REGULATORY STATUTES AND CIVIL LIABILITY: DO THEY REALLY GO HAND-IN-HAND?

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There's nothing surprising about a claimant who targets multiple businesses – with seemingly broad, flimsy claims – in a civil lawsuit. An injury occurs, and the claimant predictably casts as wide a net as possible in order to maximize his odds of a favorable recovery. A personal injury that arises from a mishap at a restaurant or tavern, for example, might result in a lawsuit that alleges multiple theories of liability against multiple potential businesses and insureds. Perhaps a security guard was on duty at the time of the injury, perhaps the incident involved the service of alcohol, and perhaps the injury involved a particular product. The result may be a demand or lawsuit that brings a dram shop/liquor liability claim, a general premises liability claim, a negligent security claim, a products liability claim, and so on. The claims are often vague, wide-sweeping, and allegedly apply to most or all of the targeted businesses and insureds. Is the tact that these claimants employ proper?

The business and insureds targeted in this example are, in many jurisdictions, regulated by grand, but specific, statutory schemes. Many states' statutes govern the private security agency industry, the liquor industry, and so on. Depending on jurisdiction, products liability exposure may also be governed by statute. Within these statutory schemes, there are often specific statutes that expressly, and many times narrowly, describe the extent that civil liability is permitted within the context of the specific industry regulated.

A potential hurdle for the targeted business or insured arises when the injured

claimant, often with the use of a standard of care expert, manipulates statutory construction in an attempt to broaden the scope of allowable civil liability for a given industry associated with an implicated defendant. The claimant's standard of care expert, armed with vast knowledge and years of experience in a particular area, argues he has adequate experience to apply all manner of statutes that govern his particular industry in order to impose broad, often novel, duties in a civil case. This happens despite existing statutes that expressly provide for civil remedies for the particular industry at issue. The expert may even claim his expertise qualifies him to use general statutes that govern his industry to impose liability on defendants *outside* of the expert's area of industry expertise. These experts give their claimant-clients maximum "bang for their buck." In the example of the personal injury claim raised at the beginning of this article, the Plaintiff might retain a single standard of care expert to issue adverse opinions against most or all of the target defendants. The typical result is a culmination of numerous negligence *per se* theories that, with any luck on the part of the claimant, will make their way past summary judgment and on to a jury for consideration.

I'm familiar with a recent case where a private security agency was the target of negligent security claims and, in a strange twist, was also the target of dram shop claims after the Plaintiff was injured in a bar fight. The Plaintiff retained a standard of care expert – universally regarded in the jurisdiction as exclusively a liquor industry expert – who argued that, among other things, the private security guard, who provided security services at the bar, was a statutory "employee" within the definition of the jurisdiction's liquor statutes. The liquor statutes in the jurisdiction define an employee to mean, in part, "any person who performs any service on a licensed premises… whether or not the person is denominated an employee, independent contractor, or otherwise." With that, argued the Plaintiff and his expert, the contracted security agency defendant and its security guard were "employees" of the bar subject to statutory civil dram shop liability – and, therefore, subject to numerous other liquor industry duties contained in the state's substantial liquor regulatory scheme.

The Plaintiff's novel claim, along with the expert's broad opinions, was ultimately stricken by a judge, and a handful of key concepts from the case might prove useful in the event your business or insured is confronted with such a situation.

Initially, it's important to keep in mind that almost universally, legal duties are not established by experts, nor are they to be decided by a jury based on expert testimony. Whether a legal duty exists is, instead, a legal question to be decided by a court. Similarly, the manner in which statutes are to be applied in a civil case is a question of law for a court. Although an adverse expert may be credentialed to the hilt and claim his breadth of expertise qualifies him to make determinations about the extent that a statute imposes a legal duty by a defendant to a claimant in a civil case, that analysis is likely beyond the expert's allowable role. Experts, of course, are appropriately suited to provide opinions regarding the standards of care in an industry, and while statutes often provide experts with guidance, it is typically inappropriate for an expert to usurp a court's role to determine the extent that a statute may impose a legal duty on a party in a civil case.

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How a legal theory has developed in the particular jurisdiction or your business or insured may provide the best insight regarding the extent that a court may permit or prevent an adverse expert's attempts to establish legal duties arguably beyond those intended by a legislature. In many jurisdictions, there are both common law and statutory remedies that provide authority for the same civil legal theory alleged. In the jurisdiction where the security company case example is located, the right of a dram shop cause of action by an injured third-party against a licensed liquor seller is authorized both by the common law and by statute. Both rights of action are nearly identical and are narrow in scope to the extent they provide remedies against only a seller and only in a handful of instances. Many jurisdictions also have "limiting statutes" that expressly provide that, other than a statute that specifically authorizes a civil claim within a certain industry or context, no other statutes are to be used to impose civil liability. Courts in jurisdictions with specific statues like these, where a narrow, express civil cause of action against a specific audience (sellers of liquor in the case of dram shop liability) is on the books, have voiced doubt when it comes to the idea of expanding miscellaneous regulatory statutes to broaden civil liability.

The key takeaway from courts in jurisdictions that have tackled the issue seems to be that, absent the presence of legislative intent, the proposed use of regulatory statutes to broaden civil legal duties should be viewed with skepticism. There appears to be even less of a likelihood that a claimant will be permitted to interpret regulatory statutes to create new civil causes of action where there are statutes already in place that unambiguously authorize a civil remedy in a particular industry.

So, the next time your business or insured is faced with a barrage of statutory claims in a civil suit, think twice – the case may be smaller than you think!

Mr. DeLong joined Jones, Skelton & Hochuli in 2003, and has been a Partner since 2012. He concentrates his practice in the areas of premises liability litigation, commercial transportation industry defense, automobile liability litigation, and general insurance litigation. He is admitted to practice in both state and federal courts in Arizona.