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Patents As Public Nuisances

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PATENTS AS PUBLIC NUISANCES

KEYANA PAYNE

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I. INTRODUCTION

The opioid crisis has devastated our nation. Opioid addiction is long lasting, and across the United States, 42,249 opioid related deaths occurred in 2016.[1] A number of state attorney generals and individual counties have begun filing lawsuits against major opioid manufactures and distributors to combat the epidemic through the judicial process.[2] However, one potential problem remains with these lawsuits: the lawsuits may be preempted by patent law. "Patents offer the strongest possible form of intellectual property protection—an exclusive right to make, use, sell, offer to sell, or import the patented invention anywhere in the United States for the duration of the patent."[3] The drug prescription process begins with patent ownership.

The doctrine of federal preemption is rooted in the supremacy clause, which provides that, "the Laws of the United States… shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."[4] "A

1. Andrew M. Parker, Daniel Strunk & David A. Fiellin, *State Responses to the Opioid Crisis*, 46 J.L. MED. & ETHICS, Summer 2018, at 367.

2. Michael J. Purcell, *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, 52 COLUM. J.L. & SOC. PROBS. 135, 136-37 (2018).

3. GARY MYERS, PRINCIPLES OF INTELLECTUAL PROPERTY LAW ¶ 13.01, at 278 (2d. ed. 2017).

4. SPGGC, LLC v. Ayotte, 488 F. 3d. 525, 530 (1st Cir. 2007) (quoting U.S. CONST. art. VI, cl. 2).

federal statute or regulation may preempt a state regulatory scheme in three relevant ways."[5]

> First, Congress can preempt by explicit statutory language. Second, Congress can enact a regulatory scheme so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, also knowns as "field preemption." In such cases, state regulation will be invalid even if it does not directly conflict with federal laws or regulations. Third, federal law may be in irreconcilable conflict with state law also known as "conflict preemption."[6]

If Congress has not legislated in a specific area of law, then the courts must resolve arguable conflicts through application of the Commerce Clause.[7]

This comment claims that patents can be regulated by state law, such as public nuisance, under the police power of the Tenth Amendment of the United States Constitution.[8] Part II of this comment discusses *Oklahoma, ex rel., Hunter v. Purdue Pharma* and how Oklahoma's use of public nuisance law was justified given the state regulation.[9] Part III examines the possibility of allowing states to use their police power to regulate the use of patented drugs by regulating fraudulent drug advertising. In doing so, this comment examines two schools of thought on state regulation of patents as a possible solution to patent law. In Part IV, this comment discusses Oklahoma's use of public nuisance law to address the opioid crisis or other patents. Finally, in Part V, this comment discusses whether state regulation is the proper way to address phenomena like the opioid crisis.

II. OKLAHOMA'S EFFORTS TO USE PUBLIC NUISANCE LAW TO CONFRONT THE OPIOID CRISIS

In the Oklahoma district court case, *Oklahoma ex rel. Hunter v. Purdue Pharma*, Judge Balkman ruled for the state of Oklahoma as they challenged thirteen pharmaceutical companies, including Johnson & Johnson and its affiliates.[10] During the bench trial, Judge Balkman found evidence that

5. *Id.*

6. *Id.* at 530–31 (citations omitted) (first citing Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (1996); and then citing Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 167–68 (1942)).

7. Richard J. Pierce Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 612–13 (1985).

8. U.S. CONST. amend. X.

9. *See* Oklahoma *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486 (D. Okla. Aug 26, 2019).

10. *Id.* at 38.

defendants used marketing techniques to convince doctors that they were undertreating chronic pain felt by their patients.[11] Once doctors were prescribing more opioids, the defendants, through their sales representatives, tried to convince the doctors that any signs of addiction the doctors saw were "pseudoaddiction" and that the solution was to prescribe more opioids.[12] Additionally, it was found through defendant's efforts that in 2015 over 326 million opioid pills were dispensed to Oklahoma residents—enough for every adult in Oklahoma to have 110 opioid pills.[13]

The defendants released a drug that the FDA found to be not tested properly and was marketed using a misleading study.[14] Later evidence was presented that the FDA sent letters to defendant's advisors about a particular brand of opioid drugs describing it as misleading and not a valid comparison among other opioid drug products because it was described as less addicting.[15] The implications as a result of the marketing and branding done by defendants were serious and cost the state of Oklahoma thousands of dollars to combat the crisis.[16]

