IADC COMMITTEE NEWSLETTER

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IN THIS ISSUE

In Part II of The Second Coming of Nuisance Law Litigation we introduce you to a young, new author, James K. Holder, a partner in the San Francisco office of Gordon & Rees. Mr. Holder takes you through a nuisance law related litigation that is new but expanding rapidly all across the country: Opioid litigation. The media has been constantly reporting issues relating to opioid addiction in numerous cities and states. Mr. Holder provides an accurate and complete expert analysis of this new mass tort in the public nuisance mold and yet another issue that defense counsel, in-house as well as outside counsel, must understand and prepare to defend against. We recommend this Part II article as required reading for all IADC members.

A Tidal Wave of Public Nuisance Law Suits across the US Involving Opioid Litigation

ABOUT THE AUTHORS

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Joseph F. Speelman is currently serving as General Counsel for a private, Swiss based energy information group. He has directed successful defense efforts against Public Nuisance lead paint litigation in 15 states, gaining defense verdicts in those states including achieving a defense verdict before the state of Rhode Island Supreme Court that reversed a lower court trial verdict and rendered a defense verdict by the high court. He can be reached at jfspeelman49@gmail.com.

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Over the course of 2017, the opioid painkiller drug litigation has expanded by what some commentators have referred to as a "tidal wave" of public nuisance-based lawsuits filed by states, cities, and counties across the United States against the pharmaceutical companies that produce FDA approved painkilling opioid drugs.

According to a recent report by the Washington Post, within the past year more than 25 states, cities and counties have filed civil cases against manufacturers of opioid drugs, and this number continues to grow. The suits generally allege that the opioid drug manufacturers are responsible for widespread problems with opioid addiction based on an alleged deceptive marketing campaign by the pharmaceutical companies to trivialize the risks of opioids while overstating the benefits of using them for chronic pain. The opioid law suits generally seek damages for the governmental costs of medical care, drug treatment, and law enforcement associated with what has been described as the opioid epidemic in America.

The public officials spearheading the opioid lawsuits are encouraging comparisons of these lawsuits to the 1990s public nuisance litigation filed by the states against major tobacco companies, in which 46 states sued the largest tobacco companies for public nuisance asserting that the tobacco companies should take up the burden of paying for the costs of treating smoking-related diseases. For example, the State of Ohio's opioid litigation complaint claims that the pharmaceutical manufacturers' conduct "borrow[ed] a page from Big Tobacco."

As setout in Part I above, the tobacco litigation was settled in 1998 before courts could determine whether public nuisance claims are viable in the products liability mass tort arena. The tobacco litigation settlement was the largest civil litigation mass settlement agreement in U.S. history. Commentators have noted that the strategy employed by the states in the current opioid lawsuits is reminiscent of the 1990s litigation against the tobacco industry, with the apparent goal of the states being to try and obtain a similar mass settlement. However, the states' attempt to rely on public nuisance theory to pursue this current litigation raises legal considerations about the proper role and scope of public nuisance law that was not decided in the tobacco litigation, and which has broad implications even beyond the current litigation.

Public Nuisance Filings

1980	1985	1990	1995	2000	2005	2010	2015	2020
-	Asbestos	-	Tobacco	>Lead Paint >Firearms > MTBE	>Climate Change	-	>PCBS >Opioids >Drinking Water >Flushable Wipes >Trans Fats	?

Source: "Is The Public Nuisance Universe Expanding?" Bloomberg/BNA; Jan. 31, 2017

The precipitous rise in public nuisance claims stems from the malleable nature of the doctrine. The vague and elastic nature of public nuisance law that led to its criticism has also made it attractive to plaintiffs and their counsel as a way to plead around the particularized requirements of other more strictly defined causes of action. With public nuisance claims, because the focus is different than a private cause of action, the plaintiffs are able to obtain relaxed evidentiary standards on issues that can derail individual plaintiff lawsuits, such as the statute of limitations, or issues regarding duty, breach, causation, and product identification. Over time, creative plaintiffs' attorneys have sought to expand the scope of public nuisance law beyond its traditional boundaries in order to broaden the context for pursuing litigation, including product liability claims.

By contrast, for defendants, any expansion of public nuisance law represents a worrying source of undefined potential liability on a potentially massive scale. Public nuisance claims, if allowed against product manufacturers, have the potential to impose considerable liability for attenuated harms without the safeguards of traditional product liability requirements and defenses.

Most commentators agree that modern attempts to expand the scope of public nuisance law beyond its traditional realm began in the 1970s when plaintiffs in environmental contamination cases successfully revived public nuisance law, which had been largely dormant, in order to force industrial landowners to stop polluting and pay for the costs of environmental cleanup. Environmental litigation was seen

as an appropriate venue for nuisance law because the litigation is connected to the traditional realm of nuisance law – i.e., real property.

This revival of public nuisance law led to attempts to import public nuisance law into other areas of law, including product liability litigation. The earliest example comes from the California case of *Diamond v. General Motors Corp,* 97 Cal. Rptr. 639 (Cal. Ct App. 1971), a class action filed on behalf of 7 million property owners in Los Angeles County against manufacturers of automobiles seeking billions in compensation for societal costs of air pollution. The California trial court and appellate court dismissed the case primarily on the grounds that applying public nuisance on such a massive scale would effectively supersede legislative and administrative authority over the regulation of automobiles.

