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Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line

by Victor E. Schwartz

A fundamental of tort law is that liability should be imposed on a wrongdoer according to the facts and the law. An innocent party should not be burdened with the cost of an injury simply because the responsible party cannot pay for the harm. Most judges and courts have followed this basic principle of justice. Nevertheless, some courts have stretched tort law to impose liability against an entirely innocent party that has not engaged in wrongful conduct. Why? Because the actual wrongdoer is "judgment proof" or immune from suit, lacks adequate insurance, or simply cannot be located. This approach should be called what it is: "deep pocket jurisprudence."[1]

Deep Pocket Jurisprudence: What It Is and What It Is Not

Having studied tort law for almost five decades, I have been continually interested in why common-law judges change the law to favor plaintiffs. Sometimes it occurs because the basis underlying legal precedent no longer exists. For example, for many decades tort law did not provide a remedy for a child injured in the womb. Courts believed it was impossible to show causation. Once science developed to a point in which a cause and effect could be demonstrated, many common-law courts changed the law and allowed a recovery. This was both reasonable and just.

Sometimes the law changes because values in society change. For a long period of time courts did not recognize claims for emotional harm because they were not considered "real" injuries and were too speculative. But once objective criteria could be established to show that somebody had indeed suffered severe emotional harm, some common-law courts allowed claims in limited circumstances.

Unfortunately, sometimes tort law changes to help plaintiffs for unsound reasons. For example, the actual wrongdoer is judgment proof, is immune to suit by preemption or by some other barrier to imposing liability, has inadequate insurance, or cannot be reached by the judicial process. Some common-law judges may place sympathy over equal justice under the law and stretch legal doctrines to allow a victim to recover from a "deep pocket" that did not wrongfully cause harm.

In this regard, deep pocket jurisprudence is a particular form of tort law's expansion: an innocent party is made to pay the cost of a harm because the real wrongdoer is, for whatever reason, not available. Courts rarely acknowledge the real reason for holding the innocent defendant liable; rather, their true objectives are disguised and buried in the rubric of tort-law principles.

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[1] *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 Okla. L. Rev. 359 (2017).

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The Subtle Nature of Deep Pocket Jurisprudence

Because deep pocket jurisprudence is almost never acknowledged when engaged in by courts, it can be difficult to identify. Relatively few courts have been candid in expressing such an outcome-oriented approach to deciding cases. For example, in a rare confession, a New York trial court judge openly admitted he was allowing a city to proceed with an environmental clean-up action against a company that did not dump the chemicals at issue based on the belief that "[s]omeone must pay to correct the problem."[2]

In 2014, the Iowa Supreme Court, in *Huck v. Wyeth, Inc.*, became the first state high court to call out a plaintiffs' liability theory as "[d]eep-pocket jurisprudence."[3] In the case, a plaintiff sued the manufacturer of a brand-name drug even though he only took generic versions of the drug, which were made and sold by entirely different companies.[4] In dismissing the case, the Iowa Supreme Court recognized that "[d]eep pocket jurisprudence is law without principle."[5]

The *Huck* decision is a legal gem casting light on deep pocket jurisprudence. It should be used in briefs to show the lack of any real limiting principle behind deep pocket jurisprudence.

Four Examples of Deep Pocket Jurisprudence

Allowing "Innovator Liability"

Innovator liability was at issue in the *Huck* case. The plaintiff sued the "innovator" of a brand-name drug even though the plaintiff consumed, and was allegedly injured by, a competitor's generic drug product. Why did the plaintiff's lawyer sue a branded drug company for a harm caused by a competitor's generic product?

The reason is that the U.S. Supreme Court had held previously that claims against a generic drug company are generally preempted by federal law.[6] On the other hand, the Court has held that claims against a branded (innovator) drug company are generally *not* preempted by federal law.[7] Deep pocket jurisprudence arises because the branded drug manufacturer can be sued, while a generic drug company is generally shielded from liability under the doctrine of preemption.

