



The Hamilton Consulting Group

Legislative, Regulatory & Information Services

Recent Developments in Lead Paint Cases

James E. Hough

The Hamilton Consulting Group

June 2007

© 2007 *The Hamilton Consulting Group*

City of Milwaukee v. NL Industries (Jury Verdict, June 22, 2007)

On Friday, June 22, a jury in Milwaukee entered a verdict in which it determined that NL Industries was not negligent and would not have to pay the City of Milwaukee for reimbursement for the city's lead-cleanup effort. (The city was seeking \$52.6 million from NL Industries.) While the jury determined that the presence of lead paint in some of the city's housing stock created a public nuisance, that finding did not translate to liability absent the showing of negligence (actual causation) on the part of the defendant.

The jury's verdict in the Milwaukee case appears to be consistent with very recent decisions rendered by the Missouri and New Jersey Supreme Courts. Illinois courts ruled similarly in 2005. These are the only states in which public nuisance has been fully adjudicated as that theory relates to the lead paint industry.

The lead plaintiff lawyer, who was representing the city under a contingent fee (to be paid only if the city won the case or there was a settlement) tried to mitigate his disappointment at the verdict by suggesting that it was important that the jury found that there was a public nuisance. The City of Milwaukee Ordinances have defined public nuisance and specifically designated lead paint as a public health hazard for children and assessed blame to landlords for failure to abate the problem. In relation to the New Jersey case cited below, the New Jersey Legislature had, in its Lead Paint Act, declared the "presence of lead paint upon the interior of any dwelling causing a hazard to the occupant...to be a public nuisance."

The mere designation of something as a public nuisance is not depositive as to fault and the penalty applied. Wisconsin and New Jersey have both relied upon the Restatement (Second) of Torts in defining the elements of public nuisance, including: proof of the nuisance; proof of the underlying tortious conduct giving rise to the nuisance; and, proof that the tortious conduct was the legal cause of the nuisance.

State of New Jersey v. Lead Industries Association (Decided June, 15, 2007)

Judgment was rendered in favor of the defendant, paint companies.

Twenty six municipalities and counties consolidated a suit against paint manufacturers for the cost of detection, clean up, education and health care with respect to lead paint.

The claim of public nuisance as a cause of action asserted by the plaintiffs' complaint was rejected by the court. The Court stated that plaintiffs' view that defendants' product is a public nuisance would improperly stretch the theory to the point of creating strict liability to be imposed on the manufacturers of ordinary consumer products which, although legal when sold, have become dangerous through deterioration and poor maintenance by the purchaser.

The Court relied heavily on *The Restatement 2nd of Torts*. There was considerable discussion of nuisance claims relating to property and control of the property. Additional discussion of public nuisance included:

- A public nuisance requires interference with the interests of the community at large and the goal of vindicating a right common to the public at large.
- The damages a party can receive depend upon the status of the party bringing the action. A private plaintiff who has suffered a particularized harm (one different from the general public) can receive monetary damages. In this case the damages are generalized to the public as a whole. A public plaintiff is limited to abatement. The action does not fit the remedy available because in this case the municipalities (public plaintiffs) are asking for monetary damages.
- The court also stated that the appropriate target for an abatement action would be against the current owner of the premises whose actions have caused the nuisance.
- The court concludes that the plaintiff could have a claim under products liability. The court states that the actions would qualify because lead paint fits under the products liability act (New Jersey) with respect to the product and the harms.

City of St. Louis v Benjamin Moore, et al. (Decided June 12, 2007)

Case Number: SC88230

Judgment was affirmed in favor of the defendant, paint companies.

The city of St. Louis brought this lawsuit against paint manufacturing companies who sold lead based paint before the year 1978. The city intended to recoup hundreds of thousands of dollars in cleanup costs it had expended.

In its discussion the court specifically rejected the market share theory argued by the city, in which a producer would be assessed a percentage of the claim based upon its share of production regardless of being able to show direct damage from that company's product. The court cited *Zafft v. Eli Lilly & Co.*, 676 S.W. 2d 241 (1984), in concluding that the theory is unfair, unworkable, and unsound.

The court has held that some causal relationship between the defendant's conduct and the injury for which the damages are sought must exist, which means that actual cause must be shown in a public nuisance case. This is supported by the restatements second and its comments. Actual cause can be established by using a "but for" test of the conduct which means that but for the actions of a party the injury would not have occurred. This linkage in causation is only established if the plaintiff is able to identify the defendant who made or sold the injury producing agent.

In this case the city was seeking damages for a private tort action and not for a public health injury. Because of this the city, like any other private tort actor, must show specific and particularized harm. Thus, the Supreme Court of Missouri affirmed the application of the product identification requirement standards in *Zafft* (a personal injury case) to the public nuisance case at bar.

The following are two significant quotes from the decision:

"Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictates that there be some causal relationship between the defendant's conduct and the injury or event for which damages are sought."

"...market share liability is unfair, unworkable and contrary to Missouri law, as well as sound public policy." "...but simply to state, as have courts ruling in favor of plaintiffs, that as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury and that defendants can better absorb this cost, ignores strong countervailing considerations."

Update on Rhode Island & California

Rhode Island:

On February 22, 2006 a superior court jury found lead paint companies guilty of a public nuisance and required them to pay an abatement. This decision was appealed and is currently pending before the State Supreme Court. On June 2, 2006 the Supreme Court denied the petitioners writ of certiorari with respect to engaging private counsel under contingent fee arrangements. On March 19th, 2007 the Superior Court of Rhode Island denied a motion for judgment as a matter of law by Atlantic Richfield Corporation. This motion stated that finding liability would be impermissible retroactive lawmaking and that the State had failed to show a causal nexus between Atlantic Richfield and itself. The appeals are still pending before the Supreme Court.

While the trial court judge continues to attempt to appoint a Special Master to award unspecified damages based on a jury verdict which held only that three of the four defendants had substantially contributed to a public nuisance, defined as the presence of threatening lead in the older housing stock in the state, the Supreme Court has accepted petitions for review by both the defendants and the state, and it is in the midst of setting up the process for a very complicated appeal. It is certain that any decision on the Special Master, in the meantime, will be fought vigorously by defendants, who will move to have this deferred pending the arguments and opinions of the Rhode Island Supreme Court.

It is, of course, unknown, but interesting, to speculate what, if any impact the recent Missouri and New Jersey Supreme court decisions will have on Rhode Island.

California:

On March 3rd, 2006, the Appeals Court of California held that the government was able to peruse a claim of public nuisance on behalf of the people but were limited to abatement and could not receive personal damages. In April of 2007 the Superior Court ruled that contingent fee awards for private counsel retained by government plaintiffs were not permissible. On May 24th, 2007, the last day to file a fourth amendment claim, the matter was stayed by the court.

The trial judge, citing CA Supreme Court precedent re contingency fee arrangements, like the one Santa Clara, entered into with private attorneys to bring their public nuisance case unconstitutional, as a bright-line violation of impartiality and the public trust, provided public entity plaintiffs an opportunity to try to construct an amended agreement that would hold up. The counties chose, instead, their intention to appeal the ruling.