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Recent Trends In Environmental Nuisance Law


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Law360, New York (November 17, 2015, 10:53 AM ET) -- Nuisance has increasingly become the "tort of choice" for plaintiffs in environmental and toxic tort litigation. In addition to other tort claims at their disposal (e.g., strict liability, negligence, trespass), plaintiffs consistently tack on nuisance claims because of the perception that such claims are subject to less stringent legal standards. Although recent judicial trends have limited the expanse of nuisance claims, environmental plaintiffs will continue to assert state nuisance law claims. This article provides an overview of recent developments in the area of environmental nuisance law.

Private and Public Nuisance Defined

A private nuisance occurs when a defendant invades "another's interest in the private use and enjoyment of [their] land."[1] To establish a legal nuisance, the plaintiff must suffer "significant harm," meaning that it "would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose."[2] Additionally, the invasion must be unreasonable, meaning that the gravity of the harm outweighs the utility of the actor's conduct.[3] As one court put it, "[e]xamples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. 'So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.'"[4]

Whereas a private nuisance interferes with rights exclusive to an individual, a public nuisance is an "unreasonable interference with a right common to the general public."[5] Traditionally, "a public right is a right to a public good, such as an indivisible resource shared by the public at large, like air, water, or public rights of way."[6] Private citizens can bring public nuisance claims if they have suffered harm that is "different in kind" than that suffered by the public.[7]

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Preemption

In *American Electric Power v. Connecticut*,[8] the United States Supreme Court held that Congress had displaced federal common law nuisance claims by enacting comprehensive environmental regulations, such as the Clean Air Act (CAA), and by delegating authority to regulate the field to the U.S. Environmental Protection Agency. Thus, plaintiffs are barred from alleging nuisance under federal common law for air pollution and global warming issues.

But the question of whether federal environmental regulations preempt *state* nuisance law has divided many courts. In *North Carolina v. Tennessee Valley Authority*,[9] the Fourth Circuit found that the CAA preempted state law nuisance claims against coal-fired power plants because the CAA occupied the entire field of regulation for noxious emissions. The court read the CAA to embody Congress's intent to have the benefit of agency expertise in the "highly technical area" of pollution regulation. The court also acknowledged the potential lack of uniformity among the states if common law nuisance suits were allowed to proceed.

The Third Circuit disagreed in *Bell v. Cheswick Generating Station*.[10] In *Bell*, the plaintiffs sued for damages because the defendant's coal-fired electric plant released particles into the air that visibly rested on the plaintiffs' property; this was alleged to affect both the plaintiffs' health and their ability to use and enjoy their property. The Third Circuit noted that under the EPA's regulatory structure, states are responsible to submit reports to the EPA and enforce emission standards in their state, which cut against the argument that federal law encompassed the entire field. Likewise, the Second Circuit recently held in an MTBE contamination case that imposing state tort liability for public nuisance "falls well within the state's historic powers to protect the health, safety, and property rights of its citizens" and therefore "the presumption that Congress did not intend to preempt state tort law verdicts is particularly strong."[11] Other federal district courts[12] and state courts[13] also are divided on this subject.

Political Question

Federal courts are similarly divided on whether plaintiffs' environmental nuisance cases present political questions, thereby stripping those courts of the jurisdiction to hear the claims.[14] In *Comer v. Muphy Oil Co.*,[15] for example, the Southern District of Mississippi dismissed the plaintiffs' public nuisance suit, which alleged that the emissions of several oil, gas and chemical companies contributed to global warming. The court dismissed the case because it presented a political question that required the balancing of "economic, environmental, foreign policy, and national security interests and make an initial policy determination of a kind which is simply nonjudicial."[16] Thus, the court deemed that "the executive and legislative branches of the government ... are not only in the best position to make those decisions but are constitutionally empowered to do so."[17] Other courts, however, have found that similar circumstances of harmful pollutants and noxious odors invading the plaintiffs' land did not present political questions.[18] Nevertheless, the political question doctrine presents an additional hurdle that plaintiffs must overcome when pursuing state law environmental nuisance cases in federal court.

Type of Injury

Despite the perception that it easier to establish injury in nuisance cases, individual plaintiffs alleging private nuisances must still show that they suffered "significant harm," and for public nuisances, that this harm is "different in kind" than that suffered by the rest of the public. In*Smith v. ConocoPhillips Pipe Line Co.*,[19] the plaintiffs brought a public nuisance action under Missouri law alleging that a leaking petroleum pipe caused a fear of *future*contamination. The Eighth Circuit surveyed Missouri law and the law of several other surrounding states and concluded that the mere "fear of contamination spreading" in the future, without actual proof of harm to the property, "is not a sufficient injury to support a claim for common law nuisance."[20] In *Alcoa Inc. v. APC Invt. Co.*,[21] the Central District of California also dismissed a public nuisance case which did not have a fully developed theory of injury. The plaintiffs alleged that amid their investigation into groundwater contamination in Southern California, they voluntarily incurred investigation and testing costs. The court recognized that costs incurred as a result of *required* testing can be considered a "different in kind" injury necessary to bring a public nuisance action, but held that *voluntary*testing and cleanup costs cannot. These cases demonstrate that courts continue to strictly adhere to the "significant harm" element required to prove nuisance claims.

Causation

Although lay testimony may be sufficient to prove that an alleged nuisance caused the loss and enjoyment of property,[22] courts typically require more to prove health impacts. In*Cerny v. Marathon Oil Corp.*,[23] the Texas Court of Appeals held that the plaintiffs needed expert testimony to establish that the defendant's operation of nearby oilfields caused their alleged health ailments and diminution in property value. The court found that the cause of such ailments was not within the knowledge of a lay person. Additionally, the court found that the plaintiffs' lay testimony did not present probative evidence that the defendant's oilfields were the actual cause of noxious dusts and odors. Rather, their lay testimony was conclusory in nature based partly on the direction of travel of increased traffic around their neighborhood and noxious odors that were carried by a southerly wind from the direction of the oilfields.

