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ARTICLE

DREAMLAND DEFERRED

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> At the beginning of May 1921, 8,000 people lived in Greenwood, the black section of Tulsa ….. [Greenwood] was largely a self-sufficient community, with a school, a hospital, hotels, grocery, drug, and clothing stores, two newspapers, and two movie theaters. One of the theaters was called the Dreamland. Greenwood itself could easily have passed for a dreamland.[1]

> [T]he center of it all was that gleaming, glorious swimming pool. Memories of Dreamland, drenched in the smell of chlorine, Coppertone, and french fries, were what almost everyone who grew up in Portsmouth took with them as the town declined. Two Portsmouths exist today. One is a town of abandoned buildings at the edge of the

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1. ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND 1 (Oxford Univ. Press ed., 2002).

> Ohio River. The other resides in the memories of[] thousands in the town's diaspora who grew up during its better years and return to the actual Portsmouth rarely, if at all. When you ask them what the town was back then, it was Dreamland.[2]

The communities of Greenwood, Oklahoma and Portsmouth, Ohio, both "dreamlands" in their own right, were destroyed by outside forces. Portsmouth fell to the opioid epidemic as pharmaceutical companies pumped millions of pills into small towns. Greenwood, known as Black Wall Street, was razed by white Tulsans, including many deputized as police, during the Tulsa Race Massacre. In both cases, governments failed to protect the communities from favored and powerful outside interests. Promises for repair were not fulfilled or were "too little, too late."[3] Traditional legal claims for damages were inherently difficult and insufficient because of statutes of limitations and the widespread, ongoing harm.[4]

Now, both communities are seeking reparations under the same legal theory. Portsmouth and thousands of other towns, cities, counties, and states, including both Tulsa and the state of Oklahoma, have filed lawsuits against opioid companies for causing a public nuisance.[5] In federal court, thousands of opioid cases are aggregated in multidistrict litigation (MDL) in the Northern District of Ohio.[6] State attorneys general have brought

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2. SAM QUINONES, DREAMLAND 4 (Bloomsbury Publ'g ed., 2015).

3. Jan Hoffman, *CVS, Walgreens and Walmart Fueled Opioid Crisis, Jury Finds*, N.Y. TIMES, (Nov. 23, 2021) (quoting plaintiffs' trial attorney, Mark Lanier, in Lake and Trumbull Counties v. Purdue hearing), https://www.nytimes.com/2021/11/23/health/opioids-verdict-drugstores.html ; *see* Alexander v. Oklahoma, No. 03-C-133-E, 2004 U.S. District LEXIS 5131 (N.D. Okla. Mar. 19, 2004).

4. In Tulsa, initial claims were blocked by the KKK-dominated legal system in the aftermath of the massacre and later claims were rejected as time barred. *Alexander*, 2004 U.S. Dist. LEXIS 5131 at *30-32. In the opioid crisis, individual plaintiffs were sometimes successful, but faced charges of contribution or lack of proximate cause. *See* ERIC EYRE, DEATH IN MUD LICK (Simon & Schuster, Inc. ed., 2020). As a result, these plaintiffs did not represent a significant enough liability threat to force changes in behavior or reparations for the communities as a whole.

5. Nikki Blankenship, *Law firm explains opioid suit*, PORTSMOUTH DAILY TIMES (Aug. 23, 2017), https://www.portsmouth-dailytimes.com/news/18164/lawfirm-explains-opioid-suit; Petition at 66, City of Tulsa v. Cephalon, Inc., No. CJ-2020-02705, (Okla. Dist. Ct. Tulsa Cnty. Sept. 2, 2020); Oklahoma v. Purdue Pharma L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486, at *1 (Okla. Dist. Ct.Cleveland CntyAug. 26, 2019).

6. Transfer Order, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804, MDL

claims in state courts.[7] In September 2020, Tulsa survivors and descendants followed the opioid model, filing a lawsuit against Tulsa and other entities seeking to abate an ongoing public nuisance in Greenwood triggered by the 1921 massacre.[8] Public nuisance claims allow for the remedy of abatement instead of damages. Abatement is a forward-looking remedy; the survivor plaintiffs seek reparations for the ongoing effects of past and continuing harms. As an equitable remedy, public nuisance claims for abatement can avoid statutes of limitations and limits on joint liability. If this model is successful, public nuisance may prove to be a pathway to repair ongoing mass harms, including localized reparations for the ongoing effects of systemic racism.

Thus far, public nuisance has shown promise as an effective tool to hold pharmaceutical companies responsible for their role in the opioid epidemic. Pending global settlements could provide tens of billions of dollars for abatement.[9] Purdue Pharma, the company that manufactured and pushed OxyContin, has filed for bankruptcy. Cases brought by cities and counties have settled for hundreds of millions. However, the few cases that have been resolved by the courts have had mixed results. Courts have seemed to balance defendants' culpability and the need to abate the crisis against fears that this "rather novel use of[] nuisance has the potential to morph into the 'tort that ate the world."[10]

Oklahoma courts have played a central role in the litigation. An Oklahoma case brought by the Cherokee Nation has been designated as a bellwether in the federal MDL.[11] The state of Oklahoma's case against opioid manufacturer Johnson & Johnson was the first in the nation to go to trial, the first verdict where abatement of the epidemic was ordered on the public nuisance theory, and the first verdict to be overturned by a state

No. 2804 (N.D. Ohio transferred Dec. 12, 2017).

7. Grant Schulte & Geoff Mulvihill, *Nebraska's AG is Lone Holdout in Pursuing Opioid Cases*, A.P. NEWS (June 12, 2019), https://apnews.com/article/prescription-opioids-wv-state-wire-ne-state-wire-us-news-ap-top-news-2ca3e7d1501643b7aea0feeb2bed3929.

8. Petition at 2-3, Randle v. City of Tulsa, No. CV-2020-01179, (Okla. Dist. Ct. Tulsa Cnty. Sept. 1, 2020).

9. *See, e.g.*, Jan Hoffman, *Drug Distributors and J&J Reach $26 Billion Deal to End Opioid Lawsuits*, N.Y. TIMES (July 21, 2021), https://www.nytimes.com/2021/07/21/health/opioids-distributors-settlement.html.

10. Cherokee Nation v. McKesson Corp., No. CIV-18-056-RAW, 2021 WL 1200093, at *6 (E.D. Okla. Mar. 29, 2021).

11. Suggestions of Remand at 6, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, Doc. #2941(N.D. Ohio Nov. 19, 2019).

supreme court.[12]

The Oklahoma Supreme Court decision in *State ex rel. Hunter v. Johnson & Johnson* has forced a shift in the Tulsa Race Massacre survivors' case for reparations through abatement of a public nuisance. While the survivors' strategy had been to wind their claim tightly around the state's opioid case,[13] now they will need to distinguish their case from it. However, there is still hope. The ruling in *Johnson & Johnson* was narrow – the Court only held that public nuisance law should not be extended to cover claims based on opioid manufacturing and sale.[14] The Court's reasoning does not easily apply to the Tulsa survivors' claims.[15] Moreover, reparations claims like those of the Tulsa survivors may hew more closely to public nuisance's doctrinal structure than the state's claim against opioid manufacturers.[16]

The survivors' claims fit abatement of public nuisance in a way that could defeat both legal and political arguments against reparations. Reparations claims often face defenses based on statutes of limitations. While time bars to reparations for state action are inherently unjust—plaintiffs are expected to bring claims before the same power structures that caused their harms—these defenses have proved to be formidable obstacles.[17] As an equitable, forward-looking remedy, where plaintiffs step into the shoes of the state, abatement of a public nuisance avoids legal defenses based on statutes of limitations.[18]

In *Looking to the Bottom*, Mari Matsuda identifies one standard political objection to reparations as a sense that "[t]he sins of the past

12. Jan Hoffman, *Johnson & Johnson Ordered to Pay $572 Million in Landmark Opioid Trial*, N.Y. TIMES (Aug. 26, 2019), https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html; Oklahoma *ex rel.* Hunter v. Johnson & Johnson, 2021 OK 54, ¶ 6, 499 P.3d 719, 722, 731 (Okla.).

13. Brakkton Booker, *Oklahoma Lawsuit Seeks Reparations in Connection to 1921 Tulsa Massacre*, N.P.R. (Sept. 3, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/09/03/909151983/oklahoma-lawsuit-seeks-reparations-in-connection-to-1921-tulsa-massacre.

14. *Johnson & Johnson*, 2021 OK 54, ¶ 2, 499 P.3d at 721.

15. *Id.* at ¶¶ 19-21, 725.

16. It also appears that the public nuisance case against distributors appears stronger than that against manufacturers because the causal link between the distributors unlawful conduct is less attenuated from the resulting nuisance than that of the manufacturers. *See generally id*. at ¶ 24, 726.

17. *See, e.g.*, *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *5.

18. Revard v. Hunt, 119 P. 589, 593 (Okla. 1911).

should not forever burden the innocent generations of the future."[19] Public nuisance claims for abatement overcome this objection as well. Instead of looking backward for past damages, abatement remedies the ongoing effects of the nuisance. As claims for reparations, public nuisance claims are "based on continuing stigma and economic harm."[20] If there is no present harm stemming from the past sins, there is no remedy. Additionally, to the extent that the Tulsa Race Massacre and other acts of racism are sins of the past, this "past isn't dead and buried . . . [i]n fact, it isn't even past" as long as it can be traced directly to disparities and inequalities that exist today.[21] Under Matsuda's theory of reparations, claims should be actionable until there is no longer "an identifiable and disadvantaged class [of victims]."[22] Public nuisance claims for abatement fit this theory. Rather than burdening present and future generations with "the sins of the past," public nuisance reparations claims can relieve both victims' and perpetrators' descendants of those burdens by resolving ongoing harm.

I. THE OPIOID CRISIS

"It is accurate to describe the opioid epidemic as a man-made plague, twenty years in the making. The pain, death, and heartache it has wrought cannot be overstated."[23]

– Judge Dan Polster, presiding judge for the national prescription opiate multidistrict litigation.

The modern American opioid epidemic is not the country's first.[24]

19. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations, in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 72 (Kimberl. . . Crenshaw et al. eds., 1995).

20. *Id.*

21. Senator Barack Obama, Remarks at the Meeting in Philadelphia about the Role of Race in the Presidential Campaign, (Mar. 18, 2008) (transcript available on https://www.npr.org/templates/story/story.php?storyId=88478467)(quoting William Faulkner).

22. Matsuda, *supra* note 19, at 73.

23. City of Summit v. Purdue Pharma L.P. (*In re* Nat'l Prescription Opiate Litig.*)*, No. 18-op-45090, 2018 U.S. Dist. LEXIS 213657 at *113-14 (N.D. Ohio Dec. 19, 2018).

24. As Paul Farrell, co-lead for the MDL Plaintiffs' Executive Committee and lawyer for Cabell County, West Virginia has described the crisis: "There is no new evil in the world. We just recreate new ways to experience it." Scott Simon, *Was It 'Reasonable' To Ship 81 Million Opioid Pills To This Small West Virginia City?*, N.P.R. (July 30, 2021),

Since opium's introduction into the United States, its use has led to waves of addiction. These waves have followed a pattern: a new technological development, a claim by the inventors or sellers that the new product would allow use without risk of addiction, an increase in use under the promise of safety, and then a resulting epidemic of addiction.

