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ATTEMPTS TO EXPAND PUBLIC NUISANCE LAWS TO REACH PRODUCTS

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The current fad in high-profile products litigation involves suits by government entities to recover public expenditures from certain product manufacturers. Thus far, those suits have focused on various allegedly "bad" (although legal) products that the government claims has contributed to public nuisances, increasing costs for such public services as medical care, police patrols, insurance and criminal prosecutions. Examples include the suits filed by state attorneys general against tobacco companies and by various cities, counties and states against lead paint manufacturers and fire-arms manufacturers.

One of the most striking aspects of this litigation is the attempt to expand public nuisance law to the design and distribution of products. For example, in firearms litigation, plaintiffs argue that firearms possessed by criminals are a public nuisance. Plaintiffs often further allege in the various suits that firearms manufacturers have substantially contributed to that public nuisance by purportedly designing firearms with features attractive to criminals and failing to prevent the sale of firearms by retailers to criminals or "straw purchasers" (i.e., legal purchasers buying guns for illegal possessors). The plaintiff cities typically argue that firearms manufacturers, even absent wrongdoing, should alter their business practices and reimburse the cities for costs associated with firearms misuse.

One's initial reaction is that this cannot and should not work, particularly given the well-known admonition that, if public nuisance law is expanded to cover products, it would become a "monster" that would "devour in one gulp the entire law of torts" according to the frequently cited 8th U.S. Circuit Court of Appeals' opinion in *Tioga Public School District v. United States Gypsum Co.* (1993). But, as they say, not so fast. In firearms litigation, some state and federal courts have denied motions to dismiss these public nuisance claims, including courts in Ohio, New Jersey and Illinois.

An expansion of public nuisance law to cover products would have enormous consequences not only for the industries presently targeted by government entities pursuing cost-recovery litigation, but also for other industries. Why? Because this reformulated public nuisance cause of action undoubtedly will be applied to more traditional product liability suits. After all, private parties generally may bring public nuisance actions if they have suffered a "unique" or "special" injury, and it is certainly conceivable that creative plaintiffs could devise such claims in traditional products cases.

Even if restricted to government cost-recovery suits, many products could be characterized as contributing to public nuisances when mishandled or misused to cause public injury and associated costs, e.g., alcohol, chemical products, pharmaceutical products, cell phones and automobiles, just to name a few. If public nuisance law applies to products, these and other manufacturers may face potential liability for subsequent misuse of products by third parties with whom they have no relationship and over whom they have no control, simply because they lawfully placed their products into the stream of commerce, and the product, through misuse or otherwise, caused government entities to incur greater public service expenditures.

Equally disturbing are plaintiffs' efforts to modify traditional elements of public nuisance law to facilitate its broad application to products. For example, plaintiffs in the various suits often contend that, although public nuisance is a tort, it should not be limited by the absence of wrongdoing or traditional tort notions such as proximate cause. As plaintiffs formulate it, even a law-abiding manufacturer of a lawful product sold, traded-in and re-sold repeatedly as a used product, until it finds its way into inappropriate hands and is misused to cause public harm, is nevertheless responsible for the resulting public nuisance — regardless of the remoteness of the manufacturer's conduct to the ultimate misuse of the product and the absence of wrongdoing by the manufacturer. After all, the plaintiffs often argue in these types of suits, the principal purpose of a public nuisance action is to abate the nuisance, regardless of fault.

The Right Approach

It is ill-advised to seek to apply public nuisance law to products. Injuries caused by products are properly addressed through other tort law. Applying public nuisance law to products would create the potential for absolute and almost limitless liability.

Historically, public nuisance law

has not become the feared monster devouring the entire law of torts because it has operated within well-recognized limits. These limits should not be lightly discarded, including notions of proximate and producing cause, remoteness and wrongdoing. Otherwise, manufacturers may face liability for public nuisances that arise long after the product is sold and long after control of the product ceases. Historical restrictions of the public nuisance doctrine to actions involving statutory violations or the possession or use of real property make good sense because there, unlike in products cases, the public nuisances are clearly within the violator's or property owner's control when the nuisance is created. An expanded public nuisance cause of action also raises due-process and other constitutional issues, particularly if wielded as a weapon by government entities to extract reimbursement of government expenditures.

Thankfully, a number of courts, such as the Supreme Court of the State of New York, Appellate Division, have recognized the import of plaintiffs' arguments and rejected efforts to broaden public nuisance laws to reach products. For example, in the firearms litigation, numerous state and federal courts throughout the country have dismissed plaintiffs' public nuisance claims.

While substantial progress has been made in defeating the effort to expand public nuisance law to products, the war is not over. A number of federal and state appeals court cases are pending. Practitioners on both sides of the "v." and in-house counsel should be alert to future developments in this battle over the scope and reach of public nuisance law as it may have a profound effect on their clients. TTL

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