Circuit courts help define the boundaries of public nuisance

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Over the past 20 years, government entities have sought to use the vagueness of generic public nuisance statutes to address complex public health issues, including tobacco use, gun violence, childhood lead poisoning, global warming and the fallout from the subprime mortgage meltdown. Because the tort of public nuisance is so amorphous, many of these entities have sought to blame industry for societal problems even when the actual harm is often caused by third and fourth parties who misuse or abuse industry products.

Some sympathetic judges have issued abatement orders that go far beyond what is otherwise required by statutory law. Consequently, a number of important cases have been working their way through the judicial system requiring appellate courts to identify and clarify the boundaries that define the circumstances under which a public nuisance cause of action exists.

Recently, the 4th U.S. Circuit Court of Appeals and the 6th U.S. Circuit Court of Appeals issued important decisions that should help bring some commonsense clarity to public nuisance suits. In reversing a “cross-border pollution” case in which North Carolina sought to use a claim of public nuisance to force the Tennessee Valley Authority’s power plants in neighboring states to comply with the same requirements it imposed on its own power plants, the 4th Circuit said “it is difficult to understand how an activity expressly permitted and extensively regulated by both federal and state government could somehow constitute a public nuisance.”

One day later the 6th Circuit affirmed dismissal of a case in which the city of Cleveland claimed the banks that underwrote subprime loans should be held liable for the harm the city suffered when its citizens could no longer afford the mortgages and defaulted on their loans. According to the court, the city’s public nuisance suit failed because it did not satisfy the directness condition of proximate cause that “requires some direct relation between the injury asserted and the injurious conduct alleged.”

These opinions are important because they both support the argument that public nuisance is not a form of “standardless” liability; it is tethered to statutory law and commonsense notions of proximate cause.
THE TENNESSEE VALLEY AUTHORITY CASE

In the 4th Circuit case, North Carolina v. Tennessee Valley Authority,¹ the state attorney general alleged that emissions from TVA plants in neighboring states were creating a pollution-based public nuisance in North Carolina when compared with North Carolina’s recently promulgated pollution regulations.

“Dissatisfied with the air quality standards authorized by Congress, established by the Environmental Protection Agency, and implemented through Alabama and Tennessee permits, North Carolina … requested the federal courts to impose a different set of standards” — standards essentially identical to North Carolina’s newly enacted air emission requirements that are far more stringent than those required under other state or federal laws.²

Although the U.S. District Court for the Western District of North Carolina acknowledged that the “ancient common law of public nuisance is not ordinarily the means by which such major conflicts among governmental entities are resolved in modern American governance” and that the EPA is the “chief arbiter of interstate air pollution concerns,” it nonetheless held that states can come to the courthouse if they are not satisfied with a legislative solution.³

More importantly, the District Court held as a matter of law that the statutory pollution control regulations in the states where the TVA operated are “inapplicable to this case, because all of plaintiff’s alleged injuries are within North Carolina.”⁴

Freed from the limits imposed by pollution control regulations and permits issued in the neighboring states, the District Court judge agreed with arguments made by North Carolina and declared that 10 of the TVA’s coal-fired power plants created a “public nuisance” because they adversely affected the air quality in western North Carolina.

To abate the nuisance, the judge instructed the TVA to invest additional money ($1 billion, according to the TVA) in the “prompt installation and year-round usage of appropriate pollution control technologies” at four facilities within 100 miles of North Carolina.⁵ The judge also set emission caps at those facilities to reduce the pollution to levels acceptable to North Carolina.

The TVA appealed the decision, and a unanimous panel reversed what it called a “flawed” ruling. According to the 4th Circuit:

If allowed to stand, the injunction would encourage courts to use vague public nuisance standards to scuttle the nation’s carefully created system for accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean-air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike. Moreover, the injunction improperly applied home state law extraterritorially, in direct contradiction to the Supreme Court’s decision in International Paper Co. v. Ouellette, 479 U.S. 481 (1987). Finally, even if it could be assumed that the North Carolina district court did apply Alabama and Tennessee law, it is difficult to understand how an activity expressly permitted and extensively regulated by both federal and state government could somehow constitute a public nuisance. For these reasons, the judgment must be reversed.⁶
The 4th Circuit panel recognized the value of reducing air pollution but held that the District Court’s “well-meaning attempt [to use the tort of public nuisance] to reduce air pollution cannot alter the fact that its decision threatens to scuttle the extensive system of anti-pollution mandates that promote clean air in this country.”