In the years after the Civil War, doctors believed claims that injecting morphine with the newly invented hypodermic needle could not lead to addiction in the way that smoking opium could.[25] It became "standard practice" to provide morphine and hypodermic needles to Civil War veterans for home use.[26] Soon, a hundred thousand veterans became addicted, with concentrations among white Southerners in small cities and towns.[27]

In the late 19th century, Bayer invented heroin.[28] Bayer pitched the product as a "new and nonaddictive substitute for morphine" claiming that heroin was a miracle drug that could cure ailments from baby colic to joint pain.[29] By 1900, more than 250,000 Americans were addicted to heroin or other opium-based painkillers.[30] In response, Congress passed the Harrison Narcotics Act of 1914 which regulated opium sales for the first time in the United States.[31] After a heroin epidemic in the 1960s, Congress passed the Controlled Substances Act (CSA) in 1970.[32]

The modern opioid epidemic stems in part from Purdue Pharma's invention and marketing of OxyContin. OxyContin is pure oxycodone, a drug with a similar molecular structure to heroin, with a hard coating that releases the drug slowly (or continuously) over a period of several hours.[33]

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https://www.npr.org/transcripts/1021676306.

25. BETH MACY, DOPESICK 22 (Little, Brown & Co. eds., Hachette Book Group, Inc., 2018).

26. *Id.*

27. *Id.* at 22.

28. *Id.* at 23-24.

29. *Id.* at 24.

30. *Id.* at 25.

31. Harrison Narcotics Tax Act, Pub. L. 63-223, 38 Stat. 785 (1914). In a statement to the House Committee on Ways and Means, Donald McKesson, of the eponymous Big Three opioid distributor, declared support for the bill saying, "[o]ur firm was founded in 1832, and we have been ever since against the sale of habit-forming drugs and all that kind of thing. Orders which have come to us from suspicious people, we have put in the hands of the proper authorities for tracing, and prosecution if necessary." *Importation and Use of Opium: Hearings on H.R. 25240, H.R. 25241, H.R. 25242, and H.R. 28791 Before the Comm. on Ways and Means*, 61 Cong. 3 (Jan. 11, 1911) (statement of Donald McKesson).

32. *See* 21 U.S.C. § 823.

33. QUINONES, *supra* note 2, at 124.

Purdue Pharma's marketing hinged on claims that OxyContin was virtually risk-free and should be prescribed even for chronic or moderate non-cancer pain.[34] According to Purdue, the extended release coating gave the drug a lower potential for abuse.[35] Purdue marketers claimed that opiates were only addictive in less than one percent of pain patients.[36] The basis for this claim was a one-paragraph letter to the editor of *New England Journal of Medicine* that presented evidence from a limited study of hospital patients who were prescribed opiates during surgery.[37] Other manufacturers, including Johnson & Johnson, developed and marketed competing products and generic pills containing oxycodone, hydrocodone, or other opioids.[38] Purdue hosted medical conferences for physicians, pharmacists, and nurses, sponsored continuing medical education at destination resorts, funded groups like the American Pain Foundation that purported to advocate for pain patients, and motivated sales representatives with aggressive bonuses for meeting opioid sales goals.[39]

Physicians began prescribing more opioids. Pharmacists filled more prescriptions. Purdue, Johnson & Johnson, and other manufacturers increased production.[40] Distributors, including the "Big Three" of AmerisourceBergen, Cardinal Health, and McKesson, shipped increasing amounts of opioids to pharmacies. From 2006 to 2012, distributor shipments of oxycodone and hydrocodone pills increased from 8.4 billion to 12.6 billion per year.[41]

This oversupply led to an increase in addiction and drug diversion.[42] A doctor might prescribe a 30-day supply of oxycodone for a workplace or sports injury or a minor surgery.[43] A high percentage of patients

34. *Id.*
35. *Id.*
36. *Id.* at 127.
37. *Id.* at 107-08.
38. Hoffman, *supra* note 12.
39. QUINONES, *supra* note 2, at 133-34.
40. *See, e.g.*, *id.* at 138 ("Oxy[Contin] prescriptions for chronic pain rose from 670,000 in 1997 to 6.2 million in 2002.").
41. EYRE, S *supra* note 4, at 255.
42. *See, e.g.*, QUINONES, *supra* note 2, at 138 (describing increase in addiction to pain pills in Southeast Ohio).
43. In 2006, at 17 years old, I was prescribed 30 days of Percocet, an oxycodone based pill manufactured by Endo Pharmaceuticals for wisdom teeth removal. This was so common at my Ohio high school that classmates who had heard I was getting my wisdom teeth removed pre-emptively offered to buy, or suggested that I sell, excess pills. Communities with higher rates of physical labor have been harder hit by the opioid

prescribed opioids in this way become addicted; in fact, first-time patients given a 30-day or longer initial opioid prescription for acute pain have more than a one in three chance of continued opioid use one year later.[44] If the patient did not use the full supply, those pills might be left sitting in a medicine cabinet, saved for later use, given away, or sold on the street. Unlike with other pain medications, the body quickly develops increased tolerance for opioids, so opioid users need escalating doses to ward off withdrawal.[45] Opioid marketers pushed the idea of "pseudoaddiction" to explain addict-like, drug-seeking behavior in pain patients.[46] According to this theory, pain patients were seeking higher doses because the current dosage was not enough to soothe their pain. Since supposedly pain, not addiction or withdrawal, was causing their symptoms and behavior, the solution for addiction became increasing the opioid dosages.[47]

As opioid demand and addiction grew, some doctors and pharmacists began operating as "pill mills."[48] Doctors charged patients cash for opioid prescriptions, often without physically examining the patient. Patients were directed to fill the prescriptions at pharmacies that would look the other way. Distributors supplied even these pharmacies and doctors with more and more pills.[49] In this way, communities were overwhelmed with opioids. For example, in Kermit, West Virginia, population 406,[50] distributors supplied two pharmacies with nearly nine million hydrocodone pills alone from 2007 to 2008—more than eleven thousand pills per year for every resident of the small town.[51]

The controlled substance manufacture and distribution system is intended to prevent this kind of crisis. The system is meant to operate as a closed loop: only prescriptions for legitimate medical purposes are filled by pharmacies, who only receive the appropriate amount of drugs from distributors, who buy from manufacturers, who make no more drugs than

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epidemic; Appalachian Ohio, West Virginia, and Kentucky have been hit the hardest.

44. Anuj Shah, et al., *Characteristics of Initial Prescription Episodes and Likelihood of Long-Term Opioid Use*, CDC (Mar. 17, 2017), https://www.cdc.gov/mmwr/volumes/66/wr/mm6610a1.htm#F1_down.

45. QUINONES, *supra* note 2, at 109.

46. *Id.*

47. *Id.*

48. *See* EYRE, *supra* note 41.

49. *See* HOUSE ENERGY & COMMERCE COMM., RED FLAGS AND WARNING SIGNS IGNORED: OPIOID DISTRIB. AND ENF'T CONCERNS IN W. VA. (2018), *hereinafter* "House Energy & Commerce Report."

50. *Id.* at 4.

51. EYRE, *supra* note 41, at 176.

dictated by legitimate demand.[52] The CSA imposes duties on members of the scheduled drug supply chain. All members of the supply chain are required to obtain a Drug Enforcement Agency (DEA) registration.[53] Physicians must only write opioid prescriptions for a legitimate medical purpose and pharmacists and pharmacies have a "corresponding responsibility" to only fill prescriptions that were written for a legitimate medical purpose.[54] Distributors have a duty to "maintain[] effective control[s] [to prevent] diversion", conduct due diligence, know their customers, and to report, investigate, and block suspicious orders.[55]

Opioid companies clearly failed to live up to their duties. In 2007, Purdue Pharma and three executives pleaded guilty to criminal charges for misleading regulators about the drug's risk of addiction and potential for abuse, agreeing to pay $600 million in fines.[56] The same year, the DEA initiated enforcement actions against each of the Big Three distributors for failure to comply with their duties under the CSA.[57] All three distributors agreed to heightened reporting requirements to prevent diversion.[58] Fines totaled in the hundreds of millions.[59]

However, these settlements did not solve the problem. Later DEA enforcement actions demonstrate that the distributors did not abide by the terms of their agreements and continued to fail to meet their duties under the CSA. The distributors and the opioid industry launched a lobbying and public relations campaign,[60] but continued distributing opioids to pharmacies in quantities that could not be justified.[61] For example, distributors supplied more than 780 million hydrocodone and oxycodone pills to West Virginia alone between 2007 and 2012.[62] Only about 1.8

52. *See* 21 U.S.C. § 823.
53. 21 U.S.C. § 823.
54. 21 C.F.R. § 1306.04(a).
55. 21 U.S.C. § 823(b)(1), (e)(1); *see also*, Masters Pharm., Inc. v. U.S. Drug Enf't Admin., 430 U.S. App. D.C. 47, 861 F.3d 206 (D.C. Cir. 2017).
56. Barry Meier, *In Guilty Plea, OxyContin Maker to Pay $600 Million*, N.Y. TIMES (May 10, 2007), https://www.nytimes.com/2007/05/10/business/11drug-web.html.
57. House Energy & Commerce Report, *supra* note 49, at 34-35.
58. *Id.*
59. *Id.*
60. Erin Beck, *Landmark Federal Opioid Trial Against Three Drug Distributors Begins*, W. VA. REC., https://wvrecord.com/stories/594198008-update-landmark-federal-opioid-trial-against-three-drug-distributors-begins.
61. *See, e.g.*, House Energy & Commerce Report, *supra* note 49.
62. *Id.* at 4.

million people live in West Virginia.[63] Even after DEA admonishment, the distributors shipped about 435 hydrocodone and oxycodone pills per person for the entire state over that time period.

Additionally, the nature of addiction means that even if the opioid manufacturers, distributors, and dispensers stopped producing and selling all opioids, the epidemic would continue. When addicted patients cannot access renewed opioid prescriptions, they turn to other means. OxyContin and other opioids can be purchased from other users or from drug dealers. The brain cannot tell the difference between oxycodone and other synthetic opioids and heroin.[64] Predictably, many who had become addicted to prescription opioids switched to heroin.[65] Of people entering treatment for heroin who became addicted to the opioids in the 2000s, more than 75 percent reported that their first opioid was a prescription drug.[66]

As use of all opioids rose, including both prescription opioids and heroin, so did overdoses and overdose deaths.[67] Since 1999, overdose deaths in the United States have quadrupled, mostly driven by opioids.[68] By 2015, drug dealers had begun mixing in fentanyl.[69] Fentanyl is far more potent than heroin or oxycodone, which makes it easy to smuggle.[70] However, its high potency means that a lethal dose might only be a few

63. U.S. Census Bureau, *Total Population in West Virginia*, (2020), https://data.census.gov/cedsci/all?q=West%20Virginia.

64. Brendan Pierson, *Brain Can't Tell Pills from Heroin – W. Va. Opioid Lawsuit Plaintiffs' Expert*, REUTERS (May 4, 2021), https://www.reuters.com/business/legal/brain-cant-tell-pills-heroin-wva-opioid-lawsuit-plaintiffs-expert-2021-05-04/.

