

Liability Coverage For Lead Paint Contamination: Insurance Implications Of The Rhode Island Lead Paint Public Nuisance Verdict

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OVERVIEW

On February 22, 2006, a Rhode Island jury became the first in the country to find major manufacturers liable for creating a “public nuisance” by manufacturing lead paints that were used in homes until the 1970’s. The jury ordered Sherwin Williams Co., Millennium Holdings, and NL Industries to abate, or clean up, the lead paint present in approximately 240,000 Rhode Island homes.¹ The Court will decide the defendants’ specific abatement obligations in subsequent proceedings. By some estimates, abatement costs can average \$10,000 per house, which could potentially bring Rhode Island abatement costs to about \$2.4 billion.² After the verdict, one industry analyst estimated that abatement costs could run as high as \$4.5 billion. This “white paper” addresses some potential insurance implications of the verdict.

In 1978, the sale of paint containing lead for home use was banned in the United States after studies showed that lead paint could cause brain damage and other serious health problems in children. But in Rhode Island and other states with older housing stock, many homes still contain residual lead paint that is chipping and peeling. The State of Rhode Island commenced the lawsuit against Sherwin Williams and other paint manufacturers alleging that the lead paint manufacturers created a public nuisance by making the lead paints that continue to poison children in Rhode Island. The public nuisance allegedly consisted of the cumulative presence of lead pigment in buildings throughout the State; the nuisance claim was not premised on the presence of lead in any particular home.³ Prior to the trial, the Court ruled that to succeed on its public nuisance claim, the State had to establish the public nuisance—unreasonable interference with a right common to the general public—and that the defendants’ conduct was substantially responsible for creating or maintaining the nuisance.⁴

¹ A fourth defendant, Atlantic Richfield, was found not liable. Atlantic Richfield’s predecessor manufactured lead pigments for a relatively short span of time and there was little testimony about its products when compared to the evidence presented against the other defendants.

² Peter B. Lord, *3 Companies Found Liable in Lead-Paint Nuisance Suit*, PROVIDENCE JOURNAL, March 1, 2006.

³ *State v. Lead Industries Ass’n.*, No. 99-5226, 2005 WL 1331196, at *2 (R.I. Super. Ct. June 3, 2005).

⁴ *Id.*

The State originally sought to recover \$35 million in compensatory damages it claimed to have spent as a result of the injuries stemming from lead paint, as well as future amounts it claimed would be necessary to abate the public nuisance caused by the paint.⁵ The trial court dismissed the State's \$35 million compensatory damages claim during trial, reasoning that the State could not differentiate between lead poisonings caused by paint and lead poisonings caused by other lead sources, such as gasoline, water, or soil. Thus, once the jury found liability, the only "damages" question presented to the jury was whether the defendants should be ordered to abate the nuisance. The jury rendered an affirmative verdict on the abatement issue.

In a separate post-trial ruling, the Court dismissed the State's punitive damages claims against the three paint manufacturers because (1) the State failed to show that the defendants' conduct was so willful, reckless, or wicked that it rose to the level of criminality required by Rhode Island law; (2) the State could not recover punitive damages because it was not awarded compensatory damages; and (3) the State produced insufficient evidence of the defendants' Rhode Island-based conduct to justify the imposition of punitive damages by a Rhode Island court. The Court also noted that standards for gauging the hazards of lead poisoning have changed dramatically since the first half of the twentieth century, when most of the paints were made and sold, and the defendants should not be held to contemporary standards of conduct, having stopped putting lead in paint long ago.

The verdict is important beyond Rhode Island's borders because it is the first verdict against paint companies in several lawsuits brought by local, county, and state governments. Rhode Island was the first state to bring a public nuisance claim, but similar claims have been brought by local governments in many jurisdictions, including California, Illinois, Maryland, Missouri, New Jersey, New York, Ohio, Texas, and Wisconsin. On March 3, 2006, an appellate court in California reversed the trial court's dismissal of similar claims brought by five counties in California, the cities of San Francisco and Oakland, and several municipal entities against many of the same lead paint producers that were defendants in the Rhode Island action, and remanded the case for trial.⁶ According to the Boston Globe, the Massachusetts attorney general has been watching the Rhode Island case with interest and the Connecticut attorney general has made inquiries about the case with the State of Rhode Island's attorneys.⁷ After the verdict, one of the lawyers retained by the State remarked, "This case is hugely precedent-setting. It is the first time the companies that sold products that injured kids are finally being held responsible. And my phone has been ringing off the hook."⁸ Among the issues insurers may have to address in the context of claims arising from the

⁵ Peter B. Lord, *Opening Arguments Begin Today in State's Lead-Paint Lawsuit*, PROVIDENCE JOURNAL, November 1, 2005.