The innovator liability "theory" stretches product-liability law beyond its basic moorings. A company is held subject to liability even though it did not make the product that allegedly injured the plaintiff. The specific theory alleged by plaintiffs' lawyers to accomplish such a transfer of responsibility from a generic to a branded drug company is called transferred "misrepresentation;" this theory argues that because generic drugs must carry the warning of branded drugs, the branded drug company that created the warning should pay for injuries to users of the generic drug.

Almost all courts have rejected this theory, but the issue is now before the California Supreme Court and may soon be considered by the U.S. Court of Appeals for the Seventh Circuit.[8] Thus far, the Alabama Supreme

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[2] *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 976 (N.Y. Sup. Ct. 1983).
[3] 850 N.W.2d 353, 380 (Iowa 2014) (quoting Victor E. Schwartz, Phil Goldberg & Cary Silverman, *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When the Harm Was Allegedly Caused by Generic Drugs Has Severe Side Effects*, 81 Fordham L. Rev. 1835, 1872 (2013)).
[4] *See id.* at 358-61.
[5] *Id.* (citing Schwartz et al., *supra* note 3, at 1872).
[6] *See PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011).
[7] *See Wyeth v. Levine*, 555 U.S. 555 (2009).
[8] *See T.H. v. Novartis Pharm. Corp.*, 371 P.3d 241 (Cal. 2016); *Dolin v. GlaxoSmithKline LLC*, 2017 WL 4054618 (N.D. Ill. Sept. 14, 2017), *appeal filed*.

Court is the only state high court to adopt innovator liability;[9] however, the Alabama Legislature wisely overruled the state high court's decision in 2015.

Stretching the Law of Nuisance

Plaintiffs' lawyers have, for decades, endeavored to expand the law of public nuisance to subject deep pocket defendants to liability for various social or environmental risks and harms.[10] The tort of public nuisance has traditionally had a narrow purpose—to allow governments to use the tort system, rather than criminal or regulatory law, to stop someone from unlawfully interfering with a public right or make that person repair any damage he or she has caused to the public right. Typical public nuisance suits seek to stop quasi-criminal conduct, such as blocking a public road or illegally dumping pollutants into a public river. A court can issue an injunction against the action causing the public nuisance and require the payment of abatement costs.

Nevertheless, cities have tried to use public-nuisance theory against manufacturers of products such as firearms and lead paint where the real wrongdoer was a criminal using a gun or a slumlord allowing lead paint to deteriorate in private residences.[11] These attempts have generally failed, but they have not been called out as deep pocket jurisprudence.

Recently, cities in California and Washington have tried to use public-nuisance theory against a company that manufactured polychlorinated biphenyls (PCBs), a fire-retardant insulation material, in the 1930s.[12] Subsequent to that time, other manufacturers disposed of PCBs in landfills, which ultimately resulted in PCBs leaking into waterways. Rather than sue the entities engaged in improper product uses, including dumping PCBs into public waterways, the cities have sued the original manufacturer, which had nothing to do with the disposal of the product.

Most courts have rejected plaintiffs' lawyer attempts to stretch the law of public nuisance, recognizing that the manufacturer of a lawful product did not engage in a wrongful *activity* causing the alleged nuisance. The door on improper deep pocket jurisprudence use of the law of nuisance, however, is not closed. Plaintiffs' lawyers are likely to continue to try to stretch the law against innocent defendants when the real wrongdoer is judgment proof or unavailable for suit.[13]

Expanding the Scope of Liability of Hirers of Independent Contractors

Employers are generally subject to liability for torts committed by their employees. This is because the employer exercises control over, and generally profits from, the employee's work. In contrast, a person who hires an independent contractor is generally not subject to liability for that contractor's torts because that hirer has no right of control over the contractor's business.

For example, if a homeowner hires a moving company to move furniture and the driver of the moving van drives negligently, causes an accident, and injures someone, the moving company bears sole responsibility for that harm. Suppose the moving company turns out to have no insurance or inadequate insurance. Should the homeowner who hired the moving company be subject to liability?

