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Opponent Testimony to HB 126

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Chairman Manning, Vice-Chair Reynolds, Ranking Member Hicks-Hudson, and members of the Ohio Senate's Judiciary Committee. My name is Dustin Herman. I am a product liability attorney with Spangenberg Shibley & Liber in Cleveland, Ohio. I am testifying today on behalf of OAJ, its members, and the clients we serve.

Less than a year ago, Vice President Vance summarized the critical importance of public nuisance lawsuits:

"It's one of the biggest problems with corporate America—socialized cost, but privatized profits. And what you really want is that you want major American companies, and I am a believer in the market economy, you want them to absorb the benefits, but also the costs. And that's often what doesn't happen. For example, so I talk about this train disaster in East Palestine, and the railroad companies hate me because I kind of went on a crusade against them afterwards, and what I realized is—think of all the costs of that disaster, think of the healthcare costs, the welfare costs from people who lost their jobs, the declining home values in that community. Just all of the costs absorbed by that community. And the railroads are paying slap-on-the-hand fines. And it sort of occurred to me that the reason they are not more serious about these train disasters is because they are privatizing the rewards, but when a major train disaster happens, who picks up the tab? It's the local residents and it's the American taxpayer. And that is something that fundamentally has to change."

(Vice President J.D. Vance on the Joe Rogan Experience #2221, **October 31, 2024**, starting at 1 hour and 9 minutes, 8 seconds on Spotify; or at 1 hour, 11 minutes, 35 seconds on YouTube)

HB126 is the exact opposite of what Vice-Present Vance is arguing for here.



Public nuisance lawsuits have prevented corporations from socializing costs and privatizing profits for over 100 years—allowing the taxpayers to say “pay us back” when a corporation’s wrongful conduct causes a mess that the government has to clean up.

HB126 does much more than simply codify the Ohio Supreme Court decision in the opioid cases. See *In re National Prescription Opiate Litigation*, 2024-Ohio-5744.

In 1953, the Ohio General Assembly passed R.C. 715.44, which gave Ohio cities the “Power to abate nuisance and prevent injury.” But HB126 will severely curtail that power as it amends R.C. 715.44 and subjects it to the immunities provided in HB126 for certain corporations. This limitation on the statutory cause of action for public nuisance far exceeds the *Opiate* decision.

Furthermore, HB126 is in fact an immunity bill for product manufacturers. It totally eliminates the taxpayers’ ability to get reimbursed by product manufacturers whose wrongful conduct costs the taxpayers money—i.e., this bill forces socialization of the costs of a company’s bad conduct, while allowing the company to privatize the profits.

The reason that is the case is because OPLA only applies to claims for personal injuries or damage to property. It never applied to claims for economic loss only and does not provide any remedy for economic loss only claims. So governmental entities have **never** been able to bring a product liability lawsuit under OPLA to recover solely economic damages or abatement costs. Instead, OPLA explicitly allowed claims for economic loss to go forward under the common law. See R.C. 2307.72(C). But HB126 eliminates the ability of governmental entities to bring such common law claims, which will result in total immunity to product manufacturers from government claims.

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I’d like to make three points on which I hope we can all agree:

(1) **Vice President Vance is right.**

Vice President Vance is right when he says “one of the biggest problems with corporate America is socialized costs, but privatized profits.” That is what public nuisance lawsuits are all about—allowing county commissioners, mayors, and city councils to make



wrongful corporations, like Purdue Pharma, pay for expenses that would otherwise be paid by the taxpayers.

The opioid litigation will bring over \$1 Billion in settlements to Ohio's cities and counties to help address the expenses from the opioid crisis. If HB126 had been law 10 years ago, pharmaceutical companies would have socialized the costs of their wrongful conduct without repercussion.

Additionally, HB126 goes well beyond the Ohio Supreme Court's decision in the opiate litigation. It abolishes a municipality's ability to bring *statutory* public nuisance lawsuits under R.C. 715.44 based on a defective product.

Vice President Vance warned us about corporations being allowed to socialize costs and privatize profits. What other legitimate lawsuits in the future to prevent corporations from socializing costs will be precluded by this bill? We don't know. But we do know that Vice President Vance was right when he said "the reason they are not more serious about these train disasters" is because laws like HB126 shift the cost of economic harm from their bottom line to tax payers, privatizing the profits and socializing the costs.