⁶ *County of Santa Clara v. Atlantic Richfield Co.*, __ Cal. Rptr. 3d __ (Cal. App. 6th. March 3, 2006).

⁷ Raja Mishra, *Rhode Island Wins Lead Paint Suit*, BOSTON GLOBE, February 23, 2006.

⁸ Peter B. Lord, *No Punitive Damages for Lead-Paint Companies*, PROVIDENCE JOURNAL, March 1, 2006.

Rhode Island verdict and others like it are:

- The extent of a defendant's potential liability in a public nuisance action;
- Whether injuries or damages caused by lead paint were expected or intended and not fortuitous because lead paint manufacturers knew about the dangers of lead paint for decades before they stopped manufacturing the products;
- Whether lead paint abatement costs incurred following a finding of public nuisance are "damages" within the meaning of comprehensive general liability insurance contracts;
- Whether lead paint manufacturers failed to disclose material information regarding the risks posed by lead paint before the underwriting process; and
- The extent to which lead paint losses fall within the pollution exclusions in insurance contracts.

Although multiple courts have addressed these complex coverage issues in the context of environmental and asbestos contamination, among other areas, no reported decisions have addressed the unique indemnity issues arising from lead paint public nuisance claims. In light of the varying case law, this white paper references decisions from federal and state courts throughout the country, and applies general insurance principles to the potential insurance implications raised by the Rhode Island verdict.

THE EXTENT OF A DEFENDANT'S LIABILITY IN A PUBLIC NUISANCE ACTION

The Restatement (Second) of Torts defines a public nuisance as:

- (1) . . . an unreasonable interference with a right common to the general public.
- (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.⁹

In lead paint cases, defendants can be assessed compensatory damages and punitive damages, as well as abatement costs or other equitable relief. Some courts require governmental plaintiffs to show special harm apart from the injury to the public's interest to recover money damages for a

⁹ RESTATEMENT (SECOND) OF TORTS §821B (1979).

public nuisance.¹⁰ However, this rule is not uniform as demonstrated by the Rhode Island case in which the court allowed the State to prosecute claims on behalf of the public without requiring it to show specific harm.

Lead paint nuisance cases also raise unique causation issues not usually seen in traditional environmental damage and toxic tort cases. In the Rhode Island case, the State sought compensatory damages for funds it had expended treating various lead related problems, collectively referred to as lead poisoning. The defendants successfully moved during trial to strike the State's compensatory damages claims as conjectural because the State could not allocate any specific portion of its lead-based expenses to problems caused solely by lead paint. Historically, lead was present in various consumer products such as gasoline, furniture, and even children's toys. The State was unsuccessful in convincing the Court that experts could calculate the percentage of lead poisonings solely attributable to lead paint and that damages should be derived from that percentage. However, courts in later cases may view such statistical evidence more favorably and allow a similar claim for compensatory damages to go to a jury, which in turn could open the door to punitive damages.

The Rhode Island court's logic for denying punitive damages may or may not resonate with other courts. The principal requirements for the recovery of punitive damages are: (1) proof of an independent cause of action, as there is no cause of action for punitive damages only; (2) proof of actual or compensatory damages; and (3) evidence that the defendant's wrongful act was characterized by either willfulness, wantonness, maliciousness, gross negligence or recklessness, oppression, outrageous conduct, insult, indignity, or fraud.¹¹ As the Rhode Island court noted in denying punitive damages, lead safety standards have changed dramatically since lead paints were manufactured and sold for use in the home. Lead levels that were once considered safe are now considered dangerous.