65. SAM QUINONES, THE LEAST OF US 77 (Bloomsbury Publ'g eds., 2021); *See, generally*, QUINONES, DREAMLAND. Around this time, I began to hear about a wave of overdose deaths from Ohio – high school classmates, friends' younger or older siblings, and family friends. My wife, who is from Appalachian Ohio, has known even more people who have overdosed or become addicted, many of whom were initially prescribed opioids by a doctor after an accident or sports injury.

66. *Prescription Opioid Use is a Risk Factor for Heroin Use*, NATIONAL INSTITUTE ON DRUG ABUSE, NIH, https://www.drugabuse.gov/publications/research-reports/prescription-opioids-heroin/prescription-opioid-use-risk-factor-heroin-use.

67. *See, e.g.*, QUINONES, DREAMLAND, 252 (describing a 0.979 correlation between prescription opioid dispensing and overdose deaths in Ohio – correlating every two months' supply dispensed with one overdose death).

68. *Understanding the Epidemic*, CDC (June 1, 2022), https://www.cdc.gov/opioids/basics/epidemic.html.

69. QUINONES, THE LEAST OF US, 77.

70. *Id. at 79.*

grains.[71] As a result, fentanyl needs to be cut with other substances to be ingestible.[72] Illegal fentanyl manufacturers blend the drug with heroin or press it into counterfeit pills designed to look like prescription opioids.[73] Fentanyl's potency makes the drug particularly dangerous: failure to blend the mixture to uniformity leads to lethal batches.[74] This leads to overdose clusters—twenty to fifty overdoses in a short time period from the same batch of fentanyl-laced heroin.[75] Driven by fentanyl, overdose deaths continued to rise even as prescription opioid supply fell.

In total, from 1999 through 2019, nearly 500,000 people in the United States died from an overdose involving an opioid.[76] Overdose deaths are not only a result of heroin or fentanyl; about 250,000 people died from an overdose that involved a prescription opioid.[77] In 2018 and 2019, more than 130 Americans per day died from an opioid-related overdose.[78] The COVID-19 pandemic has only exacerbated the opioid epidemic. In the first year of the pandemic, total drug overdose deaths rose by almost 30 percent to over 100,000, the vast majority of which involved synthetic opioids.[79] Deaths represent the tip of the crisis. For every overdose death, there are many more who struggle with addiction. Addiction leads to increased healthcare costs as well as crime and decreased productivity. Children are born in withdrawal from opioids that they were exposed to in the womb, left orphaned, or left without care by parents who suffer from addiction. From just 2015 to 2018, the total cost of the opioid epidemic exceeded $2.5 trillion.[80]

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71. *Id.*

72. *Id.*

73. *Facts about Fentanyl*, DRUG ENF'T AGENCY, https://www.dea.gov/resources/facts-about-fentanyl.

74. QUINONES, *supra* note 69, at 78-79.

75. *Id.* at 77.

76. *Understanding the Opioid Overdose Epidemic*, CDC, https://www.cdc.gov/opioids/basics/epidemic.html.

77. *Drug Basics*, CDC, https://www.cdc.gov/drugoverdose/basics/.

78. *What Is the U.S. Opioid Epidemic?*, U.S. DEP'T HEALTH & HUMAN SERVS., https://www.hhs.gov/opioids/about-the-epidemic/index.html.

79. Roni Caryn Rabin, *Overdose Deaths Reached Record High as the Pandemic Spread*, N.Y. TIMES (Nov. 17, 2021), https://www.nytimes.com/2021/11/17/health/drug-overdoses-fentanyl-deaths.html. In comparison, COVID killed about 500,000 Americans in the first year – the pandemic acted to obscure and hide as well as exacerbate the opioid epidemic. Louis Jacobson, *One Year In: How Covid's Toll Compares With Other Causes of Death*, KAISER HEALTH NEWS (Mar. 11, 2021), https://khn.org/news/article/pandemic-first-year-how-covid-toll-compares-with-other-causes-of-death/.

80. *The Full Cost of the Opioid Crisis: $2.5 Trillion over Four Years*, COUNCIL OF

II. PUBLIC NUISANCE LITIGATION AS A TOOL TO ABATE THE OPIOID EPIDEMIC

The nature of the epidemic rules out conventional solutions. Stricter enforcement of DEA regulations or new legislation curtailing the prescription opioid supply are inadequate because drug cartels will meet excess demand with fentanyl and heroin.[81] Individual victims have difficulty recovering because opioid companies point to the individual's own abuse as an intervening cause and because people suffering from addiction are often seen as unsympathetic or undeserving plaintiffs.[82] Statutes of limitations could act to limit recovery for past damages to only a few years, or to bar claims entirely. Additionally, the cost of cleaning up the epidemic will be enormous; state and local governments simply do not have the resources needed to treat addiction and respond to the other effects of the epidemic.[83]

Communities have turned to the courts in search of a solution to the crisis.[84] Many of the cases are aggregated in federal court in multidistrict litigation labeled *In re National Prescription Opiate Litigation*.[85] The plaintiffs include more than 2,500 cities, counties, tribes, labor unions, and other entities.[86] The defendants include opioid manufacturers, distributors, dispensers, and prescribers.[87] State attorneys general have brought similar

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ECON. ADVISORS (Oct. 28, 2019), https://trumpwhitehouse.archives.gov/articles/full-cost-opioid-crisis-2-5-trillion-four-years/.

81. *See generally* QUINONES, DREAMLAND; QUINONES, THE LEAST OF US.

82. *See generally* EYRE, *supra* note 41.

83. Jared S. Hopkins & Andrew M. Harris, *One Man's $50 Billion Vendetta Against Opioids*, BLOOMBERG (July 23, 2018), https://www.bloomberg.com/news/features/2018-07-23/lawyer-paul-farrell-s-50-billion-vendetta-against-opioids.

84. Joel Achenbach, *A Hometown Lawyer is Suing the Nation's Largest Drug Companies Over the Opioid Crisis*, WASH. POST (Oct. 14, 2019), https://www.washingtonpost.com/health/a-hometown-lawyer-is-suing-the-nations-largest-drug-companies-over-the-opioid-crisis/2019/10/14/ff2551a0-e3b5-11e9-a331-2df12d56a80b_story.html.

85. Burton LeBlanc et al., *Early Opioid Litigation Takeaways*, TRIAL MAGAZINE, Dec. 1, 2020, at 43. Public nuisance is a state law claim, but cases are in federal court under diversity jurisdiction or under federal question jurisdiction based on civil claims under the Racketeer Influenced and Corrupt Organizations Act.

86. *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804, MDL No. 2804 (N.D. Ohio transferred Dec. 12, 2017).

87. *Id.*

claims in state courts.[88] The resulting litigation has been called the "most complex in American legal history."[89] However, the centuries-old claim of public nuisance lies at the core of the litigation.[90]

The Restatement (Second) of Torts defines public nuisance as "an unreasonable interference with a right common to the general public."[91] Under this definition, a plaintiff needs to prove that the defendant's conduct caused an unreasonable interference with a public right.[92] Conduct necessary for liability may consist of acts or the failure to act under circumstances in which the actor owed a duty to act to prevent or abate the interference with the public right.[93] Under the Restatement view, when the conduct creates a "condition that is of itself harmful after the activity that created it has ceased," the harm is traceable to any participant whose conduct was a substantial factor in creating the harmful condition as long as the condition continues.[94] The Restatement also imposes a special injury requirement: actors may only bring an action if they have suffered particular harm of a "kind different from that suffered" by the general public or if they have authority to represent the state or a political subdivision in the matter.[95] A suit may be maintained for damages or for the equitable remedy of abatement.[96]

Under the Restatement, "[a] public right is one [in] common to all members of the general public" that is "collective in nature."[97] For example, the "threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an

88. *See, e.g.*, Original Petition, Oklahoma *ex rel*. Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2017 WL 8234419, (Okla. Dist. Ct. Cleveland Cnty. June 30, 2017).

89. Jan Hoffman, *What to Know About the Landmark Opioid Trial Starting Monday*, N.Y. TIMES (Oct. 20, 2019), https://www.nytimes.com/2019/10/20/health/opioids-trial-cleveland.html.

90. Achenbach, *supra* note 84.; *see, e.g.*, "Track Two" cases: City of Huntington v. AmerisourceBergen Drug Corp., 531 F. Supp. 3d 1132 (S.D. W. Va. 2021); Cabell Cnty. Comm'n v. AmerisourceBergen Drug Corp., No. 3:17-cv-01665, MDL No. 2804 (S.D. W. Va. 2020); *See generally*, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804, MDL No. 2804 (N.D. Ohio transferred Dec. 12, 2017).

91. RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

92. Peter Tipps, *Controlling the Lead Paint Debate: Why Control is not an Element of Public Nuisance*, 50 B.C. L. REV. 605, 607 (2009).

93. RESTATEMENT (SECOND) OF TORTS § 824 (AM. L. INST. 1979).

94. *Id.* § 834, cmt. e.

95. *Id.* § 821C.

96. *Id.*

97. *Id.* § 821B, cmt. g.

epidemic."[98] In this sense, the extreme oversupply of opioids represents a public nuisance as it could and did cause an epidemic of addiction. Notably, the Restatement distinguishes interference with a public right from interference with the private rights of a large number of persons.[99] However, some state statutes, including Oklahoma's, define public nuisance to include a nuisance which affects "any considerable number of persons."[100] According to the Restatement, under statutes like these, no purely public right need be implicated.[101]

The Restatement provides factors to determine whether an interference is unreasonable, including whether the conduct (a) "involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience," (b) is proscribed by law, or (c) is of a "continuing nature" or "has produced a permanent or long-lasting effect."[102] In an opioid case, the defendants' conduct may represent an unreasonable interference based on all three factors, assuming the plaintiffs can show that the conduct is the proximate cause and cause-in-fact of the epidemic.

The opioid epidemic clearly represents a significant public health and public safety problem. Additionally, the defendants' conduct that led to the epidemic was often unlawful. For example, plaintiffs allege that distributor defendants failed to maintain effective controls against drug diversion and shipped orders that they knew or should have known were suspicious, violating their duties under the CSA. A report by the House Energy and Commerce Committee, *Red Flags and Warning Signs Ignored: Opioid Distribution and Enforcement Concerns in West Virginia*, details some of these failures.[103] The Committee Report reveals that the distributors did not follow the control systems that they represented to the DEA were in place to prevent diversion.[104] For example, McKesson instituted monthly thresholds for opioid classes, but then sold Sav-Rite No. 1, a pharmacy in Kermit, West Virginia, more than the *monthly* threshold on a *daily* basis.[105] The distributor's due diligence file for the pharmacy

98. *Id.*
99. *Id.*
100. OKLA. STAT. ANN. tit. 50, § 2 (West, Westlaw through the legislation of the Second Regular Session of the 58th Legislature).
101. RESTATEMENT (SECOND) OF TORTS § 821B, cmt. g (AM. L. INST. 1979).
102. *Id.* § 821B.
103. *See* House Energy & Commerce Report, *supra* note 49.
104. *Id.*
105. *Id.* at 195.

contained just one document, a handwritten assertion by the owner that the pharmacy only sold legitimate prescriptions.[106] Even though Kermit had a population of 406, McKesson shipped Sav-Rite No. 1 "more than 5.66 million doses of hydrocodone and oxycodone in 2006 and 2007."[107] Distributors also continued to sell to pharmacies despite clear red flags. For example, distributors continued to supply Sav-Rite No. 1 after Sav-Rite No. 2, a second, co-owned location just two miles away, was shut down in a DEA raid.[108] These acts and omissions amount to failure to act under circumstances where the distributors owed a duty to prevent interference with a public right.