The General Assembly should be very careful in eliminating the government's ability to bring these types of lawsuits. Precise legislation is the answer, not total elimination of claims.

(2) **OPLA carefully accomplished its intended purpose.**

The Ohio Product Liability Act ("OPLA") is an example of precisely-crafted legislation.

For over 100 years, product liability law developed slowly in Ohio and around the country. Under these laws, people were able to hold corporations accountable for injuries and property damage caused by defective products.

In 1988, the Ohio General Assembly passed OPLA. It was a comprehensive piece of tort reform legislation that codified product liability law for personal injuries and property damage caused by defective products. In essence, the General Assembly thought



common law product liability claims were too easy for plaintiffs. So the General Assembly decided to step in and set the rules of the game.

For what OPLA was trying to accomplish (even though I may disagree with those goals), it carefully achieved those goals with comprehensive legislation. OPLA has 10 different sections that address all the various aspects of over 100 years of product liability law that dealt with injuries from defective products. Among other things, OPLA sets forth the elements required to prove claims for design defect, manufacturing defect, failure to warn, and breach of warranty; it protects corporations by prohibiting liability under the market-share, enterprise, or industrywide theories of liability; and it set limits on punitive damages.

Importantly, in passing OPLA, the General Assembly did not eliminate any causes of action. It just forced all product liability lawsuits for personal injuries and property damage (defined collectively as “Harm”) from defective products to be brought through OPLA and to meet the strict elements set forth in OPLA.

OPLA also specifically only applied to claims for “Harm” from a product and did not apply to claims for solely “Economic loss.” See R.C. 2307.71(A)(2) and (7) (“Harm is not ‘economic loss’” and “Economic loss is not ‘harm’”); R.C. 2307.73(C) (claims for economic loss are “not subject to” OPLA and “may occur under the common law”). That is, the General Assembly expressly stated that OPLA was not intended to apply to claims for solely economic loss (or abatement costs).

OPLA is what precisely crafted legislation looks like.

(3) If the General Assembly wants to limit certain public nuisance lawsuits, it should spend the time to make careful reforms.

Similar to product liability law, public nuisance law developed in Ohio and around the country for well over 100 years. Under these laws, governments have been able to abate nuisances and ensure that corporations paid for damage caused to the public by all sorts of conduct (not just conduct related to products).



In the 2000's, lawyers brought lead paint lawsuits for brain damage to children and damage to homes. They tried to avoid the strict requirements of OPLA by characterizing these claims as public nuisance claims. Because the claims were for “harm,” they could have been brought under OPLA and simply would have been subject to the strict proof requirements of OPLA, but the lawyers tried to get around OPLA anyway.

In 2007, the General Assembly sought to make sure lawsuits of this kind were brought under OPLA. The General Assembly expanded the definition of a product liability claim under OPLA to cover certain so-called public nuisance claims, “regardless of how the claim is described, styled, captioned, characterized, or designated” and specifically stated that it “declares its intent that the amendments made by this act . . . are **not intended to be substantive but are intended to clarify the General Assembly’s original intent** in enacting the Ohio Product Liability Act.” See 2006 Ohio Laws File 198 (Am. Sub. S.B. 117). In other words—listen plaintiff lawyers, our original intent was that claims for harm from a defective product, regardless of what you call the claim, must be brought under OPLA.

This expanded definition of a product liability claim was sort of attached onto the existing definition. Just look at it at the end of R.C. 2307.71(13). The expanded definition is just hanging there under subsections (a), (b), and (c). It wasn’t even given a number or a letter. It was a very odd way indeed to expand a definition. At the same time, all the provisions of OPLA stating that OPLA did not apply to claims seeking solely economic loss were left intact. And because the amendment was declared to be “non-substantive” by the General Assembly, it was not supposed to have any drastic new effects.

The effect of this non-substantive amendment was that lawsuits like the lead paint lawsuits, regardless of being called a public nuisance claim, would have to be brought under OPLA and meet the strict requirements of OPLA. This could be done since the lead paint lawsuits were about “harm” from the lead paint. But OPLA provides no remedy for abatement of a nuisance or damages for solely economic loss. Thus, lawsuits like the



opioid cases would have no remedy at all under OPLA, even if the plaintiffs could prove wrongful conduct.

