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PERSPECTIVE

Nuisance lawsuits by local prosecutors: A dangerous game?

By Kim Stone

Recent lawsuits brought by local prosecutors using a public nuisance legal theory — the lead paint lawsuit, the opioid lawsuit and the Monsanto lawsuits — raise troubling questions of law and public policy. Local jurisdictions are using public nuisance legal theory as a kind of super-tort to avoid traditional product liability law. They apply new law to lawful conduct that took place decades ago, rely on revisionist history, and seek to hold companies liable for the failure of others to maintain products or to dispose of them properly. Making product manufacturers responsible for the entire life and afterlife of their products is bad law and bad for consumers, who ultimately have to pay the price.

In 2000, seven California counties and three cities claimed that former manufacturers of white lead pigment last used in residential paint over 40 years ago should pay to inspect every residence built before 1981 and to abate any lead paint hazards found. It didn't matter to local government or their bounty-hunting outside lawyers that no one knew about the dangers of lead paint to children when it was made and sold. It didn't matter that the manufacturers fully complied with all contemporaneous government regulations about selling paint, and that they quit selling the paint in 1972 when risks became known and the residential use of lead paint was outlawed. It didn't matter that federal and state law provides that intact, well-maintained lead paint is not a hazard, and that property owners are responsible to prevent or abate hazards from deteriorated lead paint. It didn't matter that abating intact lead paint actually creates hazardous lead dust and can raise children's blood lead levels. The trial judge nevertheless imposed liability on only three of the many former white lead and lead paint manufacturers — to the tune of $1.15 billion — to inspect and abate all homes constructed before 1981. That's approximately 4 million homes the court has just declared a public nuisance.

The blood lead levels of California children are at an all-time low, still declining, and below the national average. California's lead poisoning prevention program is a public health success, and it is funded entirely by industries. The California Department of Health says that most lead exposure now comes from lead in soil created by old auto and industrial emissions, not paint. The trial judge's program is not only unnecessary, extraordinarily intrusive on owners and residents, and potentially very risky for children, but it misses the target.

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These cases were brought "on behalf of the people of the state of California," without the local governments having heard from homeowners, health groups, realtors, citizens, or even the State Department of Health. Additionally, the prosecutors partnered with large plaintiff's firms, who only get paid if they win, justice be damned. Public nuisance has been misused to impose limitless, unprincipled liability.

In the opioid lawsuit, Orange and Santa Clara Counties sued five makers of opioid painkillers, alleging that they marketed the medicines for general pain use when they "knew" they should only be used for short-term cancer pain. Opioids are narcotic painkillers, like OxyContin and Vicodin. Because the drug makers over-marketed the medicines, the counties claimed in the lawsuit, the drug makers should pay for the societal costs for some people becoming addicted to the drugs. Furthermore, since some people switched to the street drug heroin when they could no longer get a prescription, the drug makers should pay for the costs that heroin addicts impose on the counties. The lawsuit asked drug makers to pay for the costs of emergency room visits, addiction treatments, treating babies born to addicted mothers, employee absenteeism, heroin addiction, and more.

The opioid case was dismissed as an example of prosecutorial overreach. Judge Robert Moss of Orange County Superior Court explained: "The patients, potential patients, and the medical community deserve more. This action could lead to inconsistencies with the FDA's findings, inconsistencies among the States, a lack of uniformity, and a potential chilling effect on the prescription of these drugs for those who need them most. The court does, however, take pause at involving itself in an area which is best left to agencies such as the FDA who are designed to address such issues." Ruling available here: http://assets.fiercemarkets.net/ public/005-LifeSciences/purdueruling. pdf.

Now, plaintiff lawyers have convinced San Diego, Berkeley and Los Angeles to sue Monsanto for allegedly polluting our oceans. Nearly 40 years ago Monsanto manufactured PCBs, a chemical that is now allegedly contaminating waterways. PCBs, or polychlorinated biphenyl, was originally designed to keep electrical equipment safe for use. PCBs were widely used from the 1920s to the 1970s. In the seventies, they were determined to be toxic to humans and the environment and banned. But now, the cities want Monsanto to pay for cleanup of water, even if others actually spilled or dumped the chemical. Typically pollution lawsuits try to hold responsible the party who actually polluted.

The courts agreed with Monsanto and dismissed some of the cases against it — then the Legislature stepped in with a one paragraph late night addendum to a budget trailer bill that, like a zombie, revived a dead lawsuit.

These lawsuits — lead paint, the son of lead paint (Opioid), and the zombie child of lead paint (Monsanto) — are dangerous. As citizens, we need our governmental attorneys to focus on doing what is right, just and fair, not what will bring the biggest payday.

Kim Stone *is the president of the Civil Justice Association of California. CJAC is hosting a free MCLE issue briefing on the subject of nuisance lawsuits at Cafeteria 15L in Sacramento on Sept. 28 at noon. To RSVP, email Debbie Edgar at dedgar@cjac.org.*

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