Oklahoma's nuisance law states that,

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: [(1) a]nnoys, injures or endangers the comfort, repose, health, or safety of others; or [(2) o]ffends decency; or [(3) u]nlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or [(4) i]n any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.[17]

Additionally, Oklahoma public nuisance law states that the level of the nuisance does not need to equally affect the entire community or neighborhood, the nuisance just has to be considerable.[18] The court reasoned that defendant's actions fit in the definition of Oklahoma's nuisance law based on evidence that defendant's sales representatives utilized Oklahoma property, real and

11. *Id.* at 14.
12. *Id.* at 15.
13. *Id.* at 2.
14. *Id.* at 20.
15. *Id.* at 26.
16. *Id.* at 47–58.
17. OKLA. STAT. tit. 50, § 50-1 (2014).
18. *Id.* § 50-2.

personal, to create the public nuisance of misleading marketing and promotion of opioids.[19] For example, the sales representatives were trained in Oklahoma, they used Oklahoma hospitals to market to doctors, they used company cars traveling on state and county roads to travel to market at the hospitals, and they sent messages to the homes of Oklahomans via their electronic devices.[20]

Public nuisance law is an activity or a thing that affects the health, safety, or morals of a community.[21] "It is distinguished from a private nuisance, which harms only a neighbor or a few individuals."[22] The basis for standing in these lawsuits is that states have inherent authority to protect quasi-sovereign interests in pursuit of maintaining the welfare of their citizenry.[23] States must show harm other than just to the individual affected parties.[24] With mounting costs for implementing systems like prescription drug monitoring programs, it is not hard to imagine the economic harms suffered by states, including devoting countless public resources trying to manage the issue.[25] When pharmaceutical companies are flooding the markets with opioid drugs, states should exercise their rights and regulate using their Tenth Amendment police power.

III. THE TENTH AMENDMENT PERMITS STATE REGULATION OF PROPERTY UNDER STATE POLICE POWER

The federal government is the sole regulator of U.S. patents through two primary mechanisms: the U.S. Patent and Trademark Office that regulates the issuance and grant of the patent, and the Food and Drug Administration that regulates the issuance of pharmaceutical drugs. However, a scholarly debate has increasingly identified the potential power of states to regulate patents post issuance. The Tenth Amendment of the United States says, "The powers not delegated by to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[26]

The case *New York v. U.S.* highlights what is protected under the Tenth Amendment.[27] In this case, the Supreme Court looks at what is broadly protected under the Tenth Amendment as it relates to state's power to regulate.

19. *Hunter*, 2019 Okla. Dist. LEXIS 3486, at *36.

20. *Id.* at 34-35.

21. Wex Definitions Team, *Public Nuisance*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/public_nuisance (last updated July 2020).

22. *Id.*

23. Purcell, *supra* note 2, at 153.

24. *Id.*

25. *Id.*

26. U.S. CONST. amend. X.

27. New York v. U.S., 112 U.S. 144, 144–47 (1992).

The Supreme Court upheld that "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."[28] The Court has consistently upheld that "[t]he States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[29] To further illustrate how the Tenth Amendment's separation of powers work, the *New York* Court provided the example that the Commerce Clause allows Congress to regulate interstate commerce, but it does not give Congress the ability to regulate how state governments may regulate interstate commerce.[30]

The Supreme Court has also found that patents can be regulated under the Tenth Amendment. First, this comment looks at the case that established state police power under the Tenth Amendment. In *Allen v. Riley*, the Supreme Court held that states had police power under the Tenth Amendment to regulate patents as property.[31] Plaintiff filed suit to recover the value of lands that were allegedly transferred to Allen as payment to plaintiff for rights over a washing machine patent.[32] The *Allen* Court recognized state regulation as a way of responding to social issues.

While states are preempted from issuing patents, "states retain the ability to regulate traditional areas of state concern even if patents are involved."[33] Professor Feldman suggests, "[a]t a basic level, the Patent Act 'relies upon and presupposes a functioning state system of commerce and contract law.'"[34] "Commerce, contract and consumer laws traditionally are viewed as appropriate forums for reflecting and promoting local values and preferences, and as such, appropriate areas for state regulation."[35] Other traditional areas of state concern include, but are not limited to, a state's ability to regulate health, commerce, and contract law.[36] Specific examples include "regulat[ing] commercial contracts involving patents, deceptive practices involving patents, and in some cases, unfair competition involving patents."[37] In the past, states

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28. *Id.* at 157.

