ANDREWS LITIGATION REPORTER

THOMSON WEST

Food Health & Safety

COMMENTARY

REPRINTED FROM VOLUME 1, ISSUE 3 / NOVEMBER, 2004

Heavyweight Litigation: Will Public Nuisance Theories Tackle the Food Industry?

By Charles H. Moellenberg Jr.*

Imagine a society where a single trial judge could ban jelly donuts and potato chips from grocery store shelves. Consider the impact of a lone state or city official suing to force food manufacturers or suppliers of lawful products to reimburse the cost of governmental services provided to prevent or treat obesity, high cholesterol or hypertension.

This is not a world of an overactive imagination. It is the emerging worldview of a growing number of public health advocates in the United States who are teaming with activist government officials and hungry contingency fee lawyers to impose social change through litigation.[1] As one commentator aptly remarked, "Going to court has become the 'American Way' to affect social change." John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L.J. 103, 130 (2003).

Reformers head to court for good reason. The "tort law is generally elastic. It can be stretched to fit new situations as courts deem appropriate. The courts can interpret and mold tort law to fit what the courts think it ought to fit, consistent with fundamental social values." *Id.* at 131. Persuading one judge or jury can be much simpler than getting a legislature or regulating agency to act. Public nuisance — an obscure tort traditionally relegated to cleaning up houses of sin or noxious waste dumps — has emerged as one favorite judicial tool for public health litigation.[2] It has many virtues, according to its proponents:

- Public nuisance standards are exceedingly vague and, therefore, seemingly elastic and pliable;
- Public nuisance focuses on present harm rather than past conduct;
- Perfectly lawful, innocent conduct can still give rise, advocates say, to public nuisance liability;
- Proof of causation is lax, it is asserted, so that a company can be responsible for all social costs merely because it sold the offending product at one time;
- It may escape effective defenses, such as contributory negligence, assumption of the risk, and statutes of limitations or repose;
- One plaintiff, such as a state attorney general or a city, can aggregate all costs from the purported harm to hundreds of thousands of individuals, as well as public expenditures, without proof that a company's product injured any particular individual;
- If an injunction is sought, a single judge can issue broad injunctive rulings without a jury.

State and local governments have long had the authority to seek the abatement of a public nuisance. *See, e.g., Division of Health, Dept. of Health & Welfare v. Rogers*, 32 A.2d 135, 139 (R.I. 1981). A "public nuisance" has been vaguely defined as any substantial and unreasonable interference with a right common to the general public, such as public health, safety, or peace. RESTATEMENT (SECOND) OF TORTS, § 821B (1979). Public officials can obtain a court abatement order directing that an activity posing a threat to the health or welfare of the public-at-large be stopped. This nuisance authority is both broad and vague, far too broad and far too vague to prevent the abuse of governmental power.

Many societal forces are joining together to spur these new attacks on whole industries, ranging from tobacco to firearms to lead paint, actions which would wash away long-established legal principles if they were to succeed. Plaintiffs' law firms have vast resources as a result of

their successes in asbestos, the State Attorneys General settlement with the tobacco industry and other mass tort suits. Insurers are squeezed between increasing health care costs as well as public efforts to keep health insurance premiums affordable. Public bodies are strapped for funds. And, public health advocates have learned from the success of the states' assault on the tobacco industry to use litigation as another weapon in their arsenal to bring about change in social policy.

If theories of liability such as public nuisance were read expansively, and traditional tort rules of duty and proximate causation were relaxed to allow a single plaintiff to bundle thousands of claims, then one would expect more public health issues to make their way into the courts. The health effects of fatty foods, alcohol, and sources of pollutants, among others, would be debated in forums hand-picked by plaintiffs and their attorneys and before judges or juries whose decisions could affect not only company fortunes but national product offerings.

Despite the alarming prospect of this type of public policy or public health litigation, several traditional rules have fortunately stalled its advance in most, but not all, states. In especially colorful language to chew on, one judge explained:

> [N]o rule of law requires persons whose acts cause harm to cover all of the costs, unless these acts were legal wrongs. The food industry puts refined sugar in many products, making them more tasty; as a result some people eat too much (or eat the wrong things) and suffer health problems and early death. No one supposes, however, that sweet foods are defective products on this account; chocoholics can't recover in tort from Godiva Chocolatier….

International Brotherhood of Teamsters, Local 734 Health and Welfare Fund v. Phillip Morris Inc., 196 F.3d 818, 823 (7th Cir. 2000).

