CO_2, Four, Six, Eight, How Do We Abate? Climate Change and Public Nuisance Law

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Abstract

This Article spotlights a recent 9th Circuit case, *City of Oakland v. BP PLC*, which exemplifies a new strategy in climate litigation where public entity plaintiffs seek to avoid federal jurisdiction by limiting the claim solely to a state-law public nuisance action. However, because the remedy in a public nuisance action is limited to abatement, this Article explains why, as pleaded, plaintiffs in that case and similar cases are unlikely to succeed. Part I provides a brief background on nuisance law, emphasizing the differences between private and public nuisance actions. Notably, when a public entity plaintiff seeks damages rather than abatement of the public nuisance, the suit is dismissed by the court. Part II explores several public nuisance cases within the context of lead paint litigation and the opioid epidemic to demonstrate how courts distinguish between an abatement remedy and a damages award. Finally, Part III applies the public nuisance abatement rule to *City of Oakland* and explains why plaintiffs should amend the complaint to seek funding for carbon sequestration rather than rising sea-level mitigation infrastructure.

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David Rose[1]

I. INTRODUCTION

Climate change poses an existential threat to our planet.[2] In order to protect profits, for decades, oil manufacturers misled the public about the harmful effects of CO2 emissions by launching disinformation campaigns. The lack of action from the federal government to address the problem has prompted cities, counties, and states to seek solutions through the judicial process. In the last five years, the number of lawsuits brought by public entity plaintiffs against oil manufacturers has increased significantly.[3] Many of these claims are state statutory and state

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[2] *City of Oakland v. BP PLC*, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018), *vacated and remanded on other grounds sub nom. City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020), *opinion amended and superseded on denial of reh'g,* 969 F.3d 895 (9th Cir. 2020) ("This order fully accepts the vast scientific consensus that the combustion of fossil fuels has materially increased atmospheric carbon dioxide levels, which in turn has increased the median temperature of the planet and accelerated sea level rise.").

[3] Subodh Mishra, *The Rise of Climate Litigation*, Institutional Shareholder Services, Inc. (March 3, 2022), https://corpgov.law.harvard.edu/2022/03/03/the-rise-of-climate-litigation/#comment-1216524.

common law public nuisance claims. Jurisdictional and procedural hurdles have kept these climate actions from reaching the merits of claim. Accordingly, the courts have not yet thoroughly considered the proper remedy for a public entity plaintiff in a climate case arising out of a public nuisance action.

First, this paper provides some background on nuisance law, emphasizing the differences between private and public nuisance actions. Next, several public nuisance cases are explored within the context of lead paint litigation and the opioid epidemic. Cases within both of these contexts demonstrate the rule that in a public nuisance action brought by a public entity plaintiff, the remedy must abate the nuisance. This section also serves to explain how courts distinguish between damages and the equitable remedy of abatement. When the public entity plaintiff improperly seeks damages rather than abatement, its claim is dismissed. Last, the abatement rule is applied to a public nuisance action against Big Oil that was recently remanded to state court. As pleaded, the public entity plaintiffs' action is doomed to fail. Because the remedy must abate the nuisance, Plaintiffs in that case should amend their complaint to seek funding for carbon sequestration, rather than damages to build a sea wall.

II. BACKGROUND ON NUISANCE LAW

Nuisance law dates back to at least the twelfth century. [4] A thorough examination of the history and confusion of nuisance law is outside the scope of this paper but writing on the subject

[4] RESTATEMENT (SECOND) OF TORTS § 821D (1979) ("The action for private nuisance originated in the assize of nuisance, which dates back to as early as the twelfth century. This action was complementary to the assize of novel disseisin. While the assize of novel disseisin was an action for redressing interferences with the seisin of land, the assize of nuisance provided redress when the injury was not a disseisin, as when there was no entry on the plaintiff's land, but was an indirect damage to the land or an interference with its use and enjoyment. The assize of novel disseisin was directed to secure an undisturbed possession; the assize of nuisance to secure its free enjoyment. This assize of nuisance also extended to interferences with easements and profits. Early in the fifteenth century, the assize of nuisance was replaced by an action on the case for nuisance that became the sole common law remedy. This

easily fills the shelves (and servers) of law libraries.[5] Here, the focus is on understanding why abatement, rather than damages, is the proper remedy in a public nuisance claim brought by a public entity plaintiff. That said, to better appreciate the limited remedy in a public nuisance action, a brief explanation of private nuisance law is helpful by distinguishment.

A. Private Nuisance

Private nuisance and public nuisance "have almost nothing in common."[6] The Restatement (Second) of Torts defines a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[7] Private uses are limited to "a use of land that a person is privileged to make as an individual, and not as a member of the public."[8] In other words, a "private nuisance is a civil wrong, based on a disturbance of private rights in land."[9] To maintain an action for private nuisance, the plaintiff must have a property interest in the land affected.[10] Notably, the term "property rights and privileges" does not include public rights such as travel on public highways.[11] Examples of private nuisances that invade another's interest in their private use and enjoyment of land include property damage,[12] annoyance,[13]

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action on the case lay only for damages and not for abatement as did the older remedy, thus making it necessary for the successful plaintiff to resort to equity if he wished to secure abatement by judicial process.").

[5] s*ee* Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 89 (1998); *see also* Robert Abrams Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359 (1990).