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[9] *See Wyeth, Inc. v. Weeks*, 159 So. 3d 649 (Ala. 2014), *superseded by statute*.

[10] *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L. J. 541 (2006).

[11] *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923 (2009).

[12] *See* Schwartz et al., *supra* note 1, at 380-82.

[13] *See* Phil Goldberg, Christopher E. Appel & Victor E. Schwartz, *The Liability Engine Could Not: Why Decades-Long Litigation Pursuit of Natural Resource Suppliers Should Grind to a Halt*, 12 J.L. Econ. & Pol'y 47 (2016).

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The answer under long-standing principles of tort law is no, but this is an area where deep pocket jurisprudence has lurked in the shadows. Some courts have suggested that the party who hires an independent contractor should have a duty to determine, at the time of hiring the contractor, whether the contractor has adequate assets or insurance to pay a potential judgment. If such a duty were imposed by a court, it would, as a practical matter, eviscerate the "no duty" rule regarding hirers of independent contractors.

Expanding Auto-Maker Liability Under the Guise of the Crashworthiness Doctrine

Automobile manufacturers may be subject to liability if they design a car with a defect that renders the car "unreasonably dangerous" in the event of a crash. For example, if a car was designed with a gas tank near the rear bumper and no occupant protection in the event of a rear-end collision, the manufacturer might be subject to liability if the rear of the car was struck and the gas tank exploded. Tort law says that in such a situation automobiles must be "crashworthy."

Deep pocket jurisprudence comes into play when the doctrine of "crashworthiness" is stretched beyond reasonable limits. In the example above, for instance, if the car had a fire shield and adequate space between the rear seat and gas tank, the manufacturer should not be subject to liability if a drunk driver traveling 90 miles per hour struck the car and the gas tank exploded.

Deep pocket jurisprudence in automobile-design liability may arise in cases involving drunk or uninsured drivers who have wrongfully caused a serious accident, but are unable to provide adequate compensation for injuries. Instead, plaintiffs' lawyers sue the "deep pocket" car maker, arguing some aspect of the vehicle failed to provide adequate safety for the crash victims.

For instance, a trial court in Virginia recently accepted a plaintiff's lawyer's argument that a soft-top convertible's failure to provide rollover protection rendered the car unreasonably dangerous and allowed a $20 million jury verdict against the manufacturer. Plaintiff's expert provided no objective evidence that a soft-top convertible could have been designed in a manner that would have prevented or mitigated plaintiff's injury; indeed, the Federal Motor Vehicle Safety Standards, which set roof crush resistance standards for vehicles, specifically exempts soft-top convertibles.[14]

The Virginia Supreme Court reversed this decision in 2016, explaining that the lack "of a permanent roof structure necessarily diminishes the level of occupant rollover protection" and that this feature is not only "characteristic of a convertible ... it is 'the unique feature of the vehicle.'"[15] Consequently, the court found that "imposing a duty upon manufacturers of convertible soft tops to provide occupant rollover protection defies both 'common sense' and 'good policy.'"[16]

Conclusion

This LEGAL BACKGROUNDER has identified the earmarks of deep pocket jurisprudence and provided several examples of its influence over the judiciary. Those who support a fair and balanced civil justice system can positively use this knowledge to identify other instances of such unprincipled burden-shifting and devise opposition strategies. Organizations such as Washington Legal Foundation can shine a spotlight on specific cases through the media or file *amicus curiae* briefs in appeals from lower courts that have engaged in deep pocket jurisprudence. Others, such as state legal reform organizations, can engage the state legislative process to overrule particularly egregious decisions, as was done so effectively in Alabama to halt innovator liability.

[14] *See* Federal Motor Vehicle Safety Standard No. 216, 49 C.F.R. § 571.216(S3)(c).
[15] *Holiday Motor Corp. v. Walters*, 790 S.E.2d 447, 456 (Va. 2016) (internal citation omitted).
[16] *Id.* at 457 (quoting *Jeld–Wen, Inc. v. Gamble*, 501 S.E.2d 393, 397 (Va. 1998)).

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