A 'Public' Right Must Be Infringed

One historical limit has been that public nuisance law should not be used to regulate the sale of products. *E.g.*, *Tioga Public School Dist. v. U.S. Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993). To constitute a "public" nuisance, a current activity must infringe on a right that the entire community holds in common. For example, a tree blocking a highway or the polluting odors from a waste dump in a residential area are classic examples.

Public officials in new public nuisance actions have attempted to avoid this historical limit by casting their suit as an effort to protect public health or safety, such as keeping the streets safe from handgun violence. But, any harm to persons who choose to smoke cigarettes, or damage to a residence from the presence of flaking lead paint, or injury to a person shot by a criminal does not violate a public right. When public officials bring public nuisance suits for private harm suffered by individuals, they cross the limits of public nuisance law.

There Must Be Specific Proof of Individual Responsibility

In a traditional public nuisance action, the identity of each person alleged to be responsible for the nuisance, and the extent of each party's contribution to the nuisance, must be proved. *Young v. Bryce Arms,* 327 Ill. App. 3d 948, 765 N.E.2d (1st Dist. 2001), *app. granted*, 201 Ill.2d 619, 786 N.E.2d 202 (2002). Often this is straightforward: noxious odors emanate from a waste dump, annoying nearby homeowners. The waste dump owner is known and responsible. The point is to abate an existing nuisance, and ordinarily the party committing the nuisance is readily identifiable.

However, when generic risks posed by lawful products made by different companies over many years are alleged to add up to a public nuisance, then this proof is likely to be missing. Whose handguns caused what injury, if any? Whose lead paint is in which residences, if any? Whose foods caused the prevalence of obesity? The public officials do not know and do not care to know. In their view, it is enough to impose 100% liability for all public expenditures and social costs if a company at one time made or sold a product that is now contributing to harm, even if the product was lawful to sell and the harm is occurring years later from product misuse.

Proof of causation is, of course, an indispensable part of a valid tort claim. *E.g., Skipworth v. Lead Industries Ass'n, Inc.*, 690 A.2d 169 (Pa. 1996); *see also* W. Page Keeton, Prosser & Keeton on the Law of Torts, § 41 (5th ed. 1984). Requiring the government to specifically identify the causal contribution of any defendant in a public nuisance action is an important means of protecting against abuse of government power. Public officials should not be allowed to single out certain unpopular or "deep pocket" companies by bringing public nuisance actions against them, without having to prove that they actually caused the nuisance.

The Nuisance Must Result from Current Activity Within the Defendant's Control

Public nuisances aim to stop current conduct that unduly harms public health or welfare. The new public nuisance

suits attack products which are not defective and are lawful to sell. The public harm often results from misuse of the product, such as a criminal shooting, or failure to maintain it, such as old, flaking lead paint. After a manufacturer had done everything necessary to comply with government regulations and the rules of tort law, the government plaintiffs would have public nuisance law supersede this lawful conduct. This would amount to unfair, retroactive liability.

It is not only a question of fairness. Legal responsibility arises from a person's ability to prevent or remove the nuisance. *E.g.*, *People of Brockman*, 143 Ill.2d 351, 373, 574 N.E.2d 626, 635 (1991); *City of Chicago v. Stern*, 96 Ill. App. 3d 264, 267, 421 N.E.2d 260, 262 (1st Dist. 1981). In the case of lead paint, for example, those who own the properties containing lead-based paint are in the best position to prevent or abate the dangers posed by poorly maintained lead-based paint. In fact, all federal, state, and local statutes and regulations make the property owners responsible for eliminating these lead paint risks.

Plaintiff Must Show a Direct Connection Between Its Harm and The Defendant's Conduct

There must be a direct connection between the alleged nuisance and the plaintiff's harm, and the plaintiff must be the person directly harmed. In the traditional public nuisance case, for example, if the defendant's tree falls and blocks a public highway, the harm to the public is the direct result of the defendant's conduct.

The new public nuisance tort tries to evade a rule known as the "remoteness" doctrine, which says that a person who incurs costs because of personal injury or property damage to someone else does not have a right to sue the party who caused the injury or damage. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992); *United Food & Commercial Workers v. Philip Morris, Inc.*, 223 F.3d 1271, 1273 (5th Cir. 2000).

In the tobacco cases, public officials have sought repayment of health care costs incurred when citizens became ill; in the handgun cases, governments seek to recover the costs of preventing and responding to handgun violence, including the increased costs of criminal justice administration and emergency medical services; and in the lead paint cases, public officials seek reimbursement for the cost of lead paint abatement, child health care, and special education. The governments in these cases have sued for costs they have incurred because of other individuals' losses. This is not allowed under traditional rules.