Under the Restatement approach, the plaintiffs need to prove that the defendants' conduct was a substantial factor in causing the unreasonable interference to the public right.[109] Courts apply the standard principles for determining both cause-in-fact and proximate cause.[110] The proximate cause inquiry hinges on whether the harmful condition was a foreseeable consequence of the defendants' conduct.[111] As discussed above, conduct includes omissions where the defendant owed a duty to act.[112] Courts have found that in public nuisance cases, "the cause need not be so proximate as in individual negligence cases" because "the welfare and safety of an entire community is at stake."[113] Where the plaintiffs show a statutory violation, such as the distributors' violations of the CSA, that violation is "[rightly considered] the proximate cause of an[y] injury which is a natural, probable and anticipated consequence" of the violation.[114] In opioid cases, the defendant companies argue that there is no proximate cause and that actions by others, such as doctors, pharmacists, drug cartels, and opioid users, represent intervening, superseding causes. However, an intervening act does not automatically vitiate proximate causation.[115] The defendants need to prove that the intervening act "operate[s]

106. *Id.* at 12.
107. *Id.* at 12, 19.
108. *Id.* at 262.
109. RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).
110. *Id.* § 834.
111. Tipps, *supra* note 92, at 628-29.
112. RESTATEMENT (SECOND) OF TORTS § 824 (AM. L. INST. 1979).
113. Brooke Cnty. Comm'n v. Purdue Pharma L.P., No. 17-C-248, 2018 WL 11242293, at *14 (W.Va. Cir. Ct. Dec. 28, 2018) (quoting NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 497 (E.D.N.Y. 2003)).
114. Gillingham v. Stephenson, 551 S.E.2d 663, 671 (W. Va. 2001).
115. *Brooke Cnty. Comm'n*, 2018 WL 11242293 at *14.

independently of any other act" and was not reasonably foreseeable.[116] As such, opioid cases that have gone to trial have focused on whether drug diversion and heroin addiction are foreseeable results of oversupply of prescription opioids.[117]

State nuisance statutes vary on the special injury requirement as applied to local governments. In some states, such as West Virginia, a statute explicitly authorizes certain governments to declare a public nuisance and to have it abated.[118] In others, local governments need to meet a special injury requirement. Under the Restatement approach, a plaintiff must have "suffered harm of a kind different from that suffered by other members of the public" in order to recover damages.[119] In order to maintain an action to enjoin or abate the nuisance, the plaintiff must meet that same requirement or have authority to sue as a political subdivision or otherwise as a representative of the general public.[120] Notably, if the special injury requirement applies, the injury must be different in nature, not just in degree.[121] In states where local governments must meet the special injury requirement, there is a strong argument that the epidemic's toll on emergency services and law enforcement represents a different form of harm than its general impact on public health and safety.

III. THE COURSE OF THE OPIOID LITIGATION

The plaintiffs cleared initial hurdles to have the cases aggregated in federal MDL.[122] The claims of state attorneys general proceeded in parallel in state court.[123] In this MDL, presiding Judge Polster selected a series of

116. *Id.* at *12-14.

117. Lacie Pierson, *Landmark Reaches Conclusion as Closing Arguments Wrap*, HERALD-DISPATCH (July 28, 2021), https://www.herald-dispatch.com/news/landmark-opioid-trial-reaches-conclusion-as-closing-arguments-wrap/article_0a15fe3a-b331-5a57-ac4d-b1ab778755bd.html.

118. W. VA. CODE § 7-1-3kk (2022).

119. RESTATEMENT (SECOND) OF TORTS § 821C(1) (AM. L. INST. 1979).

120. *Id.* § 821C(2).

121. *Id.* § 821C, cmt. b.

122. J. Burton Pieko LeBlanc et al., *Early Opioid Litigation Takeaways: Here are Some Quick Tips to Help Untangle a Complex Litigation with Many Moving Parts*, TRIAL MAG., Dec. 1, 2020, at 42.

123. Suggestions of Remand at 4, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, Document #2941 (N.D. Ohio Nov. 19, 2019).

bellwether cases.[124] The first bellwether, which included plaintiffs in northern Ohio, was limited to five defendants, including distributors, a manufacturer, and a pharmacy.[125] The claims were pared down to public nuisance and civil Racketeering Influenced and Corrupt Organizations Act (RICO) actions.[126] This structure was intended to provide a "central cross-section of the evidence, the parties, and the claims."[127] However, all defendants except the pharmacy defendant settled on the eve of trial, agreeing to pay the local governments $260 million towards abating the epidemic.[128] The court postponed the trial as it could no longer serve as an effective bellwether.[129]

After the settlement, the court shifted its strategy for the next bellwethers.[130] In order to resolve specific portions of the MDL in parallel, the court began a series of strategic remands to transferor courts.[131] Claims and parties would be severed so that each trial could test a specific aspect of the MDL.[132] Those bellwethers that have reached final judgment have seen mixed results. In "Track Two," limited to a public nuisance claim brought by Cabell County and Huntington, West Virginia against the Big Three distributors.[133] which went to trial in the summer of 2021.[134] In July 2022, Judge David Faber rejected the plaintiffs' public nuisance. "Track Three" includes public nuisance claims brought by two Ohio counties

124. *Id.* at 7-8.

125. *Id.* at 4.

126. *See* Cnty. of Summit v. Purdue Pharma L.P., Case No. 18-OP-45090 (N.D. Ohio May 30, 2018*);* Cnty. of Cuyahoga v. Purdue Pharma L.P., Case No. 17-OP-45004 (N.D. Ohio May 29, 2018)*;* City of Cleveland v. Purdue Pharma L.P., Case No. 18-OP-45132 (N.D. Ohio Dec. 20, 2019).

127. Suggestions of Remand at 4, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, Document #2941 (N.D. Ohio Nov. 19, 2019).

128. Eric Heisig, *Four Drug Companies Reach $260 Million Settlement to Avoid First Federal Opioid Trial in Cleveland*, CLEVELAND.COM (Oct. 21, 2019, 8:31 AM), https://www.cleveland.com/news/2019/10/four-drug-companies-reach-settlement-to-avoid-first-federal-opioid-trial-in-cleveland.html.

129. Suggestions of Remand at 4-5, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, Document #2941 (N.D. Ohio Nov. 19, 2019).

130. *Id.* at 5.

131. *Id.*

132. *Id.*

133. City of Huntington v. AmerisourceBergen Drug Corp., 531 F. Supp. 3d 1132 (S.D. W. Va. 2021); Cabell Cnty. Comm'n v. AmerisourceBergen Drug Corp., No. 3:17-cv-01665, MDL No. 2804 (S.D. W. Va. 2020).

134. Weekend Edition Saturday, *Was It 'Reasonable' To Ship 81 Million Opioid Pills To This Small West Virginia City?*, NPR (July 30, 2021 5:01 AM), https://www.npr.org/transcripts/1021676306.

against pharmacy defendants.[135] In Track Three, the court determined that the plaintiffs' allegations of proximate cause in their public nuisance claim were enough to create a question of fact for the jury.[136] On November 23, 2021, the jury found that the pharmacies substantially contributed to the public nuisance.[137] After a separate trial to determine the remedy, Judge Polster ordered the pharmacies to pay $650.6 million to abate the epidemic.[138] An appeal is pending. Other bellwethers are in process in courts across the country, including cases slated to test claims against manufacturers and against distributor and pharmacy defendants in other jurisdictions.[139]

As the bellwether process has played out, global settlement discussions have moved in fits and starts. Purdue Pharma and the Sackler family had agreed to a $4.5 billion settlement in bankruptcy court.[140] However, on December 16, 2021, the district court overturned the settlement on appeal, holding that the bankruptcy court lacked authority to give the Sackler family personal immunity from future civil claims relating to Purdue's role in the opioid epidemic.[141] The Big Three distributors, along with manufacturer Johnson & Johnson, agreed to a $26 billion settlement that would bring an end to both state attorney general and local government cases.[142] Pharmacy defendants including Walmart,

135. Order, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804, 2020 U.S. Dist. LEXIS 96242 (N.D. Ohio June 2, 2020) (granting Track Three Plaintiffs' Motion to Bifurcate Bellwether Claims, Join Bellwether Cases for Trial, and to Stay Remaining Claims).

136. *In re* Nat'l Prescription Opiate Litig., 477 F. Supp. 3d 613, 636 (N.D. Ohio 2020).

137. Brian Mann, *3 of America's Biggest Pharmacy Chains Have Been Found Liable for the Opioid Crisis*, NPR (Nov. 23, 2021), https://www.npr.org/2021/11/23/1058539458/a-jury-in-ohio-says-americas-big-pharmacy-chains-are-liable-for-the-opioid-epide.

138. John Caniglia, *Federal Jury Finds 3 Major Pharmacies Oversupplied Opioids in Lake, Trumbull Counties*, CLEVELAND.COM (Nov. 24, 2021), https://www.cleveland.com/court-justice/2021/11/federal-jury-finds-3-major-pharmacies-oversupplied-opioids-in-lake-trumbull-counties.html.

139. *See, e.g.*, Suggestions of Remand, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, Document #2941 (N.D. Ohio Nov. 19, 2019); Order , *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, Document #3688 (N.D. Ohio Apr. 9, 2021) (designating Five Bellwether Cases for Trial in New Litig. Tracks Against Pharmacy Defendants).

140. Jan Hoffman, *Judge Overturns Purdue Pharma's Opioid Settlement*, N.Y. TIMES (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/health/purdue-pharma-opioid-settlement.html.

141. *In re* Purdue Pharma, L.P., 635 B.R. 26, 38 (S.D.N.Y. 2021).

142. Jan Hoffman, *Drug Distributors and J&J Reach $26 Billion Deal to End Opioid Lawsuits*, N.Y. TIMES (July 21, 2021), https://www.nytimes.com/2021/07/21/health/

Walgreens, and CVS are finalizing a $13.8 billion global settlement.[143] However, even after these settlements are finalized, many cases related to the epidemic will remain, including cases against non-settling defendants as well as cases from governments that elect not to participate in the global settlements.[144]

IV. PUBLIC NUISANCE OPIOID LITIGATION IN OKLAHOMA

The State of Oklahoma's case against opioid manufacturer Johnson & Johnson was the first in the nation to go to trial, and the first verdict to be overturned on appeal. In 2017, the State brought public nuisance claims against opioid manufacturers.[145] After the State filed its claim, the City of Tulsa considered joining[146] but ultimately decided to file on its own,[147] bringing claims including public nuisance against entities up and down the opioid supply chain.[148] The Cherokee Nation brought claims for public nuisance against dispensing and distributor defendants in Oklahoma state court.[149] The Tulsa case is aggregated in the MDL.[150] Tulsa will likely receive millions through the global settlements with the Big Three distributors and Johnson & Johnson.[151] The Cherokee Nation case was

opioids-distributors-settlement.html.

143. Brendan Pierson, *CVS, Walmart, Walgreens agree to pay $13.8 bln to settle U.S. opioid claims*, REUTERS (Nov. 2, 2022) https://www.reuters.com/business/healthcare-pharmaceuticals/cvs-walmart-walgreens-reach-tentative-12-bln-opioid-pact-bloomberg-news-2022-11-02/.

