Hannibal Eclipsed? Envelopment by Public Nuisance

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By Richard O. Faulk, Esq.

Only recently, the ancient tort of public nuisance was “down” and in the process of being “counted out” when its expansion was rejected by the highest courts of New Jersey, Rhode Island, Missouri and Ohio.1 Within the past year, however, it was remarkably resuscitated by federal courts that approved it as a vehicle for redressing climate change and interstate pollution.2

Without the constraints of geography, public nuisance now “spans the globe” in an enveloping maneuver that threatens to reduce Hannibal’s legendary victory at Cannae to a mere neighborhood brawl.3 Unless the tort’s scope is narrowed by reviewing courts, its pincer movement may encircle industries and apply pressures that can only be relieved by congressional intervention or international agreements.

Public nuisance, which is one of the eldest creatures of the common law, may yet mature into a “monster that will devour in one gulp the entire law of torts.”4

Defendants are rightfully alarmed by these developments. At times, it must seem that the path leads inevitably to limitless and universal liability. But the common law is not a one-way street. The common law is characterized by its dynamism — a characteristic that not only fosters judicial creativity, but also constrains that creativity to accommodate the influences of other branches of government, such as statutes and regulatory policies.

As society developed from medieval times, through the Industrial Revolution and into modern times, the common law has been increasingly restrained — not liberated — by external influences, and, as we shall see, even silence by other governmental branches is not a license for judicial intervention.

Global environmental controversies, even when they are characterized as “ordinary” public nuisance lawsuits, may nevertheless be outside the competence of courts. In such cases, judges may lack the resources and standards to reach
principled decisions. This special breed of “political question” is non-justiciable — not because congress or the executive branch has expressly or impliedly occupied the field, but rather because those branches are far better equipped than the judiciary to amass and evaluate vast amounts of data bearing upon complex and dynamic issues.

Irrespective of whether the executive or legislative branches has spoken, due respect for their constitutional responsibilities, combined with awareness of the judiciary’s own limitations, can justify judicial deference and dismissal.

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The “political question” doctrine can be traced to the U.S. Supreme Court’s decisions in Baker v. Carr and its progeny, where the high court held that courts should not entertain disputes when they lack “judicially discoverable and manageable standards” for resolving them.

The Supreme Court has stressed that cases must be resolved by standards and rules, and judgments must be “principled, rational and based on reasoned distinctions.” When the “political question” argument is raised, therefore, courts must consider whether they have the tools to rationally resolve the dispute. Even if some resources are available, they must also consider whether other branches of government are more effective forums to address wide-ranging controversies.

Unlike courts, the legislative and executive branches can consider all pertinent issues in their entirety, rather than being limited to the issues raised just by the parties involved in litigation. As a result, their policy choices are likely to strike a fairer and more effective balance between competing interests because they are based on a broad perspective and ample information.

Moreover, in contrast to courts, which lose jurisdiction upon rendition of final judgment, political branches always have the opportunity to revise previously passed statutes and regulations.

Unlike courts, political branches also have a direct connection to citizens. Legislation must obtain the support of a majority of the people’s representatives. When these political safeguards are bypassed to implement “common law” solutions, the judiciary — the least political branch of government — declares policy unilaterally, and the “will of the people” is expressed not through their elected representatives, but through judges and a mini-plebiscite of jurors.

For this reason alone, the resolution of planetary concerns that are caused by and impact populations globally lie outside judicial competence. Resolving such matters requires the participation of the people — indeed all people who are allegedly involved — not just a selected few who have no political accountability. In these and other public nuisance contexts, such considerations should prompt judicial restraint, not “common law” reform.

In Connecticut v. American Electric Power, the 2nd U.S. Circuit Court of Appeals held that public nuisance claims based upon climate change were “ordinary tort suits” because they could be litigated under an existing legal framework. With all due respect to the judges who decided that case, climate change cases are certainly not “ordinary.” Instead, they frame wholly new claims by which plaintiffs seek to hold an arbitrarily selected group of defendants liable for the consequences of a “tort” committed universally by nature’s creatures and natural forces.