[6] WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS §86 (5th ed. 1984).

[7] RESTATEMENT (SECOND) OF TORTS § 821D (1979).

[8] *Id.* at cmt. c.

[9] PROSSER & KEETON, *supra* note 5.

[10] More specifically, those who may recover in a private nuisance include, "(a) possessors of the land, (b) owners of easements and profits in the land, and (c) owners of nonpossessory estates in the land that are detrimentally affected by interferences with its use and enjoyment." RESTATEMENT (SECOND) OF TORTS § 821E (1979).

[11] *Id.* at cmt. a.

[12] *United Verde Extension Mining Co. v. Ralston*, 37 Ariz. 554 (1931) (destruction of crops); *Heeg v. Licht*, 80 N.Y. 579 (1880) (building damaged by explosion); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 226 (1970) (excessive cement dust).

[13] *Sierra Screw Prods. v. Azusa Greens Inc.*, 88 Cal.App.3d 358 (1979) (golf balls from golf courses); *Macca v. General Tel. of Nw., Inc.*, 262 Or. 414 (1972) (negligent listing of plaintiff's telephone number as after-hours number for florist).

disturbance of peace of mind,[14] and interference with health.[15] Private nuisances often diminish the plaintiff's property value.

Commonly referred to as "the balancing test," a private nuisance exists where the harm caused by the defendant's conduct is substantial, and the gravity of harm outweighs the utility of the defendant's conduct.[16] Traditionally, "where a [private] nuisance has been found and where there has been any substantial damage shown by the party complaining[,] an injunction… [would] be granted."[17] That is, traditionally, under private nuisance, the remedy "lies in the hands of the individual whose rights have been disturbed."[18] The necessary exception under the traditional rule arose when the private nuisance was permanent and un-abatable in character.[19] In those circumstances, instead of an injunction, permanent damages including past and future harm would be awarded. [20]

However, the landmark case of *Boomer* added a second layer of balancing to determine the proper remedy in a private nuisance action.[21] Post *Boomer*, after finding a private nuisance, the court then weighs the cost of abatement relative to the cost of compensating the plaintiff for the harm. [22] This gives courts broader discretion to award damages, instead of ordering an injunction, despite the abatable character of the private nuisance causing substantial harm.[23] When the cost of abatement outweighs the recoverable cost of the harm, courts have discretion to

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[14] *Hilliard v. Shuff*, 260 La. 384 (1971), *appeal after remand*, 280 So.2d 845 (La.App.1973) (fire hazard from storage tank).
[15] *Yaffe v. Fort Smith*, 178 Ark. 406 (1928) (burning of rubber creating toxic fumes).
[16] RESTATEMENT (SECOND) OF TORTS § 826 (1979).
[17] *Boomer*, 26 N.Y.2d at 223.
[18] PROSSER & KEETON, *supra* note 5.
[19] *Boomer*, 26 N.Y.2d at 226.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*

deny injunctive relief.[24] In such cases, the proper remedy is permanent damages that include past and future harm.[25]

Notably, the rule in *Boomer*, articulating a stricter approach in granting injunctive relief, applies only in the context of a private nuisance claim. The *Boomer* court explained:

> The nuisance complained of by these plaintiffs may have other public or private consequences, but these particular parties are the only ones who have sought remedies and the judgment proposed will fully redress them. The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court.[26]

Thus, denying injunctive relief in a private nuisance action has no bearing on determining the proper relief in a public nuisance action. In other words, the second layer of balancing—determining the proper relief in a private nuisance—action does not apply in a public nuisance analysis. As discussed below, when a court finds that a public nuisance exists, the remedy that necessarily follows has nothing to do with the approach taken by the court in *Boomer*. Rather, the proper remedy in a public nuisance action brought by a public entity plaintiff is abatement.[27]

B. Public Nuisance

A public nuisance is "an unreasonable interference with a right common to the general public," such as the right to health and safety.[28] Other examples of rights common to the general public include the use of public highways, parks, rivers, and lakes. [29] Whether an interference with a public right is unreasonable depends on the facts and circumstances including; (1) the

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[24] *Id.*
[25] *Id.* at 225.
[26] *Id.* at 226.
[27] *See In re Lead Paint Litig.*, 191 N.J. 405, 434 (2007); *citing* RESTATEMENT (SECOND) OF TORTS, § 821C(2) cmt. a (1979).
[28] RESTATEMENT (SECOND) OF TORTS § 821B (1979).
[29] RESTATEMENT (SECOND) OF TORTS § 821D cmt. c (1979).

significance of the interference; (2) whether the conduct is proscribed by law; (3) the continuing or permanent nature of the conduct; and (4) the actor's actual or constructive knowledge of their interference with a public right.[30] Unlike the remediation of private property rights, justice is not served by allowing an offending party to purchase the right to harm the public at large in perpetuity.[31] Thus, in the context of a public nuisance claim brought on behalf of the public, damages fail to provide meaningful relief.