29. *Id.* at 156 (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 549 (1985)).

30. *Id.* at 166.

31. Kali Murray, *Constitutional Patent Law: Principles and Institutions,* 93 NEB. L. REV. 901, 928 (2015) (citing Allen v. Riley, 203 U.S. 347, 350 (1906)).

32. *Allen*, 203 U.S. at 347.

33. Robin Feldman et al., *The Patent Act and the Constitutionality of State Pharmaceutical Regulation*, 45 RUTGERS COMPUTER & TECH. L.J. 40, 43 (2019).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

have even been able to regulate "outright taxation of patent peddlers to '[a]cts to regulate the sale of patent rights and to prevent frauds in connection therewith.'"[38] States can also regulate the use of patents the way they regulate the use of other property in the state because regulation relied upon the state's police power under the Tenth Amendment.[39]

States also have protection for their citizens of harmful patents through consumer protection laws.[40] All states mirror to some degree the Federal Trade Commission Act consumer protection laws and some states have seen consumer fraud class action lawsuits that "describe a relatively new species of products-based litigation that have found fertile ground in the pharmaceutical and medical device landscape and are grounded primarily, if not exclusively, upon violations of state consumer protection acts (CPAs)."[41] Plaintiffs filing a lawsuit under consumer protection laws could claim that a patented drug is improperly advertised or that it does not work.[42] States have historically had an array of tools to use their Tenth Amendment police power to regulate patents and many of those tools are still in existence today.

Despite the persistence of state regulation, scholarly controversy exists. Scholars in the field agree that the *Allen* case gave states the right to pass laws regarding patents but disagree on the scope of the regulation of patents at the state level. Professor Kali Murray takes the broad view that the social obligation principle derived from constitutional interpretation is a legitimate way for states to intervene in the patent process.[43] Professor Camille Hrdy takes the narrower view that the Intellectual Property Clause is the best tool to analyze state rights in the process because it acts as a preemptive barrier where states can only intervene if state action does not unreasonably burden those rights.[44]

Murray discusses the social obligation principle as a tool the Supreme Court uses to place an obligation on the owner of a patent to protect the public.[45] The social obligation principle describes the notion that states should be able to protect their citizens by stressing the public interest and "placing obligations on

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38. Camilla A. Hrdy, *The Reemergence of State Anti-Patent Law*, 89 U. COLO. L. REV. 133, 150 (2018).

39. Murray, *supra* note 31, at 926–27.

40. Joseph J. Leghorn, Christopher Allen Jr. & Tavares Brewington, *Defending an Emerging Threat: Consumer Fraud Class Action Suits in Pharmaceutical and Medical Device Products-Based Litigation*, 61 FOOD & DRUG L. J. 519 (2006).

41. *Id.*

42. *Id.*

43. Murray, *supra* note 31, at 902.

44. Hrdy, *supra* note 38, at 139.

45. Murray, *supra* note 31, at 917–18.

the owner of the patent to act in such a way as to best protect the public."[46] This principle was born from an idea that the inventor owes an obligation to publicly disclose the patented invention.[47] Scholars and courts focused on what power the social obligation principle was drawn from, and there seems to be an impression that, as a public policy matter, the federal government does not want to authorize patents of inventions that will cause harm unless it is disclosed that the invention could be harmful. Besides the public policy matter, courts generally gave legal meaning to the obligation posed on patent owners using the language "to promote the progress of science and the useful arts," found in the Intellectual Property Clause.[48]

Establishing that there is an obligation posed on the patent owner is not enough. States must have a legal method to be able to hold patent owners responsible for their obligation. Remember that the *Allen* case gave states the right to pass laws regarding patents under the Tenth Amendment, and afterward other courts began to uphold state's legislature actions to regulate patents.[49] State legislatures were able to "regulate patents as property under states' police powers as derived from the Tenth Amendment."[50]

