Public Nuisance Law: Resistance to Expansive New Theories

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In the eternal struggle by plaintiffs' lawyers to stretch the law to fit their clients' cases, public nuisance law has quite a history. Over the past few decades, plaintiffs' lawyers have tried to broaden the meaning of the term "public nuisance" to include a cause of action for any harm caused to citizens on a broad scale. The most recent area of law to suffer from these attempts is product liability. In response, the defense bar has been vigilant and has stood strong against these attacks.

The modern concept of a public nuisance cause of action is addressed in section 821B of the Restatement (Second) of Torts. While section 821B was being drafted, a disagreement arose as to the scope of public nuisance law. Dean Prosser pushed to limit public nuisance to its historical roots (e.g., actions to violations of criminal statutes), while activists urged for the expansion of the definition of public nuisance to include environmental harms. Today's vague definition was the unfortunate result of a compromise between these competing interests.[1]

The Restatement defines public nuisance as follows:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
> (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
> (c) whether the conduct is of a continuing nature or has produced a permanent or long lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

This definition does nothing to clear up the "impenetrable jungle" of public nuisance law. Indeed, creative lawyers have used the Restatement's ambiguity to broaden the factual circumstances that will satisfy the essential elements. Courts now interpret the Restatement as laying out four distinct elements: the existence of a public right, a substantial and unreasonable interference with that right, proximate causation, and injury.[2] These elements and others suggested by additional case law are discussed in turn below.

Interference with a Public Right

To be actionable as a public nuisance, an act must interfere with a "right common to the general public." This requirement is used to distinguish public nuisance from private nuisance. It is only those rights that are common to the general public, and not merely some group of individuals (albeit large in number), that are protected by an action for public nuisance.

The comments to the Restatement (Second) of Torts provides some guidance on this element, clarifying that "[t]here

Public Nuisance in Historical Context

Public nuisance law has been described as an "impenetrable jungle" that "elude[s] precise definition" and is more easily "negatively defined" by contrast to other types of tort actions.[i] Very generally, a public nuisance is an unreasonable use by a person of his or her own property that works to injure the rights of the public.[ii] "It is a part of the great social compact to which every person is a party."[iii]

In its earliest form, public nuisance was a criminal cause of action used to abate activities that were considered to be nuisances to the common and public welfare.[iv] Such activities were thought to be violations of the rights of the Crown, and they were therefore punishable as a criminal offense.[v] Over time, however, public nuisance law has become a more flexible remedy used to protect rights common to the public, including "roadway safety, air and water pollution, disorderly conduct, and public health."[vi] Eventually, public nuisance became a cause of action that also gave private citizens standing to bring claims if they simply demonstrated that they had suffered a "special" or "particularized" injury.[vii]

Endnotes

i. W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 86, at 616 (5th ed. 1984); City of Chicago v. Festival Theatre Corp., 438 N.E.2d 159 (Ill. 1982).

ii. *See, e.g.*, H. Wood, A Practical Treatise on the Law of Nuisances § 1, at 1–3 (3d ed. 1893).

iii. *Id.*

iv. *See, e.g.,* Rhode Island v. Lead Indus. Ass'n, 951 A.2d 428, 444 (R.I. 2008) (quoting Donald G. Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. Rev. 741, 790–91, 793–94 (2003)).

v. Restatement (Second) of Torts § 821B cmt. a, at 87 (1979).

vi. *Rhode Island*, 951 A.2d at 444 (quoting Richard O. Faulk and John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 951 (2007)).

vii. Restatement (Second) of Torts § 821B cmt. a, at 87–88.

must be some interference with a public right . . . [that] is 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."[3] This last sentence is key and is to remind courts that causes of action that sound in negligence are not properly brought as actions for public nuisance.

Finally, the injury actually sustained (and not merely the right) must be common to the general public. This requirement is also pivotal in product liability cases. A defective product harms only those persons who purchase and use the product. Although, at times, these products may be used on a broad scale, there is nonetheless only a discrete group of persons who are within the sphere of harm. Therefore, products will generally not interfere with a public right.

Specifically, courts have been cautious not to recognize broad public rights that would implicate any potentially dangerous instrumentality. For example, in a recent case regarding whether the sale of firearms, eventually used to commit illegal crimes, interfered with a public right, the court refused to expand the concept of public rights to encompass the right of a citizen not to be victimized by crime.[4]

Unreasonable Interference

Not every interference with a public right will constitute a public nuisance. Specifically, the interference must be unreasonable. The Restatement (Second) of Torts lists specific factors to be considered in determining whether conduct is an unreasonable interference (e.g., significant interference with public health, safety, peace, comfort).

