



Professional Perspective

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Since the arrival of Covid-19 in the U.S., both federal and state governments have felt pressure to preempt an inevitable wave of litigation associated with the devastating health and economic impact of the novel coronavirus. Although the latest negotiations surrounding a federal [bill](#) to curb frivolous lawsuits have stalled, states have increasingly enacted executive orders and legislation with the intent of broadly protecting businesses, employees, health-care professionals, and a variety of other persons and entities from the potential overwhelming financial impact of litigation. As of February 2021, at least 20 states had some form of Covid-19 liability protections in place, while a dozen others had proposals making their way through the legislature.

As these protections take shape, an area of potential vulnerability has consistently been overlooked: public nuisance litigation. Unlike traditional theories of direct harm that are outright prohibited in many newly enacted Covid-19 immunity statutes, plaintiffs under a public nuisance claim would be seeking relief for alleged aggregate harms to the community as a whole.

By focusing on the denial of a public right to health, such plaintiffs would not focus on specific instances of exposure and transmission of the novel coronavirus, thus requiring courts in the likely near future to adjudicate the letter and the spirit of liability immunity statutes. As the [first wave](#) of Covid-19 claims take hold, public nuisance is at the forefront of plaintiffs' strategies. As a result, it is vital to assess provisions in liability immunity statutes that may lull future defendants into a false sense of security.

Growth of Public Nuisance Litigation

Once thought of as a legal theory tethered to land use, in recent years public nuisance litigation has become more popular as a broader tool for plaintiffs—including state governments, counties, cities, Native American tribes, hospitals, physicians, and patients—to wield against actors in disparate industry sectors, from tobacco to energy to prescription opioids, alleging interference with the public health in myriad ways.

Opioid-related public nuisance litigation alone has drawn more than 3,000 plaintiffs into the courts. Those plaintiffs have brought suit against pharmaceutical manufacturers, distributors, and retailers seeking relief for past and future costs of health care, addiction treatment, support facilities, law enforcement, and more. States with broad public nuisance statutes have given plaintiffs' counsel latitude to frame the opioid epidemic's unprecedented public-health crisis within their capacious terms. For example, Oklahoma [defines](#) a "nuisance" as any act that "annoys, injures or endangers" the comfort, health or safety of others, or otherwise "renders other persons insecure in life." A "public nuisance" is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons ..."

The breadth of Oklahoma's public nuisance statute helped furnish the legal framework for a bench trial judgment totaling \$465 million. *Oklahoma ex rel., Mike Hunter v. Purdue Pharma L.P.*, Case No. CJ-2017-816 (Okla. Dist. Ct. Aug. 26, 2019).

Covid-19 Immunity Statutes and Public Nuisance Claims

Covid-19 liability immunity has been enacted in a variety of ways across the U.S., but three factors inform whether those protections may effectively encompass public nuisance suits: the types of individuals and entities granted protections, the harms that are the focus of the immunity granted, and the scope of litigation relief endpoints that are enumerated. How a state addresses each of these dimensions in its immunity scheme could greatly impact the potential success of a public nuisance claim. The arguments described below have not yet been litigated before a court, and they may ultimately lack traction given the ultimate canon of statutory interpretation, namely, ascertaining the legislature's original intent in enacting the protections granted by Covid-19 liability shields.

Legal Immunity for Health-Care Providers and Their Agents

Some statutes have narrowly tailored protections to health care providers or certain manufacturers of PPE, like Kentucky's [Senate Bill 150](#), which was signed into law in March 2020. At least two states, Maryland and Montana, rely on long-standing statutes that provided immunity to health care providers before Covid-19. Maryland's [statute](#) protects providers from both

civil and criminal liability when they act in “good faith and under a catastrophic health emergency proclamation.” In the minority of states that have applied such limiting language to their protections, public nuisance litigation could threaten any number of entities beyond the relatively narrow domain comprising hospitals, health clinics, senior living facilities, nursing homes, and similar medical providers.

In contrast, the clear majority of states have broadly defined the subject of Covid-19 liability protection to encompass not only health care providers, but also businesses, agents and employees of those businesses, schools, universities, and individuals.