Since a patent is a type of property, it should be subject to state regulation like any other type of property. One way that states are able to hold patent owners accountable is through "property law, including eminent domain, nuisance, historic preservation, and environmental regulations."[51] As we have seen in the *Oklahoma, ex rel., Hunter v. Purdue Pharma* case, a state can take the route of holding patent owners responsible through public nuisance.[52] In that case, the patent owner's property, the patent on opioid drugs, caused harm to the citizens of the state of Oklahoma and was able to fall into the definition of their nuisance statute.[53]

Professor Camilla A. Hrdy takes a narrower approach to state action in regard to patents. Hrdy refers to any state action regarding patents as state anti-patent laws, which are "state laws that seek to tax, weaken, or regulate

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46. *Id.*

47. *Id.* at 919–20 (citing 1 WILLIAM CALLAHAN ROBINSON, TREATISE ON THE LAW OF PATENTS 31 (1890)).

48. *Id.* at 939 (quoting Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 510 (1917)).

49. *Id.* at 925–33.

50. *Id.* at 926–27 (citing U.S. Const. amend. X).

51. *Id.* at 924 (citing Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 775–801 (2009)).

52. *See* Oklahoma *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486 (D. Okla. Aug 26, 2019).

53. *Id.*

patents."[54] According to Hrdy, "state anti-patent laws . . . constrain the ability of [patent owners] to enforce or otherwise profit from their patent rights in the [specific] jurisdiction."[55]

Hrdy's approach is narrower because it contrasts with the idea of giving state's the authority under the police power of the Tenth Amendment to hold patent owners to their public obligation. Hrdy does not suggest there is an obligation to the public by the patent owner, but instead maintains that any regulation should stay in the realm of law that has been made clear through the Intellectual Property Clause and the Supreme Court case, *Allen v. Riley*. Under the Intellectual Property Clause, Congress grants the power to the patent owner to secure their exclusive rights, and Hrdy contends that this is a preemptive barrier that prevents states from weakening or burdening a patent owner's rights which are codified in federal law.[56] This comment has established that *Allen* allows for state action in regard to patents, but Hrdy goes further saying that the *Allen* court intended to opine that state "law must be preempted if it imposes an 'unreasonable' burden on the patentee's exclusive right."[57] To reiterate, Hrdy's interpretation is narrow because instead of looking to the Constitution or a state's property law, she recommends that a court compares the public harm with the patent owner's rights allowed by the state using the reasonableness test of *Allen*.[58]

IV. WAS OKLAHOMA'S USE OF PUBLIC NUISANCE CLAIM JUSTIFIED?

Oklahoma's use of public nuisance claim was justified. Generally, the Oklahoma statute considers "a public nuisance to include interference with any considerable number of persons and that no public right need be involved."[59] For example, if enough people were affected by a neighbor who is trying to convert their home into a dog kennel and the noise and smell is adversely affecting a large number of people, then even if a public right to live free of dog smells or dog noises does not exist, a public member's action against the neighbor would be considered a public nuisance in Oklahoma.

Oklahoma's use of public nuisance law to protect the public is not a new phenomenon. What happened in *Oklahoma, ex rel., Hunter v. Purdue Pharma*, was not surprising given Oklahoma has historically treated public nuisances as

54. Hrdy, *supra* note 38, at 215.
55. *Id.* at 196.
56. *Id.* at 215.
57. *Id.* at 140–141.
58. *Id.* at 206.
59. L. Mark Walker & Dale E. Cottingham, *An Abridged Primer on The Law of Public Nuisance*, 30 TULSA L.J. 355, 358 (1994).

crimes against the state.[60] When public nuisance occurs, the state has the right to require the offender to pay damages as abatement along with other remedies.[61] Given the extent of the damage that was caused by Oklahoma having to create programs to help those who have become addicted to opioids, it makes sense that the state chose damages as a way to remedy the issue. Oklahoma is not alone in its use and expansion of public nuisance law because "[i]ncreasing efforts are being made today to apply the law of public nuisance to new types of private claims for money damages which were not traditionally associated with claims for public nuisance."[62]

Oklahoma has a history of regulating other intellectual property rights such as copyrighted materials. In *State, ex rel., Field v. Hess*, the district attorney brought action against Hess (appellant) to secure injunctive relief against appellant's adult bookstore.[63] The district attorney claimed that the adult bookstore was a public nuisance because it affected the entire community.[64] The petition alleged that customers were able to read obscene books and view obscene pictures and films in violation of Oklahoma's obscenity statute.[65] The trial court granted the district attorney's action for permanent injunction on the basis that the business constituted a public nuisance under Oklahoma law because the business offended the decency of the citizens in the county.[66]