The appeals court was concerned that allowing public entities to “use the vagaries of [the] public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions” would lead to a world of standardless liability because “it would be increasingly difficult for anyone to determine what standards govern.” Accordingly, the use of public nuisance litigation to sidestep established pollution regulations “amounts to ‘nothing more than a collateral attack’ on the system” and “risks results that lack both clarity and legitimacy.”

In fact, the court went so far as to say that “a patchwork of nuisance injunctions could well lead to increased air pollution” because differing standards could create perverse incentives instead of an organized effort to spend scarce resources “where changes will do the most good.”

While the court specifically declined to hold that “Congress has entirely preempted the field of emissions regulation,” citing U. S. Supreme Court precedent, it said there was a strong cautionary presumption against nuisance suits that seek to establish emission standards different from federal and state regulatory law.

Finally, recognizing that though the Clean Air Act Congress entrusted the EPA with obtaining the expertise to make the scientific and other judgments necessary to develop national air emission standards and that the required notice and comment periods are designed to allow the EPA and state regulators to receive broad input about the regulatory scheme, the court sagely observed that:

[Despite] the obvious efforts the District Court expended in this case, we doubt seriously that Congress thought that a judge holding a 12-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider. “Courts are expert at statutory construction, while agencies are expert at statutory implementation.” Negusie v. Holder, 555 U.S. ----, 129 S. Ct. 1159, 1171 (2009) (Stevens, J., concurring in part and dissenting in part). ... It is crucial therefore that courts in this highly technical arena respect the strengths of the agency processes on which Congress has placed its imprimatur.

The 4th Circuit concluded by saying that while North Carolina’s “quest to guarantee pure air to its citizens” is an entirely laudable goal, “[s]eeking public nuisance injunctions against TVA, however, is not an appropriate course.” Such an approach seeks to replace the laws designed by Congress to protect our air and water with an “unknown and uncertain litigative future.”

“No matter how lofty the goal, we are unwilling to sanction the least predictable and the most problematic method for resolving interstate emissions disputes, a method which would chaotically upend an entire body of clean-air law and could all too easily redound to the detriment of the environment itself,” the court said.

THE CLEVELAND CASE

In City of Cleveland v. Ameriquest Mortgage Securities, the 6th Circuit affirmed the U.S. District Court for the Northern District of Ohio’s dismissal of Cleveland’s lawsuit.
against 22 financial entities whose financing, purchasing and pooling of subprime mortgages allegedly created a foreclosure-based public nuisance that was scarring neighborhoods and draining the city’s tax base.

The city alleged that the banks’ subprime-lending practices (the banks did not originate the mortgages) facilitated the making of loans to subprime borrowers in Cleveland who could not afford the debt. After the borrowers defaulted, the lenders foreclosed and the harm began. The city sought to hold the banks liable for its burdens and costs in maintaining the foreclosed properties.

The District Court dismissed the complaint on four independent grounds:

• Preemption.
• The economic-loss rule.
• Unreasonable interference with a public right.
• The city’s failure to satisfy the directness requirement of proximate cause.

In affirming the decision, the appeals panel focused on the District Court’s decision to dismiss the case because funding subprime lending did not proximately cause the damages that the lawsuit sought to remedy: harm to the city caused by increased expenditures and decreased tax revenue.

In its dismissal, the District Court concluded that the city “fail[ed] to demonstrate any direct relationship between its alleged injury and defendants’ conduct,” noting that “[i]t would be tremendously difficult, if not completely impossible, to determine which of the city’s damages are attributable to defendants’ alleged misconduct and not to some absent party, … namely, the subprime borrowers whose homes were foreclosed and became fire hazards, eyesores, etc.”

Accordingly, the city’s assertion that the defendants “knew about the consequences of subprime lending” was irrelevant to the court’s directness analysis, which is distinct from foreseeability, and applies even if the defendants intentionally caused the course of events.

In determining whether the complaint sufficiently pleaded proximate cause as required by Bell Atlantic Corp. v. Twombly, the 6th Circuit agreed that Holmes v. Securities Investor Protection Corp. applied and focused on the first and third of the three factors laid out in that case:

• Indirectness adds to the difficulty in determining which of the plaintiffs’ damages can be attributed to the defendants’ misconduct.
• Recognizing the claims of the indirectly injured would complicate the apportionment of damages among plaintiffs to avoid multiple recoveries.
• These complications are unwarranted given the availability of other parties who are directly injured and who can remedy the harm without these associated problems.

Considering the first Holmes factor, the court noted that the city’s alleged injuries “(neglect of property, starting fires, looting and dealing drugs)” are “completely distinct from defendants’ alleged misconduct (financing subprime loans).” “[T]he less direct an injury is, the more difficult it becomes to ascertain the amount of a
plaintiff’s damages attributable to the violation, as distinct from other, independent factors,” the appeals court said.  