i. The Sovereign's Police Powers and Public Nuisance

Historically, a public nuisance was "a species of catch-all criminal offense, consisting of an interference with the rights of the community at large."[32] This historical underpinning underscores the fact that the "[a]uthority for an action in public nuisance derived from what is now known as the sovereign's police power and not from tort law."[33] While balancing the reasonableness of the harm with the utility of the conduct may be regarded as equitable in a private nuisance dispute, the sovereign's police powers, in contrast, give rise to a special responsibility to protect the public from harm. [34] Unlike abatement, which requires measures to prevent future harm, damages are merely compensatory. As such, they fall short of protecting the public.[35] In the words of Justice Holmes, the State "is not lightly to be required to give up quasi-

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[30] RESTATEMENT (SECOND) OF TORTS § 821B (1979).
[31] WASHINGTON, *supra* note 4, at 380; *see also State v. Waterloo Stock Car Raceway*, 409 N.Y.S.2d 40, 45 (Sup. Ct. 1978) (injunction is proper because "[t]he injury to the public is serious and permanent and no adequate remedy exists at law").
[32] PROSSER & KEETON, *supra* note 5; *see also* RESTATEMENT (SECOND) OF TORTS, § 821B (1979) cmt. a ("In its inception a public, or common, nuisance was an infringement of the rights of the Crown. The earliest cases appear to have involved purprestures, which were encroachments upon the royal domain or the public highway and could be redressed by a suit brought by the King.").
[33] WASHINGTON, *supra* note 4, at 362.
[34] *Id.* at 378.
[35] *See* Louise A. Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 ENVTL. L. REP. News & Analysis 10292, 10295 (1986) ("That which interferes with the rights of all must be abated when the public, through its appropriate representative, seeks its abatement.").

sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped."[36] Because the state's right to bring a public nuisance action, civil or criminal, derives from its police powers, the proper remedy is to stop the continued invasion of a public right by abating the cause of the harm.

More than a century ago, the Supreme Court held that the state's police power "include[s] everything essential to the public safety, health and morals and justif[ies] …abatement of whatever may be regarded as a public nuisance."[37] The state, as a sovereign with police power, has a duty to protect the public by holding the liable party accountable for payment of the costs of abating the nuisance.[38]

ii. Public Nuisance Statutes

When the state codifies a public nuisance cause of action by a broad general statute, the common law rules are generally still applicable in determining whether the defendant's conduct amounts to an unreasonable interference with a right common to the general public.[39] Alternatively, specific conduct amounting to a public nuisance may be proscribed by statute.[40] For example, the Minneapolis Supreme Court upheld the conviction of a municipal corporation for creating a public nuisance by emitting obnoxious odors into the atmosphere.[41] By default,

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[36] *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).
[37] HALPER, *supra* note 34, at 10296; *citing Lawton v. Steele*, 152 U.S. 133, 136 (1894).
[38] *Id.* at 10293 ("The state, in the exercise of the police power and as 'guardian of the environment,' may act in the public interest and place liability for costs of abatement upon the party responsible for the nuisance."; *quoting State of N.Y. v. Shore Realty*, 759 F.2d 1033, 1051 (1984) (footnote removed).
[39] RESTATEMENT (SECOND) OF TORTS § 821B (1979).
[40] *Id.*
[41] *State v. Lloyd A. Fry Roofing Co.*, 310 Minn. 535, 535 (1976) (affirming conviction based on Minneapolis Code of Ordinance § 180.015 which provided in pertinent part, "[n]o person shall cause, suffer or allow to be emitted into the open air any foreign materials such as rusts, gases, fumes, vapors, smokes and odors in quantities which, by reason of their objectionable properties, shall be considered a nuisance because they do one or more of the following: 2. Create an obnoxious odor in the atmosphere.") (internal quotation marks and citation omitted).

public entity plaintiffs may "maintain a proceeding to enjoin to abate a public nuisance."[42] However, neither private party plaintiffs nor public entity plaintiffs may recover for damages unless they have suffered special injury.[43] That is, damages in a public nuisance claim are recoverable only if the plaintiff can show that they have "suffered harm of a different kind from that suffered by other persons exercising the same public right."[44] Thus, suffering "the same kind of harm or interference but to a greater extent or degree" [45] is insufficient to bring a claim for damages. Jurisdictions vary in determining what constitutes a special injury when the plaintiff is a public entity.[46]

Some states outright prohibit by statute a public entity plaintiff from seeking damages in a public nuisance action.[47] Accordingly, regardless of a showing of special injury, the available remedy is limited to abatement or injunction. [48] However, prospective funding for the creation of

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[42] RESTATEMENT (SECOND) OF TORTS § 821C (1979).

[43] *Id.*; s*ee New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1241 (D.N.M. 2004) ("Absent proof of some discrete "special injury" to the State's interest apart from the injury to the public's interest in unappropriated groundwater, Plaintiffs may be limited to equitable relief seeking the abatement of the claimed nuisance.").

[44] RESTATEMENT (SECOND) OF TORTS, § 821C cmt. d (1979); *see Hopi Tribe v. Arizona Snowbowl Resort Limited Partnership*, 430 P.3d 362, 371 (2018). (As an element of a public nuisance action, "special injury" describes "harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.") (citation omitted).

[45] RESTATEMENT (SECOND) OF TORTS, § 821C cmt. d (1979); *see Louisiana v. Rowan Companies Inc.*, 728 F. Supp. 2d 896, 905 (S.D. Tex. 2010) ("In order to reach the particular damages threshold of a common-law public nuisance claim, the State must establish that its territory or citizens suffered significant harm different in kind from the general public.") (internal quotation marks omitted).