For years after the 2007 amendment, courts continued to hold that OPLA did not apply to claims for solely economic loss.¹ But in the 2024 opiate decision, the Ohio Supreme Court held for the first time that, because of the way the 2007 amendment to OPLA was written, public nuisance claims for solely economic loss (or abatement of a nuisance) were totally eliminated by OPLA. In doing so, the Ohio Supreme Court stated it was *ignoring* the General Assembly's declared legislative intent that the 2007 amendment was to be non-substantive. *In re National Prescription Opiate Litigation*, 2024-Ohio-5744, ¶¶ 7, 32. Under this interpretation of this non-substantive amendment, claims like the opioid claims seeking solely economic loss or abatement costs cannot be brought outside OPLA and they cannot be brought within OPLA (since OPLA provides no such remedy). And just like that, the power Ohio governments have had for over 100 years to prevent corporations from socializing costs was suddenly eliminated through the interpretation of a clumsily-added, single sentence definition, in a non-substantive amendment, from 17 years prior.

To be sure, OPLA never had this kind of effect on product liability claims before—of eliminating claims without providing a remedy within OPLA. This is something the General Assembly can and should address with well-crafted legislation.

¹ *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litigation*, 684 F.Supp.2d 942 (N.D. Ohio 2009); *CCB Ohio LLC v. Chemque, Inc.*, 649 F.Supp.2d 757, 763 (S.D. Ohio 2009) (“Ohio Revised Code § 2307.72(C) makes it clear that a claim for compensatory damages for economic damages, other than a product liability claim, is not subject to the OPLA”); *Hale v. Enerco Group, Inc.*, No. 1:10 CV 00867-DAP, 2011 WL 49545, *7 (N.D. Ohio 2011) (“Plaintiffs’ common law negligent design and failure to warn claims, not sounding in products liability law, survive dismissal, but only to the extent that Plaintiffs seek economic damages.”); *Huffman v. Electrolux N. America, Inc.*, 961 F.Supp.2d 875, 880 (N.D. Ohio 2013) (class action involving defective washing machines); *Great Northern Ins. Co. v. BMW of N. America LLC*, 84 F.Supp.3d 630, 649 (S.D. Ohio 2015) (“Plaintiffs are permitted to argue in the alternative, and bring their OPLA claims for compensatory damages, and their common implied warranty claim for purely economic damages, under the same set of facts.”); *Chapman v. Tristar Products, Inc.*, 1:16-CV-1114, 2017 WL 1433259, *12, fn. 97 (N.D. Ohio April 24, 2017) (“Thus, R.C. 2307.72 makes it clear that although a cause of action may concern a product, it is not a product liability claim within the purview of Ohio’s product liability statutes unless it alleges damages other than economic ones, and that a failure to allege other than economic damages does not destroy the claim, but rather removes it from the purview of those statutes.”).



The Ohio Supreme Court did expressly note: **“We recognize that the opioid crisis has touched the lives of people in every corner of Ohio. The devastation experienced by these private citizens, individually and collectively, undoubtedly has far-reaching consequences for their communities and for the State as a whole. Creating a solution to this crisis out of whole cloth is, however, beyond this court’s authority. We must yield to the branch of government with the constitutional authority to weigh policy considerations and craft an appropriate remedy.”** *In re National Prescription Opiate Litigation*, 2024-Ohio-5744, ¶ 34.

The General Assembly can now craft an appropriate remedy. But HB126 is not that. And HB126 goes well beyond the Ohio Supreme Court’s decision because it amends R.C. 715.44 so that municipalities can no longer bring *statutory* public nuisance lawsuits based on product defects.

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The General Assembly should take Vice President Vance’s warning seriously and not further expose Ohio to **“one of the biggest problems with corporate America—socialized cost, but privatized profits.”** At a minimum, the General Assembly should clarify that this is not an immunity bill for product manufacturers and that governmental entities are still able to hold corporations accountable when they privatize the profits but socialize the risks—and that they are able to bring suit to seek reimbursement for economic loss in the past and abatement costs in the future.

Thank you for the opportunity to testify. I welcome any questions from the Committee.