The Oklahoma Supreme Court held that the Oklahoma law against obscene materials is constitutional and that "even though the constitutional standards are not literally incorporated therein . . . those standards are to be implied whenever the statutes are applied."[67] The court reasoned that the obscene materials met Oklahoma's statutory definition of nuisance and that selling, bartering, and trafficking the materials violated Oklahoma's obscenity law because it offended the decency of the citizens in the community.[68] The court further reasoned that bartering, selling, or trafficking counted as nuisance because it had a tendency to get into the hands of easily influenced youth which

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60. *Id.* at 364; *see* Oklahoma *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486 (D. Okla. Aug 26, 2019).

61. Walker & Cottingham, *supra* note 59, at 364 (Oklahoma also has the right to grant injunctive relief as well as pursue civil liability or indictment or information).

62. *Id.* at 373. Traditionally public nuisance was used to address wrongs against a governmental body and later it was used to address claims by individuals amongst those individuals. Now it is being used by state governments against large private corporations.

63. State *ex rel.* Field v. Hess, 540 P.2d 1165, 1167 (Okla. 1975).

64. *Id.* at 1170.

65. *Id.* at 1167; *see* OKLA. STAT. tit. 21, § 1021 (2014).

66. *Id.* at 1167-1168.

67. *Id.* at 1169.

68. *Id.* at 1168.

is contrary to public interest and therefore violated Oklahoma's public nuisance law.[69]

A. Other Forms of State Regulation

Like most states, Oklahoma does not have a specific or set-aside section of law in their toolbelt to regulate patents. Rather, Oklahoma, like other states, has a variety of laws at their disposal, such as consumer protection law, where it can sue for consumer fraud and tort law.[70] States are not preempted from making legislation that affect the patent process if it is tied to law that is already within the state's power to exercise as in the *Allen* case.

In Oklahoma, for example, the state legislature "signed into law an act that is designed to discourage bad faith allegations of patent infringement."[71] Essentially it is a type of consumer protection law designed to stop patent trolls from falsely stating that complaints have been filed.[72] A standard patent troll is a company that claims someone has infringed their patent even when that company probably has nothing to do with the invention process, and litigation clogs the court system.[73]

There have been other ways Oklahoma has engaged in the act of regulating patents by interpreting contractual language that deals with patents. The state has exercised its right to preside over contract law even if the litigation is about patents and royalties. For example, in *Cities Service Oil Co. v Geolograph Co.*, there was a contract dispute over royalty payments.[74] There was a sale of a trademark name for a patented device, so the patent and the trademark were included in the sale, but the dispute was over payment arrangements.[75] The Oklahoma Supreme Court ultimately held that the trial court impermissibly made a new contract for the parties.[76] Although this case is not illustrative of patent regulation, it stands as an example to show how states, particularly Oklahoma, can use an area of the law that is customarily reserved to the states to regulate patents. Imagine if the case had turned out differently or if under different circumstances it turned out that a contract regulating the sale of some patented device were unconscionable. Then that transaction would not be

69. *Id.* at 1170.

70. Leghorn, Allen Jr. & Brewington, *supra* note 40, at 519–20.

71. David M. Sullivan, *Legal Counsel: Oklahoma law fights bad faith patent demand letters*, THE OKLAHOMAN (July 27, 2014), https://oklahoman.com/article/5075904/legal-counsel-oklahoma-law-fights-bad-faith-patent-demand-letters (last updated July 28, 2014).

72. *Id.*

73. *Id.*

74. Cities Service Oil Co. v. Geolograph Co., 254 P.2d. 775, 776 (Okla. 1953).

75. *Id.* at 782.

76. *Id.* at 780.

allowed to happen in Oklahoma, and thus it restrains what patent owners would be allowed to do in the state.

