The Metropolitan Corporate Counsel®

www.metrocorpcounsel.com

Volume 20, No. 12 December 2012

Cooling Off Public Nuisance Claims

Traci L. Lovitt, Charles H. Moellenberg, Jr. and Michael L. Rice

JONES DAY

Public nuisance law has been a part of American jurisprudence from colonial times. While it is rooted in criminal actions and historically was used primarily to address obstructions to public travel and violations of morals (e.g., brothels, bars and more), nuisance law has more recently been shaped by efforts to apply it to complex, policy-laden issues more properly left to legislative solutions. From asbestos abatement to firearms and MTBE, defendants have largely succeeded in defeating those efforts. However, two key battlegrounds in public nuisance litigation remain: (1) claims against historic manufacturers of lead pigments and paints; and (2) suits seeking to impose liability for alleged damages stemming from climate change. While defense efforts have been largely successful in these areas, public and private plaintiffs do not yet appear to have abandoned their efforts to find new applications for public nuisance claims. Indeed, based on U.S. Supreme Court rulings, the next battleground may be in state courts.

Traci L. Lovitt

Charles H. Moellenberg, Jr.

Michael L. Rice

Public Nuisance And Lead Pigment Manufacturers

The lead paint lawsuits generally allege that the presence of lead-based paints on residences or other buildings poses a health risk to children. They 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. Most of these cases have been thrown out before trial. *See, e.g., In re Lead Paint Litigation*, 924 A.2d 484, 502 (N.J. 2007) (finding no violation of a public right, no defendant control of products when the alleged nuisance arose, and no proximate cause); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (affirming summary judgment for defendants because the City could not identify the manufacturer of the lead pigments or paints at any relevant property). In addition to causation problems and other flaws in the plaintiffs' public nuisance allegations, these courts pointed out that the cause of any health risk to children from lead paint arose from property owners failing to prevent and abate lead paint hazards, as state law requires, and that legislative programs existed to prevent childhood lead exposure. *See, e.g., In re Lead Paint Litigation*, 924 A.2d at 494.

The two cases that have proceeded to trial have fared no better. First, after a divided jury in Rhode Island found against three former lead pigment producers, the Rhode Island Supreme Court held that the public nuisance claim should have been dismissed before trial because, among other things, the health risk to children from peeling and flaking lead paint did not affect a right held in common by the public and because the former producers did not control their products at the time that the alleged harm occurred. *State v. Lead Indus. Ass'n Inc.*, 951 A.2d 428 (R.I. 2008). The court also observed that comprehensive legislative programs make property owners responsible to keep their properties lead-safe, foreclosing any need to create a novel public nuisance theory and to implement a mammoth, judicially administered remedy. *Id.* Second, after a Milwaukee jury found in favor of the manufacturer defendant, the Wisconsin Court of Appeals rejected the City of Milwaukee's appeal. It held that 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. Therefore, 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).

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

***Traci L. Lovitt** is Partner-in-Charge of the Boston Office of global law firm Jones Day and a member of the Issues and Appeals practice. **Charles H. Moellenberg, Jr.** is a Partner in the Business and Tort Litigation (BATL) practice in the Pittsburgh office. **Michael L. Rice** is a partner in the BATL practice in the Houston office. **Thomas Fennell,** a Partner, and **Paula E. Reichenstein,** an Associate, in the BATL practice in the Dallas office contributed to the preparation of this article. The opinions discussed in this article are those of the authors and do not express the opinions of Jones Day or any of its clients.*

Please email the authors at tlovitt@jonesday.com, chmoellenberg@jonesday.com or mlrice@jonesday.com with questions about this article.

health crisis for 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 white 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 obtain only 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 Climate Change Litigation

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 in the Southern District of New York against five major electric power companies, claiming that defendants' carbon-dioxide emissions contributed to global warming. Plaintiffs alleged violations of the federal common law of public nuisance, or, in the alternative, of state tort law and sought reductions in defendants' emissions. After extensive briefing on issues of standing, the viability of a federal claim, preemption, and displacement, the district court dismissed plaintiffs' claims as presenting non-justiciable political questions. *Connecticut v. American Elec. Power Co., Inc*., 406 F. Supp. 2d 265 (S.D.N.Y. 2005). The Second Circuit reversed, finding that plaintiffs had standing and a viable federal common-law claim that was not displaced by the Clean Air Act (CAA). The Supreme Court then reversed the Second Circuit, holding that any federal common-law public nuisance claim was displaced by the CAA, which authorizes EPA to regulate carbon-dioxide emissions. It left open the question of whether the CAA would preempt state law claims. *American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011).

In the interim, two additional climate change cases were 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 greenhouse gas emissions by over 80 defendants caused climate change, which allegedly strengthened Hurricane Katrina, increasing 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. 10-294 (Jan. 10, 2011). In May 2011, plaintiffs re-filed their claim in Mississippi federal district court. The court again dismissed the case, concluding, among other things, that plaintiff's 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, a tiny native Alaskan fishing village sued two dozen defendants in the Northern District of California, alleging that severe weather generated by climate change has eroded their land to the point that the village will be forced to move. *See Native Village of Kivalina v. ExxonMobil Corp*., 696 F.3d 849 (9th Cir. 2012). The district court dismissed the case as involving a non-justiciable political question and for lack of standing, and the village appealed to the Ninth Circuit. *Id*. While acknowledging that federal common law might apply to interstate pollution claims, the court relied on the Supreme Court's opinion in *AEP*, which "held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action." *Id*. at 858. Affirming dismissal, the Ninth Circuit concluded that the *AEP* decision "displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief." *Id*. Although sympathetic to Kivalina's situation, 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." *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

The various waves of public nuisance cases offer lessons for corporate counsel assessing potential future litigation:

1. Claims can founder on nuisance-specific issues, such as no injury to a public right, no special injury to private claimants, or no "control" by defendants of the nuisance.

2. Courts are not likely to punish through massive nuisance liability lawful conduct that is consistent with regulations and scientific understanding.

3. Courts may look to existing legislative solutions and be hesitant to second-guess those public policies and programs. Pay attention to existing legislation and consider whether new statutes or regulations could provide feasible solutions.

4. Courts are properly reluctant to allow plaintiffs to avoid the usual rules of causation and traceability. When the defendants are small contributors to ubiquitous contamination springing from myriad sources, they are neither identifiable nor substantial creators of the alleged nuisance.

5. 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. Courts addressing those claims (if they survive challenges based on standing, redressability, and political question) will need to decide whether state law can be used for this type of alleged global nuisance and, if so, whether those claims are preempted by the coordinated national efforts to address climate change.

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.

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1 A Fifth Circuit panel initially reversed the district court's dismissal, *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), but 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.