

SUBJECT: Codifying the tort of public nuisance

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Leach, Krause, Middleton, Schofield, Smith

3 nays — Davis, Julie Johnson, Moody

1 absent — Dutton

WITNESSES: For — Elbert Lin, U.S. Chamber Institute for Legal Reform; (*Registered, but did not testify*: Roger Borgelt, CALA; Kinnan Golemon, Shell Oil Company; Eric Opiela, South Texans' Property Rights Association; Lee Parsley, Texans for Lawsuit Reform; Megan Herring, Texas Association of Business; Cary Roberts, U.S. Chamber Institute for Legal Reform)

Against — Judith McGeary, Farm and Ranch Freedom Alliance; Jonathan Fombonne, Harris County Attorney's Office; (*Registered, but did not testify*: Melissa Shannon, Bexar County Commissioners Court; Clifford Sparks, City of Dallas; Jamaal Smith, City of Houston, Office of the Mayor Sylvester Turner; Christine Wright, City of San Antonio; Adam Haynes, Conference of Urban Counties; Jim Allison, County Judges and Commissioners Association of Texas; Charles Reed, Dallas County Commissioners Court; Thamara Narvaez, Harris County Commissioners Court; Cyrus Reed, Lone Star Chapter, Sierra Club; Jim Perdue, Texas Trial Lawyers Association; Julie Wheeler, Travis County Commissioners Court; Mikal Watts)

On — (*Registered, but did not testify*: Thomas Parkinson)

DIGEST: HB 2144 would codify the tort of public nuisance under Texas statute. The bill would abrogate the common law of public nuisance, supersede any other statute to the extent of a conflict, and set out provisions governing the tort, including express provisions on the only remedies that would be available for public nuisance. The purpose of the bill would be to ensure that the tort of public nuisance was defined clearly and in a

manner consistent with its traditional scope for purposes of its use as a cause of action in Texas.

**Definitions.** "Public nuisance" would be defined as an unlawful condition that violated an established public right.

"Unlawful condition" would be defined as an ongoing circumstance or effect of an instrumentality that was expressly prohibited by the laws of Texas.

"Established public right" would be defined as a right commonly held by all members of the public to the use of public land, air, or water.

"Special injury" would be defined as an injury that was different in kind, not just in degree, from an injury suffered by the public at large.

**Liability.** A person could be liable for public nuisance only if the person caused an unlawful condition and controlled that condition at the time the condition violated an established public right.

*Limitations.* Conditions arising from the following conduct would not be considered unlawful conditions:

- an activity expressly authorized or encouraged by a statute, ordinance, rule, or other similar measure adopted by Texas or its political subdivisions, the United States, or a Texas or federal regulatory agency; and
- the lawful manufacturing, distribution, selling, advertising, or promoting of a lawful product.

Liability for a public nuisance arising from conduct or conditions not listed above could not be presumed.

The aggregation of multiple individual injuries or private nuisances would not constitute violations of an established public right.

**Government enforcement.** Only the state or a political subdivision could bring a public nuisance action. The action would have to be brought by a government attorney of the relevant jurisdiction, and absent a clear and convincing showing otherwise, it would be presumed that only a single governmental entity had standing to file or maintain an action relating to the real property or waterway to which the public nuisance related.

The state or political subdivision would be required to have a substantial ownership interest in or authority over the real property or waterway, or associated ancillary spaces, to which the public nuisance related. A financial expenditure made by the state or a political subdivision in relation to the remediation, abatement, or injunction of an unlawful condition would not be sufficient to show standing to file a public nuisance action.

**Enforcement by private citizens.** A private citizen could maintain an action to enjoin a public nuisance only if the person could show a special injury by clear and convincing evidence. As a matter of law, use of or damage to public land, air, or water with only personal, spiritual, cultural, or emotional significance to the individual would not be considered a special injury.

An individual could not seek relief for both a public nuisance under the special injury exception and for a private nuisance for a harm related to the same unlawful condition.

**Remedies.** Remedies would be limited to injunctive relief sufficient to prevent the unlawful condition from violating an established public right and to monetary and nonmonetary resources established by the plaintiff through clear and convincing evidence as necessary to abate the public nuisance. The necessary resources would have to be quantifiable and based on relevant and reliable cost factors, which could not include:

- speculative estimates of current needs;
- the costs of future remediation;
- the costs of investigating and identifying the existence of an

- unlawful condition;
- the costs of public services provided as a result of the public nuisance; or
  - damages of any kind, except for compensatory damages for a special injury as defined by the bill.

**Other provisions.** HB 2144 would not affect the availability of remedies provided by statutes for conditions or activities involving criminal conduct and designated by statute as a common nuisance or public nuisance.

The bill also would not affect the authority of a governmental entity to take a regulatory or enforcement action authorized by statute in connection with a condition designated by statute as a public nuisance.

The bill would take effect September 1, 2021, and would apply only to a cause of action that accrued on or after that date.

**SUPPORTERS  
SAY:**

HB 2144 would eliminate the risks associated with misuse and expansion of the public nuisance tort by defining it clearly in statute, consistent with its traditional scope for its use as a cause of action in Texas.

Common law public nuisance actions have long been pursued by governmental entities to address private conduct that interfered with the use and enjoyment of public property, such as roadways and waterways. There is an increasing trend of trial lawyers urging courts to take a more expansive view of public nuisance to allow lawsuits over consumer products, as well as economic activities sanctioned and encouraged by the state and federal governments. These lawsuits often seek monetary damages, where injunctive relief was traditionally the exclusive remedy to abate a public nuisance. This trend seeking to transform the tort of public nuisance has the potential to make it an all-purpose tort with few defining or predictable bounds, creating potentially significant sources of future liability for activities that are lawful today.

HB 2144 would help stop the improper expansion of the public nuisance

tort. The bill would not prevent affected communities from addressing real harms, and state consumer protection laws and other statutory and common law remedies would continue to serve as powerful tools to remedy issues that impact the public. Codifying the tort of public nuisance simply would be intended to promote fairness and certainty for businesses and individuals dealing with the unpredictability of the current legal landscape.

CRITICS  
SAY:

HB 2144 would remove a tool that local governments have used to address various public health crises by abrogating the common law of public nuisance. Use of the evolving public nuisance cause of action has allowed local governments to effectively hold private actors accountable for their role in significant health crises, including the tobacco and opioid crises, and the results of the litigation have helped pay the significant costs resulting from these crises.