evidence that it had not supplied the DES in question in a particular case. The introduction of that evidence would require shifting liability in an individual case all to one party, but simultaneously it would require offsetting changes in the percentage allocations of all the firms in the residual pool, leaving the ultimate dollar distribution as it was before. Forgoing individual identification thus reduced administrative costs without changing the ultimate net liability of any particular defendant. *See*, *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989). The procedures in *Sindell* and its progeny would require a massive reduction in liability for J&J so that it could not be tagged with responsibility for the wrongs of other parties.

Indeed, the situation is still more complicated than this, because the record establishes conclusively that different opioids were sold in different tablets, tabs and capsules, which had very different properties. All opioids were known to cause problems if altered and concentrated. That problem never arose with DES, which remained at all times an unchanged chemical constant. Where dangerous substances are altered in multiple ways, it is still harder to assert that any proper defendant should be held fully responsible as if the particular opioid were still in its original form. *See* Restatement (Third) Torts: Products Liability, § 17. Thus in *Skipworth v. Lead Industries Ass'n*, 690 A.2d 169, 172 (Pa. 1997), the Pennsylvania Supreme Court refused to apply any version of the *Sindell* market-share theory to a child who suffered lead poisoning over multiple years caused by different paints that had different propensities to flake and thus to cause harm. Amici are not aware of any

decision that has departed from *Skipworth* in situations like the utterly confused landscape in this case. Product identification should be strictly required for any tort remedy with individual plaintiffs.

The state plaintiff in this case may have been able to claim that it has enough information to overcome the *Skipworth* objection. But there is nothing in this record that supports the audacious conclusion that a single firm can be held responsible for the wrongs committed by other manufacturers and by individuals who got their opioids by illicit means. Nor is there any reason to impose that liability without taking into account the powerful defenses of product misuse and assumption of risk that might well be brought in any case of wrongful death of personal injury if the particular parties (who are easy enough to produce in court) were forced to account for their own conduct. *See* Restatement (Third) Torts: Products Liability, § 17. The district court's sleight-of-hand thus strips the J&J of its market-share defenses on the one side, and its affirmative defenses on the other, all of which are well recognized in the law of Oklahoma and other states in product liability cases.

CONCLUSION

The public nuisance analysis of the district court is replete with errors at every level. That ill-considered decision would overturn important and long-settled legal principles in the state of Oklahoma, by expanding both doctrines of public nuisance and vicarious liability beyond recognition. The decision should be reversed and the cause of action dismissed.

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