In the 1980s and early 1990s, attempts were made to use public nuisance litigation for mass torts against product manufacturers of asbestos; however, as setout in Part I, these attempts were universally unsuccessful as courts were concerned about the consequences of extending the scope of public nuisance beyond its traditional scope. For example, in *Tiogal Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.,* 984 F. 2d 915, 921 (8th Cir. 1993), the Eighth Circuit explained that if public nuisance law were permitted to encroach unpon other traditional areas of tort law it would "in effect totally rewrite…tort law….[and] [n]uisance thus would become a monster that would devour in one gulp the entire law of tort…".

Despite these early defeats, plaintiffs continued asserting public nuisance claims in product liability lawsuits, including, most notably, lawsuits against the manufacturers of tobacco products, handguns, and lead paint. As discussed above and in Part I of this article, courts in the tobacco litigation never ruled on the validity of public nuisance claims against the tobacco manufacturers because the parties agreed to a global settlement. However, the settlement itself created a massive incentive to the plaintiff bar for the filing of public nuisance based claims against other product manufacturers.

In the subsequent public nuisance litigation against manufacturers of handguns, as has been discussed in Part I of this article, states and cities sued the manufacturers of handguns alleging that the handgun industry created a public nuisance by failing to design the guns with sophisticated safety mechanisms to prevent criminal use and that negligent marketing and distribution led to the placement of guns in the hands of criminals. The handgun manufacturers litigation these claims aggressively, and the vast majority of the handgun cases were dismissed on several grounds, including that: (1) the lawful sale of products does not meet the requirement of a nuisance that interferes with a right common to the general public, (2) the gun manufacturers do not have control over the use of the guns once they have been shipped to licensed distributors and dealers and thus cannot

have caused a nuisance, and (3) a lack of proximate causation between the criminal misuse of the handguns and the mere manufacture of the guns themselves, which are a lawful and legitimate product when used appropriately.

In the lead paint cases, numerous states sued lead paint manufacturers for public nuisance (after more traditional product liability and negligence actions failed) on the grounds that the lead paint manufacturers promoted the use of lead-based paints without informing the public of the danger of lead exposure. This despite, as clearly pointed out in Part I of this article, most state building regulations required the use of lead-based paint in new construction. Such litigation was also mostly unsuccessful, with the notable lone exception of California, in which the defendants were ordered by a trial court to pay $1.1 billion to clean up lead paint on older homes in parts of California. This ruling, as more fully set out in Part I of this article, is currently on appeal.

With regard to pharmaceutical products, public nuisance claims have been attempted, but rejected in the context of another drug epidemic in America, the methamphetamine drug epidemic. In *Ashley County v Pfizer,* 552 F. 3d 659 (8th Cir. 2009) twenty individual counties in Arkansas sued the manufacturer of an over-the-counter cold medicine that incorporated ephedrine for public nuisance on the grounds that the manufacturer did not take adequate steps to prevent the cold medicine from being converted by criminals into methamphetamine. The lawsuit sought to hold the cold medicine manufacturer liable for the costs of government services necessary to deal with the methamphetamine drug epidemic, including law enforcement, drug treatment, inmate housing, and family services.

The cold medicine lawsuit was dismissed at the pleading state due to a lack of proximate cause between the manufacture of the cold medicine and the resulting societal harm. The Eighth Circuit affirmed, holding that "criminal actions of the methamphetamine cooks…. Are sufficient to stand as the cause of the injury….and they are totally independent of the Defendants' actions of selling cold medicine to retail stores…." *Id* at 670. The Eighth Circuit cited to the handgun cases to support its reasoning and explained, "we are very reluctant to open Pandora's Box to the avalanche of actions that would follow if we found this case to state a cause of action." *Id.* At 671. Thus, in the only appellate case so far to address public nuisance in the context of a pharmaceutical product, the claim was denied at the pleading stage. As such, there are currently no known cases permitting public nuisance claims against the manufacturers of FDA-approved drugs.

Despite the present attempts to compare the opioid litigation to the tobacco litigation of the 1990s, the handgun cases and cold-medicine cases are the closest analogue to the current opioid litigation since those cases involve similar instances of misuse of a legitimate product breaking the causal chain

of any potential public nuisance action. Defendants in the opioid litigation have focused on several key defenses intended to prevent the states from establishing proximate cause, including: (1) the opioid drugs are FDA-approved and regulated for limited uses and with specific warnings (unlike tobacco products), (2) opioids are not sold directly to consumers but are only legally available by prescription from a doctor – aka a learned intermediary, (3) if the opioid drugs are used as intended under a doctor's supervision, the opioids relieve a patient's pain and thereby improve health, and (4) as with handgun and cold medicine litigation, the opioid epidemic is the result of criminal misuse of the drugs, which constitutes an intervening event breaking any causal chain between the manufacturers' conduct and the complained of harm.

The pending cases will tell us whether public nuisance law will be confined to its traditional boundaries or whether it will be allowed to intrude into product liability actions, leading to expansive liability and unpredictable results.

In Part III of The Second Coming of Nuisance Law Litigation, the growing use of public nuisance theories by states, cities, and other governmental sub divisions in litigation against large product manufacturers will be discussed, including the cases, the theories of liability, and the reactions of those defendants as well as reactions of representatives of governments as well as national commerce entities.

Past Committee Newsletters

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