144. Andrew Selsky, *Cities Wwracked by Oopioids Copioids close to Ggetting $26B Ssettlement*, A.B.C. NEWS, (Dec. 14, 2021, 2:00 PMp.m.), https://abcnews.go.com/Health/wireStory/cities-wracked-opioids-close-26b-settlement-81744614.

145. *See, e.g.*, Original Petition, Oklahoma v. Purdue Pharma L.P., No. CJ-2017-816, 2017 WL 8234419, (Okla. Dist. Ct. Cleveland Cnty. Jun. 30, 2017). The State later brought claims against the Big Three distributors (AmerisourceBergen, Cardinal Health, and McKesson).

146. Brian Brus, *OKC, Tulsa Consider Joining Opioid Lawsuit*, THE J. REC. (May 8, 2018), https://journalrecord.com/2018/05/08/okc-tulsa-consider-joining-opioid-lawsuit/.

147. Notably, the City of Tulsa filed its suit the day after the Tulsa Race Massacre survivors named the city in their own public nuisance lawsuit. *Compare* Complaint, City of Tulsa v. Cephalon, Inc., No. CJ-2020-02705, (Okla. Dist. Ct. Tulsa Cnty. Sept. 2, 2020); Complaint, Randle v. City of Tulsa, No. CV-2020-01179, (Okla. Dist. Ct. Tulsa Cnty.Sept. 1, 2020).

148. Complaint at 66-71, City of Tulsa v. Cephalon, Inc., No. CJ-2020-02705.

149. Cherokee Nation, 2021 WL 1200093 at *3.

150. *See generally In re* Nat'l Prescription Opiate Litig., MDL No. 2804.

151. Jan Hoffman, *Drug Distributors and J&J Reach $26 Billion Deal to End Opioid Lawsuits*, N.Y. TIMES (July 21, 2021), https://www.nytimes.com/2021/07/21/

removed to federal court and then designated as a bellwether for cases brought by Native American tribes.[152] The Tribe's public nuisance claim survived motions to dismiss by distributor and pharmacy defendants.[153] In September 2021, the Big Three distributors settled with the Cherokee Nation for $75 million.[154] After settlement, the Cherokee Nation moved to remand the claims against the pharmacy defendants to state court for lack of federal jurisdiction.[155] The Tribe argued that the claims, including claims of public nuisance, unjust enrichment, and civil conspiracy, are all Oklahoma common law tort claims and raise substantial questions of Oklahoma law.[156] Litigation over remand is ongoing.[157]

The State settled with some defendants before trial for over $350 million.[158] However, opioid manufacturer Johnson & Johnson proceeded to a bench trial in state court,[159] leading to the first trial in the national opioid litigation.[160] The State's sole claim was for causing a public nuisance and the only relief sought was abatement.[161] The trial court found that Johnson & Johnson's actions had caused a public nuisance, that the

health/opioids-distributors-settlement.html.

152. Suggestions of Remand, In re Nat'l Prescription Opiate Litig., MDL No. 2804, Document #2941 (N.D. Ohio Nov. 19, 2019); Cherokee Nation, 2021 WL 1200093, at *1 cert. denied, No. CIV-18-56-RAW, 2021 WL 2695353 (E.D. Okla. June 30, 2021).

153. Cherokee Nation, 2021 WL 1200093, at *12 cert. denied, No. CIV-18-56-RAW, 2021 WL 2695353 (E.D. Okla. June 30, 2021).

154. Jef Feeley, Opioid Distributors to Pay $75 Million in Cherokee Opioid Accord, Bloomberg (Sept. 28, 2021), https://www.bloomberg.com/news/articles/2021-09-28/opioid-distributors-to-pay-75-million-in-cherokee-opioid-accord.

155. Motion to Remand All Claims Against Non-Settling Defendants at 1, Cherokee Nation v. McKesson Corp., No. CIV-18-056-RAW-SPS, (E.D. Okla. Sept. 29, 2021), ECF No. 420.

156. *Id.* at 2, 12.

157. *See* Cherokee Nation v. CVS Pharmacy, Inc., No. CIV-18-056-RAW, 2022 U.S. Dist. LEXIS 55165, at *4 (E.D. Okla. Mar. 28, 2022).

158. ex rel. Hunter v. Purdue Pharma LP, No. CJ-2017-816, 2019 WL 4136840 at *5-6 (Okla. Dist. Mar. 26, 2019); ex rel. Hunter v. Purdue Pharma LP, No. CJ-2017-816, 2019 WL 4136841, at *5-6 (Okla. Dist. June 24, 2019); Attorney General Hunter Files Lawsuit Against Three Leading Opioid Distributors for Fueling Opioid Epidemic, Office of the Oklahoma Attorney General, https://oag.ok.gov/articles/attorney-general-hunter-files-lawsuit-against-three-leading-opioid-distributors-fueling.

159. ex rel. Hunter v. Purdue Pharma LP, No. CJ-2017-816, 2019 WL 4019929, at *1 (Okla. Dist. Aug. 26, 2019).

160. Jan Hoffman, Johnson & Johnson Ordered to Pay $572 Million in Landmark Opioid Trial, N.Y. Times (Aug. 26, 2019), https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html.

161. Hunter, 2019 WL 4019929, at *1.

nuisance was ongoing, and that the nuisance could be abated.[162] The court determined that the proper remedy was equitable abatement and ordered Johnson & Johnson to pay $465 million to abate the opioid crisis in Oklahoma.[163]

However, on November 9, 2021, the Oklahoma Supreme Court overturned the trial court's ruling.[164] The Court held that Oklahoma's "public nuisance law does not extend to the manufacturing, marketing and selling of prescription opioids."[165] The Court stated that "[f]or the past 100 years, our Court, applying Oklahoma's nuisance statutes, has limited Oklahoma public nuisance liability to defendants (1) committing crimes constituting a nuisance, or (2) causing physical injury to property or participating in offensive activity that rendered the property uninhabitable."[166] The Court identified reasons not to extend public nuisance law to opioid manufacturer conduct, including: "(1) the manufacture and distribution of products rarely cause a violation of a public right, (2) a manufacturer does not generally have control of its product once it is sold, and (3) a manufacturer could be held perpetually liable for its products under a nuisance theory."[167]

The Oklahoma Supreme Court's decision provides significant, recent precedent defining the scope of public nuisance claims in Oklahoma. The Tulsa Race Massacre survivors modeled their initial claims after the case against the opioid manufacturers. However, the survivor plaintiffs' allegations of public nuisance may be distinguishable from the State's opioid claims.

V. THE TULSA MASSACRE

Oklahoma joined the Union as a state in November 1907. As the oil industry in Oklahoma grew, Tulsa became "a boom city in a boom state," with its population jumping from 1,400 in 1900 to nearly 100,000 by

162. *Id.* at *14-15.

163. *Id.* at *15, *20; *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2019 WL 9241510, at *15, *21 (Okla. Dist. Nov. 15, 2019) (correcting clerical error in summation of total cost of abatement and ordering Johnson & Johnson to pay $465 million). The state cross-appealed as the award only funded the first year of the state's proposed abatement plan.

164. *ex rel.* Hunter v. Johnson & Johnson, 2021 OK 54, ¶ 2, 499 P.3d 719, 721.

165. *Id.* at ¶ 2, 721.

166. *Id.* at ¶ 18, 724.

167. *Id.* at ¶ 23, 726.

1921.[168] As it grew, "Tulsa became one of the most sharply segregated cities in the country."[169]

White supremacy and *de jure* segregation were baked into the state's formation, but Oklahoma had also served as a "Promised Land" for Black people who built communities there in an effort to escape oppression in the Old South.[170] After the Civil War, formerly enslaved Black people formed more than twenty all-Black towns in what was then known as Indian Territory.[171] In the late 1800s, former Kansas auditor E.P. McCabe campaigned to bring the territory into the union as an all-Black state.[172] However, by the time Oklahoma became a state in 1907, white supremacists had asserted control over the levers of power. The first bill passed by the new legislature "tightly segregated the state."[173] Over the next decades, white supremacist powers within the Oklahoma Democratic Party, including the Ku Klux Klan, would come to dominate the state's political and justice systems.[174]

Greenwood emerged from the collision of the "Promised Land" movements and the new state's Jim Crow policies. Black businessmen O.W. Gurley and J.B. Stradford came to Tulsa before statehood and "invested large sums in large acreages of real estate" in what would become Greenwood.[175] Gurley laid out a grid of streets and individual lots and then sold the lots only to Black buyers.[176] Other developers followed Gurley's lead, surveying surrounding tracts and designating lots for Black buyers only.[177] Black businesses opened along Greenwood Avenue.[178] The business district grew in part because Black Tulsans were not welcome to patronize white businesses in other parts of the city.[179] Tulsa had become

168. SCOTT ELLSWORTH, DEATH IN A PROMISED LAND 8-9 (1992).
169. BUCK COLBERT FRANKLIN, MY LIFE AND AN ERA 200 (John Hope Franklin & John Whittington Franklin eds., 1997).
170. Don Ross, *Prologue, in* REPORT OF THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921 iv (2001), hereinafter, "Oklahoma Commission Report."
171. *Id.* at vi.
172. *Id.*
173. *Id.*
174. Alexander v. Oklahoma, No. 03-C-133-E, 2004 N.D. LEXIS 5131, at *30-31 (N.D. Okla. Mar. 19, 2004).
175. FRANKLIN, *supra* note 168.
176. *Id.*
177. *Id.*
178. ELLSWORTH, *supra* note 167, at 14.
179. *Id.*

"not one city, but two."[180] However, as Tulsa boomed, Greenwood boomed as well.[181] By 1921, Greenwood had about 11,000 residents.[182] By that time, the community had two schools, one hospital, two newspapers, and two theaters.[183] "Deep Greenwood," the heart of the Black business community, occupied "[t]he first two blocks of Greenwood Avenue[,] north of Archer [Street]."[184] Deep Greenwood was home to four hotels, including the Gurley Hotel, and "the offices of Tulsa's unusually large number of Black lawyers, doctors, and other professionals."[185] This section was popularly known as "[Black] Wall Street."[186]

After World War I, race riots broke out across America, peaking in the "Red Summer" of 1919.[187] These riots were marked by white invasion of Black neighborhoods.[188] The Ku Klux Klan, reformulated in 1915,[189] was on the rise. That year, D.W. Griffith's film glorifying the Klan, *The Birth of a Nation*, became the first film to be screened at the White House.[190] In the year before the Tulsa massacre, 59 Black people were lynched in the South or in border states.[191]

At the same time, Black veterans, including "some [who] had fought in France," returned home to Tulsa.[192] Participation in World War I "helped to clarify black thinking on the subject of white militancy" and "added to black America's indignation toward the sharp postwar wave of white violence."[193] In fact, the Greenwood community had taken action to prevent a lynching in 1919.[194] Leaders had shown up at the courthouse and demanded that a Black prisoner be protected.[195] Black Tulsans were

