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Building a Fire Wall

Missouri and New Jersey Hold the Line Against Plaintiffs' Efforts to Expand the Law of Public Nuisance

Part One of a Two-Part Series

By Eric G. Lasker

In its 2006 report on "Judicial Hellholes®," the American Tort Reform Association ("ATRA") identified the plaintiff bar's aggressive use of public nuisance theories in product liability litigation as one of the key "rising flames" that is threatening traditional judicial protections for defendants in the country's most plaintiff-friendly jurisdictions. As ATRA explained, "personal injury lawyers and some attorneys general have been trying to move public nuisance theory far beyond its traditional boundaries in order to avoid the well-defined strictures of products liability law." American Tort Reform Association, *Judicial Hellholes 2006*, at 9. In so doing, they seek to tilt the playing field dramatically in their favor by writing out of the common law a plaintiff's obligation of establishing actual causation, proximate causation, and control.

Historically, most courts have been properly resistant to this misuse of the public nuisance doctrine. *See generally,* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006). These courts have recognized that the purpose of the public nuisance doctrine is to abate conduct that gives rise to injury to public lands or waterways or to rights common to the public as a whole, not to compensate individuals or entities allegedly injured by exposures to an alleged injurious product.

However, three recent developments have provided fuel for this "rising flame" of public nuisance and threaten to fan the flames even higher. First, although the litigation in fact never tested plaintiffs' expanded use of public nuisance theories, the $368 billion settlement of lawsuits brought by state attorneys general against the tobacco industry demonstrated the coercive power of such lawsuits and, equally importantly, generously funded similar attacks on other industries. Second, state attorneys general and, increasingly, municipalities have turned to public nuisance theories against private industry as a means to fund general treasuries and to sidestep the constitutional checks and balances of the legislative and regulatory power. Third, plaintiffs enjoyed preliminary success with their first major trial victory in Rhode Island, where a jury found that the presence of deteriorating lead paint in public buildings gave rise to a public nuisance for which former manufacturers of lead paint could be held liable. *See* Richard O. Faulk and John S. Gray, *The Mouse That Roared?: Novel Public Nuisance Theory Runs Amok in Rhode Island*, Washington Legal Foundation, Critical Legal Issues, Working Paper Series No. 146 (March 2007).

Following the plaintiff's trial victory in Rhode Island, all eyes turned to Missouri and New Jersey, where the respective state supreme courts were considering whether to allow public nuisance theories to proceed against former lead paint manufacturers. A victory in one or both of these courts could have fanned this rising flame into an inferno. Within four days of each other, however, both courts properly built a firewall against plaintiffs' distortion of the common law, rejecting plaintiffs' theories and putting an end to the lead paint public nuisance claims in those states. *See City of St. Louis v. Benjamin Moore & Co.*, ___ S.W.3d ___, No. SC 88230, 2007 WL 1693582 (Mo. June 12, 2007); *In re Lead Paint Litig.*, ___ A.2d ___, A-73-05, 2007 WL 1721956 (N.J. June 15, 2007). While these opinions have provided a welcome relief, the embers of plaintiffs' public nuisance theories still burn. In the lead paint litigation alone, the Ohio state attorney general recently announced Ohio's decision to sue former lead paint manufacturers (following the lead of a number of Ohio municipalities which brought similar suits over the past year). Similar cases are winding their way through the courts in California, Rhode Island, and Wisconsin.

This two-part series discusses plaintiffs' attempts to misuse public nuisance law and explains why the public nuisance doctrine does not fit with the facts at issue in product-based claims. It then reviews the recent opinions of the Missouri and New Jersey supreme courts and discusses the ramifications of those cases moving forward.

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The Misuse of Public Nuisance Law

The lead paint litigation is part of a broader effort by plaintiffs' counsel to use public nuisance law to avoid important evidentiary safeguards imposed by product liability law for a wide variety of allegedly defective products. In recent years, private plaintiffs, state attorneys generals, local municipalities, and other public entities have attempted to bring public nuisance claims against, among others, manufacturers of handguns, alcoholic beverages, automobiles, video games, and genetically modified corn.

