



COOLING OFF PUBLIC NUISANCE CLAIMS

The Ninth Circuit's ruling in *Native Village of Kivalina v. ExxonMobil Corp.*, ___ F.3d ___, 2012 WL 4215921 (September 21, 2012) represents the most recent high-profile victory against efforts to use public nuisance claims to address issues more properly left to legislative solutions. Building on our extensive experience responding to such public advocacy suits against the tobacco, firearms, lead paint, and other manufacturers, Jones Day worked actively as part of a strong joint defense effort to obtain this win on behalf of the energy industry. This *Commentary* will briefly discuss the history of public nuisance litigation brought by government entities and look at lessons learned on how to defend public nuisance litigation.

BACKGROUND

Public nuisance law has been a part of American jurisprudence since colonial times. It traces its beginnings to criminal actions and grew in early America to address both obstructions to public travel and violations of morals (e.g., brothels, bars, and more). Public nuisance law has evolved through the years. In the 1980s and 1990s, school districts and cities began

using public nuisance suits to attempt to recover the costs of asbestos abatement. While the courts largely rejected those efforts, public nuisance claims gained traction in the mid-1990s when more than 40 states sued tobacco companies to recoup government expenditures allegedly attributable to their citizens' tobacco use.

While the global tobacco settlement ended those suits prior to judicial opinion on their validity, the sheer magnitude of the settlement created an overwhelming incentive for others to try their hand at such claims. Starting in the late 1990s, more than 30 municipalities and others included public nuisance claims in their suits seeking to hold most of the major firearms manufacturers responsible for violent crime. Representing Colt's Manufacturing Company, Jones Day was a leader of the joint defense effort that won dismissal of many of the cases. Courts generally agreed that nuisance law did not provide the municipalities with a remedy against the lawful manufacture and sale of firearms, because the defendants' sale of lawful products did not interfere with a public right and because the alleged injuries were too indirect

or remote from the manufacturers' conduct. Harm from firearms results from the criminal acts of others.

In the one case that went to trial—*NAACP v. A.A. Arms, Inc.*—judgment was entered for defendants based on plaintiff's failure to establish that it had a special injury. The firearms litigation confirmed that, while typical public nuisance-related defenses remained important, broader threshold issues—including remoteness of injury and standing—were key to defeating these new efforts to apply public nuisance concepts in nontraditional ways.

PUBLIC NUISANCE AND LEAD PIGMENT MANUFACTURERS

Despite the failure of public nuisance claims in the firearms context, some state attorneys general and county and city attorneys have continued to pursue public nuisance claims against product manufacturers, usually in contexts where they could not otherwise prove the traditional elements of a product liability or negligence claim. For example, for more than a dozen years, some states, cities, and counties have attempted to assert state law public nuisance claims against historic manufacturers of lead pigments and paints sold for architectural use. To date, none has succeeded, and only one such public nuisance claim remains. The lawsuits, which allege that the presence of lead-based paints on residences or other buildings poses a health risk to children, typically seek to have a handful of former manufacturers of lead pigments inspect and abate all lead paint in buildings built before the 1978 federal ban on the sale of lead paint for architectural use. They also demand that the companies abate all lead found in soil around the buildings, conduct a public education campaign, assist in blood lead screening for children, and train contractors in lead-safe work practices.

Most cases have been thrown out before trial. For example, the Supreme Court of New Jersey ruled that the public nuisance claim brought by 26 New Jersey municipalities failed as a matter of law. *In re Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007). It found that there was no violation of a public right, defendants no longer controlled their products when the alleged nuisance arose, and their manufacture and sale

of lead pigments decades ago was not the proximate cause of the alleged public nuisance today. *Id.* at 502. The cause of any health risk to children arose from property owners failing to prevent and abate lead paint hazards, as state law requires. It also relied on the state legislature's creation of a comprehensive program to prevent childhood lead exposure. That program imposed fees on manufacturers to fund government programs but placed the obligation on property owners to prevent and abate lead hazards. *Id.* at 494.