180. *Id.*
181. *Id.* at 14-15.
182. *Id.* at 14.
183. *Id.*; BROPHY, *supra* note 1, at 1.
184. ELLSWORTH, *supra* note 167, at 15.
185. *Id.* at 16.
186. *Id.* at 15; Ogletree, *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13, 17 (2004).
187. ELLSWORTH, *supra* note 167, at 17.
188. *Id.*
189. *Id.* at 20.
190. Allyson Hobbs, *A Hundred Years Later, "The Birth of a Nation" Hasn't Gone Away*, NEW YORKER (Dec. 13, 2015), https://www.newyorker.com/culture/culture-desk/hundred-years-later-birth-nation-hasnt-gone-away.
191. *Id.*
192. ELLSWORTH, *supra* note 167, at 24.
193. *Id.* at 23.
194. *Id.*
195. *Id.*

"increasingly determined" to make heard their call for fulfillment of the Constitution's promise of equal protection.[196] However, in August 1920, eight months before the massacre, a lynching demonstrated that the Black community had little reason to have faith that this promise would be fulfilled. In Oklahoma City, three white men without masks walked into the jail and kidnapped Claude Chandler, a "Black man accused of killing a white police officer."[197] Chandler was lynched despite efforts by the Oklahoma City Black community to track down his kidnappers.[198]

This was the backdrop when, on May 31, 1921, a Black teenager named Dick Rowland was arrested and accused of assaulting a white woman in an elevator.[199] That afternoon, the *Tulsa Tribune* printed a front-page story titled "Nab Negro for Attacking Girl in Elevator," and, although the editorial page was "deliberately torn out" and is still unrecovered, some sources suggest that they may have printed an editorial encouraging Rowland's lynching.[200] The *Tribune* may also have reported that "a mob of whites were forming to lynch" Rowland.[201] Whether or not instigated by the *Tribune*, talk of lynching followed the *Tribune*'s reporting.[202] By sunset, a mob of hundreds of whites had gathered outside the courthouse.[203] Smaller groups of armed Black Tulsans arrived to offer their services to the sheriff in defense of the jail, but were turned away.[204] By 9:30 PM, the white crowd numbered 2,000.[205] A group of armed Black Tulsans returned to the jail to offer their assistance in protecting Rowland once more.[206] The sheriff and police again refused their assistance and ordered them to leave.[207] However, the sheriff and police did not seriously attempt to disperse the crowd of whites.[208] Nor had the Tulsa Police Chief called in any substantial police presence. By 10:00 PM, there may have

196. BROPHY, *supra* note 1, at 15-16.
197. *Id.* at 12.
198. *Id.* at 12-13.
199. *Id.* at 24. The most common theory for what actually occurred is that Rowland accidentally stepped on the girl's foot, causing her to scream. *Id.* at 48.
200. SCOTT ELLSWORTH, *The Tulsa Race Riot*, *in* OKLAHOMA COMMISSION REPORT at 58-59.
201. BROPHY, *supra* note 1, at 48.
202. ELLSWORTH, *supra* note 199, at 59.
203. *Id.* at 59-60.
204. ELLSWORTH, *supra* note 167, at 50.
205. ELLSWORTH, *supra* note 199,at 62.
206. ELLSWORTH, *supra* note 167, at 51.
207. *Id.*
208. *Id.*

been as few as five policemen on duty at the courthouse, and the chief had returned to his office.[209] At 10:30 PM, the police chief refused Governor James Robertson's offer to bring in the National Guard, asserting that the Tulsa authorities could manage the situation.[210] Minutes later, as the Black men were leaving, a white member of the crowd attempted to disarm one of the Black veterans.[211] The gun went off.[212] The violence had begun.[213]

As the armed whites fought and chased the Black group back to Greenwood, other whites, possibly including police officers, broke into hardware stores and pawnshops to secure weapons.[214] The police commissioned hundreds of men as "special deputies."[215] These men "became as deputies the most dangerous part of the mob"; they were "imbued with the same spirit of destruction."[216] By 1:00 AM, fires had been set at the edges of Greenwood.[217] The mob of 500 whites forced the firemen to return to the station and let the fires burn.[218] As "wholesale burning and looting of black Tulsa began . . . police were . . . disarming and interning *black* Tulsans."[219] Black Tulsans were rounded up by special deputies, Tulsa National Guardsmen, police, and non-commissioned members of the white mob, leaving Greenwood defenseless.[220] As the riot carried on, a deadly pattern emerged. Armed whites forced Black residents into the street, where they were then led to internment centers or shot.[221] Next, whites looted and burned the emptied Black homes and businesses.[222] Airplanes flew over Greenwood, firing rifles and possibly dropping bombs into the district.[223]

By the end of the massacre, the death toll was as high as 300.[224] At

209. ELLSWORTH, *supra* note 199, at 62.
210. ELLSWORTH, *supra* note 167, at 51.
211. *Id.* at 52-53.
212. *Id.*
213. *Id.*
214. ELLSWORTH, *supra* note 167, at 54-55.
215. Alfred L. Brophy, *Assessing State and City Culpability: The Riot and the Law*, *in* OKLAHOMA COMMISSION REPORT at 159.
216. *Id.* (quoting Major General Charles F. Barrett of the Oklahoma National Guard).
217. ELLSWORTH, *supra* note 167, at 55.
218. *Id.*
219. *Id.* at 57.
220. *Id.*
221. Ellsworth, *The Tulsa Race Riot*, OKLAHOMA COMMISSION REPORT at 74.
222. *Id.*
223. Richard S. Warner, *Airplanes and the Riot*, *in* OKLAHOMA COMMISSION REPORT at 105-06. Richard S. Warner, *Airplanes and the Riot*, Commission Report 104-5.
224. Robert L. Brooks & Alan H. Witten, *The Investigation of Potential Mass Grave*

least 1,256 houses had been burned and hundreds more had been looted,[225] leaving as many as 9,000 Greenwood residents homeless.[226] The Gurley Hotel, the offices of both of Tulsa's Black newspapers, the Mount Zion Baptist Church, and the Dreamland Theater were among the buildings destroyed.[227] During the massacre and in its aftermath, over 4,000 Black citizens would be "forcibly interned under armed guard."[228] In the aftermath of the massacre, Tulsa convened a grand jury to whitewash the role of the white mob and of Tulsa authorities.[229] The grand jury report was published in the *Tulsa World* with the headline "Grand Jury Blames Negroes for Inciting Race Rioting: Whites Clearly Exonerated."[230]

VI. PRIOR LITIGATION FOR REPARATIONS

The public nuisance litigation is not the first time that Tulsa survivors have sought redress in the courts in order to rebuild Greenwood. The initial claims failed largely because the powers responsible for the massacre were in charge of determining their own liability.[231] The Klan had consolidated power across Oklahoma and in Tulsa.[232] In November 1922, less than a year and half after the massacre, *both* candidates running for the offices of county attorney and sheriff were Klansmen.[233] In 1997, House Joint Resolution No. 1035 began the process that would lead to the 1921 Tulsa Race Riot Commission.[234] The Commission's final report was published

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Locations for the Tulsa Race Riot, Airplanes and the Riot, *in* OKLAHOMA COMMISSION REPORT at 123. Robert L. Brooks & Alan H. Witten, *The Investigation of Potential Mass Grave Locations for the Tulsa Race Riot, published with* Oklahoma Commission Report at 123.

225. Larry O'Dell, *Riot Property Loss*, *in* OKLAHOMA COMMISSION REPORT at 144. Larry O'Dell, *Riot Property Loss*, *published with* Oklahoma Commission Report at 144.

226. Complaint, Bennington Randle v. City of Tulsa, No. CV-2020-01179 at 15.

227. ELLSWORTH, *supra* note 167, at 70.

228. Brooks & Witten, *supra* note 223.Robert L. Brooks & Alan H. Witten, *The Investigation of Potential Mass Grave Locations for the Tulsa Race Riot*, Commission Report at 123.

229. Brophy, *supra* note 214, at 167. Alfred L. Brophy, *Assessing State and City Culpability: The Riot and the Law*, Commission Report at 167.

230. *Id.*

231. *See* Alexander v. Oklahoma, No. 03-C-133-E, at *30-31 (N.D. Okla. Mar. 19, 2004).

232. ELLSWORTH, *supra* note 167, at 22.

233. *Id.*

234. Danney Goble, *Final Report of the Oklahoma Commission to Study the Tulsa Race Riot of 1921*, *in* OKLAHOMA COMMISSION REPORT at 1. Oklahoma Commission Report, 1

in 2001.[235] After the publication of the Commission Report, over 120 still-living survivors and their descendants brought suit in federal court against Oklahoma, Tulsa, and the Tulsa Police Department in *Alexander v. State of Oklahoma*.[236] However, the court found that these claims were time barred.[237]

A. Claims Immediately Following the Massacre

In the year following the massacre, residents filed claims against the city for over $1.8 million.[238] Most of the claims were denied by the city commission, with the notable exception of a white store owner's claim for nearly $4,000 in missing guns and ammunition.[239] These denials fit Tulsa's goals. The Tulsa government was invested in shifting blame for the massacre to Black residents and actively sought to prevent any attempts to rebuild.[240] For example, the city passed a fireproofing ordinance in the wake of the massacre that made rebuilding prohibitively expensive.[241] The city's rationale for the ordinance stated that forcing Black residents farther from the white side of Tulsa would "be desirable" as it would create greater separation between the races.[242] In the immediate aftermath of the massacre, Black attorneys Buck Colbert Franklin, I.H. Spears, and T.O. Chappelle set up a law firm in a tent in the ruins of Greenwood.[243] The firm filed a lawsuit to enjoin the ordinance on due process grounds.[244] While the ordinance was eventually ruled unconstitutional by the Oklahoma Supreme Court, its enactment ensured that rebuilding would be delayed.[245] However, even with this barrier removed, "Greenwood

(2001).

235. *Id.*

236. Charles Ogletree, *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13, 18 (2004); Alexander v. State of Oklahoma, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131 (N.D. Okla. March 19, 2004).

237. *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *24.

238. O'Dell, *supra* note 224, at 143, 145. Oklahoma Commission to Study the Tulsa Race Riot of 1921 book pg 145.

239. *Id.* at Larry O'Dell, *Riot Property Loss, published with* Oklahoma Commission Report at 145 &150 n.4.

240. Brophy, *supra* note 214, at 167-68. Alfred L. Brophy, *Assessing State and City Culpability: The Riot and the Law, published with* Oklahoma Commission Report at 167-68.

241. *Id.* at 168.

242. *Id.* at 168 & 172 n.87.

243. FRANKLIN, *supra* note 168, at 198.

244. *Id.*

245. Brophy, *supra* note 214, at 168. Alfred L. Brophy, *Assessing State and City*

residents were left . . .free to rebuild their property, but without the direct assistance from the city that was crucial to doing so."[246]

Many Greenwood residents and landowners sued the city and other defendants for damages from the massacre or sought compensation from insurance companies based on fire insurance policies. Franklin, Spears, and Chappelle filed dozens of lawsuits against fire insurance companies, but no recovery was possible because of clauses excluding damage due to "riots" or "civil commotion."[247] In total, the Oklahoma Commission discovered 193 cases for damages after the massacre, with damages claimed of $1.47 million in 1921 dollars.[248] Defendants included insurance companies, the City of Tulsa, and the Sinclair Oil Company, the latter of which provided airplanes used in the assault.[249] However, in *Redfearn v. American Central Insurance, Co.*, the Oklahoma Supreme Court upheld a directed verdict for an insurance company that barred recovery based on a riot exclusion clause. The Court rejected the plaintiff's theory that—as in a Kentucky fire insurance case where a riot exclusion clause was found inapplicable—deputized law enforcement set fires in order to effectuate arrests of Black residents, and the unlawful act of setting fires for that purpose represented an intervening cause of the destruction.[250] The Court found that even though the men arresting Black people in Greenwood wore police or deputy sheriff badges or military uniforms and evidence showed that those men set fire to buildings, there was no evidence that those fires were set *in order to* make the arrests.[251] As discussed by Alfred Brophy, this is a distinction without substantive difference that makes "little sense."[252] There is no reason that unlawful fire-setting by law enforcement after arrest should be analyzed differently from unlawful fire-setting before arrest. As Brophy concludes, the tortured nature of the ruling indicates that the court must "have grasped for some distinction" based on

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Culpability: The Riot and the Law, published with Oklahoma Commission Report at 168.