EXPECTED OR INTENDED LOSSES

The doctrine of "expected or intended" losses, often discussed in the context of "fortuity", allows an insurer to demonstrate it is not responsible for indemnifying for harm intentionally or knowingly brought about by the insured. In most states, including New York, insurers need not indemnify for

¹⁰ See *B & W Management, Inc. v. Tasea Inv. Co.*, 451 A.2d 879, 882 (D.C. 1982). See also *New Mexico v. General Elec. Co.*, 335 F. Supp. 2d 1185, 1239 (D.N.M. 2004) (under New Mexico law, State could bring common law public nuisance action only for injunctive relief—to abate nuisance—against defendant that allegedly contaminated the public's groundwater by releasing hazardous substances at an industrial site; monetary damages could not be recovered absent proof of some discrete "special injury" to the State's interest apart from the injury to the public's interest in the groundwater).

¹¹ J.L. Litwin, *Punitive Damages in Actions Based on Nuisance*, 31 A.L.R.3d 1346.

harm resulting from an act that is not “unexpected, unusual, and unforeseen.”¹² New York defines a fortuitous occurrence as “any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party.” See N.Y. INS. LAW §1101 (a)(2). Courts have denied coverage for intentional pollution even though the insured’s acts “may well have been lawful and socially acceptable at the time they were taken . . .”¹³ See generally, BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES §8.02[b] (12th ed. 2004). Courts have also held that the policyholders’ knowledge of the harm can be inferred from its conduct and the resultant harm flowing from that conduct.¹⁴

Insurers may argue that the paint manufacturers are precluded from seeking indemnification because they knew about the dangers of lead paint as early as the 1920’s (or earlier), yet continued selling and distributing it, resulting in non fortuitous exposure. In *Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 414 (D. Conn. 2005), a case interpreting the doctrine in the first party property context, the court considered an insurer’s argument that Yale University’s expenses to abate lead and asbestos on university property were not covered because the damage caused by the contaminants was not fortuitous. Applying Connecticut state law, the court stated that the fortuity doctrine barred many of the losses for which the insured sought coverage because “the parties were aware, at the time of the issuance of the policies, that asbestos or lead contamination was substantially likely to occur during the policy period.” *Id.* at 415.

If a court finds in a coverage action that the defendants in the Rhode Island litigation knew about the harm caused by lead paint chips, it may deny coverage.¹⁵

TRIGGER OF COVERAGE

CGL insurance contracts typically provide that “the insurer will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury

¹² *RJC Realty Holding Corp. v. Republic Franklin Ins. Co.*, 808 N.E.2d 1263, 1266 (N.Y. 2004) (citations omitted).

¹³ *Energynorth Natural Gas, Inc. v. Continental Ins. Co.*, 781 A.2d 969, 976 (N.H. 2001); see also *Commercial Union Ins. v. Gillette Co.*, No. 012917H, 2004 WL 1427157 at *7 (Mass. Super. May 27, 2004) (denying insured’s motion for summary judgment because there was a viable argument that the company knew its disposal process might result in aerosol leakage).

¹⁴ See *Morton Int’l Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 895, 909 (N.J. Super. Ct. App. Div. 1991).

¹⁵ It should also be noted that any voluntary removal of non-contaminating paint by an insured will probably be considered non-fortuitous by courts. See *Yale*, 224 F. Supp.2d at 415. Insurers should monitor whether paint companies attempt to submit claims for cleanup beyond the scope of the court’s order.

or *property damage*.” Damages are a form of substitutional redress intended to compensate an injured party for a past injury or other loss.¹⁶ Abatement costs, on the other hand, are an equitable remedy and future expense.¹⁷

Because the Rhode Island verdict is the first verdict of its kind, no reported decisions address whether lead paint abatement costs assessed against a manufacturer under a public nuisance theory constitute “damages” under a CGL insurance contract. In environmental cases, however, some earlier decisions held that there is coverage for all court-ordered “sums that the insured becomes legally obligated to pay as damages”, including prospective abatement costs.¹⁸ Other courts have excluded abatement costs from coverage, reasoning that damages in insurance parlance and the law are commonly understood to mean compensatory monetary awards.¹⁹