[46] *Compare Town of E. Troy v. Soo Line R. Co.*, 653 F.2d 1123, 1127 (7th Cir. 1980) ("The expenses incurred by a town in assisting its residents affected by the public nuisance are an injury peculiar to the town and are therefore sufficient to support a public nuisance claim for damages brought by a public entity plaintiff") (*internal quotations omitted*), *with New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1241 n.121 (D.N.M. 2004) ("The State, as a public entity plaintiff, cannot satisfy the special injury requirement by pleading special injuries resulting in losses to private parties.").

[47] RESTATEMENT (SECOND) OF TORTS § 821B (1979); *People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499, 560 (Cal. App. 6th Dist. 2017) (The California Code of Civil Procedure § 731 does not permit the government to seek damages in a public nuisance action.); *see In re Lead Paint Litig.*, 191 N.J. at 436 ("[S]eek[ing] damages rather than remedies of abatement …fall[s] outside the scope of remedies available to a public entity plaintiff."); *see also People ex rel. Van de Kamp v. American Art Enterprises, Inc.*, 33 Cal.3d 328, 333, n.11 (1983) ("[A]lthough California's general nuisance statute expressly permits the recovery of damages in a public nuisance action brought by a specially injured party, it does not grant a damage remedy in actions brought on behalf of the People to abate a public nuisance.").

[48] RESTATEMENT (SECOND) OF TORTS § 821B (1979); *ConAgra*, 227 Cal. Rptr. 3d at 560 (The California Code of Civil Procedure § 731 does not permit the government to seek damages in a public nuisance action.); *In re Lead*

an abatement fund may be characterized as a form of abatement, rather than as damages.[49] Indeed, an abatement fund utilized to prospectively fund the remediation of the public nuisance is "not a thinly-disguised damages award."[50] This is important because it means that in the context of Climate Litigation, a public entity plaintiff seeking to abate the public nuisance of rising sea levels, for example, may demand payment from the defendant for the costs of sequestering atmospheric carbon dioxide.

III. RECENT PUBLIC NUISANCE ACTIONS

This section examines recent court rulings in public nuisance actions brought by public entity plaintiffs. The reasoning used by courts to explain that abatement is the only proper remedy is applicable in the context of Climate Litigation because it shows that seeking funding for climate adaptation (like building a sea-wall) is outside the scope of the available remedy in a public nuisance action because it amounts to a damages award.

A. Lead Paint Litigation

Over the last fifteen years, government plaintiffs in several states have brought public nuisance actions against lead paint manufacturers.[51] While the outcomes of these actions have been mixed, across jurisdictions the courts have consistently held that the proper remedy in a public nuisance action brought by a government plaintiff is limited to the abatement of the nuisance.[52] The core facts of public nuisance actions in the context of lead paint litigation and in

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Paint Litig., 191 N.J. at 436 ("[S]eek[ing] damages rather than remedies of abatement …fall[s] outside the scope of remedies available to a public entity plaintiff.").

[49] *ConAgra*, 227 Cal. Rptr. 3d at 569 (An abatement fund utilized to prospectively fund the remediation of the public nuisance is "not a "thinly-disguised" damages award.").

[50] *Id.* (internal quotations omitted).

[51] *In re Lead Paint Litig.*, 191 N.J. 405 (2007); *State v. Lead Indus. Ass'n.*, 951 A.2d 428, 453-54 (R.I. 2008); *ConAgra*, 227 Cal. Rptr. 3d 17 Cal. App. 5th 51 (2017).

[52] *In re Lead Paint Litig.*, 191 N.J. 405, 435 (2007) (Damages "fall outside the scope of remedies available to a public entity plaintiff" in a public nuisance action); *ConAgra*, 227 Cal. Rptr. 3d at 569 ("[T]he trial court could

the context of climate cases "are strikingly analogous: both …involve a widespread threat, government plaintiffs, and an abatement remedy."[53] Furthermore, both the fossil fuel industry and the lead paint industry promoted products that they knew to be harmful while at the same time suppressing and undermining the growing evidence of the dangers of their products.[54] And in both cases, the appropriate remedy involves the removal of the cause of the nuisance. That is, removal of the lead paint and removal of the excess carbon dioxide in the atmosphere.

i. Removing Lead Paint Abates the Nuisance

In *People v. ConAgra*, the California Court of Appeals upheld the lower court's ruling that the likely future harm to children exposed to interior lead paint in their dwellings constituted a public nuisance.[55] The trial court created an abatement plan and ordered the defendants, lead paint manufacturers, "to deposit funds… which would be utilized to prospectively fund remediation of the public nuisance."[56] Importantly, "[n]one of these funds were permitted to be utilized" [57] to reimburse already-incurred costs. For example, the funds could not be used to pay for the medical treatment of children who had been harmed by the presence of interior lead paint.[58] Instead, the abatement plan narrowly addressed the *cause* of potential *future* harm to children.[59]

More specifically, the court ordered the State to use the funds to identify and remediate the presence of interior lead paint in homes where children may reside by physically removing or