Limiting Liability for Personal Injury and Death

An important distinction between traditional harm under tort liability and harm advanced under a theory of public nuisance is that under the latter, a plaintiff sues to abate interference with a public right rather than to combat a specific personal injury or wrongful death claim. Time and again, plaintiffs engaged in the prescription opioids litigation have made the distinction between personal injury and harm to the public as a whole. This argument has prompted some courts to limit defendants’ requests for discovery relating to a public entity’s individual residents who suffered from opioid overdoses, because plaintiffs posit that their arguments hinge only on the level of harms to a public right.

The focus in Covid-19 immunity statutes on personal injury and wrongful death based on past exposure and transmission may lead to litigation in which plaintiffs contend that public nuisance claims are exempt from the safe harbor by its terms. Such plaintiffs may seek to frame such public nuisance actions as seeking relief only for forward-looking harms associated with alleged interference with a public right to health and safety.

For example, Louisiana’s [statute](#) is framed in terms of a direct connection between the civil action at issue and an “injury or death resulting from... actual or alleged exposure to Covid-19 ...” A plaintiff pursuing a public nuisance claim could seize upon such language to contend that it does not intend to litigate each and every death or injury arising from transmission of the novel coronavirus, but instead seeks relief for harms on a broader, community-wide scale. Yet, a court may not be so easily persuaded.

On its face, Louisiana’s statute bars liability for “any civil damages.” Moreover, attempting to make a distinction between a theory of public harms arising from Covid-19, on the one hand, and the underlying injuries and deaths of community residents, on the other, would run contrary to state legislatures’ expressed intent in enacting liability immunity. Louisiana and other states that provide immunity to entities reopening during the Covid-19 outbreak are doing so to protect and stabilize businesses and other economic actors. This recent legislative history, like that enumerated in Alabama’s [safe harbor](#), would be key to a court in addressing any argument that a legislature intended to enact loopholes in the protections afforded by these laws.

Further, many states provide for immunity conditioned on either “[substantial compliance](#)” with local, state, or federal public health guidance, or at a minimum, making a “[good faith effort](#)” to comply. In rare instances, a statute may allow an inference of good faith or substantial compliance if an entity takes certain precautionary measures, like posting warning [signs](#) on their entrances. On the whole, whether an entity has taken sufficient steps to prevent injury is another issue ripe for litigation in the courts. Yet, it may be difficult for plaintiffs to persuasively argue that an entity did not do enough to comply with health mandates, given that ordinances are often enforced inconsistently by local authorities themselves.

Covid-Related Damages

Key to recovery under a public nuisance claim is abatement relief, rather than a more traditional form of damages. Public entities suing for relief under a theory of public nuisance often seek an injunction to force defendants to cease the community-harming activity, and request payment for the costs of abatement to remediate the harm caused to the community. This is a different focus compared to backward-looking damages under traditional civil claims, which seek to make a plaintiff whole for past losses.

Alabama has arguably the most robust [protections](#) due to its inclusion of catch-all language barring a wide variety of damages, including “any other damages” stemming from injury, death, “or otherwise.” This type of expansive language would strongly support the argument that the legislature intended broadly to bar all forms of litigation prayers for relief, including under a theory of public nuisance.

Currently, only one other statute comes as close to limiting all Covid-related types of relief. North Carolina [mandates](#) that “[i]n any claim for relief ... no person shall be liable for any act or omission that does not amount to gross negligence.” However, the injury specified within the statute is the alleged “contraction of Covid-19.” Public nuisance plaintiffs could attempt to argue that their injury is not the transmission of Covid-19, but an interference with health and safety impacting the public at large that warrants abatement relief. Courts may thus be called upon to decide whether legislatures intended to carve out abatement costs from the otherwise facially broad exculpation of damages provided for by Covid-19 liability immunity laws.

Future of Covid-19 Public Nuisance Litigation

Covid-19 liability protections continue to evolve as legislation makes its way through legislatures across the nation. In the meantime, entities must remain cautious about their risk of future litigation stemming from acts taken during the ongoing public health crisis. It has yet to be seen if a federal bill will codify protections on a larger scale. However, as advocates push for wide-scale reform, they must keep in mind the unique features of public nuisance litigation.