Not only are the governments not directly harmed, but the connection between what the defendant did and the harm to the public is anything but direct. The links in the chain in the handgun cases, for example, are many. The defendant manufacturers make perfectly legal sales to distributors or wholesalers; distributors or wholesalers then make perfectly legal sales to retailers; retailers then sell the guns either to authorized buyers, to "straw men," or through other illegitimate means, to unauthorized buyers. The guns then enter an illegal market, and the unauthorized buyers misuse the guns to commit crimes or other harmful acts.

The plaintiff governments then incur expenses for crime investigation or emergency services. As a result, the public has a higher tax burden, reduced property values, and the destruction of communities, for which losses the plaintiff governments seek to hold the handgun manufacturers liable. This is hardly what the courts historically had in mind when they required "direct" harm. *See, e.g., Ganim v. Smith & Wesson Corp.,* 780 A.2d 98 (Conn. 2001).

The Remedy Must Be Abatement, Not Reimbursement for Services Provided

The traditional purpose of a public nuisance suit has been to stop the harmful conduct and remove the offensive condition. Yet, instead of abatement, public officials now seek reimbursement for state or municipal services. This violates the "free public services" doctrine, which holds that those whose actions cause government to provide services are not liable for the cost of those services (absent specific legislative authorization). *E.g., District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir. 1984); *Koch v. Consolidated Edison Co. of N.Y., Inc.*, 468 N.E.2d (N.Y. 1984), *cert. denied*, 469 U.S. 1210 (1985). Making these types of expenditures is what government is all about, and the method by which those services are properly financed is taxation or fees, not tort liability imposed on a few, selected private parties.

Tort Liability Must Fit With Legislative Rules

Often the state legislature or city council has already dealt with the public health issue that is the subject of a public nuisance suit. Depending on what the legislature has done, a public official may well be precluded from bringing the particular suit that it has brought. *See* Restatement (Second) of Torts, § 821B, cmt. f.

We all learned about the separation of powers principle in elementary school. It applies to public nuisance. If the legislature has implemented a comprehensive regulatory program, the separation of powers principle may preclude

a public nuisance action. A nuisance action also may not conflict with a legislative rule or standard.

Finally, the legislature may have given specific, exclusive authority to bring public nuisance actions to a different entity than the one that has brought the suit. In these ways, legislative action might rein in public nuisance suits. *E.g., In re Lead Paint,* 2002 WL 31474528 (N.J. Super. Nov. 4, 2002), *appeal pending*; *Young v. Bryce Arms*, 327 Ill. App. 3d at 968; *City of Chicago v. General Motors Corp*., 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd*, 467 F.2d 1262 (7th Cir. 1972).

Conclusion

Public nuisance lawsuits brought by politically powerful state attorneys general or big-city mayors, represented by well-heeled contingency fee lawyers, are the heavyweights of litigation. By aggregating claims involving harm to hundreds of thousands of individuals, as well as the large sums expended on public health and welfare programs, these suits raise the stakes immensely.

The vague public nuisance standards provide ample latitude for creative claims against food manufacturers, suppliers, retailers, and restaurants, which find themselves in the crosshairs of a public health controversy. Whether the traditional boundaries of public nuisance law will again be transgressed to permit suits against the food industry, as has occurred in the litigation campaigns against tobacco, firearms, and lead paint manufacturers, will test the mettle of judges, trial attorneys, and their clients. Now is the time to take steps that can blunt attempts to vilify the industry and lay the groundwork for future public nuisance litigation.

Notes

[1] Constitutional and public policy limitations may prohibit public officials from using contingency fee lawyers to prosecute public nuisance actions. *People ex rel. Clancy v. Superior Court,* 39 Cal.3d 740 P.2d 347, 218 Cal. Rptr. 24 (1985).

[2] Consumer unfair trade practice laws are also likely to be used to coerce changes in labeling and marketing of food products. Both public officials and consumers can use those laws, which often have very broad language and statutory penalties. These laws, which vary state by state, are beyond the scope of this LEGAL BACKGROUNDER.

** Charles H. Moellenberg Jr., a partner in the international law firm Jones Day, has been involved in the nationwide coordination of major product liability cases, securities and takeover litigation, commercial and insurance coverage disputes, and a variety of general business litigation. This LEGAL BACKGROUNDER represents the personal views of the author and does not necessarily reflect the views of Jones Day or any of its clients.*