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properly order abatement as a remedy in this case."); *Lead Indus. Ass'n*, 951 A.2d at 445 ("[T]he [Rhode Island] state Attorney General is empowered to bring actions to abate public nuisances.").
[53] Nick Eberhart, *State Climate Suits: The Case for A Limited Remedy*, 48 Ecol. L.Q. 311, 344 (2021).
[54] *Id.*
[55] *People v. Atlantic Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at *51 (Cal.Super. Mar. 26, 2014).
[56] *Id.* at *56-57; *ConAgra*, 227 Cal. Rptr. 3d at 569.
[57] *ConAgra*, 227 Cal. Rptr. 3d at 569.
[58] *Id.*
[59] *Atlantic Richfield Co.*, 2014 WL 1385823, at *56-57.

suppressing potential exposure to lead paint by other means.[60] The court stressed that any funds not used "for that sole purpose by the end of the four-year abatement period were to be returned to defendants."[61] Therefore, "[t]he abatement fund was not a thinly-disguised damages award."[62] Furthermore, because the production, promotion, and distribution of interior lead paint had long since ceased, the remedy did "not result in an injunction that prevented the defendants from continuing their current business operations."[63]

The court observed the fundamental differences between funding for an abatement plan from a damages award:

> The distinction between an abatement order and a damages award is stark. An abatement order is an equitable remedy, while damages are a legal remedy. An equitable remedy's sole purpose is to eliminate the hazard that is causing prospective harm to the plaintiff. An equitable remedy provides no compensation to a plaintiff for prior harm. Damages, on the other hand, are directed at compensating the plaintiff for prior accrued harm that has resulted from the defendant's wrongful conduct.[64]

In short, abatement prevents future harm, damages compensate past harm.[65] The court held that an abatement order was the proper remedy because "the hazard created by defendants was continuing to cause harm to children, and that harm could be prevented only by removing the" lead paint.[66] Similarly, in a public nuisance climate case, plaintiffs

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[60] *Id.*
[61] *ConAgra*, 227 Cal. Rptr. 3d at 569.
[62] *Id.* (internal quotations removed).
[63] *Cty. of Santa Clara v. Superior Ct.*, 235 P.3d 21, 34 (2010).
[64] *ConAgra*, 227 Cal. Rptr. 3d at 569.
[65] *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 872 (1985) ("Where some means of abatement exists, there is little or no incentive to make remedial efforts once the nuisance is classified as permanent. Such a result is at odds with tort law's philosophy of encouraging innovation and repair to decrease future harm."); *see also* FOWLER V. HARPER AND FLEMING JAMES, JR., THE LAW OF TORTS Volume 1 91-92 (1956) ("If the defendant fails to abate the nuisance, its continuance constitutes a new nuisance and gives rise to another action for damages, as where the defendant repeatedly floods the plaintiff's lands. …The right to successive actions, it will be observed, serves the double purpose of compensating the plaintiff and inducing the defendant to abate the nuisance.").
[66] *ConAgra*, 227 Cal. Rptr. 3d at 569.

should seek the abatement of the cause of climate change, not the funding for adaptation measures. In declaring that an abatement order was the proper remedy in *ConAgra*, the court explained that the nature of the harm generally determines the remedy available to the plaintiff. [67] That is, "continuing nuisances are subject to abatement, and permanent nuisances are subject to actions for damages."[68]

However, the court's explanation relied on *Baker*, a private nuisance claim brought by private plaintiffs.[69] The court's reliance on *Baker* is confusing given its own acknowledgement that "public and private nuisance actions are distinct;"[70] a public nuisance "is an interference with the rights of the community at large"[71] whereas a "private nuisance is a civil wrong based on disturbance of rights in land."[72] In granting an abatement order to fund the removal of the lead paint, the court ultimately reached the right result. However, because public nuisance "is an entirely different concept from that of a private nuisance"[73] the court's reliance on *Baker* was inapposite. By relying on the private nuisance action in *Baker* to explain that abatement was the proper remedy in the public nuisance action under review, the court furthered the muddling of nuisance doctrine.[74] Nonetheless, the plaintiffs sought abatement, which is the available remedy prescribed by California statute for a public entity in a public nuisance action.[75] The court noted that the California Code of Civil Procedure permits public entity plaintiffs to bring an action to

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[67] *Id.*
[68] *Id.*; *citing Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 870 (1985).
[69] *ConAgra*, 227 Cal. Rptr. 3d at 514; *see also Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d at 867.
[70] *ConAgra*, 227 Cal. Rptr. 3d at 560.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 643.
[74] PROSSER & KEETON, *supra* note 5, at 616 ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance."").
[75] Cal. Civ. Proc. Code Ann. § 731 (West) ("A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as defined in Section 3480 of the Civil Code, by the district attorney or county counsel of any county in which the nuisance exists, or by the city attorney of any town or city in which the nuisance exists.").