Public nuisance cases traditionally are contained within defined geographical dimensions. They are localized and linked to impairment of property or to injuries resulting from such effects. Significantly, all the precedents upon which the recent climate change cases relied were within that tradition.

Although the 2nd Circuit suggested that nuisance actions were “the common-law backbone of modern environmental law,” it failed to recognize that the those actions always involved defined locations and encompassed situations where the full range of responsible parties was either known or could be identified.

Global climate change, by contrast, is boundless and, according to scientists, is caused by a universal and unlimited range of actors and events. A single judgment for damages, even a large one, cannot encompass the universe of causal factors or participants in global warming.

There is no “judicially discoverable” standard by which a court can distinguish one exhalant’s contribution.
from vehicular or industrial emissions. Even if such distinctions were possible, there are no guiding principles to determine which emissions, if any, were sufficiently substantial to constitute a nuisance. There are no processes whereby the biosphere of emissions from every animal on the planet can be isolated, and the role of titanic natural forces, such as volcanism, cannot be calculated.

Simply stated, the scope of the alleged controversy matters. Using public nuisance to redress global climate change far exceeds the tort’s common law boundaries.

Despite the 2nd Circuit’s holding that its ruling was consistent with the Restatement (Second) of Torts,它 failed to heed William Prosser’s stern warning against using public nuisance in controversies outside of its traditional experience. In his comments to Section 821B, he warned that if a defendant’s conduct “does not come within one of the traditional categories of the common-law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard.”

Because of the “case by case” limits of the common law, judges have little, if any, experience in deciding matters with global dimensions. Before courts gain that experience by allowing global encirclement strategies to proceed, they must first decide whether they are capable of creating definitive standards and rules to resolve the controversies fairly and whether they have the resources to investigate and devise an efficacious remedy.

Despite public nuisance’s ravenous reputation as a potential “monster” capable of devouring time-honored legal precedents in a single gulp, that appetite is wisely constrained by the common law’s tendencies to move in a “molar and molecular” fashion—to chew thoroughly and then to swallow, if at all, only small bites at a time. Under such circumstances, the limits of judicial competency in vast environmental controversies suggest that forbearance, rather than adventure, may be the most “principled response.”

Notes


2 See, generally, Richard O. Faulk & John S. Gray, Premature Burial? The Resuscitation of Public Nuisance Litigation, 24 TOXIC & ENVTL. L. REP. 1231 (Oct. 22, 2009). The 5th U.S. Circuit Court of Appeals recently granted en banc rehearing to review a panel decision allowing public nuisance claims based upon defendants’ greenhouse gas contributions to global warming under Mississippi law to proceed. See Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), reh’g en banc granted (Feb. 26, 2010). The 2nd Circuit denied en banc rehearing in a similar case, and the defendants have moved to stay the mandate pending application for certiorari to the Supreme Court. See Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009), reh’g en banc denied (Mar. 5, 2010), application to stay mandate pending certiorari filed (Mar. 11, 2010). Another global warming case, which was recently dismissed, is now pending in the 9th Circuit. See Native Village of Kivalina v. Exxon Corp., 2009 WL 3326113 (N.D. Cal. Sept. 30, 2009), notice of appeal filed, No. 09-17490 (9th Cir. Nov. 5, 2009).

3 During his invasion of Italy, the Carthaginian leader Hannibal used the double envelopment maneuver to encircle and crush the Roman army at the Battle of Cannae in 216 B.C. His execution of the tactic is praised by historians as one of the greatest battlefield maneuvers in history.

4 See In re Lead Paint Litig., 924 A.2d 484, 505 (N.J. 2007) (holding that, if public nuisance law expanded beyond its traditional boundaries, it “would become a monster that would devour in one gulp the entire law of tort”).

5 369 U.S. 186 (1962).
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