Other suits have met similar fates. The Missouri Supreme Court affirmed summary judgment dismissing the City of St. Louis' public nuisance claim to recover the costs of its lead paint abatement program and activities because the city could not identify the manufacturer of the lead pigments or paints at any property at which the city spent money. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007). Likewise, the Illinois Appellate Court, drawing heavily on earlier Illinois dismissals in the firearms nuisance litigation, affirmed the dismissal of the City of Chicago's lead pigment public nuisance suit. Without manufacturer identification at any location, the court held that the lawful manufacture and promotion of lead pigments historically was not the actual or proximate cause of any alleged public nuisance arising from lead paint that was allowed to deteriorate in homes decades later. *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. 2005). Finally, in Ohio, a trial court dismissed the City of Toledo's action, because it was barred by Ohio's Product Liability Act, was time-barred, and impermissibly relied on market share liability. *City of Toledo v. Sherwin Williams Co.*, No. CI-200606040, 2007 WL 4965044 (Ohio Ct. Com. Pl. Dec. 12, 2007). After that decision, the Ohio attorney general and other cities voluntarily walked away.

The two public nuisance cases that have proceeded to trial have fared no better. A divided jury in Rhode Island found against three former lead pigment producers. On appeal, the Rhode Island Supreme Court held that the attorney general's public nuisance claim should have been dismissed before trial. It found, among other things, that the health risk to children from peeling and flaking lead paint did not affect a right held in common by the public and that the attorney general had failed to prove causation, because the former producers did not control their products at the time that

the alleged harm occurred. And, the Court believed that the comprehensive and effective legislative programs, which made property owners responsible for keeping their properties lead-safe, foreclosed any need for the Court to create a novel public nuisance theory and to implement a mammoth, judicially administered remedy. *State v. Lead Indus. Ass'n Inc.*, 951 A.2d 428 (R.I. 2008).

In the other case to proceed to trial, a Milwaukee jury found that the manufacturer had not acted wrongfully in making and promoting lead pigment for use in residential paints historically. The Wisconsin Court of Appeals rejected the City of Milwaukee's appeal, holding that because the producer could not have foreseen the alleged, present-day health risk to children arising from minute amounts of lead in dust and very low blood lead levels that could not have been measured at the time of sale, the jury properly found that the manufacturer did not intentionally cause the public nuisance. *City of Milwaukee v. NL Industries*, 762 N.W.2d 757 (Wis. App. 2008), *review denied* 765 N.W.2d 579 (Wis. 2009).

Only one public nuisance action involving lead pigment manufacturers remains pending. Ten California cities and counties have sued five former manufacturers alleging that they have created a public health crisis to children, notwithstanding that the average blood lead level in California children and the rate of elevated blood lead levels are at all-time lows and continue to decline. Reversing a demurrer and accepting all of plaintiffs' allegations as true for purposes of its decision, the California Court of Appeal has allowed the case to proceed on one narrow, unique theory: plaintiffs must prove that each former manufacturer affirmatively promoted its lead pigments for a use that it knew at the time would be hazardous to children. The plaintiffs, however, may not recover monetary damages, but may sue only for injunctive relief of abatement. *County of Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d 313, 328, 137 Cal. App. 4th 292 (6th Dist. Ct. App. 2006). Trial is set for 2013.

PUBLIC NUISANCE AND MTBE

More recently, public nuisance claims have been asserted in the litigation arising from the use of the additive methyl tertiary butyl ether ("MTBE") in gasoline. The most recent public

nuisance decision in the MTBE context arises from the State of New Hampshire's *parens patriae* action. In 2003, the State of New Hampshire sued numerous gasoline manufacturers and refiners that supplied the state with gasoline containing MTBE, seeking damages for contamination of its groundwater and surface waters. The state's complaint included a claim under state law public nuisance, which was dismissed as a matter of law. See *New Hampshire v. Amerada Hess Corp., et al.*, No. 03-C-550, slip op. at 10-13 (Merrimack Cty. Supr. Ct., Sept. 16, 2008). The court reasoned that: "Life in organized society involves an unavoidable clash of individual interests. Each individual in a community must put up with a certain amount of annoyance, inconvenience, and interference, and must take a certain amount of risk in order that all may get on together. The law of torts does not attempt to impose liability in every case where one person's conduct has some detrimental effect on another." *Id.* at 11 (quoting *Robie v. Lillis*, 112 N.H. 492, 495 (1972) (ellipses omitted)).

