Legal Backgrounder

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Ohio's Contamination of Public Nuisance Law Reflects Perils of Contingent-Fee-Driven State Litigation

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This Legal Backgrounder will discuss the Ohio Attorney General's recent public nuisance lawsuit to require a former manufacturer to pay for the cleanup of chemicals it last lawfully made and sold decades ago. The chemicals are present in Ohio's lakes and rivers because of improper product disposal by other entities. The lawsuit is yet another example of collaboration between public officials and contingency-fee lawyers aimed at expanding tort theories beyond their traditional, and in this case statutory, boundaries.

Summary of the Complaint. On March 5, 2018, Ohio's Attorney General followed several other states and cities by suing Monsanto Co., Solutia, Inc., and Pharmacia LLC (together, "Monsanto") for allegedly contaminating natural resources with polychlorinated biphenyls ("PCBs").[1] Ohio, acting in its *parens patriae* capacity to protect its natural resources, alleged seven claims for relief: (1) public trust doctrine; (2) design defect; (3) failure to warn and instruct; (4) negligence; (5) public nuisance; (6) trespass; and (7) unjust enrichment. The Attorney General retained outside counsel to act as Special Counsel for the State.

The three companies are spin-off corporations of old Monsanto Co., which made and sold PCBs from 1929 through 1977. Throughout that time, numerous products took advantage of PCBs' unique properties, including paints, caulks, inks, dyes, lubricants, sealants, plasticizers, coolants, hydraulic fluids, and fireproofing. Monsanto stopped all sales of PCBs by 1977, and the federal EPA banned most uses in 1979.

Ohio claims that PCBs are dangerous, carcinogenic chemicals that threaten human health, wildlife, and environmental safety. Monsanto allegedly failed to warn the public, despite knowing of these potential risks as early as the 1940s. Monsanto also purportedly instructed consumers to dispose of products containing PCBs in landfills, while knowing that the PCBs would leach out into water and soil. Ohio acknowledges that extensive federal and state regulations control the disposal and cleanup of PCBs.

Ohio alleges that Monsanto "caused and continued to cause injury to the physical and economic health and well-being of Ohio citizens." It further alleges expenses to remove and prevent PCB contamination, to restore natural resources, and to investigate and monitor PCB contamination. It seeks compensatory and punitive damages, cleanup costs, and injunctive relief for unjust enrichment.

Monsanto's Motion to Dismiss. Monsanto has moved to dismiss on several grounds. *First*, Monsanto argues that all claims fall within the scope of Ohio's Product Liability Act (OPLA). Ohio amended OPLA in

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[1] *State of Ohio ex rel. Michael DeWine, Ohio Attorney General v. Monsanto Co. et al.,* Civ. Action No. A1801237 (Hamilton County, Ohio Com. Pleas).

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2005 to abrogate common law claims, including public nuisance, involving products. R.C. § 2307.71(B). Accordingly, Monsanto contends, OPLA abrogates all of the State's common law claims, which are premised on the manufacture and distribution of products. In Monsanto's view, OPLA's environmental-claims exemption does not apply to Ohio's claims, because the exemption is limited to claims brought under federal and state environmental regulations, which Ohio did not pursue. Ohio has not alleged any OPLA claims.

Second, because Monsanto stopped making PCBs in 1977, OPLA's ten-year statute of repose for manufacturers of allegedly defective products bars the claims. Moreover, Ohio's claims, which the State contends accrued before the 2005 OPLA amendments, are time barred.

Third, the public trust doctrine is not a stand-alone claim. The doctrine only confers standing on the Attorney General to sue to protect the State's natural resources.

Fourth, Ohio failed to allege that Monsanto controlled the PCBs at the time the alleged public nuisance arose, as Ohio law requires. Monsanto itself did not discharge or release PCBs into landfills or the environment. The users of products with PCBs were responsible for any improper disposal and releases.

Fifth, there was no unauthorized act to satisfy the elements for trespass, because Monsanto's PCB manufacture and sale were legal when done. Also, Monsanto did not release the PCBs onto the State's property.

Sixth, Ohio has not conferred a benefit on Monsanto, as the unjust enrichment claim requires. Because Monsanto has no duty to clean up the PCBs discharged by others, the State's investigation and remediation of PCBs provides a benefit to Ohio's citizens, not Monsanto.

