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State of Rhode Island v. Lead Industries Association, Inc.: Rhode Island Supreme Court Rejects Novel Public Nuisance Theory in Favor of Traditional Products Liability Approach

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OVERVIEW

In an 81-page decision issued today, the Rhode Island Supreme Court threw out the first jury verdict holding manufacturers of lead pigment liable under a theory of public nuisance for substantially contributing to the "cumulative presence" of lead pigment in Rhode Island. The Supreme Court held that, "however grave the problem of lead poisoning is in Rhode Island, public nuisance law simply does not provide a remedy for this harm." The decision eliminates the manufacturers' potential liability for over two billion dollars in estimated abatement costs to remove lead paint from buildings in Rhode Island.

Following on the heels of similar decisions from the Supreme Courts of Missouri and New Jersey throwing out pre-verdict public nuisance claims as a matter of law, today's opinion reflects growing skepticism among state high courts of efforts to use public nuisance claims as an alternative to traditional products liability claims.

BACKGROUND

Public nuisance is a common law tort that imposes liability on one who interferes with a public right. Over the past two decades, state Attorneys General and other governmental actors have brought public nuisance actions against the manufacturers of tobacco, guns and lead paint on the theory that these products interfere with public rights relating to, among other things, health and safety. By using public nuisance theories of recovery, plaintiffs have tried to circumvent requirements of traditional products liability claims relating to product identification, causation and damages.

In 1999, the State of Rhode Island sued former lead pigment manufacturers and their trade association alleging that they created a public nuisance by making, promoting, and distributing lead paints or lead pigments in paint prior to 1978. The State alleged that lead paint poisons and threatens to poison children in Rhode Island. The State's theory was that the "cumulative presence" of lead pigment in paint on buildings in the state was a public nuisance because it caused a variety of harms, including lead poisoned children, increased costs of maintenance, repair and renovation of buildings with lead paint, an increased tax burden, and an overall adverse impact on the economy.

In November 2005, trial began again against The Sherwin-Williams Company ("Sherwin-Williams"), NL Industries, Inc. ("NL"), Millennium Holdings LLC ("Millennium"), and Atlantic Richfield

Company ("ARCO"). On February 22, 2006, after eight days of deliberation, the jury found that the "cumulative presence of lead pigment in paints and coatings on buildings throughout the State of Rhode Island" was a public nuisance, that Millennium, NL, and Sherwin-Williams "caused or substantially contributed to the creation of the public nuisance," and that these three defendants "should be ordered to abate the public nuisance."

THE RHODE ISLAND SUPREME COURT DECISION

In today's decision, the Rhode Island Supreme Court held that the State's public nuisance claim should have been dismissed at the outset for failure to state a claim primarily because the State failed to plead and could not establish two of the core elements of public nuisance: (1) interference with a public right and (2) control over the instrumentality alleged to have created the nuisance when the damage occurred.[1]

First, according to the Court, the "right of an individual child not to be poisoned by lead paint" was not a public right for purposes of a public nuisance claim.[2] The Court said that the public's right to be free from the hazards of unabated lead "falls far short of alleging an interference with a public right as that term traditionally has been understood in the law of public nuisance."[3] Rather, the Court held, "[t]he term public right is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way."[4]

Second, the manufacturers' lack of control over the lead pigment at the time it harmed Rhode Island's children was dispositive.[5] In other words, landlords, not manufacturers, control the properties from which the alleged public nuisance emanates in Rhode Island. The manufacturers' lack of control over the properties precluded imposing public nuisance liability.[6] According to the Court, control at the time the alleged damage occurs is "critical in public nuisance cases, especially because the principal remedy for the harm caused by the nuisance is abatement. The party in control of the instrumentality causing the alleged nuisance is best positioned to abate it and, therefore, is legally responsible."[7] The Court cited Rhode Island's Lead Poisoning Prevention Act

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1 *State v. Lead Indus. Ass'n, Inc.*, No. P.C. 99-5226, slip op. at 17 (R.I. July 1, 2008).

2 *Id.* at 36.

3 *Id.* at 35.

4 *Id.* at 35-36.

5 *Id.* at 38.

6 *Id.*

7 *Id.* at 27 (citation omitted).

and the Lead Hazard Mitigation Act, through which the Rhode Island legislature "recognized that landlords, who are in control of the lead pigment at the time it becomes hazardous, are responsible for maintaining their premises and ensuring that the premises are lead-safe."[8]

The Court's decision was guided by the fact that "[t]he law of public nuisance never before has been applied to products, however harmful."[9] It observed that injured parties are not without a remedy against manufacturers of unsafe products, stating that "the proper means of commencing a lawsuit against a manufacturer of lead pigments for the sale of an unsafe product is a products liability action" because it "has its own well-defined structure, which is designed specifically to hold manufacturers liable for harmful products that the manufacturers have caused to enter the stream of commerce."[10] The Court also pointed to possible injunctions requiring abatement against landlords who allow lead paint on their properties to decay.[11]

IMPLICATIONS

Today's decision reflects a trend in state Supreme Courts against replacing products liability law with the tort of public nuisance. The Supreme Courts of Rhode Island, New Jersey and Missouri have now rejected lead paint-related public nuisance claims on the basis that such claims do not satisfy the traditional elements of public nuisance.[12] Public nuisance cases remain pending against manufacturers of lead paint and pigment in California, Ohio and Wisconsin. It is likely that courts in those states will take notice of today's decision by the Rhode Island Supreme Court.

Today's decision should end the dispute in Rhode Island regarding whether manufacturers can be held liable for harms arising from lead paint in the state under a public nuisance theory. It should also render moot litigation among Millennium, NL, and Sherwin-Williams and their insurers in New York, Ohio and Texas state courts concerning insurance coverage for the now-overturned jury verdict.

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8 *Id.* at 42.

9 *Id.* at 40.

10 *Id.*

11 *Id.* at 39. The Court also reversed the trial court's contempt finding against the Attorney General for comments he made during the pendency of the case. The Court also held that the Office of the Attorney General can enter into a contingency fee arrangement with private outside counsel under certain limited conditions and with supervision of the court.

12 *See City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007).

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