Additionally, Oklahoma has a prescription drug monitoring program coded as House Bill 1948, effective November 1, 2015.[77] The bill warns in section 2-304 that a registrant who manufactures, distributes, dispenses, or prescribes controlled substances is subject to repercussions upon a finding that the registrant has falsified an application pursuant to the Uniform Controlled Dangerous Substance Act.[78] Once a patent owner has registered a drug with the United States Patent and Trade Office (USPTO), a patent owner or the drug distributor is also bound by this Oklahoma registration system. This is another way that Oklahoma protects its citizens from the harmful effects of patented prescription drugs. The prescription drug monitoring program also requires physicians to check upon the patients they have prescribed opioid drugs to.[79]

It is clear that Oklahoma's goal is to protect its citizens within the legal realm of their state police power. Another way that Oklahoma has protected its citizens from the effects of patents is through antitrust law. For example, in *Prelin Industries Inc. v. G & G Crafts, Inc*., plaintiff sued defendant claiming that defendant infringed upon its patents by manufacturing and selling electric oil refiners.[80] Importantly, plaintiff also alleged that defendant engaged in unfair competition practices and violated the Federal Antitrust laws and the laws of Oklahoma.[81] Plaintiff and defendant were competing manufacturers and distributors of electric oil refiners.[82] The court held that plaintiff violated the federal and Oklahoma antitrust laws.[83] The court reasoned that plaintiff tried to acquire for itself the entire market for electric oil refiners with the knowledge that the patent had numerous clouds on its title.[84] The court further reasoned that plaintiff evidently planned to use the doubtful patent to cause harm to defendant's business, and thus plaintiff would be able to gain control of the market.[85] So, in this case, Oklahoma used its antitrust laws to protect citizens from one company becoming a monopoly using a potentially fraudulent patent.

77. H.R. 1948, 55th Leg., 1st Sess. (Okla. 2015).

78. *Id.* at 1–2.

79. *Id.* at 8–9.

80. Prelin Indus., Inc. v. G & G Crafts, Inc., No. Civ-72-95, 1972 U.S. Dist. LEXIS 11977, at *1–3 (W.D. Okla. Sep. 15, 1972).

81. *Id.*

82. *Id.*

83. *Id.* at *46–54.

84. *Id.* at *50.

85. *Id.* at *50–52.

V. DOES STATE REGULATION OF INTELLECTUAL PROPERTY LAW PROVIDE A LEGITIMATE SOLUTION TO THE OPIOID CRISIS?

State regulation of intellectual property law, specifically patents, is a legitimate solution to the opioid crisis. It is a legitimate solution because states have their Tenth Amendment police power to protect their citizens. As mentioned above, there are a variety of legal tools that states can use in their state laws to be able to protect citizens from the harm caused by patents. States can use public nuisance law as we saw in the Oklahoma case, they can use contract law to potentially declare the sale of a harmful patent to be unconscionable, and they can use anti-patent law to regulate potentially fraudulent patents.

Whether it is a legitimate solution or not, it is happening. For instance, in an article published by Joseph Leghorn, he asserted that "[c]onsumer fraud class action suits describe a relatively new species of products-based litigation that have found fertile ground in the pharmaceutical and medical device landscape and are grounded primarily, if not exclusively, upon violations of state [CPAs]."[86] The idea of protecting consumers from the pharmaceutical and medical industries is catching on because the Michigan House of Representatives has proposed House Bill 6226, which would add legal pharmaceutical products to the Michigan Consumer Protection Act.[87] The bill would essentially penalize deceptive practices by manufacturers of producers who fail to communicate the risk of over-the-counter medicines.[88]

Allen established that states could regulate patents to protect citizens because it is in their power to do so as long as the regulation is reasonable and does not conflict with federal law. Patent owners are not allowed to ignore state law which has general authority over all property within its limits.[89] Given that patents are a type of property, it makes sense that states should be able to regulate them and protect its citizens using state law, including public nuisance. Perhaps with more time, scholarship will have more information about whether state regulation is truly the best way for citizens to be protected from harmful patents such as the patents on opioid medications. For now, states like Oklahoma are doing the best they can, using their Tenth Amendment police power to protect citizens using state law.

86. Leghorn, Allen Jr. & Brewington, *supra* note 40, at 519.

87. *Michigan Bill Adds Drug Products to State Consumer Protection Act*, 26 No. 7 FDA ADVERT. & PROMOTION MANUAL NEWSL. (Thompson Info. Servs.) Sep. 2018, at 17.

88. *Id.*

89. 60 AM. JUR. 2D *Patents* § 894 (1987) (citing Webber v. Virginia, 103 U.S. 344 (1880)).