abate a public nuisance, "but it does not allow the government to seek damages."[76] Thus, damages are not an available remedy in a public nuisance action brought by the government on behalf of the people.[77] Because the plaintiffs "did not seek to recover for any prior accrued harm nor . . . seek compensation of any kind", the court rejected the defendant's characterization of the abatement fund as a damages award.[78]

ii. Medical Treatment for Lead Exposure Does Not Abate the Nuisance

Plaintiffs in a public nuisance action must carefully draft their complaint so that the remedy sought is clearly distinct from a damages award. Failure to do so can prove fatal for the plaintiff. For example, similar to the plaintiffs in *ConAgra*, the public entity plaintiffs in *In re Lead Paint Litig.* brought a public nuisance action against lead paint manufacturers and sought funding for the abatement of the nuisance.[79] However, unlike the abatement plan in *ConAgra*, the plaintiffs' complaint in *In re Lead Paint Litig.* sought funding to provide medical care for lead-poisoned residents. [80] As such, the court characterized the remedy as compensatory damages, rather than abatement, and the motion to dismiss was upheld by the state supreme court.[81] The court explained that unless public entity plaintiffs are expressly permitted by statute, "damages cannot be sustained under traditional concepts of public nuisance under the common law."[82]

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[76] *ConAgra*, 227 Cal. Rptr. 3d at 560; Cal. Civ. Proc. Code Ann. § 731 (West) ("A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as defined in Section 3480 of the Civil Code, by the district attorney or county counsel of any county in which the nuisance exists, or by the city attorney of any town or city in which the nuisance exists.").
[77] *ConAgra*, 227 Cal. Rptr. 3d at 560.
[78] *Id.* at 569.
[79] *In re Lead Paint*, MID-L-2754-01, 2002 WL 31474528, at *1 (N.J. Super. L. Div. Nov. 4, 2002), *aff'd in part, rev'd in part sub nom. In re Lead Paint Litig.*, A-1946-02T3, 2005 WL 1994172 (N.J. Super. App. Div. Aug. 17, 2005), *rev'd*, 924 A.2d 484 (N.J. 2007).
[80] *In re Lead Paint Litig.*, 924 A.2d at 486-87.
[81] *Id.* at 502.
[82] *Id.* at 503 n.9.

While abatement may include prospective funding for the costs associated with abatement,[83] here, the relief sought was "outside the scope of remedies available to a public entity plaintiff" in a public nuisance action.[84] *In re Lead Paint Litig.* further supports the rule that abatement must be preventative, rather than remedial, and must address the cause rather than the harmful effects of the nuisance. Therefore, plaintiffs in a public nuisance climate action must limit the scope of their sought relief to the abatement of the the cause of climate change, not merely adapting to the effects.

B. Opioids Litigation

In the context of litigation arising out of the national opioid epidemic, we find further support of the rule that the proper remedy in a public nuisance action brought by a public entity plaintiff is the abatement of the nuisance, not damages.

In *Oklahoma v. Purdue Pharma*, the lower court held opioid manufacturer Johnson and Johnson liable under the state's public nuisance statute for conducting marketing campaigns about prescription opioids that were false, misleading, and dangerous.[85] The court ordered Johnson and Johnson to pay over 465 million dollars to the state. [86] The money funded "one year of the state's Abatement Plan, which consisted of the court appropriating money to 21 government programs for services to combat opioid abuse."[87] However, the court's ruling was reversed on appeal by the Oklahoma Supreme Court.[88]

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[83] *Id.* at 498.
[84] *Id.* at 502.
[85] *State of Oklahoma v. Purdue Pharma L.P.*, 2019 WL 9241510, at *12 (Okl.Dist., Cleveland County Nov. 15, 2019), *rev'd sub nom.*, *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021).
[86] *Id.* at *21.
[87] *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 722 (Okla. 2021).
[88] *Id.* at 731.

The Oklahoma Supreme Court described the state's Abatement Plan as "an award to the State to fund multiple governmental programs for medical treatment and preventive services for opioid abuse, investigatory and regulatory activities, and prosecutions for violations of Oklahoma law regarding opioid distribution and use."[89] One of the reasons for reversal given by the state supreme court was its finding that the remedy did not abate the alleged nuisance.[90] According to the court, the proper abatement of the alleged nuisance would have "abate[d] the opioids themselves" or would have "halt[ed] the promot[ion] and marketing of opioids."[91] Because the state's Abatement Plan did neither of those things directly, the court rejected the lower court's characterization of the remedy as abating the nuisance.[92] Thus, the plaintiff must narrowly and directly target the cause of the nuisance in their complaint.

In determining if the funding of an abatement plan qualifies as an equitable remedy, rather than a claim for damages, courts also assess whether the relief sought targets the underlying conduct or conditions creating the nuisance. [93] When the relief sought targets the harmful *effects* of the nuisance, the court is likely to categorize the plan as an award for damages rather than abatement.[94] In other words, the relief sought in a public nuisance action must treat the cause and not merely the symptoms.

For example, in *City of Huntington v. AmerisourceBergen Drug Corp.*, the "City and county filed suits against three wholesale distributors of pharmaceutical and other medical products, claiming their distribution of prescription opioids created" an opioid epidemic,

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[89] *Id.* at 729.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *City of Huntington v. AmerisourceBergen Drug Corp.*, CV 3:17-01362, 2022 WL 2399876, at *68 (S.D.W. Va. July 4, 2022).
[94] *Id.*

resulting in a public nuisance. [95] The plaintiffs sought relief in the form of funding for a plan that would treat and address drug use and addiction.[96] However, according to the court, the only element of the plaintiffs' plan that qualified as abatement was a safe drug disposal program for unused pills, which amounted to less than a tenth of one percent of the total costs of the abatement plan.[97]

