



For Immediate Release

February 25, 2005

Paper Provides Case Study in Judicial Restraint of Expansive Tort Law Theories

Public nuisance, an ancient, broad tort law theory traditionally used by governments against egregious cases of pollution and other truly “public” injurious acts, has recently been dusted off and enlisted in litigation campaigns against legitimate businesses and their products. Private plaintiffs’ lawyers and their state and local political allies have been urging courts to expand public nuisance’s boundaries and permit the theory to be used against “disfavored” products such as tobacco, food, lead paint, guns, and coal-generated electricity. But as a new Washington Legal Foundation (WLF) paper discusses, two recent rulings on public nuisance from an unlikely source – a state Supreme Court – may stand in the way of these activists’ grand “regulation by litigation” plans.

The paper, **PUBLIC NUISANCE TORT SILENCED?: ONE COURT’S STAND AGAINST “REGULATION BY LITIGATION”**, is the latest installment of WLF’s educational WORKING PAPER publication series. It was authored by **Charles H. Moellenberg, Jr.**, a partner in the Pittsburgh office of the international law firm Jones Day. It is the third paper Mr. Moellenberg has authored for WLF on the issue of public nuisance law. His prior work is available at www.wlf.org/Publishing.

Mr. Moellenberg begins his case study by examining the background of the two lawsuits at issue, brought by the City of Chicago and a private plaintiff against firearm producers. In late 2004, the Illinois Supreme Court dismissed the two lawsuits, and put forth in two strongly worded but scholarly opinions its rationale for a limited interpretation of the public nuisance doctrine.

The paper continues with a meticulous analysis of the Justices’ rulings, walking the reader through the elements of the public nuisance tort and how the Court found these elements were inapplicable to the illegal use of guns by criminals. Most notable in the Court’s reasoning, Mr. Moellenberg found, was an acute understanding of how allowing these lawsuits to proceed could spark an avalanche of copycat suits against other industries and their products, and lead to a wholesale usurpation of legislators’ role of regulating human conduct by judges.

The concluding section of the WORKING PAPER discusses the ruling’s potential impact on future litigation. As the author states, “Although result-oriented courts might be inclined to brush aside the opinions as simply embracing a too cautious philosophy, the opinions offer much more in their careful explication of public nuisance law.” He does note, however, that the Illinois Supreme Court did not heighten the pleading standards for public nuisance claims, so the tort certainly remains a viable tool for harassing litigation in that state as well as in other jurisdictions. Also, other states’ courts have issued opinions that are entirely at

odds with the Illinois Court's approach to public nuisance, so makers of lead paint, alcohol, food, and other favorite plaintiff lawyer and state official targets must still be wary of the doctrine. The state Supreme Court's ruling, however, as Mr. Moellenberg concludes, provides businesses significant hope that justice will prevail in future cases.

Washington Legal Foundation is a national, non-profit, public interest law and policy center. By utilizing a unique approach to forward its mission – publishing timely legal studies, engaging in innovative litigation, and communicating directly to the public – WLF has become the nation's most effective advocate of free enterprise.

Copies of this educational paper, WLF WORKING PAPER, Number 127 (February 2005), can be obtained by forwarding a request to: Publications Department, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, or calling (202) 588-0302.