Numerous courts have explained the dangerous consequences that would follow from allowing public nuisance claims to ignore the time-tested principles of product liability law:

> [G]iving a green light to a common-law public nuisance cause of action today will, in our judgment, likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities. All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born. *People ex rel. Spitzer v. Sturm, Ruger & Co.,* 761 N.Y.S.2d 192, 196-197 (App. Div. 2003)).

As these courts have explained: "The courts have enforced the boundary between the well-developed body of product liability law and public nuisance law. Otherwise, if public nuisance law were permitted to encompass product liability, nuisance law 'would become a monster that would devour in one gulp the entire law of tort.'" *Camden County Board of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3rd Cir. 2001); *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

Fortunately, the public nuisance doctrine is not a monster; it is a long-established doctrine with traditional requirements that preclude its application in product liability litigation. An analysis of these requirements clearly demonstrates why attempts by private plaintiffs and government entities to bring mass product liability claims under the guise of public nuisance must fail.

Public Nuisance Requires Interference with a Public Right

"A public nuisance is an unreasonable interference with a right common to the public." Restatement (Second) of Torts §821B(1) (1979). Products manufacturers, however, do not deal with the public as a whole; they provide products to individual customers. Plaintiffs seek to avoid this basic disconnect by arguing that the products in the hands of these end-users give rise to a danger to the public at large. For example, in the lead paint litigation, plaintiffs attempt

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to satisfy the public right requirement by pointing to the large percentage of housing constructed prior to the ban of lead paint in 1978 and the large number of children at risk from lead poisoning. But this mathematical analysis does not transform damages alleged to arise from the failure of property owners to maintain private housing into a public nuisance. As the Restatement explains:

> Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured. Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. *Id.* comment g.

Plaintiffs' argument that the claimed dangers of the targeted products pose a public health risk merely begs the question. Plaintiffs must demonstrate that the conditions giving rise to the health risk impose an "unreasonable interference with rights common to the public." *City of Kansas City v. New York-Kansas Bldg. Assocs.*, 96 S.W.3d 846, 857 (Mo. Ct. App. 2002). In determining whether a public nuisance exists, "the court must consider whether the alleged nuisance is located in a public place, a place where the public is likely to congregate, a place where the public has a right to go, or a place where the public is likely to come into contact with the nuisance. A nuisance is public when it affects rights to which every citizen is entitled such as traveling on a public street." *Id.*

In the lead paint litigation, courts have held that plaintiffs' claim for costs of abating lead paint in private properties cannot satisfy this first essential element of public nuisance law:

> The concept of public right as that term has been understood in the law of public nuisance does not appear to be broad enough to encompass the right of a child who is lead-poisoned as a result of exposure to deteriorated lead-based paint in private residences or child-care facilities operated by private owners. Despite the tragic nature of the child's illness, the exposure to lead-based paint usually occurs within the most private and intimate of surroundings, his or her own home. Injuries occurring in this context do not resemble the rights traditionally understood as public rights for public nuisance purposes — obstruction of highways and waterways, or pollution of air or navigable streams. *City of Chicago v. Am. Cyanamid Co.,* 823 N.E.2d 126, 132-133 (Ill. App. Ct. 2005).

Requirements for Public Nuisance

Public nuisance actions require either that the defendant's conduct involve: 1) the defendant's use of land; 2) interference with a public highway, navigable stream, railroad right of way, or public property; or 3) defendant's violation of a specific statute or ordinance. *See* Donald G. Gifford, *Public Nuisance As a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741,

831 (2003) ("[W]hen one reads hundreds of nuisance cases from medieval times to the present, one is struck by the reality that public nuisance almost always involves land, not injuries that occur in a variety of other factual contexts such as collisions between vehicles, business or professional settings, or other personal injuries."). These limitations ensure that public nuisance law does not expand beyond the scope of its purpose in protecting rights common to the public and should defeat any effort to apply public nuisance doctrine to the manufacturer of a lawful product.