The court explained that "[d]amages, unlike abatement, are directed at compensating a plaintiff for the costs of eliminating the nuisance effects."[98] In contrast, "courts generally grant injunctions to abate existing nuisances."[99] That is, an abatement order seeks to enjoin or stop the underlying *cause* of the nuisance, such as an environmental nuisance case where the court issues "an injunction to remove the contaminant from the environment."[100] Here, the court characterized the plaintiffs' claim for relief as damages in the form of "remuneration for the costs of treating the horrendous downstream harms of opioid use and abuse."[101] The plaintiffs' plan did not target the surplus of prescription opioid pills, and therefore the court refused to categorize the plan as a form of abatement. [102] Because damages are not permitted in a public nuisance action, the court concluded its bench trial in favor of the defendants.[103]

In contrast, in a similar public nuisance action arising out of the opioid epidemic, the Northern District Court in Ohio sided with the plaintiffs.[104] The court rejected the defendant's

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[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* (internal quotation marks omitted); *citing* Dobbs, I Law of Remedies § 5.7(3).
[99] *AmerisourceBergen Drug Corp.*, 2022 WL 2399876, at *68 (internal quotation marks omitted); *citing Duff v. Morgantown Energy Associates*, 421 S.E.2d 253, 257 (W. Va. 1992).
[100] *AmerisourceBergen Drug Corp.*, 2022 WL 2399876, at *68.
[101] *Id.*
[102] *Id.* at *67.
[103] *Id.* at *69.
[104] *In re Natl. Prescription Opiate Litig.*, 1:17-MD-2804, 2019 WL 4043938, at *2 (N.D. Ohio Aug. 26, 2019).

argument that because the plaintiffs sought future costs to abate the nuisance, their claim was, in fact, a thinly disguised damages award.[105] Explaining the distinction between damages and abatement, the court stated:

> In a traditional public nuisance case, a municipal entity who is harmed by the maintenance of a nuisance will give notice to and ask the offending party to abate the nuisance. If the offending party is unable or unwilling to abate, the harmed party can, when appropriate, abate the nuisance themselves or ask the court for the right to do so, and then seek compensation for the costs of abating the nuisance. This compensation is equitable in nature. The goal is not to compensate the harmed party for harms already caused by the nuisance. This would be an award of damages. Instead, an abatement remedy is intended to compensate the plaintiff for the costs of rectifying the nuisance, going forward.[106]

Thus, the court distinguished between "the forward-looking, equitable remedy of abatement and the rearward-looking remedy of damages."[107]

The court further explained that the context and scope of the nuisance can impact the form that abatement of the nuisance will take:

> The opioid crisis litigation is, as this Court has repeatedly stated, unlike any other case. One example is that the opioid crisis is so massive that Plaintiffs cannot possibly hope to remedy it on their own without additional, substantial financial resources. If Defendants are eventually found liable for creating the opioid crisis, there is no realistic way the Court could order either that: (1) Defendants abate the crisis themselves (Defendants do not have the requisite infrastructure), or (2) Plaintiffs abate the crisis and then order Defendants to pay Plaintiffs the costs incurred in doing so (Plaintiffs do not have the financial resources).[108] Thus, the Court must, if Defendants are found liable, have some mechanism to predict and fairly award prospective future costs to abate the crisis.[109]

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[105] *Id.*

[106] *Id.* at *1.

[107] *Id.*

[108] Although I agree with the overall reasoning, I would argue that the opioid crisis litigation is, in fact, quite similar to climate crisis litigation. For example; (1) both crises "are so massive that [p]laintiffs cannot possibly hope to remedy it on their own without additional, substantial financial resources;" (2) oil manufacturers, like opioid manufacturers, lack the requisite infrastructure to abate the nuisance themselves; and (3) plaintiffs in both contexts lack the financial resources to pay upfront for the costs of abating the nuisance on their own.

[109] *Id.* at *2.

Courts have broad discretion in determining whether the remedy sought by the plaintiff is an award for prospective future costs to abate the nuisance or is instead damages in the form of remuneration for costs addressing the harms created by the nuisance.[110] Because the characterization nature of the relief can determine the outcome of the case, plaintiffs should be careful to narrowly and directly target the cause of the nuisance in their pleading. The case proceeded to a jury trial, where the opioid manufacturing defendants were found liable for creating a public nuisance.[111] A bench trial to determine the form that the abatement of the nuisance will take is still pending.[112] This case reinforces the rule that the proper remedy in a public nuisance action is abatement, which is forward looking at the prevention of continuing harm by addressing the cause of the nuisance. Had the plaintiffs improperly characterized the relief sought, the court likely would have granted the defendant's motion to dismiss.