Lead paint cases, however, raise distinct legal issues from environmental cleanup cases for a number of reasons. In environmental cases, abatement orders are often precipitated by damage that is traceable back to a particular defendant whose conduct had an effect on specific property. For example, in *Aetna Cas. & Sur. Co. v. Commonwealth of Kentucky*, 179 S.W.3d 830, 834 (Ky. 2006) the insureds allowed rain water mixed with radioactive waste to contaminate the soil of a site, causing measurable increases of radiation in the soil on and near the premises. Similarly, in *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, 594 S.E.2d 455, 456-7 (S.C. 2004), the insureds released chemicals into the soil in close proximity to their operations. The legal analysis regarding the nature of damages was done in the context of quantifiable, traceable damage. Conversely, the public nuisance theory in the lead paint case premises liability on the sole fact that a company was one of many that

¹⁶ See *United States v. Price*, 688 F.2d 204, 212 (3d Cir. 1982).

¹⁷ Indeed, the Rhode Island court described the forthcoming abatement remedy as equitable in nature.

¹⁸ See *Lindsay Mfg. Co. v. Hartford Accident & Indem. Co.*, 118 F.3d 1263, 1271 (8th Cir. 1997) (holding that “as damages” language in a CGL policy covers environmental cleanup costs mandated by government agencies.); see also *Snydergeneral Corp. v. Century Indem. Co.*, 113 F.3d 536, 539 (5th Cir. 1997) (holding that environmental cleanup costs constitute damages under a CGL.).

¹⁹ See *Mraz v. Canadian Universal Ins. Co. Ltd.*, 804 F.2d 1325, 1329 (4th Cir. 1986) (holding that remedial environmental response costs cannot be equated with property damage and are not covered as such under a general liability policy.); *Certain Underwriters at Lloyd’s of London v. Superior Court*, 24 Cal.4th 945, 964 (2001) (holding that abatement costs ordered by an administrative agency are not damages under a CGL insurance contract.); *Northern Illinois Gas Co. v. Home Ins. Co.*, 334 Ill.App.3d 38, 53-54 (2002) (agreeing with the reasoning in *Lloyds* that a polluter should not be allowed to shift to the insurer some or all of the costs that might be imposed on the insured at the end of a proceeding conducted by an administrative agency pursuant to an environmental statute.).

manufactured a particular product that may or may not have ended up in any number of homes in the jurisdiction.

Moreover, the specific remedy in the Rhode Island case is uncertain. The court has yet to determine what form the abatement in Rhode Island will take. Once the court imposes its abatement plan, insurers will have to make individual assessments as to whether the costs associated with the abatement program fall within the traditional definition of damages.

THE LOSS IN PROGRESS AND KNOWN LOSS DOCTRINES

Insurance, by definition, is not available for losses that the policyholder knows of, planned, intended, or is aware are substantially certain to occur.²⁰ While the fortuity defense focuses on the insured's reasonable expectation about a set of facts, the "known loss" issue turns on the presence of an actual loss before the policy takes effect.²¹ Courts reason that insurance provides protection against uncertain future risks; once the risk becomes certain it no longer is insurable. Insurers need not prove that an insured knew the exact nature and value of the loss at the time of underwriting, but rather that the insured knew or had reason to know that the losses or liability, for which it seeks coverage, had been incurred prior to inception.²² Some courts have narrowly interpreted the known loss doctrine, holding that any contingency associated with the risk at the time of policy inception takes the risk out of the doctrine.²³

Whether known lead paint losses existed at the time any of the potentially triggered policies incepted and whether any contingencies surrounded those losses is not clear at this time, but likely will become an issue in any coverage action following the Rhode Island verdict and any others like it.

²⁰ See, e.g., *Chase Manhattan Bank v. New Hampshire Ins. Co.*, 749 N.Y.S.2d 632, 637 (Sup. Ct. N.Y. County 2002) (citation omitted).

²¹ See *National Union Fire Ins. Co. of Pittsburgh, PA. v. Stroh Cos., Inc.*, 265 F.3d 97, 106 (2d Cir. 2001).

²² See *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 607 N.E.2d 1204, 1211-12 (Ill. 1992).

²³ See *Montrose Chemical Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358, 370 (2d Dist. 1992), revised, 862 P.2d 661 (1992), *aff'd and remanded*, 913 P.2d 878 (1995).