As with any reasonableness analysis, foreseeability must be considered in determining whether the harm is "unreasonable." Plaintiffs typically will be required to prove that it was foreseeable that a defendant's conduct would create the alleged public nuisance. On this basis, some courts have held that a third-party user's illegal use of a product (e.g., firearms) is not foreseeable, thereby precluding liability of the manufacturer for the nuisance caused by crime.[5]

One of the factors defining an unreasonable interference is the violation of a statute or regulation. Unfortunately for manufacturers, these statutes or regulations themselves often use the term "public nuisance" in a broad-sweeping manner that is not intended to provide fodder for these types of suits. Defendants must resist attempts to equate the use of the term "public nuisance" in a statute or regulation with the elements required by a cause of action for public nuisance.

On the other hand, the Restatement's comments provide support for the argument that compliance with statutes or regulations makes activity per se reasonable.[6] Therefore, in suits that involve an activity that is regulated by the federal government (e.g., automobile manufacture and safety), there is a strong argument that compliance with the applicable regulations bars a cause of action for public nuisance.

A public nuisance substantially interferes with a public right and causes unreasonable harm. It is not sufficient that the interference causes only an annoyance or disturbance of everyday life.[7]

Control of the Nuisance

Some courts have held that a public nuisance cause of action requires that the defendant have control over the instrumentality alleged to have created the nuisance at the time injury occurred.[8] Such a requirement is logical, considering that plaintiffs in these causes of action generally seek abatement of some certain activity, which cannot be satisfied by a defendant without control over the nuisance.

Some courts, however, have refused to find a control requirement, finding that it is not an element of public nuisance but merely a relevant factor in assessing proximate cause or damages. For example, in a case involving the manufacture of firearms, one court has found that "[c]ontrol is not a separate element of causation in nuisance cases that must be pleaded and proven. . . . It is, rather, a relevant factor in both the proximate cause inquiry and in the ability of the court to fashion appropriate injunctive relief."[9] In cases involving products, therefore, the fallback defense argument is that lack of control over the product after sale breaks the chain of causation, not merely that lack of control bars plaintiff's claim.

Environmental Cases

The jury is still out on whether the drafters of section 821B crafted an effective compromise. Results in the environmental arena have certainly been mixed. For example, in 1971, the California Court of Appeal struck a blow on the environmental front by denying class certification in a suit against 293 corporations for air pollution in Los Angeles premised on public nuisance law.[10] However, environmentalists were later successful in forcing a significant settlement based on public nuisance liability in the famous case involving the Love Canal.

In the last decade, manufacturers of the gasoline additive methyl tertiary butyl ether (MTBE) became the target in this realm of law. MTBE is an oxygenate once used in gasoline to help it burn more cleanly and more efficiently.[11] In 1979, the U.S. Environmental Protection Agency (EPA) approved MTBE's use as a gasoline component, and manufacturers began using it instead of another component that had been identified as an air pollutant. In 1990, amendments to the Clean Air Act required the use of oxygenates such as MTBE.

Starting in 1998, many states around the country filed suits alleging that MTBE is a defective product and that its use creates a public nuisance. MTBE can leak into the water supply from underground storage tanks at gas stations. Environmentalists have argued that MTBE has health-related risks, although the EPA has concluded that there is not enough available data to consider MTBE a risk at low exposure levels in drinking water.[12]

Many of the MTBE cases were consolidated by the Judicial Panel for Multidistrict Litigation and transferred to the Southern District of New York, referred to as *MDL 1358*. In 2002, the court dismissed a number of the claims brought by well owners who simply alleged that their wells were "threatened" for failing to state a cause of action.[13] The court then denied class certification to the remaining plaintiffs, finding that the requirements of Federal Rule of Civil Procedure 23 had not been met.[14]

Nonetheless, during the early to mid-2000s, more cases were filed and transferred to the Southern District of New York as *MDL 1358 II*. Over the past few years, settlements were reached in many of these cases. However, a number of defendants, including Exxon Mobil Corporation, still have public nuisance cases pending on the court's docket.