C. Climate Change Litigation

In 2017, "the city attorneys for the City of Oakland and the City and County of San Francisco" brought a public nuisance action "against five of the world's largest energy companies."[113] The Cities alleged that "the Energy Companies' production and promotion of massive quantities of fossil fuels caused or contributed to global warming-induced sea level rise" and created a public nuisance.[114] The associated harms to the Cities included "increased shoreline erosion, salt-water impacts on the Cities' wastewater treatment systems, and

[110] *See, e.g.*, *AmerisourceBergen Drug Corp.*, 2022 WL 2399876, at *68.
[111] *In re Natl. Prescription Opiate Litig.*, 18-OP-45032, 2022 WL 671219, at *1 (N.D. Ohio Mar. 7, 2022).
[112] *Id.*
[113] *BP PLC*, 969 F.3d at 901.
[114] *Id.* at 901–02 (internal quotation marks removed).

interference with stormwater infrastructure."[115] They sought an abatement order "requiring the Energy Companies to fund a climate change adaptation program." [116] After removal to federal court, the Energy Companies' motion to dismiss for failure to state a claim was granted.[117] The district court took issue with the anticipatory nature of the relief sought:

> Although plaintiffs allege that global warming has already caused sea level rise, Oakland and San Francisco have yet to build a seawall or other infrastructure for which they seek reimbursement . . . Oakland and San Francisco may eventually incur expense over and above federal outlays, but that is neither certain nor imminent. If and when those expense items are actually incurred, defendants will still be in business and will be good for any liability. Requiring them to pay now into an anticipatory "abatement fund" would be like walking to the pay window before the race is over.[118]

While the court's gambling analogy makes for clever rhetoric, its recommendation that plaintiffs seek reimbursement after the costs are incurred is a form of damages that is outside the scope of remedies available to a public entity plaintiff in a public nuisance action. Damages "are directed at compensating the plaintiff for prior accrued harm that has resulted from the defendant's wrongful conduct."[119] In contrast, the Cities sought abatement, which "is an equitable remedy that . . . provides no compensation to a plaintiff for prior harm." [120] Rather than "walking to the pay window before the race is over," the Cities are demanding that Defendants pay to keep the lights on at the race track. Abatement is always prospective in that it seeks to eliminate the cause of future harm. On appeal, the 9th Circuit vacated and remanded the district court's dismissal on

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[115] *Id.* at 902.
[116] *Id.* (internal quotation marks removed).
[117] *Id.*
[118] *BP PLC*, 325 F. Supp. 3d at 1024 n.8.
[119] *ConAgra*, 227 Cal. Rptr. 3d at 569; *See also In re Lead Paint Litig.*, 924 A.2d at 498 (acknowledging that abatement of a public nuisance may include prospective funding for the associated costs).
[120] *ConAgra*, 227 Cal. Rptr. 3d at 569; *See also In re Lead Paint Litig.*, 924 A.2d at 498.

other grounds.[121] The Cities' renewed motion for remand to state court is currently pending in district court.[122]

Although the district court's critique of the anticipatory nature of the remedy is not on point, the form of relief sought by the Cities is problematic for a different reason. The Cities have alleged that global warming-induced sea level rise is creating a public nuisance.[123] They seek funding from the Energy Companies to cover the costs of building sea walls and other infrastructure necessary for mitigating the harmful effects of sea level rise.[124] However, courts have repeatedly held that "[d]amages, unlike abatement, are directed at compensating a plaintiff for the costs of eliminating the nuisance *effects*."[125] Abatement of the nuisance, on the other hand, must address the underlying cause. Here, excess carbon dioxide in the atmosphere is the cause of global warming-induced sea level rise.[126] Because sea-level rise is creating a public nuisance, carbon sequestration is the only way to abate the cause of the nuisance. Just as the remedy in *ConAgra* abated the nuisance by providing funding for the removal of interior lead paint, here too, the Cities should amend their complaint to seek funding for the removal of excess levels of atmospheric carbon dioxide.

IV. CONCLUSION

The need to address climate change is both imminent and obvious. Resolution will likely need to come from both the political and judicial branches of government. Within a judicial

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[121] *BP PLC*, 969 F.3d at 912.
[122] *Id.*
[123] *Id.* at 901–02.
[124] *Id.* at 902.
[125] *AmerisourceBergen Drug Corp.*, 2022 WL 2399876, at *68 (alteration omitted, emphasis added, quotation marks and citation omitted.
[126] *BP PLC*, 325 F. Supp. 3d at 1026 ("This order fully accepts the vast scientific consensus that the combustion of fossil fuels has materially increased atmospheric carbon dioxide levels, which in turn has increased the median temperature of the planet and accelerated sea level rise.").

resolution, many different approaches are potentially available. For public entity plaintiffs hoping to bring a public nuisance action, the first step in understanding the cumbersome and convoluted doctrine of nuisance law is to separate the concepts of private nuisance and public nuisance. Because the remedy in a public nuisance action is limited to abatement, public entity plaintiffs bringing climate actions must carefully craft their complaints so that the remedy sought is not characterized by the court as a form of damages. Examination of public nuisance actions in the context of lead paint and opioid epidemic litigation provides guidance on where different courts have drawn the line between damages and abatement. Public entity plaintiffs bringing climate actions should use these cases to ensure that they are coloring within the lines.

The central argument of this paper is quite simple. First, the remedy in a public nuisance action brought by a public entity plaintiff must abate the nuisance. That is, the relief must prevent future harm by addressing the underlying cause. Second, climate change—caused by excess levels of atmospheric CO2—has created a public nuisance. For example, in coastal communities, rising sea levels create an unreasonable interference with the general public's use of public highways. Third, the only way to prevent the future harm caused by climate change is to reduce the amount of atmospheric CO2. Climate adaptation measures, such as building a sea wall, are not a form of abatement because they do not address the underlying cause of the nuisance. Therefore, the proper remedy in a public nuisance climate action is the sequestration of excess CO2.