

REGULATION BY LITIGATION AND THE LIMITS OF GOVERNMENT POWER

Washington Legal Foundation
WORKING PAPER

EXECUTIVE SUMMARY

With the onset of government-driven litigation against the tobacco industry in the 1990s, State Attorneys General and other executive branch officials began to realize the formidable power lawsuits provided as a tool of regulation and taxation outside of the political process. Such lawsuits could be targeted at the makers of lawful products which, even when used as intended, could cause harm and require governments to incur costs through government services such as health care. Rather than allege liability under product defect or negligence theories, which restrict plaintiffs with well-established rules such as causation and specific proof, government officials have instead attempted to expand the concept of “public nuisance.” Essentially, these officials claim that lawful, non-defective products are a public nuisance because when they injured citizens, government in turn suffers harm by having to provide services to those citizens.

Thus far, courts have rejected most government suits against product makers based on public nuisance theories, but the unprecedented nature of the claims and their superficial appeal may convince a judge or a jury to embrace them at any moment in the future. The use of public nuisance theories could easily expand from guns and lead paint to other products which cause government to expend funds, such as food, alcohol, and even automobiles. Standing in the way of such an expansion are a set of rules underlying public nuisance claims which, taken together, protect defendants against abuse of government authority by requiring proof of each element.

First and foremost, there must be an infringement of a right that is held in common by an entire community. Obstruction of a highway or air pollution are classic examples. Alleged injury to individuals in the community from, for instance, flaking paint, criminal activity, or smoking, are not common harms, but are private interests subject to tort rules. Second, government plaintiffs must prove that a specific individual created the nuisance, something that should prove impossible when generic products such as guns or paint are the alleged culprits. Courts have strictly applied this element to public nuisance cases because of the great risk of government abusing its power in claims against private citizens.

The next two elements are that the public nuisance must be emanating from a present activity, and there must be a direct connection between the alleged nuisance and the plaintiff's harm. The “new” government public nuisance suits, where public officials are essentially standing in the shoes of private citizens who were allegedly harmed by products, fail to meet this standard because the causal connection is not direct, but quite remote. The fifth element requires that the remedy government seeks is abatement of the nuisance, not reimbursement for services it provided. These new public nuisance suits fail to satisfy this element, as costs are exactly what governments would be seeking.

The final principle is that one branch of government cannot bring public nuisance suits if another branch has already addressed the problem. The legislature may have decided to occupy a field entirely, such as passing a comprehensive program for regulating flaking lead-based paint. Also, a standard set by a legislature could conflict with the remedy being sought in a suit. Such respect for the separation of powers is critical in the context of public nuisance suits.