Product Liability Cases

Product manufacturers have not been immune to public nuisance claims. In the 1980s and 1990s, suits were brought against manufacturers of products containing asbestos, alleging that asbestos created a public nuisance that affected the public's right to health or safety.[15] Most cases were dismissed either because the court found that the manufacture of a legal product is not the same as the creation of a nuisance or because the court found that a public nuisance claim requires the defendant to have control of the product at the time of the nuisance's creation.[16]

The next product to be targeted by the plaintiffs' bar was tobacco. In an attempt to avoid causation requirements and affirmative defenses that would gut their case, the plaintiffs' bar began to argue that tobacco manufacturers were liable under a public nuisance theory.[17] Only one of these cases, however, was ever adjudicated, with the court refusing to extend the theory of public nuisance.[18]

Gun manufacturers were the next industry targeted. In *City of Chicago v. Beretta U.S.A. Corp.*, plaintiffs sought punitive damages and permanent injunctive relief from gun manufacturers to abate the alleged public nuisance of gun violence. The court, "reluctant to recognize a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it," ruled that there was no public right to be free from the threat of crimes.[19]

More recently, public nuisance claims have been brought against lead paint manufacturers. Much like the suits brought against asbestos manufacturers decades ago, these suits have targeted manufacturers of lead paint, seeking reimbursement for the costs of lead exposure programs or lead paint abatement. Last year, the Supreme Court of Rhode Island struck a huge blow against their validity, overturning the first verdict against lead paint manufacturers.[20]

In *Rhode Island v. Lead Industries Ass'n*, a jury entered a verdict for plaintiffs after a four-month trial, the longest civil jury trial in Rhode Island's history. One of the issues on appeal was the liability of the defendants on the plaintiffs' cause of action for abatement. The Supreme Court of Rhode Island overturned the verdict, ruling that the trial court erred by denying the defendants' motion to dismiss. Specifically, the court found that the defendants had never interfered with a public right nor were they in control of the lead pigment at the time of injury.

The court's opinion provides a thorough history and analysis of the elements of public nuisance. Integral to the court's finding was that the "right of an individual child not to be poisoned by lead paint" does not constitute a right relative to the public's right to health, safety, peace, comfort, or convenience. The court was concerned by the effect of any other finding, cautioning that "[w]ere we to hold otherwise, we would change the meaning of public right to encompass all behavior that causes a widespread interference with the private rights of numerous individuals." Specifically, the court noted that "public nuisance and product liability are two distinct causes of action, each with rational boundaries that are not intended to overlap."[21]

Conclusion

Plaintiffs have attempted to use public nuisance law to evade the requirements of other causes of action for almost half a century. In the vast majority of cases, courts have barred such suits. However, that is not always the case, and defendants must remain prepared to resist expansive new theories presented under the guise of public nuisance. For example, recent cases filed in some parts of the country against financial institutions allege that the institutions have created a public nuisance by offering subprime mortgage loans. The key to defending a public nuisance action is to distinguish the actual cause of action the plaintiff should have brought from public nuisance, both in terms of the elements and the purpose of each. ■

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Endnotes

1. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 806–7 (2003).
2. City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1113 (Ill. 2004).
3. Restatement (Second) of Torts 821B at cmt. g.
4. *City of Chicago*, 821 N.E.2d at 1116.
5. *See, e.g., id.* at 1126–27, 1132–38.
6. Restatement (Second) of Torts § 821B cmt. f.
7. William L. Prosser, Handbook of the Law on Torts § 71, at 557–58 (1st ed. 1941).
8. *See, e.g.*, Rhode Island, 951 A.2d at 446.
9. *City of Chicago*, 821 N.E.2d at 1132.
10. Diamond v. Gen. Motors Corp., 20 Cal. App. 3d 374 (Cal. Ct. App.1971).
11. What is MTBE?, www.mtbelitigationinfo.com/external/?fuseaction=external.docview&cid=942&documentID=72925 (last visited May 26, 2009).
12. Overview—Methyl Tertiary Butyl Ether (MTBE)—US EPA, www.epa.gov/mtbe.faq.htm#concerns (last visited June 1, 2009).
13. *MDL 1358*, www.mtbelitigationinfo.com/go/doc/942/76134 (last visited May 26, 2009).
14. *See In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 209 F.R.D. 323 (2002).
15. Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L. J. 541, 553 (2006); Gifford, *supra* note 1, at 751.
16. *See, e.g.*, City of San Diego v. U.S. Gypsum Co., 35 Cal. Rptr. 2d 876 (Cal. Ct. App. 1994); Tioga Pub. Sch. Dist. No. 15 of Williams County, N.D. v. U.S. Gypsum Co., 984 F.2d 915, 920–21 (8th Cir. 1993); Corp. of Mercer Univ. v. Nat'l Gypsum Co., No. 85-126-3-MAC, 1986 WL 12447, at *6 (M.D. Ga. Mar. 9, 1986).
17. Gifford, *supra* note 1, at 759.
18. Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997).
19. *City of Chicago*, 821 N.E.2d at 1116.
20. *See generally Rhode Island*, 951 A.2d 428.
21. *Id.* at 443–52, 453–54.