Here, the alleged injury “could have been caused by many other factors unconnected to the defendants’ conduct.” Home buyers made voluntary decisions “to enter into a subprime mortgage and to default on their loans,” and the original lenders “ultimately made the decisions regarding where they would market and sell, and, once the mortgagee, whether to keep the mortgage or sell it to another buyer, such as one of the defendants.”

Moreover, the alleged damages that subsequently occurred were not directly caused by the defendants. For example, homeowners are responsible for maintaining foreclosed properties, “[d]rug dealers and looters made independent decisions to engage in … criminal conduct,” and properties not subject to subprime loans also entered into foreclosure.

In addition, there is another discontinuity between the defendants’ alleged misconduct and the claimed injury that makes it impossible to ascertain the amount of the city’s damages attributable to the violation. “A ‘complex assessment’ would be needed to determine which municipal expenditures increased and tax revenues decreased because of the ills caused by foreclosed homes rather than, inter alia, job losses due to the decline in manufacturing, fickle consumer tastes, deteriorating schools, a national recession, or increases in crime not related to foreclosures,” the appeals court said.

The panel held that the city’s claim also failed under the third Holmes factor, which considers whether “more immediate victims can sue to the extent that the defendants violated any laws.” Here, individual mortgagors could bring “relatively straightforward” suits with easily calculable damages against the individual defendants that financed their subprime loan(s).

The court observed that it is easier to calculate individual damages in specific neighborhoods where the number of foreclosures and what caused them are more ascertainable than it is to calculate the damages to the whole city of Cleveland. Accordingly, the court held that “[t]hese other potential claims obviate the need for this court to allow Cleveland’s claim to proceed.”

CONCLUSION

Although both North Carolina and Cleveland have publicly stated that they will appeal these decisions, both will have an uphill battle because of the commonsense reasoning anchoring the decisions.

The 4th Circuit essentially held that activities regulated and permitted by state and/or federal regulations and operating in compliance with permits cannot be a public nuisance. More importantly, the decision recognized that courts sitting in equity cannot ignore statutory laws and regulations that are otherwise applicable to the controversy just because the plaintiff chose to bring a common-law claim. Today’s public nuisance suits are unique in that they often present a controversy that sits squarely at the intersection between statutory and common law.

The 6th Circuit held that foreseeability alone is not enough to cause a public nuisance. Instead, plaintiffs must demonstrate a direct relationship between their alleged injury and the conduct claimed to have created a public nuisance.
American jurisprudence consists of a great legal tapestry woven with strands of legislative enactments, administrative regulations and the common law. Although the “common law” may have originated within the judiciary, citizens have increasingly imposed legislative and regulatory policies to guide and regulate its discretion. These began as early as the Magna Carta, proceeded through the Industrial Revolution, and matured into today’s complex legislative and regulatory environment.

In today’s legal landscape, where conduct and business activities are thoroughly regulated by statutes and administrative rules, there are comparatively few areas where a “common law” court is free to act without legislative influence. All modern courts construing this network of principles should therefore be influenced by their inter-relationships, but plaintiffs pursuing public nuisance suits often claim that statutory law has no relevance in their suit.

When a plaintiff claims an activity has created a public nuisance, and there are legislative and regulatory policies that define and deal with the issue, courts must consider fully and fairly the complete matrix of the jurisdiction’s statutes, regulations and common-law principles before determining who, if anyone, is responsible for creating and ultimately abating a public nuisance. In today’s complex and interactive environment, courts sitting in equity cannot rest their decisions solely on “common law” grounds. They are neither free to ignore applicable legislative enactments nor empowered to create their own “flexible judicial remedies.”

Justice Harold Blackmun once said, “[O]ne searches in vain … for anything resembling a principle in the common law of nuisance.” The cases that these plaintiffs brought bear out that observation.

NOTES

2. Id. at *6, *11-13.
4. Id. at 829-30.
5. Id. at 830.
6. 2010 WL 2891572 at *1
7. Id. at *3.
8. Id.
9. Id. at *6.
10. Id. at *7.
11. Id. (citing Ouellette, 479 U.S. 481, 494-96 for singling out nuisance standards in particular as “vague” and “indeterminate”).
12. Id. at *9-10.
13. Id. at *16.
18. Id. at *5 (citing Holmes, 503 U.S. at 269-70 for the factors and Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 459 (2006), for the proposition that “all three factors do not need to be present for remoteness to bar recovery”).
19. Id. at *6.
20. Id. (citing Holmes, 503 U.S. at 269).
21. Id. at *7.
22. Id.
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