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Abatement Isn't a Piggybank for Nuisance Plaintiffs

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Covington attorneys examine how plaintiff's attorneys are bringing cases under the public nuisance doctrine to address various social problems, from environmental cleanup to the opioid crisis. They say recent court decisions rejecting sweeping abatement relief may have the effect of narrowing plaintiffs' claims.

In courts across the US, parties are disputing whether the public nuisance doctrine should apply to the manufacture and sale of lawful products.

In one such case, a federal judge in West Virginia awarded a decisive victory in July to three large opioid distributors—McKesson Corp., Cardinal Health Inc., and AmerisourceBergen Corp. Judge David Faber said that to "apply the law of public nuisance to the sale, marketing, and distribution of products would invite litigation against any product with a known risk of harm."

The decision is also notable because it rejects a broad-ranging "abatement" remedy for public nuisance that seeks relief—in the form of medical treatment and other services—for the harms allegedly caused by a product.

The court here determined that the plaintiffs were "not seeking to 'abate' (enjoin or stop) the nuisance" but instead were seeking "remuneration for the costs of treating" downstream harms allegedly caused by the product.

The court said this was not a proper abatement remedy for a public nuisance.

Courts in other states, including California and Oklahoma, have agreed with that result that plaintiffs in public nuisance claims involving lawful products cannot use "abatement" to collect damages.

Public Nuisance and Lawful Products

This has important implications for the application of public nuisance law to the manufacture and sale of lawful products. Even assuming public nuisance law can be applied to lawful products, the West Virginia

decision establishes that a plaintiff cannot seek to recover for the claimed downstream harms caused by that product in the guise of seeking "abatement" of the nuisance.

The plaintiffs in West Virginia case disclaimed all damages that might accompany traditional tort claims. Instead, they sought more than $2.5 billion in forward-looking "abatement" funds, primarily to fund programs and services for downstream harms like treatment of opioid addiction and abuse. They did not seek any relief aimed at altering the distributor defendants' conduct generally or in the plaintiff jurisdictions.

Abatement Remedy and Damages

Faber explained that the difference between equitable abatement relief and damages is that abatement is usually limited to an injunction, which is designed to eliminate allegedly tortious conduct or remove contaminants from the environment. Damages, on the other hand, are directed to compensating a plaintiff for the costs of "eliminating the nuisance effects."

The proposed remedy did not seek to "abate" the alleged nuisance but was instead aimed at treating the "downstream harms" of opioid abuse. Those costs have no "direct relation" to any of the alleged misconduct, and thus are "not properly understood as in the nature of abatement."

Faber was not the first judge in opioid litigation to reach this conclusion.

Other Courts Reach Same Conclusion

The Supreme Court of Oklahoma in 2021 held in a case against Johnson & Johnson that the plaintiffs were not seeking proper abatement relief. The court said the abatement relief does not stop the act constituting the nuisance and was instead an award to fund future programs.

A court in the state of Washington expressed similar skepticism in an opioid public nuisance trial brought by the state against McKesson Corp. During the course of the trial, the court remarked that the remedy the state sought, which included funds to treat medical harms, was the classic definition of damages.

The court emphasized that the state had not identified a single public nuisance case where a court had ordered an abatement remedy that included future medical treatment.

Although the question of the limits of abatement as a remedy has been most squarely presented in opioid cases thus far, decisions in similar cases mirror these principles.

In a case against ConAgra Grocery Products Co., the plaintiffs brought a public nuisance involving lead paint. The court said the proposed abatement remedy was not to "recompense anyone for accrued harm but solely to pay for the prospective removal of the hazards" —i.e., removal of the lead paint from homes, not for harms caused by exposure to the lead paint.

These interpretations of the abatement remedy may have the effect of curtailing plaintiffs' reliance on public nuisance claims with respect to the manufacture and sale of lawful products.

In cases across the country, opioid plaintiffs have narrowed their kitchen-sink complaints to focus on public nuisance claims, appearing to concede that individual damages would be difficult or impossible to prove.

But "abatement damages" are not an end-run around that problem. Public nuisance claims involving a lawful product cannot properly seek wide-ranging "abatement" relief that is in effect a form of past and future damages.

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Disclaimer: McKesson is a Covington client that the firm represented in matters discussed in this article.