Ohio's Opposition. Ohio contends that its claims are not "product liability" claims subject to OPLA abrogation. OPLA targets personal-injury and localized property-damage claims, which the State does not allege. In Ohio's view, its claims fit within OPLA's environmental-claims exemption, which allows common law tort claims aimed at cleaning up pollution. In addition, Ohio says that its claims accrued on a rolling basis before 2005, so OPLA's abrogation provision, which is prospective only, does not apply.

Ohio also disagrees that the statute of repose bars its claims. The statute of repose is limited to OPLA's inapplicable product liability claims. Even if OPLA applies, Monsanto's fraudulent concealment tolls the statute of repose, and the statute cannot apply retroactively to bar accrued claims.

Finally, Ohio adequately pled its remaining claims: the public trust doctrine permits a stand-alone claim; Ohio law does not require a defendant to "control" the instrumentality of the public nuisance, so long as the defendant's conduct assisted in creating the nuisance;[2] the trespass claim meets Ohio's elements for indirect trespass and proximate cause through chemical invasion of property; and the Complaint identifies the benefits, including investigation and remediation costs, that were unjustly conferred on Monsanto.

Analysis and Commentary. Monsanto's motions to dismiss prior lawsuits in Washington and Oregon shed some light on the viability of Ohio's claims.[3] In general, product liability claims have failed because the plaintiff state, city, or other public agency did not purchase or use the allegedly defective products with PCBs. Courts have been reluctant, however, to hold on the face of the complaint that state product liability statutes preempt common law claims. Washington law also exempts local governments from the statute of

[2] Citing *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (2002)(permitting public nuisance claim against firearms manufacturers for helping to create illegal secondary market).

[3] *See City of Seattle v. Monsanto Co.*, 237 F. Supp. 3d 1096 (W.D. Wash. 2017); *City of Portland v. Monsanto Co.*, 2017 BL 338814 (D. Or. 2017); *Port of Portland v. Monsanto Co.*, No. 3:17-cv-00015, 2017 U.S. Dist. LEXIS 156369 (D. Or. 2017).

limitations when they sue for the state's benefit. In Oregon, the federal district court rejected Monsanto's argument that the claims are time-barred, finding fact questions on when the city and port were injured and aware of their injury. The court also rejected Monsanto's argument that plaintiffs' claims were product liability claims subject to Oregon law, explaining that "it is not clear that the predominant characteristic of the claims is grounded in a product defect." *Port of Portland*, 2017 U.S. Dist. LEXIS 156369, at *7. The court found that plaintiffs adequately alleged standing and causation for its public nuisance, trespass, and failure to warn claims. Of course, the Washington and Oregon motions turn on state law peculiarities.

Ohio starts with several advantages. Ohio had latitude to choose a favorable venue for its suit. Monsanto cannot remove the lawsuit to federal court; Ohio has elected judges at all levels. The public trust doctrine, at a minimum, gives the Attorney General standing to sue to protect the State's natural resources, including its lakes, rivers, and groundwater. In 1917, the Ohio General Assembly passed the Fleming Act, which provides that the waters of Lake Erie, and the soil beneath, "belong[] to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted … to the public rights of navigation, water commerce, and fishery … ." R.C. § 1506.10. As trustee, the State can sue to protect its natural resources from contamination. *See Illinois Cent. R. Co. v. State of Illinois,* 146 U.S. 387, 455-56 (1892). Moreover, claims such as negligence and public nuisance are broadly defined, vague, and consequently, malleable.[4]

Nevertheless, Monsanto's motion and Ohio law raise hurdles for the Attorney General to clear. First, Ohio law on the public trust doctrine is scarce. It is uncertain whether the doctrine provides a substantive claim in addition to standing. Admittedly, this issue may not matter if the State's other claims survive.

Second, in response to the State's and numerous municipalities' public nuisance lawsuits against former lead pigment manufacturers, Ohio amended its Product Liability Act in 2005 to encompass "any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public." R.C. § 2307.71(A)(13). Because each State claim is based on Monsanto's manufacture, promotion, and sale of a product or a failure to warn about product risks, Monsanto contends, with good reason, that the OPLA applies to abrogate the State's common law claims.

However, the OPLA carves out "liability … that arises, in whole or in part, from contamination or pollution of the environment …, including contamination or pollution or a threat of contamination or pollution from hazardous or toxic substances." R.C. § 2307.72(D)(1). Monsanto says that the "actual nature" of the State's claims are product liability claims asserting property damage. The State says not so, it is suing for pollution of its natural resources from a hazardous substance. Whether the environmental claims exemption applies is an open question and an important call. And if the exemption does not apply, then the State also faces a serious obstacle from the ten-year statute of repose. R.C. § 2305.10.

