By Carolyn Raffensperger

Power Tool: Public Nuisance Suits

Despite federal efforts to severely limit torts, class actions, and public nuisance cases through the misnamed tort reform, several innovative public nuisance cases are moving their way through the legal system. These suits promise to expand the protection afforded the public and the commons.

One of the most exciting decisions occurred in April in a Rhode Island lead case where the jury decided that three paint companies were liable for Rhode Island's contamination and the resulting harm to children. Prior lead paint cases had failed under a product liability theory. The attorney general in Rhode Island sued claiming that the lead, which dated back decades and essentially blanketed the state, was a public nuisance. The jury, in an unexpected turn of events, agreed. A flurry of lead public nuisance cases in other states will likely follow.

Perhaps the most novel of all the public nuisance cases is the global warming suit brought in 2004 by eight state attorneys general and New York City's attorney general. Rather than sue the federal government for its failure to act to curb greenhouse gas emissions, the attorneys general sued the energy companies themselves — Cinergy Corp., Southern Company, Xcel Energy, American Electric Power Company, and the Tennessee Valley Authority — for generating 10 percent of U. S. emissions. This case was dismissed but is on appeal.

Public nuisance cases are a key method for defending the commons. Derived from British law, they can be brought when there is an unreasonable interference with public health, safety, and welfare and are usually brought by an attorney general. Public nuisance suits were revived in the 1990s by municipalities that sued gun manufacturers for the public losses associated with gun violence.

One of the reasons public nuisance is so valuable is that unlike product liability suits, there is no statute of limitations for an ongoing nuisance like lead contamination. Coupled with the public trust doctrine, which asserts that government serves as the trustee of the commons such as tidal lands and waterways for this and future generations, public nuisance opens up broad avenues for attorneys general to recover damages for pollution or other harm to the air, water, and public health.

A nuisance case that has proved most contentious is a suit brought by the Wisconsin attorney general and joined by local homeowners and boaters against a cranberry farmer who polluted a lake on the Lac Courte Oreilles Chippewa Reservation through his agricultural practices. The fertilizers used in the cranberry bog produces a green algae slime that covers the water during the summer growing season. Private plaintiffs had brought an earlier suit against the grower in federal court. This case had been dismissed because each private plaintiff was required to show damages of $75,000 to establish jurisdiction. They failed on this requirement. So the attorney general brought a nuisance case in state court, where all the plaintiffs needed to do was seek abatement of the harm. A county judge just ruled in early April that the bog does cause pollution, but hasn't reached the point of being a public nuisance.

This case and the global warming suit have been a cause celebre for industries that wish to limit the power of attorneys general to bring cases on behalf of the public. The backlash was predictable: last October, Wisconsin Republican legislators tried to strip away the attorney general's power to file public nuisance lawsuits. The legislation would have prohibited the attorney general from joining in multi-state lawsuits without the approval of the governor, and prevented the attorney general from intervening in a civil action unless directed to do so by the governor or both houses of the legislature. Fortunately, this effort was blocked in the legislature this February. In a press release the ranking Democratic senator, Judy Robson, noted another reason that public nuisance suits are valuable: "Public nuisance law has developed in common law over centuries precisely to protect citizens when there is no specific statute on the books to protect them."

Unfortunately, the polluters have laws protecting them: according to the Institute for Agriculture and Trade Policy, a Midwest policy group, at least 43 states have right-to-farm laws on the books that protect farms from nuisance suits over their operations. Iowa's law contains standard language: "A farm or farm operation located in agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation."

But the courts haven't always favored the right-to-farm statutes. IATP reports that "in September 1998, the Iowa Supreme Court upheld the rights of landowners to bring a nuisance challenge against local factory farm owners. The Iowa Supreme Court ruled that nuisance suit protection for designated agricultural areas in Iowa was 'flagrantly unconstitutional' because neighbors' property rights were being taken away without just compensation as required by the state and U. S. constitution."

Polluters should be on notice that the Earth — and the legal system — have reached a tipping point: old assumptions about the necessity of protecting the economy at all costs no longer work in a choked and damaged world. Polluters need to be held accountable for damage to the commons. Public nuisance cases are an essential tool that will only expand. The public good requires it.

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