POLLUTION EXCLUSIONS

Although coverage determinations will have to be made on a policy-by-policy basis depending on the wording of a specific insurance contract, the existence of a pollution exclusion in a policy may bar coverage.

The standard ISO pollution exclusion²⁴ provides that the coverage under a policy

does not apply to bodily injury or property damage (1) arising out of pollution or contamination caused by oil or (2) arising out of the discharge, dispersal, release or escape of smoke vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Recently, some courts have limited the application of pollution exclusion clauses to traditional environmental pollution, but most courts have not drawn such rigid lines and apply the exclusion on a case by case basis.²⁵ Most courts that have addressed the applicability of pollution exclusions to claims seeking indemnification for personal injury liability from exposure to lead paint have found that the exclusion was *not* triggered by those claims.²⁶ Other courts have applied the exclusion and

²⁴ Many policies contain broader versions of the standard ISO pollution exclusion that may preclude coverage in additional circumstances depending on the specific language used.

²⁵ See *National Union Fire Ins. Co. v. American Re-Insurance Co.*, 351 F.Supp.2d 201, 211-12 (S.D.N.Y. 2005) (refusing to apply the literal terms of a broad pollution exclusion to claims of exposure to metalworking fluids because such harm did not constitute environmental pollution “in the accepted and historical sense of the words . . .”).

²⁶ See, e.g., *Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 620-24 (Md. 1995) (“a reasonably prudent layperson may interpret the terms ‘pollution’ and ‘contamination’ . . . as *not* encompassing lead paint, a product used legally and intentionally.”) (emphasis in original); *Atlantic Mut. Ins. Co. v. McFadden*, 595 N.E.2d 762, 764 (Mass. 1992) (there is no language in pollution exclusion “from which to infer that the provision was drafted with a view toward limiting liability for lead paint-related injury.”); *General Accident Ins. Co. of America v. Idbar Realty Corp.*, 622 N.Y.S.2d 417, 419-20 (Sup. Ct. Suffolk County 1994) (it is a reasonable interpretation that the “pollution exclusion clause only applies to claims for injuries based on industrial environmental pollution” and therefore does not apply to lead paint poisoning in an apartment building.); *Generali-U.S. Branch v. Caribe Realty Corp.*, 612 N.Y.S.2d 296, 298-99 (Sup. Ct. N.Y. County 1994) (same); *Schumann v. States*, 610 N.Y.S.2d 987, 990-91 (Ct. Cl. 1994) (same); *Mount Vernon Fire Ins. Co. v. Valentin*, No. 91-CV-0909, 1995 U.S. Dist. LEXIS 21413 (E.D.N.Y. Mar. 29, 1994) (leave to amend complaint to assert that pollution exclusion bars coverage for child’s injuries from ingestion of lead paint chips denied as “lack[ing] any merit.”); *Lititz Mut. Ins. Co. v. Steely*, 785 A.2d 975, 982 (Pa. 2001).

denied coverage in lead paint cases.²⁷ The courts finding the pollution exclusion inapplicable to lead paint claims reasoned that the manufacture, sale, distribution and application of lead paints did not amount to contamination arising out of the “discharge” of toxic substances onto land or into the atmosphere or water.²⁸ Courts have applied the same reasoning when finding the exclusion did not apply in cases involving similar contaminants, like asbestos.²⁹

However, in *Oates v. State*, 597 N.Y.S.2d 550, 554 (Ct. Cl. 1993), the court held that a pollution exclusion barred coverage for a lead paint bodily injury claim because the exclusion did not contain any language limiting its applicability to discharges “into or upon land, the atmosphere or any watercourse or body of water.”³⁰ Similarly, in asbestos cases where the language of the pollution exclusion at issue was not limited to the discharge of hazardous substances into the “atmosphere,” some courts have applied the exclusion and denied coverage.³¹ Thus, the applicability of a pollution

²⁷ See, e.g., *Peace ex rel. Lerner v. Northwestern Nat’l Ins. Co.*, 596 N.W.2d 429, 436-38 (Wis. 1999) (concluding that lead present in paint in a residential property is a pollutant and the exclusion applies.)

²⁸ See note 26, *supra*.