246. *Id.*

247. FRANKLIN, *supra* note 168, at 198.

248. O'Dell, *supra* note 224, at 145. Larry O'Dell, *Riot Property Loss*, *published with* Oklahoma Commission Report at 145.

249. Brophy, *supra* note 214, at 166.

Alfred L. Brophy, *Assessing State and City Culpability: The Riot and the Law*, *published with* Oklahoma Commission Report at 166.

250. Redfearn v. Am. Cent. Ins. Co., 1926 OK 22, 116 Okla. 137, 243 P. 929, 931.

251. *Id.*

252. Alfred L. Brophy, *The Tulsa Race Riot of 1921 in the Oklahoma Supreme Court*, 54 OKLA. L. REV. 67, 95 (2001). https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1574&context=olr.

a motive to insulate both the insurance company and the city from liability.[253] Following the decision in *Redfearn*, no other insurance case went to trial.[254] The remaining cases were finally summarily dismissed in 1937, 16 years after the massacre.[255]

B. Litigation Following the Commission Report

In *Alexander v. State of Oklahoma*, the plaintiffs' principal claims were for compensatory damages under the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983, and 1985.[256] The plaintiffs alleged that during the massacre and its aftermath, the defendants violated the Fourteenth Amendment by killing, injuring, and detaining Greenwood residents and burning, bombing, and looting their homes, depriving those residents of life, liberty, and property.[257] The plaintiffs also brought claims for equal protection violations, intentional discrimination, deprivation of federal rights under a policy of racial discrimination, and conspiracy.[258] While the history of the massacre demonstrates the merit of these claims, the plaintiffs were unable to clear certain procedural hurdles.[259]

Standing and the statute of limitations represented the most significant barriers to the *Alexander* plaintiffs' claims. Both are important to the nuisance litigation. The plaintiffs in the nuisance litigation will need to overcome time-related defenses. Additionally, the special injury requirement to bring a public nuisance claim under Oklahoma law is at least somewhat analogous to the federal court standing requirement.

In *Alexander*, the City of Tulsa argued that the plaintiffs did not have standing to sue, relying on *In re African-American Slave Descendants Litigation*,[260] where the Seventh Circuit held that descendants of enslaved people lacked standing to pursue claims of unjust enrichment.[261] In that case, descendants sued companies and successor companies that provided

253. *Id.*
254. Brophy, *supra* note 214, at 167. Alfred L. Brophy, *Assessing State and City Culpability: The Riot and the Law, published with* Oklahoma Commission Report at 167.
255. O'Dell, *supra* note 224, at 145.
Larry O'Dell, *Riot Property Loss, published with* Oklahoma Commission Report at 145.
256. Ogletree, *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13, 18 n.25 (2004).
257. *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *2-3.Alexander, No. 03-C-133-E at 1.
258. *Id.* at *4.
259. *See id.*
260. *Id.* at *20.
261. *In re* Afr.-Am. Slave Descendants Litig., 471 F.3d 754, 763 (7th Cir. 2006).

services such as insurance and financing to slaveholders.[262] There, the plaintiffs argued that the companies' profits should be disgorged and distributed to the plaintiffs as the profits were wrongfully earned.[263] The Seventh Circuit characterized the harm to plaintiffs as an argument that, "had there been less slavery," ancestors of the plaintiffs would have had income which they "might have saved rather than spent, and left to their heirs."[264] Under this characterization, the court reasoned that it would be impossible to determine whether the "defendants' conduct harmed the plaintiffs at all, let alone in an amount that could be estimated without the wildest speculation"[265] because doing so would require determining how much financing and insurance services increased slavery and what effect that increase in slavery had on bequests by the plaintiffs' ancestors that could have reached the plaintiffs.[266] Based on this reasoning, the court concluded that the "causal chain is too long and has too many weak links" to meet the traceability requirement for standing.[267]

The court distinguished the Tulsa plaintiffs from the plaintiffs in *In re African-American Slave Descendants* and held that even the descendant plaintiffs had standing to sue.[268] The court found that the descendant plaintiffs' claims were not based on "derivative injury resulting from a wrong done to a population in general," but rather based on "specific injury as a result of being the descendant of a specific victim" with a "direct link to the damages caused" by the massacre.[269]

The statute of limitations had passed on all claims asserted by the plaintiffs in *Alexander*.[270] However, the plaintiffs put forward several theories to avoid a time bar, including arguments that the claims had not accrued until the publication of the Commission Report and that the statute of limitations should be tolled by the court or that the defendants should be estopped from asserting the statute of limitations defense at all.[271]

As the two-year statute of limitations for civil rights claims does not begin to run until the claims accrue, the plaintiffs argued that their civil

262. *Id.* at 757.
263. *Id.* at 759.
264. *Id.*
265. *Id.*
266. *Id.* at 759-60.
267. *Id.*
268. *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *21.
269. *Id.*
270. *Id.* at *21-22.
271. *Id.* at *22.

rights claims had not accrued until the facts that supported the claims became or should have been apparent.[272] Additionally, the plaintiffs argued that the defendants should be estopped from invoking the statute of limitations defense both because the City concealed its role in the massacre and because it had promised to provide restitution.[273] The court determined that the plaintiffs' theories for accrual and equitable estoppel hinged on the plaintiffs' claim "that they did not and could not know of the City's involvement" in the massacre before the Commission Report's publication.[274] The court found that this claim was inconsistent with the allegations in the complaint. The court reasoned that "victims would have observed the City's actions during the Riot," such as "when the white mob, including newly deputized members of the police department and men in military uniform broke through and heavily attacked the church," and so the victims would have been clearly aware of the alleged actions.[275] Additionally, the court stated that the victims must have been aware of Tulsa's role in the massacre before the Commission Report, as some victims had filed lawsuits against the city in the immediate aftermath of the massacre.[276]

"Equitable tolling is appropriate where extraordinary circumstances" have prevented the plaintiffs from asserting their claims.[277] In *Alexander*, the court did determine that the "political and social climate after the riot simply was not one wherein the Plaintiffs had a true opportunity to pursue their legal rights."[278] The court found that extraordinary circumstances existed, including "intimidation, fear of a repeat of the Riot, inequities in the justice system, Klan domination in the courts, and the era of Jim Crow."[279] However, the court did not toll the statute of limitations, finding "no credible allegation" had been put forth that those extraordinary circumstances continued up until the publication of the Commission Report.[280] In this sense, *Alexander* confirms that institutional racism prevented the survivors from seeing justice for their original claims. However, in finding that those circumstances ended before the

272. *Id.* at *24.
273. *Id.* at *23.
274. *Id.* at *25-26.
275. *Id.* at *26-27.
276. *Id.* *19-20.
277. *Id.* at *21.
278. *Id.* at *22.
279. *Id.*
280. *Id.* at *23.

Commission Report, the court still denied justice for the survivors, only this time solely on procedural grounds.

VII. PUBLIC NUISANCE CLAIMS BY THE TULSA SURVIVORS AND DESCENDANTS

Through the public nuisance lawsuit, the three known remaining survivors of the massacre, Lessie Benningfield Randle, Viola Fletcher, and Hughes Van Ellis, have found one more way to seek justice through the courts.[281]

A. The Plaintiffs' Public Nuisance Claim

Oklahoma law defines a nuisance as "unlawfully doing an act, or omitting to perform a duty," which "[a]nnoys, injures or endangers the comfort, repose, health, or safety of others" or "[i]n any way renders other persons insecure in life, or in the use of property."[282] A nuisance is public rather than private when it "affects at the same time an entire community or neighborhood, or any considerable number of persons."[283] The extent of the damage or annoyance inflicted need not be equal for every member of the group.[284]

The plaintiffs' theory asserts that the defendants' actions during the massacre interfered with the Black residents' right to self-determination and "annoyed, injured and endangered the comfort, repose, health, and safety of the members of the Greenwood community, and rendered them insecure in their lives" and use of property.[285] As discussed above, a large white mob, including members of the police, the sheriff's department, and the National Guard, killed, terrorized, and detained Black residents, burned over 1,000 Greenwood homes and businesses, and looted residents' property. The massacre affected an "entire community" and a

281. Samantha Vicent, *Tulsa Race Massacre Survivors Have Day in Court as Judge Weighs Whether Their Case Will Go to Trial*, TULSA WORLD (Oct. 2, 2021), https://tulsaworld.com/news/local/racemassacre/tulsa-race-massacre-survivors-have-day-in-court-as-judge-weighs-whether-their-case-will/article_b1151b14-2204-11ec-afba-ab7b64e3cfbb.html.

282. Okla. Stat. Ann. tit. 50, § 1 (West 2022).

283. *Id.* § 2.

284. *Id.*

285. Petition at 3-4, Randle v. City of Tulsa, No. CV-2020-01179 (Okla. D. Ct. Tulsa Cnty., Sept. 1, 2020).

"considerable number of persons."[286]

Following the massacre, the plaintiffs argue that the defendants exacerbated the damage and, "[f]rom the period immediately after the Massacre until the present day, Defendants actively and unlawfully thwarted the community's efforts to rebuild."[287] This effort began with the internment of thousands of Black residents following the massacre. According to the complaint, "Greenwood residents lived on the sites of the internment camps for over a year in squalid conditions while awaiting reconstruction."[288] During and after the internment, the city commission denied claims for damages by Black residents. The city also attempted to prevent rebuilding through enacting the fireproofing ordinance that was subsequently ruled unconstitutional.[289] The plaintiffs also allege that Tulsa's misrepresentations prevented Greenwood residents from collecting on insurance policies, preventing them from rebuilding without leaving them no choice but to use any savings and capital they had or undertaking exorbitant debt to rebuild.[290] In the decades following the massacre, the plaintiffs allege that the defendants' actions served to continue the nuisance, including the destruction of the community's leadership, the continuation of policies of racial segregation, the failure to enforce housing codes, and the construction of Interstate 244 through the middle of Greenwood.[291] These "years of discrimination" have contributed to racially disparate "outcomes with respect to every single basic human need: jobs, financial security, education, housing, justice, and health."[292]

Under Oklahoma law, as under the Restatement, a private person may maintain an action for a public nuisance if the private person meets the special injury requirement.[293] Here, the path blazed in *Alexander* may

286. Okla. Stat. Ann. tit. 50, § 2 (West 2022).

287. Petition at 4, Randle v. City of Tulsa (No. CV-2020-01179).
Complaint, Benningfield Randle v. City of Tulsa, CV-2020-01179 at 4.

288. *Id.* at 22. *Id.* at 22.

