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SEPTEMBER 13, 2022

Regulation by Litigation

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Introduction

- “Classic” environmental statutes and programs have limits on what they regulate and remedies they offer
- Where existing regulation is not directly applicable or is perceived to be insufficient to address perceived harms, lawsuits based on common law claims are increasingly asserted.
- “Public Nuisance” is the predominant claim used by individuals and governments to seek damages not available through existing statutes and regulations
- Broadens universe of potentially liable parties and potentially liable conduct



Overview

- 01 An Overview of the Theory**
- 02 Case Studies**
- 03 Future Areas of Growth**
- 04 Strategies to Address**



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Overview of Public Nuisance Law

Definition of Public Nuisance

- An “unreasonable interference with a right common to the general public.”
- Public right typically relates to a publically shared good such as water, air, or other public resources.
- Private citizens can bring a suit if they have suffered harm that is “different in kind” as that suffered by public.



Public vs Private



Private

- Relates to a private right or good, e.g., enjoyment of property
- Can be brought by anyone who is harmed



Public

- Rights to a public right or good
- Can be brought by governments, or by individual if harm is different than general public

Water Quality

Air Quality

Climate Change

Odor

Others?



Lawsuit Targets

Who is Bringing the Lawsuits?

- State Attorneys General
- Local governments
- Tribal governments
- Nonprofits
- Individual Plaintiffs



What About Preemption?

- Do federal statutes provide the only relief? Courts are divided.
- Courts may allow state law claims on subjects otherwise regulated by federal law (see *American Electric Power v. Connecticut*)
- Some federal statutes having savings clauses, allowing state claims to proceed





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Case Examples

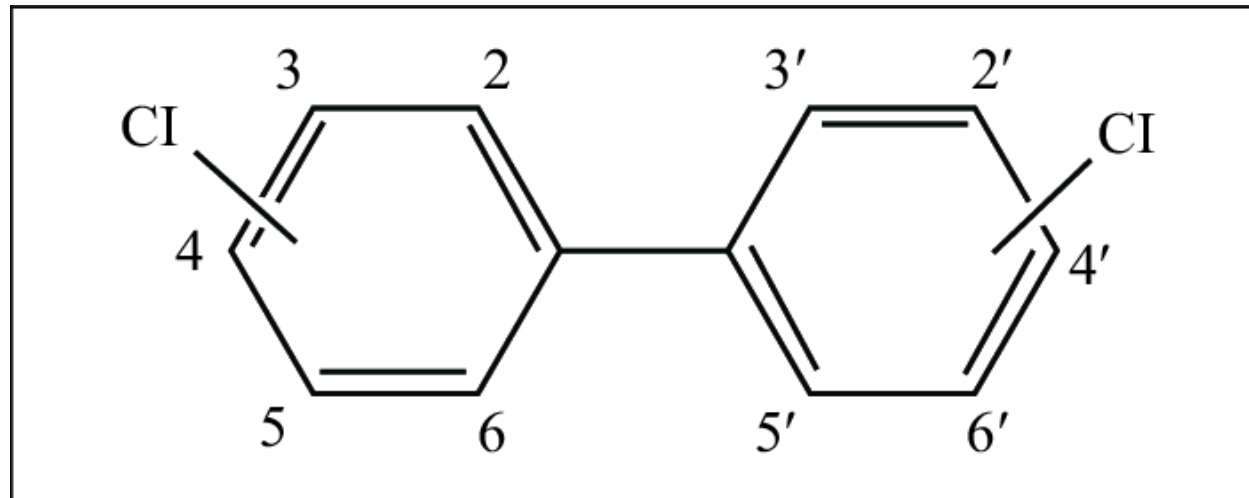
Sugarcane Burning Litigation

- Burning sugarcane fields is authorized and heavily regulated in the state of Florida, but that hasn't stopped lawsuits
- Despite compliance, sugar companies have faced nuisance suits alleging a range of harms
- Nuisance claims dismissed based on active agency regulation



PCBs in Water

- Lawsuits against PCB manufacturers brought by state, local and tribal governments around the country alleging harm from presence of PCBs in public waterways
- Suits based on state common law public nuisance claims, not federal or state environmental statutes