²⁹ In *Continental Cas. Co. v. Rapid-American Corp.*, 593 N.Y.S.2d 966, 973 (1993), the New York Court of Appeals held that the pollution exclusion does not apply to negate the duty to defend in a case alleging injury due to asbestos exposure. The court concluded that although asbestos could be a contaminant or pollutant encompassed by the clause, the pollution exclusion was ambiguous with regard to whether asbestos fibers inhaled in a confined space, or indoors, were discharged into the “atmosphere.” See also *Lumbermens Mut. Casualty Co. v. S-W Indus., Inc.*, 39 F.3d 1324, 1336 (6th Cir. 1994) (concluding that exposure to toxic dust confined to work space did not constitute the discharge, dispersal, release or escape of pollutants); *Essex Ins. Co. v. Avondale Mills, Inc.*, 639 So.2d 1339 (Ala. 1994) (holding that the qualified pollution exclusion clause did not bar a claim for bodily injury caused by the inhalation of asbestos while dismantling a building because its language suggested that it applied to “a broad natural environment rather than the environs of a building.”).

³⁰ See also *Auto Owners Ins. Co. v. City of Tampa Hous. Auth.*, 231 F.3d 1298, 1300-01 (11th Cir. 2000); *Kaytes v. Scottsdale Ins. Co.*, No. Civ A. 97-3225, 1997 WL 763022 (E.D. Pa. Dec. 9, 1997); *St. Leger v. American Fire & Casualty Ins. Co.*, 870 F.Supp. 641, 643 (E.D. Pa. 1994); *Kaytes v. Imperial Casualty & Indem. Co.*, No. Civ-A 93-1573, 1994 WL 780901 (E.D. Pa. Jan. 6, 1994); *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777 (Minn. Ct. App. 1999); *United States Liab. Ins. Co. v. Barbeau*, 49 F.3d 786, 789-90 (1st Cir. 1995).

³¹ *American States Ins. Co. v. Zippro Constr. Co.*, 455 S.E.2d 133, 135 (1995), *cert. dismissed* (Ga. May 15, 1995); *Yale Univ.*, 224 F. Supp. 2d at 423-24; *Cincinnati Ins. Co. v. German St. Vincent Orphan Ass’n.*, 54 S.W.3d 661, 665 (Mo. Ct. App. 2001).

exclusion found in a policy potentially implicated by a lead paint claim may turn on the wording of the particular exclusion.

Moreover, the cases finding that the pollution exclusion did not apply typically arose in the context of individual underlying claims for personal injury, and not—as was the case in the Rhode Island litigation—claims by the “public” that lead paint has so contaminated the homes of a state as to create a broad public nuisance that must be abated.³² The nuisance claim, when coupled with a remedy ordering the defendant manufacturers to abate the public contamination, certainly begins to appear more like a classic court-ordered or agency-mandated cleanup of a toxic waste site.³³ Depending upon the remedy ordered by a court, an argument could be made for the application of the exclusion.

CONCLUSION

In the aftermath of the Rhode Island verdict and the March 3, 2006, California appellate decision, *see* note 6, *supra*, other state and local governments are likely to bring new (and vigorously prosecute existing) nuisance claims against lead paint manufacturers. The manufacturers inevitably will look to their insurers to defend and indemnify them. The outcome of these claims will depend on not only the law of the particular jurisdiction and the language of the insurance contracts at issue, but also on how courts apply existing law from other toxic tort arenas to this burgeoning area of insurance coverage litigation.

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³² As noted, *supra*, a public nuisance “is an unreasonable interference with a right common to the general public . . . [c]ircumstances that may sustain a holding that an interference with a public right is unreasonable include . . . [w]hether the conduct involves a significant interference *with the public health, the public safety* . . . or . . . whether the conduct is proscribed by a statute, ordinance or administrative regulation, or . . . whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.” RESTATEMENT (SECOND) OF TORTS §821B. (emphasis added).

³³ *See, e.g. Olin Corp. v. Ins. Co of N. Am.* 221 F.3d 307, 312 (2d Cir. 2000) (Describing underlying case in which Environmental Protection Agency issued three orders for insureds to clean up site that had been damaged by insured’s pesticide production.)