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OPINION

PUBLIC NUISANCE

The tort that refuses to die

By Steven R. Williams, R. Trent Taylor & James T. Lynn special to the national law journal

The tort of public nuisance has seen its fortunes rise and fall dramatically during the past several years. It was once hailed by the legal literati as the next big tort. More than one court described it as a monster threatening to devour tort law because of its propensity for reaching conduct that other tort theories could not. See, e.g., *Tioga Public School Dist. No. 15 of Williams County, State of N.D. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993). Recent events confirm that analogy to a degree. Public nuisance resembles nothing so much as a zombie—a mindless creature perhaps not particularly dangerous at first glance but incredibly difficult to kill once and for all.

Earlier this decade, the legal world seemed to hold its collective breath, unsure whether this creature posed a legitimate threat. When a jury in 2007 awarded what was estimated to be $2.4 billion in damages in a case against former lead paint manufacturers alleging that lead paint was a public nuisance in Rhode Island, it appeared that the zombie's rampage had finally begun.

But, in the legal equivalent of a shotgun blast to the head, last summer the Rhode Island Supreme Court erased in one fell swoop the tort's crowning achievement by reversing the jury verdict and declaring that the suit should have been dismissed at the motions stage. See *State of Rhode Island v. Lead Industries Assoc.*, 951 A.2d 428 (R.I. 2008). The conventional wisdom was that the zombie had been slain.

Recently reanimated

In the tradition of any good horror movie, however, public nuisance did not die as a result of the Rhode Island decision. Far from it—public nuisance hardly missed a beat, picking itself up and slouching toward its next target. At least four important decisions have been handed down in the past half-year proving as much.

■ *North Carolina v. TVA.* On Jan. 13, in the case of *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 593 F. Supp. 2d 812 (W.D.N.C. 2009), a federal district court declared that air emissions from three coal-fired plants operated by the Tennessee Valley Authority are a public nuisance contributing to "significant hurt, inconvenience [and] damage" in North Carolina. As a remedy, the court ordered that the TVA proceed with plans to install enhanced pollution controls in these plants at a cost of $1 billion.

The decision found against the TVA despite its compliance with all applicable federal and state regulations, and it could lead to a flood of new public nuisance suits seeking to redress environmental harms by bypassing the traditional administrative procedures.

■ *N.J. DEP v. Exxon Mobil.* On Aug. 29, 2008, Judge Ross Anzaldi of New Jersey Superior Court granted summary judgment in favor of the plaintiffs on a public nuisance theory. *New Jersey Dep't of Env. Protection v. Exxon Mobil Corp.*, No. UNN-L-3026-04, 2008 WL 4177038 (Union Co., N.J., Super. Ct. Aug. 29, 2008). The state filed this suit against Exxon Mobil Corp. and others to mandate a cleanup that goes beyond remediating the petroleum-contaminated property at issue to health-based standards. Instead, the state sought to restore the natural resources to their fully functioning ecological value.

Not only is it significant that a court held a corporate defendant liable for a public nuisance on summary judgment, but it also sets the bar much higher than has previously been seen for environmental cleanup in a nuisance suit.

■ *Gates v. Rohm and Haas Co.* A federal district court in Pennsylvania ruled in July 2008 that the presence of vinyl chloride in the air, even if undetectable, constitutes a physical injury to property under common law public and private nuisance claims. See *Gates v. Rohm and Haas Co.*, No. 06-CV-01743, 2008 WL 2977867 (E.D. Pa. July 30, 2008). The court concluded that the evidence of airborne contamination is sufficient to survive summary judgment, even if it is below background levels: "[T]he exposure level need not necessarily present a health risk to make out a property damage claim."

This is significant because it sets a very low threshold for plaintiffs who are suing over pollution to make out a claim.

■ *Birke v. Oakwood Worldwide.* In *Birke*, 69 Cal. App. 4th 154 (Calif. 1st Ct. App. 2009), a California appellate court recently ruled that an asthmatic 7-year-old's suit against the apartment complex where she lived alleging that secondhand cigarette smoke in outdoor common areas is a public and private nuisance can go forward. The trial court dismissed the suit, but the appellate court reversed, noting that the complex had "admitted it made an affirmative business decision not to restrict smoking cigarettes in the outdoor common areas."

This decision marks a significant expansion of the type of conduct that can survive a motion to dismiss in a public nuisance suit.

As demonstrated by these cases, the fate of public nuisance is not synonymous with the fate of the lead-paint litigation. Though it is impossible to predict whether public nuisance will continue on its current trajectory, if the four decisions above are any indication, it is more than simply alive and well. The zombie of public nuisance continues to stalk Corporate America. NLJ

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