289. Larry O'Dell, *Riot Property Loss*, *in* OKLAHOMA COMMISSION REPORT at 145; Alfred L. Brophy, *Assessing State and City Culpability: The Riot and the Law*, *in* OKLAHOMA COMMISSION REPORT at 168.
Larry O'Dell, *Riot Property Loss*, *published with* Oklahoma Commission Report at 145; Alfred L. Brophy, *Assessing State and City Culpability: The Riot and the Law*, *published with* Oklahoma Commission Report at 168.

290. Petition at 23, Randle v. City of Tulsa (No. CV-2020-01179).
Complaint, Benningfield Randle v. City of Tulsa, CV-2020-01179 at 23.

291. *Id.* at 26-33.

292. *Id.* at 35.

293. Okla. Stat. Ann. tit. 50, § 7 (West 2022).

prove revealing. In *Alexander*, the court agreed with the plaintiffs' argument that the descendant plaintiffs had suffered a "specific injury as a result of being the descendant of a specific victim" with "a direct link to the damages caused" by the massacre.[294] While the court made this determination in a federal jurisdictional standing analysis, the allegations in the current case are the same and the legal standard is at least similar. The plaintiffs allege that each plaintiff has a specific connection to the massacre—either through their own personal experience as a witness and survivor or through its impact on their families.[295]

B. Defendant Motions to Dismiss

On September 28, 2021, more than a hundred years after the massacre, the Tulsa County District Court heard oral arguments on motions to dismiss brought by the City of Tulsa and other defendants.[296] The three survivors, all centenarians, were present in the courtroom.[297] The defendants' motions to dismiss focused on two major defenses: the Oklahoma Governmental Tort Claims Act (GTCA) and the equitable doctrine of laches.[298]

The GTCA applies to claims against the state or political subdivision for money damages under state law.[299] Plaintiffs argue that the GTCA does not apply.[300] There is at least some authority that the GTCA does not apply to claims for equitable relief.[301] Abatement of a nuisance is an equitable

294. *Alexander*, 2004 U.S. Dist. LEXIS 5131, at *21. Alexander, No. 03-C-133-E at 15.

295. Petition at 7-10, Randle v. City of Tulsa No. CV-2020-01179.
Complaint, Benningfield Randle v. City of Tulsa, CV-2020-01179 at 7-10.

296. Brady Halbleib, *Tulsa Race Massacre Survivors Await Judge's Decision*, K.J.R.H. (Sept. 28, 2021, 7:10 AM), https://www.kjrh.com/news/local-news/reparations-hearing-for-tulsa-race-massacre-survivors-set-for-tuesday-morning.

297. *Id.*

298. *See, e.g.*, Defendants City of Tulsa and TMAC's Reply to Plaintiffs' Combined Opposition to the Motions to Dismiss at 1, Randle v. City of Tulsa, No. CV-2020-01179 (Okla. D. Ct. of Tulsa Cnty.Aug. 26, 2021). *See, e.g.*, Defendants City of Tulsa and TMAPC's Reply to Plaintifffs' Combined Opposition.

299. Okla. Stat. Ann. tit. 51, § 153(A) (West 2022).

300. Plaintiffs' Combined Opposition to the Motions of Defendants City of Tulsa and TMPAC to Dismiss Plaintiffs' First Amended Petition at 18-19, Randle v. City of Tulsa, No. CV-2020-01179 (Okla. D. Ct. Tulsa Cnty. June 1, 2021).
Plaintiffs' Combined Opposition to the Motions of Defendants City of Tulsa and TMAPC to Dismiss Plaintiffs' First Amended Petition, Benningfield Randle v. City of Tulsa, CV-2020-01179.

301. Plaintiffs' Combined Opposition to the Motions of Defendants City of Tulsa and

remedy.[302] The defendants argue that "simply labeling a claim as 'equitable relief' is not enough to overcome governmental immunity," and that if the claim would require payment from the treasury for a "past breach of a legal duty," immunity under GTCA applies.[303] However, the defendants misstate the distinction between retrospective and prospective relief. Like retrospective damages, prospective relief such as abatement may well stem from past conduct. In fact, in order to show that any defendants caused a public nuisance, the plaintiff often needs to show a "past breach of a legal duty."[304] As the plaintiffs argue, abatement is a form of injunctive relief designed to eradicate ongoing harms, "*not* to compensate . . . for previously-inflicted harms."[305]

The defendants' second defense is based on the doctrine of laches, which would be an equitable time bar to the plaintiffs' claims.[306] However, Oklahoma law is clear that "[n]o lapse of time can legalize a public nuisance."[307] While this does not suspend the statute of limitations on claims for damages, an action may be brought for abatement so long as the nuisance exists.[308] In the 1911 decision *Revard v. Hunt*, the Oklahoma

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TMPAC to Dismiss Plaintiffs' First Amended Petition at 19, Randle v. City of Tulsa, No. CV-2020-01179 (Okla. D. Ct. of Tulsa Cnty. June 1, 2021).; Sholer v. State *ex rel.* Dep't of Pub. Safety, 945 P.2d 469, 472-73 (Okla. 1995); *see also*

Abab, Inc. v. City of Midwest City, No. CIV-20-0134-HE, 2020 WL 9073568 (W.D. Okla. Sept. 1, 2020).

See, e.g., Sholer v. State ex rel. Dep't of Pub. Safety, 945 P.2d 469, 472-73; Abab, Inc. v. City of Midwest City, 2020 WL 9073568 (W.D. Okla. Sep. 1, 2020).

302. *See* Jackson v. Williams, 714 P.2d 1017, 1020 (Okla. 1985); *See also* Judgment After Non-Jury Trial at 30, Oklahoma v. Purdue Pharm. L.P., No. CJ-2017-816, 2017 WL 8234419 (Okla. D. Ct. Cleveland Cnty. Jun. 30, 2017). Jackson v. Williams, 714 P.2d 1017, 1020 (Ok. 1985?); State of Oklahoma v. Purdue.

303. Defendants City of Tulsa and TMAPC's Reply to Plaintiffs' Combined Opposition to the Motions to Dismiss at 3, Randle v. City of Tulsa, No. CV-2020-01179 (Okla. D. Ct. Tulsa Cnty. Aug. 26, 2021).

304. *See* RESTATEMENT (SECOND) OF TORTS §§ 821B, 824 (AM. L. INST. 1979).

305. Plaintiffs' Combined Opposition to the Motions of Defendants City of Tulsa and TMPAC to Dismiss Plaintiffs' First Amended Petition at 20, Randle v. City of Tulsa, No. CV-2020-01179 (Okla. D. Ct. Tulsa Cnty. June 1, 2021).

306. Defendants City of Tulsa and TMAPC's Reply to Plaintiffs' Combined Opposition to the Motions to Dismiss at 9, Randle v. City of Tulsa, No. CV-2020-01179 (Okla. D. Ct. Cnty. Tulsa Aug. 26, 2021).

See, e.g., Defendants City of Tulsa and TMAPC's Reply to Plaintifffs' Combined Opposition to the Motions to Dismiss, Benningfield Randle v. City of Tulsa, CV-2020-01179, (D. Ct. of Tulsa Cty. Ok. Aug. 26, 2021).

307. Okla. Stat. Ann. tit. 50, § 7 (West 2022).

308. *See, e.g.*, Branch v. Mobil Oil Corp., 788 F. Supp. 531, 536 (W.D. Okla. 1991);

Supreme Court found that it was "not open to question" that these abatement actions could not be blocked by laches or statutes of limitations because the private litigant "assert[s] the right[s] of the state or the public."[309]

C. The Impact of the Oklahoma Supreme Court's Decision in *Johnson & Johnson*

In briefing, both sides cited to the district court decision in *State of Oklahoma v. Purdue Pharma*.[310] However, on November 9, 2021, a little over a month after the court heard oral arguments on the motions to dismiss, the Oklahoma Supreme Court overturned that ruling in *Johnson & Johnson*.[311] As a result, while the survivors' strategy had been to wind their claim tightly around the state's opioid case, now they need to distinguish the unlawful conduct that led to the massacre from the conduct that caused the opioid epidemic. The plaintiffs filed a motion seeking a briefing schedule and an additional hearing on the impact of the *Johnson & Johnson* decision.[312]

The reasoning in the *Johnson & Johnson* decision should leave the survivors some room for hope. The Court found that "for the past 100 years," Oklahoma public nuisance liability has been limited to "defendants (1) committing crimes constituting a nuisance, or (2) causing physical injury to property or participating in an offensive activity that rendered the property uninhabitable."[313] The Tulsa defendants' conduct during the massacre fits both categories. Furthermore, while the defendants may no longer be engaging in criminal acts, the plaintiffs allege that the criminal acts during the massacre created a "condition that is of itself harmful after the activity that created it has ceased."[314] Under the Restatement view, which the Oklahoma Supreme Court cites favorably in *Johnson & Johnson*, if the defendants' conduct created a harmful condition, the harm

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Revard v. Hunt, 1911 OK 425, 119 P. 589, 589.

309. Hunt, 1911 OK 425, 119 P. at 592-93.

310. Notice of Supplemental Authority, Randle v. City of Tulsa, No. CV-2020-01179 (Okla. D. Ct. Tulsa Cnty. Sept. 1, 2020).

311. Oklahoma v. Johnson & Johnson, 2021 OK 54 ¶ 18, 499 P.3d 719, 724 (Nov. 9, 2021).

312. Notice of Supplemental Authority at 2-3, Randle v. City of Tulsa, No. CV-2020-01179 (Okla. D. Ct. Tulsa Cnty. Nov. 10, 2021).

313. Johnson & Johnson, 2021 OK 54, ¶ 18, 499 P.3d at 724.

314. Restatement (Second) of Torts § 834, cmt. e (Am. L. Inst. 1979).

is traceable so long as the condition continues.[315]

Additionally, while the *Johnson & Johnson* Court hesitated to extend public nuisance to cover the manufacturers' conduct as doing so would supplant product liability doctrine,[316] there is no equivalent developed body of law that covers the plaintiffs' reparations claims.

Finally, the Oklahoma Supreme Court found that the state failed to show a violation of a public right, defining "public right [as] more than an aggregate of private rights by a large number of injured people."[317] However, in doing so, the Court leaves room for the Tulsa survivors' claims. The Court categorizes the typical interferences with a public right as often "property-related conditions" that "have no beneficial use and only cause annoyance, injury, or endangerment."[318] There is no argument that a violent, state-sanctioned massacre that has caused ongoing racial inequity and a blight on an entire community serves a beneficial purpose. Certainly, such a condition causes injury, endangerment, and annoyance.

VIII. CONCLUSION

The survivors of the Tulsa Race Massacre have been awaiting justice for over one hundred years. When *Alexander v. Oklahoma* was filed, the known survivors numbered over one hundred and twenty. Just three are still alive.[319] The public nuisance strategy could finally achieve some measure of justice in a situation in which the courts have rejected all other attempts. Abatement will not correct or compensate for the sins of the past, but it at least may allow us to eradicate ongoing harms and begin to move forward.

315. *Id.*
316. Johnson & Johnson, 2021 OK 54, ¶24, 499 P.3d at 726.
317. *Id.*
318. *Id.* at ¶ 25, 727.
319. Since this Article was written, an order from the Tulsa County District Court narrowed the case to include only the three surviving plaintiffs, Order on Defendant's Motion to Dismiss, Randle v. City of Tulsa, No. CV-2020-01179, (Okla. Dist. Ct. Tulsa Cnty. Aug. 3, 2022).