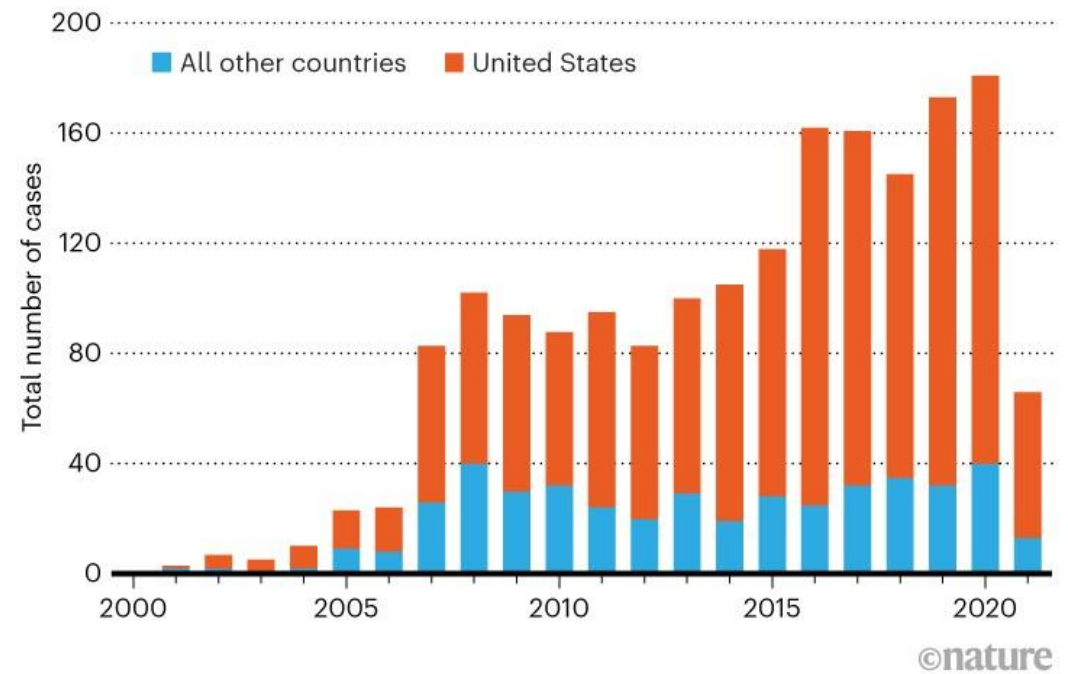


Climate Change

- Lawsuits brought by governmental entities and private entities alleging a host of injuries and damages from climate change.
- Companies in the oil industry are the current primary target.
- So far largely unsuccessful but cases proceeding in state courts.

CLIMATE CASES ON THE RISE

There has been a sharp increase in the number of lawsuits related to climate change in the past five years.



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Future Areas of Growth



Future Areas of Growth

01 | “Emerging Contaminants”

Substances not yet regulated often make good targets for nuisance lawsuits. *E.g.*, micro plastics, PFOAs, pharmaceuticals, food additives.

02 | Societal Ills

Societal problems that are not caused by any one particular party are often subject to nuisance lawsuits. In the future this could include issues such as lead pipes and new developments in climate change lawsuits.

03 | Innovations in Product Liability

Plaintiff attorneys are also looking to similar innovations in product liability law. Through the use of product liability lawsuits, they assert that EPA or other federal agency standards are inadequate or inapplicable.

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Strategies to Address

Strategies to Address



01 | Standing/Political Question

Jurisdictional defenses are often the first line of defense for these claims. Does this plaintiff have an injury that is unique compared to the general public? Should this be left to a jury, or the legislature or regulatory agency (primary jurisdiction)?

02 | Regulation as a Shield

Actual regulation can sometimes be used as a shield either affirmatively (such as preemption) or a general defense (such as arguing that the government's regulation should be the adopted as the applicable standard)

03 | Causation

Even if plaintiffs get past these defenses, causation is difficult to prove in these cases. Science will be at the forefront.



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