The Illinois Supreme Court recently confirmed the importance of these limitations on the scope of public nuisance law in rejecting a claim brought against handgun manufacturers:

> Defendants assert that in more than 2,500 reported cases in the over-100-year history of public nuisance law in Illinois, a public nuisance has been found to exist only when one of two circumstances was present: either the defendant's conduct in creating the public nuisance involved the defendant's use of land, or the conduct at issue was in violation of a statute or ordinance. Thus, they argue, even though an action for public nuisance may lie without allegations that the nuisance emanates from the defendants' use of land, the law of public nuisance does not encompass conditions that eventuate from the lawful manufacture, distribution, and sale of a nondefective product.
>
> Although we have not attempted to verify defendants' claim that the body of law on this topic in state and federal courts applying Illinois law exceeds 2,500 cases, we have found no Illinois case in which a public nuisance was found in the absence of one of these two conditions. While no case law in this jurisdiction expressly limits application of the doctrine of public nuisance to these two circumstances, no case law expressly authorizes its application in the absence of either condition. To do so would be to expand the law of nuisance to encompass a third circumstance — the effect of lawful conduct that does not involve the use of land. We are reluctant to allow such an expansion. *City of Chicago v. Beretta U.S.A. Corp.,* 821 N.E.2d 1099, 1117 (Ill. 2004).

Proximate Cause

Plaintiffs also must establish that a defendant's acts were "the proximate and efficient cause of the creation of a public nuisance." *City of St. Louis v. Varahi, Inc*., 39 S.W.3d 531, 537 (Mo. Ct. App. 2001). This requirement cannot be met where there is an intervening cause giving rise to the alleged hazard, *e.g.*, where a property owner allowed lead paint to deteriorate in violation of state statutes and municipal ordinances or where a gun owner uses the gun for illegal purposes. Expanding the scope of public nuisance to allow claims against manufacturers of lawful products that are misused by others would transform product manufacturers not only into insurers of their products but also into insurers of consumers who might use their products improperly.

Ignoring the requirement of proximate causation through public nuisance litigation would "give rise to a cause of action … regardless of the defendant's degree of culpability or of the availability of other traditional tort theories of recovery." *Tioga Pub. Sch. Dist*., 984 F.2d at 921. As one jurist observed, the results would be "staggering": "The manufacturer's liability will turn not on whether the product was defective, but whether its legal marketing and distribution system somehow promoted the use of its product by 'criminals and underage end users.'" *Ileto v. Glock, Inc*., 370 F.3d 860, 862 (9th Cir. 2004) (Callahan, J., dissenting).

Control Over and Power to Abate The Alleged Hazardous Condition

Further, "liability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance." *Tioga Pub. Sch. Dist*., 984 F.2d at 920 (citing cases). "[I]nability to allege that the defendants ha[ve] a legal right to abate the nuisance is fatal to [a] nuisance claim." *Corp. of Mercer Univ. v. Nat'l Gypsum Co*., No. 85-126-3-MAC, 1986 WL 12447, at *7 (M.D. Ga. Mar. 9, 1986). Again, this requirement cannot be satisfied in claims against product manufacturers who lose control over their products and any potential subsequent misuse at the time of sale.

Illustrative is the ruling in *City of Manchester v. Nat'l Gypsum Co*., 637 F. Supp. 646 (D.R.I. 1986). There, the court focused on the requirement of control in holding that the City of Manchester could not recover from manufacturers of asbestos-containing plaster products used in the construction and renovation of school buildings:

> [L]iability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise. If the defendants exercised no control over the instrumentality, then a remedy directed against them is of little use.
>
> The instrumentality which created the nuisance, in this case, has been in the possession and control of the plaintiff, the City of Manchester, since the time it purchased the products containing asbestos materials. The defendants, after the time of manufacture and sale, no longer had the power to abate the nuisance. Therefore, a basic element of the tort of nuisance is absent, and the plaintiff cannot succeed on this theory of relief. *Id.* at 656 (internal citations omitted).

The conclusion of this series will discuss the rejection of public nuisance theories by courts in Missouri and New Jersey.