The court then rejected the state's public nuisance claim on two grounds. First, the court recognized that public nuisance claims under New Hampshire common law have been asserted only against landowners. See *id.* at 12 ("Liability for common law nuisance may be established if the landowner knew or had reason to know that a public nuisance existed." (quoting *New Hampshire v. Charpentier*, 126 N.H. 56, 62 (1985)). Because the state asserted "a public nuisance against the defendants in their capacity as manufacturers, marketers and distributors of MTBE and/or gasoline containing MTBE," rather than as landowners, the claim was improper. *Id.* Second, even if land ownership were not required, the court ruled that a defendant is not liable unless it maintains "control over the instrumentality alleged to constitute the nuisance." *Id.* (quoting *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986) (applying New Hampshire law)); see also *id.* ("Although defendants need not control the nuisance at all times, they must have, minimally, controlled the nuisance at the time of damage." (quoting *Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 450 (R.I. 2008)). The state, however, did not allege "that the defendants maintained requisite minimal control of the product when the public nuisance is said to have occurred." *Id.* Because permitting the claim to go forward in those

circumstances “would be to extend nuisance law beyond its limits as recognized in this jurisdiction,” the court dismissed the state’s public nuisance claim. *Id.*

PUBLIC NUISANCE CLIMATE CHANGE LITIGATION

The most recent effort to stretch public nuisance law can be found in plaintiffs’ effort to impose liability for alleged damages stemming from climate change. Two groups of plaintiffs (eight states and New York City in one case and three nonprofit land trusts in the other) brought the first public nuisance-based climate change case in July 2004. They filed complaints in the Southern District of New York against five major electric power companies, including the Tennessee Valley Authority. Plaintiffs claimed that defendants emitted carbon-dioxide emissions that contributed to global warming, which created a “substantial and unreasonable interference with public rights,” in violation of the federal common law of interstate public nuisance or, in the alternative, of state tort law. Plaintiffs sought injunctive relief capping the defendants’ carbon-dioxide emissions and reducing those emissions each year for at least a decade.

After extensive briefing that addressed threshold issues of standing, political question doctrine, preemption, and displacement, the district court dismissed plaintiffs’ claims as presenting nonjusticiable political questions. The Second Circuit reversed, holding that plaintiffs’ public nuisance action was implied under federal common law because of the interstate nature of greenhouse gas emissions and climate change. The court rejected arguments that the Clean Air Act (“CAA”) displaced a federal public nuisance cause of action for climate change because, at the time of the Second Circuit’s decision, the EPA had not exercised authority under the CAA to regulate greenhouse gas emissions. Because it held that federal common law governed, the court did not address plaintiffs’ state law claims.

In June 2011, the Supreme Court reversed. *American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011). It held that whether plaintiffs had a federal common-law public nuisance claim was an “academic question” because any such claim was displaced by the Clean Air Act, which authorizes EPA to regulate carbon-dioxide emissions. Because

plaintiffs’ state law public nuisance claims were not presented, the Supreme Court did not address whether the CAA would preempt those claims.

In the interim, two additional climate change cases had been making their way through the courts. In 2005, plaintiffs in *Comer v. Murphy Oil USA* filed a public nuisance lawsuit in the Southern District of Mississippi, claiming that emissions of greenhouse gases by more than 80 defendants caused climate change, which allegedly warmed the Gulf of Mexico and strengthened Hurricane Katrina, increasing the damage to their property. The case was dismissed by the district court, plaintiffs’ appeal was dismissed by the Fifth Circuit Court of Appeals, *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010),¹ and a petition for writ of mandamus to the Supreme Court also was denied. *In re Comer*, U.S. No. 10294 (Jan. 10, 2011). In May 2011, plaintiffs refiled their claim in Mississippi federal district court. The court again dismissed the case, concluding, among other things, that plaintiffs’ claims were both displaced (as in *AEP*) and preempted. *Comer v. Murphy Oil USA, Inc.*, 839 F.Supp.2d 84 (S.D. Miss. 2012). Plaintiffs appealed to the Fifth Circuit, and briefing is ongoing. *Comer v. Murphy Oil USA, Inc.*, No. 12-60291 (5th Cir.).

At the same time, *Kivalina*’s case progressed to the Ninth Circuit. *Kivalina* involves a tiny native Alaskan fishing village suing two dozen defendants, alleging that severe weather generated by climate change has eroded their land to the point that the village will be forced to move. The district court dismissed the case as involving a nonjusticiable political question and for lack of standing. The village appealed to the Ninth Circuit, which affirmed the dismissal.

