TORTS/PRODUCTS

THE NEW STATE LOTTERY: LITIGATION RATHER THAN REGULATION

A number of state attorneys general are partnering with the plaintiffs' bar to find new ways to go after companies and industries—and often using litigation in place of regulatory enforcement.

For many years, states have engaged outside counsel on a contingency basis to sue companies for damages. Today, the practice is burgeoning, even amidst growing concerns that firms that contributed to campaigns of attorneys general won lucrative contingency agreements, raising questions of propriety and legality. At the same time, courts are struggling with the question of when and how states can deputize outside lawyers to sue on their behalf and share judgments and settlements with them. "This is an area of the law that is still unsettled," says Rick Wallace, a partner in Crowell & Moring's Mass Tort, Product, and Consumer Litigation Group. Nevertheless, he adds, "outside attorneys are frequently pitching claims to state AGs for contingency cases."

States are also expanding the nature of their claims. Instead of suing on their own behalf to recover government costs, they are often bringing suits purportedly on behalf of citizens. In many instances, says Wallace, "they are seeking damages from companies based on product liability or nuisance claims or other nebulous common law tort theories." In a very real sense, they are shifting away from traditional regulatory enforcement and using litigation to go after companies—and large payouts. And quite often, says Wallace, "we see states suing companies for conduct that is permitted by the states' own statutes and regulations, raising serious questions about due process, separation of powers, and preemption."

For example, a number of state attorneys general have sued oil companies for using an additive that made gasoline burn more efficiently. In the mid-1990s, the federal government mandated the use of "oxygenates" in gasoline to reduce harmful air pollution, which effectively required companies to blend into gasoline an oxygenate known as MTBE. "The EPA approved the use of MTBE, and Congress knew when it enacted this requirement that MTBE would be the primary oxygenate used," says Wallace. Years later, states sued over the use of MTBE—including states that had previously joined the federal government in effectively mandating the use of the product. The litigation caused MTBE to be taken off the market.

"The cases have usually focused on product liability claims based on the allegation that gasoline with MTBE was a defective product," says Wallace. The cases place companies in a kind of Catch-22, in which states seek to penalize them for actions they took in order to follow regulatory mandates.

States are now applying common law tort theories to other industries. Earlier this year, the state of Washington brought a

KEY POINTS

States partner with plaintiffs' bar
States are moving complex issues from the regulatory arena to the courtroom.

Catch-22
States are often suing companies for conduct permitted under their own laws.

New tools, new risk
Advancing technology is opening the door to more litigation.

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—Rick Wallace

suit against Monsanto and other chemical companies that had manufactured PCBs, which were used in a variety of products through the late 1970s. "The state of Washington says that it now has PCBs in waterways across the state and has alleged that this constitutes a public nuisance and a trespass on their land, and they want money to remove it," Wallace says. To handle the case, the state has engaged a prominent plaintiffs' firm on a contingency basis. Other state attorneys general have recently targeted financial services companies—alleging unfair trade practices on behalf of citizens—and pharmaceutical companies based on various tort theories.

These kinds of cases present special challenges for litigators. As they move such complex issues from the regulatory arena to the courtroom, they open the door to having a lay jury essentially override the careful analyses done by scientists and policy experts—penalizing companies for complying with existing rules.

Companies are not defenseless, however. Wallace recommends that they encourage their industry groups to stay in touch with state attorneys general to try to fend off unwarranted litigation. "They may not avoid it, but at least they can be heard," he says. In addition, some states are responding to the controversy surrounding the use of outside contingency firms and passing legislation making the process more transparent. "We are now seeing more AGs issuing public requests for proposal rather than going through private single-source negotiations with a law firm. Companies should monitor these RFPs because they're an early indication that the state is contemplating a suit—and they will typically lay out the nature of the case the state is considering," he says.

TOXIC TORTS: SMALL LEVELS, BIG PROBLEMS

Some states have recently sued companies over chemicals found in water when the amounts involved are well below the levels recognized to cause harm—again, contrary to government guidelines. "We see cases where states are seeking damages based on infinitesimal levels of a chemical, even though the state statutory and regulatory standard sets a clean-up level far above the level that the state AG contends is actionable in court," Wallace notes. The argument here, often, is that these small amounts may cause harm that no one yet knows about.

That's a tactic likely to be more common as advancing technology makes it possible to identify very small levels of chemicals. Many substances can now be measured in parts per trillion—tiny levels that were unimaginable not long ago.

As the technology becomes more and more sophisticated, "we'll see more litigation, as well as regulation, over the presence of these chemicals," says Wallace. With the wide availability of such tools, that litigation is likely to involve municipalities and individuals, as well as states. And in instances where chemicals are unique enough to be traced back to specific sources, he says, "we'll see companies surprised by suits over the presence of minute levels of their products or chemicals in locations that they could not have anticipated."

In that world, the *Daubert* standard for admitting expert testimony becomes all the more important. "The viability of claims or the admissibility of evidence can turn on these micro detections," says Wallace. "Defendants can raise the question of whether exposure to a given substance is even capable of causing injury or harm, and *Daubert* is central to resolving that question." The *Daubert* decision, he adds, will be 25 years old in 2018—"and when applied properly, it can get better with age."

CLASS ACTIONS: SOME RELIEF FOR DEFENDANTS

Statewide class actions will continue against companies that manufacture and market allegedly defective products. Now, however, defendants have a new basis for escaping so-called "judicial hellholes," thanks to the 2017 U.S. Supreme Court decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*.

In that case, the California Supreme Court would have allowed statewide claims by classes of plaintiffs from other states to proceed along with claims by a class of Californians. The U.S. Supreme Court disagreed. It held that state courts cannot assert jurisdiction over product liability claims by out-of-state plaintiffs against out-of-state defendants, unless the plaintiff purchased the product within the forum state or suffered injury from the product there. The mere fact that a defendant sells its product in a given state is not enough for it to be sued there by non-residents. Plaintiffs should find forum shopping a bit harder as a result.