Ohio's common law product liability claims face other substantial defenses. Monsanto sold PCBs in bulk to product manufacturers. The State did not purchase PCBs from Monsanto, and therefore arguably lacks standing to bring claims for design defect. Moreover, a design defect claim is thorny, because no alternative design is alleged for PCBs. They are what they are. *See City of Philadelphia v. Lead Indus. Ass'n,* 994 F.2d 112 (3d Cir. 2003); *Godoy v. E.I. DuPont de Nemours & Co.*, 768 N.W.2d 672 (Wis. 2009).

As a bulk supplier of PCBs to other sophisticated product manufacturers, Monsanto has a significant defense to Ohio's failure-to-warn claims. Also, the long history of scientific knowledge of potential risks

[4] *See City of Cincinnati*, 768 N.E.2d at 1142, 1143-44 (defining public nuisance as "an unreasonable interference with a right common to the public").

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alleged in the Complaint as well as the regulatory history since the 1970s cut against the failure-to-warn claims. Another overriding legal issue is one of control. Monsanto did not make or control the use or disposal of other manufacturers' products containing its PCBs. Those facts imperil all of the State's claims. It raises questions of causation in fact and proximate cause, because Monsanto did not dispose of or discharge PCBs into Ohio's environment. Ohio's response is that environmental contamination was "inevitable," once Monsanto instructed users of its PCBs to dispose of their products into landfills, while knowing that the PCBs would leach out. Ohio's argument seems to benefit from hindsight and to run against defenses premised on the state of knowledge at the time Monsanto made and sold PCBs.

Quoting the Ohio Supreme Court, Ohio further contends "it is not fatal to [a] public nuisance claim that [Monsanto] did not control the actual [PCBs] at the moment that harm occurred." *City of Cincinnati*, 768 N.E.2d at 1143. To plead public nuisance liability against firearms manufacturers, it sufficed that they "created a nuisance through their ongoing conduct of marketing, distributing, and selling firearms in a manner that facilitated their flow into the illegal market." *Id.* Of course, Monsanto's rejoinder is that it has no ongoing conduct, because it stopped its sale of PCBs over 40 years ago, and its manufacture and sale of PCBs was legal before then. If the Ohio courts require a company to have control over the hazardous substance at the time the public nuisance arose, the trespass occurred, or the negligent disposal took place, then no claim against Monsanto should survive.

Lurking in the background of Ohio's Complaint against Monsanto is the California Court of Appeal's recent decision expanding public nuisance liability to include the affirmative promotion over 60 years ago of then-lawful products (lead paints) for uses with known hazards. *Cty. of Santa Clara v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51 (Cal. Ct. App. 2017). This decision leapt far beyond precedent imposing liability for instructing companies to dispose of chemical waste in an unlawful manner. *See City of Modesto Redev. Agency v. Superior Court*, 119 Cal. App. 4th 28, 41-42 (Cal. Ct. App. 2004). Government officials around the country have brought similar public nuisance claims against dozens of companies for promoting and selling historically lawful and useful products now deemed to create societal hazards, including fossil fuels, pharmaceuticals, subprime mortgages, and MTBE additive for gasoline.

Ohio's Complaint raises several recurring questions in the ongoing battle between public officials and manufacturers of historically useful, but potentially harmful, products:

- What is the appropriate interaction between statutory environmental programs and common law claims, such as public nuisance? Is there statutory preemption or deference to a regulatory agency?
- Should manufacturers be responsible for others' failure to safely maintain or dispose of products?
- Should manufacturers be held liable when scientific knowledge of product hazards changes after sale? Every product has known risks, and the extent of the risks become foreseeable in hindsight.
- What is the shared responsibility of federal, state, and local governments that used and encouraged the use of products that they now consider to be hazardous and to require abatement? Is it fair for public officials to single out one or a few surviving companies to bear all liability for a societal problem? Or is a legislative solution more equitable and effective?
- Will courts follow the urging of some public officials to adopt the principle of lifetime product stewardship, apply public nuisance law to products, and impose liability on manufacturers of historically lawful products? What are the limits set by due process of law?

Conclusion. The lawsuit by Ohio's Attorney General crosses the line of established tort-law principles of duty and causation as well as statutory amendments to Ohio's product liability law intended to prevent this type of lawsuit. Environmental legislation offers a more equitable solution to clean up contamination arising from historically accepted and useful products.

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