The Ninth Circuit explained that plaintiffs sought to “invoke the federal common law of public nuisance” and that the court’s task was to address “first the threshold questions of

¹ A panel of the Fifth Circuit had reversed the district court’s dismissal in 2009, finding that plaintiffs had standing to assert their state law public nuisance, trespass, and negligence claims and that the claims did not present nonjusticiable political questions. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009). The Fifth Circuit granted rehearing *en banc*, which vacated the panel opinion. *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010). “After the *en banc* court was properly constituted, new circumstances arose that caused the disqualification and recusal of one of the nine judges,” which, the court concluded, meant the court no longer had a quorum and could not address the case. *Comer v. Murphy Oil USA*, 607 F.3d at 1053-54. The court also noted that it could not “reinstate the panel opinion, which has been vacated” and dismissed the appeal. *Id.* at 1054.

whether such a theory is viable under federal common law in the first instance and, if so, whether any legislative action has displaced it.” 2012 WL 4215921 at *3. Noting that “federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution,” the court concluded that “federal common law can apply to transboundary pollution suits,” which are typically “founded on a theory of public nuisance.” *Id.*

However, the court then pointed out that the right to assert a public nuisance claim “has limits.” *Id.* at *4. As one limit, “when federal statutes directly answer the federal question, federal common law does not provide a remedy because legislative action has displaced the common law.” *Id.* The court held that the Supreme Court in *AEP* has provided “direct guidance” on the issue of displacement of plaintiffs’ claims:

The Supreme Court [in *AEP*] has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief. The civil conspiracy claim falls with the substantive claim. Therefore, we affirm the judgment of the district court.

Id. at *6. Although sympathetic to Kivalina’s dire straits, the Ninth Circuit suggested that “the solution to *Kivalina*’s dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law.”² *Id.* On October 4, 2012, the *Kivalina* plaintiffs filed a petition for rehearing *en banc*. *Native Village of Kivalina v. ExxonMobil Corp.*, No. 09-17490 (9th Cir.).

FUTURE OF PUBLIC NUISANCE CLAIMS

Some global lessons can be learned from the various waves of public nuisance cases that Jones Day has defended:

- Claims can founder on nuisance-specific elements of proof, such as no injury to a public right, no special injury to private claimants, or no “control” by defendants of the nuisance.
- Courts are not likely to punish through massive nuisance liability lawful conduct that is consistent with regulations and scientific understanding.
- Key arguments in defeating many public nuisance claims reach beyond traditional public nuisance law. In the lead pigment, firearms, and climate change cases, courts have relied on existing legislative solutions and have been properly hesitant to second-guess those public policies and programs. The prospect of creating expansive, expensive, and intrusive new remedies affecting entire communities, if not the entire nation, deters judicial action.
- Courts have been reluctant to allow public nuisance plaintiffs to avoid the usual rules of causation and traceability. When the defendants are small contributors to ubiquitous contamination springing from myriad sources, such as lead or greenhouse gas emissions, they are neither identifiable nor substantial creators of the alleged nuisance, nor do they control the nuisance, nor can they abate it.
- Strong appellate rulings will limit plaintiffs’ ability to pursue federal common law public nuisance claims in the future. For example, in the climate change arena, after the Supreme Court’s ruling in *AEP*, plaintiffs must turn to state law claims.
- In addition to the standing, redressibility, and political question arguments that are still very much alive in climate change and other public nuisance litigation, courts addressing the state law nuisance claims substantively will need to decide as threshold matters whether state law can be used for this type of alleged global nuisance and, if so, whether those claims are preempted by the coordinated efforts to address climate change at the national level.

Recent rulings have tarnished the aura of public nuisance as the “tort du jour” invoked to entice the judiciary to take on public health and environmental problems allegedly not adequately redressed by elected officials and government programs. Yet, the vague standards for public nuisance and the prospect for massive remedies will likely keep the theory alluring to advocacy organizations and government bodies.

² For a full discussion of the logic of this conclusion, please see Charles H. Moellenberg, Jr., *et al.*, “No Gap Left: Getting Public Nuisance Out Of Environmental Regulation and Public Policy,” 7 EXPERT EVIDENCE REPORT 474 (Sept. 24, 2007).

Jones Day, which has represented companies sued for public nuisance because of alleged harm from tobacco, firearms, lead paint, and climate change, has been and remains at the forefront of defending public nuisance litigation and will continue to advise on these complex issues as they evolve.

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