Class Certification

Courts also are divided in their treatment of class certification for private nuisance claims.[24] For example, in *Georgia-Pacific Corp. v. Carter*,[25] the class of plaintiffs alleged injury for their inability to use and enjoy their land because of odors and harmful gases released by a nearby wastewater treatment center. The Arkansas Supreme Court found that "from the property owners' claims and from the sheer nature of a claim for private nuisance," there would be differing levels of unreasonable interference between individuals and their different properties. Thus, common issues did not predominate over individualized issues.[26]

However, an Iowa court recently certified a class of plaintiffs living within 1.5 miles of a corn wet milling operation, finding there was sufficient commonality in the plaintiffs' injury of their inability to use and enjoy their land caused by pollutants and odors. The court found that Iowa nuisance law "measures the existence of nuisance-level harm objectively, [so] a nuisance claim brought under Iowa law is not inherently individual."[27] The court's holding did not appear to draw any distinction between private and public nuisance.

Conclusion

There is little doubt that plaintiffs will continue to utilize public and private nuisance law in environmental litigation. But two federal jurisdiction doctrines — preemption and political question — remain potential roadblocks. And while environmental nuisance cases continue to be viable under state law, courts generally have refused to lower the bar for plaintiffs to prove injury and causation, and to certify classes based on nuisance. Because courts are often divided in this area of the law, it will be in the best interest of litigants to track the trends of environmental nuisance law in their respective jurisdictions before initiating a lawsuit or attempting to defend against one.

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[1] Restatement (Second) of Torts § 822.

[2] *Id.* § 821F.

[3] *Id.* § 826.

[4] *Koll-Irvine Ctr. Prop. Owners Ass'n v. Cnty. of Orange*, 24 Cal. App. 4th 1036, 1041 (1994) (internal citation omitted).

[5] Restatement (Second) of Torts § 821B.

[6] *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 448 (R.I. 2008) (quotation and citation omitted).

[7] *Id.* § 821C.

[8] 131 S. Ct. 2527 (2011).

[9] 615 F.3d 291 (4th Cir. 2010), *cert. denied*, 132 S. Ct. 46 (2011).

[10] 734 F.3d 188 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014).

[11] *In re MTBE Products Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013), *cert. denied* 134 S. Ct. 1877 (2014).

[12] *See, e.g., Merrick v. Diageo Americas Supply, Inc.*, 5 F. Supp. 3d 865 (W.D. Ky. 2014) (finding no preemption in a case involving ethanol emissions from a whiskey distillery).

[13] *See, e.g.*, *Sciscoe v. Enbridge Gathering LP*, 2015 WL 3463490, No. 07-13-00391-CV (Ct. App. Tex. June, 1, 2015) (finding no preemption in a case involving light, noise, and airborne chemical particulates coming from nearby energy production facilities); *Merrick v. Brown-Foreman Corp.*, No. 2013-CA-002048 (Ct. App. Ky. 2014) (finding no preemption in a case involving "whiskey fungus" from a nearby whiskey distillery accumulating on plaintiffs' property from the distillery's emissions).

[14] *See Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004).

[15] 2007 WL 6942285, No. 1:05-CV-436-LG-RHW (S.D. Miss. Aug. 30, 2007).

[16] *Comer v. Murphy Oil USA*, 585 F.3d 855, 860 n. 2 (5th Cir. 2009), *reh'g granted,* 598 F.3d 208 (5th Cir. 2010).

[17] *Id.* The Fifth Circuit ultimately reversed this decision, but because of judicial procedure (granting en banc review, but not having a quorum to issue a decision), the district court decision still stands.

[18] *See, e.g.*, *Freeman v. Grain Processing Corp*., 848 N.W.2d 58 (Iowa), *cert. denied,* 135 S. Ct. 712 (2014); *Bell*, 734 F.3d at 198. *But see Gen. Motors Corp.,* 2007 WL 2726871, No. C06–05755 (N.D. Cal. Sept. 17, 2007) (dismissing plaintiffs' nuisance claim based on the political question doctrine in a case against automobile manufacturers for their contribution to global warming).

[19] 801 F.3d 921 (8th Cir. 2015).

[20] *Id.* at *11.

[21] No. 2:14-cv-06456 (C.D. Cal. Aug. 12, 2015).

[22]*See Freeman v. Grain Processing Corp.*, No. LACV021232 (D. Ct. Muscatine Cnty. Iowa Oct. 28, 2015) (approving plaintiffs' plan to only provide lay testimony for nuisance claims that they lost the use and enjoyment of their property).

[23] 2015 WL 5852596, No. 04-14-00650-CV (Ct. App. Tex. Oct. 7, 2015).

[24] *See, e.g.*, *Admasu v. Port of Seattle,* 185 Wash. App. 23 (2014) (denying certification to class alleging private nuisance for airplane noise because commonality of injury and damages would not predominate over individual inquiries).

[25] 371 Ark. 295 (2007).

[26] *See also Dep't of Fish & Game v. Superior Court,* 197 Cal. App. 4th 1323, 1337 (2011) (denying certification to a class of landowners, business owners, and a city alleging nuisance for the poisoning of a nearby lake because the different types of injury alleged by the diverse plaintiffs—including declining property value, decreased property taxes, and decreased business income—did not predominate over necessary individualized inquiries).

[27] *See id.*